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BROCKWAY v. JEWELL.

(Supreme Court of Ohio. Dec. 18, 1894.)

COMMON DRUNKARDS—PAYMENT OF DEBTS.

1. Section 6318, Rev. St., which provides that "from the time of service of such notice until the hearing or the day thereof, as to any persons having notice of such proceedings, no sale, gift, conveyance or incumbrance of the property of such intemperate person or habitual drunkard shall be valid," does not prohibit such drunkard from purchasing and paying for necessaries after the service of such notice and before the appointment of such guardian; and such payments may be made in money or personal property, when made and accepted in good faith.

2. C., being in a drunken fit of sickness, requiring a nurse and attendant, requested B. to nurse and take care of him, and as compensation for such service promised to deliver to B. a harness. B. accepted, and performed the service, and received the harness on the order of C. *Held*, that the delivery of the harness to B. was a payment for his services, and not a sale to him.

(Syllabus by the Court.)

Error to circuit court, Trumbull county.

Action by one Jewell, guardian, against James W. Brockway. There was a judgment of the circuit court reversing a judgment of the common pleas for defendant, and he brings error. Judgment of the circuit court reversed, and that of the common pleas affirmed.

The action below was commenced before a justice of the peace by defendant in error against plaintiff in error, in replevin, to recover a single harness, with gilt trimmings. On appeal to the court of common pleas the plaintiff below filed his petition, the defendant below filed his answer, but there was no reply. A trial before a jury resulted in a verdict for defendant below, finding him to be the owner of the harness, and assessing his damages at $30. A motion for a new trial was filed by the plaintiff below, the seventh ground of which is founded upon a supposed error in the charge of the court, appearing in the opinion later on. The motion for a new trial was overruled, and judgment rendered on the verdict, to which plaintiff below excepted, and filed his petition in error in the circuit court of Trumbull county, which court, on hearing the case, reversed the judgment on the sole ground that the court of common pleas erred in giving the charge as set out in the seventh ground of the motion for a new trial. Thereupon defendant below (plaintiff in error here) filed his petition in error in this court to reverse the judgment of reversal of the circuit court.

C. S. Darrow and E. B. Leonard, for plaintiff in error. George H. Tuttle, for defendant in error.

BURKET, J. (after stating the facts). The facts and circumstances out of which this action grew, as shown by the record, are as follows: On and before March 1, 1885, Grove E. Clark and the defendant below, James W. Brockway, were close friends, and frequently went about the country together. Mr. Clark had inherited quite a fortune, and fell into the habit of drinking to excess, and had spent some $10,000 of cash, and often borrowed of his friends. Matters grew so bad that on the 2d day of March, 1885, application was made to the probate court of Trumbull county for the appointment of a guardian for Mr. Clark, on the ground that he was an inebriate. Notice of this application was served on Mr. Clark on the 4th or 5th day of March, and Mr. Brockway had notice of the application on the same day. The application was set for hearing on March 9th, and was continued, and the appointment of the guardian was finally made on March 23, 1885. About the last of February, 1885, Mr. Clark took sick at the Sawdy Hotel, at Kinsman, in Trumbull county, and was in a condition to require the services of a nurse to wash and cleanse him and his clothes and bed, and he employed the defendant below to nurse him during his sickness, and in payment for his services agreed to supply him with a harness. Defendant accepted the employment on the terms named, and at once went to the harness shop, and looked over the stock on hand, and, among others, the harness in question, but made no selection at that time. Defendant nursed Mr. Clark for about two weeks from and after the last day of February or 1st day of March, under and in pursuance of this contract between them. On the 10th day of March, Mr. Clark gave defendant below an order on the harness maker for the harness, which was presented the same day, and not honored. Thereupon Mr. Clark and defendant on the same day went to the harness shop together, and Mr. Clark requested the harness maker to let defendant have the harness, which was agreed to. Afterwards, on the same day, the harness maker delivered the harness to defendant, in the absence of Mr. Clark, and afterwards, on the same day, in the absence of defendant, received from Mr. Clark his note for $30 for the harness. Defendant retained the harness until about May 1, 1885, when it was taken from him in this action of replevin.

The petition in the common pleas avers that defendant, at the commencement of this action, and for 10 days before that time, wrongfully detained from plaintiff the following goods and chattels of the plaintiff, as guardian, to wit, one single harness, with gilt trimmings. It will be noticed that this petition does not claim that the defendant detained the property for a longer period than 10 days before the suit was commenced, and does not aver that plaintiff, as such guardian, was owner of the harness for a longer period than the 10 days during which the property was so detained. The answer admits that the case came into court by appeal, and denies each and every other allegation therein contained. The answer further avers that at the time of the commencement of the action the defendant was lawfully in possession of the harness; that he was the owner thereof, and that it was delivered and given to him in good faith, as a consideration for necessaries furnished to Grove E. Clark, who was then owner of the same; and that said necessaries so furnished consisted of care and nursing of said Clark while he was in a fit of sickness. The ownership and rightful possession of the harness at the time of the commencement of the suit, and for 10 days previous thereto, is clearly put in issue by both the general denial and the further averment that defendant was the owner and had

lawful possession thereof, and this is as far as any issue is made up by the pleadings. The defendant goes further in his answer, and shows how he became owner, and avers that Mr. Clark was owner of the harness at the time it was delivered to defendant as a consideration for necessaries furnished to him. No reply appears in the record, so that the manner of acquiring ownership is not denied; and it stands admitted that the harness was delivered and given to defendant in good faith, as a consideration for care, nursing, and necessaries furnished to Mr. Clark while he was in a fit of sickness. The time of the sickness and of the delivery of the harness does not appear in the pleadings, but the testimony shows that it was the last day of February or forepart of March, as above stated.

There is no inconsistency in the pleadings, and the latter part of the answer does not modify or contradict the general denial. While the answer avers that at some time Mr. Clark was owner of the harness, and that he delivered it to defendant below, it was claimed upon the trial, as one defense, that the title to the harness was never in Mr. Clark, but passed directly from the harness maker to the defendant; and evidence was introduced, without objection, and the trial proceeded upon that theory, notwithstanding the state of the pleadings. If the charge of the court excepted to had reference to this phase of the case, as so made by the evidence, it was clearly right, because, if defendant below did not derive title to the harness from Grove E. Clark, but from the harness maker, his title was unimpeachable. That the court had the right to submit the case to the jury upon the evidence introduced, notwithstanding the state of the pleadings, is shown by the case of Mehurin v. Stone, 37 Ohio St. 49–58. As another phase of the case, the defendant below claimed that the contract of hiring and promise to pay for the services rendered by delivery of the harness completed the sale, if sale there was, as of the date of the hiring, even though the harness was handed over by the harness maker some days later. As still another phase of the case, the defendant below regarded the delivery of the harness as a payment for services rendered under a contract made before application was made for the appointment of a guardian for Mr. Clark. Opposed to these three phases of defense, the plaintiff below regarded the transaction as a sale of the harness by Mr. Clark to defendant below, after notice of the application for the appointment of a guardian, and therefore void under the statute.

Upon the phase of a sale of the property as claimed by the parties the court charged the jury as follows: "The court says to you, as matter of law, that to constitute a valid sale of this harness by Clark to Brockway it must have been before Brockway had notice of the application for the appointment of a guardian for Clark, and any sale after notice upon Brockway would confer no title upon the defendant." To this charge there was no exception. Upon the phase of the case that the delivery of the harness was in payment of the services rendered under the contract of hiring, the court charged the jury as follows: "You are further instructed that if you find from the evidence that Grove E. Clark and the defendant entered into an agreement, prior to the time of the filing of this application for guardian, or before he had notice of the same, that in consideration of services rendered by the defendant said Grove E. Clark would purchase a harness for the defendant, and that pursuant to such an agreement the services were rendered as agreed, and that said harness was selected by the defendant, and delivered to him by James Clark (the harness maker), upon the order, either verbal or written, of said Grove E. Clark, and that the harness remained in the possession of the defendant until taken on the writ of replevin in this case, then you should find for the defendant, and assess him such damages as is shown to you that this property was worth at the time it was taken." There was an exception to this part of the charge, which resulted in the reversal of the judgment of the court of common pleas. A transfer of property for cash is a sale by one and a purchase by the other. It is not a sale by both, nor a purchase by both. A party who hires a hand may pay him in cash or personal property, and the receipt of the property instead of cash is not a purchase by the hand, but a payment to him. Whether a delivery of the harness to defendant below was a sale or payment depends upon the circumstances. If Mr. Clark was in a fit of sickness, and required a nurse to take care of him, and applied to defendant, and said to him, "If you will nurse and take care of me, I will give you a harness as compensation," and defendant having accepted and rendered the service, and received the harness, the delivery of the harness was clearly a payment. On the other hand, if the defendant below desired to procure a harness, and applied to Mr. Clark therefor, and proposed that if Mr. Clark would deliver to him a harness he would work for him to the value of the same, or nurse and take care of him in payment therefor, and in that way obtained the harness, such transaction was a sale on the part of Clark, and a payment on the part of defendant. There was evidence strongly tending to show that Mr. Clark was seeking a nurse, that he stood in sore need of one, and agreed to make payment by the delivery of a harness, and that defendant below accepted the offer, rendered the service, and received the harness as payment therefor. Such a transaction is not prohibited by section 6318, Rev. St., which is as follows: "At least five, and not more than ten, days prior to the time when the application for the ap-

pointment of the guardian authorized by the foregoing section shall be made, a notice, in writing, setting forth the time and place of the hearing of the application, shall be served upon the person for whom such appointment shall be sought; and from the time of the service of such notice until the hearing, or the day thereof, as to all persons having notice of such proceeding, no sale, gift, conveyance, or incumbrance, of the property of such intemperate person or habitual drunkard, shall be valid." It will be noticed that the inebriate is not prohibited by this section of the statute from making either purchases or payments. Only sales, gifts, conveyances, and incumbrances are prohibited. If the transaction was as claimed by defendant, the charge was correct. Defendant had a right to have this phase of the case submitted to the jury, and let the jury pass upon the question, and say whether the real transaction was as claimed by himself or as claimed by the plaintiff. The phase of the transaction as claimed by each was fairly submitted to the jury. True, the charge complained of is not as clear and definite as it might be, but clearness would only have made the case more favorable for the defendant. In reversing the judgment of the court of common pleas the circuit court erred. Its judgment will therefore be reversed, and that of the common pleas affirmed.