NOT TO AFFECT THE CLUBS

CORPORATION COUNSEL BELIEVES THEM FREE OF LIQUOR TAX.

In His Opinion the Recent Ruling in the Adelphi Case Covers Questions Under the Raines Law—Organizations in Which the Furnishing of Liquors to Members Is Incidental in the Exempted Class—Are Not Engaged in Traffic.

In response to a letter from Acting Chief of Police Cortright, Corporation Counsel Scott yesterday gave the following opinion in regard to the liability of social clubs under the provisions of the excise law:

I have your letter of May 2, asking me to advise you whether corporations or associations commonly known as clubs are subject to the provisions of the liquor-tax law, and consequently required to procure such a tax certificate as is provided for in Subdivision 1 of Section 11 of said law; and also whether the fact that the premises occupied by such corporations or associations have ten furnished bedrooms, and are regularly kept open for the feeding and lodging of guests, constitutes said places hotels within the meaning of a hotel as defined in Exception 2 to certain clauses of Section 31 of the liquor-tax law.

The question of the liability of social clubs to the provisions of the excise law which preceded the present liquor-tax law has been recently determined by the Court of Appeals of this State, and it has been held by that court, after a careful and exhaustive review of all the authorities, that social clubs organized under the statute for a legitimate purpose, to which the purpose of furnishing liquors to its members is merely incidental, did not fall within the purview of the excise law, were not required to take out an excise license, and were not subject to the penalties provided in the statute for the offense of selling or giving away liquor without a license.

This case absolutely determined that bona fide social clubs were in no respect subject to the excise laws of the State, and that their act in distributing liquors among their members and guests did not constitute a sale of such liquors.

The only question which now presents itself is whether or not the liquor-tax law, known as Chapter 112 of the Laws of 1896, has effected any change in the law so far as such clubs are concerned.

In the case to which I have referred, the defendant, being a social club, had been indicted for a violation of Section 31 of the excise law, known as Chapter 401 of the Laws of 1892. That section provided as follows:

"Any person who, without having a license granted to him in pursuance of a law of this State permitting him to sell either strong or spirituous liquors, wines, ales, or beer, shall sell strong or spirituous liquors, wines, ale, or beer in quantities of less than five gallons at a time, or shall sell any strong or spirituous liquor, wine, ale, or beer in quantities of five gallons or more at a time to be drunk on or used on the premises where the same shall be sold, or in any garden or inclosure communicating with such premises, or in any public street or place contiguous thereto, shall be guilty of a misdemeanor."

The court held that the defendant had been wrongly convicted, because it did not sell liquor to its members or to others, and in thus deciding the court used the following language:

"As we have seen, the defendant is a social club organized under the statute for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental, and is not unlike the supplying of dinners or articles which the member may desire for his own comfort and entertainment. The defendant has a limited and selected membership. And while the property and supplies are technically owned by the club, each member is in equity an equal owner in common. It was not organized for the purpose of engaging in a business for profit or for the traffic in liquors. It engages in no business other than that which pertains to the maintenance of its library, reading rooms, and the social intercourse and comfort of its members. Liquors as well as other supplies are distributed to its members upon the written order of the member, at a price fixed by the officers of the club designed to cover the purchase price and disbursements in serving. These orders pass to the steward or Treasurer of the club and are charged against the member, who settles therefor monthly. We think that the transaction with Stark did not amount to a sale within the meaning of the statute. It was but a distribution among the members of the club of the property that belonged to them. The fact that a payment was made does not change the character of the act, for it was but the means adopted by which each member could receive his own and not that belonging to his fellow-member. The payment went into the treasury to ultimately restore that which he had taken."

The present liquor tax law, in its thirty-first section, provides as follows:

"It shall not be lawful for any corporation, association, copartnership, or person which, or who, has not paid a tax as provided in Section 11 of this act and obtained and posted the liquor tax certificate as provided in this act to sell, offer, or expose for sale, or give away liquors in any quantity less than five wine gallons at a time; nor, without having paid such tax and complied with the provisions of this act, to sell, offer, or expose for sale or give away liquor in any quantity whatever, any part of which is to be drunk on the premises of such vendor or in any outbuilding, booth, yard, or garden appertaining thereto or connected therewith. It shall not be lawful for any corporation, association, copartnership, or person, whether having paid such tax or not, to sell, offer, or expose for sale, or give away any liquor—

"(a.) On Sunday, or before 5 o'clock A. M. on Monday; or,

"(b.) On any other day between 1 o'clock and 5 o'clock in the morning."

It will be seen that this present law, like the excise law which it superseded, forbids the selling of liquor without having taken out a tax certificate, and also forbids the giving away of liquor under like conditions, and excepting that the words "give away" are added to the words "sell or expose for sale," Section 31 of the present act does not differ materially, so far as the question you have asked me is concerned, from Sections 31 and 32 of the excise law under which the case above quoted from was decided. The words "give away" as thus used are, in my opinion, intended merely to prevent any attempt to evade the law by making a "sale" under the guise of a "gift."

The opinion of the Court of Appeals to which I have referred was distinctly based upon the proposition that a club of the character of that one which was considered by the court does not sell liquor, and it must equally follow that it does not give it away. The language of the court is that the transaction between the club and its members is "a distribution among the members of the club of the property that belonged to them," and this the court says does not amount to a sale within the meaning of the statute, and as it is equally clear that it does not amount to a gift, I can see no other conclusion to be arrived at than that a social club organized for legitimate purposes, to which the furnishing of liquors to its members is merely incidental, does not fall within the purview of the liquor tax law, and is not required to pay the tax provided for therein.

I am aware that under Subdivision 2 of Section 24 of the act, which prohibits the traffic in liquor in any building, yard, booth, or other place, which shall be in the same street or avenue and within 200 feet of a building occupied exclusively as a church or schoolhouse, an exception is made in the following words:

"Provided, however, that this prohibition shall not apply to a place which, at such date, is occupied, or in process of construction by a corporation or association which traffics in liquors solely with the members thereof, nor to a place within such limit to which a corporation or association trafficking in liquors solely with the members thereof when this act takes effect, may remove—"

—and that it has been suggested that the peculiar phraseology used in this section brought clubs, such as those referred to in your communication, within the scope of the statute. Such is not, however, its effect under the exposition given by the Court of Appeals of the real nature of the transaction between these clubs and their members.

The court says distinctly, in that opinion, that such clubs do not traffic with liquor in any sense whatever, and consequently the provisions of the statute to which I have referred, which relate solely to persons or corporations which do traffic in liquor, do not apply to them. Just what these words were intended to apply to may not be apparent; but that they do not apply to bona fide social clubs is, in my opinion, abundantly clear.

The same reasoning which leads me to advise you that social clubs do not require to pay a liquor tax and take out a receipt, leads inevitably to the conclusion that they are not subjected to the penal provisions of Section 31 of the liquor tax law, which forbids any person, corporation, association, or copartnership to sell, offer, or expose for sale, or give away any liquor—

(a) On Sunday, or before 5 o'clock A. M. on Monday; or

(b) On any other day between 1 o'clock and 5 o'clock in the morning—

—because, as I have already explained, under the opinion of the Court of Appeals such clubs do not sell, offer for sale, or give away liquors under any circumstances, or at any time, and there is nothing in the statute which prohibits the distribution among their members of their own property on Sunday, or during those hours commonly known as the prohibited hours.

The fact that a club has ten furnished bedrooms, and is regularly kept open for the feeding and lodging of its members, does not, in my opinion, constitute such a place an hotel within the meaning of that word as defined in Exception 2 to Section 31 of the liquor tax law.

The essential feature fo a club is its privacy, that it is open and accessible only to its members, and to those who may be introduced therein in the manner provided by its by-laws or constitution.

The essential and distinguishing feature of a hotel is its publicity, and the fact that it is bound to afford, within the limits of its capacity, entertainment and shelter to any traveler who may apply therefor, who is able to pay for his accommodation, and willing to conduct himself in a seemly manner.

RECORDER GOFF AGAIN REVERSED.

Excise Case in Which He Admitted Record of a Bartender's Conviction.

Dennis Mullins, a saloon keeper at 1,421 Second Avenue, and his bartender, John Cotter, were arrested for "selling and exposing for sale" Sunday, June 30, 1895. Cotter pleaded guilty in Special Sessions and was fined $50. Mullins pleaded not guilty and was tried in General Sessions Aug. 16 before Recorder Goff and a jury.

The prosecution introduced as evidence against him the plea of his bartender, Cotter, and the record of Cotter's conviction. Charles Goldzier, counsel for Mullins, objected to the testimony, and the Recorder overruled his objection. Mullins was convicted, and Recorder Goff sentenced him to pay a fine of $250 and to go to prison for thirty days. An appeal was taken.

In the opinion handed down yesterday the Appellate Division of the Supreme Court decided that the Recorder erred in allowing a record of Cotter's conviction to be presented to the jury and ordered the conviction reversed. The opinion written by Justice Ingraham, in which all the Justices concur, says:

We think the admission of the record of Cotter's conviction was clearly an error. The defendant was not indicted as an accessory, and, indeed, as the crime charged was a misdemeanor, he is the principal whether or not under the law as it formerly existed he would in the case of a felony have been an accessory. Upon the question of his guilt, the conviction of his associates for the commission of a crime was entirely immaterial.

The opinion quotes several decisions of the Court of Appeals in support of this ruling and then goes on:

The defendant was indicted as a principal. It was not necessary to prove that any one else had been convicted of the offense to establish his guilt, and evidence tending to show that some one else had been convicted of the crime for which he was indicted was plainly incompetent and could not have been injurious to the defendant.

It is impossible for us to imagine upon what principle this record and the depositions in Cotter's case could have been competent evidence against this defendant. The Court also admitted the record of the conviction of one Ward, a bartender for the defendant. Cotter was called and examined as a witness, and swore that defendant was absent at the time of the commission of the crime charged; that he did not see and had no conversation with the defendant on the Sunday in question; that he had no orders to open the place, but that he went in to clean up, and while there sold some beer, and put the money in the drawer.

There was not the slightest competent evidence against the defendant except the record of Cotter. There are several exceptions to the charge of the learned Judge which we think well taken, but which it is unnecessary to notice. For the errors in the admission of the evidence, the judgment must be reversed.