LEGISLATION

Race Equality by Statute

Enactment of the recent "Equal Rights Bill" [1] by the Pennsylvania legislature serves to focus the legal spotlight upon a legislative and judicial problem of great practical importance. Although the hubbub engendered by this latest addition to the statute books might suggest that it is a novel question, the contrary is true. Pennsylvania itself has had a similar statute since 1887,[2] and while a federal "Civil Rights Bill" [3] was found fatally defective under the Constitution,[4] the state lawmaking agencies have produced like statutes in at least eighteen jurisdictions.[5] Longer than its predecessors, the new Pennsylvania bill raises certain old problems in addition to some of its own.

Typical of the statutes in other jurisdictions is that in force in Indiana: [6]

> "All persons within the jurisdiction of said state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land and water, theaters and all other places of public accommodations and amusements, subject only to the conditions and limitations established by law and applicable alike to all citizens.
>
> "Any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay a sum not to exceed one hundred dollars to any person aggrieved thereby, to be recovered in any court of competent jurisdiction in the county where said offense was committed, and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not to exceed one hundred dollars, or shall be imprisoned not more than thirty days, or both. And provided, further, that a judg-

1. Acts General Assembly No. 132, June 11, 1935.
2. PA. STAT. ANN. (Purdon, 1930) tit. 18, § 1211 (1887).
3. 18 STAT. 335 (1875).
4. Civil Rights Cases, 109 U. S. 3 (1883).
5. CAL. CIV. CODE (Deering, 1931) §§ 51, 52, 53 (1923); COLO. STAT. ANN. (Courtright, 1926) §§ 754a, 754b (1895); CONN. GEN. STAT. (Cum. Supp. 1933) § 1160b (1933); ILL. REV. STAT. (Cahill, 1933) c. 38, ¶¶ 104, 105 (1911); IND. STAT. ANN. (Baldwin, 1934) §§ 4763, 4764 (1885); IOWA CODE (1931) §§ 13251, 13252 (1897); KAN. REV. STAT. ANN. (1923) §§ 21-2424, 21-2425 (1874); MASS. ANN. LAWS (1934 Cum. Supp.) vol. 9, c. 272, § 98 (1934); MICH. COMP. LAWS (Mason's 1933 Supp.) §§ 17115-146, 17115-147 (1931); MINN. STAT. (Mason, 1927) § 7321; NEB. COMP. STAT. (1929) §§ 23-101, 23-102 (1893); N. J. COMP. STAT. (Cum. Supp. 1911-1924) §§ 39-1, 39-2 (1921); N. Y. CONS. LAWS ANN. (McKinney's Supp. 1935) tit. 8, §§ 40, 41 (1913); OHIO CODE ANN. (Throckmorton's Baldwin 1930) §§ 12940-12942; Pennsylvania (*supra* note 1); R. I. Acts and Resolves 1925, c. 658; WASH. REV. STAT. (Remington, 1932) § 2686 (1909); WIS. STAT. (1931) § 340.75 (1931). Many of these statutes represent amendments of earlier versions.
6. IND. STAT. ANN. (Baldwin, 1934) §§ 4763, 4764 (1885).

ment in favor of the party aggrieved, or punishment or committal upon an indictment, affidavit, or information, shall be a bar to further or other prosecution or suit."

The older Pennsylvania act was unusually brief:

"Any person, company, corporation, being owner, lessee or manager of any restaurant, hotel, railroad, street railway, omnibus line, theatre, concert, hall or place of entertainment, or amusement, who shall refuse to accommodate, convey or admit any person or persons on account of race or color over their lines, or into their hotel, or restaurant, theatre, concert, hall or place of amusement, shall, upon conviction thereof, be guilty of a misdemeanor, and be punished by a fine not less than fifty dollars nor more than one hundred dollars."

The new act, like the old, is entitled, "An act to provide civil rights for all people, regardless of race or color", is said to be for the purpose of "amplifying and extending the provisions" of the old act, and continues as follows:

"All persons within the jurisdiction of this Commonwealth shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of any places of public accommodation, resort, or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person being the owner, lessee, proprietor, manager, superintendent, agent, or employe of any such place, shall directly or indirectly refuse, withhold from, or deny to, any person, any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, and privileges of any such places, shall be refused, withheld from, or denied to, any person on account of race, creed, or color, or that the patronage or custom thereat of any person belonging to, or purporting to be of, any particular race, creed or color is unwelcome, objectionable or not acceptable, desired or solicited. The production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any person being the owner, lessee, proprietor, superintendent, or manager thereof, shall be presumptive evidence in any civil or criminal action that the same was authorized by such person. A place of public accommodation, resort or amusement, within the meaning of this article, shall be deemed to include inns, taverns, roadhouses, hotels, whether conducted for the entertainment of transient guests, or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, barrooms, or any store, park, or inclosure where spirituous or malt liquors are sold, ice cream parlors, confectioneries, soda fountains, and all stores where ice cream, ice and fruit preparations, or their derivatives, or where beverages of any kind, are retailed for consumption on the premises, drug stores, dispensaries, clinics, hospitals, bathhouses, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating

rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of this Commonwealth, garages and all public conveyances operated on land or water, as well as the stations and terminals thereof. Nothing herein contained shall be construed to include any institution, club or place or places of public accommodation, resort or amusement, which is or are in its or their nature distinctly private, or to prohibit the mailing of a private communication in writing sent in response to a specific written inquiry.

"Any person who shall violate any of the provisions of this act or who shall aid or incite the violation of any said provisions shall for each and every violation thereof be fined not less than one hundred dollars nor more than five hundred dollars, or shall be imprisoned for a period of not less than thirty days nor more than ninety days, or, in the discretion of the Court, both such fine and imprisonment may be imposed."

The act was signed by the Governor on the 11th of June, 1935, and took effect September 1st.

Statutes of this sort began appearing shortly after the Civil War, the enthusiasm of the movement climaxing in the passage of the federal statute of 1875.[7] This act provided for "full and equal enjoyment" of the accommodations of inns, public conveyances, theatres and "other places of public amusement." Reasons for denial of accommodations were required to be those applicable to all citizens, of every race and color. Heavy penalities were exacted for non-compliance: $500 to go to the aggrieved party, plus a fine of $500 to $1000, or thirty days to one year imprisonment. Applicable to all persons within the jurisdiction of the United States, this act bid fair to eliminate the need for legislation among the states. In 1883 the act was declared unconstitutional in the *Civil Rights Cases*.[8] It was argued that authority for such legislation was contained in that portion of the Fourteenth Amendment providing against state abridgement of privileges and immunities, deprivation of liberty, or denial of equal protection of the laws. It was answered, correctly it seems, that this amendment gave the federal government power to bar only state interference, and not to regulate discriminatory conduct on the part of citizens. An attempt was also made to bring the legislation under the Thirteenth Amendment, prohibiting slavery or involuntary servitude except as a punishment for crime. To the argument that discrimination in effect pinned upon negroes the badge of servitude, the Court replied that such denial could not be brought within the terms "slavery" or "involuntary servitude" without an unconscionable stretching. Justice Harlan entered a lengthy dissent to Justice Bradley's majority opinion on both these points, evidencing a willingness to extend both amendments with a free hand in order to effectuate what he believed to be a salutary policy. Although the Court did not pass on the question of discrimination in conveyances in interstate commerce, nor in amusement places in the

7. For a full treatment of the early history of civil rights legislation, see Stephenson, *Race Distinctions in American Law* (1909) 43 AM. L. REV. 547.

8. 109 U. S. 3 (1883).

District of Columbia or the territories, the holding effectually quashed any hopes for a general statutory attempt by Congress to solve the problem. The decision called forth a revival of activity in the state legislatures, and numerous statutes appeared within the next few years.

The constitutionality of the state acts has been attacked on different grounds, and with complete lack of success. Proprietors who believe that their trade is menaced by the necessity of catering to a racially mixed clientele may be expected to have raised the familiar outcry of "due process." They have done so, but on this score they have met with uniform frustration. Places of public accommodation and amusement are deemed to come within the scope of the states' police power for regulatory purposes, and combatting racial prejudice is considered a reasonable objective. That property is taken when and if business wanes, and that freedom of contract is mitigated, cannot of course be denied, but the weight of judicial pronouncement that due process is not violated fairly precludes any serious question as to the validity of the new Pennsylvania act on this count. Civil rights bills have been upheld by the Pennsylvania courts,[9] by the highest tribunals in numerous other states,[10] and by the United States Supreme Court.[11] Another possible ground of attack lies in the frequent constitutional prohibition of excessive penalties.[12] The general statement has been made that penalties will be held invalid when they are so heavy as to frighten off those who might otherwise be willing to risk violation of the statute and test its constitutionality.[13] While a plausible argument might be framed to the effect that the penalties imposed by the new act are disproportionate to the offense, the chances of its success are not good. Several statutes have heavier penalties,[14] and the decisions indicate no instance of the argument being raised at all, much less triumphantly. A court inimical to the act might, on the other hand, seize upon such a ground for invalidating it, as an easy way out of the difficulties attendant upon such a result. Since the nature of the offense must be weighed separately in each instance, prior case authority involving other crimes would not be seriously binding. Any considered forecast of the constitutional fate of the new act must recognize, however, that it will probably be upheld.

Assuming the statutes to be constitutional, there is a large question as to their efficacy in securing the rights they purport to grant. It is at least clear that at common law, discrimination was unchecked in most of the establishments named in the statutes. For example, in this country a ticket to a theatre was considered only a revocable license, and although the proprietor was under a contract duty once the sale was made, exclusion gave the ticket holder only a right to the limited damages arising from breach

9. Commonwealth v. George, 61 Pa. Super. 412 (1915).

10. Pickett v. Kuchan, 323 Ill. 138, 153 N. E. 667 (1926); Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718 (1890); People v. King, 110 N. Y. 418, 18 N. E. 245 (1888); and further cases collected in Note (1927) 49 A. L. R. 505.

11. Western Turf Assn. v. Greenberg, 204 U. S. 359 (1907).

12. *E. g.*, U. S. CONST. Amend. VIII; MASS. CONST. pt. I, art. XXVI; N. Y. CONST. art. I, § 5; PA. CONST. art. I, § 13.

13. See *Ex parte* Young, 209 U. S. 123, 147 (1907); Amos v. Gunn, 84 Fla. 285, 363, 94 So. 615, 641 (1922).

14. See *infra* p. 79.

of contract.[15] Disappointment and humiliation could not be compensated in damages.[16] Carriers and innkeepers were, of course, under stricter duties, being required to accept all unobjectionable comers,[17] but even in those instances the sanction behind the rule was not entirely effective. It is true that carriers have been held liable in damages for humiliation, upon excluding patrons,[18] and while a clear cut case involving damages for humiliation alone has not been found as to innkeepers, their liability is admittedly tortious and not limited to contract measure of damages.[19] Nevertheless, white juries are unlikely to extend generous awards to colored plaintiffs in such cases, and the "rights" recognized at common law were all too likely to become largely theoretical.

The sanctions set up in the statutes vary in degree and form. On the criminal side, discrimination is generally made a misdemeanor.[20] Fines and imprisonment, or both, are commonly specified. There is ordinarily a minimum fine stated, but in some instances it is extremely small,[21] some states provide for no minimum,[22] and some for no fines at all.[23] None have minimums higher than $100, and the maximums range generally from $100 to $500.[24] Kansas is unique with a maximum of $1000 and a minimum of only $10. Possible periods of imprisonment are as high as one year,[25] while some states have no minimum period [26] and others specify thirty days as the lowest limit.[27] In some states no imprisonment is provided.[28] Most of the statutes allow the imposition of both these penalties at the court's discretion. In New Jersey violators are required to turn over $100 to $500 to the state in an action of debt, in addition to the fine and jail term. A number of the acts insure something more than moral satisfaction to the aggrieved by specifying that cash sums be turned over to him, in addition to the criminal provisions noted above.[29] New York and Massachusetts lead in this respect with minimums of $100, maximums of $500. In all of these states the specified sum must be secured by bringing suit in a competent

15. Marrone v. Washington Jockey Club, 227 U. S. 633 (1913); De La Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P. (2d) 818 (1933); see 2 COOLEY, TORTS (4th ed. 1932) § 250; 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 349 (d).

16. Taylor v. Cohn, 47 Ore. 538, 84 Pac. 388 (1906); see 1 SUTHERLAND, DAMAGES (4th ed. 1916) § 95.

17. Messenger v. Penna. R. R., 37 N. J. L. 531 (1874); Willis v. McMahan, 89 Cal. 156, 26 Pac. 649 (1891); see BEALE, INNKEEPERS AND HOTELS (1906) §§ 55, 61.

18. Cleveland R. Co. v. Kinsley, 27 Ind. App. 135, 60 N. E. 169 (1901); Runyan v. Central R. R. of New Jersey, 65 N. J. L. 228, 47 Atl. 422 (1900); see 3 SUTHERLAND, DAMAGES (4th ed. 1916) § 936, p. 3446.

19. Atwater v. Sawyer, 76 Me. 539 (1884); see Mateer v. Brown, 1 Cal. 221, 230 (1850); BEALE, INNKEEPERS AND HOTELS (1906) c. VI.

20. In Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota ("gross misdemeanor"), Nebraska, New Jersey, New York and Washington.

21. Colorado ($10), Kansas ($10), Nebraska ($25).

22. Connecticut, Indiana, Iowa, Massachusetts, Wisconsin.

23. California, Michigan, Minnesota, Rhode Island, Washington.

24. A $500 maximum is specified in Illinois, New Jersey, New York, Ohio, and Pennsylvania.

25. In Colorado, Illinois, and Massachusetts.

26. Colorado, Connecticut, Illinois, Indiana, Iowa, Massachusetts, New Jersey, Wisconsin.

27. New York, Ohio, and Pennsylvania.

28. California, Kansas, Michigan, Minnesota, Nebraska, Rhode Island, Washington.

29. California, Colorado, Illinois, Indiana, Massachusetts, Minnesota, New York, Ohio, Wisconsin.

court. New Jersey allows the aggrieved to sue in the name of the state to recover his costs and attorney's fees. Some acts require that the aggrieved person choose between civil recovery and enforcement of the criminal provisions.[30]

A serious question of interpretation arises under a few of the statutes, including the new Pennsylvania act. These make no provision at all for civil liability, merely setting out criminal penalties.[31] While it has been held that the passage of a civil rights bill did not disturb the privilege of bringing a common law action against an innkeeper,[32] it might be argued that civil suits are not available against amusement proprietors unless the statute grants such a right. Nevertheless, it has been decided in Michigan [33] and Washington [34] that civil suits for damages might be maintained although the statutes were silent on the question. These holdings may or may not be followed in Pennsylvania, where the situation is deeply befogged. In *Commonwealth v. George*,[35] which involved a criminal prosecution under the old act, Judge Kephart specifically noted the uncertainty concerning civil suits, declining to express any conclusion on the question by way of *dictum*.[36] In the new act there are instances of wording which suggest, at least, that the legislators had civil suits in mind. The act prohibits the use of any written or printed matter stating an intention to discriminate, or expressing an objection to colored patronage. It then states that the production of such matter, purporting to be made by or on behalf of any proprietor, shall be presumptive evidence that he authorized its use, "in any *civil or criminal* action." The reference to civil actions, unless attributable to mere inadvertence, seems to be highly relevant. Another possible argument lies in a change from the wording of the old act, which simply stated that any person refusing accommodations should be guilty of a misdemeanor punishable by fine. The new act opens with the statement that "all persons . . . *shall be entitled* to the full and equal accommodations . . ." It seems plausible to argue that the new act grants affirmative rights against discrimination more explicitly than the old, and that these rights, though acquired by statute, may be civilly enforced. The strongest argument against civil suits is the very fact that the new act makes no mention of them in a clear fashion. Strikingly similar to the New York and New Jersey acts, it is significant that the act contains no provision for payments to the aggrieved party as do those statutes, since in most other respects the preceding acts were scrupulously duplicated. Whichever way the question is decided, there is little to be said for draftsmanship that casts only uncertainties upon an issue which should have been clarified.

Aside from criminal and civil liability there is no case authority for added means of enforcing these statutory rights. If juries consistently refuse to convict or to grant substantial damages, injunctive relief from discrimination might be thought desirable. It has been sought in one case under the Illinois act, but the court without hesitation dismissed the bill in view of

30. Colorado, Illinois, Indiana, Ohio, Wisconsin.
31. Michigan, Nebraska, Rhode Island, Washington.
32. Cornell v. Huber, 102 App. Div. 293, 92 N. Y. Supp. 434 (2d Dep't, 1905).
33. Bolden v. Grand Rapids Operating Corp., 239 Mich. 318, 214 N. W. 241 (1927).
34. Anderson v. Pantages Theater Co., 114 Wash. 24, 194 Pac. 813 (1921).
35. 61 Pa. Super. 412 (1915).
36. *Id.* at 418, 419.

the existing civil and criminal means of enforcement.[37] It is unlikely that any court would extend the scope of "inadequacy of the remedy at law" to include a situation where the only insufficiency consisted of a hostile jury. And it is only in unusual cases of persistent discrimination that injunctive relief is likely to be considered at all.

Another matter, probably sufficiently self-evident, should be noted in passing. The acts prohibit exclusion only on grounds of race, creed, or color. They in no way detract from a proprietor's privilege of excluding or ejecting persons of any race who conduct themselves in an objectionable manner.

As may have been expected, there has been considerable controversy as to the places covered by these statutes. Certain standard provisions remove from the field of possible doubt "conveyances on land and water", theatres, restaurants and inns. Barber shops are mentioned by name in many statutes, as are bathhouses and skating rinks. In New Jersey, New York, and Pennsylvania, a large number of places are specified. The questions of interpretation arise, of course, over places not specifically named. There has been litigation over bootblack stands,[38] saloons,[39] dance halls,[40] beauty parlors [41] and soda fountains.[42] Courts readily apply the dogma that penal statutes are to be strictly construed,[43] and the same is true of those in derogation of the common law. When general phrases, such as "places of public accommodation", are followed by enumeration of specific places, the general terms are of course limited by the latter list. Many statutes, after enumerating specific places, add the phrase, "and all other places of public accommodation . . ." Even in such a situation it has been held that this general phrase was to include only the same type of place as those specifically mentioned.[44] In one case, however, it was held that this

37. White v. Pasfield, 212 Ill. App. 73 (1918).

38. Darius v. Apostolos, 68 Colo. 323, 190 Pac. 510 (1920) (held within act under term "other places of public accommodation"); Burks v. Bosso, 180 N. Y. 341, 73 N. E. 58 (1905) (held not covered by "other places . . ." phrase, due to lack of similarity to places previously named in act).

39. Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31 (1898) (not covered by term "other places of . . . refreshment, accommodation, or entertainment"; quite possibly a deliberate omission due to likelihood of riots); Kellar v. Koerber, 61 Ohio St. 388, 55 N. E. 1002 (1899) (saloon not a place of public accommodation; public policy against drinking should be furthered). In New York, the Court of Appeals reversed lower court holdings and held saloons not places of public accommodation. Gibbs v. Arras Bros., 222 N. Y. 332, 118 N. E. 857 (1918) (three judges dissenting). The statute was amended shortly thereafter and now includes specific mention of saloons. The same is true of the present Minnesota statute. See *supra* note 5 for citations.

40. Johnson v. Auburn & Syracuse Ry., 169 App. Div. 864, 156 N. Y. Supp. 93 (4th Dep't, 1915) (not covered by "all other places . . ." term). The case was reversed in 222 N. Y. 443, 119 N. E. 72 (1918) but principally on the ground that the dance hall was an auxiliary to a trolley line, concededly within the statute as a public conveyance. In Youngstown Park and Falls Street Ry. v. Tokus, 4 Ohio App. 276 (1915) a dance hall was held covered by the term "and all other places of public accommodation or amusement."

41. Campbell v. Eichert, 155 Misc. 164, 278 N. Y. Supp. 946 (Sup. Ct. 1935) (not a place of public accommodation under statute).

42. Cecil v. Green, 161 Ill. 265, 43 N. E. 1105 (1896) (not a place of public accommodation under the act); Goff v. Savage, 122 Wash. 194, 210 Pac. 374 (1922) (same).

43. Chochos v. Burden, 74 Ind. App. 242, 128 N. E. 696 (1920) (ice cream parlor not covered by act); Brown v. Bell Co., 146 Iowa 89, 123 N. W. 231 (1909) (booth at Pure Food show not covered by act); Goff v. Savage, 122 Wash. 194, 210 Pac. 374 (1922) (same as to soda fountain).

44. Cecil v. Green, 161 Ill. 265, 43 N. E. 1105 (1896); Brown v. Bell Co., 146 Iowa 89, 123 N. W. 231 (1909); Gibbs v. Arras Bros., 222 N. Y. 332, 118 N. E. 857 (1918).

doctrine of *ejusdem generis* was inapplicable since the enumerated places were of so diversified a character as to have no common characteristic.[45]

The new Pennsylvania act does not include the phrase "and all other places . . ." This makes doubly significant the omission of at least two prominent types of amusement place in the lengthy tabulation of what the term "place of public accommodation . . ." is to be "deemed to include." Swimming pools and dance halls are the notable omissions, too important to admit of suggestions that the failure to include them was due to oversight. It is worthy of note that these places are not specifically mentioned in any of the acts, and while dance halls have been held included under the "and all other places . . ." clause,[46] an opposite result has been reached even under such a clause.[47] The court in the latter case pointed out that the omission of such a place may well have been deliberate, due to the increased element of physical proximity attached to that type of amusement place. No reported cases have been found passing on the question of swimming pools, though exclusion from bathhouses at a beach would come under the specific ban of most of the statutes. It seems safe to predict that pools and dancing establishments will not be held answerable to the new Pennsylvania bill, unless the above principles are completely disregarded.

The new Pennsylvania act borrows from its New York and New Jersey predecessors one clause of notable obscurity in meaning: "Nothing herein contained shall be construed to include any institution, club, or place or places of public accommodation, resort, or amusement, which is or are in its or their nature distinctly private . . ." What is meant by "clubs" and "institutions" of private character is relatively clear. This would appear to include organizations having, for example, a fixed membership, with monthly or yearly dues, as contrasted with establishments charging admission in the orthodox fashion. Even as to those terms close questions may of course arise. But it is by no means clear what is meant by the additional mention of "places of public accommodation . . . distinctly private . . ." There seems to be a contradiction in terms. It is quite conceivable that there will be a widespread formation of "clubs" to take advantage of this clause, and it will be interesting to see to what extent the courts will sweep aside such devices of this sort as appear to be no more than camouflage. It has even been suggested that this provision in the new Pennsylvania act delimits the entire statute to places conducted by the state or municipality, since all those "distinctly private" are exempt.[47a] This interpretation appears to require small consideration, but the fact remains that the true meaning of the clause is thoroughly hidden, perhaps non-existent.

An important practical matter concerns the legality of providing separate, but equal, acommodations in theaters and the like. It has been held that refusal to seat a negro in the seat to which his ticket entitled him, is violative of the civil rights act, although he was offered seating in a different section of the house.[48] Since acquisition of a ticket merely adds a contract

45. Darius v. Apostolos, 68 Colo. 323, 190 Pac. 510 (1920).

46. Youngstown Park and Falls Street Ry. v. Tokus, 4 Ohio App. 276 (1915).

47. Johnson v. Auburn & Syracuse Ry., 169 App. Div. 864, 156 N. Y. Supp. 93 (4th Dep't, 1915). See *supra* note 40 for later history of this case.

47a. See pamphlet *"Equal Rights Law"*, published by Pa. State Hotel Assn. (1935) at 4.

48. Joyner v. Moore-Wiggins Co., 152 App. Div. 266, 136 N. Y. Supp. 578 (4th Dep't, 1912); Anderson v. Pantages Theater Co., 114 Wash. 24, 194 Pac. 813 (1921).

right to the patron's legal standing, it would appear to follow that restricting negroes to a particular section is illegal irrespective of whether the complaining party had secured a ticket calling for a particular seat. It has been so decided.[49] The theory appears to be that having a portion of the theatre open to whites and not to negroes, constitutes discrimination. This may be true if the whites are allowed seats in any portion of the theatre, but it is open to serious question in case negroes have a section from which whites are excluded and which is fully as adequate as other sections. In such a case both races are treated equally. This point does not appear to have been pressed in the cases, however. The difficulty with such an argument is that separate accommodations in a theatre are seldom in fact equal. Seats on one side are on the whole less desirable than those in the center, and balcony accommodations cannot accurately be termed the equivalent of downstairs seats. In a New York case it was held proper for the lower court to exclude evidence that many persons preferred balcony seats,[50] and this seems a commendably realistic view. As in other instances, the Pennsylvania position here is unclear. In *Commonwealth v. George,*[51] the Superior Court reversed the trial court for not leaving it to the jury to find whether limiting negroes to balcony seats was not a sufficient compliance with the statute. But it will be noted that the old act prohibited only refusal of accommodations; no mention was made of "full and equal" accommodations. Seating in a balcony is unquestionably "accommodation", but it by no means follows that it will suffice under the new act, which requires equality of accommodation. This is perhaps the gravest question arising under the new act, and there appears to be better than an even chance that segregation of negroes in balconies will be held no longer lawful.

Two New York cases present an interesting diversion from the orthodox type of question arising under the statutes. In *Matthews v. Hotz,*[52] it was held that a white man who had been charged exorbitant prices in a saloon because he was accompanied by a negro had no ground for complaint under the civil rights act, since the discrimination was due not to his but to his companion's color. In *Cohn v. Goldgraben,*[53] the court became impaled upon the horns of a dilemma. The white plaintiff was denied service in a colored restaurant because he was with a negro companion and the establishment had a rule against serving racially mixed parties at the same table. The majority of the court held that there was no violation of the civil rights bill, since the refusal was due not solely to the plaintiff's color, but to that coupled with the color of his companion. A dissenting opinion was entered, urging that the plaintiff's color had been the real reason for the denial of accommodation—had he been a negro, he would have been served, since the party would not then have been mixed. These decisions are, of course, more interesting than significant.

49. Jones v. Kehrlein, 49 Cal. App. 646, 194 Pac. 55 (1920); Guy v. Tri-State Amusement Co., 7 Ohio App. 509 (1917). Separate accommodation in restaurants has also been held an insufficient compliance with the act. Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718 (1890).

50. Joyner v. Moore-Wiggins Co., 152 App. Div. 266, 136 N. Y. Supp. 578 (4th Dep't, 1912).

51. 61 Pa. Super. 412 (1915).

52. 173 N. Y. Supp. 234 (N. Y. Sup. Ct. 1918).

53. 103 Misc. 500, 170 N. Y. Supp. 407 (Sup. Ct. 1918).

It should be pointed out that whatever benefits may come of the new Pennsylvania act can scarcely be credited to the legislature which passed it. Political timidity seems clearly responsible for the lack of opposition; although only a single vote was cast against the bill, there was a frantic effort, just too late, to recall it before the Governor signed.[54]

The social advisability of civil rights legislation is the most controversial phase of the whole matter. The reported cases do not, of course, give an adequate picture of the practical consequences of the statutes, and it is to those consequences rather than to legalistic problems, that greatest importance attaches. Over a long period of time, it is likely that the acts will contribute in some measure to removing the barriers of race prejudice, and to that extent they may be regarded as desirable. Beyond that, little can profitably be said except that there is a delicate problem of conflicting interests. Against the fairly obvious interest of the colored race in a more equal standing in the community, stands the interest of some whites in being free from what is to them distasteful contact with negroes in places of amusement. Perhaps more substantial opposition to the case for the negro is to be found in the alleged financial detriment to proprietors within the scope of the acts. This factor loses much of its magnitude when it is recalled that the acts apply to the competitors of any given proprietor, as well as to him. There is, to be sure, a possibility of definite harm to any enterprise on which belligerent colored organizations might decide to "gang up" by sending there an abnormal amount of colored trade. But no instances of anything of this sort have been reported in the public press, and it seems reasonable to suppose that such measures will not be instituted. Moderation on both sides is necessary if the application of such legislation is to be in any sense successful.

L. M. G.

54. See TIME, August 12, 1935, at 10.