[HALLINAN, C.J., AND MELISSAS, J.]

(April 15, 1952 and May 10, 1952)

ZABRI ZAGA OF BEIRUT, *Appellant*,

*v.*

TASSOS DEMETRIOU OF NICOSIA, *Respondent.*

(*Civil Appeal No.* 3886.)

*Cheques—Claim against bona fide transferor by delivery—Waiver by endorser of an obligation to make presentation under sec.* 46 (2)(*e*) *of the Bills of Exchange Law* (*Cap.* 189)*—Negotiation affected by illegality defeats holder in due course—Reg.* 5 *of Emergency Powers* (*Cyprus Defence*) (*Finance*) *Regulations*, 1940.

Plaintiff-appellant bought six cheques expressed in dollars from the defendant-respondent for £2,758. The purchase price being paid in cheques expressed in sterling. Four of these cheques were not endorsed by the respondent but were merely transferred to the appellant by delivery. The other two cheques were endorsed to the appellant who alleged that the respondent had verbally guaranteed the endorsed cheques. The trial Court dismissed the claim on the ground that the appellant had failed to prove that the cheques were non-genuine and had been dishonoured.

On appeal—*Held :* (i) As regards the cheques not endorsed the respondent was not liable as transferor by delivery because the appellant had failed to prove that the respondent knew at the time of the delivery that the bills he was transferring were bad.

(ii) As regards the endorsed cheques, the respondent waived the obligation to make presentation by acknowledging the cheques as bad ; but the appellant was nevertheless not a holder in due course as the negotiation of the cheques was affected by illegality.

(iii) The negotiation of the sterling cheques for the dollar cheques was an offence contrary to Regulation 5 of the Emergency Powers (Cyprus Defence) (Finance) Regulations, 1940, and the appellant had aided and abetted the offence.

Appeal dismissed.

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Appeal by the plaintiff from the judgment of the District Court of Nicosia (Action No. 2229/1948) in favour of the defendant.

*A. Emilianides* with *Glafcos Clerides*, for the appellant.

*G. N. Chryssafinis*, Q.C., with *A. Indianos* for the respondent.

The facts of the case are fully set out in the judgment of the Court which was delivered by :

HALLINAN, C. J : In this case the appellant as plaintiff sues on a number of cheques (which were either transferred or indorsed by the respondent to the appellant) or for the return of £2,758 which the appellant paid the respondent

in consideration of these cheques. The appellant is a Lebanese who, during a visit to Cyprus, bought four cheques (Exhibit 3 (*a*), (*b*), (*c*), (*d*)) from the respondent early in November in 1948. These cheques were drawn on banks in the United States and were expressed in dollars; the respondent did not endorse these cheques; they were endorsed in blank and the respondent merely was a transferor by delivery to the appellant who paid for them by cheques expressed in sterling. On the 10th November, 1948, the appellant procured from the respondent a document which guaranteed the full validity of these four cheques, and in case any of them were not paid on presentation the respondent undertook to refund the consideration. On the same day the respondent endorsed over to the appellant another cheque, Exhibit 5, drawn on a bank in the United States and expressed in dollars, and on the next day the respondent again endorsed another cheque, Exhibit 8, drawn and expressed in the same way. The appellant also paid for these cheques in sterling. The appellant stated in evidence that a day or two after the 13th November he learnt that information had been received from America concerning these cheques which indicates that it was doubtful if the banks by or on which the cheques were drawn existed. Some days later the appellant says that the respondent promised that if the appellant gave him back the cheques the respondent would refund the money. Later the respondent, according to the appellant, said "wait and keep quiet and I will give you the money."

The Court below considered that in order to succeed the appellant had to prove first, that the cheques were not genuine, and secondly, that they had been presented for acceptance and payment and had been dishonoured. The trial Court found that there was not sufficient evidence to support a finding in the appellant's favour on either of these issues and thereupon dismissed the claim.

It would appear that in his Statement of Claim the appellant was alleging four causes of action: first, an action against the respondent as transferor by delivery of the cheques which he did not endorse (Exhibit 3); secondly, an action on the two cheques which the respondent endorsed (Exhibits 5 and 8); thirdly, an action in respect of the consideration for the cheques in Exhibit 3 on the letter of guarantee dated 10th November, 1948; fourthly, an action in respect of the consideration given for all the cheques on a verbal guarantee.

As to the third cause of action, it is conceded in this appeal that there is no evidence that the cheques were presented for either acceptance or payment, and since there had to be a presentation before the written guarantee

operated, counsel for the appellant rightly admitted that he could not rely on the letter of guarantee as a ground of appeal.

As to the first cause of action, in my view the respondent cannot be sued either on the bills or for the considerations in respect of the cheques where he was the transferor by delivery. In Byles on Bills, 20th Edition, at page 177, it is stated :—

> " It was long ago held that if the holder of a bill sends it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time that it was not a good bill."

and at page 178 :—

> " the transferor is not even liable to refund the consideration if the bill or note so transferred by delivery without endorsement turns out to be of no value, by reason of the failure of the other parties to it."

In order to establish a cause of action against the transferor by delivery in this case the appellant must prove that the respondent knew at the time of delivery that the bills he was transferring were bad. I think there was evidence before the Court below that the cheques, the subject matter of the case, are not genuine, but I agree with the finding of that Court that there is no evidence when these cheques were sold or transferred to the appellant that the respondent knew they were bad.

As regards the second cause of action on the cheques indorsed by the respondent, although the Court below held that the appellant had failed to prove presentation for payment, there was, I consider, sufficient *prima facie* evidence before the Court to hold that the respondent had accepted the fact that the cheques were bad and impliedly waived presentation. Mr. Clerides on this point has rightly relied on section 46 (2) (*e*) of the Bills of Exchange Law (Cap. 189). The appellant is therefore a holder in due course of these cheques (Exhibits 5 and 8) under section 30 of the Bills of Exchange Law unless it is proved that the negotiation of the cheques was affected by illegality.

We have been referred to Regulation 5 of the Emergency Powers (Cyprus Defence) (Finance) Regulations, 1940, the material part of which provides :—

> " No person shall—
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> .....
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> (*d*) negotiate any bill of exchange .... so that a right (whether actual or contingent) to receive a payment in the Colony is created or transferred as consideration .....

(ii) for a right (whether actual or contingent) to receive a payment or acquire property outside the Colony ....."

Applying the facts of this case to the provisions of Regulation 5 which I have cited, the appellant by giving his cheques expressed in sterling to the respondent negotiated a right to receive a payment in the colony; and in consideration for this the respondent transferred or endorsed cheques to the appellant giving the appellant a right to receive a payment outside the colony. It is clear that the appellant aided and abetted the respondent in committing an offence under the Finance Regulations of 1940. It was suggested by counsel for the appellant that his client was not in *pari delicto* with the respondent but this contention cannot be maintained in view of the evidence. It is clear from the evidence of the appellant himself that he applied for a permit to acquire dollars so as to purchase nylons in the United States and when this was refused he bought dollars illegally at a rate of 50% over what he would have paid had he secured these dollars under a permit. This and other facts disclosed in his evidence clearly show that he was not merely buying these cheques to sell again but was himself acquiring dollars in a manner which he knew was illegal. The whole of these transactions between the parties in this case are obviously affected with illegality. The appellant certainly gave value for the cheques, but did not do so in good faith.

Having decided the issue as to illegality against the appellant, it follows that, even if the evidence were sufficient to establish the verbal agreement alleged by the appellant, nevertheless the defence of illegality must prevail against this (his fourth cause of action) also.

*This appeal must therefore be dismissed.*

MELISSAS, J.: I have had the opportunity of reading and considering the judgment just delivered. I fully concur in the conclusions arrived at and in the result indicated.