

**PHARMACEUTICAL SOCIETY OF GREAT BRITAIN V
BOOTS CASH CHEMISTS (SOUTHERN) LD.**

[1951 P. No. 1413.]

[COURT OF APPEAL]

[1953] 1 QB 401

HEARING-DATES: 5 February 1953

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CATCHWORDS:

Poisons - Sale of - Self-service system - Selection of articles by customer from shelves - Payment at cash desk in presence of qualified pharmacist - Legality - Pharmacy and Poisons Act, 1933 (23 & 24 Geo. 5, c. 25), s. 18 (1) (a) (iii). Contract - Offer and acceptance - Sale of goods - Self-service - Time of sale.

HEADNOTE:

The defendants' branch shop, consisting of a single room, was adapted to the "self-service" system. The room contained chemist's department, under the control of a registered pharmacist, in which various drugs and proprietary medicines included, or containing substances included, in Part I of the Poisons List compiled under section 17 (1) of the Pharmacy and Poisons Act, 1933, (but not in Sch. I to the Poisons Rules, 1949), were displayed on shelves in packages or other containers, with the price marked on each. A customer, on entering the shop, was provided with a wire basket, and having selected from the shelves the articles which he wished to buy, he put them in the basket and took them to the cashier's desk at one or other of the two exits, where the cashier stated the total price and received payment. That latter stage of every transaction involving the sale of a drug was supervised by the pharmacist in control of the department, who was authorized to prevent the removal of any drug from the premises.

In an action brought by the plaintiffs alleging an infringement by the defendants of section 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933, which requires the sale of poisons included in Part I of the Poisons List to be effected by or under the supervision of a registered pharmacist:-

Held, that the self-service system did not amount to an offer by the defendants to sell, but merely to an invitation to the customer to offer to buy; that such an offer was accepted at the cashier's desk under the supervision of the registered pharmacist; and that there was therefore no infringement of the section.

Decision of Lord Goddard C.J.[1952] 2 Q.B. 795; [1952] 2 T.L.R. 340; [1952] 2 All E.R. 456 affirmed.

INTRODUCTION:

APPEAL from Lord Goddard C.J.

Special case stated by the parties under R.S.C., Ord. 34, r. 1.

The defendants carried on a business comprising the retail sale of drugs at premises at Edgware, which were entered in the register of premises kept pursuant to section 12 of the Pharmacy and Poisons Act, 1933, and from which they regularly sold drugs by retail. The premises comprised a single room, so adapted that

customers might serve themselves, and the business there was described by a printed notice at the entrance as "Boots Self-Service." On entry each customer passed a barrier where a wire basket was obtained. Beyond the barrier the principal part of the room, which contained accommodation for 60 customers, contained shelves around the walls and on an island fixture in the centre, on which articles were displayed. One part of the room was described by a printed notice as the "Toilet Dept." and another part as the "Chemists' Dept." On the shelves in the chemists' department drugs, including proprietary medicines, were severally displayed in individual packages or containers with a conspicuous indi-

cation of the retail price of each. The drugs and proprietary medicines covered a wide range, and one section of the shelves in the chemists' department was devoted exclusively to drugs which were included in, or which contained substances included in, Part I of the Poisons List referred to in section 17 (1) of the Pharmacy and Poisons Act, 1933; no such drugs were displayed on any shelves outside the section, to which a shutter was fitted so that at any time all the articles in that section could be securely inclosed and excluded from display. None of the drugs in that section came within Sch. I to the Poisons Rules, 1949 (S.I. 1949, No. 539).

The staff employed by the defendants at the premises comprised a manager, a registered pharmacist, three assistants and two cashiers, and during the time when the premises were open for the sale of drugs the manager, the registered pharmacist, and one or more of the assistants were present in the room. Each customer selected from the shelves the article which he wished to buy and placed it in the wire basket; in order to leave the premises the customer had to pass by one of two exits, at each of which was a cash desk where a cashier was stationed who scrutinized the articles selected by the customer, assessed the value and accepted payment. The chemists' department was under the personal control of the registered pharmacist, who carried out all his duties at the premises subject to the directions of a superintendent appointed by the defendants in accordance with the provisions of section 9 of the Act.

The pharmacist was stationed near the poisons section, where his certificate of registration was conspicuously displayed, and was in view of the cash desks. In every case involving the sale of a drug the pharmacist supervised that part of the transaction which took place at the cash desk and was authorized by the defendants to prevent at that stage of the transaction, if he

thought fit, any customer from removing any drug from the premises. No steps were taken by the defendants to inform the customers, before they selected any article which they wished to purchase, of the pharmacist's authorization.

On April 13, 1951, at the defendants' premises, two customers, following the procedure outlined above, respectively purchased a bottle containing a medicine known as compound syrup of hypophosphites, containing 0.01% W/V strychnine, and a bottle containing medicine known as famel syrup, containing 0.23% W/V codeine, both of which substances are poisons included in Part I of the Poisons List, but, owing to the small percentages of strychnine and codeine respectively, hypophosphites and famel syrup do not come within Sch. I to the Poisons Rules, 1949.

The question for the opinion of the court was whether the sales instanced on April 13, 1951, were effected by or under the supervision of a registered pharmacist, in accordance with the provisions of section 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933. n1

The Lord Chief Justice answered the question in the affirmative.

The Pharmaceutical Society appealed.

COUNSEL:

H. V. Lloyd-Jones Q.C. and T. Dewar for the Pharmaceutical Society. The real question at issue in this appeal is whether under the self-service system of trading devised by the defendants the sale in fact takes place at the point where the customer removes from the shelves the article that he wishes to buy, and puts it in the basket, or whether it takes place at the cash desk, where the money is paid and the pharmacist is stationed. We contend that the self-service system invites the customer to purchase, the price of each article being fully displayed, and that the taking of an article by the customer is an acceptance of the trader's offer to sell. Even if it be the law that a customer cannot demand goods merely because they are displayed in a shop window, the position is different where goods are displayed inside a self-service shop. It is submitted that the contract is made and the property passes at the moment when the customer takes

n1 Pharmacy and Poisons Act, 1933, s. 18: "(1) ... it shall not be lawful - (a) for a person to sell any poison included in Part I of the Poisons List, unless - (i) he is an authorized seller of poisons; and (ii) the sale is effected on premises duly registered under Part I of this Act; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist."

an article from the shelf and puts it in the receptacle. [Cheshire and Fifoot's Law of Contract, 3rd ed., p. 26, and Timothy v. Simpson, n2 referred to.] In Wiles v. Maddison n3 a butcher was charged with offences against the Rationing Order, 1939, and the Meat (Maximum Retail Prices) Order, 1940, by offering meat for sale to registered customers at a price exceeding the maximum, and in excess of the rationing quantity. He was acquitted, although he had put aside the meat, with the price affixed, because the customers had given no specific orders for the meat and he had not intended to deliver it until the following day. In the words of Lord Caldecote C.J., "the facts were not such as to justify or permit a

finding that there had been an offer." Tucker J., agreeing, said: "or myself, I think that the position might be different if the course of conduct between the butcher and the customer in this case had been different, that is to say, if the evidence had been that the custom was for the butcher to put ... in his shop certain quantities of meat allocated to certain customers at certain prices and if the practice had been for the customers to call on a particular day and take away the meat." In the present case, by their deliberately devised self-service system the defendants are making an offer to sell, and the customer, when he takes an article from the shelf and puts it in the receptacle, is accepting the offer. By section 17 (2) of the Sale of Goods Act, 1893, the property in goods passes when it is intended to pass, and here there is clearly an intention that the sale shall take place at the spot where the customer takes the article from the shelf. The intention of the legislature under the Act of 1933 was to interpose the possibility of guidance or veto on the part of the pharmacist when a customer is selecting poisons, and even though at the time of payment the pharmacist is present, the sales in question, it is submitted, were not effected in accordance with the provisions of section 18.

[Roberts v. Littlewood's Mail Order Stores n4 also referred to.]

G. G. Baker Q.C. and G. D. Everington for the defendants were not called on to argue.

PANEL: Somervell, Birkett and Romer L.JJ

JUDGMENTBY-1: SOMERVELL L.J

JUDGMENT-1:

SOMERVELL L.J: This is an appeal from a decision of the Lord Chief Justice on an agreed statement of facts, raising a question under section 18 (1) (a) (iii) of the Pharmacy and

n2 (1834) 6 C. & P. 499.

n3 [1943] W.N. 40; [1943] 1 All E.R. 315, 317.

n4 [1943] K.B. 269.

Poisons Act, 1933. The plaintiffs are the Pharmaceutical Society, incorporated by Royal charter. One of their duties is to take all reasonable steps to enforce the provisions of the Act. The provision in question is contained in section 18. [His Lordship read the section and stated the facts, and continued:] It is not disputed that in a chemist's shop where this self-service system does not prevail a customer may go in and ask a young woman assistant, who will not herself be a registered pharmacist, for one of these articles on the list, and the transaction may be completed and the article paid for, although the registered pharmacist, who will no doubt be on the premises, will not know anything himself of the transaction, unless the assistant serving the customer, or the customer, requires to put a question to him. It is right that I should emphasize, as did the Lord Chief Justice, that these are not dangerous drugs. They are substances which contain very small proportions of poison, and I imagine that many of them are the type of drug which has a warning as to what doses are to be taken. They are drugs which can be obtained, under the law, without a doctor's prescription.

The point taken by the plaintiffs is this: it is said that the purchase is complete if and when a customer going round the shelves takes an article and puts it in the receptacle which he or she is carrying, and that therefore, if that is right, when the customer comes to the pay desk, having completed the tour of the premises, the registered pharmacist, if so minded, has no power to say: "This drug ought not to be sold to this customer." Whether and in what circumstances he would have that power we need not inquire, but one can, of course, see that there is a difference if supervision can only be exercised at a time when the contract is completed.

I agree with the Lord Chief Justice in everything that he said, but I will put the matter shortly in my own words. Whether the view contended for by the plaintiffs is a right view depends on what are the legal implications of this layout - the invitation to the customer. Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organized way of doing what is done already in many types of shops - and a bookseller is perhaps the best example - namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying "I want this"? The assistant in 999 times out of 1,000 says "That is all right," and the money passes and

the transaction is completed. I agree with what the Lord Chief Justice has said, and with the reasons which he has given for his conclusion, that in the case of an ordinary shop, although goods are displayed and it is intended that custo-

mers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed. I can see no reason at all, that being clearly the normal position, for drawing any different implication as a result of this layout.

The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the plaintiffs' contention when he pointed out that, if the plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred. I can see no reason for implying from this self-service arrangement any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that there was supervision in the sense required by the Act and at the appropriate moment of time. For these reasons, in my opinion, the appeal should be dismissed.

JUDGMENTBY-2: BIRKETT L.J

JUDGMENT-2:

BIRKETT L.J: I am of the same opinion. The facts are clearly stated in the agreed statement of facts, and the argument on them has been very clearly stated by Mr. Lloyd-Jones. I think that clearest of all was the judgment of the Lord Chief Justice, with which I agree. In view of an observation which I made during the argument, I should like to add that under section 25 of the Pharmacy and Poisons Act, 1933, it is the duty of the Pharmaceutical Society of Great Britain, by means of inspection and otherwise, "to take all reasonable steps to enforce the provisions of Part I of this Act" - that really deals with the status of the registered pharmacist - "and to secure compliance by registered pharmacists and authorized sellers of poisons with the provisions of Part II of this Act." This action has been brought by the Pharmaceutical Society in pursuance of that duty which is laid upon them by statute, and

the short point of the case is, at what point of time did the sale in this particular shop at Edgware take place? My Lord has explained the system which had been introduced into that shop in March of 1951. The two women customers in this case each took a particular package containing poison from the particular shelf, put it into her basket, came to the exit and there paid. It is said, on the one hand, that when the customer takes the package from the poison section and puts it into her basket the sale there and then takes place. On the other hand, it is said the sale does not take place until that customer, who has placed that package in the basket, comes to the exit.

The Lord Chief Justice dealt with the matter in this way, and I would like to adopt his words n1 : "It seems to me, therefore, that the transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer.'" Then he went on to deal with the illustration of the bookshop, and continued: "Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price. The offer, the acceptance of the price, and therefore the sale take place under the supervision of the pharmacist. That is sufficient to satisfy the requirements of the section, for by using the words 'the sale is effected by, or under the supervision of, a registered pharmacist' the Act envisages that the sale may be effected by someone not a pharmacist. I think, too, that the sale is effected under his supervision if he is in a position to say 'You must not have that: that contains poison,' so that in any case, even if I were wrong in the view that I have taken on the question as to when the sale was completed, and it was completed when the customer took the article from the shelf, it would still be effected under the supervision of the pharmacist within the meaning of section 18."

I agree with that, and I agree that this appeal ought to be dismissed.

n1 [1952] 2 Q.B. 795, 802.

JUDGMENTBY-3: ROMER L.J

JUDGMENT-3:

ROMER L.J: I also agree. The Lord Chief Justice observed that, on the footing of the plaintiff society's contention, if a person picked up an article, once having picked it up, he would never be able to put it back and say that he had changed his mind. The shopkeeper would say: "No, the property has passed and you will have to pay." If that were the position in this and similar shops, and that position was known to the general public, I should imagine that the popularity of those shops would wane a good deal. In fact, I am satisfied that that is not the position, and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I quite agree with the reasons on which the Lord Chief Justice arrived at that conclusion and which Birkett L.J. has just referred to, and to those observations I can add nothing of my own. I agree that the appeal fails.

DISPOSITION:

Appeal dismissed.

Leave to appeal to House of Lords refused.

SOLICITORS:

Solicitors: A. C. Castle; Masons.

A. W. G.