APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J

H.C. 1948

Aug. 24.

ABDUL RAZAK (APPELLANT)

v.

U PAW TUN AUNG & Co. (RESPONDENTS).*

Appeal under s. 20 of the Union Judiciary Act—Order XLI, Rule 22, Civil Procedure Code—Cross-objection—Whether can be filed—Pledge of jewellery with contract that after a period it will be irredeemable—Ss. 176 and 177 of the Contract Act—Sale by the pledgee after the period—Conversion—Measure of damages whether to be determined at the date of the conversion or at the date of the suit.

Held : Under Order XLI, Rule 22 of the Code of Civil Procedure cross-objection can be filed in an appeal under s. 20 of the Union Judiciary Act, 1948 (Corresponding to letters patent appeal).

Abhlakh Baksh Singh and others v. *Thakur Prasad and others*, (1943) I.L.R. 18 Luck. 256 ; *Abhilakhi* v. *Sada Nand*, (1931) I.L.R. 53 All. 535 (F.B.) ; *Sabitri Thakurain* v. *Savi*, (1921) I.L.R. 48 Cal. 481 ; *Sein Dass* v. *Lakhajee and another*, (1940) R.L.R. 393 ; *M. D. Venkatasam Chetty and one* v. *Mathichand Gulabchand*, (1926) I.L.R. 49 Mad. 291, followed.

Lala Khazanchi Shah v. *Haji Niaz Ali*, A.I.R. (1940) Lah. 438 at p. 441 ; *Mir Ghulam Hussain Sahib* v. *Ayesha Bibi and twelve others*, I.L.R. (1941) Mad. 775 (F.B.), referred to.

Even though a pledger agrees that he will have no right of redemption after a certain period still his right of redemption continues under ss. 176 and 177 of the Contract Act. The pledger cannot contract himself out of his statutory right given by ss. 176 and 177 of the Contract Act and if the pledgee sells the pledged articles without due notice as provided in the act, he is guilty of conversion.

The Co-operative Hindusthan Bank, Limited v. *Surendranath De*, (1932) I.L.R. 59 Cal. 667 at p. 668, followed.

The B.I.S.N. Company, Limited v *Alibhai Mahomed*, (1919-20) 10 L.B.R. 292 (F.B.) : *Fut Chong* v. *Maung Po Cho*, (1929) I.L.R. 7 Ran. 339 ; *The Bombay Steam Navigation Company, Limited* v. *Vasudev Baburao Kemat*, (1928) I.L.R. 52 Bom. 37 ; *Lakhaji Dallaji & Co.* v. *Boorugu Mahades Rajanna and one*, A.I.R. (1939) Bom. 101 ; *Brij Coomaree* v. *Salamander Fire Insurance, Company*, (1905) I.L.R. 32 Cal. 816 at p. 823, referred to.

Dwarika v. *Bagawati*, A.I.R. (1939) Ran. 413 at p. 414, dissented from.

Measure of damages in a suit for conversion of pledged goods made *bona fide* is the market value of the goods sold at the time of conversion and not at the time of the institution of the suit.

---

* Special Civil Appeal No. 4 of 1948 under s. 20 of the Union Judiciary Act against the judgment and decree of U THAUNG SEIN, J. in Civil 2nd Appeal No. 129 of 1947 reported in (1948) Bur. L.R. 182.

S.L. Ramaswamy Chettiar and one v. *M.S.A.P.L. Palaniappa Chettiar*, A.I.R. (1930) Mad. 364 ; *Alliance Bank of Simla (in Liquidation)* v. *Ghamandi Laljaini Lal*, (1927) I.L.R. 8 Lah. 373 ; *Bhimji N. Dalai* v. *Bombay Trust Corporation, Limited*, A.I.R. (1930) Bom. 306 ; *Shivaprasad Singh* v. *Prayagkumari Debee*, (1934) I.L.R. 59 Cal. 711 at pp. 738 and 739 ; *Motilal* v. *Lakshmichand*, A.I.R. (1943) Nag. 163 ; *Solloway and one* v. *McLaughlin*, (1938) A.C. 247 ; *Brierly* v. *Kendall*, (1852) 117 E.R. 1540; *Johnson* v. *Stear*, (1863) 143 E.R. 812 ; *Owners of Steamship Celia* v. *Owners of Steamship Volturno*, (1921) A.C. 544 (House of Lords) ; *Owners of Dredger Leisbosch* v. *Owners of Steamship Edison*, (1933) A.C. 449 (House of Lords) ; *SS. Celia* v. *SS. Volturno*, (1921) 2 A.C. 544 at pp. 562 to 564, followed.

Louis Dreyfu & Co. v. *Firm of Ghandamal & Co.*, (1919) 52 I.C. 878 ; *Bansidhar* v. *Sant Lal*, 10 All. 133 ; *Ma Me Shin* v. *Rm.R.n. N. Chettyar Firm*, A.I.R. (1933) Ran. 76 ; *Greening* v. *Wilkinson*, (1825—29) R.R. 790 ; *Rosenthal* v. *Alderton & Sons Ltd.*, (1946) K.B. 374, distinguished.

Donald v. *Suckling*, (1866) L.R. 1 Q.B.D. 585 ; *Wilkinson* v. *Verity*, (1871) L.R. 6 C.P. 206 ; *Beaman* v. *A.B.T.S., Limited*, (1948) 64 T.L.R. 285 at p. 287 : *Clayton* v. *Le Roy*, 27 T.L.R. 479 (1911) 2 K.B. 1031 ; *Sachs* v. *Miklos*, (1947) 64 T.L.R. 181 ; *France* v. *Gaudet*, (1871) L.R. 6 Q.B.D. 199 referred to.

Tun Sein for the appellant.

P. K. Basu for the respondents.

U THEIN MAUNG, C.J.—This is an appeal under section 20 of the Union Judiciary Act, 1948, in which cross-objections have been filed by the respondent.

The facts are as follows. The appellant filed a suit for redemption of gold ornaments or for recovery of their value alleging that he had made over his gold ornaments to the respondent as security for a loan of Rs. 950 with interest at annas ten per cent per mensem on the 17th January 1941, and that the respondent has failed to allow redemption and to deliver the gold ornaments inspite of repeated demands therefor.

The respondent's defence was that the appellant had lost his title to the gold ornaments as " under the terms of the pledge (Ex. A and Ex. 1) the plaintiff was to redeem the gold by the end of Tagu, 1302 B.E. (circa April 1941) failing which he was to lose his title

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & CO.

U THEIN MAUNG, C.J.

to the said gold in favour of the defendant " and " the plaintiff failed to turn up to redeem the gold within the stipulated time."

The Court of First instance decreed the suit as the respondent was found to have sold the gold ornaments on the 14th September 1942 without having given notice to the appellant of his intention to do so as required by section 176 of the Contract Act and directed the respondent to pay Rs. 2,747-5 as compensation at " the present market value of gold " minus what was due on the pledge at the date of the sale if the gold ornaments could not be returned.

The Court of First Appeal confirmed the decree. However, the Court of Second Appeal modified the decree by reducing the amount of compensation to Rs. 308-14 on the basis of the market value of gold on the date of conversion, *i.e.* on the 14th September 1942.

The appellant now contends that he is entitled to compensation on the basis of the market value on the date of the judgment of Court of First Instance and the respondent has filed cross-objections claiming that the suit should have been dimissed.

We shall consider the cross-objections first as the appeal must fail if the cross-objections prevail. The learned Advocate for the appellant has contended that no cross-objection can be filed in an appeal under section 20 of the Union Judiciary Act, 1948 ; and he has invited our attention to *Abhlakh Buksh Singh and others* v. *Thakur Prasad and others* (1) and *Abhilakhi* v. *Sada Nand* (2).

However *A. B. Singh*'s case (1) is one in which cross-objections were filed by a person who had no right

(1) (1943) I.L.R. 18 Luck. 256. (2) (1931) I.L.R. 53 All. 535 (F.B.).

of appeal under any law whatsoever and the Court observed :

" Where the law confers no right upon a party to file an appeal, it follows that he is precluded from filing cross-objections to the appeal."

Abhilakhi v. *Sada Nand* (1) is a case in which it was held that " while the procedure of the Civil Procedure Code does apply to the hearing of Letters Patent appeals and to the consequent decrees, the jurisdiction in the exercise of which the judgments are made is derived from the Letters Patent and not from the Code " and that no application lies for review of a judgment passed in an appeal under clause 10 of the Letters Patent. However, that was a case which the Court decided on the special wording of section 114 of the Code of Civil Procedure that an appeal from the judgment in a Letters Patent appeal was not an appeal allowed " By the Code." Banerji and Bennet JJ. actually observed in the course of their judgment :

" If we were to hold that section 114 would allow reviews of judgments passed in exercise of jurisdiction derived from other laws, then the section would fail to attain its object."

There is no question of the interpretation of section 114 of the Code in the present case just as there was no question of the interpretation of Order 41 of the Code in that case. (*See* p. 551 *Ibid.*)

On the other hand under section 121 of the Code the Rules in the First Schedule (including Order 41) have effect as if enacted in the body of the Code ; under section 117 the provisions of the Code apply to the High Court ; they remain so applicable except in so far as they are inconsistent with or contrary to the Appellate Side Rules of Procedure (Civil) (*see* p. 489

(1) (1931) I.L.R. 53 All. 535 (F.B.).

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & Co.

U THEIN MAUNG, C.J.

of the Rules and Orders applying to the High Court of Judicature at Rangoon) and Order 41, Rule 22 is not inconsistent with any such rule ; so far as Order 41 is concerned Rule 35 is the only rule of it which has been made inapplicable to the High Court in the exercise of its appellate jurisdiction by Order 49 ; Their Lordships of the Privy Council have held in *Sabitri Thakurain* v. *Savi* (1) that Order 41, Rule 10 applies to a Letters Patent Appeal ; and the High Court of Judicature at Rangoon has applied Order 41, Rule 33 to a Letters Patent Appeal in *Sein Dass* v. *Lakhajee and another* (2).

A Full Bench of the Madras High Court has held in *M.D. Venkatasam Chetty and another* v. *Mathichand Gulabchand* (3) that the provisions of Order 41, Rule 22 do apply to appeals from the Original Side of a High Court and that cross objections may be filed therein.

Dalip Singh, J. observed in *Lala Khazanchi Shah* v. *Haji Niaz Ali* (4) " The matter might be different in the case of a second appeal, for a Letters Patent Appeal in such a case is only permissible with the certificate of the Judge who heard the case in single Bench." However, as has been held in *Mir Ghulam Hussain Sahib* v. *Ayesha Bibi and twelve others* (5) " Where a single Judge of the High Court grants a certificate under clause 15 of the Letters Patent he can only declare that the case is a fit one for appeal. He has no power to limit the certificate to certain points only." The case having been certified to be a fit one for appeal, the appellate Court has jurisdiction over and seisin of the whole of it. No further certificate is necessary to give the appellate Court jurisdiction to

(1) (1921) I.L.R. 48 Cal. 481.
(2) (1940) R.L.R. 693.
(3) (1926) I.L.R. 49 Mad. 291.
(4) A.I.R. 1940 Lah. 438 at p. 441.
(5) I.L.R. (1941) Mad. 775 (F.B.)

deal with such questions as may be raised in cross-objections ; and the requirement to file cross-objections within the prescribed period is only a matter of procedure. Besides Order 41, Rule 22 unlike section 114 of the Code does not contain anything to show that cross-objection can be filed only in appeals which are allowed by the Code. So the mere fact that the appellate Court derives jurisdiction to hear an appeal from the Letters Patent and not from the Code cannot make any difference.

We accordingly hold that Order 41, Rule 22 applies also to a Letters Patent Appeal which is only permissible with the certificate of the Judge ; and as an appeal under section 20 of the Union Judiciary Act, 1948 is of the same nature as such a Letters Patent Appeal we hold that Order 41, Rule 22 applies to it also and that cross-objections can be filed in it.

The most important cross-objection is " that the respondent had right to sell the property as they did because the transaction was not a pledge in the ordinary sense but was a conditional sale " ; and with reference to this objection we are in entire agreement with the learned Judge who has observed in the course of his judgment :

> " The question whether the transaction was a pledge or a conditional sale depends mainly on the construction to be put on Exhibit A. At the outset I would say that this document is very vaguely worded and reads as follows : ' If the goods are not redeemed by Tagu (April) 1302 B.E U Paw Tun Aung and Company will take the same. There will be no right to object to anything.' The document does not read as if it were a sale deed, and as far as I can see from the evidence on record the parties did not regard it as anything more than a document of pledge."

It has been contended that the transaction is not an ordinary pledge but one in which the pledgor has

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & Co.

U THEIN MAUNG, C.J.

contracted himself out of his statutory rights under sections 176 and 177 of the Contract Act. However the Calcutta High Court has held in *The Co-operative Hindusthan Bank, Ltd.* v. *Surendranath De* (1) :

"Section 176 of the Contract Act, unlike some other sections, *e.g.*, sections 163, 171 and 174, does not contain a saving clause in respect of special contracts contrary to its express terms. The section gives the pawnee the right to sell only as an alternative to the right to have his remedy by suit. Besides, section 177 gives the pawnor a right to redeem even after the stipulated time for payment and before the sale.

In view of the wording of section 176 as compared with the wordings of the other sections of the Contract Act referred to and also in view of the right, which section 177 gives to the pawnor, and in order that the provisions of that section may not be made nugatory, the proper interpretation to put on section 176 is that notwithstanding any contract to the contrary notice has to be given, which, in the words of the section, should be a reasonable notice of the sale."

The learned Advocate for the Respondent has invited our attention to *The B.I.S.N. Co., Ltd.* v. *Alibhai Mahomed* (2), *Fut Chong* v. *Maung Po Cho* (3), *The Bombay Steam Navigation Co., Ltd.* v. *Vasudev Baburao Kamat* (4), and *Lakhaji Dollaji & Co.* v. *Boorugu Mahadeo Rajanna and another* (5). But these are authorities only for the view that section 152 of the Contract Act enables a bailee to contract out of his liability under section 151 thereof. Twomey C.J. actually observed in the case of *The B.I.S.N. Co., Ltd.* v. *Alibhai Mahomed* (2) :

"It is not clearly deducible from the terms of section 152 that a bailee may only make a special contract increasing his responsibility, and that he cannot make a special contract reducing it. This is a proposition curtailing the ordinary right of

(1) (1932) I.L.R. 59 Cal. 667 at p. 668.
(2) (1919-20) 10 L.B.R. 292 (F.B.).
(3) (1929) I.L.R. 7 Ran. 339.
(4) (1928) I.L.R. 52 Bom. 37.
(5) A.I.R. (1939) Bom. 101.

freedom of contract, and we must hesitate to give effect to such a proposition on the strength of a mere inference and in the absence of express enactment."

In the case of section 176 of the Contract Act there is no provision whatsoever under which the pledgor can contract himself out of his right thereunder ; and as Maclean C.J. has pointed out in *Brij Coomaree* v. *Salamander Fire Insurance Company* (1) :

"There is nothing to prevent traders from making any contract they like, so long as the incidents of that contract are not inconsistent with the provisions of the Contract Act. But, if you find in a contract certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue ; otherwise, it is difficult to see what object there can be in codifying the law upon the question."

It is true that Mackney J. has held in *Dwarika* v. *Bagawati* (2) :

"The principle of avoiding clog on the equity of redemption does not apply to pledges and hence parties can by special agreement introduce a clause into the agreement that on failure to redeem within a certain time the property pledged would become the property of the pledgee."

But his Lordship decided that case without any reference whatsoever to sections 176 and 177 of the Contract Act, *i.e.* without considering whether the pledgor could contract himself out of his rights thereunder and inspite of the following passage from Story on Bailments which he himself has quoted (at p. 416 of the Report) :

"If a clause is inserted in the original contract, providing that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, it will not be of any avail. For the common law deems

(1) (1905) I.L.R. 32 Cal. 816 at p. 823.

(2) A.I.R. (1939) Ran. 413 at p. 414.

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & CO.

U THEIN MAUNG, C.J.

such a stipulation unconscionable and void, upon the ground of public policy, as tending to the oppression of debtors. The Roman law treated a similar stipulation (called in that law lex commissoria) in the same manner, holding it to be a mere nullity."

So we hold that the transaction is an ordinary pledge, that the pledgor cannot contract himself out of rights under sections 176 and 177 of the Contract Act, and that the respondent is liable in damages to the appellant for having sold the pledged articles without notice of the sale.

To turn now to the main appeal as to the measure of damages, C. Kameswara Rao has stated at page 1081 of his book on the Law of Damages and Compensation :

"So, where the pledgee of chattels with a power of sale, which can only be exercised under certain conditions, sells the chattels without performing the conditions, he is no doubt guilty of conversion, but the measure of damages is the value of the chattels at the time of conversion less the amount for which they were pledged. The sale by the pledgee, though unauthorized, does not put an end to the pledge, so as to entitle the pledgor to have return of the goods pledged, for in such cases, the pledgor's right of possession will not, *ipso facto*, revert so as to enable him to sue for conversion.

An action for breach of contract of pledge will, however, lie in such a case, but the damages will not be the full value of the goods, but only the damage done to the pledgor's interest."

Illustration (3) to section 10 of the Specific Relief Act reads :

"(*b*) **A** pledges certain jewels to **B** to secure a loan. **B** disposes of them before he is entitled to do so. **A**, without having paid or tendered the amount of the loan, sues **B** for possession of the jewels. The suit should be dismissed, as **A** is not entitled to their possession, whatever right he may have to secure their safe custody." [See *Donald* v. *Suckling* (1).]

(1) (1866) L.R. 1 Q.B. 585.

It has also been held in *S. L. Ramaswamy Chetty and another* v. *M.S.A.P.L. Palaniappa Chettiar* (1) that where the pledgee is guilty of an unauthorized conversion, the pledgor is entitled to his property back or its full value but only on payment of the debt. So the appellant has been rightly held to be entitled only to the excess of the value of the gold ornaments over the amount due to the respondent in respect of (1) the debt and (2) extraordinary expenses incurred by the respondent for their preservation under section 175 of the Contract Act.

The real bone of contention between the parties is as to whether compensation for conversion of the gold ornaments should be assessed with reference to the market value of gold at the time of conversion or to the market value of gold at the date of the institution of the suit. The difference is considerable as the market rate at the time of convertion was only Rs. 60 per tical whereas the market rate at the date of the institution of the suit was as much as Rs. 160 per tical.

There is a fair consensus of opinion among the Indian High Courts that the measure of damages for conversion is the market value of the goods at the date of conversion. See *Alliance Bank of Simla in Liquidation* v. *Ghamandi Lal Jaini Lal* (2), *Bhimji N. Dalal* v. *Bombay Trust Corporation Limited* (3), *Shivaprasad Singh* v. *Prayagkumari Debee* (4) and *Motilal* v. *Lakshmichand* (5). Of these the first and last cases are direct authorities on the question under discussion as they relate to conversion of pledged articles by sale without notice to pledgor.

---

(1) A.I.R. (1930) Mad. 364.
(2) (1927) I.L.R. 8 Lah. 373.
(3) A.I.R. (1930) Bom. 306.
(4) (1934) I.L.R. 61 Cal. 711 at pp. 738-739.
(5) A.I.R. (1943) Nag. 163.

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & CO.

U THEIN MAUNG, C.J.

The only Indian ruling which has been cited as authority for the contrary view is *Louis Dreyfus & Co.* v. *Firm of Chandamal & Co.* (1). That, however, was a case of fraudulent conversion and the Bench observed in the course of its judgment :

> " In actions of contract, as a rule, the motives or conduct of the defendant are not to be taken into account in assessing damages whereas in actions of tort which affect property, the conduct of the defendant may be so taken into account (Halsbury's Laws of England, Volume X, Articles 593 and 598 at pages 323, 325).
>
> * * * *
>
> There is also, as pointed out in the judgment of the Court below, reason to believe that appellants actually realized more than the amount for which they have been made liable, and if the sale price had been disclosed, the Court might have held this to be a proper measure of damages, Cf. *Bansidhar* v. *San Lal* (2)."

Even as regards conversion, which formed a part of a fraudulent system of business, their Lordships of the Privy Council have held in *Solloway and another* v. *McLaughlin* (3) the measure of damages was the value of the (converted) shares at the date of their conversion (less the value of shares received by the plaintiff at the time he received them).

Incidentally, in the present case the learned Judge has found as a matter of fact that " the sale of the pledged jewellery in September 1942 was probably under the *bona fide* belief that the ownership in them had passed to the appellant (now respondent) "; and we are of the same opinion.

The learned Advocate for the appellant has relied on *Ma Me Shin* v. *R.M.R.M.N. Chettyar Firm* (4) as an authority for the contrary view. That was a case

(1) (1919) 52 I.C. 878.
(2) 10 A.133.
(3) (1938) A.C. 247.
(4) A.I.R. (1933) Ran 76

in which the creditor, with whom certain jewels had been deposited as collateral security for two promissory notes, sold the jewels without proper notice to the creditor and filed a suit on the promissory notes, and the judgment therein appears to have been passed by consent as the Bench did not discuss the law on the assessment of damages and merely stated (at p. 79):

"I understand that it is agreed by the parties that that being so the respondents are entitled to claim the amount due on the promissory notes after deducting what is a reasonable value for the jewellery deposited. The value must be taken as the value at the date of suit, that is 20th June 1930."

In England also there was a fair consensus of opinion that the measure of damages for conversion is the market value of the goods at the time of the conversion. [See *Brierly* v. *Kendall* (1); *Johnson* v. *Stear* (2); *Owners of Steamship Celia* v. *Owners of Steamship Volturno* (3) and *Solloway and another* v. *McLaughlin* (4) (Privy Council); and Cf. *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison* (5).]

Lord Wrenbury put it so succinctly in *S.S. Celia* v. *S.S. Volturno* (6) that we must quote at some considerable length from his Lordship's judgment therein:

"Assume that a judge is sitting in July to try an action for damages for a tort committed on the preceding January 1. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on January 1 the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on January 1 the equivalent sum in British currency was (say) 7,500 lire. Adjudge that the plaintiff recover against the defendant 7,500 lire. There is no difference of principle arising from the fact that the loss is of lire as distinguished from (say)

(1) (1852) 117 E.R. 1540.
(2) (1863) 143 E.R. 812.
(3) (1921) A.C. 544 (House of Lords).
(4) (1938) A.C. 247.
(5) (1933) A.C. 449 (House of Lords).
(6) (1921) 2 A.C. 544 at pp. 562 to 564.

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & Co.

U TUN IN MAUNG, C.J.

cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be : Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150 lire. Adjudge that the plaintiff recover from the defendant 150 lire. It would be *nihil ad rem* to say that in July similar cows would have cost in the market 300 lire. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having, on January 1, deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows : the only question is, how much ? *The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.*

The argument to the contrary is that the defendant is bound by a pecuniary payment to put the plaintiff in a position as good as that in which he stood before the tort was committed. That is true, but it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension—namely, that of time. The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act."

Abbott C.J. did hold in *Greening* v. *Wilkinson* (1) :

" In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they

(1) (1825—29) R.R. 790.

may find as damages the value at a subsequent time, in their discretion."

But Clerk and Lindsell have stated in their Law of Torts, Tenth (1947) Edition :

"In actions of trover and conversion, where the value has fluctuated it must be taken as it stood at the time of the wrongful act [The Arpad (1934), p. 189] * * * * There does not appear to be any reported case in which *Greening* v. *Wilkinson* (1) has been either questioned or followed, but it has been frequently laid down, and the rule now appears to be established, that the proper measure of damages is the market value of the goods at the time of the conversion."

Winfield has also stated at page 363 of his Text Book on the Law of Tort, Third (1946) Edition :

"On principle, it seems better to select the moment of conversion as the punctum temporis for assessing damages, for the opposite rule would introduce an undesirable element of speculative profit or loss to the parties in an action of this kind."

However, the rule cannot be said to be established in England as the Court of Appeal has decided in *Rosenthal* v. *Alderton and Sons, Limited* (2), "In an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason." That was a case in which the plaintiff, who had by arrangement with the defendants left certain goods on the defendants' premises, demanded the return of the goods and, on the defendants' refusal to comply, brought an action against them claiming the

(1) (1825—29) R.R. 790. (2) (1946) K.B. 374.

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & CO.

U THEIN MAUNG, C.J.

return of the goods and, in the alternative, payment to him of their value and damages for their retention; and the Court observed in the course of its judgment, "In an action of detinue the value of the goods claimed but not returned, ought, in our judgment, to be assessed as at the date of the judgment or verdict . . . . . the defendant's failure to return the goods after that date (*i.e.* the date of the refusal of the plaintiff' s demand) becomes *and continues to be wrong*. The judgment was on the basis of detinue being a continuing wrong; but the Court has added after referring to *Wilkinson* v. *Verity* (1) a case of detinue with misconduct "in fraud of the bargain":

"But the bailor can, in such circumstances elect to sue in detinue (at any rate where he was not aware of the conversion at the time), and there is no reason why the value of the goods in fact converted should be assessed on a different basis from the value of the goods which the bailee has not converted but which for some other reasons he fails to re-deliver."

However, in *Beaman* v. *A.R.T.S., Limited*.(2) Denning J. has pointed out the essential difference between the cause of action in conversion and the cause of action in wrongful detention as follows:

"I attempt no precise definition, but, broadly speaking the cause of action in conversion is based on an unequivocal act of ownership by the defendant over the goods of the plaintiff without any authority or right in that behalf. The act must be an unequivocal act of ownership, that is, an act such as acquiring, dealing with, or disposing of the goods, which is consistent only with the rights of an owner as distinct from the equivocal acts of one who is entrusted with the custody of handling of carriage of goods. A demand and refusal is not, therefore, itself a conversion, but it may be evidence of a prior conversion. The cause of action in wrongful detention is based on a wrongful withholding of the plaintiff's goods. It depends on the defendant's being in

(1) (1871) L.R. 6 C.P. 206. (2) (1948) 64 T.L.R. 285 at p. 287.

possession of the plaintiff's goods. If such a defendant without any right so to do withholds the goods from the plaintiff after the plaintiff has demanded their return, he is, for such time as he so withholds them, guilty of wrongful detention : see *Clayton* v. *Le Roy et Fils* (1). This is the tort of which a bailee or finder is guilty who is in possession of the goods and fails to deliver them up within a reasonable time after demand, though it may also, in the case of a bailee, be a breach of contract. If the bailee or finder subsequently disposes of the goods, he is guilty of conversion, *but the wrongful detention then comes to an end and is swallowed up in the conversion.*"

Denning J. has also made the following observations on *Rosenthal* v. *Alderton and Sons, Limited* (2) in the course of the same judgment :

" But when does the cause of action accure in such cases as the present ? In my opinion it accrues at the date of the original conversion or the initial withholding of the goods. A recent decision of the Court of Appeal holds that the damages in such cases are to be assessed at the date of the judgment or verdict in the plaintiff's favour : see *Rosenthal* v. *Alderton and Sons Limited* (2), but that does not mean that the cause of action accrued at that time. The observations of the Lord Chief Justice in *Sachs* v. *Miklos* (3) considerably limit the scope of *Rosenthal* v. *Alderton and Sons Limited* (Supra) and, should prices hereafter fall, the Courts will probably be faced with the task of reconciling *Rosenthal* v. *Alderton and Sons, Limited* (Supra) with the settled rule that damages, whether in contract or tort, are to be assessed as at the date of the accrual of the cause of action, and that subsequent fluctuations upwards or downwards in rates of exchange or commodity prices before or during legal proceedings are irrelevant : *see* the decision of the House of Lords in *SS. Celia (Owners of)* v. *SS. Volturno (Owners of)* (4), particularly the speech of Lord Buckmaster (at pages 970 and 548 of the respective reports) of Lord Sumner (at page 556) and of Lord Wrenbury (at page 563), and the long line of cases of buyers who sued sellers for conversion of or for failure to deliver goods bargained and sold, such as *France* v. *Gaudet* (5),

(1) 27 T.L.R. 479 (1911) 2 K.B. 1031. (3) (1947) 64 T.L.R. 181.
(2) (1946) K.B. 374. (4) (1921) 2 A.C. 544 at pp. 562 to 564.
(5) (1871) L.R. 6 Q.B. 199.

H.C. 1948

ABDUL RAZAK v. U PAW TUN AUNG & Co.

U THEIN MAUNG, C.J.

where the damages were always assessed as at the date of the breach." [We have already quoted the speech of Lord Wrenbury in SS. *Celia* v. SS. *Volturno* (1) at some considerable length.]

In *Sachs* v. *Miklos* (2) which has been referred to by Denning J., the action was one *for detinue and conversion* against an ordinary bailee and the case was remanded by the Lord Chief Justice to determine whether the plaintiff knew or ought to have known that the defendant intended to sell the goods and if he neither knew nor ought to have known that his goods would be sold whether he found out, only on the date of the suit that his goods had been sold. At the same time the Lord Chief Justice observed, "the measure of damages is the same in conversion as it is in detinue, where the facts are only that the defendant has the goods in his possession and could hand them over but would not" (p. 183); and as we have stated above Denning J. said in *Beaman* v. *A.R.T.S., Limited* (3), "If the bailee or finder subsequently disposes of the goods, he is guilty of conversion, but the wrongful detention then comes to an end and is swallowed up in the conversion."

The authority of the ruling in *Rosenthal* v. *Alderton and Sons, Limited* (4) has been shaken considerably by the observation in the two subsequent rulings. Besides, in the present case the respondent is not an ordinary bailee who "has the goods in his possession and could hand them over but would not" but a pledgee who has actually sold the goods about four and a half years before the institution of the suit in good faith believing that he had become the full owner thereof in accordance with the terms of the agreement of pledge Ex. A and Ex. 1; and as has been pointed

(1) (1921) 2 A.C. 544 at pp. 562 to 564.
(2) (1947) 64 T.L.R. 181.
(3) (1948) 64 T.L.R. 285 at p. 287.
(4) (1946) K.B. 374.

out in the *Aliance Bank of Simla in Liquidation* v. *Ghamandi Lal Jaini Lal* (1) the rights of a pledgee are higher than those of an ordinary bailee. On the other hand the appellant is a pledgor who failed to redeem the pledged articles in March or April 1942, in accordance with the terms of the said agreement and who has filed the suit for redemption of the pledged articles or for recovery of their value only on the 31st March 1947, taking advantage (1) of the Accrual of Interest (War-Time Adjustment) Act, 1947, according to which he cannot be required to pay interest up to the date of the suit and (2) also of the abnormal rise in the price of gold after the termination of the war. He did not file the suit earlier although according to his own evidence-in-chief he was informed by the respondent's agent above the end of April 1944, that he had lost his right of redemption.

Under these circumstances, we choose to follow the rulings of the House of Lords, the Privy Council, the Indian High Courts and the opinion of the learned Authors which we have set out above in preference to the ruling of the Court of Appeal in *Rosenthal* v. *Alderton and Sons, Limited* (2); and we uphold the decision of the learned Judge that under the circumstances of the case, damages for the conversion of the pledged articles must be assessed with reference to their market value at the date of conversion.

The remaining grounds of appeal and cross-objections have not been pressed by the learned Advocate and we find that they are really unsustainable.

The appeal and the cross-objections are dismissed; and the decree under appeal is confirmed. No order as to the costs of the appeal and the cross-objections.

U SAN MAUNG, J.—I agree.

(1) (1927) I.L.R. 8 Lah. 373. (2) (1946) K.B. 374.