1965 *Present :* **T. S. Fernando, Tambiah and Alles, JJ.**

B. DANIEL SILVA, Appellant, and K. H. G. JOHANIS APPUHAMY and others, Respondents

S. C. 45 of 1962—D. C. Galle, 2827/X

Delicts—Conversion—Inapplicability in Ceylon of English doctrine of conversion—Difference between Roman-Dutch law and English law—Cheques—Forgery of payee's indorsement in a " not negotiable " cheque—Conversion of the cheque—Action filed by drawer for recovery of damages or for money had and received—Maintainability—Civil Law Ordinance (Cap. 79), s. 3—Bills of Exchange Ordinance (Cap. 82), ss. 82, 98 (2).

An action does not lie in respect of the tort of conversion. The English doctrine of conversion is not part of our law.

A " not negotiable " cheque, the indorsement of the payee of which was forged, was transferred by the forger or someone on his behalf to the defendant. The sum of Rs. 1,175·25 represented by the cheque was credited by the defendant's bank to the account of the defendant and a like sum was debited in the same bank to the account of the plaintiffs, who were the drawers of the cheque. The plaintiffs sued the defendant in the present action to recover the sum. They averred that the indorsement of the payee had been forged, that the defendant had therefore no title to the cheque and consequently had no lawful authority to convert the cheque to his own use. The defendant in his answer, stating that he was a bona fide holder for value in due course, denied that any cause of action accrued to the plaintiffs to sue him for recovery of the sum represented by the cheque. At the trial an issue was raised as to whether the plaint disclosed any cause of action against him. It was also established that the property in the cheque had not passed to the payee and that it remained in the plaintiffs.

Held, that on the pleadings it was manifest that the defendant was sued in respect of the English tort of conversion. The point was also specifically raised in the form of an issue at the trial. Accordingly, inasmuch as the English doctrine of conversion is not applicable in Ceylon, the plaint did not disclose a cause of action against the defendant. The action being one founded on a delict, the Roman-Dutch law called to be applied. The tort of conversion is unknown to the Roman-Dutch law.

Although under the English common law the plaintiffs would be entitled, prime facie, to recover the sum claimed either as damages for conversion or as money had and received, it was not open to them to rely on section 98 (2) of the Bills of Exchange Ordinance to succeed in their claim. Section 98 (2) is only intended to apply to any omissions or deficiencies in the Ordinance in respect of the law relating, inter alia, to cheques, and cannot form the basis of a proposition that, where the delict of conversion is in relation to a cheque, the English common law of conversion is introduced into our law.

Punchibanda v. Ratnam (45 N. L. R. 198) and *Bank of Ceylon v. Kulatilleke* (59 N. L. R. 188) disapproved.

2—R 8843 (9/65)

APPEAL from a judgment of the District Court, Galle.

C. Ranganathan, with *M. T. M. Sivardeen* and *M. Sivanandam*, for the defendant-appellant.

S. Gunasekera, with *Miss P. Abeyratne*, for the plaintiff-respondent.

Cur. adv. vult.

June 29, 1965. T. S. FERNANDO, J.—

The plaintiffs who are carrying on business in partnership at Galle drew on August 18, 1960 a cheque for Rs. 1,175·25 upon the Galle branch of the Bank of Ceylon. This cheque was made payable to Abdulhassan Davoodbhoy, a firm in Colombo, to which the plaintiffs owed this sum of Rs. 1,175·25 for goods supplied to them. The cheque was crossed and marked " not negotiable ". The District Judge who heard the case was doubtful as to whether the plaintiffs posted the cheque addressed to their creditor or whether it was lost while still in the plaintiff's place of business at Galle. It was established at the trial that this cheque had been presented at the bank on August 22, 1960 by the defendant who is a dealer in radio and photographic equipment and who himself had an account at this bank. The sum of Rs. 1,175·25 represented by the cheque was credited by the bank to the account of the defendant and a like sum was debited to the account of the plaintiffs. It was also established that the endorsement of the payee had been forged and that the forger or someone on his behalf had tendered the cheque to the defendant in part-payment of a radio set valued at Rs. 250. The defendant proved that he delivered the radio set and the balance Rs. 925·25 to the person who presented the cheque to him and who had endorsed the cheque as Abusalie, purporting to do so on behalf of the firm of Abdulhassan Davoodbhoy utilising for the purpose also a forged frank of the payee. The endorser ' Abusalie ' was not known to the defendant and was never traced thereafter.

So much for the facts established at the trial. The defendant-appellant contended that on these facts no cause of action accrued to the plaintiffs to sue him. In the plaint filed in this suit against the defendant claiming to recover from the latter the sum of Rs. 1,175·25, the plaintiffs averred that the endorsement of the payee of the cheque had been forged, that the defendant had therefore no title to the cheque and consequently had no lawful authority to convert the cheque to his own use. The defendant in his answer, stating that he was a bona fide holder for value in due course, denied that any cause of action accrued to the plaintiffs to sue him for recovery of the sum represented by the cheque. At the trial an issue was raised at the instance of the defendant as to whether the plaint disclosed any cause of action against him.

As has been stated above already, the trial judge was doubtful whether the cheque was lost in transit in the post or whether it was stolen from the plaintiffs' place of business. He dealt with the case as if the cheque had been posted to Abdulhassan Davoodbhoy, but had been lost in transit. Holding that there was no proof of express or implied authority given by the payee to the plaintiffs to make payment by post, he held that property in the cheque had not passed to the payee but remained in the plaintiffs. The conclusion on this point would not have been different even if he had held that the cheque had been stolen while it was still in the hands of the plaintiffs. The property in the cheque would in either event have remained in the plaintiffs.

On the pleadings in the suit it is difficult to resist the conclusion that the defendant was sued in respect of the tort of conversion. That was indeed the point the defendant in effect pleaded in answer to the claim, but the learned trial judge in his judgment refused to consider this point for the reason that the defendant in his answer had not specified the ground on which he had pleaded that no right to sue had arisen. As I have stated already, the point was specifically raised in the form of an issue at the trial, and, if the plaintiffs thought that the plea was vague or too general, it was open to them to have asked for clarification.

Although the trial judge stated in the course of his judgment that he was not prepared to consider the point that an action for conversion does not lie under our law, he permitted himself the observation, in passing, that it is a moot point whether the English Common Law relating to the action grounded on conversion had not displaced the Roman-Dutch law on this matter. He went on to express his own opinion that where the subject-matter of a conversion is a cheque, section 98 (2) of the Bills of Exchange Ordinance (Cap. 82) requires that the English Common Law should apply.

On the facts of this case, it would appear that under the English Common Law the plaintiffs would have been entitled, prima facie, to recover the sum claimed either as damages for conversion or as money had and received.—see *Morison v. London County and Westminster Bank Ltd.*[1]. As Lord Reading C.J. said there—at p. 365 —" The plaintiff has lost the sums which the defendants have wrongfully recovered, and the plaintiff is therefore entitled to recover such sums as damages for the conversion........ The same result would be reached by the plaintiff upon the alternative claim for money had and received." Under that law, in an action for conversion of a cheque there are only two matters to be established by a plaintiff. First, ownership ; second, that the defendant without title and without authority has converted the cheque.

Under the Roman-Dutch law, the basic doctrine is that without fraud or fault there is no liability. As stated in The Law of Delict in South Africa by McKerron (2nd ed.), p. 34—" ignorance of the wrongful

[1] *(1914) 3 K. B. 356.*

character of the act excludes *dolus*. Thus, a person who bona fide acquires stolen property and bona fide parts with it incurs no liability to the true owner ". Again,—at p. 225 :—

" It may be noted that the English doctrine of conversion is not part of our law. According to that doctrine a person who by an unauthorised act has deprived another permanently or for an indefinite time of the possession of property to which he was entitled is liable to account to him for the full value of the property, even though he was ignorant of the fact that the property belonged to someone else. By our law, however, a person who has by purchase or otherwise acquired property belonging to another and has subsequently parted with it is under no obligation to the true owner, unless he either knew or had reason to believe that the title was bad. Actual knowledge or suspicion must be proved ; the mere omission to make inquiries is not enough to ground liability. "

Reference may, at this stage, be made to the decision of the Privy Council in the local case of *Dodwell & Co. Ltd. v. John*[1] in the course of which it was observed, *obiter*, that " it may well be true that the principles of the English Common Law have been so far recognized in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place ". It must, however, not be overlooked that their Lordships dealt with the case before them on the footing that, if the appellants (in that case) received the money with notice of a trust affecting it, they would be bound to account for it to the respondents The case was not dealt with in the Privy Council as if there had been a suit, firstly, for money had and received, or secondly, as for a conversion. These two forms of claims were considered unnecessary. In the South African case of *John Bell & Co. Ltd. v Esselen*[2], Centlivres C.J., in relation to *Dodwell's case*, citing *Morobane v. Bateman*[3] observed that the doctrine of conversion is unknown to Roman-Dutch law. In *Morobane's case*, Innes C.J. had stated—

" but the purchaser of property belonging to a third person who has redisposed of it may nevertheless under certain circumstances be held accountable to the true owner. If the purchaser acquired and resold the property *mala fide* and with knowledge of the theft, then he would be liable to the owner, because he would virtually be party to the delict, and would be regarded in the same position as if he had fraudulently parted with possession. But if the acquisition and the resale had been *bona fide* then there would be no liability to make good the value. Because the good faith of the purchaser would protect him against a claim *ex delicto*, and there would be no contractual relationship, and no consideration of natural equity."

There is another case to be noticed. In *Punchibanda v. Ratnam*[4], where the question argued at the stage of appeal appears to have been limited to one relating to the quantum of damages upon a certain action

[1] *(1918) 20 N. L. R. 206.*
[2] *(1954) 1 S. A. L. R. at 153.*
[3] *(1918) A. D. at 465-66.*
[4] *(1944) 45 N. L. R. 198.*

filed, it has been assumed that the English law of conversion was part of our law. The question as to whether the law governing the right of action was not Roman-Dutch law does not there appear to have received consideration. Certainly, an earlier decision of this Court in *Thomson v. Mercantile Bank* [1], where it had been held that it was the Roman-Dutch law that should be applied had not been cited or considered.

In the case before us for decision, the issue having been raised as to whether the plaint disclosed a cause of action against the defendant, an answer to it required to be considered on the basis of the law applicable, i.e., whether it was the English Law or the Roman-Dutch Law. The action being one founded on a delict, in my opinion, the Roman-Dutch law called to be applied. On the pleadings it was manifest that the action was one for conversion, and such an action was not available. The issue should therefore have been answered against the plaintiffs.

There is one point remaining that needs consideration by us. In the savings clause of the Bills of Exchange Ordinance (Cap. 82)—section 98 (2)—it is enacted that

> " The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques."

The learned trial judge was inclined to take the view that, as section 3 of the Civil Law Ordinance (Cap. 79) had introduced into Ceylon the law of England with respect to banks and banking, that section and section 98 (2) of the Bills of Exchange Ordinance had the effect of making available in Ceylon the right of action given by the English common law to a person placed in the position of the plaintiffs' firm. It was brought to our notice that this court in *Bank of Ceylon v. Kulatilleke* [2], in holding that the drawer of a cheque was entitled to succeed in a claim against a collecting banker for recovery of the sums paid out on fraudulently altered cheques, has stated that in view of section 3 of the Civil Law Ordinance the case fell to be decided according to the law of England. It was submitted to us that this case has not been correctly decided. It is sufficient to observe that the question whether the action was really one where the banker was sought to be made liable on the basis of conversion did not receive attention by the court; nor were certain relevant authorities referred to in the judgment of the court.

Section 98 (2) of the Bills of Exchange Ordinance was, in my opinion, only intended to apply to any omissions or deficiencies in the Ordinance in respect of the law relating, inter alia, to cheques, and cannot form the basis of a proposition that, where the delict of conversion was in relation to a cheque, therefore the English common law of conversion is introduced into our law.

[1] *(1935) 15 Law Rec. 61.* [2] *(1957) 59 N. L. R. 188.*

In *Hongkong and Shanghai Bank v. Krishnapillai*[1], where an application had been made by the assignee in insolvency for an order of court to sell certain shares alleged to be the property of the insolvent, an application resisted by certain banks to which shares had been pledged with right to sell without reference to court, Drieberg J. (with whom Garvin J. agreed) stated :—" It was contended that as Ordinance No. 22 of 1866 (the Civil Law Ordinance) introduced into the Colony the law of England in all questions relating to banks and banking they have the same rights in the matter of realizing these securities as they would under the law of England. But the right of a pledgee to sell his securities without recourse to a court of law is peculiar to the English law of pledge and the common law of the land in the matter of rights of mortgage and pledge does not give place to the English law when the mortgagee or pledgee is a bank ". This decision was followed in an analogous case by Howard C.J. and Keuneman J. in *Mitchell v. Fernando* [2] where it was unsuccessfully sought to maintain an argument that, as the Civil Law Ordinance introduced into Ceylon the law of England with respect to joint stock companies, therefore a mortgage of shares in a company was governed by the relevant rules of English law. The Court rejected this argument by stating that the question related not to joint stock companies but to mortgage of movables, a subject governed by the Roman-Dutch Law.

The defendant was right, in my opinion, when he contended throughout the trial that the action instituted against him was not maintainable. I would therefore allow his appeal and direct that the plaintiffs' action be dismissed with costs in both courts.

TAMBIAH, J.—

I agree with the findings of my brother Fernando J. Since this is a matter of importance and interest, I wish to deal with the important question whether the English doctrine of conversion is part of our law at some length. The question to be decided is whether the plaint, which sets out in unmistakable language a cause of action based on the English doctrine of conversion, discloses a cause of action.

In England, the wrong of conversion consists in " an act of wilful interference with a chattel, done without lawful justification, whereby any person entitled to it is deprived of its use and possession " (vide Salmond on the Law of Torts, 7th Ed. page 375). There are three distinct methods by which a man may deprive another of his property and become liable in the special action known as the " action of trover " under the English Law. A person may incur liability by taking a chattel belonging to another or by wrongful detaining or disposing of it. Corresponding to these methods of wrongful deprivation, there were three distinct forms of action provided by the English Common Law, namely, (1) trespass *de bonis asportatis*, for wrongful taking ; (2) *detinue*,

[1] *(1932) 33 N. L. R. at 253.* [2] *(1955) 46 N. L. R. at 269.*

for wrongful detention, and (3) *trover*, for wrongful conversion (that is to say, disposal). Trover was simply a variant of the form of action known as detinue, the only material difference being that in trover the defendant was charged with wrongfully converting the property to his own use, while in detinue, he was charged with unjustly detaining it.

Soon trover became established and it began to extend its boundaries and succeeded in appropriating almost the whole territory both of trespass and of detinue. It became a general remedy applicable in almost all cases in which a plaintiff has been deprived of his chattels whether by way of taking, by way of detention or by way of conversion. The action for trover gradually developed into the general action for conversion by detention.

Negotiable instruments and other securities such as guarantees, considered as corporeal property, are simple pieces of paper. Their sole value is as choses in actions. But when they are unlawfully converted or detained the courts gave a remedy to the person who is entitled by giving damages to the extent of the loss (vide *Midland Bank v. Reckitt* [1]; *Savoury & Co. v. Lloyd's Bank* [2]; *Kleinwort Sons & Co. v. Le Comptoir National D'escompte de Paris* [3]). The English Courts granted this remedy by a process of extension by treating the cheque, the subject matter of conversion, as a chattel, which was converted into money.

A party could waive the action based on tort and bring an action for money had and received under the English Law. This form of action was known as assumpsit, and was applicable to cases in which a person may be required to re-pay to another money which had come into possession under circumstances which disentitled him to retain it. Although at one time, in the hands of Lord Mansfield, this class of case threatened to expand into the vagueness of moral obligation, it is reducible to certain groups of circumstances which are now clearly defined. Among these may be mentioned cases of money obtained by wrong such as payments under contract induced by fraud or duress; cases of money paid under such mistake of fact as creates belief in the payer that a legal liability rests on him to make payment and cases of liability to repay the money paid for a consideration which has wholly failed. This remedy for want of a better term, is said to be based on a quasi-contract, and is also granted to a person who is the owner of a cheque which is the subject matter of conversion. The action for conversion is therefore based on tort and the action for money had and received is based on quasi-contract, a concept which is peculiar to the English Law.

The question is whether the tort of conversion or the action for money had and received has ever been received into our legal system.

[1] *(1933) A. C. 1.*
[2] *(1933) A. C. 201.*
[3] *(1894) Q. B. 674, Vol. 63.*

The Roman Dutch Law is the common law or the general law of Ceylon. It is a legacy of the Dutch to this Island and although it has ceased to be the law governing Netherlands, the home of its origin, it has thrived on the soil of Ceylon, although to a lesser degree of growth than in South Africa.

During the Dutch regime the States General in Holland seldom legislated for the Dutch Colonies. The Dutch ruled Ceylon by a series of statutes enacted in Batavia, and by placaats promulgated by the Dutch Council in Ceylon. After nearly a century of Dutch occupation, a compilation of these was made by Mr John Maetsuyeker. This was done on the instructions of Governor Van Diemen and these came to be known as the " Old Statutes of Batavia". It consolidated all the laws in force in the colonies at that time. By a resolution of the Dutch Council of Ceylon, dated 3rd March 1666, the Old Statutes of Batavia were made applicable to Ceylon (vide *Karonchihamy v. Angohamy* [1]). The statutes of Batavia, which modified the Roman Dutch Law to suit the legal climate of the Dutch East Indies, over-rode the statutes passed locally in the Dutch Colonies whenever there was a conflict.

Almost a century later, it became necessary to make a new collection of the statutes of Batavia, in view of the number of statutes promulgated in Batavia which altered and supplemented the Old Statutes of Batavia. It was compiled on the instructions of Governor Vander Parra and was published in September 1766. Although this new collection never received full legislative authority and was never formally introduced into Ceylon, yet there is ample evidence that this collection was applied in Ceylon (vide *Van Clief's case* in Vanderstraaten's Appendix).

The States General seldom legislated for the colonies. During the Dutch era in Ceylon, apart from customary laws, the Dutch ruled by the placaats issued by the Dutch Council in Ceylon and the Statutes of Batavia. The Statutes of Batavia provided that a *casus omissus* should be governed by the Roman Dutch Law. It is in this manner that the Roman Dutch Law was introduced into Ceylon. During the Dutch period, many works of the Roman Dutch writers were cited in courts (vide the Roman Dutch Text Books in the Library of the Courts of Ceylon during the Dutch Regime, by H. W. Tambiah, Ceylon Law College Review, 1960–61, p. 44 *et seq.*).

When the British took over the reins of government those who were called upon to administer justice were often recruited from the English Bar. They were not conversant with Dutch or mediaeval Latin. The Roman Dutch authorities, save a few works which were translated into English, were rarely cited. Those trained in English legal traditions naturally turned to English decisions and text books for the exposition of the law. In this setting it became uncertain as to what was the general law of the land. Consequently, the Proclamation of 23rd September 1799 (which is now incorporated in the Adoption of the

[1] *(1904) 8 N. L. R. 23.*

Roman Dutch Law Ordinance, Cap. XII) was enacted. The preamble to this Proclamation stated that " The Laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies or to expedient or useful alterations as to render a departure therefrom either absolutely necessary and unavoidably or evidently beneficial or desirable " should be applied.

The Statutes of Batavia and the placaats promulgated by the Dutch Council in Ceylon were gradually forgotten and the courts thereafter assumed that the general principles of the Roman Dutch Law, as expounded by writers, such as Voet, Grotius and Vanderlinden applied in Ceylon.

Here again the whole of the Roman Dutch Law was never accepted in Ceylon. The courts adopted what has been described by Wood Renton C.J. (vide Roman Dutch Law in Ceylon under the British Regime (1932) 49 S.A.L.J. 161) as the " eclectic attitude " in adopting so much of the Roman Law as " suited our circumstances (vide *Wijekoon v. Gooneuardena* [1]). Fiscal measures and tenures peculiar to Holland were never received in Ceylon. Thus, for instance, the rule of Roman Dutch Law prohibiting donations to religious houses and gifts for pious causes was never enforced in Ceylon (vide 1843 Ramanathan Reports 134).

The Royal Commission known as the Colebrooke-Cameron Commission which was sent to investigate into the administration of Ceylon and suggest reforms formulated a number of questions and obtained some instructive answers which threw much light on the adoption of the Roman Dutch Law by the Dutch. In *Karonchihamy v. Angohamy* [2] Moncreiff A.C.J. cites some of the answers given to questions 9, 15 and 16. From these answers it is clear that the laws administered by the Dutch consisted of " the old Roman Dutch Law, partly of the customs of the natives, partly of the local statutes or regulations enacted in the time of the Dutch and also the British."

The question as to how far the statutes of Batavia were applied is answered thus. " The Statutes of Batavia are necessarily admitted, because the Government of that Island, having been superior to the Government of Ceylon, had power to modify or disallow the regulations of the latter. Vander Parra's collection is considered of the greatest value."

To the question " Are they (the statutes) often referred to in the Courts, and are they enforced in cases where they deviate from the provisions of the Roman Dutch Law as expounded by the Dutch Commentators ? " the following answer is given. " They must necessarily be admitted as paramount to all authorities when applicable to the present state of the Island." Moncreiff A.C.J. rightly observed that this answer was possibly given in reference only to the Statutes of Batavia (vide *8 N.L.R. 11*).

[1] *(1892) 1 S. C. R. 147 at 149.* [2] *(1904) 8 N. L. R. 1 at 10.*

The question as to how far the Roman Dutch Law was resorted to when the Muhammedan Law and the Thesawalamai contained no provisions, was answered as follows: " Where the native laws and customs have not been compiled, we refer, if the subject of dispute arise among Muhammedans, to the most learned and best informed among them. In disputes among Malabars we should pursue a course nearly similar. But in other cases we consider the Roman Dutch Law as the rule by which causes ought to be decided ; and whenever that is silent, we must refer to the laws of Rome." It may be mentioned that the courts abandoned this practice of resorting to expert evidence owing to the unreliability of those who professed to be experts.

It should be remembered that the answers cited above only applied to what was termed the Maritime Provinces of Ceylon. A separate set of questions addressed by the Colebrooke-Cameron Commission and the answers given to them give an insight into the sources of Kandyan Law as applied in the Kandyan Provinces by the British. When the Kandyan Provinces were brought under the general administration of the Island the Roman Dutch Law was applied in matters where the Kandyan Law was silent.

It is significant that in none of those answers is English Law said to be applicable. This Royal Commission visited Ceylon before the Charter of 1833 was enacted. As stated earlier, in administering the " Laws and institutions that subsisted under the ancient Government of the United Provinces " the Courts appear to have forgotten the Statutes of Batavia and followed the Roman Dutch Law as found in the writings of Grotius, Voet and Vanderlinden without adopting any rules which had only a local application in Holland.

It is important to consider how far statute law of Holland was adopted in Ceylon. The general statute law of Holland which altered the Roman Dutch Law on any topic to which this system applied, became part of the Law of Ceylon provided the placaat was enacted prior to the Dutch occupation of Ceylon and did not deal with any fixed measures or matters which had local application in Holland. Any statute passed in Holland after the Dutch occupation of Ceylon must be shown to have been recognised or adopted in Ceylon (vide *Karonchihamy v. Angohamy* [1]).

In dealing with the applicability of Roman Dutch Law in Ceylon, Thompson who was one of the earliest writers on the Laws of Ceylon says—

> " The general, or as it is popularly termed, the common law of Ceylon, is obtained from treatises on the Roman Dutch Law, that is, the Roman civil law, added to or abrogated by the feudal customs, and federal or state statutes of the United Provinces of Holland. These variations, additions, or abrogations, appeared not only in the statute books of Holland, but in respect of Dutch customs of judicial decisions, and in learned treatises of jurisconsults, which bear almost the authority of such decisions. In respect, therefore,

[1] *(1904) 8 N. L. R. 1.*

of its Roman basis, the Roman Dutch law may, perhaps, be looked upon as written law: but, in respect of the Dutch decisions and commentaries, as unwrit'en law. From this Roman Dutch Law, which is popularly regarded as the common law of the great part of Ceylon, Dutch feudalism and local customs must be largely subtracted, as well as other institutions peculiarly Dutch, which do not obtain in Ceylon; so that the Roman Dutch Law, as accepted in Ceylon re-approaches the civil law; and indeed it will be found in the old treatises, as in Voet on the Pandects, that, when not controlled by some statute or custom, the Dutch commentator always relies on the civil law as his authority.

The Roman Dutch law, modified by statute, and the introduction of certain portions of English law and of modern equity, forms the law of the "maritime provinces", and extends to every inhabitant of the island, except in those instances in which such inhabitant is by privilege under the sanction of another form of law in certain cases." (Vide Institutes of the Laws of Ceylon by Thompson, Vol. II, pp. 11 & 12.)

In *Weerasekera v. Peiris*[1] Sir Lancelot Sanderson, in delivering the opinion of the Privy Council, cited with approval the dictum of Moncreiff A.C.J. in *Karonchihamy v. Angohamy* (vide 8 N.L.R. 1) which is as follows:—

"The Common Law of Ceylon is the Roman Dutch Law as it obtained in the Netherlands about the commencement of the last century."

It must not be assumed that Roman Dutch Law applies in all matters governed by private law. The English law has made inroads into our legal system in several ways. Referring to the reception of English Law in South Africa, Hahlo and Kahn state as follows: (vide the British Commonwealth Series, The Development of its Laws and the Constitutions, Vol. 5, p. 18).

"The process by which English doctrines and principles infiltrated into the law of the Cape resembles in many respects the reception of Roman Law on the Continent during the 15th and 16th centuries. Some English institutions marched into our law openly along the highway of legislative enactment, to the sound of brass bands of Royal Commissions and public discussion. Others slipped into it quietly and unobstrusively alongside roads and by paths."

The same observations apply to Ceylon. The English Law governing certain topics on Mercantile Law were bodily introduced into Ceylon by statute law. There are other statutes which are either replicas or close imitations of English Statutes. In interpreting these statutes, naturally, English decisions have to be resorted to.

[1] *(1932) 34 N. L. R. at 285.*

A more subtle way in which English law had gradually crept in is by tacit acceptance of English Law. What Sir John Wessels wrote regarding the Cape Province is equally true of Ceylon (vide 1920 S.A.L.R. 265). He says :—

"Roman Dutch Law has influenced the English Law far more than people think. Sometimes inroads have been open and overwhelming as when the English Law of evidence was introduced by legislation, first at the Cape and afterwards throughout the whole of South Africa, and at other times English legal ideas have crept in insidiously as if it were almost by accident."

Thus the action for use and occupation is entirely English Law (vide Landlord and Tenant by Tambiah). The relief given to the lessee against forfeiture for non-payment of rent is based on English Law. In the law of property there are many instances where the English Law has found acceptance (vide Partitions in Ceylon by Jayewardene). The areas in which the English Law is applicable in Ceylon are fairly well known.

The Law of Delict in Ceylon is the Roman Dutch Law. Although the English Law dealt with specific torts, under the Roman Dutch Law delicts could be brought under two main categories : for patrimonial loss caused as a result of a negligent or intentional act the Aquilion action is available ; and for intentional and contumelious aggression against personal reputation or dignity of another person the *actio injuria* is the proper remedy. There are other actions such as the *actio de pauperie*, action *de pastu*, and actions under the Aediles edicts imposing liability on the owners and occupiers of dangerous premises. The English doctrine of tort known as conversion found no place in our legal system.

The oft quoted dictum in *Dodwell & Co. Ltd. v. John et al.* [1] does not support the proposition that the English Law of conversion is part of our law. What was held by the Privy Council in that case was that where a person receives money with notice of the nature of the trust affecting it, he was bound to account for it to the beneficiary. It is true that Lord Haldane observed (vide (1918) 20 N.L.R. 210) : "It may well be true that the principles of the English common law have been so far recognised in the jurisprudence of Ceylon as to admit of the same question being treated as one of conversion having taken place." This dictum was merely obiter and is not supported by authority.

In *Punchi Banda v. Ratnam* [2] it was held that the English Law of conversion was part of our law. But the ruling in *Thomson v. Mercantile Bank* [3], where it was held that the English doctrine of conversion is not part of our law, was not cited or considered. In *Punchi Banda v. Ratnam* it was assumed that the English Law of conversion is applicable. The Roman Dutch authorities were neither cited nor considered. The

[1] *(1918) 20 N. L. R. 206.* [2] *(1944) 45 N. L. R. 198.*
[3] *(1935) 15 Law Recorder 51.*

better view is that the English Law of conversion is not part of our law vide The British Commonwealth Series, The Development of its Laws and Constitutions by Jennings and Tambiah, Vol. 7, page 251).

In South Africa also an attempt to introduce the English Law of conversion was made, but it was not successful. In *John Bell & Co. Ltd. v. Esselen* [1] the Appellate Division of the Supreme Court of South Africa re-iterated the view that, as far as the doctrine of conversion is concerned, it is sufficient to say that the doctrine is unknown to the Roman Dutch Law.

For any principle of English law to be tacitly accepted in Ceylon, there should be a long line of decisions adopting it. For the reasons set out, I hold that the English doctrine of conversion was never tacitly adopted in Ceylon and is not part of our common law.

The only question that remains to be considered is whether by statutory provision the English doctrine of conversion has been applied to Bills of Exchange. The Civil Law Ordinance (Cap. 79) enacts that the law of England should be observed in Ceylon in certain maritime and commercial matters. Section 3 of the Ordinance enacts that in all questions or issues which may have to be decided in Ceylon with respect to the Law of Banks and Banking etc., the law to be administered shall be the same as is administered in England in the like case at the corresponding period if such question or issue had to be decided in England, unless there is some contrary statutory provision in force in Ceylon.

In English Law the liability of the Banker with regard to the collection of cheques is founded on the common law doctrine of conversion which consists of any dealing with goods in a manner inconsistent with the right of the true owner provided that it was also established that there was an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which was inconsistent with the owner's right. Therefore under the English law, any person who, however innocently obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them whether for his own benefit or that of any other person is guilty of conversion (vide *Hollins v. Howler* [2]). The Roman Dutch law on this matter differs fundamentally from the English law.

The introduction of English Law on Banking did not let in principles of English law governing mortgages and pledges of movables to a Bank. Thus in *Krishnapillai v. Hong Kong and Shanghai Bank Corporation* [3] the question arose as to whether the doctrine of parate execution, which gave the right to an English Bank to sell shares pledged to it without recourse to the Courts of law, is part of the law of Ceylon. It was contended that the Civil Law Ordinance introduced the English Law of Banking in Ceylon and therefore the principles of English law governing pledges of movables form part of the law of Ceylon. This contention

[1] *(1954) 1 S. A. L. R. 147, page 2.* [2] *(1875) L. R. 7 H. L. 575 at 591.*
[3] *(1932) 33 N. L. R. 249.*

was rejected by the Supreme Court. It was held that the common law of the land does not give place in the matter of rights of mortgagee and pledge to the English Law when the mortgagee or pledgee is a Bank. This ruling was followed in *Mitchel v. Fernando* [1].

In this connection the case of *Kulatilleke v. Bank of Ceylon* [2] should be considered. In that case it was also held that the drawer of a cheque marked "Not Negotiable", the amount of which was subsequently altered by a third party, was entitled to recover from the collecting banker the amount by which the cheque was so fraudulently altered and that in such a case the collecting banker cannot claim the benefit of section 82 of the Bills of Exchange Ordinance. Basnayake C.J. in a short judgment said ; "As our law on the subject of a banker's liability is the same as in England (section 3 of the Civil Law Ordinance) except where special provision has been made in our law, the defendant would be liable to pay to the plaintiff the amount that has been paid to the defendant by his bank without his authority." It is submitted that the liability of the banker depended on the doctrine of conversion which is not part of our law and this aspect was not considered by the court in that case.

Another reason given in that case is that section 82 of the Bills of Exchange Ordinance applies to cheques which do not have a taint of forgery or fraudulent alteration, and therefore a cheque, which is a drawer's cheque in all respects and which carries the authority of the drawer and which has been altered fraudulently is invalid. An altered cheque still remains a cheque and attaches to itself the benefit of section 82 of the Bills of Exchange Ordinance. I regret I am unable to agree with the reason given in the case of *Kulatilleke v. Bank of Ceylon.* Despite section 3 of the Civil Law Ordinance the common law of Ceylon on delict remains unaltered.

The next question for consideration is whether section 82 of the Bills of Exchange Ordinance (Cap. 82) impliedly introduced the English Law of conversion into Ceylon. It may be urged that if the English doctrine of conversion is not part of our law, section 82 of the Ceylon Bills of Exchange Ordinance is superfluous. Section 82 of the Ceylon Bills of Exchange Ordinance is an exact replica of section 82 of the English Act. In South Africa it was reproduced as section 80 of the South African Bills of Exchange Act. In South Africa the question arose whether this provision altered the common law of South Africa. In *Yorkshire Insurance Co. v. Standard Bank* [3], Tindall J. said :—

"If I do not misunderstand the English common law the collecting banker is liable, not by reason of any duty he owes to the true owner, but on the doctrine that it is guilty of a conversion............ But it is well settled now that no such doctrine obtains in Roman Dutch Law .... It is vital to bear in mind this difference in the two systems of law in considering the interpretation of section 80 of the Bills of

[1] *(1945) 46 N. L. R. 265.* [2] *(1957) 59 N. L. R. 189.*
[3] *(1928) W. L. D. 251 at 278, 280.*

Exchange Proclamation............ Seeing that in our law, the collecting banker is not liable on the ground of conversion, the only ground on which the collecting banker who receives payment in good faith could possibly be held liable is that he owed a duty to the true owner and was negligent............ The frame of section 80 is clearly not that of a section designed to impose a liability where none existed before but to afford a protection............ The result of my interpretation may be to make section 80 superfluous ; but provisions in statutes sometimes are of that character. The whole statute was copied almost verbatim from the English Act probably without considering what the effect of a specific provision would be, having regard to the differences in the common law of two countries."

In view of the fact that the English doctrine of conversion is not part of our law, the same observations would apply to the provisions of section 82 of the Ceylon Bills of Exchange Ordinance. In South Africa as a result of the ruling in *Yorkshire Insurance Co. v. Standard Bank*, the law was amended.

Finally it was contended that section 98 (2) of the Bills of Exchange Ordinance introduced the English law of Conversion so far as it applies to cheques. This section enacts :—

> " The rules of the common law of England including the Law Merchant, save in so far as they are inconsistent with the express provisions of this Ordinance. or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques."

This provision was intended to bring the substantive law of bills of exchange, promissory notes and cheques and was not intended to affect the consequence and the rights and liabilites of persons under the general law of the land when a bank enters into transactions.

Section 10 of the Canadian Bills of Exchange legislation is very similar to section 98 (2) of the Ceylon Bills of Exchange Ordinance. The question arose whether section 10 of the Canadian Bills of Exchange Act introduced the doctrine of conversion in Canada. In dealing with this aspect Falconbridge in his " Banking and Bills of Exchange in Canada " (6th Edition) says. " The result would appear to be that notwithstanding section 10 of the Bills of Exchange Act, which purports to make the common law of England applicable to bills, notes and cheques, in cases not expressly provided for by the statute itself, effect is given to this provision in Canada only within the limits of what may be called the law of bills and notes, but not including all the consequences of or all the rights or liabilities resulting from the contracts entered into by parties to bills or notes." The same observation applies to Ceylon. Merely because a cheque is the subject matter of the conversion, the English law of conversion has not been introduced into Ceylon. (Compare

Norwich Union Fire Insurance Society Ltd. v. Banque Canadienne Nationale [1], where the Supreme Court of Canada held that the English doctrine of conversion was not in force in the Province of Quebec.)

Where a cheque is forged and money obtained by using it, the remedy available under the Roman-Dutch law has to be found within the four corners of this system of Law. In *Leal & Co. v. Williams* [2] Ennis C.J. after citing Voet 6.1.10 said : " The remedy that our law gives to the owner of a stolen property is, he may follow the property and vindicate it, anywhere, provided it is still *in esse* and he may bring an action *ad exhibendum* to recover the property or its value should it have been consumed against the thief or heirs or against any person, who has received it with the knowledge of the tainted title. But the fact that these are the only remedies allowed by our law is inconsistent with the doctrine of conversion, which allows an owner to proceed against a bona fide intermediary who obtains a stolen property and parts with it again. It may be that the Aquilian action would also be available if negligence or intentional wrong doing could be shown on the part of the person who is made liable in such cases. The Roman Dutch Law always attaches liability on a fault basis. This is a matter where legislation is very necessary to amend the Bills of Exchange Ordinance in the interest of commerce. The courts of law can only interpret the provisions of law as they exist and cannot usurp the functions of the legislature. Legislation on the lines of those enacted in South Africa would be necessary in Ceylon to protect commerce. (vide Allison and Kahn, pages 582–583 and 726).

For the reasons set out I am of the view that the plaint does not disclose a cause of action. Even if it is based on an action for use of money had and received, as contended by counsel for the respondent, it cannot succeed for the reason that such an action is unknown to our law. In the present action even the Roman Dutch principle against undue enrichment cannot be invoked since enrichment is not available. The defendant has paid valuable consideration for the cheque. He has parted with a radio set and also given the balance sum to Aboosali. Therefore he would not be liable even if an action for undue enrichment was brought against him.

For the reasons set out the plaintiff's action is dismissed with costs in both courts.

ALLES, J.—I agree with the judgment of my brother Fernando.

Appeal allowed.

[1] *(1934) 4 Dominion Law Reports 223.*

[2] *(1906) T. S. 554.*