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NOTES.

A CLUB "SYSTEM" TO EVADE LIQUOR LAWS IN A PROHIBITION DISTRICT.—State laws throughout the Union, provide either that the sale of intoxicating liquors be licensed by the State, or that the sale be altogether prohibited within the limits of the State. The State-wide prohibition Act of North Carolina, Chap. 71 Laws Ex. Sess. 1908, made it unlawful for any person or persons, firm or corporation to manufacture or in any manner make, sell, or otherwise dispose of, for gain, at any place within the State any spirituous, vinous, fermented or malted liquors or intoxicating bitters.

Under this act, there arose the case of St. v. Colonial Club, decided December 14, 1910, which sanctioned the ingenious "system" by which a sale was converted into a bailment and the club permitted to enjoy, within its precincts the use of intoxicating liquors even in this prohibition State.

The "system" was shown by a special verdict of the jury. The Colonial Club was a corporation organized under the laws of North

Carolina, and had its club rooms accommodating its one hundred and eighty members. The initiation fee was ten dollars and the quarterly dues six dollars. Beside the President, Board of Directors and Treasurer, there was a manager, who stayed at the club rooms most of the time. The club kept a book with order blanks for beer and stubs corresponding in number to the order blank; this book was kept by the club and when an order was made, a memorandum was kept on the corresponding stub. These books were paid for by the club and when an order was made the money was paid to the manager, who turned it over to the treasurer. The treasurer, having a banking account, banked the money and sent an order to a liquor house, outside the State, accompanied by the club's check in payment, which check corresponded to the amount received from the member. The liquor was then sent in the member's name, in care of the club, which made no charges and received no profits from the transaction. When the beer arrived, the member got a book of coupons, entitling him to a corresponding amount of beer from the general refrigerators, in which all the beer of the other members was mingled. A bottle of beer was served the member on surrender of a coupon.

Judge Manning *held* this transaction did not constitute a sale by the club to its members, because the defendant was merely the depository of the beer, ordered by the member and delivered in his name and for his use to the defendant, who was acting solely as the servant, agent or bailee without hire for such member. Hence the only sale, which occurred, took place outside the State and since the Legislature of North Carolina had no jurisdiction over this sale, the defendant could not be convicted.

If the decision is correct, this "system" is truly ingenious for in this same State, previous decisions had held that the same sort of transactions and use of intoxicants for the same purpose under other systems, offered by social clubs, was a "sale" and rendered in State v. Neis,[2] a club steward guilty of selling liquors without a license and in State v. Lockyear,[3] guilty of a breach of the local option laws.

To determine whether such a decision is correct, it is only necessary to decide whether the process or system by which members of a club obtain the title to a quantity of liquor to be disposed of by the individual as he may desire is a mere "distribution" among its members or is a "sale." The decisions on this point, whether the club adopts the ordinary rules or a special "system," are in conflict, but the weight of authority is undoubtedly in favor of the rule, that the distribution and consumption of liquors in a club by its members is a "sale."

This view was adopted in Manning v. Canon City,[4] 1909 which

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[1] 67 S. W. 771.
[2] 108 N. C. 787.
[3] 95 N. C. 633.

decided that the distribution of liquors kept by an incorporated club, to its members who pay therefor sums, which are used to replenish the supply of liquor is a sale within the meaning of the prohibition laws. In State v. Minnesota Club,[5] 1909, the distribution of intoxicating liquors by an incorporated club to its members, though without profit, constitutes a sale. The decisions of the Supreme Courts of Alabama,[6] Kansas,[7] Kentucky,[8] North Carolina,[9] Mississippi,[10] Michigan,[11] Georgia,[12] West Virginia,[13] Louisiana,[14] Maryland,[15] New Jersey[16] and Indiana,[17] all support this general doctrine.

On the other hand in Missouri,[18] Massachusetts,[19] New York[20] and Pennsylvania,[21] the Courts, because of the inaction of the legislature or of the district attorneys in not bringing former prosecutions, hold that the furnishing of liquors by an incorporated social club, organized in good faith, owning property in common, to which the furnishing of liquors is merely incidental to the purposes for which it was organized, does not constitute a sale, but the Federal Courts of Massachusetts in U. S. v. Nittig,[22] and of Pennsylvania in U. S. v. Alexis Club,[23] hold that such a transaction with club members does not constitute a "sale."

The general rule, beyond doubt is that the distribution of liquor by incorporated clubs to their members is a sale. What then is most generally accepted to be a sale, cannot be converted into a bailment by a mere trick, subterfuge, or "system" to evade the law.[24] But even admitting that a "system" is capable of turning a sale into a bailment, what the Colonial Club did, "system" or "no system," constituted a sale in every element. The members of this club paid in addition to dues, whatever sum each thought proper to furnish funds, with which to buy beer. Such fund becomes the property of the club as in the case of general deposits in a bank. The club then sends its own check for the amount of beer each member orders.

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[5] 45 Colo. 571.
[6] 106 Minn. 515.
[7] Martin v. State, 59 Ala. 34.
[8] State v. Haracek, 41 Kan. 87.
[9] Club v. Louisville, 92 Ky. 309.
[10] St. v. Neis, 108 N. C. 787 and St. v. Lockyear, 95 N. C. 633.
[11] Nogales Club v. St., 69 Miss. 218.
[12] People v. Soule, 74 Mich. 250.
[13] Mohrman v. St., 105 Ga. 709.
[14] St. v. Shumate, 44 W. Va. 490.
[15] St. v. Boston Club, 48 La. Ann. 485.
[16] Chesapeake Club v. St., 73 Md. 97.
[17] Newark v. Club, 53 N. J. L. 99.
[18] Marmount v. St., 48 Ind. 21.
[19] St. v. St. Louis Club, 125 Mo. 208.
[20] Com. v. Smith, 102 Mass. 144.
[21] St. v. Adelphi Club, 149 N. Y. 5.
[22] Klein v. Livingston, 177 Pa. 224.
[23] U. S. v. Wittig, 28 Fed. 224.
[24] U. S. v. Alexis Club, 98 Fed. 725.
[24] 23 Cyc. 183.

True the beer is sent in the name of each member in care of the club, but it is not placed on special deposit but mingled with all the liquors on general deposit. The beer thereupon becomes club property just as a general deposit in a bank becomes the property of the bank. Each member can check on the club, and receive not his own beer but the quantity of beer for which he pays with his coupons, just exactly as a depositor checks money out of a bank. Though the beer was ordered in the member's name, yet it was shipped in care of the club, received by it and mixed with the club's other goods, and thus become the club's property subject to draft. The use of the member's name was merely colorable, not changing the true nature of the transaction. Had the beer been stolen, it must be charged in a bill of indictment, as the property of the club, or had a member broken into the club at night and regaled himself with the beer, he could not plead the beer was his any more than the depositor who breaks into a bank, and takes cash from the vaults could set up the plea, that he was merely closing his account. If an execution was issued against the club it could be levied on the beer. Instead of members paying cash, and receiving liquor in exchange, they simply paid in advance, receiving therefor coupons, which they cashed for liquor. Such a transaction, whether for profit or for loss, is clearly a sale.

Chief Justice Clark, in a dissenting opinion, pointed out that such devices to evade the law have been numerous and many of them ingenious, but if the law exempts liquor selling by social clubs, however respectable, by devices or "systems" however ingenious, it should permit it to all clubs without devices or "systems."

The expression in the Declaration of Independence "equal rights to all and special privileges to none," is not a figure of rhetoric but the truest expression of American sentiment. "Privilege and privileged class are and ought to be intolerable and it comes irritatingly near to a privilege when social clubs offering advantages of comfort and luxury, that are only open to the more prosperous, escape the prohibition of a statute because refined reasoning declares that by carrying out a "system" a sale is not effected, but merely a distribution of the common stock of liquor among its members, while the robust sense of the community, not excluding the club members themselves, knows the transaction to be a "sale."

C. S. H.

EFFECT OF THE SALE OF GOOD WILL.—Good will was first recognized some one hundred years ago[1] as a species of intangible property and an asset of a going business. A problem soon arose in the effect of transfer of the good will of a business as a restriction upon the vendor. There slipped into the law an admission that the vendor of the good will could, if he choose, set himself up in a similar business to that which he had sold out, provided it be

[1] Cruttwell v. Lye (1810), 17 Vesey, Jr., 335.

fairly and clearly a separate business. The *ratio decidendi* in these first cases was an inquiry whether the assignor of the good will made representations that the business which he had re-established was the same or a continuation of the old business. If it were found that he had made such representations, an injunction would be granted, by analogy, to the infringement of trade marks or trade names.[2]

At this time good will was regarded to be local and to attach particularly to the situs of the business. It is possible to see under this conception why the vendor was allowed to set up a new business, at least where not in or adjacent to the premises sold. It was soon recognized[3] that too much emphasis had been placed on the connection of the good will with the location and that the good will might be rather associated with the business itself[4] or with the business name,[5] or even with the personality of the business associates.[6] But the rule had become well established that the vendor could carry on a competing business, and some effect must be given to his voluntary act in assigning for a consideration the good will. Lord Romilly then and there took the stand[7] that such a vendor, although he might publicly advertise, was not entitled either by private letter or by a visit, or by his traveler or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm but to transfer it to him, the new firm. This restriction was extended in a case which even enjoined the vendor from dealing with the old customers,[8] it was overruled[9] and for ten years was disavowed; until in 1895 it was re-established in the House of Lords,[10] so that it may now fairly be said to be the law in England.

This rule which would allow the new business but restrain solicitation, has been adopted in a majority of jurisdictions in which the problem has arisen, notably Michigan,[11] New Jersey,[12] Pennsylvania,[13] Illinois,[14] and Rhode Island.[15] Other jurisdictions[16] have expressly refused to enjoin solicitation reflecting the uncertainty in England prior to the case in the House of Lords. Others have in

[2] Cruttwell v. Lye, *ubi supra*, citing Hogg v. Kirby, 8 Vesey, Jr., 215.
[3] Wood, V. C., in Churton v. Douglas, 5 Jurist N. S. 887.
[4] Brett v. Ebel, 51 N. Y. Sup. 573, mere control of all the trade with a certain port.
[5] Churton v. Douglas, *ubi supra*.
[6] Foss v. Roly, 195 Mass. 292.
[7] Labouchere v. Dawson (1872), L. R. 13 Eq. 322.
[8] Leggott v. Barrett (1880), 15 Ch. Div. 306.
[9] Pearson v. Pearson (1884), 27 Ch. Div. 145.
[10] Trego v. Hunt (1895), L. R. 1896 A. C. 7.
[11] Myers v. Kalamazoo Buggy Co., 54 Mich. 215.
[12] Newark Coal Co. v. Spangler, 54 N. J. Eq. 354.
[13] Wentzel v. Barbin, 189 Pa. 502.
[14] Rauft v. Reimers, 200 Ill. 386.
[15] Zanturjian v. Boornazian, 25 R. I. 151.
[16] Bergamini v. Bastian, 35 La. Ann. 60; Cottrell v. Babcock Mfg. Co., 54 Conn. 122; Vinall v. Hendricks, 33 Ind. Ap. 413; MacMartin v. Stevens, 37 Wash. 616.

dicta[17] disapproved the rule. The subject had never been discussed in a court of last resort in New York until the case of Von Bremen v. MacMonnies (1910), 200 N. Y. 41. In this the Court of Appeals overruled the previous holdings of the Appellate Division of the Supreme Court[18] and lined New York up with the jurisdictions avowing the English rule. The injunction restrained the defendants from soliciting the trade of the customers of the original firm and from dealing with such as had been already solicited. The right of the defendants to carry on a competing business was not denied. The court recognized the exception already made in England[19] in the case of compulsory alienation of good will, as in bankruptcy proceedings or by liquidation, where even solicitation is permitted. However the present assignment, although made a few weeks before the termination of the partnership as an alternative for liquidation, it was *held,* did not come within this exception, but must be regarded as voluntary.

The theory upon which all the cases are based, expressed as an implied covenant in the sale or an equitable principle, is, that the vendor has an obligation not to depreciate the value of what he has sold.[20] Now to engage in a similar business will certainly do this to a greater or lesser extent. Still more so, public advertisement, yet these are allowed the vendor. The line is only drawn when he begins to personally canvass the old customers. This is said to be an avowed endeavor to prevent the buyers of the good will receiving the benefit of it, or an attempt to disturb them in its enjoyment. Why is not keen competition equally such a violation? This seems, today as when it was first enunciated, a thoroughly arbitrary distinction.

Massachusetts has evolved an exceptional yet more logical rule.[21] Discovering the prior cases were reconcilable with the stand they were to take, her courts[22] disavowed the premise of the English rule, namely, that the seller had an unqualified right to engage at least in the same business. The effect of this voluntary assignment of the good will is, they say, to preclude him from setting up any competing business which will derogate from his grant. Whether the new business derogates from the good will which he has sold is a question of fact to be determined in each case. With this as a working rule injunctions will be granted[23] and good will will be

[17] White v. Trowbridge, 216 Pa. 11 and Farrand v. Williams, 88 Mich. 473.

[18] 138 App. Div. 319 and Ward v. Ward, 15 N. Y. Sup. 913; Cf. Close v. Flesher, 8 N. Y. Misc. 299.

[19] Walker v. Mottram, 19 Ch. Div. 355.

[20] Labouchere v. Dawson, *ubi supra.*

[21] Hutchinson v. Nay, 187 Mass. 262.

[22] Old Corner Book Store v. Upham, 194 Mass. 101; Marshall Co. v. New Marshall Co. (1909), 203 Mass. 410, and cases cited therein.

[23] In Old Corner Book Store v. Upham, *supra,* and in Foss v. Roby, 195 Mass. 292, the vendors were enjoined from engaging in business in the city wherein the former business was conducted. If the business were world-wide, cf. Nordenfelt v. Gun Co. (1894), A. C. 535, under the Massachusetts rule he could not have set up a similar business. *Quaere,* would that not be the result in the case of Von Bremen v. MacMonnies, *supra,* where the business was national in scope?

recognized as a valuable asset[24] where it would be impossible under the English rule. The recognition of good will is of comparatively recent origin, it has been seen, and the number of cases involving it is increasing. Those jurisdictions which choose to follow the English rule must logically accept the final word in Trego v. Hunt. On the other hand, they may choose the stricter Massachusetts rule based on a logical test adapted to each case and prefer it to a rule based on an arbitrary distinction.[25]

S. L. H.

MUNICIPAL LIABILITY TO INDIVIDUALS FOR NONFEASANCE IN THE OPERATION OF PARKS.—Given a tract of land bordering on a body of water which is devoted to the amusement and recreation of the public, and to which end there is located thereon profit producing facilities in the form of piers, pavilions, bathhouses, refreshment stands, boat landings, and walks and drives and an open, unoccupied area where the grass is kept green for the pleasure of visitors and over which visitors are permitted to walk. A dangerous condition exists on such open, unoccupied area by reason of the admitted negligence of the person in whom the duty and means to remedy it resides. No admission fee is exacted of any one who enters this park, but an opportunity to spend his money is offered him at the piers, refreshment stands, etc., to the indirect profit of the person who owns the park. A woman who is rightfully in the park and walking in this open area is, without any contributory negligence on her part, injured by coming in contact with the dangerous condition. If the owner of the park happens to be a private individual or private corporation and it was the neglect of his or its manager which caused the injury, there can be no doubt that the rule of *respondeat superior* would apply and such private owner would be held answerable to the injured party in damages. But if, under the same conditions, the owner happens to be a municipal corporation and the negligent manager is the incumbent of an office of the city created by law to exercise supervision and control over parks, the same injured party is left without remedy under the rule of the recent case of Bisbing v. City of Asbury Park.[1] In its last analysis that case seems to make the right of an individual who has thus been injured to a remedy to depend upon whether the profits from the park go into the pocket of private persons or into the treasury of a city. It is submitted that such a conclusion does violence both to the rights of the individual and to the principles upon which municipal exemption from liability is founded.

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[24] Gordon v. Knott, 199 Mass. 173.

[25] The Pennsylvania case, Wetzel v. Barbin, *ubi supra*, decided on its merits without any reference to precedent is equally reconcilable with either rule. The injunction restraining the new business, a newspaper route, was practically co-extensive with an injunction restraining solicitation.

[1] 78 Atl. 196 (1910).

The general law may be stated to be that a city exercises functions of two classes, private and governmental,[2] and that it is liable for the negligent acts of its officers and employees in the due course of duty to the same extent as a private corporation in respect to matters of the former class;[3] and in the exercise of its governmental functions, the municipality possesses the attributes of sovereignty, and is not liable in tort in the absence of a statute imposing such liability.[4]

The difficulty arises in determining whether a given duty is governmental or private, and it is at this point that the authorities differ. The cause of this conflict which makes it impossible to deduce from the mass of conflicting cases any satisfactory rule or principle to guide in the determination of this question, is stated in one case[5] in the following language: "This is because the line between powers exercised by the municipalities in their public capacity and for purposes pertaining to the preservation of the public health, safety, and morals, and those exercised for the convenience, advantage, and benefit of a city and its inhabitants, is often so narrow that the distinction between them cannot well be defined, or supported by good reason." It seems to be one of those questions which must be determined by all the circumstances in each particular case.

It is outside the purpose of this note to go into a consideration of the principles underlying municipal exemption in general, further than to state them in the hope that they may throw some light to guide in the determination of how far municipal exemption from liability to individuals should be carried. The Supreme Court of New Jersey, in which State the principles underlying city and county exemptions are held to be identical,[6] states these principles, in a case which raised the question of the liability of a county for injury resulting from negligence in not keeping a bridge along a public road in repair, as follows: " * * * the duty is owed to the public, and not to each individual who may have occasion to use the bridge, and the adoption of any other rule would be highly inexpedient and destructive of the public interests, by subjecting these public corporations to numberless suits for every petty neglect occasioning inconvenience to any one."[7] In a word, the basis seems to be public convenience.

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[2] Wilcox v. Rochester, 190 N. Y. 137; Hedge v. Des Moines (Iowa), 119 N. W. 276; Evans v. Kankakee, 231 Ill. 223; Gilemor v. Salt Lake City (Utah), 89 Pac. 714.

[3] Brown v. Salt Lake City (Utah), 93 Pac. 570; Bond v. Royson, 130 Ga. 646; Young v. Co., 126 Mo. App. 1; Posey v. N. Birmingham (Ala.), 45 S. 663; Todd v. Crete (Neb.), 113 N. W. 172; Wilcox v. Rochester (N. Y.), *supra*.

[4] Valentine v. Englewood (N. J. Err. & App.), 71 Atl. 344; Clayman v. N. Y., 117 App. D. 565; Bond v. Royson, *supra;* Judson v. Winsted, 80 Conn. 384; Kehoe v. Rutherford, 74 N. J. Law 659; Dayton v. Glasser, 76 O. St. 477

[5] Louisville v. Prinz, 105 S. W. 948 (Ky. 1907).

[6] Pray v. Jersey City, 32 N. J. Law 394 (1868).

[7] Livermore v. County of Camden, 29 N. J. Law 245 (1861).

Apparently in recognition of the fact that the rights of individuals have often outweighed the benefit of public convenience, many States have by legislative enactment imposed municipal liability in many instances where judicial decisions under the common law denied it. In some States the courts have, themselves, drawn a distinction between governmental duties of a judicial and those of a ministerial nature, imposing liability for negligence in the performance of those of the latter.[8] These two facts must argue that in a jurisdiction where the arbitrary common law rule is in force in a close or doubtful case, the presumptions should prevail in favor of the individual.

The maintenance and operation of public parks without corporate or individual gain or profit has been held to be a purely public purpose such as will exempt the city from liability for negligence.[9] This is rested upon the ground that "the municipal authorities are charged with the duty of maintaining the public health, and that parks where exercises and recreation can be indulged in, and pure and clean air breathed, contribute largely to the health of the community."[9] Admitting that the rule of city exemption is properly extended to free public parks, how far does the fact that the city receives income from a park affect its right to exemption? There can be no doubt that a general indulgence in sailing, bathing in the sea and all the exercises incident thereto, and the attendance upon concerts and amusements in piers and pavilions, and the breathing of sea air while riding in a rolling chair would contribute largely to the health of any community; but it is submitted that when a city receives a revenue from the very things which give a seaside park its peculiar health producing qualities, it ceases to be in reality a public park and becomes a health resort to those only who can pay the price. The city receipts from such a park produce a fund out of which damages may be paid those who receive injury from negligent management, and it is believed that the rule of convenience should break down under such circumstances, and that the city's liability should be the same as that of a private individual. And it is submitted that the fact that certain areas within the boundaries of the park are unleased and kept in grass in order to add to its attractiveness should not relieve the city from the same liability as to those parts, any more than that fact would relieve a private owner from liability as to a particular area which is not directly producing profit to him. The health producing qualities of those areas, if they have any in themselves, would seem to be only incidental to the business of conducting a profit producing seaside park.

This view is fortified by the fact that the enabling act in the case under consideration, which gave the city the right to receive profits from one portion of the park, also imposed the duty and

[8] Barree v. Cape Girardeau, 112 S. W. 724 (Mo. 1908); Engelking v. City of Spokane, 110 Pac. 25 (Wash. 1910); Schigley v. City of Weseca, 118 N. W. 259 (Minn. 1908).

[9] Louisville v. Prinz, *supra*.

put in the city's hands the means of keeping the unleased portions in a safe condition. And if it is a question of construction of the legislative intent, it would seem reasonable to infer that the license in respect to one portion and the duty in respect to another were not intended to be divorced. This inference seems the more reasonable in view of the fact that not only were repairs and improvements on both leased and unleased portions to be made out of a common fund which was to be derived as profits from the leased portions, but those profits were contemplated to be of such a size as would enable the city to pay the purchase money for the whole park after the cost of maintenance had been paid.

If these considerations are pertinent the conclusion seems to be inevitable that the city should be held to the same liability in respect to the whole park, and in virtue of the fact that it is a park conducted for profit to the city, the city's liability should be the same as that of a private owner..

J. F. S.