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SUPREME COURTS OF MASSACHUSETTS, OHIO, ILLINOIS, INDIANA,
APPELLATE COURT OF INDIANA, AND THE COURT
OF APPEALS OF NEW YORK.

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owed to him by the plaintiff, and testified to advances made by him to the plaintiff, the date of the last one of which previous to May 23, 1893, was March 18, 1893. But there was evidence tending to show that in proceedings brought in the probate court to direct the plaintiff's trustees to make him an advancement, and in consequence of which the trustees did in fact advance the plaintiff the sum of \$12,000, the defendant had testified in the latter part of April or the first of May, 1893, that the plaintiff did not then owe him a dollar. There was evidence tending to show that the defendant used the money obtained upon the check in payment for land which he had bought, and also that the plaintiff expected, when he gave the check, to have an interest in the land. But at one stage of the trial the plaintiff testified, in answer to a question why he paid the defendant the check of \$12,000 on May 1, 1893, that it was for the reason that the defendant wanted to make up that sum for the land; that he said he ought to have \$12,000 to buy the land with, and had paid \$200 on it to hold it. He also testified that the defendant, before obtaining the check, told him that he had got hold of a lot of land, and paid \$200 to retain it, and wanted \$12,000 to make up to get the land, and that he gave it to the defendant in a check, and got a receipt from him, which the defendant afterwards took away and altered. If the plaintiff gave to the defendant a check for \$12,000, when he owed the defendant nothing, to enable the defendant to pay for a lot of land which he had bought, the jury might, in view of all the evidence, find that the transaction was a loan from the plaintiff to the defendant; and it was within their power to disbelieve the evidence which tended to show that the plaintiff gave the check in payment of his own indebtedness to the defendant, or with the purpose of becoming a part owner of the land. In our opinion, the case was for the jury upon all the evidence, and in accordance with the terms of the report there must be judgment for the plaintiff upon the verdict. So ordered.

GIBOUX v. WHEELER.

Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 28, 1894.

JUDGMENT IN REVERSIS.

In *replevin* for a horse, where, after service of the writ, plaintiff executed a contract of conditional sale thereof to defendant, and on trial judgment was rendered for defendant, the court may properly order a return of possession to defendant.

Exceptions from superior court, Suffolk county; Henry N. Sheldon, Judge.

Replevin for a horse by A. E. Giboux against A. E. Wheeler. While the horse was in possession of a constable under the writ, plaintiff executed to defendant a lease conveyance of it in the nature of a conditional sale. On

trial, judgment was rendered for defendant. From an order commanding a return of possession to defendant, plaintiff excepts. His exceptions overruled.

F. B. Kierman, for plaintiff. E. A. Upon, for defendant.

BARKER, J. The question for decision is whether, after the finding for the defendant in *replevin*, the superior court had power to order a return of the chattel. Upon the pleadings the finding settled it as a fact in the case that when the horse was taken from the defendant by means of the *replevin* writ he was the owner of the horse, and also that the plaintiff had then no right to its possession. If we assume in favor of the plaintiff that an order for a return will not be granted to a defendant in *replevin* who is at the time in the possession of the chattel (*Hallford v. Villard*, 114 Mass. 458, 462), the bill of exceptions does not show that the horse was in the defendant's possession when he moved for the order for a return. Nor can we apply the doctrine that a return will not be ordered when it appears that, if the chattel should be delivered by the plaintiff to the defendant upon the order for a return, the plaintiff could at once retake it under a right acquired or ripened since the commencement of the suit. (*Stinson v. McFarland*, 18 Pick. 427; *Whitwell v. Wells*, 24 Pick. 25, 32; *Martin v. Bayley*, 1 Allen, 281, 282; *Davis v. Harding*, 2 Allen, 302, 303; *Leonard v. Whitney*, 10 Mass. 261, 268.) The plaintiff might have pleaded the arrangement made between himself and the defendant, after the service of the *replevin* writ, in bar of the assertion by the defendant of his title. (*Campion v. Baker*, *Letts*, (Nelson's Ed.) 256.) He did not plead it, and we cannot say, from the statements of the bill of exceptions, that the judge who ordered the verdict could not find from the facts and evidence stated that the plaintiff had no right to the possession of the horse under the conditional sale. He may have found that bargains to have been made under such a verbal reapprehension of the facts as not to be binding. The bill of exceptions does not show that the court had no power to order a return. Exceptions overruled.

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 necessities 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 necessities furnished to Grove E. Clark, who was then owner of the same; and that said necessities 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 necessities 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 necessities 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.

C. S. Christman, for plaintiffs in error.
Byrne & O'Neil, for defendants in error.

SHADBURY, J. The question to be determined in the case before us arises on a finding of fact made by the circuit court, which reads as follows: "That on the 12th day of June, A. D. 1895, the defendant Charles Hennick was engaged as a business merchant, keeping a retail saddlery and harness store at No. 125 East Town street, in the city of Columbus, Ohio, in which city he also resided. That on said 12th day of June, 1895, said defendant Hennick was indebted to the plaintiffs in the sum of two hundred and twenty nine and 1/100 dollars, with interest from the 1st day of December, 1893, at which date last aforesaid said claim of plaintiffs against said Hennick became due. That on said 12th day of June, 1895, said Hennick was also indebted to divers other persons, among others to the defendants Arthur D. and William N. Anderson, doing business as partners under the firm name and style of the Anderson Harness Company, said last aforesaid indebtedness being evidenced by a promissory note signed by Charles Hennick and his father-in-law as his surety, dated September 26, 1892, due in one year after date, and payable in terms to said John T. Gale, an attorney in fact for the Anderson Harness Company, or order," upon which note there still remained due and unpaid the sum of \$29 on June 12, 1895. That at the time said note was given by said Hennick, and also on said June 12, 1895, said Gale was acting as the attorney in fact of the Anderson Harness Company, under authority of a power of attorney. That Gale had no personal interest whatsoever in said note, nor the debt evidenced thereby. That on said 12th day of June, 1895, and for several weeks prior thereto, said Hennick was being pressed by plaintiffs for payment of their said claim, which was long past due, and also by said Gale for payment of the balance due on said note, but was unable to pay said claims or either of them, and suit was threatened and was about to be brought on each of said claims. That on said 12th day of June, 1895, said Hennick executed and delivered a chattel mortgage, whereby he assigned and conveyed all the fixtures and stock of goods and wares in his store siting the same property described in the petition in terms to John T. Gale, an attorney in fact for the Anderson Harness Company, said mortgage being conditioned for the payment of the balance due on the note herein before described. Said mortgage was verified by John T. Gale, as attorney in fact for the Anderson Harness Company, and was on the same day filed with the recorder of Franklin county, Ohio, and said Gale immediately took and held possession under said mortgage of all the property conveyed by the same, and proceeded to sell said property for the purpose of paying the balance due on said note, with the full amount

LEE et al. v. HENNICK et al.
Supreme Court of Ohio, Dec. 15, 1894.
AN ASSIGNMENT FOR BENEFIT OF CREDITORS - WILL CONSTRUCTION.

Where property of a debtor is, in contemplation of insolvency, conveyed by chattel mortgage to an agent of a creditor, for the purpose of securing the debt of the latter, such agent, as to property thus conveyed, is a trustee for his principal, and the conveyance is an assignment, under section 5242, R. v. S., and inure to the benefit of all the creditors of the mortgagor.

(Held by the Court.)
Error to circuit court, Franklin county.
Action by one Lee and others against Charles Hennick and others. There was a judgment of the circuit affirming a judgment of the common pleas for defendants, and plaintiffs being error. Judgment for plaintiffs in error.

The plaintiffs in error brought an action in the court of common pleas of Franklin county under section 5242, R. v. S., praying that a chattel mortgage, executed by said Charles Hennick to secure a debt due from him to one of his creditors, be declared an assignment in trust for the benefit of all his creditors. Neither the court of common pleas nor the circuit court adopted the plaintiff's view of the question. Thereupon they brought the record of the circuit court to this court for review.