EDITORIAL NOTES.

By W. D. L.

Must a Social Club take out a License?

The annotation by Mr. Longstreth in this number of the American Law Register and Review on the case of Com. *v.* Tierney,[1] shows the conflict of opinion in the courts of different States on the question whether a *bona fide* club is obliged, under the liquor laws, to take out a license before it can sell liquor to its members. In all the States we have Acts requiring that no one shall sell liquor without a license. The word *sale* itself appears in the license laws of almost every State in the Union. It would naturally suggest itself to any one looking at this subject for the first time, that the terms of the statutes should be interpreted in accordance with the general purpose of the Act. This purpose, which the judge must gather from the provisions of the statutes taken as a whole, is the key by which alone the meaning of each section can be interpreted. And yet if we examine the opinion in the cases upholding the view that a club cannot sell to its members without a license, we find them almost entirely taken up with the question whether the act of the steward of a club, in handing a member a glass of wine, the member paying money therefor, is technically a sale.[2] In fact, the universal attitude of the Appellate Courts, which have held that a club must take out a license, has been, that the whole question hangs on the decision of what is technically a sale. And though one judge has taken the trouble to point out that the purpose of the license

[1] *Supra*, p. 861.

[2] State *v.* Easton, 20 At. Rep. (Md.), 782 (1890); State *v.* Essex Club 20 At. Rep. (N. J.), 769 (1890); People *v.* Andrews, 115 N. Y., 427 (1889); Kas. *v.* Horacek, 41 Kas. 87 (1889); State *v.* Lockyear, 95 N. C., 633 (1886); Martin *v.* State, 59 Ala., 35 (1877); Rickart *v.* People, 79 Ill., 85 (871); State *v.* Mercer, 32 Iowa, 405 (1871).

laws would be defeated if men were allowed to form themselves into clubs and sell liquor to each other, even he has omitted critically to discuss the real purpose of the license laws.[1]

There is only one thing more remarkable than this picking out of a particular word in a statute, and defining its technical legal meaning, and that is, that any one who adopted this attitude toward the license laws, should have arrived at the conclusion that a change of ownership for a money consideration between the club and an individual member was not a sale. Yet this was what was done by an English judge, Judge FIELD, in Graff *v.* Evans.[2] The learned judge held that the sale to a member was only a transfer of special property in the goods and not a sale. In other words, that the act of changing my ownership from one-tenth or one-hundredth interest in a subject of property, as a "tenant in common" with my co-members, to a complete ownership for a money consideration is not a sale. The reasoning which led to such a conclusion was easily picked to pieces by the American judges,[3] and it therefore rather adds to than detracts from the strength of the opinion that a club cannot sell without a license.[4] The sale of wine to a member of a club has been compared to a sale to the stockholder of a railroad company of a ticket on the train. As far as the technical question of sale is concerned, we are unable to see any distinction between them.

Indeed, if the club is incorporated there is not even an apparent difference between the sale by the corporation organized for pleasure to its members, and the corporation organized for profit to its members. When, however, the club is a mere association or partnership there may be some

[1] Opinion of Judge PENNYPACKER, Comm. *v.* Tierney, 1 Dist. Rep., 17 (1892). This opinion contains the best and fullest statement of the position that clubs cannot sell liquor without a license.

[2] L. R. 8 Q. B., D., 373 (1881).

[3] See especially opinion of VAN SYCKEL, J., in State *v.* Essex Club, 20 At. Rep. (N. J.), 769 (1890).

[4] Opinion of PENNYPACKER, J., in Comm. *v.* Tierney, 1 Dist. Rep., 17 (1892).

apparent difference. If the members are partners in the liquor consumed by the members no action for the price of the liquor will lie at common law. Practically, the only method of recovery would be by bill in equity for an account and distribution of the assets of the partnership. But though a learned judge has intimated to the writer that the fact that a club was incorporated might make a difference in his decision, should the case come before him, it does not appear to us that an accident of practice—and the rule that one partner cannot sue another is nothing but an accident of practice—should affect this question of "what is a sale." Incorporated or unincorporated, in both cases there is a passage of title for a money consideration; in both cases the drinker exchanges a title giving him qualified rights to a fractional undivided part of the whole stock, to a title giving him complete control over a particular glass of liquor.

But the primary questions are—first, what is the object of our State license laws? and second, what is the method or methods by which this object is sought to be attained? The object, of course, is to discourage intemperance. The method by which this ultimate object is attained, which is, of course, the important point, can be seen both from what the statutes do make criminal, as well as from what they prescribe.

Now, a man can drink himself drunk as often as he wants to in the strictest prohibition State in the Union. The open drunkenness may be a misdemeanor, but the act of drinking liquor *never*. Neither does any State attempt to regulate the place where a man can drink. One can drink a glass of beer in a street in Boisee City with as much respect for the letter and spirit of any law of the State of Iowa as one could in a bar-room in New York City. But the license laws and the prohibition laws do attempt to restrain the business of liquor selling. Many statutes contain the words, "trading in liquors . . . by selling the same." And we doubt not that any of the courts which now hold clubs must have licenses would convict a man of "selling liquors" under the acts who bartered wine

for groceries, though according to BENJAMIN, bartering is not a sale.[1]

Now the criterion of a business is that the conduct of it is for profit; actual profit is not necessary, but that profit was the direct or indirect object proves that the transaction is a business transaction. It is the business of the retail sale of liquor without a license which our Licensing Acts mean to prohibit.

The question, then, is: Do clubs engage in the business of selling liquor? It seems to us that the subject of clubs and the license laws will never be cleared of the doubts which now hang about it until we clearly understand the difference between a club and company or business corporation. A club is an organization for the purpose of giving its members certain things at cost. A company is an association for the purpose of profit, which profit, in the shape of money, is handed over to the members according to the relative amount of capital they have contributed. To make my meaning clear: The managing board of a club agrees to furnish its members with things they can enjoy in common, such as a house, chairs and books, at an assessed valuation of so much a year, and food, drink, etc., which the members of course cannot enjoy in common, at a set price for a definite quantity. Now it is true that money may be made off food and lost in drink, or *vice versa*, but on the average the total pleasures which a man gets out of his club cost the association, as a whole, exactly what he pays for them. This being the principle of a club, and no member being interested in the amount of another member's expenditures at his club, no club transactions between its members can by any ingenuity be termed "carrying on a business," though there may often technically be a sale between the club and one of its members. This, of course, is not saying that an association which as between its members is a club, cannot enter into business. Selling liquor or giving theatricals for money to outsiders is just as much a business as if the profits were divided among the members. On the other hand, it is not neces-

[1] Benjamin on Sales, Sect. 2, 6th Ed.

sary that a club should have a common room, etc. The criterion depends on the association to furnish pleasure to the members at cost. The kind of pleasure is immaterial. The fact that liquor alone was furnished might be a suspicious circumstance which, taken with others, such as that incidental profits went to the steward, would justify a jury in looking at the "club" as a device to evade the license laws.[1] But if it is *bona fide* we see nothing in the license laws of our own or other States to prevent men combining together to purchase liquor and afterwards distributing the same at cost on a prearranged plan. That the legislatures of our States could prevent the buying of liquor in common by two or more people, or the subsequent distribution without a license, may be admitted. But to put such a strict interpretation on an Act would require very plain language. If the legislature had thought it necessary for a club to obtain a license they would have enabled reputable clubs to obtain licenses. But in Pennsylvania, at least, by requiring an applicant to affirm that no one besides himself is interested in the sale, and that the place is necessary "for the accommodation of the public," they have put it out of the power of clubs to obtain licenses. Judge PENNYPACKER, in his able opinion, has considered it extremely probable that the legislature meant to require the members of a club when they wanted to drink at the club, to send to the nearest tavern. But if this is so, would it not look like legislation to encourage the business of selling intoxicating liquors at retail?

Lastly, in interpreting license laws it seems to us that courts sometimes forget, in their commendable eagerness to give effect to legislation whose general object is meritorious, that they are interpreting a criminal statute, frequently making acts crimes which before were innocent, and that one of the best rules of our law is, that such statutes should be construed strictly. These words "construed strictly" if they mean anything should prevent courts applying the prohibitions of a penal statute to new and doubtful cases.

[1] Op. Com. *v.* Tierney, 1 Del. Rep., Pa., p. 22.