1969 *Present :* **H. N. G. Fernando, C.J., Sirimane, J., Alles, J., Weeramantry, J., and Wijayatilake, J.**

Mrs. LILY M. DE COSTA, Appellant, *and*
BANK OF CEYLON, Respondent

S. C. 365/64 (F)—D. C. Colombo, 51102/M

Cheques and dividend warrants—Collecting banker—Proceeds of a cheque credited to account of a person other than the true owner—Negligence—Liability of the banker to the true owner—Burden of proof—English law doctrine of conversion—Inapplicability of it in Ceylon—Applicability to a cheque transaction—Roman-Dutch law—History and scope of its applicability in Ceylon—Proclamation of 23rd September 1799—Adoption of Roman-Dutch Law Ordinance (Cap. 12)—An inaccuracy in s. 2 thereof—Ordinance No. 5 of 1852, s. 2—Scope and effect of it—Bills of Exchange Ordinance (Cap. 82), ss. 22, 27, 82, 98 (2)—Lost cheque—Secondary evidence—Evidence Ordinance, ss. 65 (5), 65 (3)—Banker's liability in English law—Applicability in Ceylon—Civil Law Ordinance (Cap. 79), s. 3—Action for money had and received—Maintainability—Prescription Ordinance (Cap. 68), s. 7—Quasi contractual liability—Condictio indebiti—*Unjust enrichment.*

Where a crossed " not negotiable " cheque in the form of a dividend warrant is indorsed by the payee with the words " Credit my account only ", a banker who collects payment of it and credits the proceeds to the account of a person other than the true owner is liable to pay the sum to the true owner if he acted negligently in crediting the collected sum to a wrong Account. In such a case section 82 of the Bills of Exchange cannot protect the collecting banker, and his liability has to be determined by the application of the English law of conversion in respect of cheque transactions. The Bills of Exchange Ordinance (read with section 2 of Ordinance No. 5 of 1852) has the effect that the liability of a negligent collecting banker in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

Alternatively, the collecting banker is liable to the true owner on the basis that he received the money for the use and benefit of the true owner and, accordingly, an action for money had and received would lie.

Where a collecting banker is sued by the true owner of a cheque for the recovery of the proceeds of the cheque credited by the banker to the account of a person other than the true owner, the onus, according to section 82 of the Bills of Exchange Ordinance, is on the banker to show that he was not negligent and that at the time when he received the cheque for collection there was something on the face of the cheque which justified the action taken by him ; in other words, the banker should show that the cheque was altered in such a manner as to mislead his officers.

Per FERNANDO, C.J., ALLES, J., and WEERAMANTRY, J.—The English law doctrine of conversion is not part of the common law of Ceylon.

Per SIRIMANE, WEERAMANTRY and WIJAYATILAKE, JJ.—The conversion of a cheque by a collecting banker is also a matter of banks and banking, and thus affords another basis for the application of English law.

2—J 12371—2,255 (3/70)

Per SIRIMANE, J.—The general law of conversion has been considered to be part of our law from very early times. But it is not necessary to decide it in the present case.

Per WEERAMANTRY, J.—The plaintiff is also entitled to succeed on the basis of the law relating to unjust enrichment.

Daniel Silva v. Johanis Appuhamy (67 N. L. R. 457) discussed.

APPEAL from a judgment of the District Court, Colombo.

The plaintiff, who was a shareholder of Deniyaya Tea and Rubber Estates Company, received from the Company a dividend warrant in her favour for a sum of Rs. 30,637·13. The warrant was crossed "Not Negotiable" and was drawn on National & Grindlay's Bank. The plaintiff made on the back of the warrant the indorsement "Credit my account only" and duly affixed her signature. She then put the warrant in an envelope, addressed it to her Bank, viz., the City Office of the Bank of Ceylon, and gave it to a servant to be posted, but there was no proof of posting. The warrant got into the hands of a third party, one Loganathan, who was said to be the proprietor of "Movie & Co.". It was presented for payment at the Wellawatte Branch of the defendant Bank of Ceylon and the money realised was credited to the account of "Movie & Co.". The resultant position was that the amount collected by the defendant Bank on the dividend warrant, the true owner of which was the plaintiff, was paid by the defendant to a person other than the true owner.

In the present action, the plaintiff sued the defendant for the recovery of the amount of the dividend warrant on the basis that the Bank had wrongfully deprived the plaintiff of the proceeds of the warrant, or alternatively that the Bank had recovered the proceeds for the use of the plaintiff.

It was found by the Supreme Court, in the present appeal filed by the plaintiff, that the defendant's officers acted negligently in crediting the amount of the dividend warrant to the account of "Movie & Co." and that the trial Judge was wrong in his decision that there was no such negligence.

H. W. Jayewardene, Q.C., with *D. S. Wijewardane, M. Shanmuganathan, Mark Fernando* and *B. Eliyatamby*, for the plaintiff-appellant.

C. Ranganathan, Q.C., with *N. Satyendra, C. Sandrasagara, N. Tiruchelvam* and *V. Jegasothy*, for the defendant-respondent.

Cur. adv. vult.

December 18, 1969. H. N. G. FERNANDO, C.J.—

The plaintiff sued the defendant, the Bank of Ceylon, for the recovery of a sum of Rs. 30,637·13, being the amount of a dividend warrant, on the basis that the Bank had wrongfully deprived the plaintiff of the proceeds of the warrant, or alternatively that the Bank had recovered the proceeds for the use of the plaintiff. The following facts as found by the learned District Judge are not now disputed.

In April 1958, the plaintiff received a dividend warrant drawn in her favour " pay Mrs. L. M. de Costa " by a Company of which she was a share-holder. The warrant was for a sum of Rs. 30,637·13 and was drawn on the National Overseas and Grindlays Bank, Colombo, which maintained a Dividend Account for the Company. The warrant when issued by the Company had been marked " & Co.", and bore a rubber stamping " Not Negotiable "; the plaintiff then made on the back of the warrant the endorsement " Credit my account only — Mrs. L. M. de Costa " and affixed her signature " Lily de Costa " below the endorsement ; the plaintiff had an account with the City Office of the Bank of Ceylon, and placed the warrant in an envelope addressed to the City Office ; she had given the envelope containing the warrant to a servant to post, but there was no evidence of posting, and the warrant was not received in the post by the City Office of the Bank. It was however common ground at the trial that the dividend warrant was in fact presented for payment on 30th April 1958, by the Bank of Ceylon to the National Overseas & Grindlays Bank, which paid out to the Bank of Ceylon Rs. 30,637·13 being the amount of the warrant. This amount, however, was not credited to the plaintiff's account.

The case for the Defendant Bank can be briefly stated : one Loganathan, under the business name " Movie and Co.", had a current account at the Bank's Wellawatte Branch, and had as its customer deposited to the credit of that account the dividend warrant for Rs. 30,637·13 referred to in the plaint for the purpose of the proceeds thereof being collected and credited to the said account ; the Bank had received payment of the amount of the dividend warrant for the said customer and had credited the proceeds to that customer's current account ; in receiving payment of the dividend warrant and crediting the proceeds to the account of "Movie & Co." the Bank had acted in good faith and without negligence ; and the Bank had in good faith in the ordinary course of its business as a Banker paid out the proceeds of the warrant on cheques drawn by "Movie & Co." on the said current account, before the Bank had notice of the plaintiff's alleged right in or to the dividend warrant or its proceeds.

The position for the plaintiff at the trial was that the first basis of the claim against the defendant Bank was in delict, and that on this basis the plaintiff was entitled to recover as for a conversion if the English law applies. The position for the plaintiff also was that even if the Roman-Dutch Law be applicable the defendant Bank was yet liable in delict. The learned District Judge over-ruled a submission for the

defendant that the first cause of action pleaded in the plaint was based on contractual liability and not on conversion ; I am in agreement with this ruling of the District Judge, which was not challenged in appeal by defendant's Counsel, and I have nothing to add to the reasons stated by the Judge for his ruling.

In so far as the plaintiff claimed that the defendant was liable as for a conversion as known to the English Law, the learned District Judge considered himself bound by a decision of this Court in the *Bank of Ceylon v. Kulatilake*[1] holding that the Law of Ceylon on the subject of a Banker's liability is the same as in England. He nevertheless proceeded to hold further on the facts that the Bank had established that it had acted in good faith and without negligence, and that accordingly the Bank was protected from liability by s. 82 (2) of the Bills of Exchange Ordinance (Cap. 82).

Subsequent to the delivery of the judgment of the District Judge in the present case, a Bench of three Judges of this Court decided the case of *Daniel Silva v. Johannis Appuhamy*[2] and held that the English doctrine of conversion is not applicable in Ceylon, and Tambiah, J. further held that the case of *Kulatilake v. Bank of Ceylon* had been wrongly decided. It thus appeared, when this appeal was first argued before my brother Sirimane and myself, that there was need to settle the conflict of opinion as to the Law of Ceylon governing a matter of great commercial importance, and hence the present appeal was reserved for a decision of a Bench of five Judges. The long delay in the final disposal of the appeal by this Court is attributable to these circumstances.

One argument of Counsel for the Appellant was that the English doctrine of conversion is part of the law of Ceylon, because the doctrine has been applied in this country in judgments of this Court. Before referring to the judgments which were relied on for this argument, it is of interest to consider the question whether the law of Ceylon authorised such a doctrine to be applied by our Courts, especially since the profitable researches of Mr. Satyendra have revealed that the Statute law relevant to that question may not have been properly understood in the past. Our consideration of this matter has been much facilitated by the Collection of Documents in Volume II of Dr. G. C. Mendis's edition of the *Colebrook-Cameron Papers*.

The first formal Commission to a British Governor of Ceylon, the Letters Patent issued on 19th April 1798 to Governor Frederick North, declared the pleasure of His Majesty (George III) that the Government of Ceylon be "placed as far as circumstances will permit under the Direction" of "the United Company of Merchants of England trading to the East Indies". A similar declaration was contained in the Royal Instructions of 26th March 1798 also issued to Governor North. The 5th clause of these Instructions declared His Majesty's Pleasure that the Administration of Justice in Ceylon should nearly as circumstances will permit be exercised by the Governor in conformity to the Laws and

[1] *(1957) 59 N. L. R. 188.* [2] *(1965) 67 N. L. R. 457.*

Institutions that subsisted under the ancient Government of the United Provinces. This clause permitted some deviations from those Laws, and the extent of the permitted deviations were set out in the Proclamation of 23rd September 1799, the Preamble and the first clause of which it is useful to set out here fully :—

> " WHEREAS it is His Majesty's gracious Command, that for the present and during His Majesty's will and pleasure, the temporary Administration of Justice and Police in the Settlements of the Island of Ceylon now in His Majesty's Dominion, and in the Territories and Dependencies thereof, should, as nearly as circumstances will permit, be exercised by us, in conformity to 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 such expedients and useful alterations as may render a departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable; subject also to such directions, alterations, and improvements, as shall be directed or approved of by the Court of Directors of the United Company of Merchants of England trading to the East Indies, or the secret Committee thereof, or by the Governor-General in Council of Fort William in Bengal.
>
> We therefore, in obedience to His Majesty's Commands, do hereby publish and declare, that the administration of Justice and Police in the said Settlements and Territories in the Island of Ceylon, with their Dependencies, shall be henceforth and during His Majesty's pleasure exercised by all Courts of Judicature, Civil and Criminal, Magistrates, and Ministerial Officers, according to the Laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such other deviations and alterations as we shall by these presents or by any future Proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of Justice, to ordain and publish, or which shall or may hereafter be by lawful Authority ordained and published."

The Proclamation of 1799 thus declared that the Administration of Justice shall be exercised by the Courts according to the Roman-Dutch Law, subject to deviations or alterations—

(*a*) in consequence of emergencies, or absolutely necessary and unavoidable, or evidently beneficial and desirable;

(*b*) by the Court of Directors of the East India Company or the Secret Committee thereof or the Governor of Fort William;

(*c*) by Proclamation of the Governor;

(*d*) by lawful authority ordained.

But the Proclamation did not authorise any such deviations or alterations to be made by the Courts of law.

There were in fact several subsequent Proclamations passed by the Governor under the power reserved by the Proclamation of 1799. But these became obsolete or inapplicable after a somewhat comprehensive Charter of Justice was enacted in 1833. Consequently, Ordinance No. 5 of 1835 was enacted by the Governor with the advice and consent of the Legislative Council. This Ordinance repealed the Proclamation of 1799 and several other Proclamations, but the repeal of the Proclamation of 1799 was made subject to an express exception in the following terms :

> " except in so far as the same (i.e. the Proclamation of 1799) doth publish and declare that the administration of justice and police within the settlements then under the British Dominion and known by the designation of the Maritime Provinces should be exercised by all Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces ; which laws and institutions it is hereby declared still are and shall henceforth continue to be binding and administered through the said Maritime Provinces and their dependencies, subject nevertheless to such deviations and alterations as have been or shall hereafter be by lawful authority ordained."

Thus the Legislature of Ceylon declared in 1835 that the Roman-Dutch Law shall continue to apply in Ceylon by virtue of the Proclamation of 1799, and after the enactment of the Ordinance of 1835, deviations and alterations from or of the Roman-Dutch Law were not permitted to any of the authorities specified in the Preamble to the 1799 Proclamation, and were permitted only if they were *ordained by lawful authority*. The meaning of this expression becomes clear when account is taken of the fact that the Letters Patent of 23rd April 1831 (*Mendis*, Vol. II, p. 138) had established a Council of Government in Ceylon, the membership of which was prescribed in the Royal Instructions of 30th April 1831 (idem p. 142), and of the provision in the ninth clause of these Instructions which required the Governor ordinarily to act with the advice of that Council. From 1831 therefore, the power to make laws for Ceylon was committed to the Governor, acting with the advice and consent of the Council, subject of course (as in all British Colonies) to the Governor's special powers to act without such advice. What is important for present purposes is that the Proclamation of 1799 and the Ordinance of 1835 did not authorise *the Courts* to alter or deviate from the Roman-Dutch Law or to apply in Ceylon principles of English Law which conflict with the Roman Dutch Law. From 1835 at least, such deviations or alterations could be effected only by Ordinance.

This examination of the relevant Documents and of the Ordinance of 1835 has shown that Chapter 12 of the Revised Edition of the Legislative Enactments of 1956 is not an accurate reproduction of the provisions of law relating to the application in Ceylon of the Roman-Dutch Law ; Section 2 of Chapter 12 is incorrect in purporting to permit any deviations or alterations other than those ordained by lawful authority.

I pass now to refer to the judgments which, according to the argument of Counsel for the Appellant in this case, were instances of the application in Ceylon of the English doctrine of liability for the conversion of chattels. The note of a case in *1877 Ram. 17*, C. R. Matale 34526, states that the defendant unlawfully detained and would not produce jewels which had been entrusted to him. The Court apparently held that the refusal to produce the jewels "raised a strong presumption in favour of the opposite party". This finding could well have been a reference to the establishment as against the defendant of *culpa*, that is, of negligence or fraud, which would be necessary for the Aquilian action in Roman-Dutch Law; the note does not indicate that the Court regarded the case as being one of "conversion" of the jewels. In a case reported in *7 S. C. C. 86*, the plaintiff had leased a still to the 1st defendant for a term, and alleged that the 1st defendant had converted the still to his own use by fraudulently transferring it to 2nd defendant. The plaintiff sued both defendants for restoration of the still and for damages. The plaintiff obtained judgment against the 1st defendant for the value of the still and there was no appeal by the 1st defendant against the judgment. But the plaintiff himself appealed asking for judgment against the 2nd defendant for restoration of the still. This appeal was dismissed on the ground that having got judgment for the value of the still against the 1st defendant the plaintiff could not also get judgment against the 2nd defendant for the return of the still. While the Court may have assumed that the 1st defendant was liable as for a conversion, there is nothing in the statement of facts or in the judgment to indicate that the 1st defendant would not have been liable otherwise than for a conversion, or that the Court admitted a basis of liability which did not arise under Roman Dutch Law. The case of *Williams v. Baker & Another*[1] was one in which the plaintiff sued the defendants expressly on the allegation that they had "unlawfully converted" some coffee to the possession of which the plaintiff was entitled. But the only question which was disputed in the case was whether for purposes of limitation the action had to be regarded as one *ex delicto*, and this question was answered in the affirmative. Here again the Court was not called upon to decide whether or not the acts of the defendants constituted a delict under Roman-Dutch Law.

In the much later case of *Samed v. Segutamby*,[2] Bertram C.J. and Jayewardene A.J. had occasion to consider the effect of decisions in Ceylon which had apparently applied English Law in preference to Roman-Dutch Law, on a question concerning delictual liability. Bertram C.J. made the following observations in this connection :—

"Are we then to consider our own common law as superseded because certain eminent Judges in previous decisions and dicta have ignored or repudiated it ? On what principle can this be justified. These eminent Judges base their view upon the proposition that 'the Roman-Dutch Law, pure and simple, does not exist in this

[1] *(1888) 8 S. C. C. 165.*

[2] *(1924) 25 N. L. R. 481.*

country in its entirety', and that 'it is not the whole body of Roman-Dutch Law, but only so much of it as may be shown or presumed to have been introduced into Ceylon' that is now applicable here. With the very greatest deference to the high authority of these Judges, I hesitate to apply such propositions to fundamental principles of the common law enunciated by authorities recognized as binding wherever the Roman-Dutch Law prevails. Such principles may no doubt, in course of time, become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place. But if our previous local authorities be examined, it will be found that they are by no means so formidable as might at first sight appear."

It seems to me that the judgments relied on for the appellant in the present case, some of which merely used the word "conversion", are not even "formidable" at first sight. If, as well may have been the case in some of the instances, the facts were such as to found liability in delict under Roman-Dutch Law, there was no purpose for a defendant to contend that the more strict principle of liability for conversion under English law is not applicable in Ceylon. None of the early decisions I have thus far examined has been shown to be one in which the liability of the defendant would not have arisen under Roman-Dutch Law, nor can it be said that they constitute "a series of unbroken and express decisions" applying an English law principle of liability unknown to the Roman-Dutch Law.

Jayewardene A.J., in the case last cited (25 N. L. R. at p. 495), quoted a statement from Black in his "Law of Judicial Precedents", p. 43 :—

> "The authority of a precedent extends only to rules or principles of law expressly decided or tacitly assumed by the Court itself. In either case, there must have been an application of the judicial mind to the question of law involved, whether the result is explicitly stated or not. Hence when counsel in the argument of a case assume a certain principle advanced by them as correct law, and the Court decides the case upon the assumption thus made by counsel, without discussing the correctness of the assumption, the opinion is not authority as to the legal validity of the principle so taken for granted. The rule is the same as to matters which, without being submitted to the Court for determination, are simply treated as settled by the parties on both sides without objection."

At the best, the Ceylon decisions in what are claimed to have been cases of conversion have applied the English principle merely on a presumption that the principle is applicable in Ceylon, and without any deliberately expressed intention to introduce a basis of liability unknown to the Roman-Dutch Law of Delict.

In the case of *Dodwell & Co. v. John* [1] their Lordships of the Privy Council did not pronounce upon the question I am now considering. Although one of the causes of action pleaded in that case was that of conversion, an alternative cause, namely that cheques were received by the defendants with notice of a breach of trust on the part of the drawer of the cheque, was quite clearly established on the facts of the case, and their Lordships dealt with the case on this latter footing. They did however make the observation that "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 a conversion having taken place. If so, undoubtedly there was a conversion according to these principles". But this observation was not preceded by any reference to the decisions of the Ceylon Courts which I have considered, nor was there need for Their Lordships (as there has been for the present Bench) to examine the effect of the Proclamation of 1799 and the Ordinance of 1835.

The case of *Punchi Banda v. Ratnam* [2] was one in which the Court and Counsel quite obviously *assumed* that the English doctrine of conversion was part of our law. Neither in the judgment nor in the notes of Counsel's argument is there anything to show that the question whether the doctrine does apply was in any manner disputed ; the only matter in dispute appears to have been the question of the time from which and until which damages were payable for the wrongful deprivation of the plaintiff's property. Considering that there had not been in fact any previous pronouncement by our Courts which considered and decided that the doctrine of conversion is applicable in Ceylon; and that the Court in *Punchi Banda v. Ratnam* was not invited to decide whether or not the doctrine is so applicable, the decision does not support the Appellant's argument.

I hold for these reasons that decisions of our Courts have not introduced and adopted the basis of liability for conversion which obtains under the English common law. This conclusion is, however, not decisive of the question whether, as was held in the *Bank of Ceylon v. Kulatilake*, the liability of a collecting Banker to the true owner of a cheque is the same in Ceylon as it would be in England. It has been argued for the appellant in this case that such liability does exist in Ceylon in view of certain provisions of our Statute law which have now to be considered.

Ordinance No. 5 of 1852 introduced into Ceylon the law of England in certain cases. Section 2 of the Ordinance provided as follows :—

> "The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes, and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the

[1] *(1918) 20 N. L. R. 206.* [2] *(1944) 45 N. L. R. 198.*

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, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."

At the time of the enactment of this section, the law of England concerning contracts upon bills of exchange, promissory notes and cheques, was the common law, including the law merchant as developed at that stage, and s. 2. had accordingly the effect that the rights, duties and liabilities of parties to the contract upon any such negotiable instrument would be regulated by the English common law. But this was not the only effect of the section; for it provided that the English law would apply also in respect of *all questions relating to such instruments* and of all matters connected with such instruments. If then a question arose as to the liability of a collecting Banker to the true owner of a cheque, it could fairly be said that there was involved a question relating to a cheque: one of the special incidents affecting a cheque, and perhaps the most important such incident, is the collection of a cheque by one Bank from another, and indeed the commercial practice of the making of payments in discharge of monetary liabilities by means of cheques is rendered effective through the system of the collection by Banks of the proceeds of cheques, and if in English law a Banker incurred a liability to the true owner of a cheque because he had collected the proceeds and credited them to the account of a customer, the law by reason of which that liability arose could fairly be regarded as the law in respect of a question relating to a cheque.

Counsel for the Bank in this appeal have contended that the English doctrine of conversion is a doctrine which relates to all dealings with chattels inconsistent with the rights of the true owner, and is not therefore a law in respect of questions relating to cheques within the contemplation of s. 2. This contention pre-supposes that the framers of s. 2 had consciously in contemplation certain particular principles or doctrines of English law, and intended only these to apply in the cases referred to in the section. But the terms of the section indicate an intention that, in respect of the specified *contracts*, *questions* and *matters*, the English law as prevailing at the relevant time, shall be applicable. Emphasis was thus laid in the Section rather on the cases in which the prevailing English law shall apply, than on any contemplated principles or doctrines of English law which are to be applicable. Indeed s. 2 had the effect that some principle defined or recognised in England even subsequently to the enactment of the Section would apply in such cases.

The particular provision of s. 2 of the Ordinance of 1852 which I am now examining is the declaration that "in all questions relating to cheques, the law to be administered shall be the same as would be administered in England in like case". The construction of this provision requires primarily a determination whether there is for decision

some question relating to a cheque ; and if the determination is that there is such a question, then the English law must be administered to decide the question. I can concede that not every matter concerning a cheque, such as the mere theft of a cheque or the placing of a cheque in the custody of some person, is a " question " contemplated in the provision. But where the alleged or proved circumstances indicate some dealing with a cheque which is peculiar to its character as a cheque, and which is for a purpose connected with that character, and some question then arises as to the effect or consequences of such dealing, does not that question relate to a cheque ? If this be not so, the reference in the provision under consideration to " questions relating to cheques " apparently adds nothing to the matters denoted in the earlier reference in s. 2 to " contracts " upon cheques. Moreover, the subsequent reference in s. 2 to " all matters connected with cheques " would appear to be quite without purpose if a dealing of the nature I am contemplating is not to be regarded as such a matter. I rely in this connection on the reasons stated by Lord Denning for the opinion that the collection of cheques by a Banker is characteristic of a Banker's business. (*United Dominions Trust v. Kirkwood* [1]).

A further and ingenious argument of Counsel for the defendant Bank depends on the fact that the English doctrine of conversion is one which applies to the taking of a chattel, and that what is taken in the present context is *a piece of paper*, and not a cheque in its character of *an order in writing*. Having pointed to this distinction, Counsel argued that when s. 2 referred to the law to be administered in respect of a question relating to a cheque, what was contemplated is a question relating to the order in writing, and not one relating to the paper on which it is written, or in other words a question relating to a chose in action and not one relating to a chattel. Since the doctrine of conversion is part of the English common law affecting chattels, there was no intention in s. 2 of the Ordinance of 1852 to introduce such a doctrine, the intention of the section being only to introduce the English law relating to certain choses in action, including cheques in their character as such. The same argument was presented in connection with a subsequent Ceylon enactment, and I shall have to consider it later in this judgment in that connection. But in the case of s. 2 of the Ordinance of 1852, the problem for solution is not which principles of English law were intended to be introduced, but (in the present context) which questions relating to cheques were intended to be determined by the administration of English law. Even on a concession that a question properly relates to a cheque only in its character of " an order in writing ", a collecting Bank does not deal with a mere piece of paper ; the Bank takes a piece of paper upon which is inscribed the order in writing, and the tort of conversion is not complete until the Bank uses the paper in its character as an order in writing by presenting it for payment. Indeed, in the instant case, the defendant Bank would have committed no tort even by so using the paper, if ultimately the

[1] *(1966) 1 A. E. R. 968.*

proceeds of the payment had been credited to the account of the plaintiff. There thus appears to be a clear distinction between a case of a cheque which a Bank merely retains and refuses to surrender to the true owner, and of a cheque on which a Bank collects a payment which is not credited to the true owner. In the former case, there may be conversion of the piece of paper with some writing on it; but in the latter case, there is conversion of the paper in its character as a cheque. I thus reach the conclusion that, even if the intention of s. 2 was only to introduce the English law relating to cheques in their character as choses in action, the intention covered a case in which a collecting Bank deals with a cheque and the proceeds thereof in the manner established in the instant case.

I have not found it necessary to rule upon the submissions of Counse for the appellant regarding the history of the action for conversion in English Law, and the manner in which that action became available to afford relief to the true owner of a cheque against a Bank which collects payment of the cheque for a person other than the true owner. It suffices to point out that the utilisation by the Courts in England of a legal fiction, for the purpose of rendering a collecting Bank liable to the true owner of a cheque, establishes the concern of the Courts with a problem which specially concerned Banks and cheques. That being so, there is much force in the submission of Counsel for the appellant that the English law of conversion, in its application to the facts of a case such as a present one, should be regarded as a law relating to the collection of cheques by a Bank and therefore as being within the contemplation of s. 2 of the Ordinance of 1852.

For the reasons which have been now stated, I am satisfied that so long as s. 2 of the Ordinance of 1852 was in force, the liability of a collecting Bank in Ceylon in circumstances such as exist in the instant case had to be determined by the application of the English law. At first the relevant English law would have been the common law, including the law Merchant.

When and after the Bills of Exchange Act was passed in England in 1882, to amend and codify the law relating to negotiable instruments, the effect of s. 2 of our Ordinance of 1852 was that the liability of a collecting Bank had to be determined in Ceylon under the English Act. Accordingly a collecting Bank in Ceylon could rely on s. 80 of the English Act and would not be liable to the true owner of a cheque if it could discharge the burden of proving that it had acted in good faith and without negligence (*Marfani v. Midland Bank Ltd.*[1]).

In connection with the argument that s. 2 of our Ordinance of 1852 introduced only the principles of English Law relating to negotiable instruments, Counsel contended that s. 80 of the English Act was a special exception to the operation of the English doctrine of conversion, i.e., an

[1] *(1967) 3 A. E. R. 967, at 973.*

exception to a general principle of the common law and not to any principle of liability applicable to dealings with negotiable instruments, as such. It is relevant however to consider the purpose of s. 97 (2) of the English Act, which provided that "the common law, including the law of merchant, shall continue to apply to Bills of exchange, promissory notes and cheques".

Counsel who argued this appeal have not been able to discover any decision in which an English Court has after 1882 considered the question whether s. 97 (2) of the Act had to be invoked in order to render a collecting Bank in England liable in conversion to the true owner of the cheque. The absence of such a decision however creates no doubt in my mind as to the true answer to this question. The terms of s. 97 (2) are so wide and general that any basis of liability under the common law would be included in its scope. Even if it was not strictly necessary to enact s. 97 (2) in order to continue the application of such a basis of liability, the enactment of that section was expedient at least *ex abundanti cautela*.

In *Daniel Silva's* case[1] T. S. Fernando J. construed s. 98 (2) of the Ceylon Bills of Exchange Ordinance, which corresponds to s. 97 (2) of the English Act. In his opinion, the section was intended only to apply to any omissions or deficiencies in the Ordinance, *in respect of the law relating inter alia to cheques*. The words which I have just italicised do not however occur in the section; if they did so occur in the English s. 97 (2) they would have implied a contemplation that, apart from the rules as codified in the Act, there remained some residuum of rules *concerning negotiable instruments* which it was expedient to preserve. But the language of s. 97 (2) as actually enacted did not seek to define in that narrow way the nature or substance of the rules of the common law which the section intends to preserve, and there is no justification for reading into the section words upon which to found the narrow construction. The opinion to which I refer was expressed without consideration of decisions in England, which resorted to s. 97 (2) for the purpose of applying rules of the English common law relating to estoppel (1907, 2 K.B. at p. 746) and to the conflict of laws (1904, 2 Q.B. 870). In neither instance was there merely the question of supplying any deficiency or omission in the Act's codification of the rules of law relating to negotiable instruments.

Having examined the English Act of 1882, I am satisfied that all its provisions applied in Ceylon by virtue of our Ordinance of 1852, and that from 1882 the liability of a collecting Bank in Ceylon was the same as that which arose in England in similar circumstances.

At the present time however it is not the Ordinance of 1852 which determines the law to be applied in Ceylon to negotiable instruments. The Legislature in 1927 enacted the Bills of Exchange Ordinance (now Cap. 82). Counsel for the defendant Bank contended in this appeal

[1] *(1965) 67 N. L. R. at p. 461.*

that a proper consideration of the question of law disputed in this case should commence with an examination of this Ordinance, and that reference to the Ordinance of 1852 is only permissible if some provision of Chapter 82 necessarily requires such a reference to be made. I must explain why I have chosen the opposite course.

The Legislature in enacting the Ordinance of 1927 stated in the long title its purpose "to *declare the law* relating to bills of exchange, cheques, banker's drafts, and promissory notes". A statement of the same purpose was contained in the Statement of Objects and Reasons which was appended to the draft Ordinance in the *Gazette* No. 7,539 of July 30, 1926 (Part II). This statement included as a reason for introducing the draft ordinance the fact that Judges of our Courts did not readily have available copies of the English Bills of Exchange Act, which at that stage was the law which those Judges had to apply. So unusual a reason for the introduction of a draft Ordinance which professed to *declare* the law would justify a departure from the rule that resort to a Statement of Objects and Reasons should not ordinarily be made when constructing a Statute; but I rely on the Statement in this instance only for the lesser purpose of under-lining the Legislature's intention *to declare the law.* The Statement of Objects further emphasizes this intention, when in reference to clauses 22 & 27 of the draft Ordinance, the point is made that the intention is only to avoid doubt or to declare what is the existing law. Apart from the clauses specially explained in the Statement, the Ordinance is a straight copy of the English Act, subject to one significant difference: whereas the English Act was enacted to "amend and codify" the law, the object of the Ceylon Legislature was only to "declare" the law. I have held that the former law of Ceylon in respect of questions relating to cheques was the English Act and (by reason of s. 97 (2) thereof) English common law, and it was therefore that law which the Ceylon Legislature intended to declare. That precisely is my reason for having examined in the first place the scope and effect of s. 2 of the Ordinance of 1852.

Our Bills of Exchange Ordinance, like its "original" the English Act, has no provision which declares or defines the liability of a collecting bank to the true owner of a cheque, but s. 82 of the Ordinance purports to afford to a collecting bank a defence against liability which is necessary and explicable only on the basis that the Legislature assumed the law to be that a collecting bank would be liable as for a conversion. I have already stated my reasons for the opinion that the same assumption which underlies the corresponding s. 80 of the English Act was a correct one, because in s. 97 (2) of the same Act the Legislature of England declared that the rules of the common law "shall continue to apply" to negotiable instruments. Considering that s. 98 (2) of our Ordinance is in terms almost identical with those of s. 97 (2) of the English Act, there is every reason for regarding as correct the assumption upon which our Legislature enacted s. 82 of the Ordinance.

Counsel for the defendant Bank relied on certain South African decisions holding that under the law of that country a collecting bank was not liable to the true owner of a cheque in the absence of proof of *culpa*. These decisions were reached despite the inclusion in the relevant South African Statute of a provision corresponding to s. 82 of our Ordinance. The Courts in South Africa regarded that provision as being superfluous in purporting to make an exception to a liability which did not in fact arise under the South African Law because the English common law doctrine of conversion was not part of the South African law. Our Section 82 was similarly regarded by Tambiah J. in *Daniel Silva v. Johanis Appuhamy* [1]. With respect, the learned Judge, although he did consider s. 98 (2) of our Ordinance in his judgment, lost sight of the fact that the South African Statute contained no provision which corresponded to our s. 98 (2), and he took no account of the previous adoption of English law by s. 2 of our Ordinance of 1852, and of our Legislature's intention in 1927 to *declare* the Law which previously applied in Ceylon. With reference therefore to the argument which depends on the decisions in South Africa, it suffices to point out that the question decided in South Africa was quite different from that which we have to decide. It would appear that the question which was decided in South Africa was only whether s. 80 of the Bills of Exchange Proclamation had by implication recognized a ground of liability as against a collecting bank which had not been previously a ground arising under the law applicable in that country ; the question before us however is whether, by reason of the long title to our Ordinance of 1927, considered together with s 98 (2) of that Ordinance and the pre-existing law of Ceylon, the Legislature in enacting s. 82 of our Bills of Exchange Ordinance correctly assumed that a collecting bank is liable to the true owner of a cheque for a conversion in the sense understood in the English common law.

Counsel for the defendant bank relied also upon the difference in phraseology between s. 2 of the Ordinance of 1852 and that of s. 98 (2) of our Ordinance of 1927. Conceding in this connection that between 1852 and 1927 a collecting bank in Ceylon may have been liable as for a conversion in the circumstances of the instant case, he argued that s. 98(2) of the Ordinance of 1927, in providing that the rules of the common law of England shall apply to negotiable instruments, did not include within its scope any rule depending on a general principle of liability which is not a rule specially relating to dealings with cheques. Had we to consider s. 98 (2) by itself, I think there would have been much force in this argument, for that Section could have expressed more clearly the intention that the English common law should apply in Ceylon to the same extent as it had applied before 1927. But having regard to the express intention of the Legislature to declare, and not to amend, our law, and to the assumption which under-lies s. 82 of the Ordinance, I am satisfied that the terms of s. 98 (2) sufficiently expressed that intention. Section 98(2) is fairly open to the construction that a case such as the present one must

[1] *(1965) 67 N. L. R. 457.*

be decided by the application of the rules of the English common law ; to construe it otherwise would be to discount the intention of the Legislature in 1927 to declare our law.

I hold for these reasons that, although the English doctrine of conversion is not part of the common law of Ceylon, the Bills of Exchange Ordinance (Cap. 82) has the effect that the liability of a collecting Bank in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

As stated towards the commencement of this judgment the learned trial Judge in the instant case had held that the defendant Bank established at the trial that it had acted in good faith and without negligence and is thus protected from liability to the plaintiff by s. 82 of the Bills of Exchange Ordinance. The grounds for this finding were : *firstly* that the dividend warrant did not reach the City Office of the Bank through the post despite the plaintiff's intention that her letter containing the warrant was to be posted by her servant ; *secondly*, that in the absence of the warrant (because it had been stolen after being paid at the drawee Bank) there was no evidence as to what endorsement the warrant bore at the time when it was paid in at the defendant's Wellawatte Branch to the credit of Messrs Movie & Co. ; *thirdly*, that in the absence of the warrant it was impossible to demonstrate that any doubt as to the title of Movie & Co. would have been apparent to the naked eye or under examination under an ultra violet ray, and also that the defendant Bank could not be held negligent for failure to examine the warrant under the ultra violet ray ; and *fourthly*, that there was no proof of negligence on the part of the defendant Bank in opening the account at the Wellawatte Branch in the name of Movie & Co.

Counsel appearing for the plaintiff in appeal has strongly challenged the correctness of all these grounds, save the first one.

The fact that the dividend warrant was paid in to be credited to the account of Movie & Co. was established by the Paying-in-slip P18 purporting to show that " cheque item No. S Rs. 30,637.13 " was paid to the credit of Movie & Co., Account No. 3341 on 29th April 1958. The slip bears the signature of Loganathan as the depositor of the cheque and the signature of one Handy who at the relevant time was the Manager of the Wellawatte Branch. The collection register or schedule, P20A, of the Wellawatte Branch for the 29th April 1958 includes an item relating to this dividend warrant as having been paid in to the Bank for the credit of Movie & Co.

The evidence of Handy as to the practice concerning cheques presented by customers was as follows :—

" *Examination-in-chief :*

This paying-in-slip is dated 29th April 1958. This is signed by me above the words Sub Accountant. When this comes it comes with

the document to which it refers. Along with this paying-in-slip and the document to which it refers come the collection register schedule of which P19 is a photostat copy.

Q. When the schedule comes to you what is that you do with regard to the cheques or dividend warrants?

A. When the schedule comes with the cheque I am supposed to see whether there are credit instructions and whether there are no contradictory instructions and if they are in order I intitial.

The credit instructions on the reverse of the cheque must tally with the credit instructions in the credit slip. I always look at the reverse of the cheque to see whether credit instructions tally with the instructions in the paying-in-slip. When I look at the reverse of the cheque if there are no suspicious circumstance or something unusual I pass it but if there are any suspicious circumstance or something unusual I wont send the cheque for collection."

In cross-examination he said :

"A cheque is presented with a paying-in-slip. Normally it is received by a clearing clerk. I can trace who the clearing clerk was on 29th April 1958. He receives and puts the receipt stamp on receipt portion of the paying-in-slip and he crosses the cheque and enters it in a schedule and takes it up to the officer for signing. At that time one Thuraiappah was the officer (clearing clerk). Thuraiappah would have seen that the name of the payee on the receipt portion was the same as the name of the payee in the bank paying-in-slip. He will also see the credit instructions. He would have seen whether the credit instructions on the paying-in-slip tallies with the credit instructions on the back of the cheque."

"Altogether there about 60 cheques here. These cheques would be put to me at about 6.30 in the night. I know that these cheques would have been already examined by Thuraiappah for irregularities. I have to check the observations made by Thuraiappah. Usually I have to scrutinize each cheque. It takes about 2 or 3 minutes for each cheque.

Q. Is it that you would have taken about 3 hours to pass these cheques?

A. It would have taken about half an hour to clear this."

It will be seen from this evidence that Handy did not directly or of his own knowledge testify to any matter concerning the receipt of this dividend warrant at the Wellawatte Branch or to the particulars which appeared on this warrant when it was so received. He testified only to what should have occurred according to the practice prevailing in April 1958 ; namely that Thuraiappah " would have seen " that the name of the

payee (i.e., the Bank's customer) was the same on both halves of the paying-in-slip, and that the credit instructions on the paying-in-slip (i.e., 'credit Movie & Co.') were repeated on the back of the warrant; that being satisfied as to these two points Thuraiappah accepted the warrant for collection, crossed it and entered it in the register or schedule P20A, and that thereafter the paying-in-slip, together with some 60 other slips and cheques and the collection register, were submitted to Handy. Handy himself knowing that each cheque had been already examined by Thuraiappah would check any observations made by Thuraiappa and presumably there were no such observations in this instance. Further, having regard to his evidence in chief, Handy himself must have been satisfied that the last endorsement on the back of the warrant must have been "credit Movie & Co.".

The learned trial Judge has obviously inferred from the testimony of Handy that the clerk Thuraiappah would not have accepted this warrant if there had been any apparent irregularity on its face or reverse, and that therefore there could have been no such irregularity. As to this matter, however, the only facts established by the evidence were that the warrant was payable to Mrs. L. M. de Costa and that it bore on its reverse the endorsement signed by her "credit my account only". The inference drawn by the trial Judge assumed that either the name of the payee on the warrant or her endorsement on its reverse, or both, had been altered or defaced in such manner that the last endorsement "credit Movie & Co." appeared to have been made by the true owner. The possibility of a defacement of the name of the payee can however be safely ruled out, since the Company for whom the warrant was drawn was a private Company and it is improbable that National & Grindlays Bank would have made payment on a warrant which did not bear the name as payee of the plaintiff or of one of the other few shareholders of the Company. Thus there remains only the question of the validity of the Judge's inference as to the apparent regularity of endorsements on the reverse on the warrant.

It seems to me that in a case where a defendant Bank had the burden of establishing the absence of negligence, it was unsafe lightly to apply the presumption that the common course of business was followed by officers of the Bank itself. Thuraiappah, the Bank's clearing clerk, was the person best able to testify as to his examination of this warrant and of the regularity of its acceptance for credit of Movie & Co., which the Manager Handy assumed must have been performed by Thuraiappah and which the learned trial Judge inferred was actually performed by him.

Section 63 (5) read with s. 65 (3) of the Evidence Ordinance entitled the defendant Bank in this case to adduce the oral evidence of Thuraiappah in proof of the particulars on the warrant. He had been named as one of the Bank's witnesses and was in Court during the trial, and was yet in the Bank's employment. Had he given such evidence, the judge might

properly have reached the conclusion that the endorsements on the warrant established the apparent regularity of its collection for Movie and Co., or even the lesser (though perhaps inadequate) conclusion that Thuraiappah must have acted in good faith and without negligence. In reaching both these conclusions despite the lack of Thuraiappah's evidence, the learned Judge fell twice into error. Since the burden under s. 82 of the Bills of Exchange Ordinance lay on the defendant, it was not for the plaintiff to demonstrate that there was anything suspicious on the warrant which could have been visible on simple or technical examination; the learned Judge failed to realise that the defendant had to adduce proof to the contrary. Again, in assuming Thuraiappah's good faith and care, the Judge did not act on his own judgment concerning Thuraiappah which could have been properly formed only upon consideration of the evidence and demeanour of Thuraiappah; instead the Judge acted on the evidence of Handy, who did not even venture an opinon as to Thuraiappah's honesty or diligence.

The plaintiff's position was that because the account of Movie & Co. had been recently opened, and had rarely been in credit for more than about Rs. 400, the presentation of a dividend warrant (and not an ordinary cheque) for Rs. 30,000 by Loganathan should have placed the defendant Bank on inquiry as to Loganathan's rights, and that again there was opportunity for inquiry when nearly the whole of this large sum was withdrawn 3 days after it was credited to the account. In fact on this latter occasion some inquiry might have been made, had not Thuraiappah intervened to identify Loganathan as the drawer of the cheque for withdrawal. Whether the comparatively large amount of the warrant was in fact a matter which was or was not taken into consideration by Thuraiappah was a matter specially within Thuraiappah's knowledge and he was best able to relate and justify his own actions. Handy's evidence did not show that his own "checking" of paying-in-slips and cheques involved consideration by himself at that stage of such matters and could not establish either the fact that Thuraiappah had no grounds for suspicion, or even the fact that Thuraiappah knew that the Bank had a duty of care, not only to its own customers, but also to the true owners of cheques.

The only facts clearly proved in this case were that the warrant bore the endorsement of the plaintiff " credit my account only ", and that the Defendant Bank did collect the proceeds of the warrant. There was no evidence to show that the Bank's Collection Department scrutinizes cheques in order to ascertain whether the true owner of a particular cheque is in fact the customer of the Branch which forwards the cheque for collection. That being so, the defendant Bank failed to exclude the possibility that the proceeds of this warrant were allocated to the Wellawatte Branch merely because this Branch had forwarded for collection a warrant which bore on its reverse the endorsement of the named payee.

There was produced without objection at the trial the letter P10 written by the lawyers for National Overseas and Grindlays Bank in which it was stated that payment of the dividend warrant had been made on the genuine endorsement of the payee; this statement at least tends to support the possibility that the plaintiff's endorsement remained in the warrant when it was paid in at the Wellawatte Branch. Even if there had been some subsequent endorsement such as "Credit Movie & Co.", Handy did not claim that it was his practice to scrutinize all endorsements on a cheque with a view to checking on the regularity of the last endorsement. Knowing that Thuraiappah had accepted this warrant for the credit of Movie & Co., Handy may well have been satisfied to pass this warrant for collection if the last endorsement in appearance tallied with the credit instructions on the paying-in-slip P18. Thuraiappah alone was the person competent to negative the possibilities just envisaged, each of which is sufficient to establish negligence on the part of the defendant Bank.

The circumstances lead at least to a suspicion that Thuraiappah either deliberately or carelessly aided Loganathan's criminal activity. If this suspicion be unfair to a person whose own explanations are not before the Court, Thuraiappah's employer, the Bank, must take the blame for that. The Bank of Ceylon at all relevant times enjoyed a monopoly in the maintenance of current accounts for Ceylonese nationals. As such it is of extra-ordinary importance that the Bank should maintain the confidence of the public and should display concern for the interests of its numerous compulsory customers. Whatever may have been the grounds of law upon which the Bank relied for its denial of liability to the plaintiff in this case, the denial of liability was morally justifiable only if the Bank had actual confidence in Thuraiappah's integrity and diligence. The failure to call Thuraiappah as a witness has negatived the existence of such confidence.

The learned trial Judge thought that the failure of the defendant Bank to call Thuraiappah as a witness was of no importance because "Handy had the ultimate responsibility in regard to the disposal of this warrant". I have tried to show however, that Handy relied largely on an assumption that Thuraiappah scrutinized this warrant, and also that Handy could well have passed this warrant after a cursory half-minute's examination without noticing that Movie and Co. was not its true owner. The conclusion that the Bank disproved negligence was based, not on any fact deposed to by Handy concerning this warrant, but on inferences which virtually begged the matters of fact which the Bank had to prove. I have no hesitation in deciding that the Bank failed to establish the defence available under s. 82 of the Ordinance.

I wish only to make a few further observations. The action in *Daniel Silva v. Johanis Appuhamy*[1] was one, not against a collecting Bank, but against a person who had received through his Bank the proceeds of a cheque bearing an endorsement purporting to be made by the payee,

[1] *(1965) 67 N. L. R. 457.*

but being in fact a forged indorsement. Since that action did not involve a decision as to the liability of a collecting Bank, it is not now strictly necessary to consider whether the judgment correctly decided that the defendant in the action was not liable to the true owner of the cheque. But the later decision in *Don Cornelis v. de Soysa & Co., Ltd.*[1] has held on similar facts that a person who is credited with the proceeds of a cheque bearing the forged indorsement of the payee is liable to pay those proceeds to the true owner. In view of this conflict of decisions, the present is a suitable opportunity for a Bench of superior numerical strength to express an opinion which should serve to resolve that conflict, especially as the arguments addressed to this Bench have fully covered all relevant considerations.

In reaching the conclusion that the English Law applies in the instant case, I have relied greatly on the consideration that the collection of a cheque by a collecting Bank is so much an activity peculiar to the commercial practice of the use of cheques that it renders that activity a matter relating to a cheque. But I am not able with the same confidence to hold that when a person who receives a cheque in the ordinary course of business and transmits it to his Bank for the purpose of being credited with the proceeds, any question which may then arise as to his liability to the true owner of the cheque is one which "relates to a cheque" within the meaning of those words in s. 2 of the Ordinance No. 5 of 1852. I do entertain some doubt whether the English law, that such a person may be held liable as for a conversion, is applicable in such a case.

Nevertheless, the draft judgments which have been prepared in this case indicate that a majority of my colleagues on the present Bench are in agreement with the decision in *de Soysa's* case, holding that the defendant in that case was liable to the true owner on the ground that he had and received money which he was liable to restore to the plaintiff. With some hesitation, I express my own agreement with that decision.

I should like to express my appreciation of the valuable assistance afforded to the Court by the full and able arguments of Counsel for both parties in this appeal and by their fruitful study of many matters which were relevant to the questions which arose for consideration.

The appeal is allowed with costs, and judgment will be entered for the plaintiff as prayed for in her plaint.

SIRIMANE, J.—

This appeal raises an important question of law relating to the liability of a Banker in Ceylon, in circumstances which frequently arise in transactions between a Banker and a customer.

The facts are shortly as follows :

[1] *(1965) 68 N. L. R. 161.*

The Plaintiff received a Dividend Warrant for a sum of Rs. 30,637/17cts. drawn on National & Grindlays Bank from Messrs Carson Cumberbatch & Co. This money was due to her as a dividend declared by the Deniyaya Tea & Rubber Estates Company Ltd., in which she held a large number of shares, and for which Messrs Carson Cumberbatch & Co. acted as Agents and Secretaries.

She was the true owner of the Warrant. It had been crossed and made payable to her. She endorsed it on the reverse and made it payable to her Account at the Defendant Bank. She had received similar Dividend Warrants before, and on those too she had made similar endorsements, as evidenced by the old Warrants produced in the case.

Her Account with the Defendant Bank was at its branch known as the City Office. Having endorsed the Warrant she put it in an envelope, addressed it to the Bank of Ceylon and gave it to a domestic servant to be posted. As this servant was not available as a witness at the time of the trial, there is no proof of posting.

This Warrant had got into the hands of one Loganathan, said to be the sole proprietor of " Movie & Co. ".

Loganathan had opened an Account in the name of " Movie & Co." with the Defendant Bank at its brach at Wellawatte. The Account had been opened about 7 months prior to May 1958, in circumstances which appear to be suspicious. It commenced with the modest sum of Rs. 1,171·40 cts., and the person introducing Loganathan, and recommending his application to be a customer had not filled in the column in which he had to state the number of years for which he had known the person whom he introduced. The initial amount was drawn out in small sums from time to time until on 5th May 1958 there was only a sum of Rs. 386.87 cts. to the credit of " Movie & Co.". On that day the sum of Rs. 30,637·17 cts. was credited to this Account.

Loganathan had presented this Dividend Warrant at the Wellawatte Branch of the Defendant Bank with the Paying-in-slip P18. An officer of the Bank named Thuraiappah, described as its " Accountant-Cashier " or " Cashier-Supervisor ", had received the Dividend Warrant and the Paying-in-slip. His signature appears on it. He is therefore the *one* officer in the Bank who would be able to state with some degree of certainty what appeared on the face of the Warrant, and exactly how it was endorsed, at the time it was presented for collection by Loganathan.

It was a very large sum of money which the Bank had to collect for a customer who, up to that time never had even a tenth of that sum to his credit.

I find it difficult, for reasons which will presently appear, to resist the inference that Thuraiappah was acting in collusion with Loganathan in furtherance of a plan to misappropriate the proceeds of the Plaintiff's

Warrant. The amount appearing on the Warrant was collected from Grindlays Bank on 30th April 1958 and thereafter credited to the Account of "Movie & Co." on the 5th of May 1958 as already stated. The Dividend Warrant had then been stolen from Grindlays.

Three days later a sum of Rs. 29,814/13 cts. was drawn out from this Account on a cheque drawn by Loganathan in favour of "Thomas Felix de Costa" or bearer. The Agent the Wellawatte Branch on that day (one Fonseka) had felt suspicious at that stage, but on the drawer of the cheque being produced before him and identified by Thuraiappah, this large sum had been paid out apparently to Loganathan himself as he has endorsed the cheque on the reverse after the name "Felix de Costa". No one ever saw the Payee on the cheque.

The resultant position is that the amount collected by the Defendant Bank on a Dividend Warrant, the true owner of which was the Plaintiff, was paid by the Defendant to a person other than the true owner.

The Warrant had in fact reached the Defendant Bank, and in my view the onus was on the Defendant to show that at the time that it received the Warrant for collection there was something on the face of it which justified the action taken by the Bank. In other words, the Defendant should be able to show that the Warrant had been altered in such a manner so as to mislead its officers.

Thuraiappah, who had so much to do with the Warrant, and with the man who presented it was not called as a witness, but the Defendant Bank relied on the evidence of one Handy who was the Agent at this branch on the day that Thuraiappah received the Warrant and the Paying-in-slip.

The credit instructions on Paying-in-slips are checked with the bills presented with those slips by Thuraiappah, and at the end of the day all such bills and slips are placed before the Agent, for the slips to be initialled. A person like Handy would scrutinize such slips and bills, only if Thuraiappah had drawn his attention to some irregularity in the endorsements. Though Handy says "I always look at the reverse of the cheque to see whether the credit instructions tally with the instructions in the Paying-in-slip", it is clear from a reading of his evidence that he has no independent recollection of the particular bill which had been placed before him with several others on that day. His evidence shows that he must have dealt with about 60 bills and Paying-in-slips in the space of about half an hour. If a thief is acting in collusion with an officer in the Bank it is not difficult to get a busy Agent to initial the Paying-in-slip without in any way altering the bill which would be sent for collection. In this case the letter P10 which had been admitted in evidence without objection indicates that when the Warrant reached Grindlays Bank there was no alteration on it.

The disappearance of the Warrant from that Bank in no way helps the thief—in this instance Loganathan has been convicted and sent to jail—but it does help a dishonest officer in the Bank with whose aid the money collected on the Warrant was credited to the thief's account. I have little doubt that Thuraiappah was not called because the Defendant knew that he had acted in collaboration with the thief.

The only evidence in regard to what appeared on the Warrant was that of an officer of Carson Cumberbatch & Co. who said that he wrote out the Warrant in favour of the Plaintiff and stamped it "Not negotiable", and the evidence of the Plaintiff in regard to the endorsement she made.

I do not see any reason for concluding that the Warrant had been altered, and in my view the Defendant as the collecting Banker was negligent in crediting the amount collected to the wrong account.

In dealing with this question the learned trial Judge said :

> " What was on the Warrant at the time it left Mrs. de Costa is then proved, but what was on the Warrant when it was presented to the Bank cannot be ascertained for the evidence is that the Warrant which should ordinarily have been in the custody of National & Grindlays Bank is no longer there having been stolen by a peon in the employ of that Bank."

He then *assumed* that Mrs. Costa's endorsement was missing when the Warrant reached the Bank and that there must have been such an alteration which was not visible to the naked eye but could only have been detected under the ultra violet ray. He therefore held that the *failure of the Defendant to examine the Warrant under the ultra violet ray was not negligence.* It was only on the assumption that the Warrant and the endorsement on it had been altered that the trial Judge held that there was no negligence. I am of the view that he was in error there, and that issue No. 17 which raised the question whether the Defendant acted bona fide and without negligence should have been answered in the negative.

The main argument addressed to us was on the footing that in the absence of negligence the Defendant could be held liable only on the tort of conversion. It was argued that this doctrine was unknown to the Roman-Dutch Law, (*Daniel Silva v. K. H. G. Juanis Appuhamy*)[1], and that the Defendant was therefore not liable. This argument proceeded on the basis that the Roman-Dutch Law and not the English Law applied to the claim in this action.

Counsel for the Appellant did not contest the position that the *tort of conversion* as known to the English Law was not part of the Roman-Dutch Law, and that in the action under Roman-Dutch Law—the action *ad exhibendum*—there must be proof of *dolus or culpa.*

[1] *(1965) 67 N. L. R. 457.*

He contended however that "Conversion" of movables has been introduced into our law by judicial decision. The summaries of two old cases—1870 Vanderstraten Reports, page 42, 1877 Ramanathan Reports, page 17, and the judgments in *Don Jeronis v. Don Bastian* [1] and *Williams v. Baker* [2] favour the view that conversion was considered to be part of our law from very early times. Though a scrutiny of the facts in those cases may reveal a delict as known to the Roman-Dutch Law, I do not think that the learned Judges decided those cases on that basis.

In the first Schedule to the Civil Procedure Code of 1889 (Chapter 101) our legislature has set out specimen forms of plaints. Under the Head "Plaints for compensation upon wrongs" is a form "for the conversion of movable property".

In *Dodwell & Co. v. John* [3] the Privy Council expressed the view (obiter) "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 a conversion having taken place". In *Punchi Banda v. Rutnam* [4] the Plaintiff's omnibus had been forcibly removed by the Defendant who thereafter sold it to a third party. The only matter in dispute in appeal was the quantum of damages—which were awarded to the Plaintiff on the basis of a wrongful conversion. The Defendant's liability for a conversion was never disputed. But earlier in 1935 in *Thomson v. The Mercantile Bank* [5] the Defendant prevented the Plaintiff from removing a car which he (Plaintiff) had purchased at a Fiscal's sale until he produced some documentary proof of his title. The Defendant remained in possession of the car, but when the Plaintiff produced the proof required, said that a third party had taken possession, and the Plaintiff lost the car. The Plaintiff was awarded damages and Akbar J. said "If this is an action in tort it is the Roman-Dutch Law which should be applied".

Even long before that in *Wall & Co. v. Fernando* [6] it was held that to maintain an action for the value of stolen property against a purchaser who had dispossessed himself of it, there must be mala fides on his part.

These are some of the reported cases.

In our original courts however, actions for conversion of movable property in the form of the plaint prescribed in the Civil Procedure Code are frequently filed and as far as I know such plaints have never been rejected on the ground that conversion is not part of our law.

Though I am inclined to agree with the submission of learned Counsel for the Plaintiff Appellant that conversion of chattels has now been introduced into our law, I do not think it is necessary to decide that question for the purpose of this case.

[1] *(1885) 7 S. C. C. 86.*
[2] *(1886) 8 S. C. C. 165.*
[3] *(1918) 20 N. L. R. 206.*
[4] *(1914) 45 N. L. R. 198.*
[5] *(1935) 15 C. L. Rec. 61.*
[6] *(1876) Ramanathan 301.*

In order to arrive at a decision in this case I would ask myself the question: "What is the liability of the Banker here in Ceylon on the facts established by the Plaintiff?". In answering that question I have no doubt in my mind that there arises in this case "a question relating to a bill of exchange" or at least "a matter connected" with such bill and also "a question relating to the law of Banking". I am convinced that the English Law applies and that the Banker's liability is the same as in England.

I am quite unable to agree with the contention of Counsel for the Defendant Respondent that the question of the liability of the Defendant in this case is not one connected with a Bill of Exchange and not one to which the law of banks and banking applies.

The basis of the Plaintiff's claim is that there has been an infringement of her rights, as the true owner of a bill of exchange, and that when the Defendant Bank collected on her bill—an act which only a Banker can perform—the Defendant received the money for her use and benefit.

Our law relating to Bills of exchange and Banks and Banking is the same as in England. By Section 2 of Ordinance 5 of 1852 the law of England relating to bills of exchange was introduced into Ceylon in the following terms :—

> "The law to be hereafter administered in this colony in respect of contracts and questions arising within the same, upon or relating to bills of exchange, promissory notes, and cheques, *and in respect of all matters connected with any such instruments*, shall be the same in respect of the said matters 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, unless in any case other provision is or shall be made by any ordinance now in force in this colony or hereafter to be enacted."

I have no doubt in my mind that had this action been filed in 1853 for example the Banker would have been liable as under the English Law. To my mind it does not matter on what ground that liability was founded—whether on the doctrine of conversion, or on any other principle of law—but a Banker who was liable in England would be liable here too.

In 1882 the English Bills of Exchange Act was passed, and the provisions of that Act by the operation of Section 2 quoted above became our law relating to bills of exchange.

The English Law then, was the law here for 75 years until 1927. In that year the Bills of Exchange Ordinance (Chapter 82) was passed by our legislature. It was "an ordinance to declare the law relating to bills of exchange, cheques, banker's drafts and promissory notes."

It reproduced practically all the provisions of the English Act, and also enacted Section 98 (2) in the following terms :—

> " 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 old Ordinance 5 of 1852 was repealed.

I find it impossible to think that in 1927 our legislature intended to reintroduce the Roman-Dutch Law relating to bills of exchange, which is, in effect, the contention of the Defendant Respondent.

With great respect I am unable to share the view expressed by T. S. Fernando J. in *Daniel Silva v. Juanis Appuhamy* (supra) that Section 98 (2) was only intended to apply to any omissions or deficiencies in the ordinance in respect of the law relating 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.

In consequence of the two enactments referred to above (Section 2 of 5 of 1852, and Section 98 (2) of Chapter 82) I am of the view that in all matters connected with bills of exchange a person who would be liable in English Law would also be liable in Ceylon, and to that extent the English Law of conversion is part of our law.

Section 82 (1) of our Ordinance reads as follows :—

> " Where a banker in good faith and without negligence receives payment for a customer on a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

This section *had* to be enacted, as the law here, at the time the Ordinance was passed, was the English Law.

I am certainly not prepared to hold that in enacting this section our legislature was merely making " a blind copy " of the English Act, as submitted for the Defendant Respondent.

Tambiah J. in *Daniel Silva v. Juanis Appuhamy* (supra), in reaching the conclusion that this section was superflous was apparently influenced by the decision in the South African case *Yorkshire Insurance Co. v. Standard Bank* [1] where the view was expressed that the corresponding section in the South African Bills of Exchange Act (Section 80) was a superfluity. Counsel for the Defendant Respondent conceded that in

[1] *(1928) W. L. D. 251.*

South Africa there was no enactment which corresponded to Section 2 of Ordinance 5 of 1852, nor even one similar to Section 98 (2) of Chapter 82.

In the absence of such vital legislation, the interpretation of a section similar to our section 82 (1) can be of little assistance in ascertaining the true intention of our legislature. In *Daniel Silva v. Juanis Appuhamy* the attention of the learned Judges had apparently not been drawn to Section 2 of Ordinance 5 of 1852 for there is no reference to it at all in the judgment.

I would respectfully dissent from the decision in that case.

Apart from the question of the law relating to bills of exchange, the Defendant in this case is the collecting Banker.

It was conceded at the argument that a Banker in England placed in the position of the Defendant in this case would be liable to make good the Plaintiff's loss, without proof of fault or bad faith.

By Section 3 of the Civil Law Ordinance of 1853 (Chapter 79) the English Law relating to Banks and Banking was introduced into Ceylon. The section enacts that—

> "In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted :
>
> Provided that nothing herein contained shall be taken to introduce into Ceylon any part of the Law of England relating to the tenure or conveyance or assurance of, or succession to, any land or other immovable property, or any estate, right or interest therein."

It was argued for the Defendant-Respondent that the liability of the banker in England was based on the doctrine of conversion, and had nothing to do with the law of Banks and Banking.

I am unable to accept this argument.

Different branches of the law often overlap, and cannot be looked at in separate water-tight compartments. Conversion has been adapted, modified, and applied to bankers and the business carried on by them, so much so that no book on the law of banking can be complete without

a discussion on this subject. It has grown with the law of banks and banking, and become part of that law. If the Plaintiff in this case had consulted a lawyer in regard to the liability of the banker, I would not expect the latter to refer to a treatise on the doctrine of conversion, or the Roman Dutch Law relating to delicts, or the Principles of Negligence but rather to a text book on the law of banks and banking. I am in respectful agreement with the decision of Basnayake, Chief Justice, in the *Bank of Ceylon v. Kulatilaka*[1] that our law on the subject of a banker's liability is the same as in England except where special provision has been made in our law.

There is one other matter to which I would like to refer, and that is the alternative claim in the plaint for money had and received by the Defendant for the use of the Plaintiff.

In *Daniel Silva v. Juanis Appuhamy* (supra) Tambiah J. alone expressed the view that an action for money had and received does not lie in Ceylon.

After that case, the question came up again for decision before Chief Justice Sansoni and myself in *Don Cornelis v. De Soysa & Co. Ltd.*[2] and we were of the view that such an action is maintainable in Ceylon. I do not wish to repeat here the reasons for our view which have been so lucidly set out in the judgment of the learned Chief Justice. I am still of that view, and only wish to add that the action for money had and received has been filed and relief obtained by parties in all parts of our Island from the very inception of our courts. Nothing that was urged at the argument has led me to think that for the last hundred years or more our Courts have granted a remedy where none existed. Section 7 of the Prescription Ordinance (Chapter 68) which laid down the prescriptive period for a claim "for money received by the Defendant for the use of the Plaintiff" was enacted in 1872.

The argument urged for the Defendant-Respondent was that there must be "a waiver of the tort" before a claim for money had and received could be made, and that since the tort of conversion was not part of the Roman Dutch Law there can bo no waiver of the tort.

The remedy was granted by our Courts on the broad equitable principles of unjust enrichment and the *condictio indebiti*. It had nothing to do with the waiver of a tort. My view is that this phrase merely means that where the remedy in tort is also available the Plaintiff cannot claim twice over.

Lord Denning in the Law Quarterly Review of 1949, Vol. 65, commented on the phrase "waiver of a tort". He said at page 40 :

"This was a misleading phrase. It referred only to the form of the action, not to the substance of the claim. After the forms of action were abolished, the phrase remained, but its origin was forgotten.

[1] *(1957) 59 N. L. R. 188.* [2] *(1965) 68 N. L. R. 161.*

Lawyers began to think that the bringing of this action was in fact a waiver of the tort: that it was assumed that there was no wrongful act in receiving the money: and that therefore the Plaintiff could not complain if it was paid over by the Defendant to another before the Plaintiff asserted his claim. This was the view expressed by Phillimore L. J. in *Morrison's case,* and considered by the Privy Council in *John v. Dodwell.* But this and similar fallacies have now been set right by *United Australia v. Barclay's Bank,* which shows that the action for money had and received does not, and never did, involve any waiver of the tort but was, and is, an insistance on the Plaintiff's right to money to which he is entitled."

Counsel for the Defendant-Respondent laid great stress on one sentence in the judgment of Lord Simon in *United Australia v. Barclay's Bank* [1] referred to above. That sentence which appears at page 29 is:

"Indeed, if it were to be understood that no tort had been committed, how could an action in *assumpsit* lie?"

It was argued for the Defendant-Respondent, that the action for money had and received was dependent on the existence of the tort of conversion. The facts in that case were shortly as follows:—

One Emons, the Secretary and a Director of the Plaintiff, had authority to endorse cheques for collection by the Plaintiff's bank *but not otherwise.*

He however endorsed a cheque made payable to the Plaintiff, to another company—M. F. G. Trust Limited. The Defendant Bank collected on the cheque and credited the proceeds to M. F. G. Trust Limited. The Plaintiff first filed an action against M. F. G. Trust Limited, which went into liquidation, and that action automatically abated.

The Plaintiff then sued the Defendant Bank. The only defence raised by the Bank which came up for consideration in appeal was, whether, having first sued M. F. G. Trust Limited the Plaintiff could now sue the Defendant Bank, and it was in this context that the question whether the Plaintiff had waived the tort arose.

Lord Simon quoted with approval a Restatement of the Law of Restitution promulgated by the American Law Institute, as follows:—

"A person upon whom a tort has been committed and who brings an action for the benefits received by the tort feasor is sometimes said to "waive the tort". The election to bring an action of *assumpsit* is not however a waiver of tort but is *the choice of one of two alternative remedies.*"

[1] *(1940) 4 A. E. R. 20.*

Lord Atkin in the course of his judgment said at page 36 :

" In cases where the money had been received as the result of a wrong, he still had the remedy of claiming damages for tort in actions for trespass, deceit, trover and the like, but he obviously could not compel the wrong doer to recoup him his losses twice over. Hence he was restricted to one of two remedies, and herein, as I think, arose the doctrine of " waiver of the tort ". Having recovered in contract it is plain that the Plaintiff cannot go on to recover in tort."

Lord Romer said at page 40 :

" A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrong doer. He may sue for the proceeds of the conversion as money had and received to his use, or he may sue for the damages which he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. In my opinion however this is due not to his having waived the tort but to his having finally elected to pursue one of his two alternative remedies."

In the sentence relied on by the Defendant-Respondent I think his Lordship was emphasizing the fact that the action for money had and received was an *alternative remedy* and did not imply " a waiver ". In the preceding sentence he said, "When the Plaintiff ' waived the tort ' and brought *assumpsit* he did not thereby elect to be treated from that time forward on the basis that no tort had been committed". In that case the Plaintiff sued for—(*a*) damages for conversion ; *alternatively*—(*b*) damages for negligence, and (*c*) in the further alternative, for money had and received.

As stated earlier the action for money had and received was recognised in Ceylon, as it was considered that the Defendant was doing something " wrongful " when he refuses to return to the Plaintiff money which justly belongs to the latter, and to which the Defendant has no right. The action was not dependent " on the waiver of the tort of conversion " as contended for by the Defendant-Respondent.

Lord Denning in *Kiriri Cotton Co. Ltd. v. Dewani* [1] referring to the action for money had and received said :

" It is simply an action for restitution of money which the Defendant has received but which the law says he ought to return to the Plaintiff".

It was this same idea which he put forward earlier in 65 Law Quarterly Review 1949 (supra) at page 48 when he said :

"The action at law for money had and received was in fact a remedy for unjust enrichment—"

[1] *(1960) A. C. 192.*

and it was on this basis that our Courts have always given relief. I am of the view that the Plaintiff is entitled to succeed on his alternative cause of action as well and that issues 6 and 7 should have been answered in favour of the Plaintiff.

After the arguments in this appeal were concluded, the Registrar at the request of learned Counsel for the Appellant has sent up a reference to an old case decided by the Privy Council—*Page v. Cowasjee Aduljee* [1]—for consideration by the Bench.

In that case the Defendant had bid for, and purchased the hull of a stranded ship put up for sale at a public auction by the Master, and paid a deposit. For certain reasons the Defendant declined to complete the purchase, whereupon the vendor resumed possession and resold the hull at a loss. The action was brought by him to recover the difference between the original price bid by the Defendant and the sum realised at the re-sale. The Defendant denied liability and claimed damages in reconvention. It was held *inter alia* that though the act of the Plaintiff in retaking the hull of the ship and selling her was wrongful, *it entitled the Defendant to bring an action for trover* but did not amount to a rescission of the contract.

It supports the contention of the Plaintiff Appellant that conversion was part of our law from early times. I have already expressed my views on this question and do not wish to say more.

I would set aside the judgment and decree entered in this case, and enter judgment for the Plaintiff as prayed for with costs both here and below.

ALLES, J.—

The Deniyaya Tea & Rubber Estates Co. Ltd. by its Agents & Secretaries, Messrs Carson Cumberbatch & Co. Ltd., sent to the plaintiff, Mrs. L. M. de Costa a Dividend Warrant on 17th April 1958 for Rs. 30,637·13 being her share of the final dividend of the Company for the year 1957. The Dividend Warrant was crossed "not negotiable" and according to the Dividend Account was numbered No. S and issued in favour of Mrs. Costa payable at the National & Grindlay's Bank. Mrs. Costa received the Warrant, signed it and endorsed on the reverse that it should be credited to her account and gave the letter addressed to the Bank of Ceylon, Colombo, containing the warrant to her servant boy to be posted. The warrant was not received in the post by the defendant Bank and Mrs. Costa became aware only several months later of the loss of the warrant when the Police came and questioned her. It has been established in evidence that this Warrant No. S for Rs. 30,637·13 was credited to the account of Messrs Movie & Co., the sole proprietor of

[1] *(1866) 1 A. C. 127.*

which was one Loganathan, at the branch of the Bank of Ceylon at Wellawatte on 29th April 1958. On 30th April 1958 the National & Grindlay's Bank paid out the money on presentation of the warrant by the Wellawatte bank and on 5th May 1958 the account of Movie & Co. was credited with this sum. On 8th May 1958 Loganathan drew a cheque for Rs. 29,413·13 on account of Movie & Co. in favour of one Felix de Costa and the money was paid to Felix de Costa after Loganathan had identified him as the payee. Loganathan and several others were subsequently charged in the criminal courts in connection with this same Dividend Warrant and Loganathan was convicted of a criminal offence.

In the present case Mrs. Costa is suing the defendant Bank for the recovery of the sum of Rs. 30,637·13, being the proceeds of the said Dividend Warrant, which she alleged was cashed and converted into money by the defendant Bank. Alternatively she claims that the defendant Bank is liable to pay her the said sum which was received by the defendant Bank for her use.

In my view many of the complex questions of law that have been argued in the course of this appeal can be resolved once there is a correct appreciation of the facts. The important question of fact that has to be determined is whether it has been established that the defendant Bank was negligent or acted in bad faith or had the knowledge that Movie & Co. had no right to the Dividend Warrant and that Loganathan was intending to misappropriate the proceeds. The trial Judge after a consideration of the evidence has held that the defendant Bank has disproved negligence on its part and that its good faith was never in issue. In coming to this conclusion he has considered certain items of evidence and also the submissions of Counsel, but in my view, he has unfortunately failed to consider adequately certain very important questions of fact and paid too much stress to matters of lesser importance. Had he considered all the attendant circumstances in their proper light he could not have failed to arrive at a finding adverse to the defendant Bank.

In 1957–1958 there was a spate of cheque frauds and this was well known in banking circles. Alwis, the clerk at Carson, Cumberbatch & Co. states that " in the latter part of 1957 and early in 1958 it appeared in the papers about the theft of cheques or forgeries of cheques " and it was thereafter that he put the crossing " not negotiable " rubber stamp on Dividend Warrants posted to shareholders. Sparks, a Senior official of the Bank, admitted that there were cheque frauds in 1957 and that in connection with these frauds the Head Office thought of installing ultra violet light in its various branches in order to detect erasures and alterations. There is evidence that the Wellawatte branch was supplied with such equipment sometime in 1958. Handy, the Manager of the Wellawatte branch, testified to the use of ultra violet rays for the examination of forgeries. The defendant Bank did not choose to place

evidence before the Court as to when the Wellawatte branch was supplied with such equipment but the probabilities point to the fact that such equipment was available at the Wellawatte Branch when the Dividend Warrant was credited to the account of Movie & Co. When Sparks was giving evidence for the defendant, Counsel for the plaintiff in cross examination moved to mark in evidence the deposition of one Thuraiappa, an employee of the defendant Bank, in the Magistrate's Court, where, Thuraiappa had stated that he examined this cheque under an ultra violet light. On objection being taken by Counsel for the Bank however the objection was upheld and this evidence was not available at the trial. Although the learned trial Judge was justified in his observation that there was no legal obligation to have cheques for large amounts examined under the ultra violet light to discover any erasures or alterations, it was incumbent on the defendant bank in order to rebut the allegation of negligence, to place evidence that the light apparatus was not available in April 1958 or alternatively that the cheque was examined under the ray and revealed no alterations. These were matters peculiarly within the knowledge of the defendant Bank but the Bank chose to adopt an attitude of silence on this issue. There is next the circumstance in regard to the opening of Loganathan's account. The Manager of the Wellawatte Branch in October 1957, when this account was opened, was one Anthony. Anthony was not available at the trial as a witness to testify to the circumstances under which this account was opened. The account was opened in favour of Movie & Co. with an initial deposit of Rs. 1,171·40 (the minimum required being Rs. 1,000) and apart from the deposit of the sum of Rs. 30,637·13 on 5th May 1958 and the withdrawal of Rs. 29,814·13 three days later the transactions only showed small deposits and withdrawals. Loganathan was introduced as a customer to the Bank by an Audit clerk called Ariaratnam who had a modest account at the Bank. In the absence of Anthony to testify to the circumstances under which Loganathan was accepted as a customer, some general evidence was given by Sparks that if a person had a regular employment and if his cheques were not returned, he may be considered as a good referee. Ariaratnam, who was a fellow lodger with Loganathan at the Y. M. C A. stated that he knew Loganathan ; that he used his room as an office ; that he told him he wanted to do business and asked him to recommend him as a customer. As the learned Judge rightly remarked the opening of Loganathan's account " played a major role in the fraud in connection with the Dividend Warrant " and one of the matters that must be considered is whether the Bank has discharged its statutory liability and its obligations to the public, in exercising sufficient care in regard to the opening of Loganathan's account. While the learned trial Judge has addressed himself correctly in regard to the questions of law pertaining to the opening of new accounts, learned Counsel for the appellant has drawn our attention to a serious discrepancy in the printed form opening the account where Ariaratnam has not filled the caption in which he was required to state how long he had known Loganathan. In regard to a person who recommends a customer to a Bank, this cannot

be considered a trifling matter. In the absence of Anthony to testify to the circumstances under which Loganathan was accepted as a customer, particularly at a period when the Bank had to be circumspect in regard to the opening of new accounts, and the lapse on the part of the Bank in not scrutinising whether the form opening the account had been properly filled, I am inclined to accept the submission of Counsel for the appellant that the defendant Bank has been remiss in accepting Loganathan as a customer. These are matters that have not been considered by the learned Judge in the course of his judgment. In order to disprove negligence, the defendant Bank has relied on the evidence of Handy and some general observations in regard to banking practice deposed to by Sparks. In my view this evidence falls far short of the requisite proof necessary to discharge the burden that rests on the collecting Bank under Section 82 of the Bills of Exchange Ordinance.

Handy was the Manager of the Wellawatte branch on 29th April 1958. He identified the paying in slip, P 18, for Rs. 30,637·13 crediting this sum to the account of Movie & Co. He says that P 18 must have been sent to him with the Dividend Warrant and the Collection Register. He admits that he was aware that it must be a Dividend Warrant and not a cheque as it bore only one numeral "8" whereas a cheque has usually five numerals. According to him he examines the reverse of the cheque to see whether any credit instructions tally with the instructions on the paying in slip and if there are no suspicious circumstances he passes the cheque for collection. His duties were to initial the register, the paying in slip and the cheque. It is however apparent from his evidence that he relied considerably on the judgment of the cashier clerk, Thuraiappa. According to Handy's evidence Thuraiappa would have seen the name of the payee on the receipt portion and verified whether it was the same as the name of the payee on the paying in slip and he would have also examined the credit instructions on the reverse of the cheque. He admitted that Thuraiappa would have examined the cheques for irregularities. Handy would therefore have to depend largely on the observations of Thuraiappa. On this day there were about 60 cheques put up to Handy for scrutiny and the largest amount credited to a single account was that on this Dividend Warrant. In spite of the fact that this was a Dividend Warrant and not a cheque and although a large sum was credited to a small account, Handy's suspicions were not aroused and he passed the Warrant for collection. If Handy had been a little more alert he could not have failed to have discovered the fraud. In this connection I think the facts in *National Housing Committee v. Cape of Good Hope Bank*[1] are relevant. In that case a cheque for a large sum crossed "not negotiable" was posted and addressed to "J. Daniels". It was received by one John Daniels, an ex-Railway employee who had received certain small amounts by cheque as gratuity. Honestly believing that this was also one such sum, he took the cheque to the defendant Bank to whom he explained the situation. On the face of the cheque appeared

[1] *(1963) (1) S. A. L. R. 230.*

the stamp of the National Housing Office and it was purported to be signed by the Secretary. The Judge quoting from Paget on the Law of Banking, p. 301, where the learned author stated—

> "The most obvious circumstances which should put the banker on his guard (is) ..... one where a cheque is presented for collection which bears on its face a warning that the customer may have misappropriated it....."

was of the view that the teller in that case was obviously put on his inquiry and held that the Bank was negligent. In the instant case on the face of it the Dividend Warrant was for a very large amount which was to be credited to a small account opened comparatively recently. Handy was not so pressed for time as not to make inquiries in regard to this matter, particularly as it was the largest amount of the 60 cheques which he had to scrutinise that evening.

The Dividend Warrant was stolen subsequently at the National & Grindlay's Bank by a peon and is therefore not available for checking. It seems unlikely that the Warrant would have been stolen at the instance of Loganathan who would not have been interested in the movements of the Warrant once the proceeds were credited to the account of Movie & Co. at the Wellawatte branch which enabled him to draw the money.

Handy's evidence leaves a great deal to speculation and to say the least is unsatisfactory and hardly sufficient to disprove negligence on the part of the Bank. The position has however been made infinitely more onerous for the defendant Bank by Thuraiappa not being called as a witness. He was on the list of witnesses for the defendant and was present in Court. It was he who first examined the Warrant, checked on the endorsements, initialled the paying in slip, entered the particulars in the Collection register and submitted the documents to Handy. According to the Ledger Officer Alwis, when the cheque for Rs. 29,413·13 was cashed by Felix de Costa, the drawer Loganathan was identified by Thuraiappa. Alwis stated that normally large amounts are not paid to third parties and that was the reason why he called in the drawer and wanted him to endorse the Warrant and take the money. The drawer signed the cheque identifying the person who took the money as the payee. In view of the important role played by Thuraiappa in this transaction he was an essential witness for the defendant on the vital issue as to whether there was negligence on the part of the Bank. He could have given first hand evidence of the contents of the Warrant in the absence of the Warrant as a production. The learned trial Judge has dismissed the failure to call Thuraiappa as a witness in one sentence by stating that any default in doing so was cured by Handy's evidence. I am unable to agree.

The reasons given by the learned trial Judge for exonerating the defendant Bank from its obligation to disprove negligence do not appear to be substantial. He states that it was not unusual for large sums to be credited to Company accounts for the purpose of evading Debits Tax; that there was nothing unusual in the opening of Loganathan's account and that there was no obligation on the part of the defendant to establish that the cheque was examined under the ultra violet light. These, in my view, are inadequate reasons for holding in favour of the Bank in the light of the more substantial matters referred to earlier. When, therefore, one looks at all the attendant circumstances it seems to me that the Bank has failed to disprove negligence. I would go further and hold that the facts establish that the Bank had knowledge that Movie & Co. had no right to the Warrant and that Loganathan intended to misappropriate the proceeds. There is no doubt that a fraud has been perpetrated in connection with this Warrant and this could not have been done without the connivance of one or more members of the Wellawatte branch. The defendant Bank therefore, in my view, has not rebutted the presumption under Section 82 of the Bills of Exchange Ordinance. In that view of the facts it matters not whether the Bank's liability is based on the English Law or the Roman-Dutch Law because in either case the Bank would be liable.

This case has been referred to a Bench of five Judges in view of the decision in *Daniel Silva v. Johanis Appuhamy* [1] where three Judges of the Court unanimously held that the English doctrine of conversion was not applicable to Ceylon since the tort of conversion was unknown to the Roman-Dutch Law.

The tort of conversion is one that had its origins in the early English forms of action and Tambiah J. in the above case at pp. 462, 463 has traced its historical background. By the fiction of treating a cheque as a chattel the doctrine of conversion was extended to cheques. The question that arises for consideration in this reference is whether the tort of conversion, which is really alien to the Roman-Dutch law of delict, has been received into our legal system. There are two methods in which such a law could be introduced into the law of Ceylon—either by statutory provision or by an unbroken line of judicial decision which recognised such a law.

The Proclamation of 23rd September 1799 and Ordinance No. 5 of 1835 (now incorporated as the Adoption of Roman-Dutch Law Ordinance—Ch. 12) declared that the Roman-Dutch law was to be the law of Ceylon "subject to such deviations and alterations..... as the authorities shall deem it proper and beneficial for the purpose of justice to ordain and publish or which shall or may hereafter be by lawful authority ordained

[1] *(1965) 67 N. L. R. 457.*

and published". Since 1835 various branches of the English law have been introduced into our legal system by special enactment. Section 2 of Ordinance 5 of 1852 reads as follows :—

> "The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters 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 ; unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."

This provision of the law was not brought to the notice of the Judges who heard *Daniel Silva's* case (supra) and enabled Counsel for the appellant to make the submission that had it been done the decision in that case might have been otherwise. It was Counsel's submission that by this enactment the entirety of the English law relating to Bills of Exchange including the principles of the law of conversion has been introduced into our legal system. A close consideration of the language of Section 2 would seem to indicate that the legislature in 1852 did not contemplate the introduction of the English doctrine of conversion into our law dealing with cheques. Indeed at that stage the law even in England had not been fully developed and the only source of law at the time would have been the common law including the law merchant as it was developed at that stage. Section 2 may be recast in the following manner :—

The law to be hereafter administered in Ceylon—

(*a*) in respect of *all contracts* relation to bills of exchange, promissory notes and cheques ;

(*b*) in respect of *questions arising* (within the contract) upon or relating to bills of exchange, promissory notes and cheques ; and

(*c*) in respect of all matters connected with such instruments shall be the English law in respect of the *said matters* as would be administered in the like case, at the corresponding period—

(i) if the *contract* had been entered into in England ; or

(ii) if the *act in respect of which any question* (arising upon the contract) had been done in England.

Although there must have been an inherent desire of the Englishmen of the time, for the purposes of promoting trade and commerce in their colonies to introduce bodily the law of England of the relevant period relating to bills of exchange, it does not appear to me, that the language of S. 2 gave effect to that intention. Under S. 2 the law of England of the

corresponding period that would be applicable in Ceylon was the law "in respect of a contract and any question arising within the contract relating to bills of exchange, promissory notes and cheques". One can envisage a situation where, in a contract relating to a bill of exchange ancillary questions within the contract may arise. For instance, where a person signs a bill in his capacity as an agent or in a representative capacity there can arise a question relating to the law of agency or partnership. The English law of the corresponding period on the law of agency or partnership would be applicable in such a case. Again where a bill in one country is negotiated in another country the rights and liabilities of the parties to the contract may have to be determined, not only under the contract relating to the bill of exchange but also under the law relating to the conflict of laws which would be an ancillary question arising within the contract. I can appreciate the arguments of Counsel for the appellant in regard to the liability of the collecting banker to the true owner of the cheque. The collection of cheques and the payment of the proceeds thereof to the true owner is perhaps the most important function of the banker's business. Could it however be fairly said to be a question arising within the contract or would it rather constitute a function of the banker's duties for which the liability falls outside the contract ?

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" (Salmond on Torts, 7th Edition, p. 375). I am inclined to take the view that it cannot fairly be said, without doing violence to the language of S. 2, that a tort, which had its origins in the early English forms of action, and which by a fiction of the law had been extended in England to cheques, can be said to be "a contract or a question arising within the same upon or relating to bills of exchange, promissory notes and cheques."

It might appear at first sight that the words "matters connected with such instruments" would be wide enough to include the liability of the collecting banker as for conversion, but having regard to the concluding words of the section which refers to the "said matters" as being the contract or act "in respect of which any question shall have arisen" these words cannot possibly mean that all matters connected with such instruments should be governed by the English law. It may properly be conceded that the theft of a cheque, which is broadly "a matter connected with a cheque" is not governed by the English law. The reason for its exclusion, I should imagine, is because theft is a wrong against the State and cannot be included as one of the matters referred to in S. 2 just as conversion is a wrong and being a tort is excluded from the purview of matters which strictly fall within the province of S. 2.

I am therefore attracted by the submission of Counsel for the bank that the bank's liability, when it deals with the chattel of another—inconsistent with that other's rights, is not a question that arises on a

bill of exchange or a matter connected with any such instrument. The act of the Bank constitutes a wrong and is not based on any contractual liability. Therefore even if the provisions of Ordinance 5 of 1852 had been brought to the notice of the Judges who heard *Daniel Silva's* case, I am of opinion that the provisions of this law would not have persuaded them to accept the view that the doctrine of conversion applied to the collecting banker. In any event the action in *Daniel Silva's* case was not against the collecting banker but against a third party who had received the proceeds of the cheque on a forged endorsement.

When the law in regard to negotiable instruments was codified in England in 1882, the law of England in respect of negotiable instruments in so far as that law had been *introduced* into Ceylon by Ordinance 5 of 1852, became part of our law. In 1882 the position, in my view was no different from that in 1852, except that there was certainty in regard to the codified parts of the English Act which dealt with the contractual aspect of the law and matters ancillary to the contract. Therefore the introduction of Section 80 (which corresponded with our later s. 82) of the Act did not impliedly introduce the doctrine of conversion into Ceylon although it did so in England. In my view even s. 97 (2) of the English Act (which corresponded with our later s. 98 (2)) only introduced such parts of the common law of England in respect of contracts relating to negotiable instruments and questions arising upon the same and did not extend to the common law rules relating to tortious liability. It is perhaps this uncertainty in the state of the law which prompted Viscount Haldane in *Dodwell & Co. v. John* [1] from deliberately refraining from making a definite pronouncement as to whether the doctrine of conversion formed part of our law or not. I am therefore unable to agree with the Statement of Objects and Reasons to the Draft Bill of the 1927 Act, when it assumed that the English Act of 1882 in its entirety was in force in Ceylon by virtue of s. 2 of Ordinance 5 of 1852.

Our law in regard to Bills of Exchange underwent a radical change in 1927 and it is this change which, in my view, enabled Counsel for the appellant to successfully argue that the English doctrine of conversion in so far as it affected the liability of the collecting banker to the true owner of the cheque formed part of our law. Under Section 97 (3) of Ordinance 25 of 1927, Act No. 5 1852, which up to that time constituted our law on the subject, was repealed. The draft Bill appeared in Government Gazette No. 7,539 of 30th July 1926 and the long title to the Act stated that it was an Act *to declare* the law relating to Bills of Exchange, cheques and promissory notes. The Act which came into operation in March 1928 also stated in the long title that the Ordinance was passed to *declare* the law relating to bills of exchange, promissory notes and cheques. When the Statement of Objects and Reasons gave as one of its reasons the unusual one that it was desirable that the law should be reproduced in a local enactment for the benefit of the District Judges who were not furnished with copies of the English Act, I think

[1] *(1918) 20 N. L. R. 206.*

there was an erroneous assumption that the entirety of the 1882 Act applied to our law. Be that as it may, it would appear from the other objects and reasons therein stated that the legislature gave careful consideration as to what should be our law on the subject and in particular dealt with the impact of the Roman-Dutch Law on our law relating to Bills of Exchange. Clause 3 of the Statement states that "Section 22 makes it clear that capacity to contract is to be determined by the Roman-Dutch Law as modified by Ordinance No. 7 of 1865 and Section 502 of the Civil Procedure Code, 1889 and not English law. But for this provision, it might be arguable that Section 98 (2) makes English law applicable. Section 22 leaves open the question by what law capacity to contract is determined. . . .". Clause 4 states that "S. 27 (1) (*a*) makes it clear that 'cause' as understood in Roman-Dutch law does not constitute valuable consideration for a bill of exchange or promissory note. This is *declaratory* of the present law".

Counsel for the appellant therefore strongly argues that the legislature gave its mind to what portions of the Roman-Dutch law it intended to retain and what parts it considered could be omitted in declaring what our law of Bills of Exchange should be. The doctrine of conversion being alien to the principles of the Roman-Dutch law, in introducing Section 82 into our law, our law impliedly accepted this doctrine as part of our law in regard to the liability of the collecting banker. I am inclined to agree with this submission. The liability of the collecting banker for negligence or lack of good faith can only be assumed on the footing that there was a denial to the true owner of the cheque of his lawful rights. The South African courts have taken the view that this section was a superfluity since the rules of the common law of England were not introduced under the various Acts in that country. But we in Ceylon must consider the section in the light of the historical background and in particular, that in 1927 our legislature declared Section 82 to be part of our law. With all respect therefore to Tambiah J. who seemed to take the view in *Daniel Silva's* case that the same considerations which applied in South Africa applied in Ceylon for the rejection of Section 82 as part of our law, I do not think it can be said that Section 82 of our law is superfluous. If it can fairly be urged that the law in Section 82 of our Act impliedly introduced the English doctrine of conversion as far as the collecting banker was concerned, I do not think it is necessary to consider further whether this doctrine has become part of our law under Section 98 (2) of the Act.

It was further submitted by Mr. Jayewardene for the appellant that as Section 3 of the Civil Law Ordinance had introduced into Ceylon the law of England with respect to Banks and Banking that the common law doctrine of conversion was part of the law of Ceylon in respect of the conversion of cheques. Tambiah J. in the Divisional Bench case has drawn attention to the difference between the English law and the Roman-Dutch law in regard to the liability of the collecting Banker. I agree with the views expressed by Tambiah J. that the rights and

liabilities of the banker under our law are not affected by the introduction of the English law of Banks and Banking. The decisions in *Krishnapillai v. Hongkong & Shanghai Bank Corporation* [1] and *Mitchell v. Fernando* [2] support this view.

I shall now proceed to consider whether the decisions of our Courts have introduced the doctrine of conversion into our legal system. Bertram C.J. in *Samed v. Segutamby* [3] stated that the principles of the Roman-Dutch law "may no doubt, in course of time, become modified in their local application by judicial decisions but it would be only by a series of unbroken and express decisions that such a development could take place". Jayewardene A. J. in the same case expressed sentiments to the same effect at pp. 495 and 496. Can it be said that there is in Ceylon a series of unbroken and express decisions which have introduced the English law of conversion in relation to cheques into this country? The decisions of the Courts during the last century can hardly be said to have made any contribution to the law on the subject. Prior to 1852, although the Courts had declared that commercial matters had to be determined in accordance with the Roman-Dutch law, the Judges who were trained in the principles of the English common law, decided the questions in accordance with the English law—Vide *Boyd v. Staples* [4] and *In re Poonan* [5]. Although the English common law in regard to negotiable instruments has been applied in our Courts prior to 1882 (Vide *Thompson v. Nannytamby* [6] and *C. M. Bank v. Silva & Co.* [7]) there is no case reported where the conversion of a cheque has been considered by the Supreme Court. The decisions cited by Counsel for the appellant only refer to the conversion of movables—(1861 Beven & Siebel's Reports 117; (1870) Vanderstraaten's Reports 42; (1877) Ramanathan's Reports 17 and (1888) *Williams v. Baker* 8 S.C.C. 165). In all these cases it has been assumed that the English doctrine of conversion applied and there has been no discussion in regard to the impact of the Roman-Dutch law. The first occasion when reference has been made to the law of conversion in reference to a cheque is in the obiter dictum of Viscount Haldane in the Privy Council case of *Dodwell & Co. v. John* [8] in 1918 where he made the following observation :—

> "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 a conversion having taken place. If so undoubtedly there was a conversion according to these principles."

But the Supreme Court does not appear to have been impressed by the dictum for 17 years later in *Thompson v. Mercantile Bank* [9], Akbar J. with whom Koch J., agreed held that the English common law doctrine of conversion found no place in the law of Ceylon. In *Punchibanda v*

[1] *(1932) 33 N. L. R. 249.*
[2] *(1945) 46 N. L. R. 265.*
[3] *(1924) 25 N. L. R. 481 at 487.*
[4] *(1820–33) Ram. Reports 19 at pp. 20 and 21.*
[5] *(1820–33) Ram. Reports pp. 80 and 81*
[6] *(1860) Ram. Reports 81.*
[7] *(1866) Ram. Reports 199.*
[8] *(1918) 20 N. L. R. 206.*
[9] *(1935) 15 Ceylon Law Recorder 61 at 63*

Ratnam[1], also in regard to a movable, it was assumed by Howard C.J. that the English doctrine of conversion was part of our law and in *Bank of Ceylon v. Kulatilake*[2] in the case of a cheque, Basnayake J. has held that the Bank was liable in conversion. The question whether the English doctrine of conversion in relation to a cheque formed part of law was considered for the first time in *Daniel Silva's* case.

Although the statutory provision in Section 2 of Ordinance 5 of 1852 was not considered by the Judges in *Daniel Silva's* case, I am of the view, that the English doctrine of conversion is no part of our law subject to the qualification that in the case of the collecting Banker he would be liable as for conversion to the true owner of the cheque. Since the defendant bank has not rebutted the defences available to it under S. 82, the plaintiff would be entitled to succeed on the first cause of action.

In South Africa the rejection of the English doctrine of conversion has been made less complicated for two reasons. Firstly there was no historical background similar to that created in Ceylon by the introduction of the English law in enactments similar to Ordinance 5 of 1852 and Ordinance 22 of 1866 and secondly when the provinces in South Africa (Natal in 1887, Orange Free State in 1902, Transvaal in 1902 and Cape of Good Hope in 1893) introduced the provisions of the English Act of 1882 they did not include what corresponded to our Section 98 (2) into their legislation. South Africa therefore deliberately refrained from introducing the rules of the common law of England including the law merchant into their legal system. It was therefore possible for the South African courts very early in their legal history to decide that the law of conversion formed no part of their law—Vide *Leal & Co. v. Williams*[3]. The decision of Innes C.J. in this case has been subsequently followed by the Appellate Division in South Africa—Vide *Morobane v. Bateman*[4] and *John Bell & Co. v. Esselen*[5]. In view of these decisions the South African Courts have held that their Section 80 (which corresponded to our Section 82) was a superfluity. Section 80 of the South African Act has now been replaced by a new section, which gives some limited protection to the true owner and affords a remedy akin to the English action for conversion (Cowen—The Law of Negotiable Instruments in South Africa—3rd Ed., p. 372).

As early as 1906 Innes C.J. in *Leal & Co. v. Williams* (supra) at p. 559 realised the hardship that would be caused to the true owner by the doctrine of conversion not being available in South Africa, which made it impossible for the true owner to sue the collecting Bank and described the position as being "unfortunate". In 1943 by the Bills of Exchange Amendment Act (now Section 81 of the South African Act of 1964) provision has been made which afforded a remedy akin to the English action for conversion, to the true owner of a crossed cheque bearing the words

[1] *(1944) 45 N. L. R. 198.*
[2] *(1967) 59 N.L. R. 189.*
[3] *1906) T. P. D. 554.*
[4] *(1918) A. D. 460.*
[5] *(1954) A. D. 147 of 153.*

"not negotiable", an action even against the collecting banker—See however the observations of Rosenow J. in *National Housing Commission v. Cape of Good Hope Bank*[1] (supra) at pp. 236, 237. Tambiah J. in *Daniel Silva's* case remarked that "Legislation on the lines enacted in South Africa would be necessary in Ceylon to protect commerce" but with respect I am of the view that such a course is unnecessary since S. 82 is today part of our law.

I will now pass to the second cause of action relied upon by the plaintiff and in my view she is also entitled to succeed in her alternative cause of action for money had and received. I do not agree with the observation of Tambiah J. in *Daniel Silva's* case that such an action is unknown to our law. Indeed in the subsequent case of *Don Cornelis v. de Soysa & Co. Ltd.*[2], where the decision in *Daniel Silva's* case was considered, the Court held that such an action was available in Ceylon. Sansoni, C.J. in the course of his judgment stated that—

> "there is no inconsistency in applying the principle of the action for money had and received, which is founded on the same principle of equity as the Roman-Dutch law action of 'condictio indebiti' and is a liberal action, founded upon large principles of equity where the defendant cannot conscientiously hold the money."

The learned Chief Justice has stated why in such a case restitution must be made to the true owner. It is on the basis of the doctrine of unjust enrichment that a defendant cannot conscientiously hold the money belonging to another. "He who has come into possession of property not his own, even though the acquisition might have been made accidentally or by mistake and without deliberate fraud, is under a strict obligation to return it or its value to the owner. This was the foundation of the important action of condictio indebiti." (per Schneider J. in *The Imperial Bank of India v. Abeysinghe*[3].)

In regard to the Banker's liability the position has been succintly stated by Cowen (supra) at p. 372—

> "If a bank knowing that its customer's title to a cheque is defective, collects payment thereof, it will be liable at common law to the true owner. But a collecting banker who receives payment of cheques, whether crossed or not, on behalf of a customer who has no title thereto is not liable at common law to the true owner of the cheques for any loss sustained by him in consequence thereof, on the ground of negligence only; he is liable only *if he had knowledge that the customer had no right to the cheques and was intending to misappropriate the proceeds.*"

The learned author cites *Yorkshire Insurance Co. Ltd. v. Standard Bank*[4] where Tindall J. at pp. 278–283 draws attention to the difference between the banker's liability in the English law and the Roman-Dutch law.

[1] 963) (1) *S.A.L.R. 230.*
[2] (1) *68 N. L. R. 162.*
[3] *(1927) 29 N. L. R. 357.*
[4] *(1928) W. L. D. 251.*

There is also a passage in *Morobane v. Bateman* (supra) which explains the basis of liability in the Roman-Dutch law. That was a case where property was obtained by the defendant contrary to an express provision of law and which imposed a criminal liability on the purchaser. Innes C.J. in allowing the plaintiff's claim said :—

> "The English doctrine of conversion finds no place in our law; 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. Voet (Ad Pand. 6-1-10) discusses the remedies which one who has been unlawfully deprived of his property has against a third person through whose hands it has passed. If the latter 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 a party to the delict, and would be regarded in the same position as if he has fraudulently parted with possession. But if the acquisition and the re-sale 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. Now the position, though not identical with the example discussed by Voet closely resembles it, and must be decided on the same broad principles. It is a very analagous case. If exactly the same test had to be applied, it would be impossible, broadly speaking, to say that an acquisition which constituted a criminal offence was a bona fide acquisition. But the expression bona fides was used by Voet merely to denote *knowledge of the tainted title ;* and here it may be said there was no such knowledge. But the illegality of the contract leads to the same result as if there had been knowledge. Because it prevents any justification of the admitted handling and disposal of the owner's property."

On the facts established in the present case it seems obvious that one or more officials of the Wellawatte branch of the defendant's Bank had knowledge of the fraud that was being perpetrated by Loganathan. The Bank received the Dividend Warrant with knowledge of its tainted title and was aware that Loganathan was going to misappropriate the proceeds. Consequently the defendant would be liable to the true owner and the plaintiff is entitled to succeed on the action for money had and received. I would allow the appeal with costs.

WEERAMANTRY, J.—

This appeal raises matters of rare interest under our law. Among these are the questions whether the English doctrine of conversion forms part of the general law of Ceylon, and whether in any event it forms part of the particular sections of our law which relate to negotiable instruments and matters of banks and banking. The resulting examination of the

precise areas of applicability of English and Roman-Dutch law has stimulated far reaching researches into the manner in which a body of mercantile law, English in origin, was worked into the texture of a legal system primarily Roman-Dutch. Indeed the basic fabric itself was subjected to a searching scrutiny at the argument before us and counsel minutely examined the mode of introduction not only of our special commercial law but of our general common law itself. Other problems as well emerged, no less attractive and no less complex, relating to the nature and scope of the principles of quasi-contractual liability under both English and Roman-Dutch law.

The plaintiff's claim arises in consequence of a clever fraud relating to a dividend warrant for Rs. 30,637·13 crossed and made payable to the plaintiff. This warrant, though endorsed by the plaintiff and made payable to her account, had found its way into the hands of one Loganathan, an account holder of the defendant bank at its Wellawatte branch. This Loganathan, who has since been prosecuted to conviction for a criminal offence relating to this dividend warrant, had some months earlier opened his account with the defendant bank in the name of "Movie & Co.". It was to this account that the warrant was credited, but how it came to be accepted to the credit of that account, when the plaintiff had already endorsed it and made it payable to her account, is by no means clear, and constitutes one of the crucial questions of fact in this case.

Apart from Loganathan, the key figure in this curious episode was one Thuraiappah, the accountant-cashier at the bank, who according to the evidence in the case, was the official entrusted with the duty of receiving cheques and checking paying-in-slips presented to the bank. Handy, the manager of the Wellawatte branch, has stated that it was Thuraiappah's duty to examine the paying-in-slips and the accompanying cheques or warrants to see that they tallied in regard to the credit instructions, and also to examine the cheques or warrants for irregularities. After this process, the paying-in-slips, cheques or warrants and collection register are passed on to Handy who initials these documents, and passes the cheques or warrants for collection, after himself seeing that the credit instructions on the cheques or warrants tally with those on the paying-in-slips.

Irrespective of the question on whom lay the burden of proof, there was then evidence placed before the court by the plaintiff in regard to crossing and endorsement, which required adequate contradiction or explanation by the bank if the inference of negligence arising therefrom was to be displaced, for a cheque so crossed and endorsed at the time of presentment could not without negligence find its way into an account other than that of the payee. This evidence thus involved the bank in the necessity of proving the circumstances in which the endorsement referred to was overlooked, or alternatively, such facts as alteration or obliteration of the endorsement at the time of crediting. On these matters the bank has signally failed to provide the court with satisfactory proof.

The witness best able to speak to these matters was Thuraiappah, who admittedly handled and examined the warrant at the time of presentment. As far as Handy was concerned, he was the officer charged with managerial and supervisory duties and unable to give individual transactions the detailed care and attention expected of officers specially entrusted with the performance of those particular duties. It is in evidence that some sixty cheques had been put up at the end of that day to Handy in the space of half an hour, and it would be reasonable to suppose that he relied to a large extent on the due performance by his cashier clerk of the specific duties entrusted to him. In any event it is evident that he does not have, nor indeed may he be expected to have, a clear recollection of this particular transaction.

Now, this Thuraiappah was a witness listed by the defendant bank summoned to give evidence, and admitted by a senior official of the bank to have been in attendance in court. He was not however called as a witness by the defendant bank, nor any ground of excuse offered therefor, and without him we have no proper evidence of any endorsements which would have justified the bank in placing this warrant to the credit of Loganathan's account. Further, although the reluctance to call Loganathan may well be understood and does not attract the same adverse comment as the failure to call Thuraiappah, it is noteworthy that Loganathan was listed as a witness by the defendant, directives obtained on the superintendent of the Prison on more than one occasion to produce him in court, special batta deposited for his expenses and indeed a postponement of the trial obtained on the ground of his illness. Nevertheless, Loganathan was not called although he was the only other person who could have spoken to the endorsements on the warrant at the time of presentment.

The warrant itself is not now available, having been stolen from Grindlays' Bank, on which it was drawn, and though the paying-in-slip P1S has been produced, it can by itself throw no light on the endorsements upon the warrant. It is significant also that interrogatories were served on the bank containing a question as to whether it made inquiries to ascertain how "Movie & Co." became holders of a dividend warrant made out in favour of the plaintiff. To this question the bank has given the singularly unhelpful reply that the record of any inquiries made would appear on the dividend warrant and that in the absence of the dividend warrant no answer was possible.

The matter does not however rest there.

It is in evidence that at or about the time when this cheque was presented, the Wellawatte branch of the defendant bank had been provided with an ultra violet ray apparatus capable of detecting alterations on cheques which would escape detection by the naked eye. If indeed an ultra violet device had been available to the Wellawatte branch on this date it was material both to the question of endorsements and to the

question of negligence whether the apparatus had been used in regard to this warrant which, as far as the transactions of that branch went, was for a conspicuously large amount. In fact the transaction was by the standards of that branch so large as to dwarf all other transactions for the day, and indeed any transaction ever recorded in the account in question. It is significant that during the entire history of this account after the initial deposit with which it was opened, there were only four sums credited prior to the crediting of this sum of Rs. 30,637·13, and these were trifling amounts of Rs. 144·88, Rs. 95·00, Rs. 49·50 and Rs. 231·39. Hence although there would be no obligation on the bank to submit all transactions to the scrutiny of such a device, it may well be contended that this was precisely the type of transaction for whose proper scrutiny such a device was intended. If on the other hand the device had not yet been provided to the bank, that was a matter capable of easy proof, thus negativing any possibility of adverse comment arising from failure to use the ray. This was clearly a matter one would expect to be reflected in the records of any well-ordered bank, and it is noteworthy that Sparkes, the senior branch manager of the defendant bank, admitted in cross examination that Handy could have looked up the records and ascertained when the ray was supplied to the Wellawatte branch. Despite attention being focussed on this matter at the trial, the bank has failed to assist the court on the question whether the device was available to it on the day in question.

I am not here expressing any view as to whether the failure to use this device, if available, constitutes negligence or not in the circumstances of this case, but the availability of the device on that day was as I have said a material question indeed. Here again, then, the bank has failed to make available to the court evidentiary material of the most obvious value.

This matter is rendered all the more significant when one sees that, at one stage in the cross examination of Sparkes, counsel for the plaintiff moved to mark in evidence, presumably as an admission, the deposition of Thuraiappah in the criminal case, wherein he had stated that he had examined this cheque under ultra violet light. Counsel for the bank objected to this evidence and the objection was upheld.

It may well be contended that the order upholding this objection was wrong, on the basis that the passage referred to was an admission of an agent of the defendant. However, without in any way taking into account the contents of that deposition as evidence, one sees from this episode what significance could attach to the question whether the ray was available and if available whether it was used. These were moreover matters peculiarly within the knowledge of the bank, and the conclusion seems inevitable that the bank has failed to place the best evidence before court of the endorsements on the cheque at the time of presentment.

There is another piece of evidence concerning this device which I find most difficult to understand. Sparkes has stated in evidence that this ray was procured because around that time there had been a spate of frauds connected with cheques which had been stolen in the post and altered through the use of chemicals. Handy, the manager of the Wellawatte Branch at the relevant time, sought however to maintain in cross examination that he had never heard of any endorsements on a cheque having been chemically removed. Quite apart from his lack of opportunity to examine the endorsements on the cheque, I am afraid the bank was resting its case upon a most insecure foundation when it chose to depend entirely on such a witness on the question of the endorsements on the cheque at the time of presentment.

The conduct, then, of the bank in receiving this warrant to the credit of Loganathan's account, is shrouded in mystery, and one feels assailed by the strongest doubts as to the innocence of Thuraiappah, its officer who received this warrant, compared it with the paying-in-slip and put it up to Handy. My brothers have in their judgments set out other reasons strongly indicative of his complicity in Loganathan's guilt and with these observations I would respectfully agree.

On feels constrained to observe that the defendant in this case was not a litigant principally concerned with success in the immediate litigation, but a public institution—indeed the leading bank in the country and one entrusted by the legislature for some time with a monopoly of the right to open current accounts. Such a defendant was in my view under a duty to be of greater assistance to the court in placing before it the evidentiary material necessary for a determination of the difficult matters it was called upon to decide.

Next in the history of this fraud is the manner in which the proceeds collected upon this cheque and deposited to Movie & Co.'s account, were withdrawn. It would appear that three days after this sum had been credited to the account of Movie & Co., a cheque for an amount nearly corresponding in value to this credit, namely a sum of Rs. 29,814·13, was withdrawn from the account upon a cheque drawn by Loganathan in the name of one Thomas Felix de Costa. Fonseka, the agent at the Wellawatte branch on that day, had wanted confirmation of the identity of the payee, but the drawer of the cheque, Loganathan, was produced before the agent and identified by Thuraiappah and the money was paid out to the drawer himself. The payee was not seen by anyone on that day and we see again the hand of Thuraiappah at work in association with Loganathan.

Another aspect of alleged negligence on the part of the bank is in regard to the very opening of the account by Loganathan in the name of Movie & Co. It would appear that one Ariaratnam, the person introducing Loganathan to the bank, had not even stated how long he had known the proposed customer—an important piece of information a bank

would ordinarily be expected to require before it accepts a new customer. The manager of the Wellawatte branch at the time, who interviewed the prospective customer and decided on his suitability and also initialled the account opening form D2, was one Anthony, who at the time of trial was still in the service of the defendant bank at its London branch. This case was important enough and the circumstances of the opening of this account sufficiently material, to warrant his evidence being placed before the court either directly or by other means available under our law. This again was not done by the bank, although it has been observed that if a bank manager fails to make inquiries which he should have made, "there is at the very least a very heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner."[1] There would appear therefore even at that stage to have been an apparent want of care on the part of the bank which the bank has failed to explain. However, for the purposes of the present case, mindful of the observation in *Marfani & Co. Ltd. v. Midland Bank Ltd.*[2] that one must resist the tendency in these cases to show wisdom after the event, I shall not take this circumstance into account as a factor against the bank. I consider that without resort to this factor the matters to which I have already referred are amply sufficient to bring into play the legal principles which I shall discuss.

I may add that I too incline to the view indicated in the judgment of my brother Sirimane that a fraudulent official of a bank acting in collusion with a fraudulent account holder would not find it difficult to get a busy bank manager in the rush of business to initial a paying-in-slip for the deposit of a cheque into a particular account without altering the endorsements on the cheque itself. Consistently with this view we have the indication from letter P10 that when the warrant was received by Grindlays' bank, on which it was drawn, it was still apparently unaltered.

One further circumstance to which I should refer is that the evidence of a spate of banking frauds, involving thefts and forgeries of cheques during the period in question, should have served to underline the need for caution when a transaction of this nature presented itself, attended as it was by so many circumstances of suspicion, and involving as it did so large a sum of money.

The standard of care required of a banker as stated by Lord Warrington of Clyffe in *Lloyds Bank Ltd. v. E. B. Savory & Co.*[3] is that it must be judged "by reference to the practice of reasonable men carrying on the business of bankers and endeavouring to do so in such a manner as may be calculated to protect themselves or others against fraud." Moreover a particular circumstance which should have called for care on the part of the banker was whether the transaction of paying in any given cheque coupled with the attendant circumstances was so unusual

[1] *Baker v. Barclays' Bank Ltd., (1955) 2 All E. R. 571 at 584.*
[2] *(1968) 2 All E. R. 573.*
[3] *(1933) A. C. at 221.*

that it should have placed the banker upon inquiry. To quote Scrutton, L.J. in *Lloyds Bank Ltd. v. The Chartered Bank of India, Australia and China*[1] "I accept the measure of duty stated by Lord Dunedin in *Commissioners of Taxation v. English, Scottish and Australian Bank*[2] where he says: "Mr. Justice Isaacs says, 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison v. London County and Westminster Bank Ltd.*[3] and relevant to the present, are (1) that the question should in strictness be determined separately with regard to each cheque; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present', their Lordships think this is an accurate statement of the law." Lord Dunedin adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that therefore there must be something markedly irregular in the transaction." I consider these tests of negligence to be sufficiently satisfied by the circumstances to which I have referred.

I must however make it clear that when I hold there was negligence I do not mean the bank had *knowledge* of Loganathan's tainted title. Though there was certainly negligence—and that of a high standard—it means no more than that there were strong circumstances of suspicion necessitating inquiry by the bank in regard to the title of its customer. Knowledge is a more definite state of mind than suspicion, however strong, and it would be unsafe in the absence of more specific evidence of knowledge and more particularly in the absence of the warrant itself, to hold that the bank, at the time it collected the cheque, had guilty *knowledge* of Loganathan's tainted title.

It is this state of facts which highlights the importance of the question whether the transaction we are here examining is one which attracts the principles of the English law of conversion or the normal principles of our common law.

The essential difference between the two systems on this matter is that a cause of action in conversion would not require fault or fraud on the part of the defendant. The position in English law is explained by Diplock, L.J. in *Marfani & Co. Ltd. v. Midland Bank Ltd.*[4] in the terms that: "At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case,

[1] *(1929) 1 K. B. 40 at 59.*
[2] *(1920) A. C. 683 at 688.*
[3] *(1914) 3 K. B. 356.*
[4] *(1968) All E. R. at p. 573.*

it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute ; he acts at his peril."

By way of contrast, the Roman-Dutch law would not attach delictual liability in the absence of *dolus* or *culpa*.

It is true there exists a general principle of the *Lex Aquilia* that a person shall not injure another's property by unlawful physical acts [1] and that the right each person enjoys that others shall not injure him in his person or property by their conduct involves a duty in such others to exercise proper care [2]. However in the specific case of the purchaser of stolen property, in consequence of the special treatment of that subject in connection with the *actio ad exhibendum*, the Roman-Dutch law would appear to attach no liability on the ground of mere negligence but to require mala fides, meaning, in this context, knowledge of defective title. Thus there would appear to be no liability in such a case merely on the ground that there has been an omission of a precaution which might have suggested itself to a careful person [3]. By analogy this principle has been held applicable to the case of a collecting banker.[4]

In the words of Cowen [5] "Of course if a bank knowing that its customer's title to a cheque is defective, collects payment thereof, it will be liable at common law to the true owner. But a collecting banker who receives payment of cheques, whether crossed or not, on behalf of a customer who has no title thereto, is not liable at common law to the true owner of the cheques for any loss sustained by him in consequence thereof, on the ground of negligence only ; he is liable only if he had knowledge that the customer had no right to the cheques and was intending to misappropriate the proceeds."

It would appear then that in the circumstances of this case, there is an absence of the ingredients necessary to the maintainability of an action under the Roman-Dutch law, for even though the facts reveal negligence, they fall short of proving mala fides on the part of the bank. This explains the necessity for the appellant to invoke the English doctrine of conversion.

In *Daniel Silva v. Johanis Appuhamy* [6] a Divisional Bench of this Court expressed the view that the English doctrine of conversion is not part of our law. In that case a not negotiable cheque on which the payee's endorsement was forged was transferred by the forger or someone

[1] *Grueber, Lex Aquilia, p. 231.*
[2] *Union Govt. v. National Bank of S. Africa Ltd. (1921) A. D. 129.*
[3] *Broughton v. Pinson & Co. (1877), Nat. L. R. 164.*
[4] *Yorkshire Insurance Co. Ltd. v. Standard Bank of South Africa Ltd., supra p. 283.*
[5] *The Law of Negotiable Instruments in S. Africa, 3rd ed. p. 372.*
[6] *(1965) 67 N. L. R. 457.*

on his behalf to the defendant. The value of the cheque was credited by the defendant's bank to the account of the defendant and a like sum debited in the same bank to the account of the plaintiffs who were the drawers of the cheque. The plaintiffs averred that the defendant had no title to the cheque inasmuch as the endorsement of the payee had been forged and that he consequently had no lawful authority to convert the cheque to his own use. It was held that the defendant being a bona fide holder for value in due course would not incur liability under the Roman-Dutch law of delict and that he could not be held liable for the tort of conversion as the English doctrine of conversion has not been introduced into Ceylon and the tort of conversion is unknown to the Roman-Dutch law. The Court further took the view that section 98 (2) of the Bills of Exchange Ordinance which makes the rules of the common law of England including the Law Merchant applicable to bills of exchange, promissory notes and cheques, so far as not inconsistent with the express provisions of the Ordinance or any other enactment for the time being in force, does not draw in the English law on this matter.

I take the view, with respect, that that judgment is correct in its conclusion that the doctrine of conversion forms no part of the general law of Ceylon. However that case did involve the rights of a bona fide holder for value of a negotiable instrument and in regard to such instruments we are governed by the English law. For reasons which will appear later in this judgment such a transaction does in my view attract the English law relating to conversion although the doctrine of conversion forms no part of our general law. On this point therefore, I would with the greatest respect, differ from that decision.

Moreover, it will be observed that the case of *Daniel Silva v. Johanis Appuhamy*[1] was one relating to the liability not of the banker but of a person to whom the cheque had been transferred by the forger or someone on his behalf. That case therefore does not determine the question whether the law applicable to the *collection* of a cheque *by a banker* is the English law and we are faced in the present case with the further question whether the transaction under examination attracts the English or the Roman-Dutch law by reason of its connection with matters of banking—a matter on which *Daniel Silva v. Johanis Appuhamy* can afford us no guidance.

I will first set out my reasons for concluding that the doctrine of conversion forms no part of our general common law and then examine the question whether it forms part of our special commercial law applicable to a transaction such as the present.

A consideration of the first question is best prefaced by a brief historical discussion of certain aspects of the introduction of the Roman-Dutch law as the common law of this country. Against this background the precise limits of the inroads made thereon by the reception of English law will appear with greater clarity.

[1] *(1965) 67 N. L. R. 457.*

I do not propose in this judgment to re-traverse the well explored ground concerning the question whether the whole of the Roman-Dutch law has been received in Ceylon. The many comprehensive judgments of this Court on this question more than adequately deal with this matter. I shall however concern myself with the somewhat different question urged on this appeal, that the terms in which the Roman-Dutch law was introduced into this country were not absolute but subject to a power expressly given to the courts to deviate from the general principle that the common law was to be Roman-Dutch. In other words it is submitted that a principle of English law may become part of our legal system not merely by tacit adoption by the courts over a long period of time, but in fact that the courts may, by virtue of express legislative authorisation in that regard, effect a deliberate deviation from the Roman-Dutch law.

In this connection reliance is placed upon the phraseology of the Adoption of Roman-Dutch Law Ordinance which has its origin in Governor North's Proclamation of 23rd September 1799, and now appears as Chapter 12 in the current edition (1956 edition) of the Enactments.

Section 2 of that Statute declares that " the administration of justice and police in the island shall henceforth and during His Majesty's pleasure be *exercised by all courts of judicature, civil and criminal, magistrates and ministerial officers,* according to the laws and institutions that subsisted under the ancient government of the United Provinces, *subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned,* and to such other deviations and alterations as we shall by these presents, or by any future proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

This provision follows upon a Preamble which reads:

" WHEREAS it is His Majesty's gracious command that for the present and during His Majesty's will and pleasure the temporary administration of justice and police in the settlements of the Island of Ceylon, now in His Majesty's dominion, and in the territories and dependencies thereof, should, as nearly as circumstances will permit, be exercised by us in conformity to 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 such expedients and useful alterations as may render a departure therefrom either absolutely necessary and unavoidable or evidently beneficial and desirable."

The phraseology of section 2 provokes inquiry into the identity of the powers and authorities therein mentioned, and it was the submission of the appellant that, in the absence of any specification of these powers and authorities in any earlier portion of the Ordinance or in the Preamble, one must seek them in the earlier words of section 2 itself. On this basis these powers and authorities would include the Courts of Judicature, civil and criminal, of the Island.

If such indeed were the position, the burden of satisfying this court that the English principle of conversion had been adopted in preference to the differing rule of Roman-Dutch law would be more easily discharged than if reliance must be placed upon the unbroken and unequivocal chain of authority required to prove the tacit adoption of a principle of English law.

One is apt however to be misled on this matter by the form in which this Proclamation now appears in the Enactments, for upon a perusal of the Proclamation in its original form, it becomes clear what these "powers and authorities hereinbefore mentioned" are; and these "powers and authorities" are certainly not the courts of law.

The Proclamation of 23rd September 1799, reproduced in its original form in Dr. G. C. Mendis' work on the Colebrooke-Cameron Papers[1], shows that the Preamble in its original form did not stop at the words "beneficial and desirable", as in recent editions of the Enactments, but continued with these words: "subject also to such deviations, alterations and improvements, as shall be directed or approved by the *Court of Directors of the United Company of Merchants of England, trading to the East India Company or the secret Committee thereof, or by the Governor-General in Council of Fort William in Bengal.*" The words quoted were omitted in later editions of the Enactments for the reason that they were inconsistent with later legislative developments, as we shall presently see. When one has regard to the terms of the actual Proclamation, there can be little doubt that "the respective powers and authorities hereinbefore mentioned", in section 2, are the powers and authorities just mentioned and referred to in the deleted portion of the Preamble. However when that deletion was made, the words in section 2 "subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned" were retained although the respective powers and authorities referred to were none other than the powers and authorities that had been specified in the deleted portion of the Preamble. It would be wrong therefore to construe the expression "respective powers and authorities" as appearing in section 2 today by reference only to such powers and authorities as appear in the form in which recent editions of the Legislative Enactments carry the Proclamation.

The same result becomes clear also from the Royal Instructions which Governor North received from King George IV dated 26th March 1798[2], for these are in terms similar to those of the Proclamation of 23rd

[1] *Vol. 2 p. 154.* [2] *Mendis, ibid, p. 70.*

September, 1799. Article 5 of this Instrument states that " for the present the temporary administration of justice and police in the settlement of the Island of Ceylon, now under our Dominion, and in the dependencies thereof should as nearly as circumstances will permit be exercised by you in conformity to the laws and institutions that subsisted under the Ancient Government of the United Provinces subject to such directions as you shall now and hereafter receive from the *Court of Directors of the East India Company or the secret Committee thereof or the Governor-General of Fort William in Council.*" Likewise also the Instructions from the Court of Directors of the East India Company to Governor North[1] contain a corresponding provision (Article 5).

This view, that there was no such authority expressly given to the courts, is further confirmed by a perusal of the revised Royal Instructions issued to Governor North on 18th February 1801[2]. Article 4 required that the temporary administration of justice and police should as nearly as circumstances would permit be exercised in conformity to the laws and institutions that subsisted under the ancient Government of the United Provinces subject to such deviation in consequence of sudden and unforeseen emergencies and to such expedients and useful alterations as may render a departure therefrom either absolutely necessary and unavoidable or evidently beneficial and desirable. The same article required the Governor immediately to report to one of the Principal Secretaries of State for His Majesty's ratification any such deviations or alterations which he chose to make in terms of this Instruction. The Letters Patent re-commissioning Governor North dated 18th April 1801[3] revoked the earlier Letters Patent and everything therein contained.[4]

The picture emerging from these documents becomes complete when one has regard to the courts in existence in 1799. There was at that time a breakdown of the administration of justice, for the Dutch judicial system had come to a complete standstill after the capitulation of Colombo and " there was an utter absence of courts for trying private civil disputes."[5] On 1st June 1796 there had indeed been passed an " Act of Authorisation " renewing the Dutch courts of justice at Colombo, Galle and Jaffna[6] but the Act could not be implemented,[7] and there were still no courts of civil jurisdiction. When Governor North arrived in Ceylon the only courts in existence were the Courts Martial, the Collectors' Courts and a Court of Equity which had been established by de Meuron, the leader of the Swiss Mercenary Regiment originally raised for the Dutch East India Company but whose men had subsequently enlisted in the British Army and assisted in wresting the maritime provinces from the Dutch.[8] This Court of Equity was established to try in a summary manner and according to Dutch laws petty causes in Colombo, but the members had refused to take the oath of allegiance.

[1] *Mendis, ibid p. 80.*
[2] *ibid, p. 96.*
[3] *ibid, p. 91.*
[4] *ibid, p. 92.*
[5] *Colvin R. de Silva, Ceylon under the British Occupation, p. 291.*
[6] *ibid.*
[7] *ibid, p. 292.*
[8] *Mills, Ceylon under British Rule, p. 35.*

Indeed, since the acquisition of the maritime provinces in 1796, there had been, to quote Governor North himself[1], "a suspension of almost all criminal and civil justice whatsoever." Even after Governor North's arrival the civil judges refused for some time to take the oath of allegiance. It thus seems evident that the established Courts were at the time of the Proclamation by no means the appropriate authorities to decide upon the deviations and alterations which the Proclamation envisaged.

For all these reasons I conclude that in terms of the Proclamation of 23rd September 1799 the common law of Ceylon was the Roman-Dutch law, subject to such deviations and alterations as the specified authorities might determine but that the authorities thus expressly empowered to make deviations did not include the Courts.

These specified authorities were later replaced by legislative institutions within the Island itself, and we see that when Governor Horton received his Royal Instructions dated 30th April 1831 he was given full power and authority with the advice and consent of the Council of Government to enact, ordain and establish laws for the peace and good government of the Island.[2] The Council of Government referred to was a Council consisting of the Chief Justice, the Officer in command of the Forces, the Chief Secretary, the Chief Commissioner of Revenue and the Vice Treasurer and Commissioner of Stamps. This Council Governor Horton was empowered to create by Letters Patent dated 23rd April 1831[3] commissioning him to set up a Council of Government of Ceylon. It would appear therefore that after the creation of this Council there was a body empowered to ordain legislation namely the Governor and Council and this authority took the place of the authorities mentioned in the original Instructions to Governor North. There followed the Charter of Justice of 1833 and Ordinance No. 5 of 1835 which repealed the Proclamation of 1799 but expressly retained that part of it which provided that justice should be administered according to the laws and institutions that subsisted under the ancient Government of the United Provinces subject to deviations by lawful authority.

This Ordinance also significantly goes on to declare, in terms even more categorical than those of the Proclamation of 1799, that those laws and institutions "still are and shall henceforth continue to be binding and administered throughout the Maritime Provinces and their dependencies" subject to the aforesaid deviations and alterations.

The Roman-Dutch Law was thus firmly enthroned as the common law of this country subject to such deviations as might be legislatively ordained.

[1] *Undated despatch to the Directors, written from Madras, and cited by Mills, Ceylon under British Rule, p. 35.*
[2] *Article 10—vide Mendis, ibid, p. 146.*
[3] *Mendis, ibid. p. 138.*

Since, then, there was no express legislative authority conferred on the courts to vary the Roman-Dutch law, the plaintiff, in seeking to establish that the English tort of conversion has been adopted into our legal system, must fall back upon the alternative and more difficult basis of the tacit reception of that principle into our legal system. Reference has been made in this connection to a series of cases where, it is submitted, our courts have invoked and applied the English rules of conversion.

An examination of these cases does not in my view support the contention of the appellant that they indicate an unequivocal adoption of the principles of English law in this regard. The mere use in some of them of the expression " conversion " is not conclusive of the deliberate and conscious application therein of the English principles relating to conversion, to the exclusion of Roman-Dutch principles, and indeed many of the cases cited may equally well have been decided the same way upon the basis of the Roman-Dutch principles relating to wrongful appropriation of property.

These decisions have been analysed in the judgment of my Lord the Chief Justice, and agreeing as I do with his assessment of these authorities, it is unnecessary for me to consider them further, except for the brief reference I shall make to *Dodwell v. John* [1].

It will suffice to observe that in any event this thin line of decisions is too tenuous to form a current of authority of the very high degree which alone would suffice as a basis for the view that a principle of English law foreign to and at variance with the principles of the Roman-Dutch system has now become ingrained in our law. As was observed in *Samed v. Segutamby* [2], although fundamental principles of the common law may in course of time become modified by judicial decisions, it would be only by a series of unbroken and express decisions that such a development could take place. The principle that delictual liability does not attach under the *lex Aquilia* in the absence of *dolus* or *culpa* is such a fundamental principle of the common law.

A special word is necessary in regard to the Privy Council opinion in *Dodwell v. John* [1] in view of the importance of that authority. Although in South Africa it has been expressly dissented from,[3] we in Ceylon are of course bound by that decision ; and if it did in fact apply the principle of conversion, that recognition of the principle would no doubt greatly advance the appellant's case.

Tambiah, J. has, with respect, rightly observed in *Daniel Silva v. Johanis Appuhamy,* [4] that the Privy Council did not in *Dodwell v. John* express a firm view that the principles of conversion applied in Ceylon. Their Lordships merely made a passing observation on this matter and would appear deliberately to have refrained from making it the subject

[1] *(1918) 20 N. L. R. 206.*
[2] *(1924) 25 N. L. R. 481.*
[3] *Bell v. Esselen, (1954) 1 S. A. L. R. 147.*
[4] *(1965) 67 N. L. R. 457.*

of a definitive pronouncement. The basis of that decision is the receipt of money with notice of the trust affecting it, and it was on the footing that those facts gave rise to a right of recovery that their Lordships formed their opinion. Their Lordships were there applying what they referred to as "principles of jurisprudence based in part, though not wholly, on a foundation of Roman law." They went on to observe immediately thereafter, "If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondent. It is on this footing that their Lordships propose to deal with the question." The principle so relied on was the principle underlying the action for money had and received, but viewed against the liberal background, which their Lordships considered was available in an appeal from a Court not confined to administering the common law of England, that money is recoverable which the defendant *ex aequo et bono* ought to refund. Therein, and not in the principle of conversion, lies the ratio of that case, a matter evident also from the cautious language employed in reference to the applicability of the latter principle in Ceylon. Indeed their Lordships went on to observe[1] that in any event relief *could not be granted* upon the latter basis in view of the provisions of the Prescription Ordinance. *Dodwell v. John* is therefore no authority for the applicability in Ceylon of the tort of conversion.

It is indeed true that there is a specimen form of plaint for the conversion of movable property, set out in the schedule to the Civil Procedure Code, which bears all the marks of the English tort of conversion. Moreover the averments contained in that specimen would appear insufficient to reveal any cause of action under the Roman-Dutch law. However, this circumstance constitutes insufficient material on which to base a proposition that the English law of conversion of movables has become part of our law, for any introduction of such a new principle of liability into our common law could not be effected through the medium of a specimen form in the schedule to the Code. The schedule does not make law and at the most shows the Legislature's understanding of the existing state of the law—an understanding which though we should be slow to depart from it, is not binding upon us if upon a careful examination of the whole question we should be convinced that it is wrong. I do not consider, either, that we have before us sufficient evidence to be able to say that there has been a settled practice in our courts of first instance to accept plaints containing only the requirements of the English tort of conversion, as containing a good cause of action.

For these reasons I am in agreement with the view expressed by the Divisional Bench in *Daniel Silva v. Johanis Appuhamy* that the tort of conversion forms no part of the general law of this country.

The conclusion that the English law of conversion does not as a general doctrine form part of the law of this country does not of course dispose of the matter before us, in view of the further questions whether, in so far as concerns cheques and matters of banks and banking, the English principles of conversion are drawn into our legal system.

[1] *(1918) 20 N. L. R. 206 at 210.*

Dealing first with the question of cheques, reference must be made to section 2 of Ordinance No. 5 of 1852 which provided that " the law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes, and cheques and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England 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, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted. "

Three quarters of a century later there was passed the Bills of Exchange Ordinance No. 25 of 1927 described by the Legislature as an Ordinance to declare the law relating to bills of exchange, promissory notes, cheques and bankers' drafts. Containing as it did a series of specific statutory provisions in regard to such instruments, it obviated the need to retain on the statute book the general provision relating to these instruments, contained in section 2 of Ordinance No. 5 of 1852. Accordingly that provision was repealed, but the legislature took the precaution of inserting in the Bills of Exchange Ordinance a provision contained in section 98 (2) thereof, to the effect that the rules of the common law of England, including the law merchant, except in so far as they are inconsistent with the express provisions of that Ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques.

One notes at once the difference in phraseology between the provisions relating to English law contained in the Ordinance of 1852 and 1927, and the fact that the first enactment is in terms far wider than the second. Not only does it make the English law applicable in respect of contracts and questions relating to these instruments but it extends the applicability of that system to *all matters connected with any such instruments.* Indeed it does not halt there but goes on to provide that the law to be administered would be the same as would be administered in England in the like case at the corresponding period *if the contract had been entered into or the act in respect of which the question arises had been done in England.*

These terms are sufficiently ample in their scope to place it beyond doubt that had the matter we are now considering fallen to be determined by the terms of the first enactment it would unquestionably have attracted the English law of conversion.

The question before us is however whether the terms of the later and less sweeping provision are sufficient for this purpose. In order to determine this question, it would be necessary to view this provision not as an isolated piece of legislation but in the setting against which it made its appearance.

When in 1927 the Bills of Exchange Ordinance was promulgated, the English law had unquestionably been the law applicable in respect of all matters connected with bills of exchange, promissory notes and cheques during that long span of our legal history which reached back three quarters of a century to the Civil Law Ordinance. During this vital formative phase, our commercial law, till then amorphous, was settling into the moulds set for it by the Ordinance of 1852. The keynote of this phase, during which our commercial law assumed the broad outlines of its present aspect, was the total displacement of the Roman-Dutch law on the matters specified in section 5 of the Ordinance of 1852.

It would be unrealistic, moreover, to lose sight of the fact that no mood of experimentation underlay the decision to introduce the English law in 1852, but rather the urgent and growing need to provide a stable legal base for a burgeoning economy. This was the era when the British had consolidated their hold over the entirety of the Island and attempted insurrections against their rule—in particular the Kandyan revolt of 1848—had been subdued. The British planter was making his ubiquitous appearance in the remotest corners of the country desiring naturally to carry with him his native law to govern his commerce—a commerce conducted almost exclusively with his own compatriots centred in Colombo or in London. Coffee, having passed through a crisis in 1847 which paralysed the industry for three years, was now recovering and in 1852 was about to enter upon a period of increasing prosperity [1] during which the industry acquired a dominant position in the coffee market of the world. The new prosperity was based on sound finance and management as opposed to the unmethodical ways that had prevailed in the 'forties',[2] for " A reckless adventure towards El Dorado had become a sober business enterprise ; and the new prosperity was based on much firmer foundations than the old ".[3] Such a systematisation of commerce provided the climate for a systematisation of commercial law on lines which had the multiple advantages of being at once familiar, practical, modern and international. The decision so to systematise the commercial law and to do away with a system which to the British was both unfamiliar and vague could well be understood against this background, more especially as the ancient economy of the country had died out and there was little commerce in indigenous hands.

We learn from the address of Governor Sir John Anderson to the Legislative Council on 2nd September 1851[4] that in January of that year the Chamber of Commerce had, in an address presented to him, made certain complaints " as to the ill working of the present laws in some respects " and that he had referred certain passages of that address to the judges of the Supreme Court requesting the judges to state if any amendments in the law as desired by the Chamber were called for.

[1] *Mills, Ceylon under British Rule, p. 236.*
[2] *Mills, ibid, p. 237.*
[3] *Mills, ibid.*
[4] *Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony, vol. I p. 239.*

The judges had suggested several alterations in the laws and among others indicated that they considered that all matters connected with shipping and all questions regarding bills of exchange should be decided by the law of England. The Council in its address in reply dated 5th September 1851 fully concurred in the need for important changes and expressed the hope that the measures brought forward would have the desirable effect among others "of terminating some of those difficulties in legal proceedings in commercial cases, which have at times occasioned much public inconvenience."[1] Such a decision, then, reached as it was on the considered advice of the Judges of this Court, was one not lightly taken nor such as would lightly be reversed—and far less after it had gathered around it the accretions of seventy-five years of judicial decision.

We see moreover that this policy of introducing the English law was carried forward by the Legislature through Ordinance No. 22 of 1866. In that year Governor Sir Hercules Robinson, addressing the Legislative Council[2] on 5th January observed that in 1852 an Ordinance had been enacted introducing the law of England in the colony in maritime matters and in contracts and questions arising out of bills of exchange, promissory notes and cheques. He went on to observe that there were other commercial questions in which it was desirable to assimilate our law with that of England such as questions relating to the laws of partnership, joint stock companies, corporations, banks and banking, principals and agents and life and fire insurance. He observed that "the English law has been for years virtually administered in these matters though it has not been formally declared in force" and that for this purpose an Ordinance would be laid before the Council.

The Judges of this Court were again consulted on this matter and their view was that an Ordinance on these lines was desirable, their only opposition to it being one in connection with immovable property which does not concern us here.[3]

Against this background of clear policy and settled law, the legislation of 1927 can scarcely be viewed as stemming from any desire to end the long reign of English law as the established common law relating to bills of exchange and to revert to the long abandoned rules of Roman-Dutch mercantile law. Had there been any intention on the part of the legislature to cut across three generations of development on lines consciously laid down by it in 1852, one would expect the clearest possible indication to such effect. We see none such in section 98 (2).

Moreover, this section though not framed in the ample terms of section 2 of Ordinance No. 5 of 1852, contains language wide enough to bear the meaning that in regard to the conversion of a cheque our

[1] *at p. 246.*

[2] *Addresses delivered in Legislative Council by Governors of the Colony Vol. 2, p. 97.*

[3] *See Sessional Paper No. 12 of 1866.*

law would be the English law. To adopt the phraseology of that section, the doctrine of conversion is a rule of the common law of England which is applicable to cheques according to the law of that country, and is a rule not inconsistent with the Bills of Exchange Ordinance or any other legislation in force in this country. A consideration of the section against its historical background reinforces this construction.

It should also be observed that by virtue of section 2 of Ordinance No. 5 of 1852, the entirety of the English law governing these instruments was introduced into this country. By virtue of that provision therefore all English statutes relating to those instruments automatically became the ruling statute law of this country as well. Hence when in 1882 the English common law relating to bills of exchange was codified and assumed the shape of the Bills of Exchange Act, that Act became an Act applicable to this country from the day it was passed. The formal promulgation of the Bills of Exchange Ordinance in 1927 therefore marked the introduction of no new legislation. Indeed the statement of objects and reasons for the introduction of this legislation [1] states, somewhat curiously but most significantly, that "In view of the fact that many of the District Judges are not provided with the English Acts, it is considered desirable that the law should be reproduced in a local enactment." This observation serves again to emphasize that what the legislature was doing in 1927 was not to introduce fresh matter into our statute book or to alter the law then prevalent but merely to declare law that had already found a place therein. These circumstances militate against the suggestion that in 1927 there was a reversion to the Roman-Dutch law as our residuary common law in matters relating to bills of exchange, promissory notes and cheques.

On behalf of the respondent a distinction is sought to be made between rules of the English common law which are of general applicability to any subject matter and rules of the English common law which are specially applicable to bills of exchange considered as such. It is submitted that the doctrine of conversion is a rule of tortious liability which is of general application to chattels and that its application to negotiable instruments is but a particular application of that general rule, resulting from the fiction that it is a physical object, namely the paper on which the instrument is written, that has been converted. On this basis it is submitted that the rule applied is none other than a rule relating to chattels pure and simple, and not one relating to negotiable instruments, and that the provision in section 98 (2) drawing in the English common law applicable to negotiable instruments does not therefore draw in the English law in so far as it concerns the conversion of a cheque.

It is of course clear that the mere circumstance that the transaction under review happens to involve a bill of exchange would not in all cases suffice to subject that transaction to the English law. For example

[1] *See* Government Gazette *No. 7,538 of 23rd July 1926, p. 551 and* Government Gazette *No. 7,539 of 30th July 1926, p. 599.*

if there be a contract of deposit of a bearer cheque and it is lost through the negligence of the depositee, the rules applicable in determining the depositee's liability would perhaps be no different from those determining his liability for the loss of any other valuable such as a diamond in similar circumstances. There is in such cases no situation peculiar to cheques nor the application of any rule particularly concerning or specially evolved to govern such instruments. Where on the other hand we are dealing with the conversion of a cheque, we are dealing with a rule specially evolved for the particular case of negotiable instruments. It is clear that but for its special development to cover such cases the notion of conversion of a comparatively valueless piece of paper is unmeaning in regard to cheques whose intrinsic quality and worth depend not upon the paper containing the writing but upon the writing itself.

The common law doctrine of conversion by its very nature postulates the existence of a physical object and is inappropriate and inapplicable to a chose in action. The gulf separating the realm of physical objects from that of intangibles, which the doctrine of conversion may not cross, is, so to speak, bridged by a legal fiction, namely that it is the physical piece of paper on which the instrument is written which is converted; and it is by this bridge that the doctrine of conversion is enabled to cross over into the territory of the chose in action and thereby gain applicability to the subject of cheques. But the employment of this fiction to cover this case represents not merely an *application* of the law of conversion to cheques but a *special development* of that law. Thus Lord Chorley [1] speaks of the extension of the doctrine of conversion to cover negotiable instruments as "a difficult but on the whole successful *development* of the common law." So also Street [2] observes of the extension of conversion to negotiable instruments, that it "makes substantial inroads on any possible rule, traceable to the former fiction of losing and finding, that conversion does not lie in respect of rights in intangible property. But this is not the limit of the doctrine; in *Bavins, Junr. and Sims v. London and South Western Bank* [3] all the judges in the Court of Appeal thought that the full value of a non-negotiable document evidencing a debt could be recovered in an action for conversion."

The very use, moreover, of a legal fiction to achieve this result is another indication that what we have here is indeed a development or alteration of the law and not the unchanged application of an existing rule. Paton [4] in discussing legal fictions observes that they are useful at a time when legal stability is desired, but a change in the application of the law is felt to be imperative, and proceeds to cite Maine's definition of a fiction in a very broad sense as "any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."

[1] *Lectures on Banking, p. 31.*
[2] *Law of Torts, 4th ed. p. 43.*
[3] *(1900) 1 Q. B. 270.*
[4] *Jurisprudence, 2nd ed. p. 42.*

Are we then in the broad open spaces of the common law when we are examining the conversion of a cheque or would it not be more correct to say that we have entered the specialised field of the law relating to negotiable instruments ? The answer, clear enough upon a consideration of the matters to which I have referred, becomes clearer still when we consider the nature of legal classification.

It is of course true that in the ultimate analysis all law is so closely intertwined as to attract frequent comparison to a continuous and seamless web. There is, viewed from this standpoint, no rule of law which belongs exclusively to any one section or department without at the same time having affinities with other areas of the law and thus belonging in a sense to the greater body of law in general. Nevertheless, with the growth and development of the law over the centuries, the process of division does set in, commencing with the division into great branches or departments such as the law of Property and the law of Obligations, and proceeding therefrom to a division into smaller and finer groupings. The latter result when, with the continued growth of each of these great departments, in due course there became discernible within them the outlines of sub-divisions which assume a shape and character of their own. These in time assume an independent status when they gather within their ambit a sufficient body of principles dealing with their particular field to make it the general sense of the profession that such a field of law now exists as an independent entity. In this way the law of Contract, for example, threw out shoots and branches such as the law of partnership, the law of insurance, the law of agency, the law of bills of exchange and the law of banking. No firm rules exist for determining whether a new branch of law has come into being, for while some are accorded early recognition, the recognition of others is sometimes long delayed. Thus even as late as 1870 so eminent an authority as Mr. Justice Holmes was inclined to think that torts was not a proper subject for a law book, and it was apparently not till 1859 that the collective name of torts was given to a treatise on the wrongs for which trespass and trespass on the case were permitted in various situations [1]. By way of contrast other titles of the law acquired their independent standing comparatively early, as for example the law of motor insurance, which emerged comparatively soon after the appearance of the class of vehicles with which it was concerned.

Once however the stage is reached when the existence of such a section of law has received general recognition, there would be legal principles undeniably falling within its ambit for such reasons as that they have particular reference to that field or have been specially developed to meet its needs.

In determining whether a principle falls within such a specialised field, we must of course always pay due regard to the fact that the emergence of a new department of law does not mean that rigid frontiers have been

[1] *See 54 L. Q. R. at 337.*

demarcated for it or fences erected to close it in. As with all things else, the different sections of the law are in continuous change and development, ever extending or contracting their limits and in so doing drawing on other territories or yielding ground before them ; and thus these fresh fields in the course of their continued growth will undoubtedly draw upon and if necessary develop principles having particular relevance to that special field even though such principles may have their origin in some other department of the law. As Plucknett observes [1] of the law of tort, in terms applicable to most other divisions of the law, "this field is really the result of the enclosure of many different acres, and the old boundaries between them are still visible." In the same way, while the law of negotiable instruments and the law of banking may have copious resort to the principles of contract, there will at the same time be a drawing upon such other branches of the law as the law of trusts or the law of limitation or the law of tort. It was thus, after the emergence of the law of negotiable instruments, that that body of law drew on the principle of conversion from the law of torts and developed that principle to meet the case of cheques. It seems to me that in its special development to cover the case of cheques, the law of conversion has unmistakably become part of the law of negotiable instruments, in so far as it concerns the conversion of a cheque, though the principle of conversion would no doubt belong also to the general law of tort whence it derived. When in this way there has been an assimilation of such a principle to the particular topic of law concerned, it would be unreal to consider such principle as still belonging exclusively to the department whence it came, for by its adoption, modification and adaptation in that specialised field, it becomes also an integral part thereof.

If therefore the legislature had intended to bring in the English law in respect of matters connected with such instruments in 1852, and in 1927 to preserve this applicability of English law, by the provisions of section 98 (2), it could scarcely have intended that on so important a matter as the conversion of a cheque, on which the English law had evolved its own special rule, the English law was to be excluded.

A reference to section 98 (2) of our Ordinance would be incomplete without a reference also to section 97 (2) of the English Act, which is similarly phrased, and was inserted as a safeguard against the contention that, once the common law relating to such instruments had crystallised into a Code, the entire law governing the subject was thereafter contained within its confines.

It should be noted that in their discussions of section 97 (2), the commentators on the English Bills of Exchange Act cite even cases of the application to bills of exchange of common law rules not specially relating to bills of exchange but of general applicability to any subject matter. For example, Chalmers on Bills of Exchange [2] and Byles on

[1] *Concise History of the Common Law, 5th ed. p. 460.*

[2] *11th ed. p. 287.*

Bills [1] cite under this provision such general rules as those relating to estoppels and the rules of private international law. These are quite clearly rules of general applicability brought to bear on bills of exchange in a manner no different to their application to any other subject matter. Indeed an examination of the judgment of the Commercial Court in *Embiricos v. Anglo-Austrian Bank* [2] shows that in applying to a negotiable instrument the rule applicable to any chattel, that the law governing the transfer is the law of the place of transfer, the Court has made express reference to section 97(2). Walton, J. observed [3] that "even if section 77(2) of the Act did not govern the case, he thought the general principle did apply, and that the effect was the same as if a chattel other than a negotiable instrument had been transferred at Vienna."

This consideration lends support to the view that the scope of section 98 (2) is by no means as rigidly circumscribed as the argument on behalf of the respondent would suggest. It is not necessary however for the purpose of this matter to invoke the principle implicit in *Embiricos v. Anglo-Austrian Bank* [4], for it has already been sufficiently indicated that conversion of cheques depends on no ordinary application of the general law.

The arguments advanced by the respondent do not for all these reasons impose any barriers in my view to the applicability in this country of the English doctrine of conversion in relation to cheques.

I turn now to the question whether conversion of a cheque by a collecting banker is a matter of banks and banking, and thus affords an alternative basis for the application of English law.

One can see, of course, that where a particular transaction which is not part of the ordinary course of a banker's business as a banker is carried out by a person who happens to be a banker, that transaction does not attract the law of banks and banking. For example, if a banker advances money upon a mortgage, the law of banks and banking is not attracted to the transaction merely because the mortgagee or pledgee happens to be a banker, and I concur with respect in the decisions of this Court in *Krishnapulle v. Hongkong and Shanghai Banking Corporation* [5] and *Mitchel v. Fernando* [6] where this Court held that in such circumstances the English law was not drawn in.

The position is manifestly different however where the transaction in question is, as here, a transaction into which the bank enters in its capacity as a banker. It is *qua* banker that the cheque in this case was collected by the respondent and it is *qua* banker that its liability for this act is under review.

[1] *21st ed. pp. 242 et seq.*
[2] *(1904) 2 K. B. D. 870.*
[3] *ibid, p. 876.*
[4] *(1904) 2 K. B. D. 870.*
[5] *(1932) 33 N. L. R. 249.*
[6] *(1945) 46 N. L R. 265.*

As was observed in *United Dominions Trust Ltd. v. Kirkwood*[1] "money is now paid and received by cheque to such an extent that no person can be considered a banker unless he handles cheques as freely as cash. A customer nowadays who wishes to pay money into his bank takes with him his cash and the cheques, crossed and uncrossed, payable to him. Whereas in the old days it was characteristic of a banker that he should receive *money for deposit*, it is nowadays a characteristic of a banker that he should receive *cheques for collection* on behalf of his customer. How otherwise is the customer to pay his money into the Bank ? It is the only practicable means, particularly in the case of crossed cheques." Any modern definition of banking therefore gives prominence to the collection of cheques. In the language of Paget[2] "No one and no body, corporate or otherwise can be a 'banker' who does not (1) take current accounts ; (2) pay cheques drawn on himself ; (3) *collect cheques* for his customer." It emerges from these observations that the collection of a cheque by a banker is a function forming an essential and integral part of the business of banks and banking.

This function of a banker receives recognition also in section 82 of the Bills of Exchange Ordinance, for this provision recognises that the banker would in the ordinary course receive payments for customers of cheques crossed generally or specially to such customers.

A large body of decided cases in England has held the doctrine of conversion to be applicable to a banker who collects a bill, note or cheque with a forged endorsement or to which the customer has no title[3]. As already observed in relation to conversion and cheques, so also in regard to conversion and banking, it is by the legal fiction referred to that the remedy of conversion, drawn from the law of tort, while still bearing the marks of its tortious origin, is linked with the law of banking and made part and parcel also of the latter body of law. As Salmond observes, specific coins in a bank are not the property of a specific customer, and a bank which pays out to some other person part of what it owes to its customer is not at first sight converting its customer's chattels[4]. Notions of conversion are thus wholly inapplicable, but for the fiction which has specially developed the law to meet the needs of banking. No treatise on banking is complete today without a section on the law of conversion and no banker is properly instructed in the rudiments of his calling if he has no instruction on this subject. It would be unrealistic in this situation to take the view that the law relating to conversion forms no part of the law of banks and banking, and it follows therefore that the Civil Law Ordinance as amended by Ordinance No. 22 of 1866 brought into this country the English rules relating to conversion in so far as they had become the subject of special application to the law of banks and banking.

[1] *(1966) 1 All E. R. 968 at 975.*
[2] *Law of Banking, 6th ed. (1961) p.8.*
[3] *Paget, Law of Banking, 6th ed. p. 304.*
[4] *Salmond on Torts, 14th ed. p. 145.*

The applicability of the English Law of conversion to the transaction we are examining thus results from the twofold consideration that the transaction is both within the special sphere of cheques and within the special sphere of banking, either of which factors by itself would suffice to draw in the English Law.

Of compelling weight in confirming the conclusion thus reached, is the assumption in section 82 of the Bills of Exchange Ordinance, of the applicability of the English Law of conversion to a banker who collects a cheque for a customer. This provision, redundant and meaningless against a background of pure Roman-Dutch Law, at once acquires a purpose and a meaning against a background of English Law and its doctrine of conversion. It is our duty to give to this section an effective meaning and to presume against redundancy. Moreover, we in Ceylon have section 98 (2) which is amply sufficient, as already observed, to invest this section with a force and efficacy denied to its former counterpart in South Africa, to which I shall presently refer.

It will be observed moreover that section 82 is not, as has been submitted, a mere reproduction of the corresponding English provision, for there is contained within it as sub-section 2 a provision which derives from the Crossed Cheque Act of 1906 and not the original English Act of 1882. The legislature therefore when it promulgated this Ordinance in 1927 has manifestly given its mind specifically to section 82 and adapted it to bring it into line with the statute law of England as it stood in 1927. The Ordinance bears other indications as well of a careful consideration by the legislature of the respective spheres of applicability of the English and the Roman-Dutch law. For example, section 27 particularly preserves the English doctrine of consideration, conscious no doubt of the differences between consideration and causa, while section 22 preserves the Roman-Dutch law of this country in so far as concerns the capacity of parties. Indeed in its statement of objects and reasons the legislature specifically indicated its awareness that but for section 22 it might be arguable that section 98 (2) makes English law applicable[1]. A legislature giving its mind to the conflicting claims of the Roman-Dutch law and the English law in certain spheres of the area for which it was legislating, must then be taken to have specifically intended that, but for section 82, there would be liability attaching to a banker in respect of cheques collected by him for a customer without fault or fraud. There is in my view no room in this context for a contention that this statutory provision is a redundancy, and with much respect I would differ from the view to this effect expressed by this Court in *Daniel Silva v. Johanis Appuhamy.*

This judgment would not appear, firstly, to have paid due regard to the historical background against which section 98 (2) of the Bills of Exchange Ordinance appeared, and in particular to the fact that by

[1] *See Govt. Gazette No. 7,538 of 23rd July 1926 p. 551 and Govt. Gazette No. 7,539 of 30th July 1926, p. 599.*

section 2 of Ordinance 5 of 1852 the English law had been made the law applicable to bills of exchange, promissory notes and cheques. Secondly it leaned too heavily, as I shall endeavour to show, on the law in South Africa and in Canada relating to the inapplicability to cheques of the English doctrine of conversion.

It is necessary at the outset to distinguish the legal position in South Africa by observing that the South African statutes which have from time to time been introduced in the several provinces of that country, do not embody a provision corresponding to section 98 (2) of our Ordinance. Moreover in South Africa the series of enactments appearing in the various provinces shortly after the codification of the English law in 1882, did not appear against a background such as that existing in Ceylon consequent on the Ordinance of 1852. Lacking a background of the applicability of English law in matters relating to negotiable instruments and lacking also an express statutory provision drawing in the law of England in residuary matters, the South African courts were driven inevitably to the view that the law of conversion did not apply in regard to negotiable instruments in South Africa. It followed also that the South African provision[1] corresponding to section 82 of our Ordinance, which denies liability where a banker receives payment of a cheque for a customer in good faith and without negligence, was a redundant provision, for indeed even the common law attached no liability in the absence of these requisites[2].

We do not have in Ceylon any reasons of so cogent a nature as compelled the South African courts to the view that this provision was a redundant section in the statute book of that country. The South African decisions on the redundancy of this statutory provision have thus no applicability in this country. Moreover a finding that a section in an Act of the legislature has been redundantly introduced is one which the Courts should be very slow to arrive at, and should avoid except for reasons of the greatest cogency.

In regard to the Canadian law relating to bills of exchange, section 10 of the present statute (omitted from the Act of 1890 but restored by an amending Act of 1891), provides 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 that Act, shall apply to bills of exchange, promissory notes and cheques. Falconbridge observes[3] that the effect of this provision would appear to be that the background of law applicable to transactions in which such bills, notes or cheques play a part may be either the common law of England so far as that background consists of rules of the law of bills and notes in the strict sense, or the commercial law of a particular province outside the limits of the law of bills and notes in the strict sense. The question arising

[1] *Section 80.*

[2] *Yorkshire Insurance Co. v. Standard Bank (1928) W.L.D. 251 at 278, 280.*

[3] *Banking and Bills of Exchange in Canada, 6th ed. p. 46.*

is whether item 18 of section 91 of the British North America Act covers legislation relating to bills and notes and whether federal legislation or provincial legislation would prevail on this matter. The learned author expresses the view that in the field of transactions involving the use of bills or notes as opposed to the law of bills and notes in the strict sense, the applicable law may be the law of a particular province and not the common law of England. In this field provincial legislation may be valid so far as it comes within any of the classes of subjects assigned to the provincial legislatures by section 92 of the British North America Act and so far as it is not inconsistent with valid federal legislation.

The conflict arising in Canada between federal and provincial legislation has no counterpart here, and it would be unsafe to draw any guidance from the law of Canada on the question we have before us. It is true that the same author observes[1] that the specific rules of the common law relating to conversion are not specifically in force in the Province of Quebec under the Civil Code of Lower Canada—and indeed this is only to be expected in a legal system based on the Civil law—but this affords us no guidance on the question whether the conversion of a bill of exchange would attract the principles of conversion or the principles of the Civil law. Furthermore, the case of *Norwich Union Fire Insurance Society Ltd. v. Banque Canadienne Nationale*[2] referred to in *Daniel Silva v. Johanis Appuhamy* is not an authority to the effect that the English doctrine of conversion is not in force in the Province of Quebec in relation to the conversion *of a bill or note.*

Neither the case law therefore nor the statute law of Canada would be of assistance to us in the matter we have to decide.

Discarding, then, the legislation of South Africa and of Canada as affording no material guidance, we fall back simply upon the position that the terms of section 82 of the Bills of Exchange Ordinance tellingly confirm the applicability of the English law to the matter before us. For this and the other reasons earlier mentioned, the doctrine of conversion becomes applicable, and, upon the facts of this case, entitles the plaintiff to judgment as prayed for on her first cause of action.

I pass now to a consideration of the defendant's position viewed by the principles of quasi-contractual liability.

Our law relating to quasi-contractual liability is of course basically the Roman-Dutch law, but there would appear to have been from time to time an importation of some of the terms and concepts of the English law, as for example in the case of the *quantum meruit* of English law. So also the action for money had and received, a product of the English law, has often been referred to and assumed to be applicable in this country.

[1] *ibid, p. 571.* [2] *(1934) 4 Dominion Law Reports, p. 223.*

Indeed the alternative cause of action set out in the plaint is couched in terms appropriate to the English action for money had and received, and the question has been much debated before us whether the action for money had and received forms part of our law. On the basis of the applicability in this country of the English action for money had and received we have been addressed at much length on the technicalities of the English doctrine and on such questions as the necessity to waive the tort in order to claim this relief. The applicability of the action for money had and received raises also the question of the extent of similarity or difference between this action and the enrichment actions of the Roman-Dutch law and whether the availability of the English action supersedes in Ceylon any of the Roman-Dutch principles relating to enrichment.

I shall first examine the question what constitutes the enrichment in this case and thereafter proceed to consider the place in our legal system of the action for money had and received and whether any recognition of this action involves a departure from the principles of Roman-Dutch law. I shall conclude by examining whether in the circumstances of the present case, unjust enrichment relief would be available according to the principles of the Roman-Dutch law.

To deal first with the question of enrichment, it is true that the defendant has paid out the money collected by it on the plaintiff's cheque, but this circumstance would suffice neither by the principles of Roman-Dutch law nor by those of English law to negative enrichment. The bank in so paying out was parting with the proceeds of the plaintiff's warrant when it was not obliged to do so, and when, if it had not been negligent, it would have realised that the warrant had not belonged to Loganathan, and a relevant time for determining whether the banker has complied with his duty of care towards the true owner of the cheque is when the banker pays out the proceeds of the cheque to his own customer and so deprives the true owner of his right to follow the money into the banker's hands.[1]

Consequently in paying out this money upon Loganathan's cheque the bank was by its own negligent act depriving itself of an asset which the plaintiff had a right to follow into its hands.

Under the Roman-Dutch law there must, for unjust enrichment, be an increase or benefit to the estate of the defendant, so that when the enrichment in the hands of the defendant diminishes or disappears, this would ordinarily have the effect of liberating him either *pro tanto* or entirely as the case may be. However it would appear that the defendant is entitled to be so liberated only if he is in a position to show that neither

[1] *See per Diplock, L. J. observed in Marfani & Co. Ltd. v. Midland Bank, Ltd., (1968), 2 All E. R. at 580-1.*

dolus nor *culpa* on his part had led to such diminution or disappearance.[1] There is always a duty on the party enriched not to allow the enrichment to diminish in consequence of blameworthy conduct on his part.[2]

We see also from Grotius[3] that if a party has enjoyed an asset and it is no longer with him he is nevertheless held to have been enriched. In the same context Grotius states with reference to minors that if they have lost what they have received or spent it in some unusual way, enrichment is not, *in their case,* held to have taken place. The implication seems clear that in the case of persons other than minors, if they lose the enrichment or spend it in some unusual way, enrichment would nevertheless be held to have occurred.

Viewed again from the standpoint of English law, the same result ensues, for both at law and in equity, the defence of change of position based on a parting with the money will not avail a party merely because he no longer has with him the money which he received. In *Durrant v. The Ecclesiastical Commissioners in England and Wales*[4] and in *Standish v. Ross*[5] the court rejected the existence of any general defence of change of position either at law or in equity. There had been earlier cases where change of position had been relied on as a defence to a claim for money which the defendant had received from the plaintiff, but the two decisions referred to laid down for the common law the rule that the mere parting with the money is not by itself sufficient to establish the defence. In equity as well a similar position was reached through the case of *in Re Diplock*[6] where Lord Simonds observed "The broad fact remains that the Court of Chancery in order to mitigate the rigour of the common law or to supply its deficiencies established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid."

It is also of importance to note, as Lord Chorley observes,[7] that in cases where the bank is liable in conversion for collection of a cheque a right exists to be indemnified by its customer, and therefore in the present case the defendant is not devoid of all benefits resulting from the money it had received, but has the advantage of a right of recourse against Loganathan to the extent of the sums paid out to him from the proceeds of the dividend warrant.

Reference should be made at this point to the decision of a Divisional Bench of this Court in *Imperial Bank of India v. Abeysinghe*[8] where Chief Justice Fisher applied some of the English decisions to which I have

[1] *de Vos, Unjustified Enrichment in South Africa, 1960, Juridical Review at p. 243.*
[2] *de Vos, ibid*
[3] *3.30.3.*
[4] *(1880) 6 Q. B. D. 234.*
[5] *(1849) 3 Ex. 527 at 534.*
[6] *(1948), Ch. 465 affd. (1950) 2 All E. R. 1137 sub nom. Ministry of Health v. Simpson.*
[7] *Law of Banking, 3rd ed., pp. 120-1.*
[8] *(1927) 29 N. L. R. 257.*

referred. In that case the defendant, a proctor, had received a cheque in part payment of the consideration on the transfer of a land attested by him. He had very little, if any, previous knowledge of either transferor or transferee. He presented the cheque drawn in his favour by the alleged transferee at the bank, and on receiving payment, handed the money to the transferor. It turned out however that the signature on the cheque was a forgery and that the land transaction was entirely fictitious. The proctor had acted bona fide throughout. In an action by the bank against the defendant for the recovery of the proceeds of the cheque it was held by the majority of a Divisional Bench that the bank was entitled to recover the money despite the fact that the money had been paid out by the defendant. Fisher, C.J. observed [1] in regard to the trial judge's finding that the proctor was negligent, that there was some foundation for it, inasmuch as the appellant, an experienced proctor dealing with two strangers, had " rather rashly jumped to the conclusion that the matter was an ordinary bone fide piece of business." The proctor had paid out the money " under a supposed but non-existent duty " [2], and there was no difference in principle between such a case and one where, on his leaving the bank, the money had been stolen or where the proctor had paid it to the forger himself. The defence that the money had been paid out did not therefore avail the proctor even though he had acted with perfect good faith throughout the transaction and had become unconsciously an unwilling participant in the scheme of fraud.

The fact then that the bank had paid out the money would not in the light of all these principles negative the availability of an enrichment action to the plaintiff, inasmuch as the bank in the present case was negligent not only in collecting but also in paying out the proceeds of the warrant and thus depriving itself by its own act of the right to invoke the fact that this enrichment has been diminished or disappeared. Since the requisites of enrichment under both systems are thus satisfied, I shall proceed to consider the question of unjust enrichment under each system.

It is necessary to commence this discussion by referring once more to the Divisional Bench case of *Daniel Silva v. Johanis Appuhamy* [3] where the view was expressed by Tambiah, J. that the action for money had and received has never been received into our legal system. As Sansoni, C.J. observed in *Don Cornelis v. De Soysa & Co. Ltd.* [4], the view expressed by Tambiah, J. on this point has not been expressed by either of the other two judges who participated in that decision and cannot therefore be said to represent the views of the majority of that court. Moreover the learned judge was in that case giving his attention mainly to the question whether the English doctrine of conversion forms part of our law.

[1] *(1927) 29 N. L. R. 257 at 263.*
[2] *ibid, at p. 262.*
[3] *Supra.*
[4] *(1965) 68 N. L. R. 161.*

The view of Tambiah, J. was perhaps unexceptionable in so far as concerns the action for money had and received in its strict common law form, with all its attendant technicalities. As Sansoni, C.J. has pointed out in *Don Cornelis v. de Soysa & Co. Ltd.*, the action in its common law form no longer exists even in England since the abolition of the forms of action in that country by the Judicature Act of 1873. In any event it is unlikely therefore, that when this particular form of action was abolished in England, it continued to survive in Ceylon if indeed it had ever been introduced here. The position is different however if in referring to the action one refers to its underlying principles rather than to its historical form ; for the similarity between this underlying principle and that underlying enrichment in the Roman Dutch law is too close to admit of its being considered foreign to our law.

If then we take the view that the true question before us is not whether the action in its original form is part of our law but whether, when we consider the action as it exists today, shorn of its trappings of form, we can say that its underlying principle is known to our law, the answer would, with respect, appear to be in the affirmative.

The old action for money had and received was but one of several particular actions such as the action for money paid, the *quantum meruit* and the *quantum valebat*, and it lay in particular circumstances, as where the plaintiff had paid money to the defendant under a mistake or for a consideration which had wholly failed.

Bertram, C.J. in *Saibo v. Attorney General*[1] endeavoured to show that the underlying principle of the action for money had and received coincides with that of the *condictiones* of Roman law. Bertram, C.J. there pointed out that the action for money had and received may be treated as identical with the *condictio* available under our law and drew attention to the close similarity between Lord Mansfield's exposition of the principles of the English action in *Moses v. Macfarlen* and the Roman principles evolved in regard to the *condictio indebiti*. Moreover Evans, the learned translator of Pothier's Law of Obligations, points out in an interesting appendix to his work, that every passage in Lord Mansfield's observations has its exact parallel in the Roman law and the translator concludes therefrom that even a slight comparison would evince the source of Lord Mansfield's principles to have been " the juridical wisdom of ancient Rome". It is no doubt for this reason that the English rules have been said to display a basically Romanesque architecture.

Schneider, J. expressed the same view in *Imperial Bank of India v. Abeysinghe*[2] when he observed that even if the English law were not applicable to the case before him, the English decisions on money had and received would still be applicable as that action was founded on the same principle as the *condictio indebiti* of the Roman-Dutch law.

[1] *(1923) 25 N. L. R. 321.* [2] *(1927) 29 N. L. R. 255 at 264.*

In more recent years Sansoni, C. J. in *Don Cornelis v. de Soysa & Co. Ltd.*[1] stated again that the principle of the English action for money had and received would be applicable under our legal system on the basis that there is no inconsistency between that principle and the principle of equity which underlies the Roman-Dutch action of *condictio indebiti*. The learned Chief Justice there expressly dissented from the view expressed by Tambiah, J. in *Daniel Silva v. Johanis Appuhamy*. The views expressed by Chief Justices Bertram and Sansoni and by Justice Schneider may, perhaps, with much respect, involve some measure of over-simplification if they are intended to suggest a complete identity between the action for money had and received and the *condictio indebiti*, but such an approach seems in broad outline to be an aid to the appreciation of the question before us in its correct perspective.

One obstacle however to such an attempt at equation of the governing principles in both systems is the theory that quasi-contractual relief is based in English law upon the existence of an imputed or fictional contract, in the absence of which such relief would not be available. This view which achieved perhaps its highest expression at the hands of Lord Haldane in *Sinclair v. Brougham*[2] and still has its powerful advocates, has to a large extent hampered the English law in its forward movement towards the liberal view that quasi-contractual relief arises from the broad principle of unjust enrichment. The difficulties resulting from it were highlighted for us in the case of *Dodwell v. John* where Viscount Haldane pointed out that if an imputed contract had to be found as the basis for the action of money had and received, there would be difficulty in maintaining such an action. However the Privy Council did not consider itself obliged to decide the matter before it upon the application of such a restrictive rule of English law, as it took the view that in a jurisdiction such as ours where the courts administer both law and equity and the courts are not confined to administering the common law of England, " it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund."

It would appear then that if the English concept of unjust enrichment is tied to the theory of a notional contract, many a case of true unjust enrichment would fall outside its scope. Even the facts of the present case are such that there would be no little difficulty in spelling out from them a fictional contract, and if such a contract be the peg on which the action for money had and received must hang, the present action would appear to rest precariously indeed.

Any attempt then, to equate the principles of the English action for unjust enrichment with that of the Roman-Dutch law becomes impossible if this theory of notional contract and not the principle of enrichment be the governing view in English law, and if the view favoured by Chief

[1] *(1965) 68 N. L. R. 151.* [2] *(1914) A. C. 398.*

Justices Bertram and Sansoni and by Mr. Justice Schneider is to be applied to this case we must assure ourselves that the theory of implied contract is not of compelling authority in English law.

We are assisted in this regard by the fact that though there is high authority in favour of the implied contract theory, there is authority of equal eminence and growing strength which stands four square against the notion that an implied contract provides the juristic basis for unjust enrichment in the English law. Which school of thought represents the true position in English law is still not settled, and though the clash of controversy set off by Lord Haldane in *Sinclair v. Brougham* still re-echoes in the field of quasi contract, one perceives through the dust of conflict, the field being slowly gained by forces ranged against the imputed contract.

One starts any examination of the rival theory by referring, of course, to *Moses v. Macferlan*[1], and it would be well at this point to refer to the actual words of Lord Mansfield. He observed[2] "if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit*) founded in the equity of the plaintiff's case, as it were, upon a contract ("*quasi ex contractu*" as the Roman law expresses it)" and again he followed this up by stating[3] "it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the *gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*"

As Fifoot the learned authority on the history and sources of the common law has observed[4], the single strand running through all the decisions was the unfair advantage secured by the defendant at the plaintiff's expense and "the precedents were so numerous and the current of opinion so steady that it wanted but the advent of a dominant personality to proclaim the principles of unjust enrichment as a single and all sufficient *ratio decidendi.*" Lord Wright has emphasised that in *Moses v. Macferlan* Lord Mansfield did not say that the law implies a promise, but that the law implies a debt or obligation, which is a different thing. The obligation is a creation of the law just as much as an obligation in tort. It is as efficacious as if it were on a contract but Lord Mansfield denies that there is a contract. Moreover Lord Wright observes that Lord Mansfield's statement of the law has been the basis of the modern English law of quasi-contract notwithstanding the criticisms which have been launched against it and that in substance the juristic concept remains as Lord Mansfield left it, the gist of the action being a debt or obligation (but not a contract) implied or imposed by the law.

[1] *(1760) 2 Burr. 1055.*
[2] *ibid at p. 1012.*
[3] *ibid, at. p. 1008.*
[4] *History and Sources of the Common Law, p. 598.*

Lord Denning has in *Kiriri Cotton Co. Ltd. v. Dewani* [1] referred to a misunderstanding of the origin of this action for money had and received. He observed that it was not an action on contract or imputed contract but was simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. All the particular heads of money had and received such as money paid under a mistake of fact, money paid under a consideration which has wholly failed and so on were observed by Lord Denning to be only instances where the law says the money ought to be returned.

Lord Atkin has likewise expressed his distaste for "fantastic resemb'ances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared."[2]

It would appear therefore that although there is high authority for the imputed contract theory, opinion is hardening in favour of the more liberal view of Lord Mansfield. Apart from the support of such eminent authorities as Lords Wright, Atkin and Denning, the more liberal view commands also the approval of the majority of writers in the field of contract who consider the alternative theory inadequate.[3] Indeed one of the more recent texts on the subject of restitution describes the concept as a "meaningless, irrelevant and misleading anachronism." [4] Viewed from the angle of legal theory, the notion of implied contract has again attracted censure, for Professor Friedmann has observed of it [5] that "it has had a deplorable effect upon the development of that branch of English law, an effect from which English law is trying to free itself."

It will suffice finally to observe of *Sinclair v. Brougham* that though it is a decision of the highest tribunal, its rationale is largely the assumption, untenable today, that all actions must fall into one or other of the rigid and exclusive compartments of contract and tort.[6] Moreover, Lord Sumner's observations were obiter dicta, as Lord Wright has observed in the *Fibrosa case.*[7] Lord Wright has there taken the view that *Sinclair v. Brougham* has not closed the door to any theory of unjust enrichment in English law, and to carry the metaphor forward in the manner done by an academic writer [8] there are others such as Professor Winfield who take the view that even if it locked the door for the purposes of that case, it left the key hanging on a nail so that if anyone now wishes to enter he can still do so.

[1] *(1960) 1 All E. R. 177 at 181.*
[2] *United Australia Ltd. v. Barclay's Bank (1940), 4 All E. R. 20 at 37*
[3] *Chitty, 22nd ed. s. 1559; see also Cheshire & Fifoot, 6th ed. p. 550; Anson, 22nd ed. p. 603.*
[4] *Goff & Jones, The Law of Restitution, p. 10.*
[5] *53 L. Q. R. 419.*
[6] *(1914) A. C. at 452.*
[7] *Fibrosa v. Fairbairn Lawson Combe Barbour Ltd., (1942), 2 All E. R. 122 at 136.*
[8] *H. C. Gutteridge, 5 Cam L. J. at 223.*

We see then that the theory of imputed contract is not nearly as compelling as it would otherwise appear and is not an obstacle to the reconciliation of the underlying principles of the English law with those of the Roman-Dutch. Lord Denning observed no less when he wrote: "The action at law for money had and received was in fact a remedy for unjust enrichment."[1] Such a conclusion enables us, on the lines indicated by Chief Justices Bertram and Sansoni and Mr. Justice Schneider, to seek out the fundamental principle underlying the English action for money had and received, without involving ourselves in the technicalities of the English law, and to note that this principle is no stranger to our legal system inasmuch as it underlies the *condictio indebiti* of our law.

The technicalities of the English action need not therefore trouble us but I would, because it was much debated before us, say a word on the question whether the action is dependent on the waiver of a tort. On this matter I would only wish to refer to the case of *United Australia Ltd. v. Barclay's Bank*[2] where many of the technicalities of this doctrine were explained. Lord Warrington there observed that "where waiving the tort was possible it was nothing more than a choice between possible alternatives, derived from a time when it was not permitted to combine them or to pursue them in the alternative and when there were procedural advantages in selecting the form of assumpsit." So also Lord Atkin dispelled many of the mysteries associated with it by pointing out that "in the ordinary case however the plaintiff has never the slightest intention of waiving, excusing, or in any kind of way palliating the tort. If I find that a thief has stolen my securities and he is in possession of the proceeds, when I sue him for that, I am not excusing him. I am protesting violently that he is a thief and because of his theft, I am suing him. Indeed he may be in prison upon my prosecution."[3] It was in this same case that Lord Atkin administered his celebrated warning to judges not to entangle themselves in the niceties of out-moded doctrines, but to pass undeterred through these "ghosts of the past who stand in the path of justice clanking their mediaeval chains." This technicality may then be dismissed, there being no necessity to launch upon any further inquiry into the niceties of this ancient doctrine.

The principle underlying the action for money had and received is thus satisfied in this case, for the proceeds of the plaintiff's cheque lying in the bank's hands were moneys which the bank was obliged by ties of natural justice and equity to refund. The bank in carrying on its functions as a banker has, through the negligence or fraud of its own servant or servants, collected the money due to the plaintiff upon her dividend warrant and by a further act of negligence deprived her of her right to follow the money into its hands. In these circumstances the duty in natural justice and equity to refund is too clear to enable the bank to ride off upon any technicality.

[1] *(1949) 65 L. Q. R. at 48.* [2] *(1940) 4 All E. R. 20.*
[3] *(1940) 4 All E. R. at pp. 36-7.*

If therefore the English action for money had and received be the determining factor, there would in my view be little difficulty in bringing the facts of this case within the scope of that action.

Passing now to the question of unjust enrichment under the Roman-Dutch law, I proceed to consider the very interesting submission made on behalf of the respondent that the facts of this case fail to conform to the requirements of any of the standard Roman-Dutch enrichment actions, and that this is a case in which the Roman-Dutch law relating to unjust enrichment would therefore afford no relief.

The principal submission made in this connection was in regard to the *condictio indebiti* and it was submitted that its requisites were not satisfied as the sum claimed had not been knowingly paid by the plaintiff to the defendant. It was further submitted that a direct payment by the plaintiff or his agent is a requisite of all the *condictiones* through which quasi-contractual relief may be sought.

No discussion of the question of unjust enrichment in the modern Roman-Dutch law is complete without reference to the valuable academic discussions which have in recent years done much to clarify the law, and from which the highest tribunals in South Africa have derived much assistance [1]. I refer to the writings of such jurists as Professor Scholtens, Professor Wouter de Vos and Dr. Honore whose specialised study of this difficult branch of the law has time and again received recognition in South African decisions. I would have welcomed more adequate reference at the argument to these juristic discussions, and my observations in regard to them are subject to the infirmity that they are largely the result of my own inquiries and would no doubt have been more comprehensive had I the benefit of such fuller assistance.

I am in agreement with the submission for the respondent that the facts of this case do not fit the *condictio indebiti* for that action requires a conscious payment or transfer. Dr. Honore in a comprehensive article on *condictio* and payment [2] in which he has sought to give an extended meaning to the concept of payment, has exhaustively analysed into seven categories the various cases that amount to payment or transfer for the purpose of the *condictio indebiti* and the *condictio ob rem dati*. The facts of the present case do not fit into any one of those categories, and it is clear that the *condictio indebiti* (or for that matter the *condictio ob rem dati*) would not be available to the plaintiff.

This would appear further to be a case where the facts cannot be brought within the requisites of any of the other standard enrichment actions of the Roman-Dutch law, such as the *condictio causa data causa non secuta* or the *condictio ob turpem vel injustam causam* or the *condictio sine causa* in the sense of recovery of money on failure of consideration.

[1] See for example *Nortje en'n Ander v. Pool, N. O.* supra (1966), 3 S. A. 96 (A.D.); *Gouws v. Jester Pool (Pty.) Ltd.* (1968), 3 S. A. 563.

[2] *1958 Acta Juridica, p. 135.*

The *condictio furtiva* likewise would not be available because the defendant was acting bona fide in receiving and cashing the cheque.[1] Consequently, relief by way of unjust enrichment in the Roman-Dutch law would not be available except on the basis of the recognition of a general principle of enrichment as giving rise to an obligation to restore. It becomes necessary therefore to examine whether such a comprehensive general action, which may be described as a *condictio sine causa generalis*, receives recognition in the modern Roman-Dutch law, as a means of relief in those enrichment situations which do not fit into the framework of any of the classical enrichment actions.

Statements of a general nature suggestive of the existence of a broad underlying basic principle are indeed not lacking in the works of the Roman-Dutch writers. Thus Grotius[2] states with regard to obligations arising from enrichment (*baettrekking*): "Inequality which profits or might profit another (i.e., apart from contract) binds the person profited to make compensation, without regard to the way in which he came by the profit, and this with regard not only to things *in specie* but also to things *in genere*; e.g., if one man were fed with another man's food; for by the law of nature he is bound to make compensation, that is, to re-establish equality." He also observes[3] "Obligation from enrichment (*baettrekking*) arises when some one without legal title derives or may derive advantage from another person's property." Further, Professor Scholtens in an illuminating article on the subject[4] has pointed out that not only Grotius but also Van Leeuwen and Huber mention *baettrekking* (enrichment) as a source of obligation.

There are however certain pronouncements both of this Court and of the Appellate Division of South Africa which would appear to militate against this view.

In *Silva v. Fernando*[5] Lascelles, C.J. observed that he could find no authority in the text books in which the principle that no one should be enriched at the expense of another had been extended to a case like that before him and that as far as he could ascertain the application of the principle was limited to certain well defined cases.

However for Ceylon there are other decisions of co-ordinate authority indicating a broader view[6] and the question is therefore an open one.

In South Africa however a bench of five judges of the Appellate Division has quite recently examined the question in very great detail in the case of *Nortje en'n ander v. Pool N.O.*[7] and the majority decision in that case,

[1] See *Bell v. Esselen, (1954) 1 S. A. L. R. 147.*
[2] *3.1.15.*
[3] *3.30.1.*
[4] *(1966) 83 S. A. L. J. 391 at 394-5.*
[5] *(1912) 16 N. L. R. 114 at 116.*
[6] See *Jayetilleke v. Siriwardane, (1954) 56 N. L. R. 73 at 80.*
[7] *(1966) 3 S. A. 96 (A.D.).*

one of compelling authority in that country, creates much difficulty in the way of the acceptance of a general principle of unjust enrichment. That decision rejected the contention that there is a general enrichment action in the Roman-Dutch law, and if that decision be correct, the plaintiff in the present case would not be able to succeed on her claim for unjust enrichment at any rate in so far as the Roman-Dutch law is concerned. It would also indicate much divergence in practical application between the English principle of unjust enrichment and that of the Roman-Dutch law, and seriously undermine any effort to relate them as was attempted in *Saibo v. Attorney-General*[1], *Don Cornelis v. de Soysa & Co. Ltd.*[2] and *The Imperial Bank of India v. Abeysinghe*[3].

Now, the decisions of the Appellate Division of South Africa have always been treated in this country with the greatest respect as containing authoritative statements of the Roman-Dutch law by the highest tribunal of the world's largest Roman-Dutch jurisdiction, and though not bound by these decisions, this Court has consistently treated them as of the greatest persuasive value. However, upon a very careful examination of the principle emerging from that decision I find myself to be of a different view, and being free in this jurisdiction to consider this matter as still an open one, I would with the utmost respect, venture to take a broader view of the scope of unjust enrichment.

In *Nortje's case* considerable expenditure had been incurred in discovering kaolin on land which was the subject of an invalid contract, and the plaintiffs claimed enrichment of the owner's estate in that the market value of the property had been enhanced by the exposure of deposits of kaolin in exploitable quantities. The unjust enrichment averred was the expense incurred by the plaintiffs in finding the kaolin. Relief was claimed by way of an extension of the action of the bona fide possessor for *impensae utiles*, and alternatively by way of an extension of this action to the bona fide occupier and in any event upon the basis of a general action for unjust enrichment. On this last ground the defendants urged that the claim did not come under any one of the recognised enrichment actions of the Roman-Dutch law—a contention which the court upheld by a majority judgment.

In reaching this conclusion the court relied *inter alia* on an observation of Professor Wouter de Vos, one of the foremost writers on the subject of unjust enrichment in the Roman-Dutch law, that there did not appear to have been a general enrichment action in the classical Roman-Dutch law.

Professor de Vos in his writings[4] whilst strongly expressing the view that such a generalaction has been recognised and ought to be recognised by the modern law, had pointed out[5] that there did not appear to be a

[1] *(1947) 48 N. L. R. 574.*
[2] *(1965) 68 N. L. R. 161 ; 69 C. L. W. 24.*
[3] *(1927) 29 N. L. R. 255 at 264.*
[4] *Verrykingsaanspreeklikheid in die Suid Afrikaanse, 1958 and to the same effect in 1960 Juridical Review pp. 125 and 126.*
[5] *1960 Juridical Review p. 142.*

recognition in the Roman-Dutch law of the sixteenth and seventeenth centuries of a general principle of enrichment. Professor de Vos stated in these works that he had been able to discover only one case where the Hooge Raad had allowed an action *ex aequitate* because the case could not be brought within one of the recognised actions. The case so referred to was one reported by Bynkershoek [1] in which the court simply allowed a claim on grounds of equity and made no attempt to classify. Professor de Vos thought that it did not appear warrantable to conclude on the strength of that one case that the classical Roman-Dutch law recognised a general enrichment liability. It was this conclusion to which the Appellate Division referred.

However since the publication of Professor de Vos to which I have referred[2] there has appeared in print the Observationes Tumultuariae Novae of W. Pauw, a President of the Hooge Raad, who reported decisions commencing where Bynkershoek left off, and covering the years 1743 to 1755. This publication, the work of four editors, appeared in the year 1964, and the cases there reported make it clear, in the words of Professor Scholtens[5] that " the Roman-Dutch law of the eighteenth century had advanced far on this road of progress (i.e., towards a general principle of enrichment[3]) nay, that it had arrived at its destination." The particular decisions reported by Pauw which conclusively show the existence of such a general principle include Nos. 12, 196 and 558, which may be found conveniently summarised in the South African Law Journal [4].

Professor Scholtens, in criticising the judgment of the Appellate Division in *Nortje's case*, has drawn attention to the fact that these decisions in the Observationes Tumultuariae Novae were not available to the Bench. Indeed Professor de Vos himself has acknowledged that Professor Scholtens is undoubtedly right when he contends that as a consequence of the further cases where a general enrichment action was granted, which have now become known as a result of the publication of Pauw's Observationes Tumultuariae Novae, it must be accepted that the Roman-Dutch law had in practice advanced beyond the point of a mere patchwork of specific actions and that a general action on unjust enrichment had developed[5]. Professor de Vos himself considers it a moot question whether the decision in *Nortje's case* may not indeed have gone the other way if the attention of the court had been drawn to the Observationes Tumultuariae Novae.

The factors to which I have referred are indicative of the possibility that with fuller material based on valuable sources of Roman-Dutch law recently made available, the court may well have decided differently. Furthermore it is my view with much respect that relief for unjust enrichment in the Roman-Dutch law has not in the past and should not in the future be confined strictly to the various specific enrichment actions evolved by that system to meet specific classes of situations.

[1] *Observationes Tumultuariae No. 303.*
[2] *See Note [1] Supra.*
[3] *(1966) 83 S. A. L. J. at 402.*
[4] *(1966) 83 S. A. L. J. pp. 396-7.*
[5] *(1969) 86 S. A. L. J. at 230.*

It would be well to refer briefly at this point to certain other decisions in the modern law which are indicative of the recognition of such a general enrichment action. In *Hauman v. Nortje*[1] it was permitted to a contracting party who was debarred from instituting a contractual action to institute an action directly on the ground of unjust enrichment without the necessity to invoke any particular form of action. This judgment is of importance as establishing the availability of an enrichment action in modern law under circumstances which could not be fitted into any of the accepted categories of the classical Roman-Dutch law.

Another significant development of the principle of general liability in the modern law is the application of the principle in cases of compensation for improvements, which did not fall within any of the established categories of the classical law. Even more importantly the case of *Pretorius v. Van Zyl*[2] contained the following observation by de Villiers, J. P.: "The doctrine against enrichment is well established . . . The doctrine has been recognised by the Appellate Division in several cases, for instance, *Rubin v. Botha*, *Fletcher v. Bulawayo Waterworks Co. Ltd.* and *Lechoana v. Cloete*. It is true that these three cases deal with the occupation of land, but the doctrine against enrichment is in them applied to circumstances where the law as to compensation for improvement to landed property does not apply: in other words, in circumstances which would equally well have warranted its application to any other cases of enrichment. On general reasoning too, it seems reasonable to suppose that the doctrine against enrichment, as it exists at all, must necessarily be of general application. I come to the conclusion that the doctrine against enrichment at the expense of another is of general application."

The principle underlying such cases as *Rubin v. Botha* and *Fletcher v. Bulawayo Municipality* was applied by the Privy Council in the Ceylon case of *Hassanally v. Cassim*[3] where their Lordships proceeded on the basis that the claim of the improver "was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment."[4] The Privy Council in that case corrected a long standing view of the Ceylon Courts based upon *Soysa v. Mohideen*[5] that it was not competent to a lessee to set up a claim for compensation for improvements, observing that this view was based on the error of not applying this cardinal rule. Their Lordships went on to observe that in allowing the appeal they "entertain no doubt that they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago."

[1] *(1914) A. D. 293.*
[2] *(1927) O. P. D. 226.*
[3] *(1960) 61 N. L. R. 529.*
[4] *at p. 539.*
[5] *(1914) 17 N. L. R. 279.*

To the same effect Gratiaen, A.C.J. observed in *Jayatilleke v. Siriwardene*[1]: "In England, the rule against unjust enrichment has been adopted by gradual stages, with the assistance of legal fictions such as the 'quasi-contract' and in more recent times, the 'quasi-estoppel'. But in countries which are governed by the Roman-Dutch law, this broad and fundamental doctrine is unfettered by technicalities, and there is no need to insist on proof that the general rule has been previously applied in a precisely similar situation. The comprehensiveness of the Roman-Dutch law principle must be enforced whenever the 'enrichment' asked for would in the facts of a particular case, be demonstrably 'unjust'."

Dicta suggestive of a broad view of the scope of the equitable principle as affording a general cause of action, are also to be found in *Knoll v. South African Flooring Industries.*[2]

The effect of these decisions may be summarised in the words of Professor de Vos[3] in terms that: "The courts have not merely added a few more classes of cases in which the person impoverished would have a claim—they have in truth decided that, *in all cases* where there has been unjustified enrichment of one person at the expense of another, and where the case does not fall into one of the old categories, there shall be a liability except where public policy militates against this."

The view that such a general enrichment principle exists in the modern law finds support also in treatises on the modern law. Thus Hahlo & Kahn observe,[4] after noting the opposing view on the matter, that the better view is that a general subsidiary action on unjust enrichment forms part of the modern law. So also, Wille[5] observes that "today the old classification has been discarded in our law, and unjustified enrichment is recognised as a distinct source of obligation." This latter statement has received express judicial approval in *Krueger v. Navratil*[6] though of course it must not, as de Vos points out,[7] be understood to mean that the old remedies no longer apply. To quote Professor de Vos[8] "It has been shown that there has been a tendency for centuries towards making the maxims in the *Corpus Iuris* aimed against unjustified enrichment progressively more effective by granting remedies over an ever-widening field. This enlargement of the remedy against unjustified enrichment which has taken place in South Africa is thus merely the logical advance along this ancient road."

[1] *(1954) 56 N. L. R. 73 at 80.*
[2] *(1951) 1 S. A. 404 (T).*
[3] *1960 Juridical Review, pp. 230-9.*
[4] *The Union of South Africa, 2nd ed. p. 570.*
[5] *Principles of South African Law, 5th ed. p. 408.*
[6] *(1952), 4 S. A. 405 S. W. A.*
[7] *1960 Juridical Review, p. 237.*
[8] *Ibid, p. 240.*

This case of *Krueger v. Navratil*, just referred to, is a case of some particular relevance to us in the context of the facts of the present case, as it deals with enrichment resulting from appropriation of stolen property. In that case the plaintiff claimed that the plaintiff's agent had wrongfully and unlawfully appropriated certain items of property of the plaintiff to the benefit and profit of the defendant and that the defendant received the benefits and profits arising from this wrongful act. The property appropriated included a motor lorry, a number of pelts and four hundred sheep. The plaintiff averred that he was entitled to the recovery of this enrichment which consisted in the items of stolen property enumerated.

The court applied the broad general doctrine of enrichment and found that a cause of action in unjust enrichment had accrued to the plaintiff. In so doing it relied on the passage from Wille just referred to, and also on the statement of Grotius that obligation from enrichment arises when someone without legal title derives or may derive advantage from another's property. This judgment went on to hold that the plaintiff was entitled not only to the actual benefit accruing to the defendant but also to the benefit which the defendant may have derived from the use of such property and in that respect has probably been too liberal in its assessment of the scope of relief available[1]; but the special interest of the case so far as we are concerned lies in its discussion of the availability of the general enrichment principle to meet a case of the appropriation of stolen property by a receiver from the thief.

In thus recognising the existence of a general principle of enrichment, the modern Roman-Dutch law, it is important to note, is by no means breaking fresh ground in regard to the extension and development of the original Roman principles but is, as de Vos observes, only keeping in step with other Romanistic legal systems. The departure from the original comparmentalised attitude is to be found also in other related jurisdictions.[2] Thus although the Roman law did not recognise a general enrichment liability, the German law gradually enlarged the specific enrichment actions of the Roman law into a general enrichment action (see now section 812 of the German Civil Code). So also Switzerland has followed a not dissimilar course in recognising a general enrichment liability as arising at common law and in recognising and regulating it by the Federal Code of Obligations, section 62 of which provides that "Any person who is enriched without legal cause at the expense of another is bound to make restitution. The enrichment must particularly be returned where it was received without a valid cause because the cause was not realised or because the cause has ceased to exist." In other jurisdictions such as Quebec and Belgium the general liability would appear to be the creation of the Courts.

[1] See *(1953) 70 S. A. L. J. 9.*

[2] *See generally on this aspect Gutteridge & David, 1933-5 Cam L. J. 204; McGregor, 55 SALJ and de Vos, 1960 Juridical Review pp. 125-9.*

It is true that the French Code Civile does not contain a general principle of unjust enrichment but contains several specific provisions based on this principle. Even under that system, however, it would appear that writers have urged that the special provisions therein contained can only be explained on the basis of a general principle of liability, and under the influence of the text writers a great change has taken place towards the end of the last century, since when there has been recognition of unjustified enrichment as a source of obligations.[1] It would appear that since a decision of June 15, 1892 the Courts have consistently held that one person may not without justification derive an enrichment from the detriment of another and that although this is only case-made law, and no precedent is binding in France, no defendant now questions the existence of such a rule.[2]

It is also of much interest to note that although the draftsmen of the Code Napoleon preferred to refer to the special instances of enrichment known to the French law rather than to codify an all-embracing underlying principle, Pothier who has so much significance for us as an expounder of the Civil law, and on whose writings so much also in the Code Napoleon is based, had indeed taken the view that the principles of *Equite* (natural justice) must prevail over the niceties of the law, "so that ' natural justice' is a sufficient foundation for a civil obligation and a cause of action."[3] So also Potheir has observed[4] in regard to quasi-contracts that "the law alone, or natural equity, produces the obligation, by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because without being contracts, . . : they produce obligations in the same manner as actual contracts."

A comparison with these systems assists us then in arriving at the conclusion that there is no element of inconsistency with the Roman groundwork of our legal system in formulating such a general principle and that in taking such a step we are not voyaging into the unknown or venturing out alone.

Since then there is nothing in principle which militates against the recognition of such a liability in a system stemming from the Roman law, and since the better view would appear to be that the modern Roman-Dutch law does recognise such a general principle of liability, it only remains to examine what requisites may be extracted from the learning upon the subject as being essential pre-conditions for the availability of relief. These requisites cannot be better stated than they have been by Professor de Vos[5] who has set them out as being : (*a*) the

[1] *1960 Juridical Review pp. 126-7 ; 5 Cam L. J. at 208.*

[2] *5 Cam L. J. at 208-9.*

[3] *Pothier, Oeuvres, vol. 5 No. 182—See the references thereto in 5 Cam. L. J. at p. 206.*

[4] *Obligations, Pt. 1 c 1. s. 1 art 114.*

[5] *Verrykingsaanspreeklikheid in die Suid Afrikaanse, pp. 180-206; 1960 Juridical Review pp. 241.-2.*

defendant must be enriched ; (*b*) the enrichment must be at the expense of another (i.e., the plaintiff must be impoverished and there must be a causal connection between enrichment and impoverishment) ; (*c*) the enrichment must be unjustified ; (*d*) the case should not come under the scope of one of the classical enrichment actions ; (*e*) there should be no positive rule of law which refuses an action to the impoverished person.

All these requisites are satisfied by the circumstances of the present case.

It is true the present case is not one of direct enrichment by a party to the transaction but of enrichment by a third party. This circumstance does not however prevent an enrichment action from being available. In Roman, Roman-Dutch and South African law alike there are some cases in which a remedy for enrichment is given against third parties who have indirectly or incidentally derived benefit from a transaction in which the plaintiff is impoverished.[1] The reluctance to extend the enrichment principle to cover benefits received by third parties is, as Dr. Honore[2] observes, traceable to the importation into the sphere of unjust enrichment of notions pertaining to the law of contract.

One may also note in this context an observation by Dr. Honore[3] who, in criticising, though on another ground, the refusal to allow the *condictio indebiti* in *Bell v. Esselen*,[4] made the significant observation that the plaintiff should have been permitted to condict the money from the defendant " not because the English notion of conversion is applicable to Roman-Dutch law but by the well developed principles of Roman law which are amply sufficient to deal with the complexities of payments made by cheque or bill of exchange."

For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment, I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development ; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts.

If the view in *Nortje's case* be correct we have, with much respect, reached the end of the development of the principle of unjust enrichment. A principle vibrant with life and struggling for growth, would then be

[1] *See A. M. Honore : Third Party Enrichment, Acta Juridica, 1960 p.236.*
[2] *Ibid, p. 253.*
[3] *1958 Acta Juridica pp. 135-40.*
[4] *(1951) 1 S. A. L. R. 117.*

locked for ever in tight compartments, a prisoner of the past. Such a view bodes ill for the future, for it cramps development in what truly is and surely ought to be an area of significant advance. We cannnot thus cry halt at one of the vital frontiers of the law.

I hold therefore, that the plaintiff would be entitled to recover the sum claimed from the defendant on the basis of the general principle of enrichment which is recognised by the Roman-Dutch law.

In the result, then, the plaintiff is in my view entitled to succeed both on the basis of conversion and on the basis of unjust enrichment, and, reversing the judgment of the learned trial judge, I would enter judgment for the plaintiff in the amount claimed. The plaintiff will be entitled to her costs both here and in the court below.

WIJAYATILAKE, J.—

On the evidence led in this case two important questions of Law have arisen for determination—firstly whether the English Law of conversion in respect of cheque transactions as in the instant case is part of our law and if so whether a Banker is liable under the Law of conversion ; secondly whether the plaintiff is entitled to the alternative remedy on the basis of an action for restitution of money had and received which is in fact a remedy for unjust enrichment.

On a close scrutiny of the facts of this case, with great respect, I agree with the views expressed above that both these questions have to be answered in the affirmative. I do not think it necessary for me to repeat the views already expressed but considering the importance of the questions raised I would make a few general observations.

As the argument proceeded at a very high academic level I was beginning to wonder whether the system of law in this country is so anaemic and outmoded that the plaintiff should be shut out from recovering what is justly due to her. This case has been referred to a Bench of five Judges in view of the decision of the Divisional Bench in the case of *Daniel Silva v. Johanis Appuhamy*[1]. Now that the judgments in this far reaching case have been discussed and dissected in great detail it is doubtful whether that Bench would have taken the same view in regard to the applicability of the Law of Conversion in Ceylon in respect of cheques if only its attention had been drawn to Section 2 of Ordinance 5 of 1852.

In my opinion the intention of the Legislature to bring a case of this nature within the scope of Ordinance 5 of 1852 is clear when referring to cheques it uses the words " . . . . . and in respect of *all matters connected with such* instruments . . . . . , or if the act in respect of which *any question* shall have arisen, had been done in England ". During the period of this enactment shortly after the coffee crisis in 1847 and world-wide depression in 1848 the British commercial interests were foremost and one could well appreciate the urge on the part of the Banks which were entirely British

[1] *(1965) 67 N. L. R. 457.*

except for The Bank of Ceylon which had failed with the coffee crisis and the leading Commercial firms and Agency houses mostly British to safeguard their transactions by adopting the Law of their country. No doubt, our common law was then as it is now, the Roman-Dutch Law. In the interpretation and construction of a statute there is a presumption against altering the common law. As Devlin J. observed " It is a well established principle of construction that a statute is not to be taken as effecting a fundamental alteration of the general law unless it uses words that point unmistakably to that conclusion ". (*National Assistance Board v. Wilkinson* [1].) As Dias in his treatise on " Jurisprudence " (2nd ed.) at page 122 comments this principle is based on the belief in the self-sufficiency of the common-law. Could we say that in 1852 our common-law was self-sufficient to meet a situation such as the one that has arisen in this case ? The answer to this question is in the negative and it is set out fully in the judgments of the Divisional Bench in the case of *Daniel Silva v. Johanis Appuhamy* referred to earlier. I am of opinion that the Bills of Exchange Ordinance though it is not in the same terms is sufficiently wide enough for us to hold that in regard to a transaction of this nature pertaining to a cheque it is the English Law which applies.

T. S. Fernando J. observes that " section 98 (2) of the Bills of Exchange Ordinance was only intended to apply to any omission 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 ". Tambiah J. observes that, " 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 liabilities of persons under the general law of the land when a bank enters into transactions ". There is nothing to show in their judgments that their attention was drawn to the very vital Ordinance 5 of 1852. Perhaps, if they were made aware of it the provisions of the Bills of Exchange Ordinance would have been seen in a different background.

Tambiah J. has referred to the operation of the Bills of Exchange Ordinance in South Africa and Canada : but so far as Ceylon is concerned there was this important historical land mark—Ordinance 5 of 1852. In my opinion this is of great significance and it is a beacon light we have to constantly keep in mind when seeking to interpret the relevant provisions of our Bills of Exchange Ordinance. With great respect, I might observe that there is a real danger in relying on foreign judgments interpreting statutes without reference to the background of these statutes.

In the interpretation and construction of a statute we have to keep in mind the several rules laid down by judicial precedent and lest we get entangled and enmeshed in them it would be well to remember how a

[1] *(1952) 2 Q. B. 648 at 661.*

shrewd writer summed up the position. Dias quotes this in his treatise at page 108 : " A Court invokes whichever of the rules which produces a result that satisfies its sense of justice in the case before it ".

The history of this form of action has been discussed at length in *Daniel Silva's* case but that too being a case pertaining to a cheque transaction the omission to deal with the Ordinance of 1852 is so vital that this decision is open to question although the defendant there was not a Banker. I might also state that in discussing these legal concepts one has to guard against taking a too rigid and a parochial view of them. It would be quite unrealistic and academic to confine them to water-tight compartments, or barbed-wire encampments. One has to recognise the fact that jurisprudence today does not stress the distinctions between these legal concepts as in the past. Today jurists recognise the fact that they fuse into one another with the ultimate object of serving the public interest. It is the essence of justice that we have to keep in mind with a view to suppressing the mischief and advancing the remedy and to suppress subtle inventions and evasions for continuance of the mischief and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico* (Heyden's Case—see Dias, page 134). It would be well to remember the words of Bertram C.J. in *Gunatilake v. Fernando*[1] : " But we are no longer tied to forms of action. If the law recognizes a right, it will provide its own forms for enforcing it ".

In Ceylon, although our common law is the Roman-Dutch Law, the principles of English Law have been introduced from time to time, particularly in the field of banking. Vide Section 3 of the Civil Law Ordinance. Learned counsel for the respondent submits that the facts in this case do not constitute a transaction governed by the law of banking as such. In my opinion it would be highly unrealistic to say that this transaction falls outside the pale of " the law of banks and banking ". It may be noted that the section refers not only to the *law of banking* but the *law of banks*. To quote the words of Lord Denning M. R. in a recent case : " We (the Judges) are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them "—*Allen v. Thorn Electrical Industries*[2]. Much has been said about the necessity to apply the principle of our common law—the Roman-Dutch Law—without adulterating it with the English Law. This view appears to be far too out-dated and quite contrary to the progress and development of our law. In fact Tambiah J. in *Kamalawathie v. de Silva*[3] observes that Law like race is not a pure blooded creature and he stresses the inroads made by English Law into the legal system of Africa.

As Tambiah J. states 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. Now that this appeal has been argued very fully before us the question does arise whether

[1] *(1919) 21 N. L. R. at 268.* [2] *(1968) 1 Q. B. 487 at 502.*
[3] *(1961) 64 N. L. R. 252.*

the conclusion arrived at in *Daniel Silva's case* that this particular remedy was not available under our Law in the context of the facts in that case is correct—assuming that in the instant case the remedy is in fact available. In my opinion the mere fact the defendant in that case was apparently a bona fide holder for value in due course would not absolve him as the Bills of Exchange Ordinance (read with Ordinance 5 of 1852) does not restrict the cause of action as against a Banker only. It may be argued that if we hold that the view taken by this Court in *Daniel Silva's case* is erroneous it will seriously hamper cheque transactions but, in my view, cheques cannot be equated with Government currency. It may well be that the English Courts granted this remedy by a process of extension with a view to checking careless and fraudulent transactions in the field of commerce. The facts in *Daniel Silva's case* are a pointer to this.

On the question of undue enrichment the facts are so cogent that I need hardly repeat them. The Bank failed to call Thuraiappah who was in Court. Surely it was the duty of the Bank to make a frank disclosure of all the facts. Why did the Bank fail to call Thuraiappah ? One need hardly answer the question. The answer is so eloquent. Obviously, the chief actor in the transaction has been kept out and a volume of evidence has been led leading the Court to a realm of speculation. The question did arise as to the use of the ultra-violet ray machine to check any alteration on the dividend warrant. It is significant that although Thuraiappah appears to have in the Magistrate's Court spoken to the use of this machine for examination of this particular dividend warrant the Bank far from seeking to rely on this in these proceedings objected to the plaintiff eliciting this fact ! Furthermore, the loss of the dividend warrant at National & Grindlay's suggests that an officer or officers of the Bank of Ceylon (Wellawatte Branch) have been actively interested in this transaction. The mere fact that Handy has given evidence is of little value—when Thuraiappah who played the most vital part in this transaction was not called. A public institution like the Bank of Ceylon should have made a full disclosure instead of keeping the Court guessing on a matter of this nature. The dividend warrant was marked " not negotiable " and endorsed by the plaintiff to her account. This was the largest sum changed on this day and the only dividend warrant of the transactions. I am satisfied that the negligence on the part of the Bank has been clearly proved to found an action for money had and received. With great respect I am of the view that the principle set out by Sansoni C. J. in *Don Cornelis v. de Soysa & Co. Ltd.*[1] and by Schneider J. in *The Imperial Bank of India v. Abeyasinghe*[2] applies with equal force to the facts in this case.

I would accordingly allow the appeal and enter judgment for plaintiff as prayed for with costs in both Courts.

Appeal allowed.

[1] *(1965) 68 N. L. R. 161.* [2] *(1927) 29 N. L. R. 257.*