

IN THE
Supreme Court of the United States
OCTOBER TERM, 1970

No. 1292

MOOSE LODGE NO. 107, *Appellant*,

v.

K. LEROY IRVIS, *et al.*

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA*

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APPENDIX

I. Relevant Docket Entries

- March 25, 1969—Complaint filed, with request for three judge court.
- March 28, 1969—Order requesting convening of three judge court.
- April 15, 1969—Order of Chief Judge Hastie, C.A. 3, convening a three judge court.
- April 28, 1969—Motion to dismiss of individual defendants Scott et al. filed.
- May 2, 1969—Motion to dismiss of defendant Moose Lodge No. 107 filed.
- September 9, 1969—Motions to dismiss argued.
- September 22, 1969—Orders denying both motions to dismiss.
- October 6, 1969—Answer of individual defendants Scott et al. filed.
- October 20, 1969—Answer of defendant Moose Lodge No. 107 filed.
- January 26, 1970—Stipulation of facts filed.
- January 28, 1970—Plaintiff's motion for summary judgment filed.
- March 11, 1970—Brief of Pennsylvania Liquor Control Board, Defendant, Contra Plaintiff's Motion for Summary Judgment, filed.

May 14, 1970—Motion for summary judgment argued.

May 22, 1970—Supplemental stipulation of facts filed.

October 8, 1970—Opinion of three judge court filed—“ * * *

We therefore hold that the club license granted by the Liquor Control Board of the Commonwealth of Pennsylvania to the Moose Lodge No. 107 is invalid because it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution. An appropriate form of decree may be submitted.”

November 13, 1970—Final decree entered.

December 3, 1970—Defendant Moose Lodge’s motion to modify final decree filed.

December 14, 1970—Plaintiff’s answer to motion to modify final decree filed.

January 4, 1971—Motion of defendant Moose Lodge for stay pending appeal filed.

January 4, 1971—Notice of appeal filed by defendant Moose Lodge.

January 5, 1971—Order denying motion of Moose Lodge to modify final decree.

January 8, 1971—Order staying final decree pending appeal until final disposition of cause by Supreme Court.

2. Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 69-107

K. LEROY IRVIS, *Plaintiff*

v.

WILLIAM Z. SCOTT, Chairman; EDWIN WINNER, member and
GEORGE R. BORTZ, member, LIQUOR CONTROL BOARD,
COMMONWEALTH OF PENNSYLVANIA

and

MOOSE LODGE No. 107,
Harrisburg, Pennsylvania, *Defendants*

COMPLAINT

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000) Dollars. This action also is brought to redress the deprivation by Defendants, their agents, employees and others acting in concert with them, under State law, statute, ordinance, regulation, custom or usage of Plaintiff's right to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States. This action is authorized by Title 42 U.S.C. § 1983, and the jurisdiction of this Court is invoked under Title 28 U.S.C. § 1331 and § 1343(3) and (4).

2. Defendants Scott, Winner and Bortz are the chairman and members of the Pennsylvania Liquor Control Board, an independent administrative board of the Commonwealth of Pennsylvania. They are, collectively, as chairman and members of such Board, charged with and do exercise comprehensive supervisory power over the administration and

conduct of the Pennsylvania alcoholic beverage control system, all in accordance with the provisions of the Pennsylvania "Liquor Code," Act of April 12, 1951, P.L. 90, as amended, Title 47, Purdon's Pa. Stat. Ann. §§ 1-101 to 9-902. Said Defendants are referred to hereinafter as Defendant Board.

3. Pursuant to the power exercised by them in accordance with the statute designated in paragraph 2 of this Complaint, Defendant Board has, among others, the power and duty (a) to grant, issue, suspend and revoke all licenses and permits authorized to be issued under the aforesaid "Liquor Code" and under the regulations of the Pennsylvania Liquor Control Board for the manufacture, possession, sale, consumption, importation, use, storage, transportation and delivery of liquor, alcohol and malt or brewed beverages and (b) to regulate the issuance of such licenses and permits and the conduct, management, sanitation and equipment of places licensed or included in permits.

4. Included among the licensing and regulatory powers and duties so granted to and exercised by Defendant Board, pursuant to the aforesaid "Liquor Code," is the authority to issue a retail liquor license for any premises kept by a club, entitling such club to purchase liquor from a Pennsylvania Liquor Store, to keep such liquor on the premises and, subject to the provisions of the aforesaid "Liquor Code" and the Pennsylvania Liquor Control Board's regulations promulgated thereunder, to sell such liquor and also malt or brewed beverages to members for consumption on the club premises. The receipt and ownership of such a license is a valuable privilege granted to a club by the Commonwealth of Pennsylvania through Defendant Board.

5. A club, according to the aforesaid "Liquor Code," is any reputable group of individuals who are associated together not for profit for legitimate purposes of mutual benefit, entertainment, fellowship or lawful convenience, having some primary interest and activity to which the

sale of liquor or malt and beverages shall be secondary, and which regularly occupies a clubhouse or quarters for the use of its members.

6. Every applicant for a club liquor license under the aforesaid "Liquor Code" must apply therefor in writing to the Pennsylvania Liquor Control Board and supply such information as said Board prescribes. Every applicant must also submit a filing fee, a license fee and a bond. Every application must set forth a description of the premises for which a license is required and such other information, description or plan of that part of the club where it is proposed to keep and sell liquor as said Board, by regulation, requires.

7. Defendant Board, upon receipt of an application for a club liquor license, the proper fees and bond, may issue such license if they are satisfied that the statements in the application are true, that the applicant is the only person pecuniarily interested in the business sought to be licensed, that the applicant is a person of good repute, that the premises meet all of the requirements of the aforesaid "Liquor Code" and of the said Board's regulations, that the applicant seeks, in fact, a license for a club and that the issuance of such a license is not otherwise prohibited by any of the provisions of the aforesaid "Liquor Code."

8. Pursuant to the provisions of the aforesaid "Liquor Code," extensive regulation and restriction of the number of retail liquor licenses which may be issued and of all aspects of the possession and sale of liquor and malt and brewed beverages by a licensee is carried out by Defendant Board. Such regulations and restrictions encompass, among others, a limitation on the number of licenses which may be issued in a municipality dependent upon the population of the municipality, the places where such beverages may be sold, the persons to whom such beverages may be sold, the times when such beverages may be sold, the transfer and annual renewal of licenses and the nature and ex-

tent of financial records which must be maintained by a licensee. Provision is made in said "Liquor Code" for the revocation and suspension of licenses by Defendant Board for violation by a licensee of any provision of the said "Liquor Code" or of any regulation of the Pennsylvania Liquor Control Board and for the imposition of criminal penalties upon any person who violates specifically prohibited acts set forth in said "Liquor Code."

9. Nothing contained either in said "Liquor Code" or in Defendant Board's regulations promulgated thereunder prohibits, restricts or regulates the conduct of any licensee in refusing membership, admission or service to any person because of such person's race or color; and Defendant Board, through its Chairman, Defendant Scott, has stated that it has no power under said "Liquor Code" to refuse to issue or renew, or to revoke or suspend, any license because of any such refusal by a licensee.

10. Defendant Moose Lodge No. 107, Harrisburg, Pennsylvania, (hereinafter referred to as Defendant Lodge) is a club as defined in the said "Liquor Code" and is the holder of a club liquor license duly issued by Defendant Board.

11. On December 29, 1968, Plaintiff entered the premises of Defendant Lodge and requested service of food and beverage. Plaintiff is a Negro, a citizen of the United States, a member of the Pennsylvania House of Representatives and the duly elected leader of the majority party of said House of Representatives. Solely on account of Plaintiff's being a Negro, Defendant Lodge, through its agents and employees, refused service to Plaintiff.

12. Defendant Lodge has stated that under its charter, by-laws and/or operating practices, its membership, and its facilities, services and privileges attendant thereon, are not available to any Negro. Defendant Lodge's preliminary

membership application contains the following certification to be made by an applicant :

“I hereby certify that I am of sound mind and body, being a member of the Caucasian, white race, and not married to one of another race, and a believer in a Supreme Being.”

13. The issuance and renewal of Defendant Lodge’s club liquor license by Defendant Board, pursuant to the provisions of the Pennsylvania “Liquor Code,” is unconstitutional and illegal and will continue to be unconstitutional and illegal for the reason that such actions necessarily involve the Defendant Board and, therefore, the Commonwealth of Pennsylvania in Defendant Lodge’s acts of discrimination based solely on Plaintiff’s being a Negro and deprive Plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

14. By virtue of the acts of Defendant Board, in issuing and renewing Defendant Lodge’s retail liquor license, Plaintiff has suffered, is now suffering and will continue to suffer irreparable injury. Plaintiff has no adequate remedy at law to redress this violation of his constitutional rights other than by this action for injunctive and declaratory relief because no other remedy would afford Plaintiff substantial protection from a continuation of Defendant Board’s practices in issuing and renewing club liquor licenses to clubs which so discriminate.

WHEREFORE, Plaintiff prays that this Court:

1. Pursuant to the requirements of Title 28 U.S.C. §§ 2281 and 2284, convene a District Court of three judges to hear and determine this action.

2. After a hearing of this action according to law:

- (a) Issue a judgment declaring that the Pennsylvania “Liquor Code,” Act of April 12, 1951, P.L. 90,

as amended, insofar as it authorizes and requires Defendant Board to issue and/or renew a club liquor license to Defendant Lodge without reference to the fact that Defendant Lodge, by virtue of its charter or by-laws or operating practices, refuses to make available to Negroes facilities, services and privileges offered by it, is in violation of Plaintiff's right to the equal protection of the laws and, hence, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(b) Issue a judgment declaring that the Pennsylvania "Liquor Code," Act of April 12, 1951, P.L. 90, as amended, insofar as it does not prohibit the issuance and/or renewal of a club liquor license by the Pennsylvania Liquor Control Board to a club applicant or licensee which refuses to make available to Negroes the facilities, services and privileges offered by the applicant, is unconstitutional for the reason that it deprives Plaintiff of his right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

(c) Enjoin permanently Defendants Scott, Winner and Bortz acting as the Pennsylvania Liquor Control Board, and their agents and employees, from issuing and/or renewing a club liquor license to or for Defendant Lodge.

(d) Order Defendants Scott, Winner and Bortz, acting as the Pennsylvania Liquor Control Board, to revoke any club liquor license now held by Defendant Lodge.

(e) Order Defendants Scott, Winner and Bortz, acting as the Pennsylvania Liquor Control Board, to promulgate regulations governing the issuance and renewal of licenses granted by them for the sale of liquor and/or malt and brewed beverages by clubs which state that

no such license will hereafter be issued and/or renewed if the applicant or licensee refuses to make available to any person the facilities, services and privileges offered by it by reason of such person's race or color.

(f) Retain jurisdiction of the cause until such time as the Court is assured from the activities of Defendant, their agents and employees, that its orders herein have been complied with and that no further unconstitutional action is threatened.

(g) Accord all such other, further or additional relief as may appear to the Court to be equitable and just.

(h) Allow Plaintiff herein his costs, reasonable attorney's fees and such other further or additional relief as may appear to the Court to be equitable and just.

/s/ HARRY J. RUBIN
 Harry J. Rubin
 LIVERANT, SENFT AND COHEN
 15 South Duke Street
 York, Pennsylvania 17401
 (717) 845-2641

 GERALD H. GOLDBERG
 Harrisburg, Pennsylvania

3. Request for a Three Judge Court

UNITED STATES DISTRICT COURT
 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

REQUEST FOR A THREE JUDGE COURT

Now, this 28th day of March, 1969, a complaint having been filed in this case seeking certain injunctive relief and a restraining order, and containing a request that a three judge district court as required by 28 U.S.C. §§ 2281 and

2284 be convened, and upon examination of the complaint it appearing that the action involves enforcement, operation and execution of a statute of the Commonwealth of Pennsylvania, I am of the opinion that a three judge court should be convened as requested.

Accordingly, a request for a three judge court is hereby made.

/s/ WILLIAM J. NEALON
United States District Judge

4. Order Constituting a Three Judge Court

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

ORDER CONSTITUTING A THREE JUDGE COURT

Pursuant to the provisions of section 2284, Title 28, United States Code, I designate Circuit Judge Abraham L. Freedman and Chief Judge Michael H. Sheridan to sit with District Judge William J. Nealon as members of the Court for the hearing and determination of the above-entitled case.

/s/ WILLIAM H. HASTIE
William H. Hastie
*Chief Judge Third
Judicial Council*

Dated: April 14, 1969

**5. Motion To Dismiss Action of Defendant Members of
Liquor Control Board**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

MOTION TO DISMISS ACTION

WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member
and GEORGE R. BORTZ, Member, Liquor Control Board,
Commonwealth of Pennsylvania, Defendants, move the
Court as follows :

1. To dismiss the action as to said defendants because
the Complaint fails to state a claim upon which relief can
be granted against said Defendants ;
2. To dismiss the action as to said Defendants because
no justiciable controversy exists as to said Defendants.

Respectfully submitted,

/s/ THOMAS J. SHANNON
Thomas J. Shannon
*Attorney for William Z. Scott,
Chairman, Edwin Winner,
Member and George R.
Bortz, Member Liquor
Control Board, Common-
wealth of Pennsylvania,
Defendants*

6. Motion To Dismiss of Defendant Moose Lodge No. 107

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

MOTION TO DISMISS

AND Now comes the above named Defendant, Moose Lodge No. 107, and moves your Honorable Court to dismiss the above action for the reason that the Complaint fails to state a claim against the Defendant, Moose Lodge No. 107, upon which relief can be granted.

Argument in support of this Motion will be presented at a hearing to be set by the Court at such time as the Court finds convenient.

CALDWELL, FOX & STONER
Two North Market Square
Harrisburg, Pennsylvania 17101

By /s/ THOMAS D. CALDWELL, JR.
*Attorneys for Moose
Lodge No. 107*

Dated: April 29, 1969.

7. Order Denying Motion of Defendants Scott, Winner and Bortz To Dismiss the Action

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

**ORDER DENYING MOTION OF DEFENDANTS
SCOTT, WINNER AND BORTZ TO DISMISS THE
ACTION**

This cause came on to be heard on the motion of defendants, William Z. Scott, Edwin Winner and George R. Bortz, to dismiss the action on the grounds that the complaint fails

to state a claim upon which relief can be granted, and that no justiciable controversy exists as to said defendants; and the court having considered the briefs filed herein, and having heard oral argument of counsel,

It is ORDERED that the defendants' motion be and the same is hereby denied.

/s/ ABRAHAM L. FREEDMAN
United States Circuit Judge

/s/ MICHAEL H. SHERIDAN
*Chief United States District
Judge*

/s/ WILLIAM J. NEALON
United States District Judge

Dated: September 22, 1969.

**8. Order Denying Motion of Defendant Moose Lodge No. 107
To Dismiss the Action**

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT

[Title omitted in printing.]

**ORDER DENYING MOTION OF DEFENDANT MOOSE
LODGE NO. 107 TO DISMISS THE ACTION**

This cause came on to be heard on the motion of defendant, Moose Lodge No. 107, to dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted; and the court having considered the briefs filed herein, and having heard oral argument of counsel,

It is ORDERED that the defendant's motion be and the same is hereby denied.

/s/ ABRAHAM L. FREEDMAN
United States Circuit Judge

/s/ MICHAEL H. SHERIDAN
*Chief United States
District Judge*

/s/ WILLIAM J. NEALON
United States District Judge

Dated: September 22, 1969.

9. Answer of Defendant Members of Liquor Control Board

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

ANSWER

WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD, COMMONWEALTH OF PENNSYLVANIA (hereinafter referred to as Liquor Control Board) make the following answer to the Complaint in the above captioned case:

1. The averments in Paragraphs 2, 6, 7, 8, 9 and 10 of the Complaint are admitted.

2. The averments in Paragraphs 3 and 4 of the Complaint are admitted with the qualification that the Liquor Control Board must exercise its powers in accordance with the provisions of the Pennsylvania "Liquor Code."

3. Paragraph 5 of the Complaint does not give the full definition of a club as set forth in the "Liquor Code" which is as follows:

" 'Club' shall mean any reputable group of individuals associated together not for profit for legitimate purposes of mutual benefit, entertainment, fellowship or lawful convenience, having some primary interest and activity to which the sale of liquor or malt and brewed beverages shall be only secondary, which, if incorporated, has been in continuous existence and operation for at least one year, and if first licensed after June sixteenth, one thousand nine hundred thirty-seven, shall have been incorporated in this Commonwealth, and, if unincorporated, for at least ten years, immediately preceding the date of its application for a license under this act, and which regularly occupies, as owner or lessee, a clubhouse or quarters for the use of its members. Continuous existence must be proven by satisfactory evidence. The board shall refuse to issue a license if it appears that the charter is not in possession of the original incorporators or their direct or legitimate successors. The club shall hold regular meetings, conduct its business through officers regularly elected, admit members by written application, investigation and ballot, and charge and collect dues from elected members, and maintain such records as the board shall from time to time prescribe, but any such club may waive or reduce in amount, or pay from its club funds, the dues of any person who was a member at the time he was inducted into the military service of the United States or was enrolled in the armed force of the United States pursuant to any selective service act during the time of the member's actual service or enrollment."

4. The Liquor Control Board is without knowledge or information sufficient to form a belief as to the truth of the

averments in Paragraphs 11 and 12 of the Complaint and proof thereof is demanded.

5. Paragraphs 1, 13 and 14 of the Complaint are denied and on the contrary it is averred that the issuance and renewal of a club liquor license by the Liquor Control Board pursuant to the provisions of the Pennsylvania "Liquor Code" is not unconstitutional or illegal and does not involve the Board or the Commonwealth of Pennsylvania in unlawful discrimination by reason of the fact that a club holding a liquor license issued by the Liquor Control Board may restrict its membership to persons of one race. It is further averred that such issuance and renewal of a club liquor license does not deprive Plaintiff of any rights under the Fourteenth Amendment to the Constitution of the United States.

/s/ THOMAS J. SHANNON
 Thomas J. Shannon,
*Attorney for William Z. Scott,
 Chairman, Edwin Winner,
 Member and George R.
 Bortz, Member, Pennsyl-
 vania Liquor Control Board
 Commonwealth of Pennsyl-
 vania, Defendants*

10. Answer of Defendant Moose Lodge No. 107

IN THE UNITED STATES DISTRICT COURT
 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

ANSWER OF DEFENDANT, MOOSE LODGE NO. 107

AND Now comes Moose Lodge No. 107 which answers the Complaint in the above captioned case as follows :

1. Paragraph 1 of the Complaint is denied. On the contrary, it is averred that neither action of Moose Lodge No.

107 nor the Pennsylvania Liquor Control Board as alleged in the Complaint deprived the Plaintiff of any right which arises under the Fourteenth Amendment or any other provision in the Constitution of the United States.

2. Paragraphs 2, 3, and 4 of Plaintiff's Complaint are admitted.

5. Paragraph 5 of Plaintiff's Complaint is answered by incorporating herein Paragraph 3 of the Answer filed by the Defendant, Liquor Control Board.

6. Paragraphs 6, 7, 8, 9, 10, and 11 of Plaintiff's Complaint are admitted.

12. Paragraph 12 of Plaintiff's Complaint is denied insofar as it refers to Defendant's Charter By-laws and/or operating practices. Defendant is a member lodge of the Loyal Order of Moose. It received its charter from the Supreme Lodge of the World Loyal Order of Moose, a corporation not for profit, chartered under the laws of the State of Indiana. Under the terms of the aforesaid charter, Moose Lodge No. 107 is bound by the Constitution and general laws of the Supreme Lodge of the World Loyal Order of Moose, Title 7, Section 71.1 of which states in part as follows :

“The membership of lodges shall be composed of male persons of the Caucasian or white race above the age of twenty-one (21) years, and not married to someone of any other than the Caucasian or white race, who are of good moral character, physically and mentally normal, who shall profess a belief in a supreme being ...”

13. Paragraphs 13 and 14 of the Plaintiff's Complaint are denied. On the contrary it is averred that neither the action of Moose Lodge No. 107 nor the Pennsylvania Liquor Control Board as alleged in the Complaint deprived the Plaintiff of any right which arises under the Fourteenth

Amendment or any provision of the Constitution of the United States.

AFFIRMATIVE DEFENSES

Further answering and by way of a first affirmative defense, Defendant, Moose Lodge No. 107, alleges:

1. Defendant as a member lodge of the Loyal Order of Moose is governed and subject to its constitution and by-laws. Defendant, in fact, operates in accordance with said constitution and by-laws.

2. The purposes of the lodge as set forth in the aforesaid constitution and by-laws are to unite its members in bonds of fraternity and to serve the members and their families in specified ways by the operation of institutions for the purpose of educating the young and assisting the aged.

3. Membership in the Defendant Lodge is not a right available to the general public. Membership is attained only on the basis of invitation. The invited applicant is required to sign an application, and a health statement, subjecting himself to investigation insofar as his moral character is concerned. Before his admission, his application is submitted to the Lodge at a duly called regular meeting, wherein his application is read, the report of the investigating committee is stated, and he is voted upon by the members assembled. Three (3) negative votes can bar any applicant from membership. The voting is secret. Thereafter, he is required to take an obligation, submit to an enrollment ceremony and take a final and binding obligation, all of which are conditions precedent to his being admitted to membership. Thereafter, the member is required to pay yearly dues.

4. The operation of the Lodge is as in other fraternal organizations, to wit: closed meetings for the conduct of business, initiation of new members and election of officers.

5. Guests are not permitted to attend meetings of a Lodge and are permitted to attend social functions only by invitation.

6. Defendant Lodge is, as above set out, and in all other respects, private in nature and does not, or appear to, have any public characteristics. The social activities enjoyed by the members are but an extension of the social activities as enjoyed in their homes.

Further answering and by way of a second affirmative defense, Defendant alleges:

1. It is guaranteed its right to exist and its members have a right to join together with those whom they choose to be members under the First Amendment of the Constitution of the United States. The service of food and liquor is but an extension of these rights which make them more meaningful.

2. Impairment of these activities by the revocation of its liquor license would constitute a penalty imposed because of its exercise of its constitutionally protected right.

Further answering by way of a third affirmative defense, Defendant alleges:

1. Plaintiff has not suffered the abridgement of any constitutional right or the loss of any property by reason of any unlawful action on the part of the Defendant.

Further answering by way of a fourth affirmative defense, Defendant alleges:

1. Should the prayer of the Complaint herein be granted and the Defendant denied a right to obtain a liquor license, it would be greatly impeded in that it would sustain a loss of membership and its capability of carrying on its benevolent purposes would be seriously impaired.

Further answering by way of a fifth affirmative defense, Defendant alleges:

1. Should the prayer of the Complaint herein be granted and the Defendant be denied a liquor license or the right to obtain a liquor license, the Defendant would be greatly impeded in that it would sustain a great loss in membership and its capability of contributing to the purposes of the Supreme Lodge would be seriously impaired.

WHEREFORE, Defendant, having fully answered Plaintiff's Complaint, prays that the said Complaint be dismissed with prejudice.

CALDWELL, CLOUSER & KEARNS
123 Walnut Street, Harrisburg, Pa.

By /s/ THOMAS D. CALDWELL, JR.
Attorneys for Defendant,
Moose Lodge No. 107

II. Stipulation of Facts

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

STIPULATION

It is hereby stipulated and agreed by and among Harry J. Rubin, attorney for K. Leroy Irvis, plaintiff, Thomas J. Shannon, attorney for William Z. Scott, Edwin Winner and George R. Bortz, members of the Liquor Control Board of the Commonwealth of Pennsylvania, defendant, and Thomas D. Caldwell, Jr., attorney for Moose Lodge No. 107, defendant, as follows:

A. The following facts are true and correct and shall be considered part of the record in this action:

1. Defendant Moose Lodge is a member lodge of the Loyal Order of Moose. It has no charter separate and

apart from the charter granted it by the Loyal Order of Moose nor by-laws separate and apart from those of the Loyal Order of Moose. Its operating practices conform to that charter and those by-laws, except as to catered functions as set forth in paragraph A-6, which are in violation of by-laws 92.1 and 92.2, which are set out in paragraph A-4(b). Defendant Moose Lodge actually received its charter from the Supreme Lodge of the World, Loyal Order of Moose, a corporation not for profit chartered under the laws of the State of Indiana. Under the charter granted it by the Supreme Lodge, defendant Moose Lodge is bound by the Constitution and general by-laws of the Supreme Lodge. Title 7, § 71.1 of this Constitution and general laws states in part as follows :

“The membership of lodges shall be composed of male persons of the Caucasian or white race above the age of twenty-one (21) years, and not married to someone of any other than the Caucasian or white race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being”

Pursuant to this provision, no Negro (including Plaintiff) may become a member of a Moose Lodge and enjoy any of the benefits or participate in any of the activities attendant thereon. Any person applying for membership in defendant Moose Lodge must submit a preliminary membership application containing the following certification :

“I hereby certify that I am of sound mind and body, being a member of the Caucasian, white race, and not married to one of another race, and a believer in a Supreme Being.”

2. The objects and purposes of defendant Moose Lodge are set forth in the Constitution of the Supreme

Lodge of the World, Loyal Order of Moose. These objects and purposes are stated as follows :

“The objects and purposes of said fraternal and charitable lodges, chapters, and other units are to unite in the bonds of fraternity, benevolence, and charity all acceptable white persons of good character ; to educate and improve their members and the families of their members, socially, morally, and intellectually ; to assist their members and their families in time of need ; to aid and assist the aged members of the said lodges, and their wives ; to encourage and educate their members in patriotism and obedience to the laws of the country in which such lodges or other units exist, and to encourage tolerance of every kind ; to render particular service to orphaned or dependent children by the operation of one or more vocational, educational institutions of the type and character of the institution now called ‘Mooseheart,’ and located at Mooseheart, in the State of Illinois ; to serve aged members and their wives in a special and an unusual way at one or more institutions of the character and type of the place called ‘Moosehaven’ located at Orange Park, in the State of Florida ; to create and maintain foundations, endowment funds, or trust funds, for the purpose of aiding and assisting in carrying on the charitable and philanthropic enterprises heretofore mentioned ; provided, however, that the corporation may act as trustee in the administration of such trust funds, with authority to use the interest therefrom and, in cases of emergency, the principal as well, for the perpetuation of Mooseheart and Moosehaven or either of them.”

Admission to Mooseheart or Moosehaven is restricted to members of the various Moose Lodges and their immediate families.

3. Membership in the Defendant Lodge is not a right available to the general public. Membership is attained only on the basis of invitation. The invited applicant is required to sign an application, and a health statement, subjecting himself to investigation. Before his admission, his application is submitted to the Lodge at a duly called regular meeting, wherein his application is read, the report of the investigating committee is stated, and he is voted upon by the members assembled. Three (3) negative votes can bar any applicant from membership. The voting is secret. Thereafter, he is required to taken an obligation, submit to an enrollment ceremony and take a final and binding obligation, all of which are conditions precedent to his being admitted to membership. Thereafter, the member is required to pay yearly dues. However, no Negro (including the Plaintiff) may be considered for membership; and any Negro who might otherwise qualify to apply for membership and meet all of the foregoing conditions for membership is not eligible to apply for membership solely because he is a Negro.

4. (a) Defendant Lodge is, in all respects, private in nature and does not appear to have any public characteristics. The social activities enjoyed by the members may be considered similar in kind to social activities enjoyed by the members in their homes; however, no member must be specifically invited by any other member in order to gain entrance to the Lodge's facilities, and no member must obtain any license from Defendant Liquor Control Board in order to enjoy such social activities in his home. Only members are permitted in any social club or home operated or maintained by any Lodge, except upon the invitation of the House Committee or upon the invitation of a member in good standing with the consent of the House Committee. No person, whether a visitor or otherwise, not

a member in good standing is permitted to purchase anything whatsoever in any social club or home maintained or operated by any Lodge.

(b) Chapter 92 of the General Laws of the Supreme Lodge is entitled “Duties Placed Upon Club Operation. Sections 92.1 and 92.2 are as follows:

“Sec. 92.1—To prevent Admission of Non Members—There shall never at any time be admitted to any social club or home maintained or operated by any lodge, any person who is not a member of some lodge in good standing, and it is hereby expressly made the duty of each member of the Order when so requested to submit for inspection his receipt for dues to any member of any House Committee or its authorized employee.

“Sec. 92.2—To Prevent Admission—Exceptions—Only members shall be permitted in any social club or home operated or maintained by any lodge, except upon the invitation of the House Committee or upon the invitation of a member in good standing with the consent of the House Committee, and in the event any such person be admitted upon such invitation to any such social club or home, the member or members so inviting such person or persons shall be responsible for their conduct in such social club or home, and shall be responsible for any property damaged or carried away by any such visitor.”

5. Defendant Moose Lodge conducts all of its activities in and from a building which is owned by it. It has never been the recipient of any public funds. None of its activities, including but not limited to, the acquisition of the building site, the construction of its building or any phase of its operation, was or is financed by public funds or obligations. Defendant Moose Lodge does not conduct any function or activity in conjunction

with any public or community group. It does not hold itself out as conducting any community or public activity.

6. Under the Pennsylvania Liquor Code (Section 401, 47 Purdon's Pa. Stat. Anno.—Section 4-401) and Regulation No. 113 of the Pennsylvania Liquor Control Board, a private club licensee may apply for and obtain the privilege of having its facilities used by non-member groups from the public at large on a catered basis. Defendant Moose Lodge has obtained such privilege and from time to time makes its facilities available to such groups on such basis. When it does so, Defendant Moose Lodge imposes no restrictions on the race or color of persons belonging to the outside group so using its facilities. The gross revenue realized by Defendant Moose Lodge from such use of its facilities on a catered basis is less than five (5%) per cent of its total operating revenues.

B. The following admissions shall be considered part of the record in this action:

1. Both Defendants admit the averments of paragraphs 2, 3, 4, 6, 7, 8, 9, 10 and 11 of Plaintiff's Complaint.

2. With regard to paragraph 5 of Plaintiff's Complaint, Plaintiff admits the averments of paragraph 3 of Defendant Liquor Control Board's answer (which averments are incorporated by reference by Defendant Moose Lodge in paragraph 5 of its answer).

3. Plaintiff admits the factual averments of the following paragraphs of Defendant Moose Lodge's affirmative defenses:

First affirmative defense: paragraphs 1, 4, 5.

Fourth affirmative defense: paragraph 1.

Fifth affirmative defense: paragraph 1.

C. The Regulations promulgated by Defendant Liquor Control Board, a copy of which is attached hereto, shall be considered part of the record in this action.

/s/ HARRY J. RUBIN
Harry J. Rubin
Liverant, Senft and Cohen
15 South Duke Street
York, Pennsylvania 17401
Attorney for Plaintiff

/s/ THOMAS J. SHANNON
Thomas J. Shannon
Pennsylvania Liquor
Control Board
Harrisburg, Pennsylvania
Attorney for Defendants
William Z. Scott, Edwin
Winner and George R.
Bortz

/s/ THOMAS D. CALDWELL, JR.
Thomas D. Caldwell, Jr.
Caldwell, Clouser & Kearns
123 Walnut Street
Harrisburg, Pennsylvania
Attorney for Defendant
Moose Lodge No. 107

[Pennsylvania Liquor Control Board Regulations, attached to original Stipulation, omitted in printing; they are available in Appendix F to the Jurisdictional Statement.]

12. Plaintiff's Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court as follows :

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in Plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that Plaintiff is entitled to a judgment as a matter of law; or (in the alternative).

2. That if summary judgment is not rendered in Plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, the Court, at the hearing on the motion, by examining the pleadings and the stipulation before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted and thereupon enter an order specifying what facts appear without substantial controversy and directing such further proceedings in the action as are just.

3. This motion is based upon (a) Plaintiff's complaint, (b) both Defendants' answers and (c) the stipulation of counsel filed in this action.

/s/ HARRY J. RUBIN
Harry J. Rubin
Liverant, Senft and Cohen
15 South Duke Street
York, Pennsylvania 17401
Attorney for Plaintiff

13. Supplemental Stipulation of Facts

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

SUPPLEMENTAL STIPULATION

It is hereby stipulated and agreed by and among Harry J. Rubin, attorney for K. Leroy Irvis, plaintiff, Thomas J. Shannon, attorney for William Z. Scott, Edwin Winner and George R. Bortz, members of the Liquor Control Board of the Commonwealth of Pennsylvania, defendant, and Thomas D. Caldwell, Jr., attorney for Moose Lodge No. 107, defendant, as follows:

1. Proper notice, in accordance with 28 U.S.C. § 2284, of the hearing scheduled on May 14, 1970, on plaintiff's motion for summary judgment was given to the Governor and Attorney General of Pennsylvania; and counsel for defendant Liquor Control Board appears at such hearing on behalf of both the Governor and Attorney General of Pennsylvania.

2. Defendant Moose Lodge No. 107 is a non-profit corporation organized under the laws of Pennsylvania and is the holder of a club retail liquor license issued by defendant Liquor Control Board pursuant to the provisions of the Pennsylvania "Liquor Code."

3. (a) A summary of the operating statements of defendant Liquor Control Board from the date it began operations through the close of the fiscal year July 1, 1968—June 30, 1969, marked Exhibit "A", is attached hereto and made a part hereof. Counsel agree that the figures appearing thereon are true and correct.

(b) No comparable figures are available regarding private club activities in the Commonwealth of Pennsylvania.

/s/ HARRY J. RUBIN
Harry J. Rubin
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15 South Duke Street
York, Pennsylvania 17401
Attorney for Plaintiff

/s/ THOMAS J. SHANNON
Thomas J. Shannon
Pennsylvania Liquor Control
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William Z. Scott, Edwin
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Bortz

/s/ THOMAS D. CALDWELL, JR.
Thomas D. Caldwell, Jr.
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123 Walnut Street
Harrisburg, Pennsylvania
Attorney for Defendant
Moose Lodge No. 107

[Exhibit "A" to Supplemental Stipulation omitted in printing.]

14. Opinion of District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 69-107

K. LEROY IRVIS, *Plaintiff*

v.

WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member,
and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD,
COMMONWEALTH OF PENNSYLVANIA, and
MOOSE LODGE No. 107, Harrisburg, Pennsylvania,
Defendants.

Before FREEDMAN, *Circuit Judge*, SHERIDAN, *Chief Judge*,
and NEALON, *District Judge*.

OPINION

(Filed October 8, 1970)

FREEDMAN, *Circuit Judge*.

The facts in this case are undisputed. They are drawn from the pleadings and stipulations of the parties.

Defendant Moose Lodge No. 107 is a non-profit corporation organized under the laws of Pennsylvania. It is a subordinate lodge chartered by the Supreme Lodge of the World, Loyal Order of Moose, a non-profit corporation organized under the laws of Indiana, which we permitted to intervene and argue as *amicus curiae*. The local Lodge conducts all its activities in Harrisburg in a building which it owns. It has never been the recipient of public funds.

It is the holder of a club liquor license issued by the defendant Liquor Control Board of the Commonwealth of Pennsylvania, pursuant to the provisions of the Pennsylvania Liquor Code, Act of April 12, 1951, P.L. 90, as amended.¹

Under its charter from the Supreme Lodge the local Lodge is bound by the constitution and general by-laws of the Supreme Lodge.² The Constitution of the Supreme Lodge provides: "The membership of the lodges shall be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married

¹ 47 Purdon's Pa. Stat. Annot. §§ 1-101 et seq.

² The objects and purposes of the local Lodge are set forth in the Constitution of the Supreme Lodge as follows:

"The objects and purposes of said fraternal and charitable lodges, chapters, and other units are to unite in the bonds of fraternity, benevolence, and charity all acceptable white persons of good character; to educate and improve their members and the families of their members, socially, morally, and intellectually; to assist their members and their families in time of need; to aid and assist the aged members of the said lodges, and their wives; to encourage and educate their members in patriotism and obedience to the laws of the country in which such lodges or other units exist, and to encourage tolerance of every kind; to render particular service to orphaned or dependent children by the operation of one or more vocational, educational institutions of the type and character of the institution called 'Mooseheart,' and located at Mooseheart, in the State of Illinois; to serve aged members and their wives in a special and unusual way at one or more institutions of the character and type of the place called 'Moosehaven,' located at Orange Park, in the State of Florida; to create and maintain foundations, endowment funds, or trust funds, for the purpose of aiding and assisting in carrying on the charitable and philanthropic enterprises heretofore mentioned; provided, however, that the corporation may act as trustee in the administration of such trust funds, with authority to use the interest therefrom and, in cases of emergency, the principal as well, for the perpetuation of Mooseheart and Moosehaven or either of them."

to someone other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being. . . .”³ The lodges accordingly maintain a policy and practice of restricting membership to the Caucasian race and permitting members to bring only Caucasian guests on lodge premises, particularly to the dining room and bar.⁴

On Sunday, December 29, 1968, a Caucasian member in good standing brought plaintiff, a Negro, to the Lodge’s dining room and bar as his guest and requested service of food and beverages. The Lodge through its employees refused service to plaintiff solely because he is a Negro.

Plaintiff complained of the refusal of service to the Pennsylvania Human Relations Commission, which upheld his complaint. The Commission held that the dining room was a “place of public accommodation,” within the definition of the Pennsylvania Human Relations Act of February 28, 1961, P.L. 47,⁵ and that the local Lodge had been guilty of discrimination against defendant. On appeal by the local Lodge the Court of Common Pleas of Dauphin County reversed the Commission and held that the dining room was not a place of public accommodation within the meaning of the Act.⁶

In the meanwhile plaintiff brought this action in the District Court for the Middle Section of Pennsylvania, and this three-judge court was constituted under 28 U.S.C. § 2281 to determine whether the issuance or renewal by

³ Section 71-1.

⁴ Section 92.2 of the Constitution of the Supreme Lodge permits members to invite non-members, apparently without limitation, to social clubs maintained by a lodge. Under § 92.6 only a member may make any purchase.

⁵ 43 Purdon’s Pa. Stat. Annot. §§ 951 et seq.

⁶ Pennsylvania Human Relations Commission v. The Loyal Order of Moose, Lodge No. 107, — Pa. D. & C. 2d — (C.P. Dauphin County, March 6, 1970).

the Pennsylvania Liquor Control Board under the Pennsylvania Liquor Code of a club liquor license to the local Lodge despite its discrimination against Negroes violates the Equal Protection Clause of the Fourteenth Amendment.

Racial discrimination is undisputed in this case. It was not only practiced against plaintiff by the local Lodge but is required by the constitution of the Supreme Lodge.

The question in the case, therefore, is focused on whether the admitted discrimination by the local Lodge in refusing to serve plaintiff a drink of liquor because of his race bore the attributes of state action and so falls within the prohibition of the Fourteenth Amendment against the denial by a state of the equal protection of the laws.

The boundaries which define what is state action are not always clear.⁷ This case presents a situation which is one of first impression. It comes to us surrounded by a mass of decisions which can serve as guides, although they do not authoritatively direct our conclusion.⁸

⁷“Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoined in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an ‘impossible task’ which ‘This Court has never attempted.’ *Kotch v. Pilot Comm’rs*, 330 U.S. 552, 556. Only by sifting facts and weighing circumstances could the nonobvious involvement of the State in private conduct be attributed its true significance.” *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

⁸ A few of the leading discussions of the subject of state action are *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065 (1969); Black, *Forward: “State Action, Equal Protection, and California’s Proposition 14,”* 81 Harv. L. Rev. 69 (1968); Paulsen, *The Sit-In Cases of 1964: “But Answer Came There None,”* 1964 Sup. Ct. Rev. 137 (1964); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Lewis, *The Meaning of State Action*, 60 Colum.L.Rev. 1083 (1960).

We believe the decisive factor is the uniqueness and the all-pervasiveness of the regulation by the Commonwealth of Pennsylvania of the dispensing of liquor under licenses granted by the state. The regulation inherent in the grant of a state liquor license is so different in nature and extent from the ordinary licenses issued by the state that it is different in quality.

It had always been held in Pennsylvania, even prior to the Eighteenth Amendment, that the exercise of the power to grant licenses for the sale of intoxicating liquor was an exercise of the highest governmental power, one in which the state had the fullest freedom inhering in the police power of the sovereign.⁹ With the Eighteenth Amendment which went into effect in 1919 the right to deal in intoxicating liquor was extinguished. The era of Prohibition ended with the adoption in 1933 of the Twenty-first Amendment, which has left to each state the absolute power to prohibit the sale, possession or use of intoxicating liquor, and in general to deal otherwise with it as it sees fit.¹⁰

Pennsylvania has exercised this power with the fullest measure of state authority. Under the Pennsylvania plan

⁹ *Tahiti Bar, Inc. Liquor License Case*, 395 Pa. 355, 150 A.2d 112, appeal dismissed, 361 U.S. 85 (1959); *Cavanaugh v. Gelder*, 364 Pa. 361, 72 A.2d 713 (1950); *Spankard's Liquor License Case*, 138 Pa. Super. 251, 10 A.2d 899 (1940); *Commonwealth v. One Dodge Motor Truck*, 123 Pa. Super. 311, 187 A. 461 (1936). See also *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948) ("The regulation of the liquor traffic is one of the oldest and most untrammelled of legislative powers. . . ."); *Crane v. Campbell*, 245 U.S. 304, 308 (1917); *Mugler v. Kansas*, 123 U.S. 623 (1887) and *License Cases*, 46 U.S. (5 How.) 504 (1847).

¹⁰ See, e.g., *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *State Board v. Young's Market Co.*, 299 U.S. 59 (1936). See generally, Note, *The Evolving Scope of State Power Under the Twenty-first Amendment*, 19 Rutgers L.Rev. 759 (1965).

the state monopolizes the sale of liquor through its so-called state stores, operated by the state. Resale of liquor is permitted by hotels, restaurants and private clubs, which must obtain licenses from the Liquor Control Board, authorizing them "to purchase liquor from a Pennsylvania Liquor Store [at a discount] and keep on the premises such liquor and, subject to the provisions of this Act and the regulations made thereunder to sell the same and also malt or brewed beverages to guests, patrons or members for consumption on the hotel, restaurant or club premises."¹¹

The issuance or refusal of a license to a club is in the discretion of the Liquor Control Board.¹² In order to secure one of the limited number of licenses which are available in each municipality¹³ an applicant must comply with extensive requirements, which in general are applicable to commercial and club licenses equally. The applicant must make such physical alterations in his premises as the Board may require and, if a club, must file a list of the names and addresses of its members and employees, together with such other information as the Board may require.¹⁴ He must conform his overall financial arrangements to the statute's exacting requirements¹⁵ and keep extensive records.¹⁶ He may not permit "persons of ill repute" to frequent his premises¹⁷ nor allow thereon at any time any "lewd, immoral or improper entertain-

¹¹ 47 Purdon's Pa. Stat. Annot. § 4-401(a).

¹² 47 Purdon's Pa. Stat. Annot. § 4-404.

¹³ See 47 Purdon's Pa. Stat. Annot., § 4-461, as amended, and § 4.472.1. When the quota for commercial licenses is reached in a municipality, no new club license can be issued there even if a club license already granted is eliminated.

¹⁴ 47 Purdon's Pa. Stat. Annot. § 4-403. See also § 1-102, "club."

¹⁵ See, e.g., 47 Purdon's Pa. Stat. Annot. § 4-411 and § 4-493.

¹⁶ See, e.g., 47 Purdon's Pa. Stat. Annot. § 4-493(12).

¹⁷ 47 Purdon's Pa. Stat. Annot. § 4-493(14).

ment.”¹⁸ He must grant the Board and its agents the right to inspect the licensed premises at any time when patrons, guests or members are present.¹⁹ It is only on compliance with these and numerous other requirements and if the Board is satisfied that the applicant is “a person of good repute” and that the license will not be “detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood,” that the license may issue.²⁰

Once a license has been issued the licensee must comply with many detailed requirements or risk its suspension or revocation. He must in any event have it renewed periodically. Liquor licenses have been employed in Pennsylvania to regulate a wide variety of moral conduct, such as the presence and activities of homosexuals,²¹ performance by a topless dancer,²² lewd dancing,²³ swearing,²⁴ being noisy or disorderly.²⁵ So broad is the state’s power that the courts of Pennsylvania have upheld its restriction of freedom of expression of a licensee on the ground that in doing so it merely exercises its plenary power to attach conditions to the privilege of dispensing liquor which a licensee holds at the sufferance of the state.²⁶

¹⁸ 47 Purdon’s Pa. Stat. Annot. § 4-493(10).

¹⁹ 47 Purdon’s Pa. Stat. Annot. § 4-493(21).

²⁰ 47 Purdon’s Pa. Stat. Annot. § 4-404.

²¹ Freeman Liquor License Case, 211 Pa. Super. 132, 235 A.2d 625 (1967).

²² Scarcia Appeal, 46 Pa. D. & C. 2d 742 (C.P. Lehigh Co. 1968).

²³ Golden Bar, Inc. Liquor License Case No. 2, 193 Pa. Super. 404, 165 A.2d 287 (1960).

²⁴ Reiter Liquor License Case, 173 Pa. Super. 552, 554, 98 A.2d 465, 467 (1953).

²⁵ Petty Liquor License Case, 216 Pa. Super. 55, 258 A.2d 874 (1969) and cases there cited.

²⁶ Tahiti Bar, Inc. Liquor License Case, 395 Pa. 355, 360-62, 150 A.2d 112, 115-16, appeal dismissed 361 U.S. 85 (1959).

These are but some of the many reported illustrations of the use which the state has made of its unrestricted power to regulate and even to deny the right to sell, transport or possess intoxicating liquor. It would be difficult to find a more pervasive interaction of state authority with personal conduct. The holder of a liquor license from the Commonwealth of Pennsylvania therefore is not like other licensees who conduct their enterprises at arms-length from the state, even though they may have been required to comply with certain conditions, such as zoning or building requirements, in order to obtain or continue to enjoy the license which authorizes them to engage in their business. The state's concern in such cases is minimal and once the conditions it has exacted are met the customary operations of the enterprise are free from further encroachment. Here by contrast beyond the act of licensing is the continuing and pervasive regulation of the licensees by the state to an unparalleled extent. The unique power which the state enjoys in this area, which has put it in the business of operating state liquor stores and in the role of licensing clubs, has been exercised in a manner which reaches intimately and deeply into the operation of the licensees.

In addition to this, the regulations of the Liquor Control Board adopted pursuant to the statute affirmatively require that "every club licensee shall adhere to all the provisions of its constitution and by-laws."²⁷ As applied to the present case this regulation requires the local Lodge to adhere to the constitution of the Supreme Lodge²⁸ and thus to exclude non-Caucasians from membership in its licensed club. The state therefore has been far from neutral. It has declared that the local Lodge must adhere

²⁷ Regulations, § 113.09.

²⁸ As stipulated by the parties, Local Lodge No. 107 has no constitution or by-laws other than those of the Supreme Lodge, by which the local lodge is expressly governed under its charter.

to the discriminatory provision under penalty of loss of its license. It would be difficult in any event to consider the state neutral in an area which is so permeated with state regulation and control, but any vestige of neutrality disappears when the state's regulation specifically exacts compliance by the licensee with an approved provision for discrimination, especially where the exaction holds the threat of loss of the license.

However it may deal with its licensees in exercising its great and untrammelled power over liquor traffic, the state may not discriminate against others or disregard the operation of the Equal Protection Clause of the Fourteenth Amendment as it affects personal rights.²⁹ Here the state has used its great power to license the liquor traffic in a manner which has no relation to the traffic in liquor itself but instead permits it to be exploited in the pursuit of a discriminatory practice. Here then are fully applicable the words of the Supreme Court in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), where discrimination by a coffee shop lessee in the municipal parking authority's garage building was held to be state action:

“[I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through

²⁹ *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). See, e.g., *Parks v. Allen*, 409 F.2d 210 (5 Cir. 1969); *Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5 Cir. 1968); *Lewis v. City of Grand Rapids*, 356 F.2d 276 (6 Cir. 1966); *Seidenberg v. McSorleys' Old Ale House, Inc.*, — F. Supp. — (S.D.N.Y. 1970). See generally, *Provisions of Statute Regarding Personal Qualifications Necessary to Entitle One to License for Sale of Intoxicating Liquor, As Denial of Equal Protection of Laws*, 145 A.L.R. 509 (1943).

it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."³⁰

As in *Burton* the state has "insinuated itself into a position of interdependence" with its club licensees, and as in *Shelley v. Kraemer*, 334 U.S. 1 (1948), it has undertaken to enforce the privately promulgated constitutional provisions of the club establishing discrimination.

³⁰ See *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."). See the discussion of *Burton*, *Evans* and related decisions in *Reitman v. Mulkey*, 387 U.S. 369, 378-81 (1967) and in *United States v. Guest*, 383 U.S. 745, 755-56 (1966) ("In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.") See also, e.g., *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962); *Pennsylvania v. Brown*, 392 F.2d 120 (3 Cir.), cert. denied 391 U.S. 921 (1968); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (5 Cir. 1966); *Wimbish v. Pinellas County, Florida*, 342 F.2d 804 (5 Cir. 1965); *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6 Cir. 1964); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (5 Cir. 1963).

See generally Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 Sup. Ct. Rev. 39, 55-79 (1967); Peters, *Civil Rights and State Non-Action*, 34 *Notre Dame Lawyer*, 303 (1959).

There is no question here of interference with the right of members of the Moose Lodge to associate among themselves in harmony with their private predilections. The state, however, may not confer upon them in doing so the authority which it enjoys under its police power to engage in the sale or distribution of intoxicating liquors, under a grant from the state which is conditioned in this case on the club's adherence to the requirement of its constitution and customs that it must practice discrimination and refuse membership or service because of race.

Nothing in what we here say implies a judgment on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin. Such cases are not the same as the present one where discrimination is practiced solely on racial grounds and therefore collides head-on against the "clear and central purpose of the Fourteenth Amendment . . . to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967); and cases there cited.

We therefore hold that the club license granted by the Liquor Control Board of the Commonwealth of Pennsylvania to the Moose Lodge No. 107 is invalid because it is in violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.

An appropriate form of decree may be submitted.

/s/ ABRAHAM L. FREEDMAN
Abraham L. Freedman,
Circuit Judge

/s/ MICHAEL H. SHERIDAN
Michael H. Sheridan,
Chief Judge

/s/ WILLIAM J. NEALON
William J. Nealon, Jr.,
District Judge

15. Final Decree of District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 69-107

K. LEROY IRVIS, *Plaintiff*

v.

WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member,
and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD,
COMMONWEALTH OF PENNSYLVANIA, and

MOOSE LODGE No. 107, Harrisburg, Pennsylvania,
Defendants.

FINAL DECREE

AND NOW, this 13th day of November, 1970, pursuant to the Opinion filed in this case on October 8, 1970, it is hereby ordered and decreed as follows:

1. The club liquor license presently held by defendant Moose Lodge No. 107 and issued to it by the Pennsylvania Liquor Control Board under the Pennsylvania Liquor Code is hereby adjudged and declared invalid because it is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. Defendants, the Pennsylvania Liquor Control Board, its members, William Z. Scott, Chairman, Edwin Winner and George R. Bortz, and their successors, are hereby directed forthwith to terminate and cancel the club liquor license issued by the Board to defendant Moose Lodge No. 107.

3. Defendants, the Pennsylvania Liquor Control Board, its members, William Z. Scott, Chairman, Edwin Winner and George R. Bortz, and their successors, are hereby permanently enjoined and restrained from issuing any club

liquor license to defendant Moose Lodge No. 107 as long as it follows a policy of racial discrimination in its membership or operating policies or practices.

4. Any party at any time may apply for modification of this decree.

5. Execution and enforcement of this decree is hereby stayed for a period of sixty (60) days.

/s/ ABRAHAM L. FREEDMAN
Abraham L. Freedman,
Circuit Judge

/s/ MICHAEL H. SHERIDAN
Michael H. Sheridan,
Chief Judge

/s/ WILLIAM J. NEALON
William J. Nealon, Jr.,
District Judge

16. Motion of Moose Lodge To Modify Final Decree

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

MOTION

NOW COMES MOOSE LODGE No. 107, Harrisburg, Pennsylvania, and respectfully moves that the Final Decree entered in the above entitled case, dated November 13, 1970, be modified by striking out the word "membership" in Line 7 of Paragraph 3 of said Final Decree and substituting therefor the words "social club".

In support of such Motion, your Petitioner contends that by restraining defendants, the Pennsylvania Liquor Control Board and its members and successors from issuing any Club Liquor License to this defendant as long as it follows a policy of racial discrimination in its *membership* policies or practices, the Decree is in conflict with the Opinion of this Court, filed on October 8, 1970. The

Opinion states on Page 12: “There is no question here of interference with the right of members of the Moose Lodge to associate among themselves in harmony with their private predilections.” The elimination of racial discrimination in the service of alcoholic beverages to guests of members will be obtained by requiring that the Club operating policies and practices of defendant Lodge do not deny members the right to invite non-caucasians to be served alcoholic beverages on all occasions when guests may be invited. To require more would violate this defendant’s rights guaranteed by the First Amendment to the United States Constitution.

This Court has held the law to be that members of a private Club may discriminate according to race if they so desire. We respectfully submit this to be the law generally. This Court likewise has stated on Page 12 of its Opinion that the state, however, may not confer upon them in doing so “authority which it enjoys under its police power to engage in the sale or distribution of intoxicating liquors”, when the Club practices racial discrimination. But this particular practice could be stopped without interfering with membership qualifications. This defendant recognizes the problem facing the Commonwealth of Pennsylvania in controlling guest privileges. The defendant could by proper action amend its By-Laws to conform to a Law or Liquor Control Board Regulation that admission of guests cannot be restricted as to race.

To go further, to hold that membership in the Lodge itself, without reference to intoxicating liquors, must not be limited, interferes with the constitutional right of association, which right this Court has recognized. Membership in a private Club carries with it many prerogatives besides the activity which can only be carried on under a Liquor License. These general activities cannot be impaired.

The only alleged illegal activity is the issuance of a License by a State Board to a private Club which uses the License to discriminate racially in the service of liquor

permitted by the license. This can be corrected. But the State cannot reach further and say that because one racially discriminating activity is illegal because the State is involved, all racially discriminating activities are illegal even when the State is not involved.

Your Petitioner, therefore, respectfully prays that the Final Decree be opened up and modified and that the time for enforcement be extended for a period of sixty (60) days from the date of the modification.

Respectfully submitted,

CALDWELL, CLOUSER & KEARNS

By /s/ THOMAS D. CALDWELL, JR.
Attorneys for Moose Lodge No. 107

17. Answer to Motion

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title omitted in printing.]

ANSWER TO MOTION

The Defendant, Moose Lodge No. 107, has filed a motion requesting the Court to modify its final Decree entered on November 13, 1970, by striking out the word "membership" in the seventh line of the third paragraph and substituting the words "social club." While Plaintiff believes that the precise change suggested by the Defendant involves the use of words ("social club") which themselves have no precise meaning, the intent of Defendant's Motion is nevertheless clear from its argument; and Plaintiff will address itself directly to Defendant's contentions in this regard rather than to the words themselves.

It is Plaintiff's position that no modification of the type suggested by Defendant is justified. Defendant argues

that the Court went beyond its opinion in ordering the Pennsylvania Liquor Control Board not to issue a club liquor license to Defendant as long as it follows a policy of racial discrimination in its membership policies, among other things. Defendant states that the Court's opinion would have been properly implemented by a Decree which simply forbade Defendant Moose Lodge from denying service of alcoholic beverages to Negroes who are brought to the Moose Club as a guest of a member. This position is both unjustified and is based upon a misunderstanding of what this case involves.

First, if all the Decree were to do was to require the Defendant Moose Lodge to serve alcoholic beverages to Negro guests of members, it seems obvious that the elimination of the State as a participant in a racially discriminatory activity would not be accomplished in any way whatsoever. The discriminatory membership requirements and discriminatory operating policies of Defendant Moose Lodge would remain intact, and the State would still be a participant by virtue of the issuance to the Club of a State liquor license. To say that the State's participation would be eliminated because a member of the Club, *if he wished to do so*, could bring to the Club a Negro guest and that the Club would be required to serve this Negro guest would accomplish nothing towards insuring that the Club's use of the great privilege granted it by the State would be used in a nondiscriminatory fashion. Negroes would still not be allowed to become members; Negroes would still not be allowed freely to make use of the license which is granted to the Club; and Negroes certainly could not force themselves upon members as guests. Therefore the suggestion made by the Defendant Moose Lodge does not even begin to meet the problem so aptly stated by the Court in its opinion where it speaks of the use of the license in a way which "permits it to be exploited in the pursuit of a discriminatory practice" (page 11).

Second, Defendant's Motion, like much of its prior argument in this case, continues to be based upon its inability or failure to understand the difference between the issuance of a liquor license by the Commonwealth to a discriminating private club and the right of the members of that club to associate freely among themselves. Both Plaintiff and the Court have taken pains to point out that nothing involved in this case attempts to interfere with the latter right. The members of Defendant Moose Lodge are free to associate with whom they please. Nevertheless, somehow, Defendant Moose Lodge continues to inject into this right of free association a concomitant right to receive a club liquor license allowing it to serve alcoholic beverages. No such concomitant right is inherent in the right to associate freely; and as Plaintiff has previously pointed out, had the Commonwealth of Pennsylvania chosen not to license private clubs at all, Defendant Moose Lodge would be in no different position with regard to its right to serve alcoholic beverages. No rights of Defendant Moose Lodge under the First Amendment would have been violated were such the case; no rights of defendant Moose Lodge are violated by stating that it may not have a club liquor license under the present circumstances. It is this inability of Defendant Moose Lodge to comprehend this distinction which has caused its present confusion over the wording of the Decree of the Court; and as Plaintiff also has previously pointed out, it leads one to wonder just how significant and valuable a privilege the right to associate freely is to the members of the Defendant Moose Lodge absent the privilege granted by the holding of a club liquor license.

Since the service of liquor under the privilege granted by the club liquor license is inextricably interwoven with the privileges of membership in Defendant Moose Lodge and with the activities and practices of Defendant Moose Lodge, there is no way of making the type of distinction suggested by the Defendant Moose Lodge. Moreover, the

State is not seeking (nor did the Court's Decree seek) to say that "all racially discriminating activities are illegal even when the State is not involved," as Defendant Moose Lodge argues in the next to last paragraph of its Motion. Nothing in Plaintiff's Complaint, nothing in Plaintiff's argument, nothing in the Court's Opinion, nothing in the Court's Decree seeks to prevent Defendant Moose Lodge from engaging in any racially discriminatory activities or to say that such activities are illegal. All that Plaintiff's Complaint, Plaintiff's argument, the Court's Opinion and the Court's Decree state is that it is illegal for the Commonwealth of Pennsylvania to issue a club liquor license to Defendant Moose Lodge as long as Defendant Moose Lodge wishes to continue its discriminatory practices. Thus, the effect of the Decree is to prevent the State from doing something, not to prevent Defendant Moose Lodge from doing anything. It is the choice of Defendant Moose Lodge to make if it wishes to comply with the constitutional requirements stated in the Opinion and Decree of the Court and to obtain a club liquor license or if it wishes to adhere to its existing discriminatory membership and operating policies and practices and forego the privilege inherent in the obtaining of such a license.

THEREFORE, Plaintiff respectfully urges that the Court deny Defendant's Motion to open up and modify the final Decree.

Respectfully submitted,

LIVERANT, SENFT AND COHEN

By /s/ HARRY J. RUBIN
Harry J. Rubin
15 South Duke Street
York, Pennsylvania 17401

GERALD GOLDBERG

Attorneys for Plaintiff

18. Order Denying Motion To Modify

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 69-107

K. LEROY IRVIS, *Plaintiff*,

v.

WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member,
and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD,
COMMONWEALTH OF PENNSYLVANIA, and
MOOSE LODGE No. 107, Harrisburg, Pennsylvania,
Defendants.

ORDER

AND Now, this 5th day of January, 1971, the motion
of defendant Moose Lodge No. 107 to modify the final
decree is hereby denied.

/s/ ABRAHAM L. FREEDMAN
Abraham L. Freedman,
Circuit Judge

/s/ MICHAEL H. SHERIDAN
Michael H. Sheridan,
Chief Judge

/s/ WILLIAM J. NEALON
William J. Nealon, Jr.,
District Judge