[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

FRIXOS CONSTANTINOU,
Appellant-Defendant,

v.

THE FIRM S. MAMAS & CO.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 4992).

Hire-purchase—Agreement for letting a motor car with option to purchase—Payment by instalments—Bill of exchange (or promissory note) for the whole amount—It operates as collateral security for the payment of the instalments due—And not as payment of the hire-purchase price so as to convert the hire-purchase agreement into a sale or credit sale agreement—Consequently the acceptance of the bill of exchange by the owner does not deprive him of his right to claim under the terms of the agreement—Cf. infra.

Hire-purchase—Nature of—Bailment coupled with elements of sale.

Findings of fact made by trial Courts—Based on credibility of witnesses—Principles upon which the Court of Appeal will approach appeals turning on credibility of witnesses—Principles well settled—Desirability that judges should normally give reasons in deciding to believe the version of one party and reject that of the other.

Appeal—Findings of fact based on credibility of witnesses—See supra.

Witnesses—Credibility—See supra.

On August 28, 1968, by a hire purchase agreement, containing elaborate provisions, made between the plaintiffs (now respondents), a firm of motor car dealers and owners of the motor car subject matter of the action, and the defendant (now appellant), it was *inter alia* provided that the plaintiffs agreed to let and the defendant to hire the said motor car (a Dodge saloon car) of the agreed value of £1,545 for a term of 4 months at the total rental price of £1,545 for the possession and use of the said motor car payable as

follows : the sum of £545 was paid on the date of the execution of the agreement of hire purchase and the balance to be paid regularly by four monthly instalments ; and for each instalment the hirer agreed to issue bonds payable to the owners with interest at 9% thereon as from the date of maturity of each bond till final payment. It appears, however, that for the quarterly period of the hiring only one bill of exchange was issued for the sum of £1,000. By clause 4 of the agreement, the owners (plaintiffs now respondents) were entitled to discount the said bonds and if the hirer failed to pay the sums due, then they would have the right to terminate the hiring and take possession of the motor car in question. By clause 7, it was agreed that if the hirer will pay the amount due, either before or on the expiration of the period of hiring, the owners shall be bound on payment of a sum of five shillings by the hirer, to transfer the property and register the said car into the name of the hirer (defendant-appellant). On the other hand by clause 8 it was stipulated : " If the owners will exercise their right to terminate the present agreement and to take possession of the said car... .... the hirer ... shall not be discharged of the amounts due and the owners shall have the right to sell or hire the said car to another person and from the collection of the amounts derived from the sale and/or the hiring, they will credit his (the hirer's) account, and if there is a balance, return it to the hirer. " By paragraph (d) of the additional conditions of the agreement it was agreed that if the hirer shall fail to pay an instalment ... ...or fail to observe any one of the stipulations of the present agreement, then all the rights of the hirer will, *ipso facto* be terminated without any notice to the hirer and the owners will have the right immediately to take possession of the said motor car and all paid instalments shall be kept by the owners as rental.

Although the hirer took the possession and use of the motor car, he failed to pay the quarterly rental of £1,000 (*supra*), and the owners, after demanding the payment of that amount and the return of the motor car, brought the present action claiming the said sum of £1,000 (with interest) ; an order for the return and sale of the motor car in satisfaction of their claim and for the refund of any surplus to the hirer (defendant-appellant). It should be noted that the plaintiffs' case was, *inter alia*, that the issue of the aforesaid bill of exchange of £1,000 was made not as (or in lieu of) payment of

that amount, but merely as collateral security for the payment of that amount as well as for the purpose of discounting the bill in question.

The trial Court found that the agreement sued on was a hire purchase agreement (and not a sale or a credit sale agreement) and that the aforesaid bill of exchange was merely a collateral security for the payment of the balance of the purchase price ; and gave judgment for the plaintiffs as claimed. The hirer (defendant) now appeals against this judgment.

Held, (1). It was argued by counsel for the appellant that once the plaintiffs-owners (respondents) have accepted the said bill of exchange they have lost their right to bring an action under the terms of the hire purchase agreement. We are of the view that this argument is untenable because during the continuance of the hiring, the hirer must pay the instalments of hire-rent stipulated for in the agreement. When these become due, they represent an accrued debt to the owner, even so that the subsequent repossession of the goods by the owner in no way relieves the hirer from his obligation to pay his debts (*see, Brooks* v. *Beirnstein* [1909] 1 K.B. 98, at p. 102).

(2) Regarding the question of collateral security, we think that the execution by the hirer of bills of exchange (or promissory notes) for the instalments falling due under the hire purchase agreement, does not constitute payment of these instalments (even if the notes are subsequently discounted to a third party) so as to convert the agreement into a sale or an agreement of sale. It is presumed that the bills (or notes) were given merely as collateral security for the payment of the instalments and not as payment, whether absolute or conditional, of the hire purchase price (*Modern Light Cars Ltd.* v. *Seals* [1934] 1 K.B. 32).

(3) We find, therefore, ourselves in agreement with the learned Judges of the trial Court that the giving of the aforesaid bill of exchange for £1,000 (*supra*) did not prevent the owners (respondents) from bringing the present action.

Cases referred to :

Helby v. *Matthews* [1895] A.C. 471 ;

Karflex Ltd. v. *Poole* [1933] 2 K.B. 251, at pp. 263–264 ;

Economides v. *Zodhiatis*, 1961 C.L.R. 306, at p. 307 ;

SS Hontestroom (Owners) v. *SS Sagaporach (Owners)* [1927] A.C. 37, at p. 47 ;

Haloumias v. *The Police* (1970) 2 C.L.R. 154, at pp. 160–161 ;

Kyriacou v. *Aristotelous* (1970) 1 C.L.R. 172, at pp. 176–177 ;

Brooks v. *Beirnstein* [1909] 1 K.B. 98, at p. 102 ;

Modern Light Cars Ltd. v. *Seals* [1934] 1 K.B. 32.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Kourris, Ag. P.D.C. & Santamas, Ag. D.J.) dated the 19th May, 1971 (Action No. 1234/70) whereby the defendant was ordered to pay to the plaintiff the sum of £1,105 due under a hire-purchase agreement.

M. Christofides, for the appellant.

E. Efstathiou, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :—

HADJIANASTASSIOU, J. : The contract of hire purchase is one of the variations of the contract of bailment, but it is a modern development of commercial life and the rules with regard to bailments, which were laid down before any contract of hire purchase was contemplated, cannot be applied simpliciter, because such a contract has in it, not only the element of bailment, but also the element of sale. At common law the term hire purchase properly applies only to contracts of hire conferring an option to purchase, but it is often used to describe contracts which are in reality agreements to purchase chattels by instalments subject to a condition that the property in them is not to pass until all instalments have been paid. In the leading case of *Helby* v. *Matthews* [1895] A.C. 471, the House of Lords decided that an agreement which merely conferred an option to purchase on the hirer was not an agreement to buy within the Factors Act, 1889, and that therefore the hirer would not, before he exercised an option pass a good title to a pledgee of the hired goods. Lord McNaghten, dealing with the question of a hire purchase agreement, had this to say at pp. 481–482 :—

> " But it was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last

in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come. The customer was under no obligation to fulfil the conditions on which and on which alone the dealer undertook to sell. He was not bound to keep the piano for a single day or a single hour. He was no more bound to purchase it after he had signed the agreement than he was before. The contract, as it seems to me, on the part of the dealer was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well-founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law."

Thus, it appears that it is of the essence of the contract that until the conditions have been fulfilled by the hirer, the property in the chattel will remain with the owner, and in such a way the hirer will normally be unable to pass a good title to a third party during the continuance of the bailment.

In *Karflex Ltd.* v. *Poole* [1933] 2 K.B. 251, Goddard, J., (as he then was) had this to say at pp. 263–264 :—

". . . . . but it must be remembered that the hire-purchase is a very modern development in commercial life, and surely it is a commonplace in comercial law that if one finds commercial men inventing new methods of business and using documents which are, perhaps, unfamiliar at the time when they are first brought into use, but which are invented to meet the requirements of a particular time or peculiar circumstances, the law has to be moulded and developed to meet the commercial developments which are taking place.

Now it does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments in bygone days apply to this modern

class of bailment which has in it, not only the element of bailment, but also the element of sale. I say the element of sale, because, of course, it is well known, since the leading case of *Helby* v. *Matthews* [1895] A.C. 471, that the hire-purchase agreement, as drawn at present, is not a true contract of sale but an option of sale. Therefore, it is a contract between the parties which is partly giving an option of sale and partly creating a bailment, and I think one has only to consider that for a moment to see how fallacious it would be to try to fuse that with the hard and fast rules with regard to bailments which were laid down before any contract of hire-purchase was contemplated."

With this in mind, it appears that the passing of the Hire Purchase Act, 1938 (as amended) had a principal purpose to afford protection to the buyers of goods on hire purchase or similar terms, against certain abuses which had become apparent in the practice of hire purchase trading.

A hire purchase agreement is defined by and for the purpose of the Hire Purchase Act, 1938, as an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee ; and a credit sale agreement is defined for the purposes of the same law as an agreement for the sale of goods under which the purchase price is payable by five or more instalments.

In Cyprus the Hire Purchase, Credit Sale and Hiring of Property (Control) Law, 1966 (Law 32/66) is of recent origin and came into force on July 7, 1966 and in this law, unless the context otherwise requires, " hire purchase " agreement is defined as an agreement in any form under any name or description, by virtue of which a person receives from another person a specific item of property on hire in return for periodic payments, and with the option to purchase or acquire the ownership thereof, and includes two or more agreements in any form having collectively the same effect ; " credit sale " agreement is defined as an agreement for the sale of property under which the sale price is in whole or in part payable by instalments. Then the second proviso is in these terms :— " Provided further that any disposal of property on credit the price of which is payable within three months of the date of disposal, shall not be deemed to be a credit sale agreement." " Cash price " is defined in relation to any hire

purchase or credit sale agreement in respect of any property, the price at which the prospective hirer or buyer may, at the date of the agreement, purchase or agree to purchase the property for cash ; and " rental " in relation to any agreement, includes any payment (howsoever payable) made wholly or partly for the possession or use of the property.

On August 28, 1968, by hire purchase agreement containing elaborate provisions, made between the plaintiffs, the firm Sofoklis Mamas & Co., the owners, who are motor car dealers, and the defendant Mr. Frixos Constantinou, the hirer, it was *inter alia* provided that the plaintiffs agreed to let and the defendant to hire a Dodge saloon motor car of the agreed value of £1,545, for a term of 4 months at the total rental price of £1,545, for the possession and/or use of the said motor car payable as follows :— The sum of £545 (initial payment) was paid on the same date of the execution of the agreement of hire purchase and the balance to be paid regularly by monthly instalments ; and for each instalment the hirer agreed to issue bonds payable to the owners and with interest of 9% as from the date of the maturity of each bond till final payment. It appears, however, that for the quarterly period of hiring only one bill of exchange was issued for the sum of £1,000. According to clause 4, the plaintiffs were entitled to discount the said bonds and if the hirer failed to pay the sums due, then the plaintiffs have the right to terminate the hiring and to take possession of the car in question. Then clause 7 provides that if the hirer will pay the amount due, either before the expiration of the date due and payable or on the expiration of the period of hiring, the plaintiffs shall be bound on payment of the sum of five shillings by the hirer, to transfer the property and register the said car into the name of the defendant. Furthermore, clause 8 is in these terms :— " If the plaintiffs will decide to exercise their right to terminate the present agreement and to take possession of the said car because of their delay in paying the amounts due, the hirer and/or their guarantor shall not be discharged of the amounts due and the plaintiffs shall have the right to sell or hire the said car to another person and from the collection of the amounts derived from the sale and/or the hiring, they will credit their account, and if there is a balance, return it to the hirer. In accordance with the additional conditions of the hire purchase agreement, paragraph (d) provides that if the hirer shall fail to pay an instalment ..... or fail to observe any one of the stipulations of the present agreement, then all the rights of the hirer will *ipso facto* be

terminated without any notice to the hirer and the owners will have the right immediately to take possession of the said motor car and all paid instalments will be kept by the owners as rental.

We think we ought to state that although the hirer was under no obligation to buy, the owners were legally bound under the terms of the hire purchase agreement to give him the option and could not retract it, if the other stipulations of the contract were duly observed by the hirer. Furthermore, the hirer may elect also to terminate the hiring and return the goods to the owner without buying them. He has power to accept the offer, but is not bound to do so. We, therefore, find ourselves in agreement with the learned Judge that the said agreement was a hire purchase agreement and not a credit sale agreement as counsel on behalf of the defendant claimed.

Although the hirer took the possession and use of the motor car, he failed to pay the quarterly rental of £1,000, and the plaintiffs, after demanding the payment of that amount and the return of the motor car, brought the present action, exercising their rights under the said agreement, on March 5, 1970, against the defendant claiming judgment for the sum of £1,105, and interest on the sum of £1,000 at the rate of 9% till payment ; an order for the return and sale of the said motor car in satisfaction of their debt, and for the return of any surplus amount to the defendant. Furthermore, the plaintiffs in paragraph 3 of the statement of claim alleged that the signing of the bond or bill of exchange on August 26, 1969, was executed not for the payment of that amount, but it was given only as collateral security for the payment of that amount as well as for purposes of discounting it.

The defendant in his defence denied that he owed the amount claimed by the plaintiffs and alleged that on September 13, 1968, there was a second oral agreement between him and the plaintiffs regarding another Dodge motor vehicle Registration CV 130, the purchase price of which has been paid fully to the owners, and which he sold to Mr. Christos Ktoras for the sum of £2,044. Mr. Ktoras undertook to pay the sum of £888 by signing 24 bills of exchange to the benefit of the plaintiffs. The defendant further alleged that the bill or bond in question was by agreement kept by the plaintiffs as security until the full payment by Ktoras of the amount he undertook to pay. (See paragraph 5 of the defence).

The defendant also alleged that the giving of the bill of exchange contained no provision that it was given as a collateral security for the amount due by them ; and in the alternative the defendant alleged that once the plaintiffs have accepted the execution of the bill of exchange or bond in their favour, for the amount of £1,000, they have lost the right to bring an action under the terms of the hire purchase agreement and as a result they are not entitled to the relief claimed in paragraph (*g*) of the statement of claim. (See paragraph 8).

Furthermore, the defendant counter-claimed, claiming a declaration of the Court that the said bond or bill of exchange of £1,000 was paid for the reasons stated in paragraphs 5, 6 and 7 of the defence, and that he was entitled to be registered as the sole owner of the motor car DU 777.

The plaintiffs in their reply to the counter-claim alleged in paragraph 2 that there was no agreement or any connection between the motor vehicle CV 130 and the motor car DU 777 hired by the defendant and that the case regarding the earlier motor vehicle is an independent transaction and in no way was connected with the motor car DU 777 or with the present action.

On May 11, 1971, the plaintiffs and the defendant gave evidence to support the claim and the counter-claim and the learned trial Judge, after hearing the evidence as well as the addresses of counsel, found that the defendant owed to the plaintiffs the amount claimed in their statement of claim and gave judgment in their favour, and at the same time dismissed the counter-claim of the defendant.

The learned Judges, after evaluating the evidence of the parties decided to believe the version of the plaintiffs and to reject that of the defendant, and had this to say :—

> " . . . . . we are satisfied that the plaintiff told the truth and we accept his evidence and we discard the version of the defendant who did not impress us as a truthful witness. The evidence of the plaintiff is supported by the ledger, *exhibit* 3, and by the statement of account marked *exhibits* 4 and 4A before the Court. The plaintiff explained that the reason why he did not prepare a hire-purchase agreement in respect of CV 130, was because he knew the defendant well and that they were on friendly relations. The defendant on the other hand, alleged in his evidence that up to the moment he bought CV 130, he knew the plaintiff by sight only."

Then the Court goes on :—

> " We are satisfied that the plaintiff told the truth on this point. Again, if we accept the evidence of the defendant that he knew the plaintiff by sight only, then we would have expected him either to receive a receipt for the payment of £650 or a copy of the hire-purchase agreement entered into between them. The defendant failed to produce either of these two documents and his allegation that he paid the £650 is merely an afterthought. Further, had the purchase-price of CV 130 been paid off when the defendant sold CV 130 to Christos Ktoras, then we would have expected that CV 130 would be registered in his name as sole owner. This was not so, indicating that the defendant had not paid off the purchase price of CV 130 when he sold it to Christos Ktoras and it was still registered in the names of the plaintiff-Company as first owners and in the name of the defendant as second owner, because at the time he did not pay off the purchase-price of the motor-lorry."

Finally, the Court concluded in these terms :—

> " For all these reasons we are satisfied that the defendant did not pay in cash to the plaintiff-Company the sum of £650 when motor-lorry CV 130 was sold to him, and we are further satisfied that the signing of the bills of exchange by Ktoras amounting to £800 and the £200 representing rents owed by plaintiff-Company to the defendant, were credited with the defendant not as a payment towards the balance of the purchase-price of DU 777, but as payment towards the balance of the purchase-price of CV 130."

Regarding the question raised by defendant in paragraph 8 of the defence, viz. that the plaintiffs were not entitled to bring an action under the hire purchase agreement, the Court had this to say in their judgment :—

> " . . . . . We have given the matter our best consideration and we find that the cause of action is based on a hire-purchase agreement and that the bill of exchange was a collateral security for the payment of the balance of the purchase-price."

The defendant now appeals against this judgment and his main complaint is that the learned trial Judges ought to have accepted the version of the appellant, having regard to the totality of the evidence before them ; and

in believing the evidence of the plaintiffs have failed to give any reasons for doing so. We think that we ought to state that it is desirable that trial Judges, in deciding to believe the version of one party and reject that of the other, should normally give reasons for doing so. Undoubtedly, of course, this Court of Appeal has the power to set aside the findings of fact of a trial Court where the trial Court has failed to take into account circumstances material to an estimate of the evidence or where he has believed testimony which is inconsistent with itself or with indisputable facts. Since the enactment of the Courts of Justice Law, 1960, under s. 25(3), it has been said time after time, judicially, that this Court is not bound by any determinations on questions of fact made by the trial Court, and has power to hear any witness already heard by the trial Court, if the circumstances of the case justify such a course. But this provision has to be applied in the light of the general principle that a Court of Appeal ought not to take the responsibility of reversing the findings of fact by the trial Court merely on the result of their own comparisons and criticism of the witnesses and of their own view of the probabilities of the case. *See Economides* v. *Zodhiatis*, 1961 C.L.R. 306 at p. 307 ; also *SS Hontestroom (Owners)* v. *SS Sagaporack (Owners)* [1927] A.C. 37 at p. 47 and *Haloumias* v. *The Police* (1970) 2 C.L.R. 154 at pp. 160-161,where I adopted and followed the principle laid down by Lord Sumner in *Hontestroom (supra)* ; and *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172, at pp. 176-177.

Having read carefully the evidence adduced on behalf of the parties to this action, we are satisfied that there was ample evidence (taking into consideration the totality of the evidence) on which the learned Judges could make their finding believing the version of the plaintiff to that of the defendant, and reasons have been given why the Court believed the evidence of the plaintiff.

Under the circumstances, we are not prepared to reject the finding of the learned Judges on the facts deposed to by the witnesses, particularly so when their finding in the case in hand is based also on the credibility of the witnesses before them. We would, therefore, dismiss the contention of counsel on this point.

The next complaint of counsel was that once plaintiffs have accepted the bill of exchange in question they have lost their right to bring an action under the terms of the hire purchase agreement.

Although no authority was cited at all, either before the trial Court or indeed before this Court, we are of the view, that the argument of counsel is untenable because during the continuance of the hiring, the hirer must pay the instalments of hire-rent stipulated for in the agreement. When these become due, they represent an accrued debt to the owner, even so that the subsequent repossession of the goods by the owner in no way relieves the hirer from his obligation to pay his debts. (*Brooks* v. *Beirnstein* [1909] 1 K.B. 98 at p. 102).

Regarding the question of collateral security, we think that the execution by the hirer of bills of exchange or promissory notes for the instalments falling due under the hire purchase agreement, does not constitute payment of these instalments (even if the notes are subsequently discounted to a third party) so as to convert the agreement into a sale or an agreement of sale. It is presumed that the notes are given merely as collateral security for the payment of the instalments and not as payment, whether absolute or conditional, of the hire purchase price. (*Modern Light Cars Ltd.* v. *Seals* [1934] 1 K.B. 32).

In the case in hand, it was conceded by defendant in his pleadings that the hiring was made under hire purchase agreement, and no point was made that the said bill of exchange was directed towards the payment of the instalment of £1,000 due under the hire purchase agreement, and to the fact that it was given, being evidence that the transaction was a sale or an agreement of sale, but that it was considered as being paid after the alleged second agreement with Ktoras which agreement the trial Court, as we said earlier, has rejected. In our view, the giving of the bill of exchange by the appellant to the respondents was, as the Court rightly came to the conclusion, a collateral security having regard to the pleadings, the terms of the hire purchase agreement and the facts of this case. Therefore, it does not constitute payment of those instalments so as to convert the hire purchase agreement into a sale or a conditional sale. We find, therefore, ourselves in agreement with the learned Judges that the giving of the said bill of exchange does not prevent the respondents from bringing the present action.

For the reasons we have endeavoured to advance, and in the circumstances of this case, we affirm the judgment of the trial Court, and we dismiss the appeal with costs in favour of the respondents.

Appeal dismissed with costs.