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ZOI CH PAPAELLINA
v
EPCO (CYPRUS) LTD
AND
LION PRODUCTS LTD

[VASSILIADES, P., STAVRINIDES, HADJIANASTASSIOU JJ.]

ZOI CH PAPAELLINA,

Appellant-Defendant

v

EPCO (CYPRUS) LTD.,

Respondent-Plaintiff

and

LION PRODUCTS LTD.,

Respondent—Third Party

(*Civil Appeal No.* 4607)

Bills of Exchange—Cheque—Indorsement—Drawer, payee, indorsee and holder—Post-dated cheque countermanded by drawer for alleged failure of consideration by the payee—Holder in due course—Presumptions—Right of the holder to recover on the cheque—Title of holder—The Bills of Exchange Law, Cap. 262, sections 2, 13(2), 29, 30(1)(2), 36(3) and 90—Holder in good faith and for value—Holder in due course—Presumption that a holder of a bill is a holder in due course—Duty of the Court to consider and weigh the evidence bearing on the said presumptions—In the present case the trial Court applied the presumption under section 30(2) (supra) without regard to the evidence bearing on it—The trial Court further, erred in that some of the considerations which led it to reject the evidence on behalf of the defendant were wrong—In the result the trial Court in the present case has misdirected itself to such an extent that a substantial miscarriage of justice has occurred—New trial ordered.

Cheque—Drawer, payee, indorsee—Holder—Consideration—Cheque countermanded—Right to recover—Presumptions—See above under Bills of Exchange.

Evidence—Presumptions—Rebuttable presumptions—Witness Credibility—See above under Bills of Exchange.

Civil Procedure—Judgments—Need for Judges to formulate clearly in their judgments the specific issue of fact arising between the parties and state their finding on such specific issue or issues—Reason in section 113(1) of the Criminal Procedure Law, Cap. 155, a fortiori applicable to civil proceedings.

Judgments—See above under Civil Procedure.

Civil Procedure—Appeal—New trial ordered—Section 25 (3) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960)—See, also, above under Bills of Exchange.

New Trial—Miscarriage of justice—See immediately above.

Retrial—See above.

Miscarriage of justice—Retrial—See above under Bills of Exchange: Civil Procedure.

Civil Procedure—Appeal—Credibility of witnesses—The Appellate Court will interfere in cases where the trial Courts were led to disbelieve the evidence of a witness for reasons which are wrong—See, also, above under Bills of Exchange.

Credibility of witness—Appeal—Findings of trial Court based on credibility of witness—The Appellate Court will interfere when the reasons which led the trial Courts to their conclusion i.e. to reject (or accept) the evidence of a given witness, are wrong—See, also, above under Bills of Exchange.

Witness—Credibility—See immediately above.

Practice—Directions before trial—Need for in certain cases as the present one—In order that a fuller understanding of the issues between the parties may be realised before the action comes on for hearing—The Civil Procedure Rules, Order 10, rules 7 and 8.

Directions—See immediately above.

Presumptions—Rebuttable presumptions under the Bills of Exchange Law, Cap. 262, section 30 (1) (2)—See above under Bills of Exchange.

Holder in due course—Holder of a bill (or cheque) in due course—Section 29 of the Bills of Exchange Law, Cap. 262—See above under Bills of Exchange.

Good faith—Holder in good faith—Meaning of "good faith"—See herebelow.

Words and Phrases—Holder in due course—Holder in good faith-A thing is deemed to be done in good faith, within the meaning of the Bills of Exchange Law, Cap. 262, when it is in fact done honestly, no matter whether it is done negligently or not—Section 90.

This is an appeal by the defendant from a judgment of the District Court of Nicosia given against her in a dispute over a cheque for £95, plus costs, dismissing, also, her claim for indemnity under the third party notice without costs. By reference to their respective position in the cheque sued upon the parties are as follows: the drawer is the defendant-appellant; the payee of this cheque is the third party company in the action and second respondents in the appeal; the indorsee-holder is the plaintiff company, first respondents.

The holder-plaintiffs alleged that their sister company, the payees of the cheque (third party-second respondents), endorsed and delivered the cheque in question for valuable consideration (cash) some time early in July, 1965. They have thus become, they say, *bona fide* holders for value of the cheque upon which they sued. This cheque was drawn on June 16, 1965 upon the defendant's account in the Ottoman Bank, Paphos. It was made payable to the payee company (the third party and second-respondents) twelve days later, on the 28th June, 1965, the drawer post-dating it accordingly. The defendant's husband—acting as agent of her wife—handed the cheque to a certain M.I. to carry it for the payees, at Nicosia, with a letter to them containing an order for goods of the value of the cheque *viz.* £95. Not receiving the goods for which he issued the post-dated cheque, the drawer's husband stopped payment of the cheque at the Ottoman Bank on June 25, *i.e.* three days before the date of the cheque, without giving any notice to the payees. When this cheque was presented to the Bank for payment it was dishonoured as the drawer had already stopped payment as aforesaid—Hence the action.

After obtaining leave to issue third-party notice to the payees of the cheque, the drawer-defendant made and filed her defence. In her pleading, she denied that the plaintiffs were *bona fide* holders for value. And she moreover stated that the cheque was countermanded at the Bank because the payees (third-party-second respondent) failed to supply the goods ordered. In any case the drawer-defendant (now appellant) claimed indemnity from the payees (third-party) on the ground that the latter gave no consideration for the cheque. The payees denying such lack of consideration on their part, allege that they received the cheque from the said M.I. who was acting as the agent of the drawer-defendant to whom (agent) they duly delivered the goods ordered. On the other hand the defendant (drawer) alleged that the said M.I. was acting at

all material times as the agent of the payees (third party-second respondents).

The trial Judge formulated the matters in dispute in these proceedings in the form of two issues as follows :

(a) Was there, in fact, a failure of consideration as between the third party (payees) and the defendant (the drawer)?

(b) Can the plaintiffs (holders-indorsees) be found to be "holders in due course" within the meaning of section 29 of the Bills of Exchange Law, Cap. 262?

The defendant (drawer), now appellant, failed on both issues, the trial Judge finding that "the defendant has failed to establish :

"(a) failure of consideration as against the third-party and

(b) that the plaintiffs are not holders in due course of the cheque in question under the provisions of section 29 of the Bills of Exchange Law, Cap. 262".

Under section 29 of the Bills of Exchange Law, Cap. 262, holder in due course is a holder who has taken a bill complete and regular on the face of it, before it was overdue, and without notice that it has been previously dishonoured, if such was the fact; that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it. Under section 30 (1) of the statute, Cap. 262, there is a presumption that every party whose signature appears on a bill is *prima facie* deemed to have been "a party thereto for value". On the other hand, sub-section (2) of the said section 30 reads as follows:

"Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill".

The Court, by majority consisting of Vassiliades P. and Stavrinides J., (*HadjiAnastassiou J. dissenting*), allowing the appeal and ordering a new trial :

Held, Per STAVRINIDES J. (*Vassiliades P concurring*), (*Hadji-Anastassiou J dissenting*) :

(1) (*a*) In the light of the pleadings and the evidence at the trial for the plaintiffs and the third-party on the one hand and for the defendant on the other, the question whether there had been a failure of consideration as between the defendant (drawer) and the third-party (payees of the cheque) depended on a number of specific issues of fact.

(*b*) Having set himself a question as to consideration in the general form he did (*supra*), the learned trial Judge answered it generally without giving any specific indication of his conclusion or the specific matters on which the answer to the general question depended

(*c*) Further he based his answer to that question on his rejection of the evidence of the defendant's husband

(*d*) But some of the considerations which led to that rejection are wrong

(2) (*a*) As regards the second issue *i.e.* whether the plaintiffs were holders in due course of the cheque in question within section 29 (*supra*), it is clear that the trial Judge proceeded on the footing that the plaintiffs in fact gave consideration for the cheque In the light of certain passages in his Judgment it seems clear that the Judge proceeded in that way relying on the presumption created by section 30 (2) of Cap. 262 (*supra*) which reads as follows

> "Every holder of a bill is *prima facie* deemed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill"

(*d*) It is apparent, in my opinion, that the latter part of that provision, relating to the effect of fraud etc, is not intended to be exhaustive of the circumstances in which the presumption created by its earlier part may be rebutted, so that, whether or not any of those circumstances exist, it is incumbent on the trial Court to consider and weigh all the evidence bearing on the presumed facts (see section 29 (1) (*a*) and (*b*)) before arriving

at a finding as to whether a holder is in fact a holder in due course. And this is particularly important in a case such as the present, where the facts as to good faith and value given were peculiarly, nay, solely, within the knowledge of the plaintiffs and the third party (see in this connection Halsbury's Laws of England, 3rd. edn. Vol. 15, p. 270, para. 493, sub-para. 3).

(c) But here to all appearances the Judge applied the presumption without regard to the evidence bearing on it.

(3) The foregoing is sufficient to show that the trial Judge has misdirected himself in various ways to such an extent that a substantial miscarriage of justice has occurred.

(4) In the circumstances I would set aside the Judgment both as between the plaintiffs and the defendant and as between the defendant and the third party and order a new trial by another member of the District Court on the terms that the costs here and below shall follow the event of that trial.

Held, Per STAVRINIDES J. : If M.I. is not called as a witness at the new trial by any of the parties, the trial Judge may well consider whether that person should be called by the Court under the Civil Procedure Rules, Order 33, rule 7 (c).

Appeal allowed. Judgment of the trial Court set aside. Order for retrial and directions as to costs as above.

Per STAVRINIDES J. (1) The defendant omitted to apply to the Court under the Civil Procedure Rules, Order 10, rule 7, for directions. If he had, directions would have been given under that and the following rule, as a result of which a fuller understanding of the issues between the parties would have been realised. On the other hand and according to a note at p. 392 of the Annual Practice for 1960 citing *Tritton* v. *Bankart* 56 L.J. Ch. 629, "If the defendant does not apply, the Court at the trial will not entertain the claim raised by the notice".

(2) The present case illustrates the need for the trial judge to formulate clearly in his judgment the specific issue or issues of fact arising between the parties and to state his finding on such issue or each one of such issues. As regards criminal cases a provision to that effect is to be found in section 113 (1) of

the Criminal Procedure Law, Cap. 155.* In no statute or other legislation is there a corresponding provision as to civil cases, but the reason of that section is *afortiori* applicable in such proceedings, and judges trying civil disputes should unfailingly give effect to it.

Cases referred to :

Tritton v. *Bankart* 56 L.J.Ch. 629;

London and County Banking Company v. *Groome* [1881]8 Q.B. 288;

Robinson v. *Benkel* (1913) 29 T.L.R. 475;

Egg v. *Barnett* (1800) 3 Esp. 196–197 per Lord Kenyon;

Keene v. *Beard* (1860) 8 C.B. (N.S.) 372, at p. 382, per Byles J.;

Westminster Bank Ltd. v. *Zang* [1966] A.C. 182 at p. 201, per Lord Denning M.R.;

Raphael v. *Bank of England* (1855) 17 C.B. 161, at p. 174, per Wills J.;

Jones v. *Gordon* [1877] 2 App. Cas. 616, at p.p. 628-9 per Lord Blackburn, H.L.;

Talbot v. *Von Boris and wife* [1911] 1 K.B. 854, C.A.;

Benmax v. *Austin Motor Co. Ltd.* [1955] A.C. 370;

Ioannis Patsalides v. *Carabet Afsharian* (1965) 1 C.L.R. 134;

Mamas v. *The Firm "Arma" Tyres* (1966) 1 C.L.R. 158;

Wheat v. *E. Lacon and. Co. Ltd* [1966] A.C. 552;

Iosifakis v. *Ghani*, reported in this Part at p. 190 ante.

Appeal.

Appeal against the judgment of the District Court of Nicosia (HajiCostantinou Ag. D.J.) dated the 25th October, 1966,

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* Sub-section (1) of section 113 of the Criminal Procedure Law, Cap. 155, reads as follows :

" Every such judgment shall be recorded in writing and, in cases where appeal lies, shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the Judge or, where the Court consists of more than one Judge, by the President thereof or by his direction by any other member of the Court, at the time of pronouncing it ".

(Action No. 3314/65) whereby the defendant was adjudged to pay the sum of £95.— to the plaintiff by virtue of a cheque.

L. Papaphilipou, for the appellant.

X. Syllouris, for both respondents.

Cur. adv. vult.

The following Judgments were delivered by :

VASSILIADES, P. : This is an appeal from a Judgment of the District Court of Nicosia in a dispute over a cheque for £95.

There are three parties in the appeal; the same parties in the dispute at the trial Court : the appellant, defendant in the action; and the two respondents, the first of whom is the plaintiff in the action; and the second is the payee of the cheque, joined as a third-party in the proceedings, at the instance of the defendant.

I shall refer to these parties by their respective position in the cheque; the drawer (defendant in the action and appellant herein); the payee (third-party in the action and second respondent herein); and the holder of the cheque (plaintiff in the action and the first respondent herein). The two latter, the payee and the holder are private limited liability companies, and shall be referred to in the plural : "payees" and "holders".

The holders, claiming as holders for value in due course, sued the drawer for the amount of the cheque. The drawer, denying the holders' title, joined nevertheless the payees as a third party, contending that in case of liability, the drawer was entitled to indemnity from the payees on the ground that the latter gave no consideration for the cheque.

The trial Judge, after a strongly contested and protracted litigation, decided the dispute in favour of the holders; and gave judgment against the drawer for the amount of the cheque (£95), plus interest and costs (£93.900 mils) dismissing the drawer's claim for indemnity under the third party notice, without costs.

The drawer challenges this Judgment on several grounds, which may be put in two groups :

(1) that the trial Judge's findings are untenable on the evidence; and

(2) that the Judgment is based on an erroneous view of the law

The second group includes ground 1 (γ) in the notice of appeal, regarding the Judge's ruling at the opening of the trial as to the burden of proof This point, however, was not actually taken at the hearing of the appeal, and I do not propose dealing further with it at this stage

The holder-plaintiffs are a private limited liability company, registered in Cyprus, and carrying on business in Nicosia The drawer-defendant is a married woman, residing in Paphos, with a bank-account which her husband was authorised to move The payee-third-party, is a sister company of the plaintiffs, carrying on business in the same office, and owned and managed (as far as the evidence goes) by the same persons who own and manage the holder-plaintiffs

According to the particulars endorsed on their writ, the holder-plaintiffs allege that their sister-company, the payees of the cheque, endorsed and delivered it to them (the holder-plaintiffs) for valuable consideration («έπι νομιμω ανταλλάγματι» para 3, p 5 of the record) They have thus become, they say, *bona fide* holders for value of the cheque sued upon The alleged consideration, however, is not described in the particulars, nor is the date of the alleged transaction given

The holder-plaintiffs furthermore allege in their pleadings, that they presented the cheque to the Bank for payment on the 28th September, 1965, when it was dishonoured as the drawer-defendant had, in the meantime, stopped payment (para 4 p 5), and that when asked to meet it, the drawer-defendant refused payment (para 5 p 5) Hence the action

After obtaining leave to issue third-party notice to the payees of the cheque, the drawer-defendant made and filed her defence In her pleading, she denied that the holder-plaintiffs were *bona fide* holders for value, as alleged (para 1 p 7) And she moreover stated that the cheque was sent to the payees (the third-party) postdated, together with an order for goods of equivalent value, for which the cheque was sent The payees having failed, she says, to supply the goods, she (the drawer) stopped payment of the cheque, and demanded its return (para 2, p 7) The Manager of the payees in fact promised to the drawer's husband, she alleges, to return the cheque, but eventually failed to do so (para 3, p 7)

The drawer-defendant's pleading further alleged that the two sister companies, operating under the same management, fraudulently and by collusion had the cheque endorsed to the holder-plaintiffs «διὰ νὰ καταδολιευθῇ τὸ συμφέρον τῆς ἐναγομένης» (for the purpose of fraudulently defeating the defendant's interest Para. 6, p 8) In any case the drawer claimed indemnity from the payees (third-party) on the ground that the latter gave no consideration for the cheque (para 7, p 8)

The Payees denying such lack of consideration on their part, stated in the first paragraph of their pleading, that they (the payees) received the cheque from "a certain Mitros Ioakim" who was acting as the agent of the drawer-defendant, to whom (agent) the payees delivered, they say, goods of the value of £97 400 mils for which the agent paid by the cheque in question (£95) plus £2 400 mils in cash (para 1 p 9) And the payees proceeded in their pleading to give particulars of the goods so sold and delivered to the drawer, and paid for by her alleged agent as above The goods consisted of 8 double packs of playing cards at £3 each as per invoice No 24522, and 33 other packets of playing cards valued at £73 400 mils as specified in invoice No 24525

In the ordinary course of business, the payees further alleged in their pleadings, they endorsed and delivered the cheque to the holder-plaintiffs who have thus become *bona fide* holders for value, entitled to their claim accordingly (para 2, p 9) The payees, in such circumstances, deny the alleged fraudulent collusion between them and the holder-plaintiffs, and deny the allegation that their Manager ever promised to return the cheque

The issues arising from these pleadings are, in my view, clear and simple

At the first hearing of the action (24 6 66) one and the same advocate appeared for both sister companies, the holders and the payees of the cheque According to the record, these parties were present Terms of settlement were discussed, but no settlement was reached One may, perhaps, pause here and wonder what sort of settlement? Who, of these parties, was to forego part of his claim? And why?

Be that as it may, however, there is another note on the record which, I confess, I find myself unable to understand. "It was pointed out to the defendant's counsel–the note reads– that on the issue in the case he has to start" (record p 11, C)

What issue in the case, arising from the pleadings, did it make the defendant-drawer the first party at the trial? Defendant's advocate, faced with this position, and with his client's husband (who had issued the cheque and was her main witness) ill in hospital, applied for an adjournment until after the summer vacation.

The record thereafter speaks for itself. After five different adjournments during the summer vacation, the case came on for hearing before another Judge on September 23, 1966.

The same advocate for the two sister companies (the holders and the payees) submitted at the opening of the trial that as "the defendant alleges that the plaintiff company is not a *bona fide* holder for value of the cheque..... the defendant has the burden of proving fraud as alleged in the defence".

This must, obviously, refer to the allegation in the defendant-drawer's pleading, of collusion between the two sister companies in passing the cheque from one to the other with notice of the relevant circumstances regarding the issuing of the cheque, its passing to the payees, the stopping of payment at the Bank, and the endorsement to the holders.

Nevertheless, the trial Judge, without hearing defendant's advocate on the point, accepted the submission; and after making reference to section 30 (2) of the Bills of Exchange Law (Cap. 262) ruled that "since the defendant alleges that the bill in question is affected with fraud the burden of proof is shifted upon the defendant and she should start her case first". (Record p. 13, F). I must confess that I find myself unable to understand the reasoning behind this ruling. It seems to me that in the circumstances of this case, the last part of section 30 (2) would lead to the opposite direction.

The drawer-defendant's advocate, finding himself as the the first party in the trial, called his client's husband in the box; and after this witness's evidence, closed the drawer's case.

The advocate of the two sister companies then called two witnesses : one of their joint directors; and one of their employees, the cashier of them both.

The evidence establishes, undisputably, that Mitros Ioakim, whom the respondents (holder and payee) put forward as the agent of the drawer, is a brother of the two joint Managers,

owners, and directors of the two sister companies, the respondents in this appeal.

Before stating, however, what passed between these two brothers on June 17, 1965, when the one handed the cheque to the other, it is useful to follow the events from the making of the cheque on the previous day, and also to have a picture of the parties involved, according to the evidence.

The drawer of the cheque is a married woman, the wife of a retiring Bank Manager at Paphos, whose account at the bank was being moved by her husband. It is not suggested that she was carrying on a business, in the ordinary sense of the word, at the material time, excepting for occasional orders for goods in her name to help Mitros Ioakim earn some commission. She is, in fact, according to the evidence, only a name in this case, in her husband's hands.

Mitros Ioakim resides at Paphos, and is described as a "foot agent-trader" (p. 14, G.); a commission agent, perhaps, more correctly. There is no suggestion that he is regularly employed by either side. The drawer's husband stated that this commission agent took orders for his brothers' companies (p. 14, H.) and that he (the husband) used to pass orders to one of these companies (the payees herein) "to help Mitros to earn his commission" (p. 15, A). One of the brothers, Vassos Christofides, who was called for the respondents, said that "as far as he could remember", Mitros Ioakim used to come to the third party for goods on behalf of the defendant. He could remember no occassion when Mitros came alone and took delivery of goods "either for his own account or for the account of any other person or company". But if Mitros came in company with somebody else, "then he was taking delivery of the goods on account of the said companion". (p. 16, H. and p. 17, A.).

The other two parties, the holder (plaintiffs), and the payee of the cheque (third party), are sister companies together with two more of their kind. All have their offices in the same building; and, according to the evidence of one of their Managing Directors, Vassos Christofides, they, all four, "employ one and the same cashier and staff in the accounts section" (p. 16, D.); but they keep separate accounts at the Bank (p. 16, F.). The same witness described the drawer (defendant) as a "customer" of the payees (p. 16, A.). The two sister companies involved in this case, have joint Managing-Directors, the two brothers, Vassos Christofides and Odysseas Ioakim. They also have the same Secretary (p. 17, E.F.).

These are shortly the principal parties involved in the transactions connected with the claim in the action.

I now come to the principal events as presented by the evidence. On June 16, 1965, the drawer's husband drew this cheque for £95, on his wife's account in the Ottoman Bank, Paphos. He made it payable to the third party twelve days later, on the 28th June, by post-dating it accordingly; and he handed it to Mitros Ioakim to carry it to the payees, together with a letter to them, containing an order for goods of the value of the cheque (p. 14, B.). Giving evidence for the drawer, he explained that he post-dated the cheque "to make sure that the goods ordered, would in the meantime be delivered" (p. 14, C.). He ordered the goods for a certain Agrotis, the witness (the drawer's husband) added.

There is no other evidence on the point, and no suggestion came from counsel for the holder and the payees (the sister companies) when cross-examining the drawer's husband, that the cheque was issued for any other purpose. Any finding inconsistent with this evidence, would be mere guesswork, without any foundation whatever; and it would moreover be inconsistent with undisputable facts and, therefore, untenable.

The following day, June 17, Mitros Ioakim called at his brothers' place of business at Nicosia, and handed the cheque to his brother Vassos Christofides, who admits receiving it "on behalf" of the payees (p. 16, A.). "Exhibit 1 (the cheque) was given to me by Mitros Ioakim for the purpose of giving him playing cards" he said. "I gave him playing cards valued at £73.400 mils" (p. 16, B.) he added. But he also stated that the goods delivered to Mitros Ioakim on June 17, 1965, were playing cards of the value of £24; and that Mitros did not inform him that the cards were for the account of the defendant, (p. 16, B.). "Mitros, he said, apart from Exhibit 1 (the cheque) handed to me the sum of £2.400 mils in cash money to cover the total amount of the two invoices issued as follows :— on 17.6.65 for £24; and on 30.6.65 for £73.400 mils". And he produced copies of these two invoices (marked Exhibits II and III respectively) (p. 16, C.).

This witness called for the two sister companies, a responsible officer of the payees, did not say why was the drawer making this payment of £95.— to the payee named in the cheque? What explanation was there for the postdating of the cheque? How did this cheque, belonging, in the ordinary course of business,

to its drawer or to its payee, come to be in the hands of his brother Mitros? And by what right or title, was his brother making use of the cheque in order to buy goods of a smaller value, in his own name, and to acquire personal credit with the payee for the balance?—Nothing of all that was said between these two brothers, according to the record, when the cheque passed from one to the other on June 17.

The invoice, exhibit II, refers to the buyer of these goods as "Mr. Mitros Ioakim, c/o Z. Papaellina, Paphos"; and states that the value of the goods, £24, was paid "by part of the cheque in question". It also refers to receipt No. 26691. But later, in the course of his evidence, when being cross-examined the same witness (this company-director) stated that the invoice (exhibit II) produced as copy of the original invoice, was not a true copy thereof. The original was then put in evidence through this witness as exhibit IIA. As it may be seen from these two documents, the original invoice issued on the 17.6.65 for the playing cards delivered to Mitros Ioakim, did not contain the words "c/o Z. Papaellina"; and did not make any reference to this cheque or to a receipt.

The alterations made to this "copy" of the original, (which had already been issued, several days earlier) were explained by the next witness called for the respondents, Rogiros Iacovides, the cashier of the sister companies for the last ten years (p. 20, A.). "Upon instructions from Mr. Vassos Christofides I issued two invoices, (the witness stated at p. 20, B) one dated 17.6.65 and the other dated 30.6.65, as well as a receipt dated 30.6.65, and all these three I delivered to Mr. Vassos Christofides. The invoice dated 17.6.65 was issued on 17.6.65. Exhibit IIA, is the one I issued on 17.6.65 and exhibit III is the copy of the one I issued on 30.6.65. I produce the copy of receipt I issued on 30.6.65 No. 26691" (p. 20 A.B. and the note at bottom of the page). This is the number of the receipt subsequently added to the copy of the original invoice issued to Mitros Ioakim on 17.6.65. The receipt in question No. 26691 is exhibit V, on the record. It is dated 30.6.65 and it specifically refers to "Mr. Mitros Ioakim, c/o Z. Papaellina"; to the cheque for the £95; and to the two invoices Nos. 24522 and 24525, the first issued on the 17.6.65 and the second on the 30.6.65 (exhibits IIA and III).

"The additions or alterations appearing on exhibits II and III were made by me (the witness added, p. 21, A.) after I had delivered the originals, and after I had received

instructions to this effect from the accounts section. Such additions or alterations are made whenever it appears that there is some omission on the invoice".

In answer to counsel for the other side, this same witness called for the sister companies, added in cross-examination that when he "received instructions to make the said additions or alterations on exhibits II and III", he also received instructions to make additions on exhibit V. "The addition I made on exhibit V, he stated, is :– a/c Zoe Papaellina, and my signature which did not appear well on the copy as the carbon must have been removed at the time of issuing the receipt. I do not remember whether I also added the number of the cheque *i.e.* the words 'cheque No. 820098, Ottoman Bank, Paphos, for £95 and cash' ". (p. 21, B, C.). As it may be seen from the exhibits, these words are found there. And in fact, what was added was c/o (and not a/c) Z. Papaellina.

So, according to the evidence adduced by the respondents, on June 17, 1965, when the cheque passed from Mitros Ioakim to his brother Vassos Christofides as manager of the payees, it was received for goods of the value of £24.– invoiced to Mitros Ioakim, without any mention of the drawer or of her cheque. The evidence also shows that the copy of the invoice issued on that day, was subsequently tamperred with on the 30th June, on the instructions of one of the Managing Directors of the sister companies, apparently for the purpose of connecting the cheque with the invoice.

On completion of this dealing on the 17th June, Mitros Ioakim left the cheque with his brother–according to the latter's evidence–took delivery of playing cards of the value of £24.– with an invoice in his name, and went away, without stating that the goods were being bought for the defendant-drawer. And without giving any explanation for the cheque in his hands, which he was using without making himself a party thereto by endorsing it in the ordinary course of business.

It may be added here that referring to the goods delivered on the 30th June, Vassos Christofides stated that "no more cards were delivered to Mitros on the 17th, because there were none available". And that Mitros was asked to call some other day later, for the purpose, which he did on the 30th June. (p. 16, G).

Not receiving the goods for which he issued the postdated cheque, the drawer's husband stopped payment of the cheque at the Bank on June 25, *i.e.* three days before the date of the

cheque. What happened to the cheque in the meantime, again comes from the evidence of the witnesses called for the respondents. The cashier said :

> "Two or three days after the 30th June, 1965, the plaintiffs cashed the cheque in question to the third party as the latter was in need of cash, after the cheque had been endorsed. The endorsement bears the signature of Vassos Christofides and Odysseas Ioakim. The endorsement by the plaintiffs is the signature of Odysseas Ioakim". (p. 26, D–E).

So according to respondents' witnesses, the cheque was received by the payee in part payment of goods valued at £97.400 mils, delivered to Mitros Ioakim for the drawer, on the 17th and 30th June. It was kept by the payee for two or three days after the 30th, i.e. until the 2nd or 3rd July, when the payee being in need of cash, sold the cheque to the holder for £95.— in cash (p. 16, H; p. 18, H; and p. 20, D.) duly endorsing the cheque "for and on behalf" of the payee.

After this endorsement by one of the joint directors of the payee (Vassos Christofides) the other brother and joint director (Odysseas Ioakim) had the cheque endorsed "for and on behalf" of the holder-(plaintiffs); and their common cashier took the cheque to the Chartered Bank, Nicosia, with a view to depositing it "in the name" of the holders (p. 20, E.).

The Chartered Bank apparently did not accept this cheque in the ordinary course of business; notwithstanding its two endorsements, without confirmation from the drawee Bank in Paphos. And after a telephone communication between the Ottoman Bank, Paphos and the Chartered Bank, Nicosia, the latter refused to cash the cheque and returned it to the cashier of the sister companies, (p. 20, F.). The cashier took it back with him and "upon instructions from Odysseas Ioakim" he kept it in the holder's safe (p. 20, F.).

The holders did not protest to the payees of the cheque who had endorsed it to them for cash, they say. Nor did they claim return of this money, or payment of any indemnity. "The plaintiffs never asked payment from the third party" witness Christofides said. Neither was there any adjustment made in the books of the two companies (p. 19, B.) as would have been done in the ordinary course of business. Nor did the manager or his cashier take any steps; as usual in such cases, to find from the drawer of the cheque and from the

drawee Bank what was wrong with it and why was it not being honoured? (p. 19, B.). The holders simply instructed their cashier to keep the cheque in his safe. And "later on" the cashier was instructed to deposit the cheque with the Chartered Bank, Nicosia "on account of the plaintiffs", until September 29, 1965, when it was returned unpaid as "countermanded by the drawer" (p. 20, F–G).

Vassos Christofides' version in this connection, is that in July, 1965, he visited the drawer's husband at his office in the Chartered Bank, Paphos, (p. 17, B.) but with no result. He did not say, however, while in the box, why the husband of the drawer refused payment. The only evidence on the point is that of the husband who stated the reason why he had countermanded the cheque on June 25, before it was payable at the Bank. It was, he said, because the goods for which the cheque was issued, had not been received; nor any other goods for that matter, either by the drawer or by Agrotis for whom he had ordered them (p. 14, C.).

As to the passing of the cheque from the payee to the holder, their joint director stated repeatedly in his evidence that the holder gave "cash money" for the cheque (p. 16, G–H; p. 18, H.). The common cashier of the two sister-companies, however, stated that he could not say whether the holder was in need of cash at the material time (p. 21, F.–G.). "There is no book either of the plaintiffs, he said, or of the third party from which it can be shown that in fact the cheque in question had been passed from the one to the other company. I keep no record from which it can be ascertained that the plaintiffs cashed the cheque in question to the third party" he added. (p. 21, G–H).

The trial Judge, after stating the versions of the three parties in his Judgment, and after giving his reasons why he did not believe the evidence of defendant's husband, he goes on to say that (p. 27, A) "Disregarding, however, entirely the question of credibility of the only witness called for the defendant, I do find that the defendant has not discharged the burden of proving failure of consideration cast upon her under section 30(1) of the Bills of Exchange Law, Cap. 262".

Rightly in my opinion the learned trial Judge held that section 30 (1) creates a rebuttable presumption that the drawer having put her signature on this cheque is deemed to have done so for value; and is thus liable to a holder in due course,

as a party to the bill for value. Not only the value which the drawer may, or may not, have received for this cheque, but also the value which the holder in due course has paid in good faith, relying on the signature of the other parties thereto.

But in this case there is no suggestion that the drawer had received any value from the payee when she signed and issued (through her husband) the cheque on June 16, 1965. In fact by post-dating it, she retained control over the money in her banker's hands until the 28th June; and at the same time she made known to the payee and any other eventual party to the cheque, that she was doing so.

On June 25, the drawer countermanded the cheque, without informing the payee that she did so. Her husband stated on oath that he stopped payment because the goods for which the postdated cheque had been issued on the 16th, had not been received by the 25th June. Can it be reasonably suggested that the drawer's husband, a retiring bank manager, after receiving, directly or indirectly, the £24.— worth of goods delivered to Mitros Ioakim, countermanded the cheque in question which he had sent to the payees for goods to be purchased? No one made such a suggestion. What is being said by the respondents, is that their brother Mitros may not have accounted for those goods to the drawer.

Be that as it may, and what Mitros Ioakim may have to say in appropriate future proceedings, regarding the cheque or the goods acquired thereby, he (Mitros) returned to the payee on June, 30; and again bought from his brothers' company (the payee) more goods, the total value of which together with that of the goods bought on June 17, exceeded the amount of the cheque by £2.400 mils which Mitros paid in cash.

On this occasion, however, the goods were invoiced to "Mr. Mitros Ioakim, c/o Z. Papaellina, Paphos". And reference was now made to the cheque, as exhibit III clearly shows. But what is very significant in this case, is that on this occasion (June 30) on the instructions of the joint director of the sister companies, their common cashier, witness Jacovides, made additions and alterations to exhibits II and III; and also to exhibit V. (p. 21, B–C). These alterations were obviously intended to connect the drawer and her cheque with both purchases.

Moreover, two or three days after June 30, when the payees say that they were in need of cash, they did not take the cheque to the Bank to get the money; but they had it endorsed by

one of their joint directors on behalf of the payees, and by the other joint-director on behalf of the holders, and presented it to the Chartered Bank, Nicosia, where the drawer's husband was well known (being, according to the evidence, the manager of their Paphos branch) to deposit the value of the cheque to the credit of the holder in that Bank. The Bank after contacting the drawer's banker at Paphos, declined to accept the cheque.

I do not propose dealing further with the evidence as to the alleged cash-sale of the cheque from the payees to the holders; or discuss the trial Judge's finding that the latter are "holders in due course of the cheque in question under the provisions of section 29 of the Bills of Exchange Law Cap. 262" (p. 27, F.). Nor, for that matter, discuss other findings made in this trial, because having had the advantage of reading in advance the Judgment which is about to be delivered by Mr. Justice Stavrinides, I agree with his view that the trial Judge misdirected himself on the legal aspect of the case in a way which resulted in a miscarriage of justice, to an extent which justifies, in the circumstances of this case, an order for retrial. This Court was expressly vested with power to make such an order in a proper case, by section 25(3) of the Courts of Justice Law (No. 14 of 1960) the effect of which is to remove any doubt on the point. In view of such retrial I wish to say no more on either the factual or the legal aspect of the case.

I would allow the appeal with an order for retrial and directions that all costs so far incurred, here and in the District Court, shall follow the event.

STAVRINIDES, J.: The learned Judge formulated the matters in dispute in the proceedings in the form of two "issues" as follows:

"(*a*) Was there, in fact, a failure of consideration as between the third party and the defendant?

(b) Can the plaintiffs be found to be 'holders in due course' within the meaning of s. 29 of the Bills of Exchange Law, Cap. 262?"

The first "issue" concerns both the dispute between the plaintiff and the defendant and that between the latter and the third party; the second "issue" relates solely to the dispute between the two last-mentioned parties. The defendant failed on both "issues", the Judge finding that—

"the defendant has failed to establish :

(a) failure of consideration as against the third party and

(b) that the plaintiffs are not not holders in due course of the cheque in question under the provisions of s. 29 of the Bills of Exchange Law, Cap. 262".

In the light of the pleadings and the evidence given at the trial for the plaintiffs and the third party on the one hand and for the defendant on the other, the question whether there had been a failure of consideration as between the defendant and the third party depended on a number of specific issues of fact, which may be put in this way :

(*a*) For the purchase of what goods did the defendant's husband deliver the cheque to Mitros Ioakim (hereafter "Ioakim")—nails or playing cards?

If for nails,

(*b*) did the defendant hold out Ioakim to the third party as her agent for the purpose of purchasing goods from them on her behalf?

If so,

(*c*) did such holding out reasonably cover the purchase of playing cards to the amount, or approximately the amount, of the cheque?

If so,

(*d*) did the third party, in consideration of the cheque being delivered to them by Ioakim, deliver to him any playing cards and if so to what value?

(*e*) If any playing cards were so delivered, did Ioakim, at the time of ordering of, and receiving from, the third party such goods and delivering to them the cheque represent to them, whether by words or conduct, that he was authorised by the defendant to do so?

(*f*) Did the third party deliver such goods to Ioakim in *bona fide* reliance on such representation as in the last preceding issue, and/or such holding out as in (*b*) and (*c*), set out?

The question whether the plaintiffs became holders of the cheque in due course is a composite one which, in the context

of the pleadings and the evidence, should have been reduced to two specific issues, which may be framed thus :

(*a*) Whether at the time of the indorsement of the cheque by the third party to the plaintiffs the latter knew or not that there had been a failure of consideration as between the third party and the defendant;

(b) whether or not the plaintiffs gave value for the cheque.

With regard to the first of his "issues" the judge said :

"The burden of proving failure of consideration lies upon the defendant because, under s. 30 (1) of the Bills of Exchange Law, Cap. 262, every holder is deemed to be a holder for value".

The intended reference is to sub-s. (2) of s. 30, reading :

"Every holder.... is *prima facie* deemed to be a holder in due course",

which is not quite the same thing. Having set himself a question as to consideration in the general form he did, the Judge answered it generally without giving any specific indication of his conclusion on the specific matters on which the answer to the general question depended. Further, he based his answer to that question on his rejection of the evidence of Mr. H. Papaellinas, the defendant's husband. But some of the considerations which led to that rejection are wrong. For instance, he takes it against the witness that he—

"stopped payment of the cheque before its maturity ..... without having made any attempt to communicate or inquire either with or from the third party or the said Mitros Ioakim as to what the position was",

when in fact there is no evidence as to whether he did or did not make any such "attempt", a point on which the witness was not questioned.

The judge went on :

"This conduct on his behalf, in my view, coupled with his repeated statements that he sent the cheque through Mitros Ioakim in order to enable the latter to earn a commission from the third party shows a person who has not acted as an ordinary business man would in similar

circumstances and, perhaps, it creates the suspicion that he did not act in good faith from the very beginning when he issued the post-dated cheque".

Apart from the fact that this part of the Judgment is based, mainly, as it seems, on the wrong premise that it had been established that the witness "made no attempt to communicate or inquire.....as to what the position was", one is unable to see how the witness's statement that an order for goods was transmitted through a particular person, whom the witness on his cross-examination described as "a foot trader-agent" and on his chief examination as "the representative of the plaintiff company and the third party company at Paphos", to enable him to earn a commission (presumably from the third party) warrants the conclusion that the witness "has not acted as an ordinary business man would in similar circumstances"; and for my part I am unable to see that anywhere in the evidence there is any ground for such suspicion as the judge thought possible.

The judge also held it against the defendant that her husband

> "alleged that in all his previous transactions with the third party he was always passing the orders to the third party through the said Mitros Ioakim and that, in all these transactions, the third party were sending the goods ordered through their own means of transport accompanied by the relevant invoices issued in the name of the defendant. However, he failed to produce any of such invoices issued in the name of the defendant, whereas he was in possession and showed in Court of a number of invoices issued in the name of Mitros Ioakim".

Probably what the judge had in mind was a passage in the witness's re-examination which reads :

> "I used to place many orders for goods to Lion Products and to plaintiff company through Mitros. In all these cases I handed over cheque to Mitros made out to the order of these companies and the companies used to send to me goods with their cars and accompanied with their relevant invoices".

In any case the witness never said that the invoices were made out *in the name of the defendant*.

Again, the judge took it against the defendant that

"he (meaning her husband) did not even call as a witness Mitros Ioakim to give evidence.....".

Certainly Ioakim's evidence would have filled an obvious, indeed a vital gap, in the evidence. But why should the defendant, rather than either of the other parties, have called him? In so far as business connection was concerned, the defendant's case was that he was the third party's agent; and if that was true it would have been a reason for her fearing that his evidence would have been biassed in favour of his principal. True, according to the other parties he was the defendant's agent. But while so far matters are even, there is evidence, undisputed on this point, by the defendant's husband that Ioakim is a brother of Vassos Christophides, who is a joint managing director of the third party, and also a brother of Odysseas Ioakim, a joint managing director of that party and managing director of the plaintiffs. Therefore if the fact that Ioakim was not called as a witness were to be counted against any of the parties the defendant should not be that party or one of them.

I now come to the second of the judge's "issues". He said :

"..... even if the defendant had proved a failure of consideration then there would be a further duty of the defendant to prove that the plaintiffs in giving consideration for the cheque had notice of such failure of consideration. To discharge such a duty it would not be sufficient for the defendant to prove that *the third party knew that they* had delivered no goods to Mitros Ioakim or that when they delivered goods to Mitros they could not be in the belief that the goods were delivered to Mitros so that they be delivered to the defendant".

The words here underlined presumably represent a slip for "the plaintiffs knew that the third party". It is clear that the judge proceeded on the footing that the plaintiffs in fact gave consideration for the cheque. But nowhere in his Judgment is there a direct finding that they did. Had this been mere inadvertence it would have been of no consequence. But earlier he said :

"It had been argued by the learned counsel for the plaintiffs and the third party that not only the plaintiffs but also the third party must be regarded as *prima facie* holders in due course and that, therefore, the provisions of s. 30(2) of the Bills of Exchange Law, Cap. 262, do equally apply and

that, consequently, the defendant's relying on the question of failure of consideration for the cheque has no bearing on the matter at issue.

I do not agree with the said argument and in fact I find that the position of the third party, being an immediate party to the cheque in question, in fact being the payees, is different from the position of the plaintiffs, being a remoter party to the cheque. This is clearly distinguished in para. 297 of Halsbury's Laws of England (3rd Edn.), Vol. 3, p. 179".

In the light of this passage it seems clear that the words " the plaintiffs in giving consideration for the cheque" in the earlier passage are based simply on the presumption created by s. 30 (2) of Cap. 262. Here I must set out the whole of that provision:

"Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill".

It is apparent, in my opinion, that the latter part of that provision, relating to the effect of fraud etc., is not intended to be exhaustive of the circumstances in which the presumption created by its earlier part may be rebutted, so that, whether or not any of those circumstances exist, it is incumbent on the trial Court to consider and weigh all the evidence bearing on the presumed facts (see s. 29 (1) (*a*) & (*b*)) before arriving at a finding as to whether a holder is in fact a holder in due course. And this is particularly important in a case such as the present, where the facts as to good faith and value were peculiarly, nay, solely, within the knowledge of the plaintiffs and the third party (see in this connection Halsbury's Laws of England (3rd Edn), Vol. 15, p. 270, sub-para. 3 of para. 493). But here to all appearances the judge applied the presumption without regard to the evidence bearing on it.

The foregoing is sufficient to show that the judge has misdirected himself in various ways to such an extent that a substantial miscarriage of justice has occurred. In the circumstances I would set aside the Judgment both as between the plaintiffs and the defendant and as between the defendant

and the third party and order a new trial by another member of the District Court on the terms that the costs here and below shall follow the event of that trial. If Ioakim is not called as a witness at the new trial by any of the parties the trial judge may well consider whether that person should not be called by the Court under the Civil Procedure Rules, Order 33, r. 7(*c*).

There are two other matters to be noticed before I conclude. First, the defendant omitted to apply to the Court under Order 10, r. 7, of the Rules for directions. If he had, directions would have been given under that and the following rule as a result of which a fuller understanding of the issues between the parties would have been realised before the action came on for hearing. On the other hand according to a note at p. 392 of the Annual Practice for 1960, citing *Tritton* v. *Bankart*, 56 L.J. Ch. 629, "If the defendant does not apply, the Court at the trial will not entertain the claim raised by the notice". Secondly, this case illustrates the need for the trial judge to formulate clearly in his Judgment the specific issue or issues of fact arising between the parties and to state his finding on such issue or each one of such issues. As regards criminal cases a provision to that effect is to be found in s. 113 (1) of the Criminal Procedure Law, Cap. 155. In no statute or other legislation is there a corresponding provision as to civil proceedings, but the reason of s. 113 (1) is *a fortiori* applicable in such proceedings, and judges trying civil disputes should unfailingly give effect to it.

HADJIANASTASSIOU, J. : This is an appeal by the defendant, from the Judgment of the District Court of Nicosia, dated 25th October, 1966, given in favour of the respondent-plaintiffs in their action on an endorsed cheque in the amount of £95, drawn by the appellant in favour of Lion Products Ltd., or Bearer, which was dishonoured on presentation for payment to the appellant's bank.

The appellant now appeals on the grounds :

(1) That the Judgment of the trial Court was against the totality of the evidence adduced;

(2) that it erroneously decided that the defendant failed to prove failure of consideration on behalf of the third party;

(3) that the Judge was wrong in law in holding that the defendant was bound to prove that the plaintiffs were not holders of the said cheque in due course and in good faith.

On June 16, 1965, Mr. Papaellinas, the husband of the defendant, acting on her behalf, issued a post-dated cheque drawn on the Ottoman Bank, payable on the 28th June, 1965, to Lion Products Ltd., or Bearer, for the sum of £95. This cheque was delivered to Mr. Mitros Ioakim together with an order for goods as well as a letter, with directions to be delivered to Lion Products Ltd. (hereinafter called respondent-third party) in Nicosia. Mr. Ioakim has been described as a foot agent-trader whom he authorized on many other occasions to place orders for goods for and on behalf of the appellant with both respondent companies. He always trusted him with the cheques representing the value of the goods ordered.

Mr. Papaellinas, who was the manager of the Chartered Bank, Paphos, claims that respondent-third party failed to deliver the goods in accordance with his orders and because of such failure, and without in any way enquiring as to the fate of the goods—which was, in my view, the proper thing to do—he instructed the Ottoman Bank on the 25th June, 1965, to stop payment of the cheque. Although paragraph 2 of the defence refers to "goods" as being "nails", nevertheless, no particular mention of nails is made in his oral evidence before the Court. About one month after June 25, 1965, he alleged that he received a visit from Mr. Christofides, the manager of respondent-third party who asked him whether he was willing to help him to recover the value of playing cards sold by them to Mr. Mitros Ioakim. He refused to intervene in any way and told his visitor that, because the company had failed to deliver to the defendant the goods she had ordered, it was only right to return to him the cheque which he had issued to the order of Lion Products Ltd. Mr. Christofides replied that he knew nothing about that case. Some time later, about a fortnight after the first visit, Mr. Christofides called again to see the husband of the appellant on the same matter; but again he received the same reply from him.

It is perhaps significant to say that, although Mr. Papaellinas in his evidence in chief stated that he did not remember anything being said about the cheque, yet it is clear, after perusing the record, that in his affidavit dated November 2, 1965, para. 4 Mr. Papaellinas maintains that the manager of Lion Products Ltd., during his visit of July, 1965, had promised to him to return the cheque because the company had failed to give value; and this statement appears again in para. 3 of the defence. Furthermore, Mr. Papaellinas stated that Mr. Christofides' visits were made after the cheque had been presented to the

bank and payment had been refused. Is it then unreasonable for this Court to draw the inference that the purpose of Mr. Christofides' visit was to inquire as to the reason why the cheque was not honoured? It is further significant that a manager of a bank did not even bother to keep a copy of the order for goods. It is clear that the defence has failed to serve respondent-third party with a notice to produce the order for goods in order to throw light as to what type of goods were actually ordered by the appellant-defendant.

Mr. Vassos Christofides, the joint manager director of respondent-third party is also a director of the respondent-plaintiff. He stated that the appellant was a client of theirs and that the cheque, *exhibit* 1, was delivered to him by Mr. M. Ioakim at his office on June 17, 1965, for the purpose of paying the price of the playing cards, which he ordered; but, without in so many words telling him that the cards were for and on behalf of the defendant. The cards were delivered to Mr. M. Ioakim on that date and on the 30th June, 1965, because there had not been sufficient available stock on the 17th. On both dates invoices were handed to Mr. M. Ioakim showing the price and the amount of goods delivered, *exhibits* 2 *and* 3; on June 30, Mr. Ioakim paid in cash an amount of £2.400 mils in excess of the amount of the cheque for the price of the playing cards.

As the respondent-third party was in need of cash, the cheque was indorsed and delivered to Mr. Rogiros Jacovides, the cashier of both sister-companies, two or three days after the 30th June, 1965. Payment of the sum of £95 was given to the respondent-third party out of the moneys belonging to respondent-plaintiff; and the cheque was also indorsed on behalf of the holder.

It seems to me that the original payee of the cheque, respondent-third party, is as the term imports, the person to whom the drawer primarily intends and directs payment to be made. It rests entirely with the payee whether he will present or negotiate the cheque, whether it is payable on demand or it is post-dated. Post-dated cheques are, in a sense, not payable on demand; they are cheques issued on one date and dated on the face of them a subsequent one, before which will not be paid if the date is noticed. Post-dated cheques are, of course, recognized by section 13 (2) of the Bills of Exchange Law, Cap. 262; they cannot be said not to be complete and regular by reason of the post-dating; a whole series of cases establish its validity

and perfect capacity for negotiation between the real date of its issue and its ostensible date and presumably for a reasonable time after that.

It is in evidence that respondent-third party, had negotiated the cheque to respondent-plaintiff within a period of five days after its ostensible date; the original payee was perfectly entitled to do so. I need not repeat the evidence, and in my view the cheque was not deemed to be overdue, having not been in circulation for any unreasonable length of time within the meaning of section 36 (3) of the Bills of Exchange Law.

What is an unreasonable length of time, within this section, is a question of fact; and in the present case the length of time of five days is not, in my view, an unreasonable length of time as to bring the cheque on the footing of an overdue bill.

In *London and County Banking* v. *Groome*, [1881] 8 Q.B., 288, it was decided that "a cheque negotiated eight days after date was held not to be on the footing of an overdue bill". See also *Robinson* v. *Benkel*, 1913, 29 T.L.R. 475.

According to the cashier, he visited the Chartered Bank in Nicosia at about the beginning of July in order to pay the cheque in the account of the respondent-plaintiff; but after a telephonic communication between that Bank and the Ottoman Bank in Paphos, it was found that the cheque could not be met. Later on he paid the same cheque into the account of the respondent-plaintiff, but on September 29, 1965, it was returned by the Bank unpaid, marked "countermanded by drawer". We all know that when a cheque is dishonoured the Bank nearly always returns the cheque to the payee so that he can sue on it. It seems to me plain that the respondent-plaintiff became the holders and were the payees in possession. It would surprise me to suppose that the respondent-plaintiff had no right to sue. I do not think that the appellant would have had any defence except, perhaps, for failure of consideration.

We already know that Mr. Christofides visited the husband of the defendant at his office in Paphos, in July, 1965, and requested him to honour the cheque in order to avoid legal proceedings.

On October 21, 1965 the respondent-plaintiff, as the record shows, instituted the present action against the defendant claiming that they were *bona fide* holders for value of the cheque for £95.

On December 23, 1965 the appellant-defendant filed her defence and denied in paragraph 1 that the plaintiff was a *bona fide* holder for value; that it failed to despatch the goods described as "nails" in paragraph 2; that Lion Products Ltd., acting in a fraudulent manner together with the plaintiff company had indorsed the said bill in favour of the plaintiff company in order to defraud the defendant (paragraph 6); and in paragraph 7, the defendant maintained that if it was decided that the plaintiff company was a *bona fide* holder for value, the defendant would have been entitled to an indemnity from Lion Products Ltd., because no value was given in return for the cheque.

Lion Products Ltd., which was joined by leave of the Court as a third-party, filed a defence on February 7, 1966, alleging *inter alia* in paragraph 1, that playing cards were delivered to a certain Mitros Ioakim, acting in his capacity as an agent for the defendant, at the price of £97.400 mils, paid by cheque of the amount of £95, plus £2.400 mils in cash.

The trial Court decided against the appellant-defendant, and gave Judgment in favour of the plaintiff.

It is quite plain to me that respondent-plaintiff could sue on this cheque; for the simple reason that it was the "holder". By section 2 of the Bills of Exchange Law "holder" means the payee or indorsee of the bill or a note, who is in possession of it, or the bearer thereof. This cheque, as I have already said, was payable to Lion Products Ltd., or bearer. It was indorsed to the present holder. There is a presumption under section 30(1) of our Law that every party whose signature appears on a bill is *prima facie* deemed to have been "a party thereto for value". The indorsement, in my opinion, has one great advantage. The signature of the payee on the back of the cheque was excellent evidence or strong evidence that it had received the money. See *Egg* v. *Barnett* (1800) 3 Esp. 196–197 per Lord Kenyon, *Keene* v. *Beard* (1860) 8 C.B. (N.S.) 372, 382 per Byles J. These two cases have been referred to in the Judgment of Lord Denning M.R. in *Westminster Bank Ltd.* v. *Zang* [1966] A.C. 182 at page 201.

In my view, the learned trial Judge quite rightly found that the respondents-plaintiffs were holders in due course of the cheque. Under section 29 of the Bills of Exchange Law, holder in due course is a holder who has taken a bill complete and regular on the face of it, before it was overdue, and without

notice that it has been previously dishonoured, if such was the fact; that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

In an action on a bill of exchange the holder is deemed to be a holder in due course (sections 29 and 30); the onus, therefore, lies on the defendant to prove that the acceptance or subsequent negotiation was obtained by fraud. But as soon as this is established, then it is for the plaintiff to prove that he took it subsequent to the alleged fraud, and value has in good faith been given for the cheque. By section 90 of the same law a thing is deemed to be done in good faith, within the meaning of this law, where it is in fact done honestly, whether it is done negligently or not.

Going through the record, I was unable to find evidence of fraud; as I said earlier, the cheque was indorsed from one company to another, complete and regular on the face of it, before it was overdue, and without notice that it had been previously dishonoured. The holder had given value honestly and without notice at the time when the bill was negotiated to him of any defect in the title of the company who negotiated it.

Can it be argued from the facts of this case, that the holder of the cheque, being an entirely separate legal entity from the original payee, had notice that the original payee gave no value; and that the holder of the cheque took it not in good faith? I must confess, having heard no argument at all from counsel for the appellant, that my answer to both questions is in the negative. As it has been said by Wills J. in *Raphael* v. *Bank of England* (1855) 17 C.B. 161 at p. 174, "a person may be proved to have had notice to an act of Bankruptcy either by proof that he had received formal notice, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed".

As regards "good faith" Lord Blackburn in his speech in the House of Lords in *Jones* v. *Gordon*, [1877] 2 App. Cas. H.L. 616 had this to say at pp. 628-9:

> "I consider it to be fully established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances that might have led a man to suspect that. All these are

matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris*, or when the bill is sought to be proved against the estate of a bankrupt, it is necessary to shew that the person who gave value for the bill, whether the value be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth, he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not have made any difference if he knew there was something wrong about it and took it. If he takes it in that way he takes it at his peril. But then, I think, such evidence of carelessness or blindness as I have referred to may, with other evidence, be good evidence upon the question whether he did know there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank note when he ought not to have taken it, still he is entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions not because he was an honest blunderer, but because he thought in his own secret mind—I suspect there is something wrong, and, if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover,—I think that is dishonesty".

I cannot, but fully endorse, and apply this reasoning in the present case.

It is in evidence that the appellant did not, even take the trouble, either before or after instructing the Ottoman Bank to stop payment of the cheque, to write a single letter to the manager of the respondent-third party in order to tell him that because of the failure of his company to deliver to the defendant the goods ordered payment of the cheque was stopped.

Where is then the proof that the respondent-plaintiff had notice on the date of the indorsement of the cheque or of facts which would inform the holder company to suspect that there was something wrong in the title of the original payee when it took the cheque? I find no such proof. On the question of the absence of value for the cheque this cropped up some time after the indorsement of the cheque to respondent-plaintiff.

As regards, however, the allegation of fraud against both respondent companies,—I want to repeat this point was not argued before us—I am disturbed to find that the defendant has failed entirely to adduce evidence, in order to substantiate his case fully before the trial Court when such grave charges have been levelled against two directors of the respondent-companies.

I would like further to add that sub-section (2) of section 30 of the Bills of Exchange Law does not apply to the original payee of a cheque, but only to subsequent parties. In the case of an original payee the ordinary common law rule prevails that a person alleging fraud or duress must prove it. See *Talbot* v. *Von Boris* [1911] 1 K.B. 854, C.A.

For the reasons I have endeavoured to explain I have reached the conclusion that respondent-plaintiff is entitled to recover on the cheque. I, therefore, affirm the Judgment of the trial Court on this issue.

Now the next issue is: has the respondent-third party failed to deliver the goods ordered to the defendant? The main contention of counsel for the defendant, before the trial Court as well as before us,—indeed the only contention raised before this Court,—was that the appellant received no value for the issuing of the cheque.

In my view, the answer to this submission, turns on whether or not Mr. Ioakim was deemed to be considered at the time the agent of appellant-defendant. If the answer to this question is in the negative then the appellant is entitled to succeed because of absence of consideration.

It is common ground that the defendant was a client of both respondent-companies; and that the husband of the defendant had on many occassions instructed Mr. Ioakim to place orders with the respondent-companies for and on behalf of the defendant. He trusted him with the cheques issued by defendant, payable to the respondent-companies, for the payment

of goods ordered. According to Mr. Rogiros Iacovides, the cashier of both sister-companies, Mr. Ioakim acting as the agent of the defendant, accepted on many other occasions delivery of goods for the account of the defendant.

I do not think I need cite authority for the proposition that a holder of a bill who has not himself given value, is, as regards third parties, deemed to be the agent of the party from whom he received it whatever their private relations may be. I take it then, in view of the evidence, that when Mr. Ioakim took the cheque to respondent-third party, he took it as agent for the appellant-defendant.

The trial Court, after hearing evidence as to absence of consideration and on the issue of whether or not Mr. Ioakim was the agent of the defendant, came to the conclusion that the husband of the defendant was not a truthful witness; and did not believe his evidence. In his Judgment the learned trial Judge found that the goods had been delivered to Mitros Ioakim in accordance with the invoices, *exhibits 2 and 3*, on account of the defendant, or alternatively to Ioakim whom the defendant held as her agent.

The principles on which this Court decides appeals on the credibility of witnesses are well-settled and we need not enter into them in detail. It must be shown that the trial Judge was wrong and the onus is on the appellant to persuade this Court. Matters of credibility are within the province of the trial Judge and if, on the evidence before him it was reasonably open to him to make the finding which he did, then this Court will not interfere with the Judgment of the trial Court. Needless to say that this being a civil case it is decided on the balance of probabilities. This being a matter of credibility the learned trial Judge decided to accept the version of the third party, and after hearing the appeal I have not been persuaded that on the evidence before the Court it was not open to him to make findings which he did make in the case.

However, even if I would have accepted the view, that the findings of fact made by the trial Court passed beyond simple direct testimony and become inferential in character, I would, without hesitation, following the principle in *Benmax* v. *Austin Motor Co. Ltd.*, [1955] A.C. 370, still be prepared to draw after the evaluation of facts, the same inference and reach the conclusion that the playing cards were delivered to Mr. Ioakim in his capacity as agent of the defendant, whom she held out

on many other occasions as being her agent. See *Ioannis Patsalides* v. *Carabet Afsharian*, [1965] 1 C.L.R. 134; *Mamas* v. *The Firm "Arma" Tyres* [1966] 1 C.L.R. 158; Wheat v. *E. Lacon & Co. Ltd.*, [1966] A.C. H.L. 552; *Iosifakis* v. *Ghani*, (reported in this Part at p. 190 *ante*).

In view of this reasoning I affirm the Judgment of the trial Court on this issue also.

Before concluding the appeal I would like to observe that the fact that Mr. Ioakim failed to deliver the goods to his principal, and I take it from the evidence of the husband of the defendant that perhaps the agent has acted in his own interest, that will not relieve the principal of liability, as in my view the agent was acting within the scope of the authority committed to him by his principal.

For these reasons, in my opinion, the appeal fails and should be dismissed with costs.

VASSILIADES, P : In the result the appeal is allowed; Judgment of the Court is set aside with an order for retrial and directions that all costs so far incurred here and in the District Court shall follow the event.

Appeal allowed. Judgment of trial Court set aside. Order for retrial and directions as to costs as above.