Overview | [1908] 2 KB 1, | 77 LJKB 626, | [1908-10] All ER Rep 317, | 52 Sol Jo 335, | 98 LT 658, | 24 TLR 401

NASH v. INMAN. [1908] 2 K.B. 1

[IN THE COURT OF APPEAL.]

COZENS-HARDY M.R., FLETCHER MOULTON, and BUCKLEY L.JJ.

1908 March 5.

Infant — Necessaries — Actual Requirements — Evidence — Onus of Proof — Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

In an action against an infant for necessaries the onus is on the plaintiff to prove, not only that the goods supplied were suitable to the condition in life of the infant, but that he was not sufficiently supplied with goods of that class at the time of the sale and delivery.

APPLICATION for judgment or new trial.

The action was brought by specially indorsed writ by a tailor carrying on business in Savile Row, London, for 145*l.* 10*s.* 3*d.* for clothes supplied to the defendant while an undergraduate at Cambridge University between October 29, 1902, and June 16, 1903. The defendant was an infant at the time of the sale and delivery of the goods. He had been at school at Uppingham, and in October, 1902, he went up as a freshman to Trinity College,

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Cambridge. He was the son of an architect of good position, who had a town house at Hampstead, and a country establishment, called Wade Court, near Havant. The clothes supplied to the defendant included, among other things, eleven fancy waistcoats at two guineas each, or 1*l.* 15*s.* for cash. Upon an application for judgment under Order XIV., the defendant set up the plea of infancy, and the action was adjourned into Court and was tried before Ridley J. and a special jury. At the trial the plaintiff claimed only 122*l.* 19*s.* 6*d.*, the cash price of the goods, in lieu of 145*l.* 10*s.* 3*d.*, the credit price. The only witness called on behalf of the plaintiff was a traveller in his employ, who stated that he went to Cambridge and other places to solicit orders for the plaintiff, and that, hearing that the defendant was spending money freely and was likely to be a good customer, he called upon him personally at his lodgings in Cambridge and obtained the first order for clothes; and he gave evidence as to the goods supplied, and stated that they were charged for at the usual prices.

Counsel for the defendant thereupon submitted that, subject to his formally proving infancy, which was not admitted, there was no evidence to go to the jury, and he called the defendant's father, who proved the date of the defendant's birth, and then went on to state that he was satisfied that his son on going up to the university was amply supplied with proper clothes according to his position; and he gave particulars of his outfit. The learned judge then held that

there was no evidence to go to the jury that the goods were necessaries, and directed judgment to be entered for the defendant.

The plaintiff applied for judgment or a new trial, on the ground that the judge himself had decided the issues of fact instead of leaving them to the jury.

McCardie, for the plaintiff. In an action to recover the price of necessaries supplied to an infant, assuming that the goods are suitable to the defendant's station in life, the onus is not on the plaintiff to prove that the defendant was not adequately supplied with goods of that description at the time of the sale; and if any of the goods are capable of falling within the description of necessaries, having regard to the defendant's condition in life,

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the evidence ought to be left to the jury: *Maddox v. Miller* (1); *Brayshaw v. Eaton* (2); *Peters v. Fleming*.(3) In *Maddox v. Miller* (1), which was similar to the present case, a new trial was ordered on the ground that the plaintiff had been improperly nonsuited. The learned judge was therefore wrong in withdrawing this case from the jury. In *Steedman v. Rose* (4) it was held that the question of adequate supply was material in considering the question of necessaries, but the proper inference from the judgments in that case is that it was for the defendant to prove that he was adequately supplied at the time of the sale; and in *Burghart v. Angerstein* (5) the fact that the defendant was held entitled to adduce evidence that he was adequately supplied presupposes that the onus of proving that he was not adequately supplied did not lie upon the plaintiff. The Court will not throw upon the plaintiff the burden of proving a matter which by the nature of the case cannot lie within his knowledge: Best on Evidence, 10th ed. p. 247; and therefore it will not call upon him to prove the contents of the defendant's wardrobe. In none of the cases cited was evidence given by the plaintiff that he in fact was not adequately supplied; yet the point is an obvious one, and, if good, it is strange that it should not have been taken.

[COZENS-HARDY M.R. These cases may perhaps be accounted for by the fact that at that time it was not definitely settled that evidence as to quantum was admissible at all.]

In *Burghart v. Angerstein* (5) it was held that such evidence was admissible.

Dealing now with the modern cases, in *Ryder v. Wombwell* (6) the Court of Exchequer Chamber, reversing the judgment of the Court below, directed a nonsuit by reason of the innate quality of the goods, and held that the articles in question in that case were prima facie not necessary for maintaining a young man in any station of life, but the view of the Court was that, if the articles were such that they could under some circumstances be necessaries, the case ought to be left to the jury; the Court was not

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(1) (1813) 1 M. & S. 738.

(2) (1839) 5 Bing. N. C. 231.

(3) (1840) 6 M. & W. 42.

(4) (1842) Car. & M. 422.

(5) (1834) 6 Car. & P. 690.

(6) (1868) L. R. 4 Ex. 32.

there dealing with the question of quantum. *Barnes v. Toye* (1) decided a point which was left open in *Ryder v. Wombwell* (2), namely, that evidence that the infant was sufficiently supplied was admissible, but it did not touch the question of onus of proof. *Johnstone v. Marks* (3), in point of decision, was to the same effect, and the dicta in that case as to the onus of proof were obiter only, and are not binding on this Court. The onus is, of course, on the plaintiff to prove the defendant's station in life, but if he supplies the defendant with an article which prima facie is a necessity, the defendant, to escape liability, must give evidence that he is amply supplied.

[COZENS-HARDY M.R. The question now turns upon the definition of necessaries in the Sale of Goods Act, 1893, s. 2. It is for the plaintiff to shew that the goods are within that definition.]

That statute has in no way altered the law or cut down the right of a tradesman to bring an action against an infant.

[FLETCHER MOULTON L.J. referred to *In re Rhodes*. (4)]

Cecil Walsh (**Atkin, K.C.**, with him), for the defendant. This controversy is really determined in the defendant's favour by the definition of necessaries in the Sale of Goods Act. In the earlier cases there was great doubt whether evidence that the infant was adequately supplied was admissible at all. That doubt was finally set at rest by *Barnes v. Toye*. (1) Then *Johnstone v. Marks* (3) went a step farther and shewed that evidence on this head must form part of the plaintiff's case. Finally, those two cases are incorporated in the statutory definition. The moment that infancy is proved the onus is shifted on to the plaintiff to prove both that the goods were suitable to the defendant's station in life and that he was not already sufficiently supplied. In the face of the father's evidence the judge took the right view in saying that there was no evidence to go to the jury that these clothes where necessaries.

McCardie in reply.

COZENS-HARDY M.R. This case is undoubtedly one of difficulty and also, I think, one of importance. It is an action by a tailor

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(1) (1884) 13 Q. B. D. 410.

(2) L. R. 4 Ex. 32.

(3) (1887) 19 Q. B. D. 509.

(4) (1890) 44 Ch. D. 94.

against Mr. Inman, who was at the date of the transactions in question an infant. There were no pleadings in the action. There was merely a writ and an application under Order XIV., and the action was adjourned into Court, and came on for trial before Ridley J. and a special jury. In

substance the position is this: The plaintiff sues the defendant for goods sold and delivered. The defendant pleads infancy at the date of the sale, and his plea is proved. What is the consequence of that? The consequence of that is that the Infants' Relief Act, 1874, becomes applicable. Under that Act all contracts for goods supplied are absolutely void, the only exception being contracts for necessaries. Then s. 2 of the Sale of Goods Act, 1893, provides as follows: "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property." That, of course, includes the Act of 1874. Then follows this proviso: "Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor." The section then defines necessaries as follows: "Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery." What is the effect of that? The plaintiff sues for goods sold and delivered. The defendant pleads infancy. The plaintiff must then reply, "The goods sold were necessaries within the meaning of the definition in s. 2 of the Sale of Goods Act, 1893." It is not sufficient, in my view, for him to say, "I have discharged the onus which rests upon me if I simply shew that the goods supplied were suitable to the condition in life of the infant at the time." There is another branch of the definition which cannot be disregarded. Having shewn that the goods were suitable to the condition in life of the infant, he must then go on to shew that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact, either by evidence adduced by himself or by cross-examination of the defendant's witnesses, as the case may be, in my opinion he has not discharged the burden which the law imposes upon him. Our attention has been called by Mr. McCardie, in his very able

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and learned argument, to a number of authorities going back for a very long period, which he said established that the burden on a plaintiff who supplied goods to an infant was simply to shew that the goods were of a class which might be necessaries, having regard to the position in life of the defendant and his family, and that, unless the judge withdrew the case from the jury on the ground that the articles in question could not be necessaries, it was for the jury to find as a matter of fact, Aye or No, were these articles necessaries? It had never, he said, been the law that the plaintiff was required to go into the question, which might present great difficulties, of whether or not the goods were actually required by the defendant at the date of the sale, or, in other words, to say what was the state of the defendant's wardrobe at the time when the goods were ordered. I think there is very great force up to a certain point in that argument. But it must be remembered that the law on this subject has been developed and altered in the course of the last century. It was until quite recently doubted whether it was even admissible to prove that the infant was supplied with goods of the class - being goods which might properly be necessaries - at the date when the contract was made, so that he really did not want any more. It was not until the decision of the Divisional Court in *Barnes v. Toye* (1) in 1884, overruling the direction given by A. L. Smith J., that it could be said to be at all established that that was even admissible evidence unless you went further and proved that the plaintiff knew he was sufficiently supplied. The point arose again in *Johnstone v. Marks* (2) before what was no doubt a Divisional Court, but it was composed of three members of the Court of Appeal, Lord Esher M.R., Lindley L.J., and Lopes L.J. In that case the county court judge had rejected evidence to prove that the defendant was sufficiently supplied with clothes at the time of the sale. Lord Esher said: "I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that

the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently

(1) 13 Q. B. D. 410.

(2) 19 Q. B. D. 509.

supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it." Lindley L.J. said: "If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him." Although it may be true that the language which I have just read from the judgments of Lord Esher and Lindley L.J. goes further than was absolutely necessary for the decision of the case, that language is perfectly clear and unambiguous, and seems to me to be logically involved in the definition of necessaries. After those two decisions there was passed in the year 1893 an Act of Parliament which defines, in a manner that admits of no doubt, what are those necessaries for which, and for which alone, an infant can be made liable on assumpsit, and that definition in terms includes the second element which Lord Esher and Lindley L.J. said was involved in the term "necessaries," and the burden of proving which, they said, rested on the plaintiff. That being so, how does the matter stand? The plaintiff called evidence to prove the delivery of the goods. It is not of course contended, and it could not be contended, that the infant would be liable for the credit price or for the cash price of the goods, because by the terms of the statute he is only liable for a reasonable price, but that is a subsidiary point. There being no pleadings, the infancy of the defendant was not admitted, and the father was called to prove the date of his son's birth. There was no cross-examination as to that, and the infancy is not disputed. Then he went on to give evidence, which was quite clear and explicit and was not shaken in cross-examination, that the infant, who was an undergraduate at Cambridge, and had just gone up to the university when these goods were supplied, was in fact supplied with clothes suitable and necessary and proper for his condition in life, and for his position as an undergraduate of Trinity College, Cambridge. The learned judge ruled as a matter of law that there was no evidence fit to be submitted to the jury that these articles, or any of them, were necessaries within the meaning of the statutory definition,

and, thinking as I do that there was no evidence in support of that which was a necessary issue, I cannot say that the learned judge was wrong in the view which he took. We have scarcely heard any suggestion that there was even a scintilla of evidence to support that which is an affirmative issue, that the goods were suitable to the requirements of the infant. Nay more, I think, if the matter had been left to the jury, and the jury had found that they were suitable to the requirements of the infant at that time, and application had been made for a new trial, it would have been the duty of this Court to grant a new trial on the ground that there was no evidence to support the verdict, and that it was perverse. Under these circumstances it seems to me that this appeal fails, and that there is no ground for interfering with the judgment which was entered for the defendant.

FLETCHER MOULTON L.J. I am of the same opinion. I think that the difficulty and at the same time the suggestion of hardship to the plaintiff in such a case as this disappear when one considers what is the true basis of an action against an infant for necessaries. It is usually spoken of as a case of enforcing a contract against the infant, but I agree with the view expressed by the Court in *Rhodes v. Rhodes* (1), in the parallel case of a claim for necessaries against a lunatic, that this language is somewhat unfortunate. An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*. I do not mean that this nicety of legal phraseology has been adhered to. The common and convenient phrase is that an infant is liable for goods sold and delivered provided that they are necessaries, and there is no objection to that phraseology so long as its true

(1) 44 Ch. D. 94.

meaning is understood. But the treatment of such actions by the Courts of Common Law has been in accordance with that principle I have referred to. That the articles were necessaries had to be alleged and proved by the plaintiff as part of his case, and the sum he recovered was based on a quantum meruit. If he claimed anything beyond this he failed, and it did not help him that he could prove that the prices were agreed prices. All this is very ancient law, and is confirmed by the provisions of s. 2 of the Sale of Goods Act, 1893 - an Act which was intended to codify the existing law. That section expressly provides that the consequence of necessaries sold and delivered to an infant is that he must pay a reasonable price therefor.

The Sale of Goods Act, 1893, gives a statutory definition of what are necessaries in a legal sense, which entirely removes any doubt, if any doubt previously existed, as to what that word in legal phraseology means. [The Lord Justice read the definition.] Hence, if an action is brought by one who claims to enforce against an infant such an obligation, it is obvious that the plaintiff in order to prove his case must shew that the goods supplied come within this definition. That a plaintiff has to make out his case is, I should have thought, the first lesson that any one studying English law would learn; and the elaborate argument of Mr. McCardie that if you look at the authorities in the past, going back nearly a hundred years, you will find cases in which particular defendants might have taken a higher standpoint and insisted upon a right which they did not insist on does not appear to me to touch the plain and obvious conclusion that in order to succeed in the action the plaintiff must shew that he has supplied necessaries. That is to say, the plaintiff has to shew, first, that the goods were suitable to the condition in life of the infant; and, secondly, that they were suitable to his actual requirements at the time - or, in other words, that the infant had not at the time an adequate supply from other sources. There is authority to shew that this was the case even before the Act of 1893. In *Johnstone v. Marks* (1) this doctrine is laid down with the greatest clearness, and the ratio decidendi of that case applies equally to cases

(1) 19 Q. B. D. 509.

since that Act. Therefore there is no doubt whatever that in order to succeed in an action for goods sold and delivered to an infant the plaintiff must shew that they satisfy both the conditions I have mentioned. Everything which is necessary to bring them within s. 2 it is for him to prove.

Passing on from general principles, let me take the facts of the present case. In my opinion they raise no point whatever as to the duty of the judge as contrasted with the duty of the jury arising from the peculiar character of the action. We have only to follow the lines of the law consistently administered by this Court for many more years than I can think of, an example of which as applied to the case of the supply of necessaries to an infant is given by the decision of the Court of Exchequer Chamber in the case of *Ryder v. Wombwell*. (1) Questions of law are for the judge; questions of fact are for the jury; but, as the Court there laid down, the particular question of fact in issue in such a case, like all other questions of fact, ought not to be left to the jury by the judge unless there is evidence upon which they could reasonably find in the affirmative. The issue in that case was whether certain articles were suitable to the condition in life of the defendant, the infant, and the Court of Exchequer Chamber thought that no jury could reasonably find that those articles were suitable to the condition of that defendant, and therefore they said that the judge - not by reason of any peculiar rule applicable to actions of this kind, but in the discharge of his regular duties in all cases of trial by a jury - ought not to have left the question to the jury because there was no evidence on which they could reasonably find for the plaintiff. We have before us a similar case, in which the issue is not only whether the articles in question were suitable to the defendant's condition in life, but whether they were suitable to his actual requirements at the time of the sale and delivery; and how does the evidence stand? The evidence for the plaintiff shewed that one of his travellers, hearing that a freshman at Trinity College was spending money pretty liberally, called on him to get an order for clothes, and sold him within nine months goods which at cash prices came

(1) L. R. 4 Ex. 32.

to over 120*l.*, including an extravagant number of waistcoats and other articles of clothing, and that is all that the plaintiff proved. The defendant's father proved the infancy, and then proved that the defendant had an adequate supply of clothes, and stated what they were. That evidence was uncontradicted. Not only was it not contradicted by any other evidence, but there was no cross-examination tending to shake the credit of the witness, against whose character and means of knowledge nothing could be said. On that uncontradicted evidence the judge came to the conclusion, to use the language of the Court in *Ryder v. Wombwell* (1), that there was no evidence on which the jury might properly find that these goods were necessary to the actual requirements of the infant at the time of sale and delivery, and therefore, in accordance with the duty of the judge in all cases of trial by jury, he withdrew the case from the jury and directed

judgment to be entered for the defendant. In my opinion he was justified by the practice of the Court in so doing, and this appeal must be dismissed.

BUCKLEY L.J. The defendant, having been at school at Uppingham, went as a freshman to Trinity College, Cambridge, in October, 1902. The plaintiff, who was a tailor carrying on business in Savile Row, sent a traveller to Cambridge to solicit orders. The traveller has stated in evidence that he was told there was a young man spending money there very freely, so he called upon him. At first he got no order, but he pressed for orders, and subsequently got orders, with the result that between October 29, 1902, and June 16, 1903, the defendant had run up a bill of 145*l.* odd for clothing of an extravagant and ridiculous style having regard to the position of the boy. The tailor now sues the defendant for 145*l.* The defence is infancy. That action is brought in contract. I understand the law before 1874 to have been this: an infant could contract, and under some circumstances the infant could enforce the contract, although it could not be enforced against him - e.g., *Farnham v. Atkins*. (2) At common law, irrespective of statute, the contracts of an infant were voidable except such as were necessarily

(1) L. R. 4 Ex. 32.

(2) (1670) 1 Siderfin, 446.

to his prejudice; these last were void. Speaking generally, the consequence of the infant's contract was that inasmuch as he was an infant the contract (with the exception of certain contracts) could not during infancy be enforced against him, but when he came to majority he might, if he pleased, ratify and confirm it, and if he did so both parties were bound. The obligation was in contract, but contract of such a kind that as against the infant at any rate it could not be enforced. It was a voidable contract. In that state of things the Act of 1874 was passed. That Act relates to certain contracts and renders them for the first time void. The classes of contract which are not referred to in the Act remain as they were before. The Act of 1874 provides that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void," subject to a certain proviso which mentions voidable contracts. The contract for necessaries therefore is excepted and is left as a contract which is not void. The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make. The defendant, although he was an infant, had a limited capacity to contract. In order to maintain his action the plaintiff must prove that the contract sued on is within that limited capacity. The rule as regards liability for necessaries may, I think, be thus stated: an infant may contract for the supply at a reasonable price of articles reasonably necessary for his support in his station in life if he has not already a sufficient supply. To render an infant's contract for necessaries an enforceable contract two conditions must be satisfied, namely, (1.) the contract must be for goods reasonably necessary for his support in his station in life, and (2.) he must not have already a sufficient supply of these necessaries. The defence that the goods were not necessaries will be made out by shewing either that in what I may call their innate quality, having regard to the position in life of the defendant, they were such that he could not want them, or that,

supposing the goods were capable of being necessaries, he had already enough, so that he did not want them. If in the action it is put in issue that the goods supplied were not necessaries on those two grounds, or on either of them, the onus is on the plaintiff to shew that they are necessaries. He is suing upon a contract which the defendant cannot make except under defined circumstances, and it is for him to shew that the defined circumstances enabling the infant to contract existed. What took place here was this. The plaintiff called his traveller, who gave evidence as to the goods supplied. At the conclusion of that evidence Mr. Atkin, for the defendant, submitted that, subject to his proving that the defendant was an infant, there was no evidence to go to the jury. He put the father in the box to prove the infancy, and then he put some further questions to the witness addressed to the point whether the boy was already sufficiently supplied with clothing, and the evidence of the father on that point was taken. The question whether or not the boy already had a sufficient supply of clothes is not a question of law, but a question of fact, and of course all questions of fact are for the jury. No doubt in these cases involving the question whether the goods are necessaries or not it is difficult to draw the line between law and fact. As regards the position in life of the boy you must have evidence, and it may be that you cannot even determine whether the article from its innate quality is capable of coming under the head of necessaries until you know what his station in life is. Therefore to enable the judge to determine as a question of law whether the goods are such as are capable of being in law necessaries some evidence is required. But certainly the issue whether the defendant was already adequately supplied or not was a question of fact and was for the jury. The doubt I have in this case is whether at the conclusion of the evidence the judge ought to have left the matter to the jury with a direction that they ought to find their verdict in a particular way, or whether he ought to have withdrawn it as he did. Perhaps the more regular course would have been for the judge to have directed the jury to find for the defendant on the ground that there was no evidence to justify a verdict for the plaintiff. It does not matter much

which way it is put. I arrive at the conclusion in point of fact that there was no evidence to go to the jury to satisfy the affirmative that these goods were necessaries, and consequently I think that the judge was right in directing judgment to be entered for the defendant.

Appeal dismissed.

H. B. H.

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