

RECENT ENGLISH DECISIONS.
High Court of Justice, Queen's Bench Division.

GRAFF v. EVANS.

The sale of liquor by a club to its members, either for use on the premises, or off of them, is not a sale within the meaning of a statute prohibiting any person from selling by retail intoxicating liquor without a license.

CASE stated by a magistrate upon the conviction of appellant for selling liquor without a license.

The following were the facts: The Grosvenor Club, situate at 200 Buckingham Palace road, was a *bona fide* club properly constituted. Trustees of the club property were appointed, and there was a managing committee to conduct the general business of the club. The appellant, Graff, was the manager of the club, acting for the said committee. There were about 1100 members of the club who paid an entrance fee and periodical subscriptions. The objects of the club were social intercourse, mutual and moral improvement, aided by lectures and rational recreation. One object also was to keep the members away from the public-house. They could obtain food and refreshments in the club, and also wine, beer and spirits, on payment. The produce of such sales went to the fund of the club. The club had no license to sell. According to the evidence Mr. James Foster, who was a member of the club and also a licensed victualler, purchased on the 4th of May last, at the bar of the club, a bottle of whiskey and a bottle of pale ale, and paid 3s. 11d. for the two. The barman wrapped them up in paper, and Foster, who had a friend not a member of the club with him, carried them away out of the club openly and without concealment. These facts were admitted by the appellant and his witnesses, and it was also found that liquor to the value of 200l. was sold annually to the members for consumption off the premises, and that there was a profit on such sales to the amount of thirty-three per cent. on the original cost.

The magistrate was of opinion that an ordinary club, such as the Grosvenor Club, was not a partnership in the legal sense of that word, not being an association formed for the purpose of realizing a joint profit, though the members of it might be joint owners; that so far as the excise authorities were concerned, they seemed to have regarded these clubs as private households, and not to have interfered with them so long as they were *bona fide* clubs and the

liquors belonged to the members only, and were consumed on the premises, and that no inquiry was made as to its dealings within its own walls; that this case, viz., selling liquor to a member to carry off the premises, went beyond these limitations, and that the question arose whether this did not amount to a trading within the meaning of the act. The magistrate was of opinion that the answer to this question depended upon another, namely, did the club derive a profit from this outside selling? that if the price charged was only the strict cost to the club and no profit was made, it would not amount to a sale within the act; that it would only be a mode of subdivision among the members; that the club committee would only be the agent of the members to purchase, and the member in that case would merely repay his agent the cost price; that the transaction would be similar to that of a subscription dinner or picnic, where one man purchases the wine or beer for all, and each afterwards contributes in proportion to what he takes, but if a profit is made by the first buyer by charging more than the cost price to the consumers that would amount to a sale; that in the present case a considerable profit, as much as thirty-three per cent. on the original cost, resulted to the club; that in answer to the objection made on behalf of the appellant that the profit did not benefit any individual in a pecuniary way, but only helped to maintain the club, the magistrate was of opinion that it was equally a profit of which the members had the advantage; that Foster, though a member, bought the liquor in his individual and separate capacity, and was liable for the amount to the committee; that, even if a partnership were admitted, it would make no difference in this respect.

The question of law for the opinion of the court was whether the sale in question of whiskey and ale to Foster was a sale of intoxicating liquor by retail within the meaning of sect. 3 of the Licensing Act, 1872, requiring the seller to be duly licensed.

The Intoxicating Liquors Act, 1872, sect. 3, provide that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his license to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his license to sell the same, shall be subject to the following penalties" (which were fine or imprisonment).

Sir F. Herschell, S. G. (*A. D. Smith*, with him).

Staveley Hill, Q. C. (*Sir Hardinge Giffard*, Q. C., and *Bremner* with him).

FIELD, J.—I have come to the conclusion that the question which the magistrate asks us, “whether the sale in question of whiskey and ale to Foster was a sale within the meaning of section 3 of the Licensing Act, 1872, requiring the seller to be duly licensed,” must be answered in the negative. The introduction of the word sale in that question is, of course, only inserted for convenience of expression, because if this is decided to be a sale, there is no question for us. The act which the appellant is said to have infringed is the Licensing Act, 1872, which for the first time introduced the words with which we have to deal to-day. Section 3 creates a distinct offence for which the person committing it is liable to a penalty; therefore it is an act imposing penalties, and before we can say a man is liable under it, we must see that he is clearly within it. The facts are very short, the case (which the learned judge read) shows a special property in the manager other than the general property in the trustees. He was a manager of the club, acting for the committee who, we know, were the persons buying the wines, &c. Members can obtain refreshments on payment, and the produce of such sales goes to the funds of the club, and the case finds there was a profit on the annual sales. If that means profit in a commercial sense, it would be an important element in the case, but the meaning I attribute to the words of the magistrate is that out of every 100*l.* worth sold 33*l.* was the proportion of club expenses.

It is next argued that the magistrate, although he does not find there was a partnership, yet finds all the members were joint owners, and I think properly so—*i. e.*, the members had a general property in all the property of the club, with special property in the trustees, and another special property in the committee. The magistrate states that the question of trading depends on another, whether there was any profit. I must confess that I am not able to follow that reasoning, that it would be a sale if the price be more than the cost price, yet would not if equal or less. That seems to me not following out the true principles of the act. We must find out the meaning of the legislature from the words of the act. Reading them, I come to the conclusion that the legislature thought it was undesir-

able that intoxicating liquors should be sold without a license, but it places no limit on any one giving them away, nor does it touch the wholesale man; it relates only to sale by retail. The question for us is, did Graff sell by retail? Undoubtedly his was the hand which delivered over the whiskey and ale, but I do not think it was a sale; it really was this: there was a right in every individual member so to receive goods, it was not a new contract, it was part of any member's original contract on joining the club that he should come in and eat and drink and carry away on payment, but on such payment there was no new contract. No one here could have maintained an action against Foster for goods sold and delivered. If it had been a sale, Foster was as much a seller as any other member of the club. I am inclined to think that it was a transfer of property, but not in the nature of a sale, or contract of sale, and that therefore the magistrate's decision must be reversed with costs.

Conviction quashed with costs.

HUDDLESTON, B., delivered a concurring opinion.

A different view seems to have been taken by Judge LOWELL, District Judge of the United States District Court of Massachusetts, in *United States v. Wittig*, 2 Low. 466. There a club or association of persons was formed, but not incorporated, to promote social and literary objects, and bought lager beer at wholesale, and the members of the club and others were permitted to take beer at the rooms of the club, upon giving as many checks as they received glasses of beer. The checks cost the members five cents each, and the price was intended to cover the cost of the beer, though there was sometimes a small profit. The question was whether the club was to be considered a retail dealer, or dealers, in malt liquors, so as to be liable to an annual revenue tax, under chap. 36, sect. 18, of the United States Statutes of 1875, vol. 18, p. 311. LOWELL, J., held that it was. "There seems to be no doubt," said he, "that the club sells the beer to its members. Every element of a sale is present; the delivery of beer on the one part, and the

payment on the other. It was argued that, at common law, a man cannot buy of himself and others. This is a mistake. The common law recognises such a sale, though, if the contract is executory, the common law has no mode of enforcing it. The true question is, whether such sales make the association a dealer under the statute. * * * This is a revenue law, and the decisions of the Supreme Court require us to construe it liberally in favor of the revenue, to prevent evasions. So construed, I think it must be held that any course of selling, though to a restricted class of persons, and without a view to profit, is within its meaning. It may be that a court ought to give the same word a more limited meaning in a penal statute, intended to punish public immorality, than in one intended for raising revenue."

A somewhat similar question arose recently in Massachusetts under a penal statute. Several persons formed a club, of which the defendant, James Smith, was a member; they advanced a certain

sum of money each, which was put into a common fund; the defendant was chosen agent of the club, and under instructions of the club purchased liquors and refreshments for the club; the fund was taken by the defendant and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club, to the extent of the money advanced by each; these checks were transferable only to other members of the club. Upon presentation of the checks by any member to the defendant, he would deliver to such member the liquor of the club to the amount of the check presented. On several occasions the defendant had delivered liquor to a particular member of the club upon checks presented by him. After the distribution of the liquor upon all the checks issued, to the amount of their face, it was calculated that about one-fifth of, the original purchase remained undisposed of, which excess the defendant, as such agent, was to have for his services in selling, and for the use of his room by the club. The defendant being indicted for a sale to one of the members, it was held that these facts did not, necessarily, and as a matter of law, constitute a sale of the liquor by the agent to the members; but that it was a question of fact for the jury whether this arrangement was colorable, and a mere evasion of the law or not. The court saying: "It certainly might happen, and not unfrequently has happened, that a number of persons unite in importing wines or other liquors from a foreign country, to be divided between them according to some agreed proportion. It could not be seriously contended that the person who should receive liquors so imported, at his place of business, and make or superintend the division among the contributors to the purchase-money, is a seller of intoxicating liquors, or that

they buy the liquors of him. It is difficult to see how it could make any difference that the liquors are of various kinds, and were purchased in this country instead of being imported from abroad, or that the person who is to make the distribution delivers them in small quantities and keeps his account by means of tickets or checks. If the liquors really belonged to members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to divide among them according to some previous arranged system, these facts would not justify a jury in finding that the defendant kept and maintained a nuisance for the illegal keeping and sale of intoxicating liquors under Gen. Stat., ch. 87, p. 6. There could be neither a selling nor a keeping for sale. On the other hand, if the whole arrangement was a mere evasion, and the substance of the transaction was a tendering of money to defendant, that he might buy intoxicating liquors to be afterwards sold and charged to the associates, or if he was authorized to sell and did sell, or keep any of the liquors with intent to sell to any persons not members of the club, he might well be convicted. This, however, would be a question not of law but of fact, and would fall wholly within the province of the jury." *Commonwealth v. Smith*, 102 Mass. 144.

Similar views to those of *Commonwealth v. Smith*, were also adopted in *Seim v. The State*, 55 Md. 566, in which it was held that the officers of a social club were not guilty of selling beer to the member to whom it was delivered by the steward of the club, at a fixed price per glass.

But the contrary opinion, and more in accordance with Judge LOWELL's decision, prevailed in *Marmont v. The State*, 48 Ind. 21; *State v. Mercer*, 32 Iowa 405. EDMUND H. BENNETT.