## GIFTS AND SALES OF INTOXICATING LIQUOR CONTRASTED.

A pure and simple gift of intoxicating liquor to one not a minor is not a criminal act,[1] except in jurisdictions where unusual legislation prevails. Indeed, there has been some casual question[2] whether the state has power to prohibit such gifts. Its power in this respect has been ably sustained in language worthy of recital: "We may here remark that, if the state has power to prohibit the sale of liquor, it has also power to prohibit the *giving* of liquor by one person to another. The evil to be avoided is the communication from one to another of an article which may be injurious to the recipient, or which, by its general use, may demoralize or harm the whole community. It is not attempted to restrain a man's private indulgence in drink. But that is because the law deals not with the isolated individual, but with men in their relations to each other. Upon the delivery of a noxious substance from one to another, a relation is established of which the law may take cognizance; and it is perfectly immaterial whether the transfer be by sale, barter or gift. The evil is not in the receipt of money for the article furnished, but in the furnishing of it. And so the authorities hold.[3] It is probable that such a law would not be construed to prevent a man from giving liquor to a guest in his own house, purely in the way of hospitality. But that is a question of interpretation, not of the power of the legislature."[4] The power, in fact, has been exercised in some states. In Vermont, the law prohibits the gift of intoxicating liquor, except at private dwellings or their dependencies, which have not become

[1] State *v.* Hutchins, 74 Iowa, 20 (1887); State *v.* Standish, 37 Kan. 643 (1887).

[2] Holley *v.* State, 14 Tex. App. 505, 516 (1883).

[3] Citing Powers *v.* Comm. (Ky.), 13 S. W. 450 (1890); Altenburg *v.* Comm., 126 Pa. 602 (1889).

[4] Black on Intoxicating Liquors, § 39. See, also, Wolf *v.* State, 59 Ark. 297 (1894).

places of public resort.[1] The exception has not been construed by the court to allow other than genuine domestic use of the beverage. A farmer who treated at his barn and granary was convicted,[2] as was a citizen who gave away liquor in a room in which no business was conducted, but which was not his dwelling.[3] The use of the upper part of the building by others as a dwelling, in the latter case, was immaterial. The court has not sustained any invasion, however, of the rights or privileges of the head of a family or household to furnish them with such food or beverage as he judges fit and proper for their sustenance and refreshment. An innkeeper's domestic privilege is as free as is that of other citizens. Where a hotelkeeper treated his hostler at the bar, for caring for his horses through the night, it was held that he had not violated the statute.[4] For an employe may be an invited guest within such an exception, and it is immaterial whether he or the host suggests the treat.[5]

The Raines law, of New York, may be mentioned in this connection. It forbids persons to give away any food to be eaten on premises where liquor is sold. The law was held to be a proper exercise of power by the legislature, and not to deprive such persons of either liberty or property, within the meaning of the Federal or State Constitution.[6] Reference may be made also to statutes like that in Pennsylvania, prohibiting the "furnishing" of liquor on Sunday,[7] and to legislation in some states, as Kentucky and Arkansas, forbidding gifts of liquor within a specified time prior to election.

The authorities recited afford a decisive answer to the query of the Texas judge alluded to at the beginning of this paper.

Where the statute merely forbids sales, the statute does not

[1] Vermont Rev. L., § 3800.
[2] State *v.* Camp, 64 Vt. 295 (1891).
[3] State *v.* Danforth, 19 Atl. (Vt.) 229 (1890).
[4] State *v.* Jones, 39 Vt. 370 (1867).
[5] Powers *v.* Commonwealth (Ky.), 13 S. W. 450 (1890).
[6] People *ex rel.* Bassett *v.* Warden City Prison, 6 App. Div. (N. Y.) 520 (1890).
[7] Commonwealth *v.* Heckler, 168 Pa. 575 (1895).

apply to gifts.[1] This will not be carried so far, however, as to protect a scheming individual in any shift or device resorted to in evasion of the prohibition.[2] Even where the legislation prohibits gifts as well as sales, the law is understood to apply only to such devices. An act of hospitality, whereby a host gives drink to a guest at his table at his private house, is not a gift within such prohibition.[3] Construing an Iowa statute forbidding gifts and devices intended to evade the liquor law, the court said: "The section evidently requires the statute to be so construed as to forbid all gifts for a consideration, direct or indirect or remote, or made with the purpose of receiving anything in return. Thus, when liquor is given to those who buy other things, or to induce trade or attract custom, or in a hundred different ways which the ingenuity of lawbreakers has or may devise to defeat the law, it is to be regarded as a violation of the statute.[4] Similar construction has been given where the statute contains the word "disposition." All such legislation is aimed at traffic followed for a consideration, or motive of gain.[5] The Minnesota court said: "The giving away of liquor is certainly one method of disposing of it, and, in connection with the sale or traffic, is within the mischief sought to be remedied. . . . As

[1] Williams *v.* State, 8 South. (Ala.) 668 (1890); Gillan *v.* State, 47 Ark. 556 (1886); Ward *v.* State, 45 Ark. 351 (1885). Where the constitution of a state authorized the legislature to tender to localities a vote upon local option whether to prohibit the sale of intoxicating liquor, the legislature could not go further and extend the option to cases of gifts of such liquor. The constitution, in authorizing the more restricted question, impliedly prohibited the larger one: Holley *v.* The State, 14 Tex. App. 505 (1883); Steele *v.* The State, 19 Tex. App. 425 (1885).

[2] State *v.* Standish, 37 Kan. 643 (1887); Palmer *v.* State, 91 Ga. 164 (1891); Marcus *v.* State, 89 Ala. 23 (1889).

[3] Comm. *v.* Carey, 151 Pa. 368 (1892); Cruse *v.* Aden, 127 Ill. 231 (1888); Albrecht *v.* People, 78 Ill. 510 (1875); Johnson *v.* People, 83 Ill. 431 (1876); Reynolds *v.* State, 73 Ala. 3 (1883); Black on Intoxicating Liquors, § 39. And see opinion of Redfield, Ch. J., in State *v.* Freeman, 27 Vt. 520, 522 (1849).

[4] State *v* Hutchins, 74 Ia. 20 (1888). And see State *v.* Briggs, 47 N. W. (Ia.) 865 (1891); State *v.* Harris, 64 Ia. 287 (1884).

[5] Wood *v.* Oregon Ty., 1 Ore. 223 (1856); Reynolds *v.* State, 73 Ala. 3 (1882), where there is an excellent opinion by Stone, J. See Comm. *v.* Herman, 4 Pa. Dist. Rep. 412 (1895), charge of Yerkes. J.

remarked by the court in *State* v. *Adamson*:[1] "To prevent abuses that might flow from the unrestrained disposal of liquors, . . . it would seem that the giving away, under circumstances which might produce the same evil results as the selling, would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary 'incident' to a statute regulating the sale, to secure its efficient operation. . . . All experience under license laws proves this." In the case before them, that of a disposal of liquor by an u licensed vendor, it appeared that the defendant was a saloon keeper, but that on the particular occasion complained of the liquor was furnished gratuitously.[2] His conviction and sentence were affirmed.

The main purpose of the legislation must be borne in mind, and this will lead to interpretations differing according to the circumstances. If a dealer in liquor were to give of his stock in store, his act would be considered as such "furnishing" or "giving away" as came within the prohibition.[3] The gift of a quart of intoxicating liquor was held to be a "furnishing," however it would be in the case of a social drink.[4] One who drove around electioneering on a Sunday, and who, for his personal comfort, carried with him a flask of liquor, out of which he gave drinks to those on whom he called without charge and solely to engender good feeling, was held not to be guilty of "furnishing on Sunday," under the Pennsylvania Act of 1887, prohibiting the furnishing, by sale, gift or otherwise, of intoxicating liquors on that day.[5] A druggist does not "furnish" whisky when he allows young men, who have "chipped in" and with the common fund bought elsewhere the liquor, to mix the whisky with the soda on his premises.[6] One, however, who buys intoxicating liquor with another's money, and takes it to him with the intention that the two will share, is guilty of "furnishing"

[1] 14 Ind. 296 (1860).
[2] State *v.* Densting, 33 Minn. 102 (1885).
[3] State *v.* Freeman, 27 Vt. 520 (1855).
[4] Dukes *v.* Georgia, 77 Ga. 738 (1886).
[5] Comm. *v.* Heckler, 168 Pa. 575 (1895); Sterrett, C. J., dissenting.
[6] State *v.* Clark, 66 Vt. 309 (1893).

same.[1] Where one takes a fund contributed by all and purchases whisky, and brings the liquor to an appointed place, where it is drank by all, he is not a vendor, according to what appears to be the better opinion.[2]

Delivery of liquor, to be paid for in kind, has been regarded differently in different jurisdictions. In Georgia[3] and in Massachusetts[4] it is not punishable as a sale, whereas it is so punishable in Texas.[5] Whether the transaction is a gift, or akin to a loan, depends upon the intention.

A defendant who was arrested for the sale of liquor was fortunate enough to escape conviction by proving clearly that a payment made in money was a departure from the contemplation of the parties, and had been made simply because the other party to the bargain had found unexpectedly that his own stock of liquor had gone; so that the repayment in kind could not be made.[6]

The sale and the giving away of intoxicating liquor unlawfully are distinct and separate offences. Proof of the one will not sustain an indictment for the other.[7] One who kept beer in the rear wareroom of a shoe store, and who at times treated visitors, was held not to be guilty of sale in so doing,[8] although it is necessary to remember, in connection with such a case, the

[1] State *v.* Hassett, 64 Vt. 46 (1891).

[2] Comm. *v.* Peters, 2 Pa. Super. 1 (1895); *contra*, Hunter *v.* State, 60 Ark. 312 (1877). See White *v.* State, 93 Ga. 47 (1893).

[3] Skinner *v.* State, 97 Ga. 690 (1896). But delivery of whisky for the hire of a carriage was held to be a sale, in Paschal *v.* State, 84 Ga. 326 (1889).

[4] Comm. *v.* Abrams, 150 Mass. 393 (1890). And see Gillan *v.* State, 47 Ark. 555 (1886).

[5] Keaton *v.* State, 38 S.W. 522 (1897); Lambert *v.* State, Tex. Cr. App. 39 S. W. 299 (1897).

[6] Coker *v.* State, 8 So. (Ala.) 874 (1891).

[7] Humpeler *v.* People, 92 Ill. 400 (1879); Stevenson *v.* State, 65 Ind. 409 (1879); State *v.* Briggs, 47 N.W. Iowa, 865 (1891); Harvey *v.* State, 80 Ind. 142 (1881); Kurz *v.* State, 79 Ind. 488 (1880); Wood *v.* Oregon Territory, 1 Oregon, 223 (1856); State *v.* Freeman, 27 Vt. 523 (1858); Wlecke *v.* People, 14 Ill. App. 447 (1883); New Decatur *v.* Laude (Ala.), 9 So. 382 (1891); Williams *v.* State (Ala.), 8 So. 668 (1891). Delivery of liquor from a speak-easy, on promise of recipient to bring a hen, is a sale, and not a gift: McGruder *v.* State, 83 Ga. 616 (1889).

[8] State *v.* Standish, 37 Kan. 643 (1887).

interpretations mentioned earlier in this paper as complementary to this principle underlying this decision. Where, under pretence of gift of liquor, a party sells some other article for more than its value, and gives the liquor as part consideration, he can be prosecuted for the sale, but not for the gift of the liquor.[1] A count in an indictment for the sale of liquor to a minor will not be sustained by proof of gift.[2] "In framing indictments the safer plan is to have two or more counts, charging the different offences severally in separate counts. In this way the indictment will meet the different phases of the evidence."[3]

Ordinarily, the difficulty is not in the interpretation of the statute, but in ascertaining the motives of the parties. Delivery of property to another, upon request, for his use, *prima facie* imports a sale rather than a gift.[4] It is a question for the exclusive determination of the jury, in view of all the evidence, whether the transaction was intended by the parties to be a sale or merely a gift. If intended as a gift, the law implies no agreement to pay, and the transaction cannot be treated as a sale. On an information for selling without a license, an instruction that if the delivery of the liquor "was not then and there declared to be a gift, the law implies an agreement to pay the reasonable value thereof, and the transaction is a sale," was held to prevent proper review of all the circumstances.[5] So, in another case, it was held that evi-

[1] Holley *v* State, 14 Tex. Cr. App. 505 (1883).

[2] Siegel *v.* The People, 106 Ill. 89 (1883); Humpeler *v.* The People, 92 Ill. 400 (1879); Williams *v.* State, 91 Ala. 14 (1890). And see Gillan *v.* State, 47 Ark. 556 (1886); Young *v.* State, 58 Ala. 359 (1894). An indictment charging sale was sustained by proof of gift, under a statute providing that a giving away should be deemed to be a selling: Dahmer *v.* State, 56 Miss. 787 (1879).

[3] Williams *v.* State. 91 Ala. 14 (1890). In an action for a penalty, a declaration alleged sale or gift. Demurrer on the ground that this left it uncertain whether a sale or gift was intended, the statute giving the penalty for either, was overruled: Hamer *v.* Eldridge, 50 N. E. (Mass.) 611 (1898). See, also, State *v.* Hodgson, 66 Vt. 134 (1893), where an indictment charging either offence was sustained under legislation prescribing just such a form of indictment.

[4] Dant *v.* State, 106 Ind. 79 (1885).

[5] Keiser *v.* State, 82 Ind. 379 (1882).

dence of drinks on Sunday in a saloon, without anything to show payment, fails to prove sale; and that no conviction could be had, as there was no prohibition of gift.[1] We can put it a little stronger still, and be correct. Without an understanding—albeit an implied one—that there shall be compensation, the delivery of liquor is a mere gratuity and not a sale.[2]

The word gifts must be given an enlarged sense when contained in a statutory prohibition of gifts to minors. A sale to a minor was held to be a gift within such a statute.[3] The treating of minors has led to a little conflict and to quite a number of questions. The better class of cases would seem to be those which hold that where a saloonkeeper, at the direction of one who pays therefor, delivers a glass of intoxicating liquor to a person under the age of twenty-one, both he and the adult paying for the liquor are guilty of a misdemeanor. All persons who participate in an act or transaction which is a misdemeanor are alike guilty.[4] In a case in Alabama it was held that a conviction might be had for selling

[1] Keller *v.* State, 23 Tex. App. 259 (1887).

[2] Commonwealth *v.* Packard, 5 Gray (Mass.), 101 (1855). In this case a witness swore that he called for liquor at a public house kept by defendant, and that a waiter, by defendant's order, delivered the liquor to him; that witness had never paid defendant, nor the waiter; that he offered to pay, but that defendant declined to take anything. It was held that this was no evidence of a sale.

[3] Commonwealth *v.* Davis, 12 Bush (Ky.), 240 (1876).

[4] Topper *v.* State, 118 Ind. 110 (1888); Commonwealth *v.* Davis, 12 Bush (Ky.), 240 (1876); State *v.* Munson, 25 Ohio St. 381 (1874). In the Indiana case, which has been cited in the text, there was an actual delivery of the liquor to the minor by the vendor, at the request, however, of the adult vendee. The decision was in 1888. Seven years before that time a decision had been rendered, which we must consider as overruled, although some tweedledum-dee distinctions may be asserted. In the case in 1881 the indictment charged a gift to the minor. The evidence proved that the adult friend called for two glasses, and the glasses were delivered to him, and that he delivered one to the minor by way of treat. The decision was that the seller had not given to the minor, and was not guilty. The opinion in 1888 omitted any reference to the case in 1881: Kurz *v.* State, 79 Ind. 488 (1881). It may be remarked that Kurz *v.* State has not been treated with favor in later decision of the Indiana Court. See Myers *v.* The State, 93 Ind. 253 (1883).

or giving liquor to a minor on proof that the minor and his uncle came into the defendant's saloon, and that the uncle called for two drinks; that the defendant set out a bottle of whisky, with two glasses; that two drinks were poured out, for which the uncle paid, giving one to the minor, who thereupon drank it in defendant's presence.[1]

In Massachusetts and in Illinois the tone of the opinions has been opposed to the foregoing, although the points involved did not require decision. In a Massachusetts case the court held that a sale to an adult, who thereupon treated a minor, was not a "sale or gift" by the seller to the minor. Very clearly it was not a "sale" to the minor; but there was a "gift" by the purchaser to the minor, in which the barkeeper participated, by handing to the minor such drink as the latter indicated.

The court even took such a narrow view of the law as to intimate somewhat that the delivery to the minor could not be considered as "delivery" under another section of the statute, not then before the court. It is difficult to approve of the decision in this case.[2] The court might well have understood the word "give," in the statute, as used in the sense of "convey" or "deliver," or it might have said that all participants in an act of misdemeanor are guilty.

The Illinois decision,[3] however, is not open to effectual attack. It has, indeed, been questioned,[4] but it is only to the side remarks of the court that objection can be attempted. The decision itself was, that a bartender did not violate a statutory prohibition of sale to a minor by a sale to an adult,

[1] Page *v.* State, 84 Ala. 446 (1887). See analogous case in Walton *v.* State, 62 Ala. 197 (1878).

[2] St. Goddard *v.* Burnham, 124 Mass. 578 (1878), decided under Massachusetts statute of 1875, c. 99, § 15. See, to same effect, Bartman *v.* State of Texas, 43 S. W. 984 (1898).

[3] Siegle *v.* People, 106 Ill. 89 (1883).

[4] In People *v.* Neuman, 85 Mich. 98, 48 N. W. 290 (1891), dissatisfaction was expressed with the Siegle case; but whether that was to be regarded as right or wrong, the court was of opinion that where a statute forbids not simply the selling or giving to a minor—but further, the "furnishing" of the same—then a saloonkeeper who allows the adult to treat the minor on his premises is guilty.

who treated the minor. This agrees with decision in Arkansas,[1] and is correct, no question of "giving" or "furnishing" arising in the case. Evidence that drinks were taken by a number of persons together, including the minor, without evidence showing who paid, is insufficient to prove a a sale to the minor.[2] Where the statute prohibited sale or furnishing—a general invitation to those present to help themselves from a jug of whisky in a public store, accepted, among others, by a youth of sixteen, was held to constitute an offence against the statute.[3]

The saloonkeeper, otherwise guilty, is not relieved by an authorization of the father to give the liquor,[4] in the absence of legislation permitting such authorization. A prohibition of sale or gift applies as well to one who buys the liquor and treats the minor as it does to the vendor.[5]

A minor whose disabilities have been removed by decree in chancery is still a minor within legislation prohibiting sales of intoxicating liquor to minors.[6]

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[1] Ward *v.* State, 45 Ark. 351 (1885).

[2] Birr *v.* People, 113 Ill. 645 (1885).

[3] Blodgett *v.* State, 23 S. E. (Ga.) 830 (1895). Those of the company who pass the liquor around would not be held guilty: Miller *v.* State, 55 Ark. 188 (1892).

[4] State *v.* Lawrence, 97 N. Car. 492 (1887); State *v.* Best, 12 S. E. (N. Car.) 907 (1891).

[5] Parkinson *v.* State, 14 Md. 184 (1859); same case, 74 Am. Dec. 522. The Ohio statute read: "It shall be unlawful for any person to buy for or furnish to any minor, to be drank by such minor, any intoxicating liquors," etc. Under this it was decided, in State *v.* Munson, 25 Ohio St. 381 (1884), that a saloonkeeper who supplied liquor to a minor, to be drank by him, was punishable, although it may have been purchased and paid for by another.

[6] Coker *v.* State, 8 So. Ala. 874 (1891).