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THE NEW ZEALAND RACING CONFERENCE : THE STATUS OF ITS JUDICIAL TRIBUNALS AND THE AMBIT OF THEIR AUTHORITY WITH REGARD TO THE PRINCIPLES OF NATURAL JUSTICE.

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THE NEW ZEALAND RACING CONFERENCE : THE STATUS OF ITS JUDICIAL TRIBUNALS AND THE AMBIT OF THEIR AUTHORITY WITH REGARD TO THE PRINCIPLES OF NATURAL JUSTICE.

Whether the Racing Conference is a fair and effective body is important. The Racing Conference is not just a sporting club. The Racing Conference exerts its influence over an industry that employs several thousand people, many of whom depend on that industry for their livelihood. There are trainers, jockeys, stablehands, farriers and thoroughbred breeders for example. The Racing Conference's rules are set out in The New Zealand Rules of Racing 1979. Rules 74 to 90 contain provisions regarding the licensing, renewal of licences and cancellation of licences of Licensed Trainers, Provisional Licensed Trainers, Jockeys, Apprentice Jockeys, Amateur Riders and Owner-Trainers. None of these people may participate in the 'sport' of racing without the necessary licences or permits issued pursuant to the rules and yet racing may be a source of livelihood for them.

The Preliminary to the New Zealand Rules of Racing 1979 illustrates the extent of the powers claimed by the Racing Conference. Rule 2(1) for example: "These Rules shall apply to all Races and Race Meetings and shall apply to and be binding on -

(a) ...

(b) ...

(c) ...

(d) All licensed and other persons working in or about any racing stable, or in connection with the management, care, control or superintendence of racehorses and their training and riding.

(e) ...

(f) All persons applying for admission to or attending any Racecourse on which any Race Meeting is held ...

(g) ...

(h) ...

(i) ...

The width of the application of these rules is very broad and Rule 2(1)(g), not written here, will be discussed more fully on the following page.

Many of the Rules contain penalties for their breach, usually in the form of either a fine or a period of suspension or disqualification even to the extent of disqualification for life from participating in the sport of racing. This is not an unusual power claimed peculiarly by the Racing Conference, many sporting bodies such as those representing soccer and

rugby interests have similiar provisions. That such provisions are necessary is well illustrated by a recent decision by the Rugby Federation to bar a player for life for an unprovoked and violent attack on a referee. As with all such punishments however, when a penalty of this type is involved and a person is accused, often publicly, of personal misconduct care must be taken that the defendant is fairly and in accordance with natural justice found guilty of that misconduct. It is for this reason that the Courts are prepared to examine the actions of the club tribunals to determine whether they have in fact acted in accordance with natural justice.

JURISDICTION

One of the first questions to be decided in a dispute is whether the body hearing the dispute has the jurisdiction to do so. The Racing Conference claims that its rules have wide application and that the jurisdiction of its tribunals is therefore correspondingly wide. This issue arose for settlement in the New Zealand case of Caddigan v Grigg (1) - did the Committee have jurisdiction to hear and determine charges and to disqualify or otherwise deal with the plaintiff under the Rules of Racing. The plaintiff claimed and the Court so found that he had not bound himself by contract to observe the Rules of Racing, either expressly or impliedly. The Racing Conference relied on Rule 2(1)(g) or 2(1)(h) of the Rules of Racing as conferring jurisdiction over the plaintiff. These rules stated:

Rule 2(1)(g) - Every person who in any manner directly or indirectly, by himself or any other person, on his own behalf or on behalf of any other person, does or attempts to do any act or thing for the purpose of securing any right, benefit or privilege which he or any such other person is not entitled to receive under these Rules or to evade any disability of any kind imposed on him or any such other person by or under these Rules:

Rule 2(1)(h) - Every person who aids, abets, counsels or procures a breach of these Rules and such person shall be liable to the same penalty as is provided for the actual breach.

Barrowclough C.J. said "I cannot see that the Rules of Racing by themselves could have the effect of making the plaintiff subject to the rules - he never having agreed to become subject to them. The mere ipse dixit of the Conference as contained in its own rules cannot impose on an unwilling outsider an obligation to be bound by them .....the

> New Zealand Racing Conference does not possess the legislative powers of the New Zealand Parliament and it cannot of its own notion, effectively declare that its jurisdiction shall extend to whatever persons it may think fit".(2)

At this stage it would appear that the Racing Conference's argument was not succeeding - however Barrowclough C.J. went on to say

> "Where statutory authority is lacking the power of a domestic tribunal to deal with a person is generally founded in contract or in consent to jurisdiction. But that these are not the only matters which can give jurisdiction to a domestic tribunal is clearly shown by the judgment of the Privy Council in Stephen v Naylor (1937) 37 S.R. (N.S.W) 127, a case on appeal from the Full Court of New South Wales".(3)

Barrowclough C.J. then discussed Stephen v Naylor and quoted from the speech of Lord Roche, a speech which he felt exactly fitted the present case (Caddigan v Grigg). Lord Roche had found that the respondent had to suffer disqualification not because he had consented to be bound by the rules (which on evidence he clearly had not) but because:

> "...he permitted himself so to act as to bring his actions within their [the rules of racing] purview".(4)

The Racing Conference were therefore able to exercise jurisdiction over Caddigan because he had been found by the tribunal to be guilty of acts which brought him within the purview of the Rules of Racing.

However this case was not an overwhelming victory for the Racing Conference. It is clear from this case that the Racing Conference's jurisdiction, although wider than many other domestic tribunals, is still limited to an extent. That extent is the doing of some act or omission that brings the accused person within the purview of the Rules of Racing. However there is a problem with this approach. If whether the accused is subject to the Rules of Racing or not depends on whether he did an act such as to bring himself within the purview of the Rules then who decides if he did that act or not? In Caddigan v Grigg for example the act done by Caddigan was the giving of a false statement at an enquiry into the true ownership of a horse. It was accepted by Barrowclough C.J. in the Supreme Court to be fact that the plaintiff had lied about the horse's ownership. Barrowclough accepted the fact as found by the Executive Committee of the Racing Conference. In effect therefore does this not mean that if the Racing Conference finds an accused guilty of doing an act then he falls within the purview of the Rules and is therefore subject

to their penalties, but if he is found to have not committed such an act then he has not brought himself within the purview of the rules. This still means therefore that the Racing Conference jurisdiction is decided in effect by the Racing Conference itself and jurisdiction is determined not prior to the hearing but at the time the result is decided. Under the decision in Caddigan v Grigg it would not be possible to tell prior to decision on the facts by a Racing Tribunal whether an act within the purview of the rules had been done. This point was raised by Counsel for Caddigan but it is apparent from the judge's discussion of this on page 712 of the case at line 51 that the point was raised in relation to the evidence admissible in such circumstances rather than the illogicality of the matter. Counsel for Caddigan argued that since the decision on jurisdiction depended on the determination of facts then the tribunal should only have admitted such evidence that would not depend for its admissibility on the Rules of Racing, in other words evidence of a type admitted in a Court of Law should be preferred. Barrowclough C.J. said of this argument however -

> "By that, I understand him to mean that the Committee had wrongly found facts which, in view of the decision in Stephen v Naylor would bring the plaintiff within the purview of the rules".(5)

The result therefore is a circular problem - in order to determine jurisdiction of a Racing Tribunal, the Tribunal must hear evidence and decide on the facts whether the accused acted so as to bring himself within the purview of the rules. Even if it finds the accused not guilty though, surely it is still in essence exercising its jurisdiction in holding the hearing at all and if the Tribunal is not to be bound at this stage, whilst determining jurisdiction, to the rules of evidence applicable to a Court of Law then there is very little protection for an accused. This may be extremely important as the accused's ability to practice his livelihood may be at stake.

PROCEDURE

Prior to the legislature recognising the existence of the Racing Conference in 1971 and reinforcing the Conference's powers by section 28(2) and section 30 of the Racing Act 1971, the Racing Conference was a domestic judicial tribunal - this is clear from Caddigan v Grigg for example. The Courts recognised that the judicial system of the Racing Conference, the District Committees and the Clubs did not need to be modelled along the lines of a Court of Law and its rules of evidence. See for example the case of Coad v Lee Steere per Dwyer J. where he said "My view is that the

whole matter of the management of horse racing on the racecourse is a matter for the club and this Court should refrain from interference when the actions of the committee were taken in good faith and were reasonably taken, and were directed to the conduct of racing affairs. Those are matters which were very properly entrusted to the club by the legislature...".(6)

Dwyer J. went on to say at page 77 - "I do not agree with the suggestion that enquiries of this sort [the death of a racehorse on the course due to doping] by a Club should be clothed in the forms and ceremonies of a Court of Law".

With regard to the evidence on which a disciplinary committee could act Dwyer J. stated at page 78 - "Now, my view of the matter is that club committees have no necessary concern with the rules of procedure and admissibility of evidence that pertain in Courts of Law, and such rules have no application to the normal circumstances of club business. The law of evidence as administered in Courts of Law is not always founded on logic and to accept evidence which is accepted and acted on by persons in the conduct of ordinary affairs is just as much the privilege of a committee as of anybody else. When this committee acted they had an abundance of material before them : they had a report by the stipendiary stewards, and a summary of the relevant evidence which had been taken; they had the transcript itself for perusal... I have perused, somewhat cursorily, the notes of evidence and I have this to say, that I think the stewards, as reasonable men, well acquainted with the incidents of racing and with the persons concerned, were justified in coming to the conclusion they did. But it is not a question for me at all; it is a question for the committee, and if I thought they were entirely wrong in their conclusions I would still think their decision should be upheld. So long as they acted in good faith and without malice towards the person concerned and having regard to the interests of racing, then their finding is not subject to appeal to this Court".

The concept of the inapplicability of court procedure and evidence to domestic tribunals is a general one and is not confined to the tribunals which are empowered to inquire into racing - see for example the dictum

of Dixon J. in Australian Workers Union v Bowen (No.2) (7) - "It is important to keep steadily in mind that we are dealing with a domestic forum acting under rules resting on a consensual (8) basis. It is a tribunal that has no rules of evidence and can inform itself in any way it chooses..".

THE RIGHT TO A FAIR HEARING

Even though the Racing Conference's judicial tribunals are not bound by the rules of a Court of Law, their decisions are still open to the Courts ruling of breach of natural justice or fairness. This was recognised, by Barrowclough C.J. in Caddigan v Grigg (9) - referring to when a Court of Law could step in he said, -"...if, for example, the Committee had not observed the procedure laid down by the rules, if it had incorrectly interpreted the rules, if it had put a wrong construction on them or if it had put a wrong construction upon a contract or other relevant document... Similarly, the Court could interfere if the Committee was shown to have been biased or if there was no evidence upon which it could find the facts it did find as giving them jurisdiction; or if there had been a failure to observe the principles of natural justice; or if the Committee had not acted bona fide".

Rules 321 to 327 of The Rules of Racing 1979 set out the rules of evidence and procedure that the Racing Conference requires Stewards, District Committees and the Judicial Committee of any club to follow. Rule 322 for example requires that the defendant or his duly authorised representative be fully informed of the charge and the nature of the enquiry. Rule 323 states that every defendant shall have the right to be present while the whole of the evidence is being given. It would appear however that no defendant is entitled to counsel (10) because whenever the rules refer to the defendants duly authorised representative it is because the defendant is not able to be present in person. For example Rule 323(1) -

"Every defendant, or in his unavoidable absence, such person as is permitted by the tribunal to appear as his duly authorised representative.....".

The exception to this is 323(2) when the defendant is an apprentice or minor in which case his Employer, Parent or Guardian or such other person as the Stewards or other tribunal may nominate, may be granted permission to be present for the purpose of assisting and safeguarding the defendant's interests.

The Rules themselves set out the status attributed to domestic tribunals by the Courts in Rule 324(1) -

> "The tribunal may in its discretion admit any evidence whether strictly legal or not which it deems relevant to the inquiry".

The defendants right to be fully informed of the case against him as set out in Rule 323 is one which the Courts would have imposed on the tribunal even if excluded by the Rules (11) under the Rule Audi Alteram Partem. However because the contents of natural justice are flexible the stringency with which they will be applied by the Courts will depend on the circumstances of the case. The Rule does require however that an individual be given notice of the time and place of the hearing including notice of the proposed action or decision to be decided upon. The House of Lords in the case of Ridge v Baldwin (12) per Lord Reid, Lord Morris and Lord Hodson held that as the appellant - a police constable - was dismissed on the ground of neglect of duty then the respondents were bound to observe the principles of natural justice and inform the appellant of the charges against him and give him the opportunity of being heard.

There can be no doubt that the Courts would insist on the Racing Conference complying with the requirements of natural justice (13) - the interest of the defendant that is at stake is the loss of some liberty - at the least the banning of a member of the public from racecourses or at a more severelevel the banning of a jockey or trainer or racehorse owner with the consequent loss of that persons trade and livelihood. The system of tribunals as set up by the Rules of Racing under Rules 321 to 327 clearly indicate that decisions on the nature of fact and law are to be made and that the Rules are to be applied accordingly to a defendants actions. The tribunals are clearly therefore making judicial as opposed to administrative decisions. Lord Reid in Ridge v Baldwin says at page 72 of the case - "In cases of the kind I have been dealing with the Board of

> Works or the Governor of the club committee was dealing with a single isolated case. It was not deciding, like a judge in a law-suit, what were the rights of the person before it. But it was deciding how he should be treated - something analogous to a judge's duty in imposing a penalty. No doubt policy would play some part in the decision - but so it might when a judge is imposing a sentence. So it was easy to say that such a body is performing a quasi-judicial task in considering and deciding such a matter, and to require it to observe the essentials of all proceedings of

judicial character - the principles of natural justice".

It is quite clear from the cases on natural justice that tribunals such as those instituted by the Racing Conference are subject to natural justice.(14) The Rules of Racing are so subject firstly because the Rules themselves set that form. As already mentioned Rules 321 to 327 set out the form that inquiries are to take under the auspices of the District Committee, the Stewards or the Judicial Committee of any club. The defendant is to be clearly informed of the subject matter of the inquiry - Rule 322; he is to have the right to be present while the whole of the evidence is being given - Rule 323(1); he is permitted to be heard in defence and have an opportunity to give evidence, produce or call for the production of all relevant documents, to call and examine witnesses and to cross-examine witnesses.

The form set out in the above rules is clearly recognisable as part of the content of natural justice. It is therefore very easy for the Courts to say that there is a clear intention on the part of the Racing Conference that natural justice rules will apply.

Natural justice is also applicable in tribunals such as those of the Racing Conference and clubs because of the interest that their decisions affect and the sanctions that the decisions impose. The types of interests of those subject to the rules have already been mentioned - a defendant's means of livelihood could be at stake for example. The sanctions imposed vary from ten dollar fines to larger amounts - for example Rule 6(2) says -

> "Any power to make Regulations conferred on any person or body by these Rules shall be deemed to include power by such Regulations to prescribe a fine not exceeding <u>one thousand dollars</u> for breach of any such Regulations and to make an order that the person committing such breach pay towards the costs of and incidental to any inquiry into such breach a sum <u>not exceeding five thousand dollars</u>."

Alternatively a person can be suspended or disqualified, ordered to dispose of all his interests in racehorses, racehorses can be disqualified from starting. The Courts have recently recognised the existence of a 'right to work' and have been prepared to apply it in regard to licences issued by domestic bodies and subsequently withdrawn. This type of development of natural justice is particularly applicable to the Racing situation when trainers and jockeys must be licensed in order to be able to carry-out their profession. In <u>Stininato</u> v <u>Auckland Boxing Association (Inc.) and Others</u> (15) the appellant was refused a renewal of a licence by

the Auckland Boxing Association. Woodhouse J. said at page 11 line 39 of the case : "The first question, therefore, is whether the Council of the New Zealand Boxing Association is a body that is obliged to observe the audi alteram partem rule when considering the sort of issues that arise in this case. In my opinion it is a domestic body organised on a voluntary basis but it has the ability which it exercises and which its rules indicate it has set out to achieve, "to govern, regulate and control amateur and professional boxing in New Zealand"....and taking into account its method of licensing professional boxers, it is obviously able to exclude any individual boxer from taking part in most of the professional contests likely to be arranged in the country. So in the general area of livelihood opportunity to compete is at stake. The refusal or cancellation of a licence would deprive a man of any chance of exercising his professional talents for whatever remuneration might be available."

Cooke J. also agreed with Woodhouse J. that the Court had jurisdiction in this matter - he said at page 24 line 24 : "As I see it, in this kind of case there is a meeting of the principles of natural justice or fairness (treating those terms as synonyms) and the principles as to unreasonable restraint of trade. The right to work in a chosen occupation or vocation is involved.. ..The rules of the New Zealand Association do not purport to exclude natural justice and probably could not validly do so. Taking all these points together, I think that a refusal by the Council of a professional boxer's licence application, for misconduct but without giving him any opportunity of answering the charge, is well capable of being regarded as an unreasonable restraint of trade and a breach of natural justice".

This then is a further basis supporting the requirement of natural justice in tribunals of the Racing Club type. (The emphasis was added.)

As mentioned earlier under Rules 321 - 327 setting out the requirements for inquiries a defendant is not entitled to legal representation at the inquiry stage. This lack is not nearly sufficient to exclude or even allow for the argument that therefore the Racing Conference intended to exclude natural justice. The Racing Conference is at liberty to exclude legal representation, however the Conference enlarges its position in

regard to this matter at the appeal stages as set out in Rules 346 to 365. There is an entitlement to legal representation when appealing to the District Committee - Rule 349(2); when appealing from a District Committee to the Appeal Judges - Rule 359(3) and when making Special Appeals - Rule 365(2). In the case of In Re The Royal Commission to Inquire Into and Report Upon State Services in New Zealand (16) Cleary J. said on the question of legal representation - "No doubt in some inquiries a greater degree of participation should be allowed than in others, as, for instance, where the sole object of the inquiry is to investigate the conduct of an individual...In such an inquiry, or in one where questions of law are involved, Commissioners would no doubt welcome the appearance of counsel and one might imagine inquiries of such a nature that it could not fairly be said that a party cited or person interested had been 'heard' in any proper sense of the word unless he had the assistance of counsel. That situation would arise, however, from the special circumstances of a particular inquiry, but as a general rule I think it must remain correct ... that Commissioners may hear counsel or not, as they please."

If the Racing Conference did not allow legal representation at the appeal level it would I think be open to the Court to say that a defendant, particularly one accused of misconduct had not been properly 'heard'.

THE COURTS DISCRETIONARY RIGHT TO GRANT RELIEF

If a Court was to find that there had been a breach of natural justice by a tribunal or a Racing Club, the Court would still have a discretion as to whether or not it should make the declaration sought by the plaintiff. There are two main reasons why the Court could refuse the declaration. Firstly because there was no substantial breach of natural justice in that the same result would have been reached if the rules of natural justice had been followed; because the breach of natural justice was slight. The second reason why the Courts could refuse a declaration has arisen in two cases - one concerned with the Rules of Trotting - Reid v Rowley (17) and the other with the Rules of Racing - Calvin v Carr(18)

In Reid v Rowley the appellant was disqualified from Trotting for two years. He commenced an action against John Rowley, Secretary of the New Zealand Trotting Conference and the New Zealand Trotting Conference that his disqualification was invalid and claiming certain injunctions. His action was dismissed. He then appealed to the Court of Appeal. The appellants contention was that the sub-committee of the Executive of the

New Zealand Trotting Conference had considered a report prejudicial to the appellant and that this report was not made available to the plaintiff so that he had no opportunity to defend himself against the damaging claims made in it. The appellant had appealed to three appeal judges of the Trotting Conference and on this occasion the appellant was attended by counsel and submissions and oral evidence were given. The appeal judges of the Trotting Conference dismissed the appeal. At the appeal stage the existence of the Report was still unknown to the appellant. The appellant did not allege however that the report was considered by the three appeal judges, but only by the sub-committee. The Court of Appeal heard no evidence of any strength from the appellant to satisfy it that the sub-committee did see and consider the report. However, it received no submissions to the contrary from the respondents and the Court of Appeal therefore concluded that this was enough to bring into play the principle that where facts lie peculiarly within the knowledge of one of the parties, very slight evidence may be sufficient to discharge the burden of proof resting on the opposite party and that therefore the appellants uncontradicted allegation that the sub-committee had seen the report should be accepted by the Court. On this assumption then, there was a serious breach of natural justice at the sub-committee stage. Cooke J. went on to say however at page 483 -

> "But I agree with Speight J. that it does not follow that a discretionary remedy will always be granted when there has been a hearing at first instance in breach of natural justice followed by an appeal hearing in conformity with natural justice.....
>
> In the exercise of the Supreme Court's discretion the nature of the hearing before the appeal tribunal will be a relevant factor, as Speight J. indicated. But it is by no means the only one....weight must often be attached to the knowledge and conduct of the party complaining of the procedure at the initial hearing. A party who, with full knowledge of a failure of natural justice at first instance, elects to appeal to an appeal tribunal without taking or reserving the point, and who then receives a full and fair rehearing will be at risk of being denied a discretionary remedy in the courts unless there are strong countervailing factors."

The last sentence above did not however state the facts as found in Reid v Rowley. At the time that the appellant appealed he did not know of the breach of natural justice at the sub-committee level. Cooke J. decided

to exercise his discretion in favour of the appellant for the reason given above and because due to the loss by the Racing Conference of its file on the case, there was no evidence of the merits on which the appeal judges decided the case. It was not possible to conclude therefore that the breach of natural justice at the sub-committee hearing did not taint the decision of the appeal body.

It is clear however from this case that the Court would be prepared not to exercise its discretion in favour of the appellant if it could be said that the appeal hearing was full and fair and in the form of a hearing de novo, and was not tainted with the breach of the earlier stage. In Calvin v Carr (19) the appellants second argument was that the defects of natural justice that may have existed in the hearing before the Stewards, were not capable of being cured by the appeal proceedings before the committee even though these were correctly and fairly conducted. This was an appeal to the Privy Council. The Privy Council agreed with the line taken by the New Zealand Court of Appeal in Reid v Rowley. It said at page 429 line 8 for example : "Naturally there may be instances when

> the defect is so flagrant, the consequences so severe, that the most perfect of appeals or rehearings will not be sufficient to produce a just result."

The Privy Council did feel however that the New Zealand Court of Appeal did take a narrower view of the importance of an appeal process after a breach of natural justice than the Privy Council preferred -

> "In general their Lordships find that the approach of that case is in line with that sought to be made in this judgment. It may be that the Court adopted a more reserved attitude as regards the effect, after a denial or breach of natural justice at first instance, of a full examination on appeal... But they do not understand the Court of Appeal to be subscribing to a view that cases of 'insulation' or 'curing' after a full hearing by an appellate body may not exist; on the contrary Cooke J. expresses the opinion that the Court, in the exercise of its discretion, when reviewing the domestic or statutory decision, should take into account all the proceedings which led to it, the conduct of the complaining party and the gravity of any breach of natural justice which may have occurred. This, though perhaps with some difference in emphasis, is their Lordships approach".(2)

The Privy Council found that the appeal process had afforded the

appellant a fair and full hearing and consideration and that therefore, although there was assumed to be a failure of natural justice by the Stewards in the first instance, the appellant should fail in his appeal. The Privy Council therefore refused to exercise its discretion to grant relief because the appeal process of the domestic tribunal had overcome the breach of natural justice at the first hearing.

THE RACING ACT, 1971

In 1971 the New Zealand Parliament passed the Racing Act. This Act contained the first parliamentary recognition of the Racing and Trotting Conferences. The Act gave both Conferences legal status, but much more importantly it reinforced the status of the Conferences in regard to their rule-making power and consequently their ability to enforce those rules. Section 28(2) of the Racing Act 1971 provides that:-

> "The Racing Conference.....shall have such powers, functions and duties as are from time to time provided for in the Rules of Racing."

Section 30 of the same Act says:-

> "(1) For the purposes of this Act, the rules of racing..... shall be.....such rules of racing made by the Racing Conference.....which are in force on the passing of this Act and such valid rules as are made after the passing of this Act.
>
> (2) The Racing Conference.....may from time to time alter or rescind the rules of racing.....and make new rules of racing ....provided that any alteration or rescission of a rule of racing....after the passing of this Act which is in conflict with any provision of this Act shall be invalid."

The proviso to Section 30(2) is of little relevance to the types of rules that have been discussed in this paper - that is the rules relating to the conduct of those within the industry, spectators, patrons, etc. The Act does not consider this side of the Racing Conference's power. The proviso would act solely to limit the right of the Racing Conference to make rules in the area now controlled by the then newly instituted (1971) Racing Authority which has relieved the Racing Conference of its financial management responsibilities. The Racing Conference is still free to conduct its day to day and race day affairs in any manner it wishes, according that is, to the silence of the Act on this point. As we have seen the Courts have not been so liberal on this matter.

Now that the Racing Conference is expressly authorised by Parliament to carry out its functions has this affected the proposition that the

Racing Conference and club tribunals are domestic bodies and are therefore not subject to procedures such as are found in a Court of Law.

The Act should make no difference. Parliament empowered the Racing Conference to make its own rules of racing, including the rules of inquiries and appeals. At no stage did the statute require a judicial format and the Racing Conference is therefore free to determine its own procedures - as indeed it has done.(21) The situation in Australia is somewhat different to New Zealand. There is for example an Australian Jockey Club Act 1873 which sets out in detail appeal procedures. However even so, the Privy Council in Calvin v Carr (22) still felt that the administration of racing and the exercise of discipline was through domestic bodies whose jurisdiction, though reinforced by statute, was founded on consensual acceptance by those engaged in the various activities connected with horse-racing.

By analogy, under section 22B of the Immigration Act 1964 a Deportation Review Tribunal is established. Subsection 6 states that the provisions of the Fourth Schedule shall have effect as to the constitution and proceedings of the Tribunal and other matters relating to the tribunal. Clause 10 of the Fourth Schedule says that the Tribunal's procedure subject to the Act and regulations made under the Act, shall be such as the Tribunal thinks fit. The Act therefore does not require the Tribunal to comply with the Rules of Evidence and procedure of a Court of Law. Legislative status therefore does not impute a judicial process unless the Act specifically contemplates such a process. However, before the Courts can insist on such tribunals following the rules of natural justice the tribunal must be required to make a judicial rather than an administrative decision; and the Rules of Racing are indicative of a judicial-type decision rather than a policy or administrative one.(23) As the Racing Statute does not specify a judicial procedure but the Racing Conference Rules indicate a quasi-judicial process that the Courts have said must have regard to the rules of natural justice, it is possible that the Courts might read into the statute a duty on the Racing Conference to make its boards of inquiry subject to a duty to act in accordance with natural justice. The Courts in doing so would be exploring Parliaments intention - it would be possible to argue that the Racing Conference that existed before the 1971 Racing Act had a set procedure that was subject to natural justice - see for example Stephen v Naylor (24) at pages 139, 140. It was reasonable for Parliament to assume therefore that there was no need to specify a judicial procedure should be followed by the Rules of Racing. This would seem to be a more favourable argument than one to the contrary that would arguethat Parliament

deliberately excluded mentioning a judicial procedure because it did not envisage one. Accepting the first argument the Court would then be able to fill the 'omissions' of the legislature - Cooper v Wondsworth Board of Works (25) ..."although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the Common Law will supply the omission of the legislature".

Such a step by the Court may not seem necessary as the Rules of Racing are generally extremely fair and offer full opportunity for a defendant to get a fair hearing. However, the Rules of Racing are, as is clearly shown by Section 30 of the 1971 Racing Act, rules made solely by the Racing Conference. Therefore unless the requirement to act judicially comes from sources outside the contents and aim of the Rules, then the Racing Conference is free to alter those rules so as to exclude the observance of set reasonable procedures.(26)

CAN THE COURTS HOLD A RULE INVALID?

One final question is whether the Courts could declare a Rule of Racing void and if so, on what basis. Is a rule of racing akin to a regulation or a by-law?

Section 2 of the Bylaws Act 1910 defines by-law as:-

> "...any rule or regulation which is made by any local authority by virtue of any Act now or hereafter in force and which is termed a bylaw in the Act by virtue of which it is so made.

Local Authority is defined as:-

> (a) ...
>
> (b) Any body corporate of any kind whatsoever having authority under any Act.....to make rules or regulations which are in that Act termed bylaws, or
>
> (c) Any Board, Council, Trustees or other body of persons being the governing body of any corporation of any kind whatsoever and having authority, under any Act now or hereafter in force, to make any rules or regulations which are in that Act termed bylaws....

The Rules of the Racing Conference clearly do not fall within the definition of By-laws. The Rules are termed "Rules" in the Racing Act 1971, not "bylaws" as is required by the definitions above. Secondly, the Racing Conference does not fall within the definition of local authority. The Racing Conference, in its constitution, is simply an association of racing clubs. It is not incorporated.

The Regulations Act 1936 says in Section 2 -

"(1) In this Act, the expression 'regulation' means or includes:

(a) Regulations, rules or bylaws made under the authority of any Act by the Governor-General in Council or by any Minister of the Crown or by any other authority empowered in that behalf.

(b) Orders-in-Council proclamations, notices, warrants and instruments of authority made under the Act which extend or vary the scope or provisions of any Act.

...but does not include regulations made by any local authority or by any authority or persons having jurisdiction limited to any district or locality.

The Racing Conference makes rules and does so under the authority of the Racing Act 1971. It is therefore an "authority empowered in that behalf". The Conference's status is not restricted by the proviso to Section 2(b) above because the Racing Conference's jurisdiction extends over horse-racing in the whole of New Zealand and is not confined to any district or locality. It would appear therefore that the New Zealand Rules of Racing fall within the definition of regulation in the Regulations Act. This has the effect that the Courts can declare a rule invalid as being ultra vires or beyond the power given to the Conference by the Act - for example if the Conference made Rules prohibited by the proviso to Section 30(2) of the Racing Act. The Court cannot however hold a rule invalid on the grounds of unreasonableness as this remedy is restricted to by-laws only and does not apply to regulations, as regulations are theoretically open to the scrutiny of Parliament.

There remains of course the Courts power to declare that a rule is ultra vires, that is, that the rule is outside the power given to the Racing Conference by the legislature in the Racing Act 1971.(27)

CONCLUSION

The rules as to the procedure to be followed by Stewards, District Committees and by the Appeal Judges of the Racing Conference are, it is submitted, generally fair and in compliance with the requirements of natural justice. There is no need for procedure to be as formal as that in a Court of Law so long as the Courts are able to review the decisions made. It is submitted however that more emphasis is needed with regard to the requirement of a fair and impartial hearing than was given, for example, by Dwyer J. in Coad v Lee Steere (28) where he said.... "But it is not a question for me at all, it is a question for the

> committee and if I thought they were entirely wrong in their conclusions I would still think their decision should be upheld. So long as they acted in good faith and without malice towards the person concerned and having regard to the interests of racing, then their finding is not subject to appeal to this Court."

The above statement is rather broad, especially having regard to an earlier comment in the same paragraph that the Stewards were "reasonable men well

> acquainted with the incidents of racing and with the persons concerned."

The Stewards could well have acted in good faith and without malice in the interests of racing but have been considerably influenced by their personal knowledge of the defendant. What must be required of the tribunal or Stewards is an open mind, and when one is both the prosecutor and the adjudicator this is a difficult requirement to fulfil.

Even on appeal from the Stewards to the District Committee of the Club or to the Appeal Judges of the Conference, the Stewards prior judgment must carry considerable weight as these are people who by their very position are responsible and respected members of the Club system. There is no intention here to dispute the integrity of the Stewards or members of the Racing Conference but merely to point out, as other organisations have found, that problems can arise where the investigation and the disciplinary proceedings are in the same hands.

In May 1977 the Public and Administrative Law Reform Committee issued a report entitled "Discipline Within the Legal Profession" - at page 9 of that Report, paragraph 19 it stated "...it is important that disciplinary

> bodies of professions having powers of self discipline should enjoy public confidence. The presence of a lay member would be likely to increase that confidence."

The Report also discussed the Law Society's present system which resulted in the investigative and adjudicative functions being performed by the same body. The Report recommended the separation of these functions.

Can these ideas, lay members and a separation of functions, be transferred to the context of the Racing Conference and Clubs. It is submitted that these ideas apply only in part. At the level of the District Committees and the Appeal Judges of the Conference there should be no problem instituting such systems. However these ideas are unlikely to be applicable to the Stewards because of their unique role. On race day the Stewards must often make instant decisions with regard to occurrences on the racetrack because for example, punters payouts are often dependent on

their decisions. It is extremely hard to see how efficiency could be maintained if a separation of functions and a lay member requirement was to be introduced. If there is a good and fair appeal system to back up the Stewards decisions then justice would not be sacrificed in order to achieve efficiency.

There is no need for justice to be restricted in this area. The Courts are well capable of reviewing decisions of disciplinary tribunals such as those of the Racing Conference and Clubs as has been indicated in the discussion on natural justice in this paper.

The presence of lay members on the Racing Conference Appeal Body and at the District Committee stage would constitute a final assertion that the tribunals are fair quasi-judicial bodies capable of being relied upon to act in accordance with natural justice.

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FOOTNOTES

(1) [1958] N.Z.L.R. 708.

(2) Idem at 710 line 32.

(3) Idem 117.

(4) Stephen v Naylor (1937) 37 S.R. (N.S.W.) 127, 140.

(5) Caddigan v Grigg [1958] N.Z.L.R. 708, at 713 line 5.

(6) (1937) 40 W.A.L.R. 70,75.

(7) (1948) 77 C.L.R. 601, 628.

(8) See however the earlier discussion at page 2 ff. with regard to whether the Racing Conference's jurisdiction had been the subject of consent.

(9) [1958] N.Z.L.R. 708, 713 line 10.

(10) See however the discussion later at page 9,10.

(11) See Stininato v Auckland Boxing Association (Inc.) and Others [1978] 1 N.Z.L.R. 1 discussed on page 8 ff. of this paper.

(12) [1964] A.C. 40.

(13) Refer to the judgment of Cooke J. from Stininato quoted at page 7 of this paper.

(14) Stininato v Auckland Boxing Association and Others op. cit footnote 11.

(15) [1978] 1 N.Z.L.R. 1.

(16) [1962] N.Z.L.R. 96, 117.

(17) [1977] 2 N.Z.L.R. 472.

(18) [1979] 22 A.L.R. 417.

(19) Ibid.

(20) Idem at page 431.

(21) See the judgment of Jeffried J. on this point in Simpson v The New Zealand Racing Conference and Others unreported 24 June 1980, A.531/79 at pages 11, 12 where he said that the Act gave the Racing Authority statutory power so that "Henceforth rule making power was to be pursuant to a power or right conferred by the Act." However Jeffries J. went on to recognise that despite this the Racing Conference was still left with the administrative and rule making power.

(22) [1979] 22 A.L.R. 417 at page 425.

(23) Refer to page 6 ff. of this paper.

(24) (1937) 37 S.R. (NSW) 127.

(25) (1863) 14 C.B.N.S. 180, 194.

(26) Refer to the emphasised passage in the judgment of Cooke J. quoted on page 9 of this paper, in Stininato v Auckland Boxing Association (Inc.) and Others.

...cont'd.

(27) See pages 13, 14 of this paper.

(28) (1937) 40 W.A.L.R. 70, 78.

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