

*Privy Council Appeal No. 62 of 1935*

Colin Campbell Stephen - - - - - *Appellant*

*v.*

Rufus Theodore Naylor - - - - - *Respondent*

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*v.*

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FROM

THE FULL COURT OF THE SUPREME COURT OF  
NEW SOUTH WALES

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 26TH FEBRUARY, 1937.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD ATKIN.

LORD MAUGHAM.

LORD ROCHE.

SIR SIDNEY ROWLATT.

[*Delivered by* LORD ROCHE.]

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These are two appeals raising substantially the same question, namely whether the Australian Jockey Club has the right, under certain by-laws of the Club, to refuse the respondent admission to the Randwick Race Course, which is in the occupation of the Club and under the control of its Committee. This question was raised by the respondent in two actions in the following manner:

Appeal No. 62 of 1935 arises out of a suit No. 393 of 1934 wherein the respondent as plaintiff claimed and obtained from the Supreme Court of New South Wales sitting in Equity (Mr. Justice Long Innes) an interlocutory order restraining the appellant, properly sued as representing the Club and Committee, from preventing the respondent from entering the race course. Upon appeal to the Full Court the appellant's appeal was dismissed by a majority (Davidson and Maxwell JJ., Harvey C.J. dissenting). The by-law relied upon in this action as giving a right to exclude the respondent was by-law IX (3) dealing with "any person under disqualification by the Club." It was alleged that the respondent was such a person. Whilst the proceedings in suit No. 393 of 1934 were in progress the Committee of the Club gave the respondent notice to attend before it to show cause why he should not be refused admission to the

course under another part (4) of the same by-law IX dealing with "any person who in the opinion of the Committee is not a desirable person to be admitted." Thereupon the respondent brought another action (No. 585 of 1934), out of which appeal No. 63 of 1935 arises, claiming a declaration that by-law IX (4) was *ultra vires* and invalid and an interlocutory injunction restraining the Club and Committee from acting under it. The judge sitting in Equity (Street J.) held the by-law valid and refused an injunction. On appeal to the Full Court Appeals Nos. 62 and 63 were heard together and by a majority the Court allowing Appeal No. 63 declared by-law IX (4) invalid and granted the injunction claimed. It was agreed between the parties that the appellant would not contend that the respondent's second action was premature.

In these circumstances both appeals have come and have been argued together before their Lordships, whose conclusions can be best stated in one judgment.

Before dealing with the questions of law involved in the contentions of the parties and referring to the material documents or to the facts in more detail the broad lines of the dispute may be indicated. The respondent had been a book-maker but at the material time his case was that he desired and was entitled to go on the race course as a member of the public for his own purposes which included attending to his business of betting large sums on horses running there. The case of the appellant was that the respondent, whilst under suspicion of being a party to serious irregularities in connection with the ownership of a horse which had run in a race, had been summoned to an enquiry by the Committee and had given evidence at such enquiry which was false and misleading and that it had the power and right to disqualify a person who gave evidence of that nature and to refuse him admission to the course. All the judges who dealt with these cases have found that the respondent was guilty of giving false and misleading evidence at the enquiry and have based their findings to that effect on clear admissions by the respondent himself made under cross-examination on his affidavits in these proceedings.

The rights and powers and duties of the Australian Jockey Club arise out of and depend upon: Firstly: A Crown Grant of date June 15th 1863, reciting that it was desirable in the public interest that the land therein described should be dedicated for the purpose of public recreation, and providing that such land was granted to trustees upon a peppercorn rent on trust to permit such land or any part thereof to be used by such persons, clubs or associations upon such terms and conditions as the trustees should think fit and proper for any of the purposes therein described and including:—

"Firstly as a race course upon which horse races may be run under the direction of the Australian Jockey Club or of any other Club which may hereafter be founded for the purpose of horse racing."

" Secondly as a training ground for the purpose of training horses and also for the erection of training stables and temporary dwellings for the use of persons engaged in training horses."

" Thirdly as a cricket ground or place at or upon which the game of cricket may be played."

" Fourthly for the erections of butts or targets for rifle shooting."

" Fifthly and for any other public amusement or purpose which His Excellency the Governor of our said Colony for the time being with the advice of the Executive Council thereof may from time to time declare to be a public amusement or purpose for which the said lands or any part thereof shall or may be used."

The grant concluded as follows:—

" And we do hereby reserve unto us our Heirs and Successors all such parts and so much of the said land as may hereafter be required for the public roads or ways in over and through the same to be set out by the Governor for the time being of our said Colony or some person by him authorised in that respect. And also all stone and gravel all indigenous timber and all other materials the produce of the said land which may be required at any time or times hereafter for the construction and repair of roads ways and bridges for naval purposes and or for public works together with the right of taking and removing the same and also all minerals with full and free liberty and power to search for dig and take away the same and also the right of full and free ingress egress and regress into out of and upon the said land for the several purposes aforesaid and we do further reserve unto us our heirs and successors full power for us or them or for the Governor for the time being of our said Colony to resume and take possession of all or any part of the said land not hereinbefore reserved which may be required at any time or times hereafter for any public purposes whatsoever. *Provided always* and these presents are upon the express condition that if the said land hereinbefore described or any part thereof shall be used for any other purpose than is hereinbefore provided or declared in and by the said trusts the said trusts shall cease and the said lands shall be forfeited and revert unto us our heirs and successors and these presents and every matter and thing herein contained shall cease and determine and become absolutely void to all intents and purposes and it shall be lawful for us our heirs and successors by our Governor for the time being of our said Colony or some person by him authorised on that behalf to re-enter upon the said land or any part thereof and the said grantees their heirs and assigns and all occupiers thereof therefrom wholly to remove."

Secondly:—In 1873 the Parliament of New South Wales passed an Act which recited the said grant, and recited that the Trustees had for some years past permitted the Australian Jockey Club to have the use and enjoyment of the said land and that the Club had expended large sums upon courses and upon fences, stands and building upon such land and was desirous of erecting a new grand stand upon the said land and erecting other permanent improvements and that it was desirable that the Trustees should be empowered to grant a lease for a longer period than seven years and enacted:—

S. 3. that the Trustees should have power to grant to the Club or to any other Association which might be formed for the purposes of horse racing " the exclusive right to use and occupy the said lands or any part or parts thereof " as the Trustees should in their discretion think fit for a period of years not exceeding twenty-one (s. 3).

S. 8. that it should be lawful for the Chairman of the Club to purchase any lands on behalf of the Club or to accept a lease of

and hold by demise from the Trustees for the purposes of the Act the said lands.

S. 10. "The lands by this Act authorised to be demised to the Chairman shall be held by the Chairman and his successors in office only for the purpose of being maintained and used for a public race course or for one or other of the purposes in the said Deed of Grant mentioned under and subject to the provisions of this Act and any by-laws to be made under and by virtue hereof."

S. 11. that the Club should have power to erect and maintain buildings.

S. 12. "The Committee or an absolute majority in number of such Committee present at any meeting duly summoned for that purpose may from time to time subject to the special provisions of this Act make such by-laws as they think fit for regulating all matters concerning or connected with any lands authorised by this Act to be leased to the said Chairman on behalf of the Club or any lands which may hereafter be vested in the Chairman of the said Committee and the admission thereto and expulsion therefrom of members of the Club or any persons respectively and the rates or charges to be paid for such admission and for the general management of the said race course and may from time to time by any other by-laws alter or repeal any such by-laws. Provided that no such by-laws be repugnant to the laws for the time being in force in New South Wales and every by-law shall be reduced in writing and shall be signed by the Chairman."

S. 13. It was further provided that by-laws should not be effective until after the expiration of a period of one month after a copy of them had been sent to the Chief Secretary and that within such period the Governor might disallow them.

S. 14. That after the expiration of the month the by-laws should be published in the Government Gazette and should thereupon be effective.

S. 16. Empowers the Governor in Council to repeal any such by-law.

S. 18. That such by-laws when published as directed by the Act should be effective and binding upon all parties and that penalties might be enacted for the infringements thereof.

S. 22. It was further provided that no person should be relieved from any other liability for which he would have been subject if the Act had not been passed and power was given to the Minister for Works to enter the land, inspect the premises and require the Committee to make good all defects and want of repair found upon inspection.

Leases in accordance with the Act have since 1873 been granted to the Club and one was in force at all material dates. Such leases were expressed to be for the purposes of the Act and to be subject to the reservations and conditions of the Crown grant.

Thirdly: By-laws made by the Australian Jockey Club pursuant to the Act which divided the course into certain divisions and provided for the conduct and management of the course and for the charges for admission during race meetings. In particular by-law IX was as follows:—

(IX) The following persons shall not be admitted into any of the said divisions:—

(1) Any person proved to the satisfaction of the Committee to have been at any time guilty of any malpractice or dishonourable conduct in connection with racing.

(2) Any person found to the satisfaction of the Committee to be a defaulter.

(3) Any person under disqualification by the Club.

(4) Any person who in the opinion of the Committee is not a desirable person to be admitted.

Fourthly : It is also material to refer to certain Rules of Racing which bear upon the dispute. Just as in this country there are Rules of Racing promulgated by the Jockey Club so in Australia there are Rules of Racing adopted and promulgated by a principal club in each State of the Commonwealth. These rules are common to all such clubs with such additions by way of local rules as are deemed necessary. The Australian Jockey Club is within the meaning of such rules the principal club in the State of New South Wales and it has adopted and promulgated Rules of Racing. The material rules for the present purpose read as follows :—

“ Disqualification ” or “ Disqualified ” shall mean :—

(a) As regards a person disqualified under these Rules or the Rules of any principal Club, or who has been disqualified in any of the said States by the Committee or Stewards of the principal Club or either or any of the principal Clubs in the said States, or whose disqualification by any other Club has been adopted or confirmed by the Committee of the principal Club that he shall not while so disqualified be qualified to subscribe, or enter or run any horse, for any race either in his own name or in that of any other person, and any horse of which he is wholly or partly the owner, or which shall be proved to the satisfaction of the Committee or Stewards to be under his care, training, management, superintendence, or control shall not while he is so disqualified be eligible to race on any course where these Rules are in force, nor shall such person while so disqualified be eligible to ride any horse in any race, or entitled to attend any race meeting held on any such course, and he shall be liable to be ejected therefrom if he attempts so to attend.

(b) As regards a horse; that the horse while so disqualified shall not be eligible to be entered or to run for any race on any course where these Rules are in force.

#### DISQUALIFICATIONS.

171. The Committee of any Club or the Stewards may fine, suspend or disqualify, for any period they may think fit or during their pleasure :—

(a) Any person who, in their opinion, has been guilty of dishonest, corrupt, fraudulent, or improper practices on the Turf.

(b) Any horse in connection with the running of which such practices have been proved to their satisfaction.

(c) Any person who may corruptly give or offer any money, share in a bet, or other benefit to any person having official duties in relation to racing, or to any owner, nominator, trainer, jockey or rider.

(d) Any person having official duties in relation to racing, or any owner, nominator, trainer, jockey or rider, who may corruptly accept, or offer to accept, any money, share in a bet, or other benefit.

(e) Any horse entered or run in any race by a fraudulently false description, and the owner, nominator, or trainer of such horse, or all or any of them, or any person having any interest in such horse.

(f) Any owner, nominator, trainer, jockey, rider, bookmaker, bookmaker's clerk, or person having official duties

in relation to racing who refuses to attend and give evidence at any enquiry when requested by the Committee or Stewards to do so.

(g) Any person who shall at any time administer or cause to be administered for the purpose of affecting the speed, stamina, courage or conduct of a horse, any drug or stimulant whatever, or use any electric or galvanic apparatus for any of the purposes aforesaid, except by permission of the Stewards, and subject to such conditions as they may impose.

(h) Any person who has given at any enquiry held by the Committee or Stewards any evidence which in their opinion is false or misleading in any particular.

175. So long as the name of any person is in the List of Disqualifications made or adopted by the "Committee," he shall not enter the Grand Stand or Saddling Paddock or any enclosure or other portion of a race course or any lands occupied or used in connection therewith at any race meeting held under these Rules, nor shall he subscribe to any sweepstakes, and no horse can be entered by him, or under his subscription, for any race held under these Rules, whether acting as an agent or otherwise, and no horse which has been entered by him, or in his name, or under his subscription, or of which he is wholly or partly the owner, or which shall be proved to the satisfaction of the Committee of any Club to be under his care, training, management, or superintendence, shall be qualified to run for any race held under these Rules; and so long as any horse is in the said List it shall not be entered or run for any race, or be trained upon any course where these Rules are in force.—Any principal Club making or adopting any disqualification shall immediately communicate such disqualification to all other principal Clubs.

It is now necessary to return to the facts of this case.

In February, 1933, a horse called Movado had run at a race meeting under the jurisdiction of the Australian Jockey Club and on enquiry first before the Stewards of the Meeting and on appeal before the Committee of the Club it was found that the horse had been pulled or not allowed to do his best. This horse was run in the name of a lessee and as a result of the enquiry horse, jockey, and lessee were disqualified. The lessor of the horse in question was one T. J. Punch and in accordance with the rules of racing horses and leases of them have to be registered in the name of the true owner. This is plainly of first importance in the conduct and control of racing. An enquiry then began as to whether T. J. Punch, who was a very young man, was not dummying for the respondent, that is to say whether Punch was not a mere nominee for the respondent as the true owner and lessor of Movado. The respondent was summoned and in fact attended at such enquiry and gave evidence on more than one occasion. In the course of such evidence the respondent said amongst other things: "Punch? No, I don't know him—not Punch": that he did not know where Punch lived: and that he did not know that Punch was the owner of the house or building in which he the respondent lived. In cross-examination of the respondent on his affidavits in the present proceedings he admitted that the house or building in question was his own property and that he had put it in the name of young Punch as his nominee at a time anterior to his

answers on the enquiry. It followed that he also admitted that other answers such as that as to not knowing Punch were untruths. He said: "To the Australian Jockey Club Committee I did not tell the truth": and "I considered I could tell untruths if I wished": and "if I thought they were making circumstantial evidence against me it is my duty to prevent them." Under these circumstances the respondent was disqualified under Rule 171 (b) of the Rules of Racing. All the judges who have dealt with the matter have felt satisfied that the enquiries were conducted with fairness and justice to the respondent. The legality of the action taken by the Club as a result is alone in question.

Their Lordships now pass to a consideration of the contentions of the parties and of the reasons urged in support of those contentions.

It was essential to the success of the actions for the respondent to establish that unless excluded under a by-law individual members of the public like himself had a right to enter the race course and that such right of his was enforceable by action in his own name. This contention prevailed in the Courts below although both there and before the Board it was objected by the appellant that the action was not maintainable except by and in the presence of the Attorney General as plaintiff or co-plaintiff. Finally however before the Board this objection was not seriously pressed by the appellant. But another contention not unlike it though different in principle was raised and strongly pressed upon their Lordships: namely that the Club as lessee was entitled to exclusive possession and that if the conditions of the lease and of the grant were departed from as regards public enjoyment of the land the remedy lay with the Crown either to re-enter and thus put an end to the occupation by the trustees under the last proviso of the grant or to compel compliance with the trusts by the appropriate legal proceedings by or on behalf of the Crown. It was submitted that upon re-entry on behalf of the Crown, every right conferred by the grant came to an end. It was also submitted that the right reserved to the Governor in Council by section 16 of the Act to revoke any by-law at any time pointed to the continued supremacy in the Crown and to the conclusion that the grant resulted in nothing more than a bargain between the Crown and the trustees for the benefit of others but alterable or revocable at any time by agreement or, in certain stated circumstances without agreement. That question is plainly one of nicety and difficulty. In their Lordships' opinion, it is unnecessary to decide it. If the judgments of the Full Court are erroneous in respect of the by-laws the existence of a *prima facie* right of entrance and action in the respondent will not entitle him to retain the judgments in his favour. For reasons which will presently be stated their Lordships are of opinion that he is not so entitled and in these circumstances the other question is best left to be fully debated and decided in a case where it necessarily falls for decision. Then, it will be proper to consider certain observations of the Lords

Justices who discussed analogous principles in the case of *Gandy v. Gandy* L.R. 30 Ch.D. 57. For their present purposes their Lordships will assume, though they must by no means be taken as deciding, that the respondent was possessed of the *prima facie* right necessary to support any case at all.

Granted that assumption it is nevertheless indisputable that the right of entrance was a qualified one—capable at least of limitation by appropriate by-laws. Their Lordships think it wholly unnecessary to review the numerous authorities dealt with in the Courts below on the subject of by-laws—the more as the law was stated with precision and accuracy in the judgments under appeal. The question is as to the correct application of the law to the facts of the case.

As regards both parts of the by-law it was suggested that the statute gave the right to regulate admission by by-law but not to refuse it. Their Lordships are unable to accept this suggestion and think that the right to refuse admission is involved in the terms of the statute dealing both with admission and expulsion. An obligation to admit accompanied by a right forthwith to expel is not on any reasonable view the true import of the statute nor did any such view find favour in the judgments under appeal. Those judgments were rested, as was that of Long Innes J., on a view that by-law IX (3) and (4) were both invalid and ineffective for quite other reasons.

As to IX (3) which relates to disqualification it was contended below and before their Lordships that it was bad for uncertainty because the words “under disqualification” as used in the by-law were undefined and uncertain; but their Lordships find themselves in entire agreement with the following words of Davidson J. in rejecting this contention. He said: “The expression ‘under disqualification by the Club’ as used in this by-law I think must be well understood by everyone and can hardly mean anything else than disqualification under the Rules of Racing.” If confirmation of this view be required it is to be found in the fact that the respondent does not in his pleadings or his affidavits allege that he did not understand what disqualification was referred to. His contention was that he was not subject to the Rules of Racing and that they were ineffective to bring about his disqualification and therefore his exclusion from the course. It is this contention which has found favour with Long Innes J. and the majority of the Full Court. They held that the respondent had not submitted to the jurisdiction of the Committee acting under the Rules. It was also held by Davidson J. that the Committee could not impose a sentence of disqualification otherwise than in pursuance of a by-law as distinct from the Rules of Racing. Their Lordships are unable to agree with these conclusions. The by-law is clear enough and gives power to exclude disqualified persons. The question then is what is a disqualified person. The dictionary to which reference is to be made, as everyone knew, is the Rules of Racing. The meaning



there given is clear and includes one in the respondent's case. It is not a question whether he consented to any adjudication or submitted to any jurisdiction. The Club properly undertook to regulate racing within its territorial limits and properly announced the rules by which it would regulate it and properly also to satisfy the claims of justice gave an opportunity to anyone whose conduct called for enquiry in connection with racing within those limits to attend and proffer explanations. Disqualification is a well known and a legitimate and indeed a necessary safeguard to be adopted to secure the absence from the race course of persons who have been found guilty of conduct gravely detrimental to the interests of racing. The exercise of such a jurisdiction may as to some matters and things such as licensing, arise out of consent, but in others such as the present, it seems no more to depend upon consent than does the disqualification of a horse. A horse is disqualified because improper things are done with it. The respondent was disqualified because he impeded by lying the course of a necessary and proper enquiry and he has to suffer not because he consented to be bound by the rules, but because he permitted himself so to act as to bring his actions within their purview. Their Lordships see nothing to warrant the conclusion that this matter or others proper to be dealt with by Rules of Racing must be dealt with by by-law and it is in their opinion both convenient and legitimate to enact by by-law that such a disqualification as this resulting from violation of the Rules of Racing may be a ground for exclusion from the race course. It follows that in their Lordships' opinion the view of the Chief Justice was right and the application of the Respondent for an interlocutory injunction in the first action should have been refused.

As to the second action and part (4) of the by-law the objection to this part of the by-law which was sustained by the Full Court was that it was bad because it was too wide and too uncertain. The reasons for this conclusion are thus expressed by Davidson J.:—

“There is not even any limit of the desirability to matters relating to racing or its enjoyment by the public. A person might be held to be not desirable for personal or any reasons as to which the committee would not be bound to state more than their general opinion as to undesirability. It would amount to a power to exclude anyone they wished.”

On a fair and natural construction of the by-law their Lordships do not regard it as thus unlimited or as conferring any such wide power. The material words in the by-law are not simply “is not a desirable person” but “is not a desirable person to be admitted.” These last and very important words in their natural meaning convey that the undesirability in question is undesirability with regard to the consequences and effect of the presence of the person in question upon the racecourse. Reference to moral character or qualities unconnected with racing and racecourses is not in their Lordships' opinion intended or conveyed by the by-law and it means no more and no less than it would have meant

if it had been couched in less formal language and had conferred a right to refuse admission to those who in popular language are sometimes known as "race course undesirables." The decision on such a matter is naturally left to the decision of the Committee, and it is no objection to the validity of a by-law that under some conceivable circumstances its meaning may be strained and used to cover a case that it ought not to be used to cover. The point here under discussion may be illustrated from an argument advanced for the respondent on the hearing of these appeals. It was said that the Committee was excluding the respondent from the course and was proposing to treat him as an undesirable person within the meaning of the by-law because he was a liar. The argument is not supported by the actual facts of the case. The objection to the respondent was not that he was a liar in other walks of life but that he found it necessary and permissible to obstruct a proper enquiry into an important matter in the government of racing by false and misleading evidence: a charge of lack of principle and of dishonesty directly concerning racing. Because in their Lordships' opinion the by-law properly understood concerns itself with the character and conduct of a person in such a connection and not with his character and conduct in general they are of opinion that it is not too wide and is not uncertain. It follows that they hold that this part of the by-law also is valid.

Their Lordships will therefore humbly advise His Majesty that the appeals should be allowed with costs. The injunctions should be discharged and the respondent should pay the costs of the applications for interlocutory injunctions and of the appeals to the Full Court.



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DELIVERED BY LORD ROCHE.

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