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Criminal Law—Sale of Intoxicating Liquor to Minors—Effect of Seller's Mistake of Minor's Age

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CRIMINAL LAW—SALE OF INTOXICATING LIQUOR TO MINORS—EFFECT OF SELLER'S MISTAKE OF MINOR'S AGE—On July 9, 1955, Barry Neu, age fifteen years, entered a tavern owned and operated by defendant and asked to purchase a case of beer. Defendant inquired as to Neu's age and Neu stated that he was twenty-one, but the owner required proof. The minor then left the bar and later returned with a card containing false names and addresses but no mention of age. After examining the card, defendant sold the case of beer to Neu. The minor was later discovered with the beer in his car, the liquor was confiscated, and a criminal proceeding was instituted against the defendant for violation of the statute prohibiting the sale of liquor to minor persons.[1] The district court found defendant guilty of a misdemeanor. The defendant claimed error in the refusal of the court to give an instruction which made the sale of liquor to a minor prima facie evidence of a violation of the statute and would allow the defendant to rebut the presumption by a showing of reasonable care in the sale. On appeal to the Montana Supreme Court, *held,* affirmed. The sale of liquor to a minor is unlawful; the minor's representations and the seller's belief of full age are immaterial in determining whether the statute has been violated. *State v. Paskvan,* 309 P.2d 1019 (Mont. 1957).

The respective states through their legislatures are invested with broad police powers. The court's function in examining the constitutional aspect of police legislation is to decide whether the purpose of the legislation is a legitimate one, and whether the particular enactment is designed to accomplish that purpose in a fair and reasonable way. If the enactment meets this test, it satisfies the constitutional requirements of due process and equal protection of the laws.[2] The right of state legislatures, in the exercise of their police power, to regulate the sale and distribution of liquor is thoroughly established.[3]

Whether a legislature may exclude the element of intent from a statutory offense will depend on whether the act is malum prohibitum or malum in se. The phrase malum in se means that an act is wrong in itself and illegal from the very nature of the transaction.[4] An offense malum prohibitum, on the other hand, is not naturally evil, but becomes so in consequence of its being forbidden by statute.[5] If an offense is denominated malum prohibitum the legislature may, in the interest of the public welfare, exclude the element of intent or knowledge and make the liability of an accused depend solely upon performance of the prohibited act.[6]

The rule in a majority of states having liquor statutes similiar to that of Montana is that an honest mistake as to the buyer's age by the seller of intoxicating beverages is no defense to a prosecution for violation of that

[1]REVISED CODES OF MONTANA, 1947, § 94-35-106: "Any person who shall sell, give away, or dispose of intoxicating liquors to any person under the age of twenty-one (21) years, shall be guilty of a misdemeanor."

[2]Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606 (1957).

[3]Stephen v. Great Falls, 119 Mont. 368, 175 P.2d 408 (1946).

[4]State v. Shedoudy, 45 N.M. 516, 520, 118 P.2d 280, 286 (1941) (dictum).

[5]People v. Boxer, 24 N.Y.S.2d 628, 632 (N.Y. Ct. of Spec. Sess., Bronx Div. 1940) (dictum).

[6]State v. Smith, 57 Mont. 563, 190 Pac. 107 (1920).

statute.[7] These courts hold that it is clearly the purpose of the legislature to absolutely prohibit the sale of liquor to minors, regardless of the intent or knowledge with which the sale was made.[8]

The courts are not completely in accord on the matter, however. Courts of a small minority of states with statutes absolutely prohibiting the sale of liquor to minors imply the element of intent in interpreting the statute. They hold that intent is a necessary element in a criminal prosecution and in the absence of express words the legislature would not be considered to have intended such injustice as punishing as criminal an act which involved no intent.[9] In these jurisdictions the sale of liquor to a minor is regarded as prima facie evidence of violation of the statute, but if the seller can show that he had good reason to believe, and did believe, that the buyer was twenty-one, there is no liability.[10] The burden is upon the defendant to show as an affirmative defense his lack of knowledge of the buyer's minority.[11]

The effect of such a rule is to remove from the liquor vendor the heavy burden of absolute liability despite diligent inquiry that is imposed under the majority rule. However, at the same time it creates the uncertainty in the enforcement of the law which is the usual result of employing a subjective standard in the determination of liability.

In many states liquor statutes incorporate the words, "knowingly" or "wilfully."[12] Here, the element of intent is specifically made a part of the offense, and the statute is not left open to judicial interpretation. If, then, the seller of intoxicants can show that he acted prudently in a sale to a minor, the sale will not have been made "wilfully" within the meaning of the statute.[13] As under the minority rule, when a statute similiar to Montana's is construed, the seller must take all the proper precautions in ascertaining the age of the minor, and must form an honest belief therefrom before he may escape prosecution under the statute.

The Montana legislature has taken steps to ease the burden of inquiry on the liquor seller by recently enacting a statute which authorizes the issuance of a state identification card to a person twenty-one, and makes the card prima facie evidence of the holder's majority.[14] It does not appear, however, that the strict liability imposed under the rule of the principal case is alleviated. This is because the statute nowhere mentions the liability

[7]See 30 AM. JUR., *Intoxicating Liquors* § 328 (1939), for discussion and citation of authority.

[8]Hershorne v. People, 108 Colo. 43, 113 P.2d 680 (1941); State v. Dahnke, 244 Iowa 599, 57 N.W.2d 553 (1953).

[9]State v. Fahey, 21 Del. 585, 65 Atl. 260 (1904); People v. Bronner, 145 Mich. 39, 108 N.W. 672 (1906).

[10]State v. Fahey, *supra* note 9.

[11]People v. Bronner, 145 Mich. 39, 108 N.W. 672 (1906).

[12]State v. McCormick, 56 Wash. 469, 105 Pac. 1037 (1909).

[13]State v. McCormick, *supra* note 12.

[14]REVISED CODES OF MONTANA, 1947, § 4-506: "All persons attaining the age of twenty-one (21) years may apply to the county clerk and recorder . . . for an identification card which shall prima facie establish that the applicant has reached the age of twenty-one (21) years." For analysis, see *Montana Legislative Summary*, 1957, 18 MONTANA L. REV. 122, 123 (1957).

of a liquor seller after relying upon one of the authorized identification cards in a sale to a minor.

It is submitted that the protection of adolescents against psychic and physical impairment from the use of alchohol, being a settled policy of the state, is more important than the inconvenience that might come to the liquor purveyors in taking the trouble to ascertain the maturity of their customers. The burden is not intolerable, and the legislature has the undoubted power to impose it. If it seems too heavy, relaxation should come from the legislature and not from the courts.

WAYNE E. LINNELL

REAL PROPERTY—CO-TENANCIES—CREATION OF JOINT TENANCIES—In 1944 Marion E. Hennigh and her husband, Charles D. Hennigh, purchased certain real property by warranty deed with money from a joint bank account. The deed described the grantees as "Charles D. Hennigh and Marion E. Hennigh as Joint Tenants of Townsend, Montana." In the granting, habendum and warranty clauses was typed the word "their," so that the clause read "their heirs and assigns." Mr. Hennigh died intestate in 1948 and his wife claimed the above property by right of survivorship. It was therefore omitted from an inventory and appraisal of the decedent's estate. The petitioners, children of the deceased husband by a former marriage, made an application in the probate court to include said property in the decedent's estate. This application being denied, the petitioners brought an action in the district court which was also dismissed. On appeal to the Supreme Court of Montana, *held,* affirmed. By the use of the words "joint tenants" in the warranty deed a joint tenancy with the right of survivorship was created. *Hennigh v. Hennigh,* 309 P.2d 1022 (Mont. 1957).

Joint tenancy is the form of co-ownership in which each co-owner is possessed of the whole of the estate, subject to the other's interest. In contrast is the other form of co-ownership, tenancy in common, where tenants hold distinct, although undivided, interests. The chief difference between the two is that the former carries with it the right of survivorship while the latter does not.

The very early common law concerning joint tenancies seems to be uncertain.[1] But at quite an early period judges tended to favor the joint tenancy, so that a conveyance to two or more people without a contrary intent shown was regarded as creating a joint tenancy rather than a tenancy in common.[2] This favoritism developed because it tended to lesson feudal burdens since only one service was due from all joint tenants.[3] With the abolition of tenures this reason no longer existed, and the courts began to look with disfavor on the joint tenancy because it worked a hardship on the heirs and made no provision for posterity.[4] Thus courts began to take

[1]See 2 TIFFANY, REAL PROPERTY § 421 n. 23 (3d. ed. 1939).

[2]See Sturkis v. Sturkis, 316 Ill. 114, 146 N.E. 530, 531 (1925) (dictum); Svenson v. Hanson, 289 Ill. 242, 124 N.E. 645, 647 (1919) (dictum); Wolfe v. Wolfe, 207 Miss. 480, 42 So. 2d 438, 438 (1949) (dictum).

[3]See Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334, 335 (1927) (dictum).

[4]See 2 TIFFANY, REAL PROPERTY § 421 at 202 (3d ed. 1939).