1944 *Present:* **Howard C.J. and de Kretser J.**

PUNCHIBANDA, Appellant, *and* RATNAM, Respondent.

61—D. C. Kandy, 849.

Wrongful conversion—Removal of omnibus—Sale of bus by defendant—Measure of damages.

Plaintiff sued the defendant for the recovery of an omnibus which the defendant had sold to him and afterwards forcibly removed when it was standing for hire on June 12, 1940.

He also claimed damages at a certain rate per month till possession was restored to him.

The defendant stated in his answer that he had sold the bus and the evidence disclosed the date of sale as August, 1941.

At the trial plaintiff restricted his claim to one for the value of the vehicle and damages.

The learned District Judge gave him judgment, including damages from date of removal to date of judgment.

Held, that plaintiff was entitled to damages only from the date of removal up to the date of sale.

APPEAL from a judgment of the District Judge of Kandy. The facts appear from the headnote.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C., S. R. Wijayatilake* and *H. W. Jayewardene*), for the defendant, appellant.

The learned District Judge has erred in awarding to the plaintiff the sum of Rs. 1,700 on account of loss of profits from the date of the removal of the bus to the date of judgment. The vehicle when it was forcibly removed from the possession of the plaintiff on January 12, 1940, must be treated as a total loss; and the plaintiff having been once awarded the value of the vehicle, as assessed by the plaintiff, cannot be heard to say that, in addition to its value, he is entitled to compensation for the non-employment of the vehicle which has resulted in loss of profits to him. The plaintiff sues for the recovery of the bus and, in the alternative, for the value of the same and he claims Rs. 475 on this head. In assessing the value he must be understood to have taken into account the profit-earning capacity of the vehicle in question. In valuing a thing all these aspects have to be taken into consideration and especially so in the case of a vehicle. *(Mayne on Damages 10th ed., p. 401.)*

[DE KRETSER J.: Yes, but the vehicle became a total loss only in August, 1941, when it was transferred to a third party and till that date damages would have accrued to plaintiff.]

The total loss occurred on January 12, 1940, when the bus was forcibly removed from the possession of the plaintiff; and in arriving at the value of the bus the future use of it is a necessary factor. The rule is that, in the event of a total loss, the plaintiff could not recover anything more than the full value of the vehicle and, in the present case, the learned District Judge has awarded Rs. 475 as the value of the bus claimed by the plaintiff.

The learned District Judge has misdirected himself by applying to this case the principles that would apply in a case of a partial loss. The date of transfer is not the material date. The loss occurred to the plaintiff at the time of theft on January 12, 1940.

T. Kanapathipillai for the plaintiff respondent: The plaintiff is at least entitled to loss of profits calculated as from the date of removal to the date of transfer.

Cur. adv. vult.

March 22, 1944. HOWARD C.J.—

I have had the advantage of reading the judgment of my brother de Kretser and, after some hesitation, am of opinion that his conclusion is correct and that an order should be made as directed in his judgment. The matter is governed by English law and a scrutiny of the English cases has involved a consideration of the history of the action of trover. There were three distinct methods in which one man may deprive another of his property and so be guilty of a conversion and liable in an action of trover (1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing of it. Corresponding to these three methods of wrongful deprivation there were originally three distinct forms of action provided by the law—(1) trespass *de bonis asportatis*, for wrongful taking (2) *detinue*, for wrongful detention, and (3) trover, for wrongful conversion, that is to say disposal. Mere detention was not, therefore, a conversion, in the original sense, but Judges directed juries to find a conversion on proof of demand and refusal without lawful justification. So in *Alexander v. Southey*[1], Best J. says: "An unqualified refusal is almost always conclusive evidence of a conversion." This rule establishing *trover* had passed its original scope and had become almost concurrent with *detinue*. Every person is, therefore, guilty of a conversion who, without lawful justification, takes a chattel out of the possession of anyone else, with the intention of exercising a permanent or temporary dominion over it. "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion" per Alderson B. in *Fouldes v. Willoughby*[2].

This historical review has been a necessary preliminary to the question of the damages that can be awarded the plaintiff in this case. The defendant's original wrong doing, when he forcibly seized the bus on January 12, 1940, gave rise to actions for *trespass de bonis asportatis* and *detinue*. In August, 1941, the selling of the bus by the defendant gave rise to the old action of *trover*. Damages awarded for conversion are

[1] *(1821) 5 B. & Ald. p. 250.*

[2] *(1841) 8 M. & W. p. 548.*

a mere substitute for possession of the chattel itself and must therefore be the equivalent of the chattel and amount to the full value of it. In all action for a conversion the plaintiff may recover, in addition to the value of the property, any additional damage, if pleaded, which he may have sustained by reason of the conversion which is not too remote, *vide Bodley v. Reynolds*[1] the headnote of which is as follows:—

> "In *trover*, damages may be given in respect of special damage, besides the value of the goods converted, if special damage be laid in the declaration. As where, in *trover*, for carpenter's tools, special damage was laid in respect of the plaintiff, a carpenter, being hindered from working."

So also if a carriage, ship or chattel is injured, the sum paid for the hire of another while it is being repaired can be recovered (vide *The Greta Holme*[2], *The Mediana*[3] and *Davis v. Oswell*[4].) It has been contended by Mr. Perera that the disposal of the bus by its sale to a third party subsequent to the original wrongful acts of taking and detaining is sufficient in law to deprive the plaintiff of any damages by way of loss of profits arising from such detention. Or in other words, the further tortious act which, under the old law, would have given rise to an action for *trover*, deprives the plaintiff of damages to which he would have been entitled if the tortious act of the defendant had merely given rise to what was known, under the old law, as an action for *detinue*. I cannot assent to such a proposition. The damages for loss of profits up to August, 1941, are not too remote. The only authority cited by Mr. Perera in support of his contention was the judgment of Dr. Lushington in *The Columbus*[5]. On behalf of the owners of a vessel sunk as the result of a collision with *The Columbus* it was argued that they were entitled to more than the full value of the vessel lost and were entitled to *restitutio in integrum*. Or in other words that they should be replaced in the same position that they would have been, provided the collision had not occurred. The passage from the judgment of Dr. Lushington on which Mr. Perera relies for the proposition he has put forward is as follows:—

> "The only ground which has been suggested in the argument, in support of such claim, is the principle to which I have just adverted, viz., that the plaintiff ought to be put in the same condition in which he stood prior to the collision; and in confirmation of this, the Court has been referred to cases of partial loss or damage, where an allowance for demurrage has been given in addition to the actual amount of the damage committed. The principle, as applied in cases of partial loss, it appears to me, does not equally apply to the circumstances of the case before the Court. Let us, for a moment, consider what would be the effect, in all cases of this kind, of giving anything beyond the full value of the vessel destroyed. Supposing, for instance, that this vessel had been an East Indiaman, bound on her outward voyage to the East Indies, with a valuable cargo on board, for the transportation of which not only would the owners be entitled to a large amount of

[1] *115 E. R. 1066.*
[2] *(1897) A. C. 596.*
[3] *(1900) A. C. 113.*
[4] *(1837) 7 C & p. 804.*
[5] *166 E. R. 922.*

freight, but the master might be entitled to considerable contingent profits from the allowances made to him upon such a voyage. Could this Court take upon itself to decide upon the amount of these contingencies, and to decree the payment of the same in addition to the payment of the full value of the ship? I am clearly of opinion that it could not. The true rule of law in such a case would, I conceive, be this, viz., to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners, as a full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle to the contrary, contended for by the owners of the smack in this case, were once admitted, I see no limit in its application to the difficulties which would be imposed upon the Court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and indeed even to those of the return voyage, which might be said to have been defeated by the collision. Upon this consideration alone, I should not, I conceive, be justified in admitting this claim, but I am further borne out in so doing, by the difference which exists between a total loss, and the case of a partial damage, viz., that in the later case the amount of the additional injury in the loss of the freight is capable of being accurately calculated. It depends upon no contingency; it is, in point of fact, an absolute loss, and, as such, the owner of the ship upon whom it falls is justly entitled to compensation."

Even if this paragraph is legally correct it amounts merely to a rule of Admiralty practice rather than an exposition of the general rule. The rule formulated by Dr. Lushington has not, however, been accepted by subsequent holders of his office. In *The Kate*[1] Sir F. Jeune stated that the general principle applicable was *restitutio in integrum* qualified by the condition that the damage sought to be recovered must not be too remote. He held the proper measure of damages to be the value of the vessel at the end of her voyage plus the profits lost under the charter-party. This principle was approved by the Court of Appeal in *The Racine*[2].

DE KRETSER J.—

Plaintiff sued for the recovery of an omnibus which the defendant had sold to him and forcibly removed thereafter when it was standing for hire on January 12, 1940: in the alternative he claimed the price of the omnibus. He also claimed damages under various heads, one being for Rs. 105 a month till possession was restored. The defendant disclosed in his answer that he had sold the vehicle. Evidence at the trial gave the date as August, 1941. When the case came on for trial the plaintiff restricted his claim to one for the value of the vehicle and damages.

The learned District Judge gave judgment for plaintiff, *inter alia*, awarding him Rs. 50 a month from the date of removal till the date of judgment. On appeal only his finding on this head was challenged, the appellant contending that the plaintiff being content to treat the vehicle

[1] *(1899) P. 165 or 68 L.J.P. 41.* [2] *(1906) P. 273 or 75 L.J.P. 83.*

as a total loss could not also recover damages for loss of profits. Mr. Perera relied on a passage in Mayne (10th edition) page 401. Mr. Perera's contention was that the total loss occurred on January 12, 1940. This seems to me to be a basic fallacy in his otherwise cogent argument. Till the date of the sale to a third party damages accrued to plaintiff and the damages which had so accrued were not destroyed when the vehicle became a loss in August, 1941, any more than rent due would have been destroyed. The illustration of the vehicle being destroyed by fire, which he gave, brings out the position clearly when properly applied. Had the vehicle been destroyed by fire in January, 1940, the resulting position would have been quite different from the case of the vehicle being removed in January and destroyed by fire in August, 1941.

The passage in Mayne relied on by the learned trial Judge referred to the case of a vessel under repair. This was not such a case. The passage relied upon by Mr. Perera is really against him when properly understood. The plaintiff's action was what in old English law would be termed an action in *detinue* and the law applicable is stated by Mayne at page 398:

> "In *detinue* the judgment is to recover the thing itself and damages for its detention; or if it cannot be returned, then its value . . . .
>
> "Where the verdict cannot be for a return of the goods, on account of their destruction or previous re-delivery, it will be absolute, in the former case, for their value and damages; in the latter case, for damages only."

The question is as to the date up to which damages will run. To my mind this will vary with circumstances. Where the thing has been destroyed or made irrecoverable from the defendant after action and before decree, then damages can run only up to the date when it became irrecoverable and so become unprofitable to the plaintiff. The case of a loss occurring during the pendency of a contract for hire does not arise for decision in this case. In such a case the rule in Admiralty may be a useful model. At page 401 Mayne is stating the existing rule in Admiralty practice based on the decision by Sir F. Jeune in the case of *The Kate*[1] and Mayne refers in passing to what was for some time considered to be the rule, viz., that the plaintiff could not recover anything more than the full value of the vessel in the event of a total loss. In the case of *The Kate*, the law on the subject was reviewed by Sir F. Juene, President of the Court. *The Chrysolite* had collided with *The Kate* and became a total loss when on a voyage in ballast under a profitable charter to load at a port in Canada and ship timber to Havre. The Assistant Registrar awarded damages for loss of profit under the charter-party and also the value of the vessel at the time she would have completed her voyage under the charter. On appeal it was contended that the value of the vessel at the time of the collision should have been awarded and no loss of profit under the charter-party. The case of a vessel with cargo on board was covered by authority and Counsel sought to distinguish such a case from that of one in ballast under a charter by urging that freight due or accruing has a definite legal status whereas in the latter case freight has not accrued and there is only the chance of earning it. This contention was repelled.

[1] *80 L. T. 423.*

The principle is that *restitutio in integrum* and the test seems to be whether the profits could be reasonably said to have accrued. Applying therefore that test the plaintiff was entitled to damages till some unspecified date in August, 1941.

The decree must be amended by reducing this head of damages (Rs. 1,700) to Rs. 950, *i.e.*, 19 months' loss of profits at Rs. 50 a month, the total damages awarded being reduced from Rs. 2,431 to Rs. 1,681.

The appellant has succeeded in part, but lost in the greater part of his appeal. There will be no costs of appeal.

Judgment varied.