BEFORE THE PENNSYLVANIA HUMAN RELATIONS COMMISSION

THOMAS S. ARMSTRONG, Complainant	:	
v.	:	DOCKET NO. P-82
EDWARD L. BELL, JR., individually and doing business as ED BELL'S TAVERN, Respondent	:	

BRIEF IN SUPPORT OF COMPLAINT

COUNTER HISTORY OF THE CASE

The respondent, in the History of the Case, tends to confuse the facts relating to the complaint whereas the evidence is very clear on the subject. The date May 3, 1962 is clearly identified as the first time that complainant and his Negro friends entered respondent's establishment and were refused beer (N.T., p. 35); the date May 6, 1962 is just as clearly the date upon which the complainant prepared his own complaint which his friends likewise signed and which was mailed to the Commission (N.T., pp. 38, 67); and June 12, 1962 is the date upon which the usual Commission complaint was signed by complainant in accordance with Regulation 101.02 which provides

> " ... The complaint shall be upon forms prepared by the Commission, blanks of which will be supplied by the Commission upon request."

and also Regulation 101.03 which specifies what averments must appear in each complaint. Prior to the public hearing, on July 27, 1962, this original complaint was amended, strictly pursuant to Regulation 101.08:

> " AMENDMENTS. A complaint or any part thereof, may be fairly and reasonably amended as a matter of right at any time before hearing thereon, and thereafter at the discretion of the Hearing Commissioners."

There is no question that the public hearing was held on the basis of the averments contained in the Amended Complaint, because it was the Amended Complaint which was enclosed with the notice of the public hearing.

Another statement which is quite inaccurate in the History reads, "Subsequently, the complaint (or complaints) was allegedly 'adjusted', (NT, p.11)

although the meaning of that term as applied to this case is not clear on the record." Nothing could be clearer than that this respondent, following the May 3, 1962 incident, was visited by the Field Representative in charge of the case and agreed to adjust the complaint by signing a Statement of Policy in which he certified to the Commission that he would thereafter serve persons entering his establishment without discrimination because of race, creed or color "so long as said persons behave as ladies and gentlemen". This was identified by the respondent himself as having been signed by him (N.T., p. 25) and was introduced into the evidence and is part of the record as Complainant's Exhibit No. 1 (N.T., pp. 94,95). It should be pointed out that it is not only routine to obtain such statements of policy by way of adjustment of a case, but that this procedure is mandatory and provided for specifically in Section 9 of the Law, as follows:

> " .... If it shall be determined after such investigation that probable cause exists for crediting the allegations of the complaint, the Commission shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion ...."

The respondent's History of the Case, as detailed as it appears to be, somehow neglects to mention some very important facts which are part of the testimony, as follows:

1. The witness, John D. Smith, testified that when he entered the respondent's Tavern for the first time on August 14, 1962, he asked for and received from the respondent himself a glass of wine (N.T., p. 29). This is important because respondent, in the Answer to the Amended Complaint, denied that his Tavern was a place of public Accommodations and this witness establishes that anyone (provided, of course, he be white) could be served by respondent, even if he were an out-of-towner who has just come to Chambersburg; that the respondent's place of business is open to, accepts or solicits the patronage of the general public.

2. Both on May 3,1962 and on July 11, 1962, when complainant and his Negro friends were refused service of beer at respondent's Tavern on the alleged ground that they "had had enough", they had <u>not</u> in fact "had enough".

On May 3, 1962, the complainant had had one beer before entering respondent's Tavern and on July 11, 1962, he had had nothing whatever to drink before going in (N.T., pp. 43, 44). The witness, Charles Ladson, had had nothing to drink on both occasions (N.T., p. 59); the witness, Arthur Mason, had had only one beer before entering on May 3 and had had nothing to drink on the evening of July 11 (N.T., p. 83); the witness, Howard Ponzo, who went to respondent's Tavern only on May 3, had had only one beer prior thereto (N.T., p. 71); and the witness, John Norman, who likewise had gone to respondent's establishment only once on May 3, 1962, had had nothing to drink before entering same (N.T., p. 76).

3. On both occasions when complainant and his friends entered respondent's Tavern and were refused to be served beer, they did not cause a disturbance of any kind but "just walked out" (N.T., pp. 37, 42).

4. On the evening of July 11, 1962, when Marjorie H. Dean, Negro, the Commission's Field Representative, entered respondent's Tavern to follow up and investigate the facts as to why the bartender had refused to serve beer to complainant and his two friends earlier that evening, she too ordered a drink and was refused on the same ground that she had already had enough, whereas in fact, she had not had anything to drink before entering the establishment (N.T., p. 92).

A R G U M E N T

Involved in this case are the public accommodations provisions of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended by Act of February 28, 1961, P.L. 47, which are Sections 4(1) and 5(i) of the Act. These provisions are by no means new to the law of Pennsylvania.

Pennsylvania was one of the very first states of the Union to have enacted a law prohibiting racial discrimination in places of public accommodations (Act of May 19, 1887, P.L. 130, later re-enacted as part of the Penal Code of June 24, 1939, P.L. 872, Section 654, 18 P.S. 4654).

These public accommodations laws have been tested for constitutionality and have been upheld as valid: Commonwealth v. George, 18 Dauph. 40 (1914); Commonwealth v. Moore, 45 Dauph. 364 (1938); Commonwealth v. Pearas , 85 Pitts. 520 (1936). Both the Superior and Supreme Courts of Pennsylvania have assumed these laws to be constitutional: Commonwealth v. Figari, 166 Pa. Super. 169 (1950); Everett v. Harron, 380 Pa. 123 (1955). In Volume 74 Harvard Law Review, in a note on the subject, "The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation", at page 586, under a section on "Constitutionality", it is stated:

> "... Nor does there remain much basis for questioning the constitutionality of statutes applying to public accommodations.... " (citing District of Columbia v. John R. Thompson Co., 346 U.S.100(1953).

The criminal and civil sanctions provided by these laws have proved relatively ineffective, and that is why ten[1] of the twenty-eight[2] states which have public accommodations laws, have empowered antidiscrimination agencies to administer them. All ten such laws are almost identical, stressing education and amicable adjustments of complaints by conference and persuasion, and providing for public hearings in only those cases where such efforts to conciliate prove fruitless.

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1) Colorado, Connecticut, Massachusetts, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Washington provide for the handling of complaints in public accommodations through administrative agencies.

2) Other states which have enacted public accommodations laws are Alaska, California, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Vermont, Wisconsin and Wyoming.

The statutes of other states which have enacted public accommodations laws have been consistently upheld as constitutional against all possible arguments: Opinion of the Justices, 247 Mass. 589; Darius v. Apostolos, 68 Colo. 323 (shoe shine shop); Pickett v. Kuchan, 323 Ill. 138 (theatre); Bolden v. Grand Rapids Operating Corp., 239 Mich. 318 (threatre); Rhone v. Loomis, 74 Minn. 200 (saloon) ; Messenger v. State, 25 Neb. 674 (barber shop); People v. King, 110 N.Y. 418 (roller skating rink); District of Columbia v. John R. Thompson Co., Inc., 346 U.S. 100.

In the very recent case of Marshall v. Kansas City, ___ Mo.____, 355 S.W. 2d 877 (1962), the constitutionality of a public accommodations ordinance in the City of Kansas City, Missouri, authorized by State Statute, was raised squarely, and the ordinance was held constitutional as properly within the police power of the State and City. This is an imporant case, not only because it is so recent, but because it involved a law which was being administered by a special commission of the City, in a manner quite similar to how the public accommodations provisions of the Pennsylvania Human Relations Act are being administered by the Pennsylvania Commission.

I. CONDUCT OF HEARINGS BY LESS THAN A QUORUM

Section 9 of the Pennsylvania Act deals with procedures and with public hearings and in the last paragraph thereof specific authority is given to the Commission to "establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder." Pursuant to this express authorization, the Commission adopted Regulation 103.01 to provide for three or more "Hearing Commissioners" to sit for the purpose of conducting a public hearing.

However, the actual decision in each and every case in which a public hearing takes place is rendered by the Commission itself at a regular meeting, with at least a quorum present, in accordance with the provisions of Section 6 of the Act. So, too, the decision in this very case will be made, not by the Hearing Commissioners, but by the entire Commission.

From the adjudicated cases on this subject and the authority of

teachers and students learned in the subject of administrative procedures , there is no doubt that the Commission may properly delegate the duty to hold public hearings to less than the whole number or even to a single member, even though such procedure has not been expressly authorized by the legislature, so long as the Commission is authorized to adopt regulations to expedite the procedure and so long as the full Commission itself is the body which makes the final decision in the case: Chace v. Providence, 36 R.I. 331 ; Western Indemnity Co. v. State Industrial Commission, 96 Okla. 100; Federal Radio Comm. v. Nelson Bros., 289 U.S. 266.

The rule is clearly stated in 80 U. of Pa. Law Review at page 880, in a note entitled, "Requisites of an Administrative Hearing", as follows:

> " A hearing is not rendered inadequate merely because the taking of testimony is delegated to a single member of the administrative tribunal, or to an examiner, hearer, or investigator employed for this purpose. The Interstate Commerce Commission and the Federal Trade Commission almost invariably use one of these two methods of conducting a hearing, usually the latter. The commissioner or examiner hears the testimony and arguments submitted, and reports them to the commission together, sometimes, with his own recommendations. Provided that the actual hearing be impartially conducted and the matters there presented be fairly laid before the commission, and provided also that the actual decision remains with those officers to whom the legislature has confided it, such a hearing is lawful even though the legislature has not expressly authorized delegation of the function of conducting hearings."

II. THE RESPONDENT WAS NOT DENIED DUE PROCESS AT THE HEARING

The respondent's principal complaint seems to be that the very same Commission which has processed the complaint sits to hear the evidence and then makes the determination, and that the case in support of the complaint is submitted at the public hearing by the General Counsel for the Commission.

Respondent is complaining as though this procedure were novel in Pennsylvania. In fact, he so states in the brief. The fact is that this is not novel procedure and is followed almost exactly by scores of administrative agencies of the Commonwealth. The allegations of the respondent, in the brief, are mistaken on this point. For example, he states, "In every instance where a representative of the government acts as hearing counsel for the complainant .... such counsel is completely independent of the administrative tribunal."

General Counsel of the Commission is an assistant Attorney General, assigned to this Commission. This is the usual practice in most of the many administrative commissions of Pennsylvania. Occasionally a Deputy Attorney General is thus assigned. All but one or two of the commissions cite the respondent, sit as the hearing tribunal at the hearing, and then make the decision, as, for example, in the case of the Pennsylvania State Real Estate Commission, the Pennsylvania Liquor Control Board, etc. In the case of the Pennsylvania Human Relations Commission, the Act itself makes it mandatory for General Counsel to present the facts of the case at the hearing. Section 9 of the Act, when speaking of the conduct of public hearings, says: "The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents."

The Pennsylvania Human Relations Commission operates according to the procedures set forth in the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, 71 P.S. Sec. 1710.1 et seq., and that Law specifically sets forth 47 other agencies which follow the same procedures. Yet respondent's brief uses such terms as "Star Chamber philosophy" .

The brief attempts to give the impression, quite unfairly, that the Commission is not objective and that it represents only the complainant and has only his interests in mind. Nothing can be further from the facts. It may interest the respondent to know that according to the annual report of the Commission just published, 56% of all complaints were dismissed on the ground that the charges of the complaint were not established. The Commission much prefers to close a case by amicable adjustment and will order a public hearing only in extreme cases where it is very obvious that a respondent has no respect for the Law or for the Commission and has no desire or intention of obeying the Law. Of the more than 1,200 complaints handled by the Commission since its inception, less than one dozen required public hearings ! !

Counsel for the respondent also states in the brief, incorrectly, apparently in an effort to show unfairness of the Hearing Commissioners, that General Counsel made threeobjections at the hearing of which two were sustained and that counsel for respondent made twenty-two objections, of which only one

was sustained. First of all, the figures are wrong. General Counsel was overruled twice and made four objections; and counsel for the respondent only made twelve objections, three of which were identical with reference to the witness, Elliott M. Kirk, and four of which were identical with reference to the testimony of corroborating witnesses, so that only seven separate objections were actually made, and in two instances the Hearing Commissioners sustained the contentions of respondent's counsel. Secondly and more important, since when is the fairness of a hearing tribunal judged by the number of objections made and the number of them sustained or overruled ? This seems very childish, indeed. It was only natural, in a case where respondent put no witnesses whatsoever on the stand, raised one technicality after another, attempted in no manner to rebut the clear evidence of discrimination, that he would have made more objections than General Counsel.

The statements concerning one of the Hearing Commissioners are likewise extremely unfair and unwarranted. Regulation 105.11 defines the powers and duties of hearing commissioners, one of which is to "examine witnesses". It must be remembered that respondent called no witnesses whatever. Had he done so, the Hearing Commissioners might have directed questions to such witnesses in like manner as they did to the witnesses produced by the complainant. Hearing Commissioners are anxious and have the duty of ascertaining the true facts in a given case --- they would be pleased to hear pertinent evidence indicating that the allegations of the complaint are not correct, but no such effort was even attempted by the respondent. Instead, he is attempting to hide behind the cry " you failed to give me procedural due process" .

And what about the cases cited by respondent in support of his contention relative to "procedural due process" ? They seem as much to the point as do the arguments themselves. Three cases are cited.

In U.S. v. Jones, 109 U.S. 513, a State Board was created to determine the fair value of property being taken by the United States for public use in the exercise of the right of eminent domain. There is no talk about "procedural due process", although the Court did say that the hearing must be fair, and then the Court said, at page 519:

III. THERE IS SUFFICIENT EVIDENCE TO WARRANT THE MAKING OF A CEASE AND DESIST ORDER AGAINST THE RESPONDENT

The Commission has leaned backwards in many cases to resolve any doubt in favor of a respondent, but there simply was no doubt to be resolved in the instant case. Perhaps that is why respondent's entire brief raises one technicality after another. Not one word of the brief even hints that the respondent did not in fact refuse to sell beer to complainant and his Negro friends or to the Commission's own Field Representative, also a Negro, solely on account of their race or color.

The respondent did not even attempt to offer a defense, and the facts were crystal clear.

The respondent refused to serve beer to the complainant and his friends on May 3, 1962 because they were Negroes, and used the excuse that in his opinion, "they had had enough" (N.T., p.37). A complaint was filed and adjusted when respondent signed a Statement of Policy agreeing to serve all persons without discrimination on account of race, religion or national origin (N.T., p. 25; Complainant's Exhibit No. 1). But respondent apparently never intended to abide by his written word. He thereafter, on July 11, 1962, refused to serve beer to this same complainant and two of his Negro friends and refused on the very same ground as before, saying that in his opinion they "had had enough" (N.T., p. 42). In fact, complainant and his friends had not had enough to drink and were in no way under the influence of intoxicating liquor on either of the said two occasions (N.T., pp. 43,44,59, 71, 76, 83), and the expression was obviously used as a device or excuse for refusal to sell liquor to the complainant and his friends because they were Negroes. On that same evening, July 11, 1962, when the Commission's representative, also a Negro, was told about what had occurred to complainant, she immediately went to respondent's establishment to investigate and determine whether the refusal to serve was justified. She then and there asked for a drink and was told the same thing -- viz., that she "had had enough", whereas in fact she had had nothing to drink before going there (N.T., pp. 90-92) and again, it was quite evident that the expression used was a trick, device or excuse for refusal to

serve liquor simply because the one who had asked for it was a Negro and for no other reason.

What clearer evidence could one hope to find to prove the simple truth that it was the policy of this respondent to refuse to serve drinks to Negroes and that he did in fact so refuse to serve this particular complainant? It should be pointed out that the respondent's attorney, by his very questions to complainant and his witnesses, showed this policy of his client . For example, he asked complainant, at page 50 of the notes of testimony, " Did you know before you went up to Bell's Tavern that this trade up there was made up of people of white or Caucasian race ?" And to the Negro witness, Charles Ladson, at page 61, "You never heard of colored people going in to be served?" Also to the witness, Arthur Mason, at page 86, "Now, you had never heard of Bell serving Negroes before ?"

This is an unusually clear case of a respondent who literally "thumbs his nose" at the Law and the Commission. A Cease and Desist Order is required in this case, so that the Court may deal directly with this respondent in any future instance of violation. His written promises, obtained as the result of efforts to adjust amicably, are worthless and meaningless.

In this portion of respondent's brief, appears the very unusual argument that there is no evidence for the Commission to consider since no witness was properly sworn according to the famous Act of March 21, 1772 . Considering all of the other technical arguments advanced, one should not smile or laugh at this argument. Suffice it to point out that the virtuous respondent, who complains so bitterly about the deprivation of his due process and legal rights, prevented counsel for complainant from leaving the room to secure a Bible, saying that a Bible was not necessary; and then, knowing about an oath according to the Act of 1772 which, frankly, counsel for the ~~respondent~~ complainant had never heard in his more than 30 years of practice in courts, nevertheless permitted the Presiding Hearing Commissioner to administer the usual oath, "Do you swear to tell the truth in this case ?", without once pointing out that a different kind of oath is required ! It is respectfully urged that no Court should permit respondent to prevail in this contention. All rules of procedure including those promulgated by the Pennsylvania Supreme Court, and all

decisions of the courts are to the effect that objections not made or urged when there is an opportunity to correct the record cannot and will not be permitted to be made after it is too late to correct the record. It is noted that on page 19 of the notes, as the witness Marjorie Dean was being sworn, counsel for the respondent said: "Please note on the record that the witness did not swear with uplifted hand." Counsel for complainant then said: "Will you please raise your right hand before you are sworn ?" Why did not counsel for respondent call to the Commission's attention at a time when it might have been corrected, his objection that the oath should be administered in different language ?

Another technicality raised by respondent is that on May 3, 1962, one of the friends of complainant, Howard Ponzo, was only twenty years of age and therefore a minor, so that it would have been illegal under the Pennsylvania Liquor Control Code for the respondent to have served him or any of them. There are two clear answers to this technical objection. First, the refusal to serve on the part of the respondent on May 3 was, as the evidence shows, because in the opinion of the respondent, they "had had enough" alcohol. There was no indication whatever that the refusal to serve on that occasion was because one person was a minor. The refusal to serve was because those who asked to be served were Negroes. Secondly, and more important, the basis of the complaint is what occurred on July 11, 1962, <u>after</u> respondent had signed a written Statement of Policy to serve all persons without discrimination because of race, religion or national origin; and on this second occasion, on July 11, 1962, the complainant and his two friends who entered with him were all adults, yet they were refused service because they were Negroes, although the excuse offered was the same as before, that they "had had enough".

Another technicality urged by respondent is that the evidence given by the Commission's Field Representative, Marjorie Dean, may not be considered since the Law and the Regulations forbid testimony at a public hearing "concerning endeavors to conciliate an alleged unlawful discriminatory practice." There was not one word of what occurred on the occasion when, following the May 3 incident, the respondent actually signed a Statement of Policy. That was the only time that efforts were made to conciliate. The record is barren

of any evidence pertaining to actual efforts to conciliate, or rather, of what happened which caused the respondent to agree to sign the Statement of Policy by way of adjustment of the case. The prohibition against evidence "concerning endeavors to conciliate" does not in any way prevent the acceptance of testimony at a public hearing which deals with the actual investigation of the facts of the case.

In this section of the brief, respondent also argues that the complainant and his friends were not "bona fide" customers. Except for a few questions asked on cross-examination, all answers to which indicate that they were in fact bona fide customers, the record is without any evidence that the complainant and his friends were not bona fide customers. They entered the establishment of the respondent to purchase beer for which they were ready to pay and which they would have consumed in the same manner as any other customer had they been served. It is suggested that this is what is meant by "bona fide" and not whether they belonged to the N.A.A.C.P. or whether they intended to find out whether Ed Bell would serve Negroes.

IV. THE EVIDENCE INTRODUCED BY MEANS OF THE COMMISSION'S AGENTS WAS NOT ILLEGAL

Respondent claims that the evidence given by the Commission's representative, John D. Smith, should have been excluded, and he cites as his authority five U.S. Supreme Court decisions dealing with illegal search and seizure of evidence produced at a criminal trial. In the case at bar, nothing was seized illegally and most important, Mr. Smith did not enter a private home without a search warrant, as was true in all but one of the cases cited by respondent. In fact, it is interesting to note that in the one case cited by respondent where the government agents entered the defendant's place of business (U.S. v. Rabinowitz, 339 U.S. 56) and searched his desk, safe and file cabinets without a search warrant, and seized 573 forged postage stamps, the Court permitted such evidence to be introduced at the criminal trial. The distinction was evidently that the police officers entered a place of public accommodations where the public could properly come, and did not attempt to enter some private place or home without a search warrant.

Let us consider the evidence which Smith secured and how he secured it. First of all, he entered respondent's Tavern as soon as he arrived in Chambersburg, ordered wine and was served wine by the respondent personally. He was not in any way asked whether he was a member or whether he lived in that neighborhood; nor was he told he had had too much to drink already, because he was white. He did not reveal to the respondent that he was an employe of the Commission. This testimony was given to show that the respondent's Tavern was open to, accepted and solicited the patronage of the general public and was therefore a place of public accommodations, as defined in the Act. The respondent, in his Answer to the Complaint, had denied he operated a place of public accommodations. Secondly, Mr. Smith looked at the liquor license on the wall and testified, giving its number and stating that it was a restaurant liquor license. This, too, was very important because the Penna. Liquor Control Board may issue a restaurant liquor license only to one who operates a restaurant which is open to the entire, general public. This, then, was conclusive proof that respondent operated his Tavern as a place of public accommodations, despite his sworn Answer to the Complaint.

The Human Relations Act specifically requires the Commission and its staff to make a thorough investigation of each complaint filed. Mr. Smith did not unlawfully enter the private home of respondent to search and seize evidence. He entered a place of public accommodations, where any person may go, and observed what happened and the liquor license, without unlawfully searching or seizing evidence. The case is clearly distinguishable from the several search and seizure cases cited by respondent.

V. THE TITLE OF THE HUMAN RELATIONS ACT DOES GIVE ADEQUATE NOTICE

The respondent claims that the Human Relations Act is unconstitutional because it does not give the required kind of notice in accordance with Article III, Section 3 of the Pennsylvania Constitution. He is obviously mistaken because he has set forth in the brief, at page 24, the title to the original Act of October 27, 1955, P.L. 744, then known as the Pennsylvania Fair Employment Practice Act.

In 1961, when this F.E.P.C. Act was amended (Act of February 28, 1961, P.L. 47) and became known as the Pennsylvania Human Relations Act, the title of the old Act was amended to read as follows:

> " Amending the Act of October 27, 1955 (P.L. 744), entitled 'An act prohibiting certain practices of discrimination because of race, color, religious creed, ancestry, age or national origin by employers, employment agencies, labor organizations and others as herein defined; creating the Pennsylvania Fair Employment Practice Commission in the Department of Labor and Industry; defining its functions, powers and duties; providing for procedure and enforcement; providing for formulation of an educational program to prevent prejudice; providing for judicial review and enforcement; and imposing penalties,' prohibiting discrimination in the selling, leasing or financing of commercial housing and discrimination in places of public accommodations, resort or amusement because of race, color, religious creed, ancestry or national origin; changing the name of the Pennsylvania Fair Employment Practice Commission to the Pennsylvania Human Relations Commission; and qualifying the scope of the act."

VI. THE HUMAN RELATIONS ACT IS NOT AN INVALID EXERCISE OF POLICE POWER

The attention of the Commission is respectfully directed to those cases cited in this brief at pages 4 and 5, particularly that of Marshall v. Kansas City, supra, the very recent case in which the Court considered this very problem and ruled that the law was constitutional and very properly within the police power of the State and City. The Pennsylvania cases cited hold the same, but refer to the old public accommodations statutes of Pennsylvania, before an administrative agency was empowered to administer the law.

The cases cited by respondent for this proposition are far from convincing and are not to the point. Neither one pertains to an anti-discrimination statute or a public accommodations statute. In Commonwealth v. Sun Ray Drug Co., 383 Pa. 1, cited by respondent, the Pa. Ice Cream Law of May 20, 1949, P.L. 1594, 31 P.S. 407, was involved. That statute forbids the selling of a product simulating but inferior to ice cream, and the Court held that the Law was not an improper exercise of police power, but that the ice milk sold by defendant was not in violation of that Law. In the other case cited by respondent, Gambone v. Commonwealth, 375 Pa. 547, the Court held unreasonable and invalid that provision of the Act of Sept. 28, 1951, P.L. 1548 which forbade price signs of liquid fuels in excess of a certain size.

VII. THE ACT IS NOT SPECIAL LEGISLATION IN VIOLATION OF ARTICLE III, SECTION 7 OF THE PA. CONSTITUTION

Respondent, in his brief, says that this Act requires a tavern owner to sell to all persons regardless of their nationality, color, religious affiliations, "and what have you". Yet it does not place similar restrictions on other businesses of a like nature where goods are sold for off-premises use or consumption. He concludes by saying, "As such, it creates a special class among retailers, and as such it is unconstitutional."

Again the respondent is mistaken in a fundamental fact. This Act, in so far as the public accommodations provisions are concerned, applies to all businesses, even the corner drug store or grocery store, so long as such business is open to, accepts or solicits the patronage of the general public. The only exception to these public accommodations provisions in the Act is in favor of accommodations "which are in their nature distinctly private" (Section 4 (1) of the Act).

There therefore cannot possibly be a question of violation of Article III, Section 7 of the Pennsylvania Constitution since there is no improper classification about which to talk.

It must be pointed out, of course, that the burden is upon the respondent, who is challenging the Human Relations Act to prove that it does not rest upon a reasonable basis but is essentially arbitrary: Pennsylvania Company &c. Trustee CASE, 345 Pa. 130.

VIII. THE ACT DOES NOT UNLAWFULLY DELEGATE JUDICIAL POWER TO THE HUMAN RELATIONS COMMISSION

As pointed out previously, the Human Relations Commission operates in conformity with the Administrative Agency Law of 1945, and therefore exactly similar to the way that scores of other administrative agencies operate in this Commonwealth and in every state of the Union. The Commission is powerless to enforce its Order, even after such Order is made, but must seek enforcement thereof by the courts; also, the transcript of record of any public hearing conducted by the Commission is reviewable for error by the Court of Common Pleas of Dauphin County and by the Superior Court of Pennsylvania.

Thus, the Courts have upheld one statute after another which granted commissions or boards the right to hold hearings and make adjudications, but which reserved to the aggrieved party the right to appeal in order to secure judicial review: Commonwealth v. Burke, 168 Pa. Super. 109, validating the Pa. Board of Parole; Commonwealth v. Cohen, 46 Dauph. 394 , holding that the old Beverage License Act is not unconstitutional as vesting judicial power in an administrative body; Appeal of Klepeis, 57 York 107, holding that the power to revoke or suspend motor vehicle operating privileges is administrative and not judicial; Commonwealth v. Fisher, 184 Pa. Super. 75, upholding the validity of the Vehicle Code Act of 1959 and stating that the power given by that Law to the Secretary of Revenue to revoke or suspend driving privileges does not vest judicial powers.

So long as the law affords the aggrieved party access to the courts, he cannot complain that the original determination was made by the same administrative body which conducted the hearing: Commonwealth v. Funk, 323 Pa. 390.

IX. THE ACT DOES NOT VIOLATE ARTICLE I, SECTION 1 OF THE PA. CONSTITUTION BY CURTAILING THE RIGHT TO ASSOCIATE WITH WHOMEVER ONE PLEASES

It is surprising, in this day and age, to hear arguments of the nature set forth in this section of the respondent's brief. Respondent claims the Human Relations Act is unconstitutional because his patrons who desire to discriminate "no longer may rely on being able to finish a meal or a drink for which he has paid the price, without coming into association with someone whose presence is repugnant to him." It is to be noted that his objection is not that he must forfeit the right to associate with whomever he pleases, but rather that his patrons must forfeit such right.

While this precise question has not apparently been raised squarely by any of the Pennsylvania decisions, it has been raised in a host of older civil rights cases in other states, but always has been resolved in favor of the proposition that as between the right to associate only with certain persons and the right of all persons to receive equal opportunities and treatment in public places, the latter right must prevail. Probably the most recent case

dealing with civil rights in which this very subject was raised squarely and adjudicated is that of Colangelo et al v. Massachusetts Commission Against Discrimination, decided by the Massachusetts Supreme Judicial Court on May 16, 1962. In that case, the Court upheld as constitutional the recently enacted Massachusetts Fair Housing Law which forbids persons from practicing discrimination in private housing because of a prospective buyer's or renter's race, religion or national origin. The Court decided that there was no violation of the "freedom of association" principle, but also ruled that the respondent who was the broker in that case had no standing to even raise the question. The language is very pertinent to the instant case, as follows:

> "The respondent Nahigian is in no position to contend that there has been an infringement of his freedom of association. Whatever may be said of the right of a home owner freely to choose his neighbors or to rent only to persons of his own choice, Nahigian is merely the rental agent of a 120-unit apartment house. He is not being compelled to live near anyone by the commission's order, and he lacks standing to raise the rights of others."

Aside from the fact that there is no infringement of the freedom of association clause in the instant case, this respondent, the owner and operator of the Tavern, has no standing to raise the question since it concerns the rights of others, his patrons, who are not parties to this proceeding.

X. CONCLUSION

It seems evident that the only defenses and arguments put forth by the respondent are technical in nature and unworthy of serious consideration. He has not even attempted to deny the allegations of the complaint. More than that, he has wilfully violated the terms of adjustment reached with him in the settlement of the first of the two incidents described in the testimony. A cease and desist Order should be entered against this respondent, so that enforcement thereof may be secured through the Courts if he violates his written Statement of Policy again.

RESPECTFULLY SUBMITTED:

Nathan Agran

NATHAN AGRAN, General Counsel
Pa. Human Relations Commission

[illegible] before the Pennsylvania Human Relations Commission

v.

[illegible] and doing business as Ed Bell's Tavern,

Respondent

Docket No. [illegible]

[illegible] Respondent's Petition for Reconsideration of the Order of the Pennsylvania Human Relations Commission, dated [illegible], 1968, in the following particulars, viz:

FIRST

The Commission erred in holding the hearing on August 17, 1968 before three members of the Pennsylvania Human Relations Commission, over the objections of respondent that the case could be heard only before not less than six members of the Commission.

SECOND

The Commission erred in admitting in evidence over the objections of respondent the following testimony, appearing at page 13 of the notes of testimony, viz:

Q. While you please look at the file and find if there is a finding on the part of the field representative assigned to this case as to whether or not there is probable cause?

A. I have a memorandum dated [illegible] by the field representative indicating that on June 17th she found that there was probable cause.

THIRD

The hearing examiner erred in admitting in evidence over the objections of respondent the following testimony, appearing at page 18 of the notes of testimony, viz:

Q. And, was it brought that the Commission continued to handle this case even after the statement of policy was signed?

finding.

THIRTEENTH

The Commission erred in Finding of Fact number 11 in finding that the patronage of Negroes at Mr. Bell's Tavern is unwelcome, objectionable, or not acceptable, desirable or solicited, for the reason that the same is not supported by or grounded upon any evidence.

FOURTEENTH

The Commission erred in [illegible] finding that the appellant, directly or indirectly, refused, withheld from or denied to Negroes, because of their race, the accommodations, advantages, facilities or privileges of a place of public accommodation, resort or amusement, in that such finding is not supported by or based upon any evidence in the case.

FIFTEENTH

The Commission erred in Finding of Fact number 13 in finding that the respondent directly or indirectly refused, withheld from or denied [illegible] to the complainant because of his color, the accommodations, advantages, facilities or privileges of a place of public accommodation, resort or amusement.

SIXTEENTH

The Commission erred in Conclusion of Law number 1 in concluding that [illegible] of discrimination within the meaning of Section 4 (i) of the Pennsylvania Human Relations Act.

SEVENTEENTH

The Commission erred in [illegible] Conclusion of Law number 2 in concluding that by using the [illegible] "[illegible] have already had enough to drink," on three separate occasions on May 7, 1968 and on July 11, 1968, when Negroes ordered alcoholic beverages and respondent refused to serve them, when in fact the said Negroes had not already had enough to drink and were not [illegible] the influence of intoxicating liquor, the respondent directly or in-

directly refused, withdrawn from or otherwise be denied in general, because of race, color, religious creed, ancestry, sex, national origin, handicap or disability or place of birth, citizenship or privileges of a person in violation of Section 5 (i) of the Pennsylvania Human Relations Act.

Discussion

The Commission avers in Conclusion of Law number 7 in concluding that on May 3, 1988 and July 11, 1988 the applicant refused, withheld or denied to complainant, the accommodations, advantages, facilities or privileges of a place of public accommodation, offered a different version of the dollar.

Discussion

The Commission avers in Conclusion of Law number 8 in concluding that the applicant on May 3, 1988 and July 11, 1988 has committed an unlawful, discriminatory practice in violation of Section 5 (i) of the Pennsylvania Human Relations Act.

Validity

The Commission avers in Conclusion of Law number 9 in concluding that the aforementioned unlawful discriminatory practice of the applicant was committed with the intent to deprive the complainant of his civil rights because of his race, color, religious creed, ancestry, sex, national origin, handicap or disability or place of birth, citizenship or privileges of a place of public accommodation, as set forth by Act of March 21, 1978, P.L. , Section 1.

Public Policy

The Commission avers in the petition for review at pages 11 of the opinion that a ruling for Respondent in this case by Applicant is against public policy and encourages discrimination by any person who offers his business establishment.

Public Policy

The Commission avers in its opinion at page 11 in opining that the conclusion is unacceptable that applicant committed an unlawful, discriminatory practice and is opining that the complainant was denied service because of his race.

Public Policy

The Commission avers in its opinion at pages 9 and 10 in opining that

the testimony of the witness, Jean B. Smith, is not borne out by the evidence by the Fourteenth Amendment to the Constitution of the United States.

TWENTY-FOURTH

The Commission erred in its opinion at page 14 in opining that the Pennsylvania Human Relations Act is not special legislation in violation of Article III, Section 7 of the Pennsylvania Constitution and in opining that it does not improperly violate the Freedom of Association provision of Article I, Section 1 of the Pennsylvania Constitution.

TWENTY-FIFTH

The Commission erred in opining that the facts in the case show clearly that a refusal or decision to deny work by the appellant to accept to refuse to serve a homosexual patronage is not based on relevant discriminatory practices and in opining that the respondent exhibited an unlawful discriminatory practice, a violation of the express language contained in Section 5 (i) of the Pennsylvania Human Relations Act.

TWENTY-SIXTH

The Commission erred in its opinion at page 13 in opining that a sense and decent order appellant has appellant is not only warranted by the testimony at the public hearing, but that the order is required in this case in order to prevent the perpetration of some subterfuge of such order by the Court if the respondent were unable to refuse to serve a homosexual patronage to ingress to his business establishment.

TWENTY-SEVENTH

The Commission erred in its decision at page 13 in finding and determining that the Commission has jurisdiction over the subject matter of the proceeding and over the respondent as amended.

TWENTY-EIGHTH

The Commission erred in finding and determining that the appellant has committed and continues to commit unlawful discriminatory practices in violation of Section 5 (i) of the Pennsylvania Human Relations Act and in finding and

determining that the appellant refused, withheld from and denied to the complainant, because of the race of the complainant, the accommodations, advantages, facilities, and privileges of his business establishment known as Ed Ball's Tavern, a place of public accommodation, resort or amusement.

TWENTY-NINTH

The Commission moved in its final order in ordering that the respondent Edward L. Ball, Jr., his managers, agents and employees, shall cease and desist from directly or indirectly refusing, withholding from or denying to the complainant, or other Negroes, and to other persons because of their race, color, religious creed, ancestry or national origin, the accommodations, advantages, facilities or privileges of Ed Ball's Tavern, located at the corner of East Catharine and Main Streets, Chambersburg, Pennsylvania or any other tavern operated by the respondent within the Commonwealth of Pennsylvania.

THIRTIETH

The Commission moved in its final order in ordering that respondent, Edward L. Ball, Jr., his managers, agents and employees, shall cease and desist from refusing any patron of Ed Ball's Tavern or of any other tavern operated by the respondent within the Commonwealth of Pennsylvania, that said patron has already had enough to drink, as a device, ruse or excuse for refusing to sell alcoholic beverages to such patron because of his race, color religious creed, ancestry or national origin.

THIRTY-FIRST

The Commission moved in its final order in ordering that respondent, Edward L. Ball, Jr., his managers, agents and employees, shall take the affirmative action indicated, which in the judgment of the Commission will effectuate the purposes of the Pennsylvania Human Relations Act.

THIRTY-SECOND

The Commission moved in its final order in directing the appellant to extend to the complainant, without regard to his race or color, full, equal and unsegregated accommodations, advantages, facilities and privileges at Ed

[illegible]

FOURTH CLAIM

The [illegible] agreed to [illegible] to [illegible] as a matter of law that the Pennsylvania Board [illegible] Commission to the [illegible] and administering of the said contract to [illegible] the [illegible] of due process of law as required by the Fourteenth Amendment to the Constitution of the United States.

[illegible]

The [illegible] to [illegible] and [illegible] of a matter of law that the Pennsylvania Board [illegible] by the [illegible] to [illegible] subject to [illegible] [illegible] to [illegible] the [illegible] or [illegible] [illegible] to any person because of his race or color constitutes a violation of the Fourteenth Amendment to the Constitution of the United States.

FIFTH CLAIM

The [illegible] to [illegible] and [illegible] of a matter of law that the Pennsylvania Board [illegible] by the [illegible] to [illegible] [illegible] to [illegible] the Commission to determine whether or not a [illegible] licensee has violated Section 3 (a) of the Act [illegible] the Fourteenth Amendment to the Constitution of the United States in that a person could be deprived of liberty and property without due process of law.

SIXTH RECORD

The [illegible] to [illegible] to enter a final order dismissing the proceedings [illegible] the complaint.

[illegible]

[illegible]
of Counsel with Appellant

PENNSYLVANIA HUMAN RELATIONS COMMISSION : IN THE COURT OF COMMON PLEAS O DAUPHIN COUNTY, PENNSYLVANIA

v.

EDWARD L. BELL, JR., Individually and doing business as ED BELL'S TAVERN : No. 550 C.D. 1962

Appellant :

A P P E A L

Edward L. Bell, Jr., individually and doing business as Ed Bell's Tavern, appeals from the adjudication of the Pennsylvania Human Relations Commission made on October 19, 1962.

GEORGE S. BLACK
209 Lincoln Way East
Chambersburg, Pa.

McNEES, WALLACE & NURICK

By Samuel A Schreckengaust
Samuel A. Schreckengaust, Jr.
300 North 2d Street
Harrisburg, Pa.

Attorneys for Appellant

COMMONWEALTH OF PENNSYLVANIA:
SS:
COUNTY OF DAUPHIN :

EDWARD L. BELL, JR., being duly sworn according to law, deposes and says that this appeal is not taken for the purpose of delay, but because appellant believes that he has suffered injustice by the adjudication appealed from.

Edward L Bell Jr
EDWARD L. BELL, JR.

Sworn to and subscribed
before me this 5th day
of Nov., 1962.

Mrs. Marie B. Rovenmaier
Notary Public
My commission expires:

NOTARY PUBLIC
My Commission Expires July 27, 1963
Harrisburg, Pa. Dauphin County

BEFORE THE PENNSYLVANIA HUMAN RELATIONS COMMISSION

Docket No. P - 82

THOMAS S. ARMSTRONG,
Complainant

v.

EDWARD L. BELL, JUNIOR,
individually and doing
business as ED BELL'S
TAVERN,
Respondent

BRIEF FOR RESPONDENT

Sur Amended Complaint, Answer, and Testimony

Black and Davison,
George S. Black,
Kenneth F. Lee,
Attorneys for Respondent

209 Lincoln Way East
Chambersburg, Pennsylvania

STATEMENT OF QUESTIONS INVOLVED

1. Where only three members of the Human Relations Commission attend a hearing on a complaint, is not the hearing an absolute nullity?

2. Was respondent denied procedural due process of law at the hearing so as to constitute the hearing a nullity, and to deprive the Commission of jurisdiction to make a decision against respondent as a result of such hearing?

3. Is there sufficient competent evidence to sustain a finding against respondent on the charges contained in the complaint?

4. Where an agent of the Commission enters into respondent's tavern, does not disclose his identity, does not serve a search warrant, and surreptitiously obtains evidence, must not such evidence be excluded from a hearing before the Commission?

5. Is not the Pennsylvania Human Relations Act unconstitutional as to respondent because its title does not comply with Article III, Section 3, of the Constitution of the Commonwealth?

6. Is not the Pennsylvania Human Relations Act unconstitutional under Article I, Section 1, of the Constitution of Pennsylvania, in that it arbitrarily interferes with private business and imposes unusual and unnecessary restrictions thereon, hence being an invalid exercise of the police power?

7. Is not the Pennsylvania Human Relations Act unconstitutional as applied to respondent, in that it is special legislation regulating trade and hence prohibited under Article III, Section 3?

8. Is not the Pennsylvania Human Relations Act unconstitutional in that it vests in the Commission the chancery powers of the Courts of Common Pleas in violation of Article V, Section 26 of the Constitution of Pennsylvania?

9. Is the Pennsylvania Human Relations Act unconstitutional under Article I, Section 1, as an abridgment of the rights of patrons of taverns to associate and be present with only those persons with whom they wish to be present or associate?

HISTORY OF THE CASE

This case was instituted by the filing of a formal complaint with the Pennsylvania Human Relations Commission against respondent. According to the complaint per se, it was filed by and signed by Thomas S. Armstrong, although the testimony clearly indicates that it was signed by Charles Ladson (N.T. 67) and others (N.T. 65). The complaint was evidently filed on one of the following dates:

a. May 3, 1962, according to paragraph 4 of the Amended Complaint.

b. May 6, 1962, according to the testimony of the various individuals who swore they signed it. (N.T. 38, 67)

c. June 12, 1962, according to the date on the document purporting to be a complaint, signed by Armstrong only, and witnessed by Marjorie H. Dean.

In any event, the complaint (or complaints) alleged, inter alia, that respondent was Ed Bell's Tavern and that on or about May 3, 1962 complainant was refused service by respondent because of his race. The complaint (or complaints) alleged further that such refusal to serve constituted an unlawful discriminatory practice in violation of some section of the Pennsylvania Human Relations Act. Subsequently, the complaint (or complaints) was allegedly "adjusted", (N.T. 11) although the meaning of that term as applied to this case is not clear on the record.

On or about July 27, 1962, a verified Amended Complaint was filed by Armstrong. This amended complaint recited that the complainant was a negro; identified respondent as per the caption in the instant case; alleged respondent's business to be a place of public accomodation; recited the filing of the original complaint on May 3, 1962 and its subsequent adjustment; alleged that on or about July 11, 1962 respondent, by his agent and bartender, denied service to respondent "and his friends" because of their race, although the ethnic background of complainant's friends is not indicated; alleged generally that respondent denies the accomodations of his tavern to Negroes; alleged the actions of respondent to be violations of Section 5(1) of the Act; and alleged that such actions are of a continuing nature.

Respondent filed a verified Answer With New Matter to the Amended Com-

plaint, which admitted the identity of the respondent and his operation of Ed Bell's Tavern, located in the Borough of Chambersburg at East Catherine and Main Streets. The answer placed in issue the following of complainant's allegations: that Ed Bell's Tavern is a place of public accomodation open to and accepting or soliciting the patronage of the general public; that service was refused because of race; that an amicable adjustment of the original complaint had been reached; that there was a discriminatory refusal to serve complainant et al. on or about May 3, 1962, July 11, 1962, or at any other time; that respondent refused, withholds and denies to and from negroes as a class the accomodations, advantages, facilities or privileges of his establishment; and other matters as contained therein.

Under "New Matter", the answer alleged that complainant and his friends were not bona fide customers, but had entered the tavern and demanded service as a pretext for fomenting discord. The answer further challenged the constitutionality of the Pennsylvania Human Relations Act, alleging that the said Act violates the following sections of that fundamental law of the Commonwealth: Article III, Section 3, in that the title of the Act is insufficient; Article I, Section 1, in that the Act arbitrarily interferes with private business and imposes unusual and unnecessary restrictions on a lawful calling; and Article III, Section 7, in that the Act constitutes special legislation regulating trade. At the hearing on August 17, 1962, respondent amended the Answer With New Matter to add two additional paragraphs. The first of these challenged the constitutionality of the said Act under Article I, Section 1, alleging the Act to be a contravention of the right to free association. The second challenged the constitutionality of the said Act under Article V, Section 26, in that it attempts to relegate to a Commission the chancery powers constitutionally assigned to the Judges of the Courts of Common Pleas.

Hearing was held on the Complaint and Answer with New Matter on August 17, 1962, in the Grand Jury Room of the Franklin County Court House. Nathan Agran, Esquire, appeared for the Pennsylvania Human Relations Commission (hereinafter called the Commission) and presented the case to such mem-

bers of the Commission as were present, viz: Harry Boyer, Chairman, Samuel H. Daroff, and Joseph X. Yaffe, Esquire. Mr. Boyer presided. George S. Black, Esquire, and Kenneth F. Lee, Esquire, of Black and Davison, appeared for the respondent, who also appeared in person. Mr. Boyer opened the hearing, whereupon counsel for the respondent objected to any further proceedings inasmuch as there was no quorum of the Commission present. Mr. Black suggested that, under Section 9 of the Pennsylvania Human Relations Act, a hearing on a complaint must be heard by the Commission; and that Section 6 of the said Act requires a quorum of six members for the Commission. Argument was had, as will be more fully discussed infra, and the objection was overruled. Further objection was made by respondent's counsel as to the make-up of the Commission. This objection was likewise overruled. During this repartee, Mr. Agran accused Mr. Black of wasting time. Objection was made to this accusation, but the same was also overruled. (N.T. 3, 4, 5, 6).

The Commission's first witness was Elliott M. Shirk, who testified as to the contents of the Commission's files, including the substance of various reports and the conclusions reached therein by others. Respondent objected frequently that such testimony was hearsay. (N.T. 9, 10, 12). In each instance, the objections were overruled. The second witness called by the Commission was Edward L. Bell, Jr., respondent, who claimed his privilege against self-incrimination and was temporarily excused. The third witness was Marjorie Dean, who testified that she served a subpoena on Edward L. Bell, Jr., whereupon she was excused and the respondent recalled. He testified that the Liquor Control Board had issued him a restaurant license in his individual name, that he did not know the number of the license, and that he did not receive a facsimile of Exhibit No. 4 on the day before or the day of the hearing. He was then excused.

The Commission's fourth witness was John D. Smith, who identified himself as an agent of the Commission. He testified that, on orders from the Commission's counsel, he entered Ed Bell's Tavern posing as a customer and talked with (but did not identify himself to) the respondent. Subsequently,

he went to the Tavern and, without identifying himself, searched the Tavern and possessed himself of certain information. Respondent objected to this testimony. Co-counsel for respondent attempted to argue the objection, but was not permitted to proceed. Argument was then made by respondent's chief counsel, after which the objection was overruled. Testimony was then admitted which showed that restaurant liquor license 18270, with the name Edward L. Bell, Jr. either signed or typed on it, was in the Tavern. (N.T. 28, 29, 30, 32, 33, 34).

The Commission's fifth witness was the complainant, Thomas Snell Armstrong. According to him, on May 3, 1962 he went to Bell's Tavern at about 6:30 o'clock P.M. in company with Arthur Mason, Charles Ladson, John Norman, and Howard Ponzo. On the premises he ordered a beer, Arthur Mason ordered a coke and some potato chips, "and the other fellow ordered a beer also". He testified that the bartender gave Mason the potato chips, but refused to sell them any beer. According to Armstrong, the bartender stated to them that they "had had enough". The four gentlemen then left the premises, whereupon the witness made a complaint. (N.T. 35-38).

Mr. Armstrong then testified that on July 11, 1962 at the Hitching Post Inn in Chambersburg he talked with Mrs. Marjorie Dean, an employee of the Pennsylvania Human Relations Commission. Respondent objected to testimony concerning this conversation, but the objection was again overruled. The conversation occurred at approximately 9:00 o'clock in the evening. Charles Ladson and Arthur Mason were also present. (N.T. 39-40). Immediately following the conversation with Marjorie Dean, the witness, Arthur Mason, and Charles Ladson returned to Bell's Tavern and each ordered a bottle of beer. The same bartender stated that he couldn't serve them, saying that in his opinion "you have had enough". Mr. Armstrong testified that five or six people were present, that all of them were Caucasions, and that there were no Negroes in the establishment on May 3rd. The two left the Tavern and returned to see Mrs. Dean, to whom they told their story and who returned with them to the Tavern, which she entered while they waited outside. (N.T. 42, 43, 53, 54). There is some conflict as to whether this

trip was made in Mr. Armstrong's car (N.T. 43) or Mrs. Dean's car. (N.T. 54).

The next four witnesses called by the Commission were Charles Ladson, Howard Ponzo, John Norman, and Arthur Mason. These witnesses corroborated, in one way or another, the general testimony of the witness Armstrong. Howard Ponzo testified that he was along on May 3rd when the group decided to go get a beer, that they went to the Tavern, that the group was refused service, and that he (Ponzo) was twenty years old (N.T. 69, 71, 73). Counsel for the Commission was successful, over respondent's repeated objections, in "incorporating by reference" the testimony of Mr. Armstrong into the testimony of these four witnesses. (N.T. 57, 70, 75, 81, 82).

The Commission's final witness was Mrs. Marjorie Dean, an investigator employed by the Commission. She testified that on July 11, 1962 she went to Bell's Tavern after learning that complainant and his friends had been denied service. She stated that she entered the Tavern alone, had a discussion with the bartender concerning the complaint filed with the Commission against Mr. Bell, and advised the bartender that she possessed a signed statement from Mr. Bell. She then ordered a Vodka and ginger ale, whereupon the bartender told her she had had enough. She remonstrated, asked the bartender if he was a doctor or whether he possessed an intoximeter. The bartender's only comment, according to Mrs. Dean, was: "The Liquor Control Board gives me that right." She stated that she went to the local State Police barracks to get a witness to her state of sobriety and to have a policeman return with her to witness "the statement by Mr. Trace." Sgt. Fagnani evidently refused to do anything concerning the matter, and advised Mrs. Dean to return to her hotel (N.T. 89-91). The Commission ended its testimony without calling Sgt. Fagnani or the bartender, Mr. Trace.

The various exhibits used during the hearing were then offered into evidence, certain of them being admitted over the objections of respondent's counsel (N.T. 94, 95).

Respondent's counsel then moved to amend the Answer With New Matter, which motion was granted (N.T. 98). After the noon recess, a stipulation concerning the oath administered to the witnesses was entered on the re-

cords (H.T. 100). The respondent then rested without offering any testimony.

ARGUMENT

I.

WHERE ONLY THREE MEMBERS OF THE HUMAN RELATIONS COMMISSION ATTEND A HEARING ON A COMPLAINT, IS NOT THE HEARING AN ABSOLUTE NULLITY?

Answered by respondent in the affirmative. Answered by the Commission at the time of the hearing in the negative.

As used in the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, § 1 et seq., as amended by Act of February 28, 1961, P. L. 47, § 1 et seq:

> (f) The term "Commission" means the Pennsylvania Human Relations Commission created by this act.
>
> ACT OF OCTOBER 27, 1955, P. L. 744, § 4, as amended, (43 P. S. 954).

The "Commission created by this act" is then described in the Act in the following language:

> Said Commission shall consist of eleven members, to be known as Commissioners, who shall be appointed by the Governor . . .
>
> Six members of the Commission shall constitute a quorum for transacting business . . .
>
> ACT OF OCTOBER 27, 1955, P. L. 744, § 6, as amended, (43 P. S. 957).

The powers and duties of the Commission are, so far as here relevant, as follows:

> The commission shall have the following powers and duties:
>
> a. To establish and maintain a central office in the City of Harrisburg.
>
> b. To meet and function at any place within the Commonwealth.
>
> c. To appoint such attorneys with the approval of the Attorney General, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.
>
> d. To adopt, promulgate, amend and rescind rules and regulations to effectuate the policies of this act.
>
> e. To formulate policies to effectuate the purposes of this act, and make recommendations to agencies and officers of the Commonwealth or political subdivisions of government or board, department, commission or school district thereof to effectuate such policies.
>
> f. To initiate, receive, investigate, and pass upon complaints charging unlawful discriminatory practices.

g. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, ... etc.

ACT OF OCTOBER 27, 1955, P. L. 744, § 7, as amended, (43 P. S. 957).

Section 9 of the above cited Act, being the section governing the procedure of the Commission in carrying out the aforementioned powers and duties, contains the following statement:

> The case in support of the Complaint shall be presented before the Commission by one of its attorneys or agents.
> (Emphasis supplied).

General Counsel for the Commission first argued at the hearing that ". . . the section dealing with the quorum deals with the business meetings of the Commission." It is suggested that this is but sophisticated sophistry unsupported by the law or logic. The powers and duties of the Commission are set out in Section 7 of the Act. They include the power and duty to hold a hearing on a complaint, as well as to hire and fire employees. If General Counsel is correct, then something less than a quorum could exercise any of the Section 7 powers and duties under the guise that such activity was not "business." Clearly, this would be erroneous. The ultimate reason for the Commission's existence is the holding of hearings on complaints; such hearings are not only "business meetings" but the most important "business meetings" which the Commission may hold, for it is at such meetings that the Commission deals with the general public, hears its problems, and adjudicates its rights and privileges. In the last analysis, this is the apex of Commission activity. By defining the word commission as it did, by specifically requiring that the Commission itself hear such complaints, and by prescribing a statutory quorum, the legislature intended to give such hearings the benefit and the dignity of the physical presence of a majority of the Commission.

General Counsel's second argument is that the Commission has established by Regulation 103.01 a process whereby three Commissioners will hear the evidence. Ergo, he says, three Hearing Commissioners satisfy the statutory requirement. This argument is entirely circular. The Commission cannot rest its decision on its own Regulations unless there is statutory authority

for such Regulations. In the face of the above cited sections, no such statutory authority exists.

There is no doubt that the device of Hearing Commissioners is analogous to the practice of most administrative agencies; there is no doubt that, from the standpoint of economy, it is salutary. But respondent suggests to the Commission that it is not legal. Generally, the statutes establishing administrative agencies contain provisions for examiners, referees, or the like, and specifically authorize them to preside at hearings. Such is not the case here; the Pennsylvania Human Relations Act contains no such provision. It is suggested that this was a deliberate omission on the part of the legislature. The field of human and civil rights frequently involves conflicting evidence; the bearing, character and demeanor of the witnesses and litigants could well prove vital. The legislature hence intended that a numerical majority of the Commission actually attend the hearing.

There being a lack of a quorum at this particular hearing, the same is a nullity. It is hence suggested that the testimony of all witnesses must be stricken from the record and the entire hearing disregarded. No further action may be taken by the Commission against respondent until the statutory mandates have been complied with.

II

WAS RESPONDENT DENIED PROCEDURAL DUE PROCESS AT THE HEARING SO AS TO CONSTITUTE THE HEARING A NULLITY, AND TO DEPRIVE THE COMMISSION OF JURISDICTION TO MAKE A DECISION AGAINST RESPONDENT AS A RESULT OF SUCH HEARING?

It was long ago decided that a quasi-judicial agency such as the Commission must accord to litigants before it procedural due process of law as required by the Fourteenth Amendment to the Constitution of these United States: UNITED STATES v. JONES, 109 US 513 at 521, 27 L. ed. 1013 at 1017, 3 S. Ct. 346 (1883); LONDONER v. DENVER, 210 US 373, 52 L. ed. 1103, 28 S. Ct. 708 (1908). Respondent submits that he was deprived of procedural due process, and that the hearing held on August 17, 1962 is hence a nullity.

Under the Pennsylvania Human Relations Act, the Commission becomes a party to the dispute, the prosecutor of the dispute, the law judge, and the jury. When this complaint was filed, the complainants did nothing further. Agents of the Commission investigated the complaint, attempted to "adjust" the complaint, reported to the Commission that there was "probable cause," prepared the amended complaint for the litigants, ordered the matter set dow hearing, heard the case as presented by its own General Counsel, acted as trial judge in ruling on motions and objections, and now will exercise the fact-finding functions of the jury. In every other phase of Anglo-Saxon law, we have been assiduous to separate the function of prosecutor from the functinn of trier of facts. We have long eliminated the Star Chamber philosophy of complete co-operation between "prosecutor" and "decider" -- and hold out such elimination to the world as a basic guarantee of the liberty of the individual. It virtually shocks the conscience to see this rejected philosopphy again injected into our law <u>in the name of human liberty</u>. Such an anomaly cannot, must not, be allowed to remain.

Our Courts have had little occasion to speak on this subject. The concept is so innately ingrained into our political, social, and moral philosophy that seldom has any legislature dared go as far as the General Assembly has gone in this statute. Yet they have spoken, and each time have upheld this fundamental concept of justice soundly and emphatically:

> . . . Such a tribunal as the Labor Relations Board, quasi-judicial in character, intended to be impartial, given the power to hear and initially determine and adjudge, should not be able to convert itself into a litigant and become the partisan advocate of one or the other parties whose cause it has heard. This would tend to destroy its quasi-judicial character and its impartiality. Furthermore, to convert it into a party litigant would be to run counter to Pennsylvania's customs and traditions. Since Penn's Frame of Government for the Commonwealth first established government by written limitations (subsequently in large measure carried into all our constitutions), it has been fundamental with us that judicial tribunals and quasi-judicial ones should be limited to hear and decide, not to espouse any party's cause at any stage of proceedings. For the Board to become a litigant is repugnant to the traditional common law heritage of judicial detachment and freedom from interest . . .
>
> PENNSYLVANIA LABOR RELATIONS BOARD v. HEINEL MOTORS, 344 Pa. 238 at (1942).

In every instance where a representative of the government acts as hearing counsel for the complainant, as would frequently be necessary, if, as a practical matter, complainant is to be able to prosecute his grievance, such counsel is completely independent of the administrative tribunal. A brief review of other agencies will reveal this: In the N. L. R. B., the General Counsel is appointed by the President and acts entirely independent of the Board; in the Pa. L. R. B., litigants must present their own case and Board counsel does not participate; the same is true of P. U. C. hearings; in Liquor Control Board hearings, a deputy attorney general not responsible to the Board will appear on occasion. Hence, the body which will decide the case has nothing whatsoever to do with the preliminaries or the prosecution of the matter.

But this Commission, according to the direct testimony of its Executive Director, investigated the complaint, and voted to prosecute the complaint against respondent. (NT 12, 13, 14). The Commission now sits to judge the merits of its own "indictment," and as it sits in judgment it will be advised on the law and other matters by the prosecutor. This is as fair, as just, as allowing the District Attorney to sit in the jury room and aid it in its deliberations.

The transcript of the hearing is sufficient evidence of the danger inherent in this system. General Counsel made three objections during the counsel of the hearing; one was overruled, two were sustained. Respondent

made twenty-two objections; of these, one was sustained; (NT 7); thirteen were overruled; and on eight occasions the Commission simply allowed General Counsel to proceed without bothering to make a ruling to which an exception could be taken. (NT 17, 17, 39, 55, 57, 58, 66, 91). On three occasions when there was no ruling, Commissioner Yaffee simply took over the questioning for General Counsel. (NT 55, 57, 58). The rulings on the merits of the objections will be discussed hereafter; respondent at this point simply suggests that in almost every case the rulings of the Commission were erroneous.

However, as an illustration of denial of due process, the attitude of the commission and its General Counsel toward respondent may be noted. General Counsel met one objection, in part, by the comment: "I urge that we not waste any more time at this hearing." (NT 5). Respondent's objections to this grossly improper remark were ignored by the Commission, (NT 6), but the ruling against respondent was promptly forthcoming. This same attitude was revealed when, in response to an objection, Chairman Boyer stated: "Objection overruled. We will proceed." (NT 70).

Early in the hearing, respondent objected to the inclusion of testimony which was patently hearsay. Commissioner Yaffee then made the following statement:

> We are not bound by the formal and technical rules of evidence in these proceedings or any proceedings before this Commission. So there is a greater latitude afforded to testimony that is received by the hearing commissioners in these types of cases. With that understanding I believe that it would be appropriate for the executive director to testify with respect to any matters that come under his direct control, such as he is about to testify to now. I, therefore, would say your objection would be overruled.
> (NT 9, 10)

The hearsay objection was overruled and the hearing continued. However, when respondent entered an objection without using the formula "I object," the Commission evidently regarded itself as being rigidly bound by common law forularism:

REDIRECT EXAMINATION

By Mr. Agran:

Q. Mr. Ladson, I show you plaintiff's exhibit No. 5. I ask you what this is?
A. This is a complaint we sent to Harrisburg.

Mr. Black: That speaks for itself.
Mr. Agran: Oh, please, Mr. Black, why don't you let me cross-examine?
Mr. Black: I have a right to object.
Mr. Agran: Then object. Don't talk to me.
Mr. Black: I did object.
Chairman Boyer: I suggest that if you have an objection that you make it after the question has been answered.
Mr. Black: The rule in Common PleaseCourt and in Quarter Sessions Court is that you must object when the question is asked.
Mr. Yaffe: But you did not state an objection. You stated an objection for a reason without stating the objection. (Sic.) I can understand the way it happens, but the objection should be properly stated and it wasn't.
Mr. Black: We object on the grounds that the document will speak for itself and will not have probative value insofar as these proceedings are concerned.

Q. Will you please answer the question. . . .
(HT 66, 67).

No ruling was made on the objection even after it was correctly stated. At common law, this was undoubtedly the correct result; if you failed to use the precise formula the first time you waived the defect. It is suggested that the only possible reconciliation between the discussion on pages 9 and 10, and that on 66 and 67, is that the benefits of the first apply only to the Commission and its General Counsel, that "We" means "the Commission", and that respondents are bound by the rigid rules of the eighteenth century. Clearly, this is not due process as that term is understood in the twentieth century.

The Commission's double-edged concept of justice revealed itself in another fashion. Commissioner Yaffe is not only a member of the bar but an able, resourceful, and extremely competent member. Throughout the hearing he demonstrated his ability by openly arguing objections, filling in with questionsomitted by General Counsel, and on three occasions meeting objections by properly propounding the questions himself. In short, he was extremely helpful to General Counsel. The Commission in effect had two competent attorneys presenting its case, one at the bar and the other on the bench. But respondent's chief counsel attempted to allow his co-counsel to argue an objection, only to be refused in the following words:

Mr. Yaffe: Mr. Black, the hearing Commission and the Commission heretofore has taken the position in public hearings that one counsel shall represent a respondent, that any associate counsel may

sit and confer with such counsel but may not participate in the hearing . . .

(MT 32).

It is recognized that tribunals must have the discretionary power to limit the number of attorneys who may participate in a hearing. However, this discretion is ordinarily exercised only as to the number of attorneys who may examine and cross-examine witnesses; normally, in the Courts, a party will be permitted to have more than one counsel "try the case." In almost no case, however, will a Court limit a party to one attorney for purposes of arguing motions and objections. And when a Court does so limit a party, it imposes an equal restriction on all parties. But not so the Commission. As Mr. Yaffe pointed out, the respondent is allowed but one participating attorney; the Commission, in fact, may have at least two, if we may judge by the practice at this hearing.

Due process is not an indefinable concept. At its heart lies basic precepts of good conscience, equal treatment under the law, and fair play. These precepts are both the foundation and the keystone of our ideals of justice. It does not take any substantial knowledge of the law to realize that this hearing is void of anything resembling these essentials. Rather, the hearing is a startling contrast between extreme liberality and archaic technicality. As a result, due process has been denied, the hearing is a nullity, and the Commission must decline to proceed further on the matter.

III

IS THERE SUFFICIENT COMPETENT EVIDENCE TO SUSTAIN A FINDING AGAINST RESPONDENT ON THE BASIS OF THE ALLEGATIONS CONTAINED IN THE COMPLAINT?

The complaint, as amended, appears to ask that the Commission make, at best, only two ultimate findings of fact: first, that respondent discriminated against complainant and his friends solely because of their race; and second, that respondent makes a consistent practice of discriminating against Negroes generally by refusing to serve them in his Tavern.

Findings made by the Commission must be based on clear and legally competent evidence: DEL BUONO v. PA. L. R. B., 370 Pa. 645 (1952); MARTEL BROS. v. PA. L. R. B., 37 Del. 10 (1950). The great bulk of the testimony adduced at the hearing does not meet this standard; rather, the testimony falls far short of it. Even though the Commission may not regard itself as bound by technical rules of evidence, it cannot base its findings on hearsay or rumor or evidence otherwise objectionable.

Respondent first suggests that there is no evidence whatsoever before the Commission because none of the testimony was taken from witnesses properly sworn or affirmed. (it goes without saying that unsworn testimony may never be considered). The Act of March 21, 1772, 1 Sm. L. § 1, as amended, provides that witnesses shall <u>either</u> place their hand upon a Bible <u>or</u> lift up the right hand, and either pronounce or assent to the following words: "I, A. B., doswear by Almighty God, the searcher of all hearts, that the testimony I give will be the truth, the whole truth, and nothing but the truth, and that as I shall answer to God at the last great day." It was stipulated that at the hearing that this oath was not administered to any witness. (NT 100). It is suggested that the very words of the Act make this oath mandatory. If a mandatory oath requirement has not been complied with, then there is, in effect, no sworn testimony and all testimony so received is legally incompetent and may not be considered. Hence, having no testimony on which to base its findings of fact, the Commission may make none. Respondent therefore suggests that the complaint against him be dismissed, inasmuch as the allegations have not been legally proven by clear and competent evidence.

Respondent secondly suggests that, even if the foregoing be inaccurate, there is still no clear and competent evidence in the record sustaining the case against him. The burden of proof is on the Commission to affirmatively prove that complainant was discriminated against because of his race, and to prove that respondent made a practice of discriminating against Negroes generally.

No effort was made to show that, as a matter of policy, respondent discriminated against Negroes as a class. In fact, the only questions pertaining to this issue were asked by respondent on cross-examination. In each instance, the uncontradicted testimony was that the witness did not know if respondent maintained his Tavern for whites only. Even after having been refused service twice, neither complainant nor the other witnesses on cross-examination were willing to give their opinion as to respondent's policies or prejudices towards Negroes generally. However, every witness testified that one of the group was served something to eat. Moreover, both the respondent and his bartender were present in the hearing room under subpoena of the Commission. Either or both could have been called to testify on this issue. The respondent was, in fact, called; but General Counsel did not ask him a single question on this issue. He could have been asked what his policies were; he could have been asked what directions he had given his bartender; he could have been asked if he had ever allowed a Negro to be served in his establishment. His testimony could be checked by asking the bartender similar questions. But this was not done!

There is nothing in the Pennsylvania Human Relations Act, or any other law, which even hints that respondent has the burden of proving his non-discrimination. It would therefore appear that the burden to prove respondent's discrimination against Negroes as a class is on the Commission. Not only did the Commission fail to prove this charge, it did not attempt to prove it. In the absence of clear and legally competent proof, the charge must be dismissed as not proved.

The same can be said as to the more specific charge that respondent

discriminated against complainant and his friends because of their race. Here, it is only by innuendo, insinuation, and conjecture that one may tie in the refusal of service with race. The witnesses all testified that they were refused service on May 3, 1962; that they were informed that respondent signed a statement agreeing to serve all persons who behaved themselves; that they were again refused service; and that they were Negroes. There is not one scrap of testimony to tshow that the bartender refused to serve them because they were Negroes; or that respondent knew that they had been refused; or that it was respondent's policy to refuse to serve them because of their race. If the Commission is to find against respondent, it must take the simple facts of race and refusal, which is all that appears of record, and then infer that the first is the cause of the second. Not only would such an inference be unreasonable and unwarranted, it would not be the strongest inference to be drawn from the evidence.

When the complainant and his friends first entered Ed Bell's Tavern, they did so as a group. (NT 35, 36). Some of them had been drinking. (NT 58, 70). All of them ordered beer except Arthur Mason, who ordered a coke and potato chips. (NT 38). Most of these men were in their early twenties and one, Howard Ponzo, was a minor. (NTR71). He had previously been drinking, and ordered a beer when he entered Ed Bell's Tavern.

Clearly, the Commission is in error in asserting that, under the Pennsylvania Human Relations Act, beer should have been served to a group accompanied by a minor who had previously been drinking. There would appear to be nothing in the said Act which was intended to modify, repeal, alter, amend, or otherwise affect the Act of April 12, 1961, as amended. Section 493 of that Act states:

> It shall be unlawful . . .
> (1) For any licensee or the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.
>
> (14) For any hotel, restaurant or club licensee, or any retail dispensee, his servants, agents or employes, to permit persons of ill repute, known criminals, prostitutes or

minors to frequent his licensed premises or any premises operated in connection therewith, except minors accompanied by parents, guardians, or under proper supervision.

The penalty for violating the above quoted subsections is set forth in section 494 of the said Act:

(a) Any person who shall violate any of the provisions of this article, except as otherwise specifically provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year.

There can no longer be any doubt that, had respondent's bartender served Howard Ponzo, or allowed him to remain on the premises, both the bartender and the respondent would have committed a misdemeanor. The mere selling of liquor to a minor is illegal, regardless of intention or good faith: IN RE REVOCATION OF RESTAURANT LIQUOR LICENSE NO. R-14023, 53 Sch. L. R. 166 (1958); APPEAL OF D. and R. BEER DISTRIBUTORS, 6 D & C 2d. 761 (1958); IN RE DAUGERT AND RAKLEWICZ BEER DISTRIBUTORS LICENSE, 46 Luz. L. Reg. 59 (1956); COM. v. KOCZWARA, 188 Pa. Superior Ct. 153 (1959), modified and affirmed 397 Pa. 575, cert. denied 363 US 848. No one claims that the minor was accompanied by a guardian. And it needs little or no argument to realize that any adult or adults who would, as did the adult witnesses here, knowingly accompany a minor into a tavern by pre-arrangement and allow him to request to be served beer, were not providing such minor with "proper supervision".

Nor can it be argued that respondent was required to serve the adult complainants even though he refused the minor complainant. The mere presence of the minor in the tavern is enough to violate the aforesaid subsections; the term "frequent" does not connote "service" which is separately provided for in subsection 1. Where a party of persons includes a minor, an innkeeper may refuse to serve any of the party, and request the entire party to leave. He need not serve them at the risk of prosecution under subsection 14, or at the risk that a drink will be passed to the minor. The only possible conclusion is that this Commission has no authority to require the

respondent to serve anyone under such conditions; nor does it have any authority to order anyone to desist from refusing to serve such persons under such conditions. For this Commission to do so would not only fly in the face of the law and common sense as regards minors who drink, but it would give to non-Caucasian minors a license and liberty not enjoyed by Caucasian minors. It is doubted that any member of the legislature dreamed, in his wildest nightmare, that this Commission would have brought or entertained an action, such as the instant case, in which it would lend its dignity to a clear violation of the laws of the Commonwealth.

Moreover, by attempting to aid this minor, in the illicit purchase of alcohol, the adult complainants were themselves violating the lawsof this Commonwealth:

> Whoever hires, or requests or induces any minor to purchase, or offer to purchase, spirituous, vinous, or brewed or malt liquors from a duly licensed dealer for any purpose, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500.00), or to undergo imprisonment not exceeding one year, or both.
>
> ACT OF JUNE 24, 1939, P. L. 872, § 677.

Can it be argued with reason that a bartender must serve persons whom he knows have previously violated, or attempted to violate, the laws relating to minors and alcohol? Respondent notes that he offered no testimony on this subject; he was not personally present when the offenses occurred. Respondent further notes)(and this is concededly not in the record) that the bartender had left the hearing room when it was time for respondent to put in his case. Respondent further notes that counsel for the Commission was assiduous in not asking the ages of any of the various witnesses. Respondent further notes that counsel for the Commission had subpoenaed the bartender, but did not call him as a witness even though the record recites that he was in the hearing room.

It is hence suggested that, since more than one inference can be drawn from the evidence, and since the strongest inference is in favor of respondent, that inference and only that inference may be drawn. On the testimony and inference which might be legitimately be drawn therefrom, no finding

adverse to the respondent can be made.

It is suggested that much of the testimony may not be considered by the Commission. Objection was raised by respondent to the testimony by the various witnesses concerning the investigation and "adjustment" of the original complaint. (NT 9, 10, 12, 39, 40, 94, 95). These objections were founded on the hearsay rule or on competency. A casual reading of the transcript indicates the objections should have been sustained. Moreover, according to a document entitled "Regulations of The Pennsylvania Human Relations Commission," which document on its cover bears the name of Harry Boyer as Chairman and bearing the facsimile signature of Nathan Agran as General Counsel contains the following statement at page 10:

> Section 105.12 EVIDENCE OF ENDEAVORS TO CONCILIATE. No testimony or evidence shall be given or received at any public hearing concerning endeavors to conciliate an alleged unlawful discriminatory practice.

It is therefore suggested that the testimony of all witnesses pertaining to the efforts of and conversations with Mrs. Dean, plus her own direct testimony, must be stricken in its entirety as a matter of the Commissionb own regulations. Absent this testimony, the record only contains Mr. Armstrong's story of events in Ed Bell's Tavern on May 3 and July 11. Such evidence is insufficient to sustain findings against respondent on any charge whatsoever.

Finally, it is suggested that complainant and his friends were not bona fide customers. Complainant went there with a minor. He testified that he was prepared to file a complaint with the Pennsylvania Human Relations Commission if he and they were not served. Was he also prepared to file a complaint with the Liquor Control Board if they were served? Section 2, subsection (6) (i) (1) of the Human Relations Act certainly does not contemplate benefiting an individual who enters a bar prepared to damn the owner if he is served and equally damn him if he is not.

IV

WHERE AN AGENT OF THE COMMISSION ENTERS INTO RESPONDENT'S TAVERN, DOES NOT DISCLOSE HIS IDENTITY, DOES NOT SERVE A SEARCH WARRANT, AND SURREPTITIOUSLY OBTAINS EVIDENCE, MUST NOT SUCH EVIDENCE BE EXCLUDED FROM A HEARING BEFORE THE COMMISSION?

The testimony of John D. Smith indicates that his role in this affair was that of an under-cover agent. He entered Ed Bell's Tavern without a search warrant or other indicia of his right so to do. In effect he posed as a bona fide customer which, in fact, he was not. Such activity violates the due process clause of the Fourteenth Amendment to the Constitution of the United States to the extent that that Amendment requires that state officials abide by the Fourth Amendment. Evidence obtained by such activity must be excluded in all state proceedings: MAPP v. OHIO, 367 US 643, 6 L. ed. 2d. 1081, 81 S. Ct. 1684 (1961).

It is admitted that no physical property was removed from the premises, but this fact does not make Smith's activities any less reprehensible or any more admissible. The Fourth Amendment was designed to restrict intrusions by public officials upon private citizens. There can be no question any longer that a place of business is within the confines of the Amendment's protection.

A "search" has been defined authoritatively years ago as a quest by an official: HALE v. HENKEL, 201 US 43 at 76, 50 L. ed. 652, 26 S. Ct. 370 (1906). To the citizens it makes little difference whether the officer is looking for a particular item to carry off or for information to copy and carry off. Nor does it make the slightest difference in result; the evidence is used against the citizen.

Not only was this a search and a seizure of information, but it was unlawful. A search and seizure without a valid search warrant is prima facie unreasonable unless it comes within one of the exceptions to the general rule: RIOS v. UNITED STATES, 364 US 253 at 261, 4 L. ed. 2d. 1688 at 1693, 80 S. Ct. 1431 (1960). These exceptions, none of which are here applicable, are: search incident to arrest, search of a moveable vehicle,

search to prevent impending destruction or removal, or search by specific consent: See UNITED STATES v. JEFFERS, 342 US 48 at 51, 52, 96 L. ed. 59 at 64, 72 S. Ct. 43 (1951); UNITED STATES v. RABINOWITZ, 339 US 56, 94 L. ed. 653, 70 S. Ct. 56 (1950).

Inasmuch as Smith had no warrant, and has not brought his activities within one of the recognized exceptions, his acts were illegal. Therefore, his evidence concerning them must be excluded, and may not be considered for any purpose by the Commission.

V

IS NOT THE PENNSYLVANIA HUMAN RELATIONS ACT UNCONSTITUTIONAL AS TO RESPONDENT BECAUSE ITS TITLE DOES NOT COMPLY WITH ARTICLE III, SECTION 3 OF THE CONSTITUTION OF THE COMMONWEALTH?

The title of the Pennsylvania Human Relations Act is as follows:

> An act prohibiting certain practices of discrimination because of race, color, religious creed, ancestry, age or national origin by employers, employment agencies, labor organizations, and others as herein defined; creating the Pennsylvania Human Relations Commission in the Department of Labor and Industry; defining its functions, powers and duties; providing for procedure and enforcement; providing for formulation of an educational program to prevent prejudice; providing for judicial review and enforcement and imposing penalties.

Article III, Section 3 of the Constitution is a notice provision. Its intent is to allow persons who might be affected by an Act to become aware of it, so that they might have notice thereof: L.J.W. REALTY CORP. v. CITY OF PHILADELPHIA, 390 Pa. 197 (1957); IN RE GUMPERT'S ESTATE, 343 Pa. 405 (1942); COM. v. WYNN, 175 Pa. Superior Ct. 546 (1954). Hence the requirements of the Constitution are met if one reading the title and possessing a reasonably inquiring state of mind would inquire into the body of the Act: IN RE LANCASTER CITY ORDINANCE NO. 16-1952, 374 Pa. 529 (1953).

Clearly, a tavern owner is not put on his guard by this title. Nothing in the title so much as hints at any effect the law might have on such an individual. The title concerns only employers, employment agencies, and labor organizations; it nowhere expresses the thought that the persons enumerated in section 5(i) of the Act should be concerned with the same. A prohibition of discrimination in the employment and union fields is not germane to discrimination in taverns or other places of public accommodation, which go unmentioned in the title. It is hence concluded that, the application of the Act to respondent not being anywhere noted in the title, such application is unconstitutional as to him. See: INVESTORS REALTY CO. v. CITY OF HARRISBURG, 281 Pa. 200 (1924).

VI

IS NOT THE PENNSYLVANIA HUMAN RELATIONS ACT UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 1, OF THE CONSTITUTION OF PENNSYLVANIA, IN THAT IT ARBITRARILY INTERFERES WITH PRIVATE BUSINESS AND IMPOSES UNUSUAL AND UNNECESSARY RESTRICTIONS THEREON, HENCE BEING AN INVALID EXERCISE OF THE POLICE POWER?

The Legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions on lawful occupations, under the guise of protecting the public interests, COM. EX REL. WOODSIDE v. SUN RAY DRUG CO., 383 Pa. 1 (1955), unless the interference is clearly related to public safety, health, or morals: GAMBONE v. COM., 375 Pa. 547 (1954).

The policy of Pennsylvania is to treat the sale and service of alcohol as an evil to be condoned but controlled. This control is, of course, a valid exercise of the police power designed to curb consumption of alcohol. The Pennsylvania Human Relations Act does just the opposite: it requires a tavern owner to sell alcohol. Respondent suggests that any law requiring the sale of alcohol under any circumstances is not and can not be a valid exercise of the police power. How can a requirement that a person be served alcohol make the public any safer, any healthier, or any more moral?

VII

IS NOT THE PENNSYLVANIA HUMAN RELATIONS ACT UNCONSTITUTIONAL AS APPLIED TO RESPONDENT, IN THAT IT IS SPECIAL LEGISLATION REGULATING TRADE AND HENCE PROHIBITED UNDER ARTICLE III, SECTION 3?

One of the duties of a tavern owner is to keep the peace on his premises. To keep such peace, he is free to keep out and to refuse service to any person whose presence for any reason might cause it to be disrupted. This Act restricts his ability to fulfill this duty.

Moreover, this Act purports to require a tavern owner to sell to all persons regardless of their nationality, color, religious affiliations, and what have you. Yet it does not place similar restrictions on other businesses of a like nature where goods are sold for off-premises use or consumption. As such, it creates a special class among retailers, and as such it is unconstitutional.

VIII.

IS NOT THE PENNSYLVANIA HUMAN RELATIONS ACT UNCONSTITUTIONAL IN THAT IT VESTS IN THE COMMISSION THE CHANCERY POWERS OF THE COURTS OF COM-COM PLEAS IN VIOLATION OF ARTICLE V, SECTION 26 OF THE CONSTITUTION OF PENNSYLVANIA?

The Commission is established pursuant to the provisions of Section 6 of the Act. Section 7 of the Act vests in the Commission, inter alia, the power to hold hearings, and pass upon complaints. Section 9 of the Act empowers the Commission to find facts with regard to violations of the Act and to issue cease and desist orders on respondent. Section 10 of the Act provides that such cease and desist orders may be enforced by petitioning the Court of Common Pleas of Dauphin County for an enforcement order. No provision is made for any further hearing by that Court; no opportunity is given to respondent to appear before any Court.

The Act hence contemplates enforcement by a Court, but denies to the Court the opportunity to hear the facts and resolve factual issues. In effect, these provisions take away the chancery powers of Common Pleas, so far as respondent is concerned, and vest the powers of the chancellor as to factual determinations, decrees nisi, and matters of law in the Commission. The Act thereby violates Article V, Section 26 of the Constitution, which prohibits the General Assembly from creating a body to exercise the powers vested by the Constitution in the Judges of the several Courts of Common Pleas.

But this Act goes even further. Section 12 of the Act prohibits any other Court from hearing a matter which is before the Commission, it purports to establish exclusive jurisdiction in the Commission and thereby oust Common Pleas of jurisdiction. Hence, Common Pleas would be without jurisdiction to hear injunctions based on allegations of fact of which the Commission had taken cognizance.

Article V, Section 20 of the Constitution vests in Common Pleas the chancery jurisdiction it possessed in 1874, when the Constitution was adopted. In 1874, Common Pleas, sitting in equity, would have been the only body empowered to hear complaints based on the instant facts. Its juris-

diction was exclusive. Article V, Section 26 protects that jurisdiction and in effect requires that it be not taken away from Common Pleas, as is done by Section 12 of the Act, and that it not be vested elsewhere, as is attempted by Sections 6, 7, and 9 of the Act.

Hence, so far as it purports to vest such powers in the Commission, the Act is unconstitutional.

IX.

IS THE PENNSYLVANIA HUMAN RELATIONS ACT UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 1, AS AN ABRIDGMENT OF THE RIGHTS OF PATRONS OF TAVERNS TO ASSOCIATE AND BE PRESENT WITH ONLY THOSE PERSONS WITH WHOM THEY WISH TO BE PRESENT OR ASSOCIATE?

§1. Natural rights of mankind.

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

The first section of the Constitution of this Commonwealth deals with a subject which, in this day of statutes and written documents, is little considered by those who devote their attention to civil liberties. Although it is the basic premise on which all formal guarantees of personal freedom are founded, modern commentators tend to overlook it. In truth, the simple foundation goes unnoticed in our study of the complex towers; yet how stand the towers sans foundation? In the instant case, we must return to an examination of the basic truths underlying our modern prolifera of formalistic human freedoms.

Ever since Jefferson gained immortality by complementing the phrase "inalienable rights" with an "among" clause, our philosophic eyes have only scanned the phrase "inherent and indefeasible rights", and have focused exclusively on the "among" clause. So intent have we peered at it, in fact, that we have failed to recognize it for what it is: a cursory listing of but a few specific illustrations of some "inherent and indefeasible rights". Writers and thinkers in the true Lockian tradition would never concede that the "among" clause was an absolute digest of all such rights. It is time, and in this case appropriate, to examine the constitutional intent of the general statement of the law without limiting the examination to the few illustrations enumerated by the framers of the Constitution of 1874.

In a free society, man has complete freedom of association. He may

talk to one, he may refuse to speak to another. He may love one wife, he may abhor all other women. He may patronize a given establishment, and decline to patronize others. In effect, a man may discriminate between the objects which surround him. Such discrimination we may label freedom of association. To realize that such a specific freedom does exist, inherent and inalienable, one need only look at the activities of the Hitler dictatorship. The first major change made in each area occupied by the S.S. was the isolation of the Juden; a type of isolation designed to prevent non-Jewish leaders from any association with their Jewish counterparts. Yet so valued was this freedom of association that the King and people of Denmark assumed the fifth of the yellow arm-band, that that freedom might continue. Seldom has history witnessed a more courageous national effort in the cause of individual freedom.

The full enjoyment of this freedom requires that the individual act on belief and reputation. Polite society does not invite a professional criminal to tea because of his reputation; few members of the tea party would have personal knowledge of the miscreant's activities. We are urged to buy by brand name because of reputation; few of us ever inspect Campbell's tomatoes or Bachrach's camera. If we feel we know an item's reputation, we are content to leave further investigation to the professional cynic. But if we are to fully enjoy our freedom of association, we must also be free to rely upon an individual's or an institution's reputation in any field in which we choose to act or react.

One area in which each of us is free to act or react is that of associating with persons of races, beliefs, political affiliations, hair styles, or clothing different than our own. To put the matter as bluntly as possible, each of us is free to refuse to associate with one of another race. To say that such activity is morally indefensible is to beg the issue. To refuse charity to one who needs it is morally indefensible, but few men deny themselves the right to choose to so refuse. Whether one agrees or disagrees as to the morality of its exercise, one must admit that each of us, in our personal associations, has a right to decline to associate with one of

lighter or darker skin, and to base such declination solely on the shade of the skin.

Hence we have a right to know the reputation of the taverns or other public places open to us. If a tavern has the reputation of serving those with whom we do not desire to drink, for any reason no matter how immoral or frivolous, we have a right to know it. Equally, we have a right to know that the reputation of some other tavern is such that we may go there without fear of contact undesirable to us. This Act decrees that, hereafter, no place of public accomodation can have a reputation concerning patronage. Hence the right to free association is effectively denied.

To focus on the same problem from a different angle, the patron who desires to discriminate no longer may rely on being able to finish a meal or a drink, for which he has paid the price, without coming into association with someone whose presence is repugnant to him. This law forces him to give up one of two rights: either the right to consume that for which he has contracted and paid, or the right to associate with only such persons as he elects. Each freedom is guaranteed him by the Constitution. For the Human Relations Act to dictate that he choose between his rights is to violate the Constitution.

Respectfully submitted,

BLACK AND DAVISON

By George S. Black
George S. Black

Kenneth F. Lee
Kenneth F. Lee