JUDICIAL CONTROL OF SPORTING BODIES

Will the courts intervene to protect an amateur athlete from the disciplinary action of a national governing body? This question is prompted by the inordinate number of instances reported recently of prominent amateurs "disciplined" by their national associations. In some cases the severity of the sentences would suggest that the associations have in some manner acquired powers in excess of what they require for the efficient control of the sport, and in others the manner in which the decision was made leaves one with the uneasy feeling that something less than justice was seen to be done. The question is no longer academic. The commonest of such sentences, exclusion from competition, with its attendant publicity is, if nothing else, damaging to a player's reputation. It may be instrumental in shutting the door to a highly professional career and will almost certainly mean the loss of substantial benefits—financial and otherwise—which to the top amateur are the rewards of a great deal of sacrifice. It is quite unreal to regard first class competitive sport as nothing more than a form of recreation.

It is submitted that any player whose conduct is in question is entitled to know what he is charged with, and to have an opportunity of explaining his conduct before an impartial tribunal, that the tribunal should observe the rules under which the sport is administered and that the interpretation of those rules should in the final analysis be a matter for the courts. It is further submitted that the powers assumed by such bodies should be subject to checks similar to those obtaining in the case of bylaws.

The only example of a New Zealand athlete trying conclusions with the national body is the case of the part-time professional boxer Murphy (*Simpson* v. *Murphy* [1947] G.L.R.411); and it serves to illustrate the danger of uncritically applying principles established in other branches of law. According to the Court of Appeal, Murphy's licence, the contract (as they held) between him and the Boxing Association, could according to its terms be suspended without explanation. The Rules of the Association, which might have afforded him some protection, were treated as *res inter alios acta*. There is an air of unreality about this decision. The licence entitled Murphy to fight "under the Rules of the New Zealand Boxing Association". One of those rules was designed to protect licence holders. It is difficult to understand how a licensee can in such circumstances be deemed a stranger when he claims the protection of the rule. Further, the decision took no account of the fact that the Association exercised a monopoly in the field. Murphy could not fight anywhere without a licence. It could hardly be suggested he was in a position to accept or reject terms.

In the absence of direct authority assistance may be sought from the appreciable number of cases dealing with the activities of other "voluntary associations"—social clubs, racing clubs, and trade unions and from the law relating to statutory tribunals. The "Club" cases appear to offer the most encouraging line of approach. A member may not be expelled from his club except in accordance with the rules, the

committee must give him adequate notice of their intention to proceed and an opportunity of refuting any charges made against him, and they must act bona fide. These are principles firmly established by a long line of cases extending back over a hundred years: *Innes* v. *Wylie* (1844) 1 C.& K.257, *Dawkins* v. *Antrobus* (1879) 17 Ch.D.615, *Baird* v. *Wells* (1890) 44 Ch.D.661. The cases were decided against a background of English social clubs where the member paid a substantial subscription and became part owner of substantial assets. The principles, however, have been extended to other associations, including sporting clubs, and to matters other than expulsion. New Zealand courts, for instance, have intervened to protect women members' rights to use a golf links: *O'Neill* v. *Pupuke Golf Club Inc.* [1932] N.Z.L.R.1012, to declare a golfer's exclusion from competitive play unlawful: *Millar* v. *Smith* [1953] N.Z.L.R.1049, and to award damages where a nomination for a committee was wrongly rejected: *King* v. *Foxton Racing Club Inc.* [1953] N.Z.L.R.852.

Although in some of the earlier cases judges expressed themselves in the broadest terms (see for example *Innes* v. *Wylie* [supra]) the emphasis has always been on the protection of some "property right" of the member. Since *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540, this phrase no longer connotes an interest in land or chattels only, and in *Millar* v. *Smith*, (supra at p.1054) North J. found exclusion from a weekly golf competition "a right sufficiently related to her property rights to justify the Court's intervening"; but in *Bouzaid* v. *Horowhenua Indoor Bowls Centre Inc.* [1964] N.Z.L.R.187, Haslam J. declined to intervene in a dispute between a bowler and the subcentre to which his club belonged, holding, "There is in this instance no deprivation of enjoyment of club amenities, nor of opportunity for earning a livelihood or of gaining an emolument, nor even the right to take part in social gatherings of which an essential incident is the use of premises". It is submitted that once it is conceded that "proprietary interest" is not to be confined to an interest in land or chattels the extension of these principles to a dispute between player and national body offers no difficulties. The player's interests, which Chafee (see (1930) 43 Harv.L.R.993) calls *interests of personality*, frequently assume such importance in his life that mere losses of property often appear trivial by comparison. "The real question" he says "is whether the injury to these interests is sufficiently serious to warrant judical interference with the internal affairs of a social organisation," (at p.1000). These remarks apply with equal force to the affairs of a sporting organisation: see also Lloyd (1950) 13 Mod.L.R.283, 291.

Similar rules are found in the trade union cases—*Abbott* v. *Sullivan* [1952] 1 K.B.189, *Lee* v. *The Showmen's Guild* [1952] 2 Q.B.329, *Bonsor* v. *Muscians' Union* [1956] A.C.104, *Huntley* v. *Thornton* [1957] 1 All E.R.234, *Annamunthodo* v. *Oilfields' Workers' Trade Union* [1961] A.C.945—rules that offer the trade union member some protection against arbitrary action by the governing body of a trade union. These have been so thoroughly discussed in a number of articles. (Morris 69 L.Q.R.318, Lloyd (1956) 19 Mod.L.R.131, (1958) 21 Mod.L.R.661, (1958) 36 Can.Bar Rev.83, Wedderburn (1957) 20 Mod.L.R.105, Thomas (1956) Camb.L.J.67, Northey and Coote (1954) 30 N.Z.L.J.7, 28.), that it is not intended to do more than

suggest their significance in the context of a dispute between athlete and governing body.

The courts are prepared to interpret the rules and ensure the governing body acts according to those rules and only where there is some evidence to support their findings: *Abbott* v. *Sullivan, Lee* v. *The Showmen's Guild* (supra). They demand that it act in good faith: *McLean* v. *Workers' Union* [1929] 1 Ch.602, and will where necessary place a restrictive interpretation on rules purporting to allow it to make certain decisions without observing the principles of natural justice. Lord Denning would go further and say such a rule would be void: *Russell* v. *Duke of Norfolk,* [1949] 1 All E.R.109, 119, c.f. Brett L. J. in *Dawkins* v. *Antrobus* (supra, p.630). Clauses making the governing body the final arbiter in the interpretation of the rules are void: *Baker* v. *Jones* [1954] 1 W.L.R.1005. The courts will not, of course, interfere with purely administrative decisions or decisions involving fact or opinion. Nor will they order a union (and presumably a body such as the Professional Golfers' Association), to open its ranks to an outsider: *Faramus* v. *Film Artistes' Association,* [1964] A.C.925.

These are principles a professional sportsman might find very useful in a dispute with his association, and there can be little doubt they are available to him. But a major obstacle for the amateur is the necessity of establishing a contractual nexus between him and the national body; for this is the basis on which the trade union cases were decided. It is true that judges have on occasions shown some ingenuity in finding a contract where it is doubtful if any were intended: see *Davis* v. *Carew-Pole* [1956] 1 W.L.R.833, *Byrne* v. *Kinematograph Renters Society Ltd,* [1958] 1 W.L.R.762, but a contract there must be. The objection to this principle is its artificiality. The essence of contract is freedom to make one's bargain with the other party. The trade unionist and the sportsman have this in common—neither has any real freedom of contract. The union member must join the union on the union's terms or he doesn't work. The sportsman becomes a member of a club which is affiliated to the national body and accepts the rules as he finds them or he doesn't play. As Wade ((1959) Camb.L.J.32) suggests "Contract is being pressed into service to fill a gap in the law of tort". The Canadian case of *Orchard* v. *Tunney* [1957] S.C.R.436 would suggest the courts are coming round to the view that it is open to them to intervene simply to protect the right to work .A similar view was expressed in *Gould* v. *Wellington Watersiders' Union* [1924] N.Z.L.R.1025, 1042. If it can be shown that the right to play competitive sport is of sufficient importance they may be induced to extend that protection.

The matter can be looked at from another angle. In *Abbott* v. *Sullivan* (supra, at p.194), Evershed M.R. said "Its jurisdiction being then challenged . . . . the onus lay on those who asserted the validity of its transactions . . . . to prove the contract which would support the necessary jurisdiction." This is understandable; but if there is no contract and the courts adopt the attitude that they are not prepared to interfere on behalf of an individual affected by a tribunal's decision unless he can prove a contract, then the tribunal has in effect by-passed the restriction demanded by Lord Evershed. The judgment of Hogarth J. in *Beale v. South Australian Trotting League* [1963] S.A.S.R.209, 249-253 illustrates the shortcomings of this approach.

Whatever assistance the litigant athlete may receive from the club

and trade union cases he is likely to find the "Racing" cases producing nothing but obstacles. Courts have been over-ready to concede disciplinary powers to Jockey Clubs and similar bodies where there is no contractual nexus with the person dealt with, and they have allowed them unusual latitude in the manner they exercise their powers. If Mr Russell received justice at the hands of the Jockey Club, it was an accident. (*Russell* v. *Duke of Norfolk* [1949] 1 All E.R.109) Yet only Denning L.J. in the Court of Appeal made any attempt to find a straight-forward answer to what was a comparatively straightforward problem. The rules created the offence of misconduct and common justice demanded an enquiry. The Jockey Club had a monopoly in an important field of human activity. It had great powers with corresponding responsibilities. But even he was prepared to find the rules of natural justice had in fact been observed—presumably on the strength of Russell having received notice of the meeting and having been permitted to put in a statement.

Fortunately in New Zealand any doubts there may have been about an accused's right to a fair hearing have been set at rest by *Walton* v. *Holland* [1963] N.Z.L.R.729, 745, approving similar statements in *Tucker* v. *Auckland Racing Club* [1956] N.Z.L.R.1, and *Caddigan* v. *Grigg* [1958] N.Z.L.R.708. In *Tucker* v. *Auckland Racing Club,* Shorland J. (p.7) accepted the proposition that the courts would examine the construction placed on the rules by the tribunal and would grant relief where the construction was erroneous in law. In certain other aspects of curial control, however, the cases are less reassuring.

Stated in its baldest terms, *Caddigan* v. *Grigg* (supra) would allow a voluntary association to frame a rule giving itself power to punish certain individuals in certain circumstances, and on the basis of evidence not admissible in a court of law, to decide that a stranger had so acted as to bring himself within the purview of the rule. This proposition was said to be based on the Privy Council decision in *Stephen* v. *Naylor* (1937) 37 S.R.(N.S.W.)127; but there are two vital distinctions of which only one was dealt with by the Chief Justice. In *Stephen* the facts relied on to bring the accused within the jurisdiction were admitted, and secondly the "rule" under which he was dealt with was a bylaw made under statutory power, and so liable to be quashed for unreasonableness or uncertainty: In the New Zealand case the court was prepared to upset the finding of the Committee if it had failed to observe the rules or had incorrectly interpreted them, but this was small comfort to one alleging the tribunal had no power to determine the limits of its own jurisdiction.

In *Tucker* Shorland J. had the opportunity of dealing with the argument that the rules of the Racing Conference were in the nature of bylaws and so subject to the court's power to declare them invalid for unreasonableness. This suggestion had the support of Denning L.J. in *Bonsor* v. *Musicians' Union* [1954] 1 Ch.479, 485. Speaking of the rules of trade unions he said "they are not so much a contract as we used to understand a contract but they are much more a legislative code laid down by some members of the Union, to be imposed on all members of the Union. They are more like by-laws than a contract". Shorland J., however, who found the rule in question reasonable, was content to leave the question unanswered, though clearly he was unimpressed by the argument. (supra at p.15) It is submitted with respect that the proposition is perfectly sound. If a local body that

draws its powers of legislation from Parliament is subject to curial checks, it would seem there is greater need for the courts to control the legislative powers of voluntary associations whose powers are self-assumed.

In *Walton* the Court of Appeal did not accept the proposition that the courts would upset the finding of a tribunal if the evidence was not capable of sustaining the charge. They would do so only if there were no evidence in support. Whatever the future of these decisions in the context of racing, it is submitted there is no justification for extending them to cases dealing with participants in amateur athletics. Racing is a sport that has its own peculiar problems of which the courts no doubt are fully aware. See, for instance, *Beale* v. *South Australian Trotting League* (supra).

The rules relating to natural justice for which we have contended above receive support from the decisions dealing with Statutory Tribunals. "Unless Parliament otherwise enacts, the duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests on any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him.": Viscount Simon in *General Medical Council* v. *Spackman* [1943] A.C.627, 635. Any doubts on this latter point that may have arisen from the unfortunate dicta of Lord Goddard in *R.* v. *Metropolitan Police Commissioner* [1953] 1 W.L.R. 1150, 1155, and *ex parte Fry* [1954] 1 W.L.R.730, 733, have now been dispelled by *Ridge* v. *Baldwin* [1964] A.C.40, the general tenor of which can be gathered from Lord Morris's quotation from *R.* v. *North ex parte Oakey* [1927] 1 K.B.491 " . . . One of the most fundamental principles of English Law is that if you are going to impose on a person a penalty for an offence you must first clearly inform him that an application to that effect is going to be made against him, so that he may know what he is charged with and have an opportunity of attending to meet it." [1964] A.C.40, 121. There is no reason for demanding a less exacting standard from non statutory bodies.

In the matter of jurisdiction however there is a very real distinction between statutory bodies and voluntary associations. The courts have no difficulty keeping a body within limits which have been set by Parliament. The powers of voluntary associations are more often than not self-assumed. To say that the national executive of an athletic association derives its powers from the devotees of the sport by way of agreement is to misrepresent the facts. As Lloyd: (1950) 13 Mod.L.R. 283, points out, many bodies have acquired a monopoly of activities without the consent of the present devotees or their predecessors, and without their being able to exercise the smallest voice in the making of rules or the election of officers. Black J's description of a Jockey Club as "a small oligarchy that has appointed itself to lay down rules for horse racing with the laudable object of keeping the sport clean,": *Green* v. *Blake* [1948] I.R.275, is an apt description of a surprising number of national sporting bodies. This is the crux of the matter. The essence of any action against a governing body is that it has acted *wrongfully*. If it is careful to observe its own rules and go through the motions of granting the accused a fair hearing it is difficult to see how court intervention is to be justified. There must be some control of the rules themselves especially if they are drawn up (as they usually are) by the body exercising the powers.

It is submitted, then, that authority can be found for the following principles:

1. Any action taken by the governing body must be in accordance with the rules and the interpretation of those rules is a matter of law to be decided in the final analysis by the courts. "If they attribute to a rule a meaning it does not bear and then punish a man for breaking the rule as so construed they are assuming a jurisdiction they do not possess": Romer L.J. in *Lee* v. *The Showmen's Guild* (supra, at p.350).
2. The rules themselves must be subject to some control. They are not the terms of a contract, but rules of general application within a limited field and so akin to by-laws. They must be reasonable having regard to the rights of the player and the interests of the sport which the body is administering: see Denning L.J. in *Bonsor* v. *Musicians' Union* [1954] Ch.479, 485.
3. Any determinations of governing bodies which affect the rights of individuals are subject to the rules of natural justice. "They ought not . . . . according to the ordinary rules by which justice should be administered by committees of clubs or by any other body or persons who decide upon the conduct of others to blast a man's reputation . . . . without giving him an opportunity of either defending or palliating his conduct.": Jessel M.R. in *Fisher* v. *Keane* (1878) 11 Ch.D.353, 364-5, approved by Lord Reid in *Ridge* v. *Baldwin* [1964] A.C.40, 71.
4. If the facts as found by the tribunal are not reasonably capable of supporting the charge, the courts should hold there is a miscarriage of justice and should intervene: Denning L.J. in *Lee* v. *Showmen's Guild* (supra, at p.345). See also *Thompson* v. *B.M.A. (N.S.W. Branch)* [1924] A.C.764, 779.

These are minimal requirements. They do no more than ensure rules are reasonable, that governing bodies observe them, that no athlete is to be punished without some sort of a hearing and that the findings of these bodies shall be supported by some evidence. Unless there is a right of appeal, courts will take no account of the weight given to evidence, of its relevance, or the application of the rules to the facts; nor will they readily upset a finding for bias, cf. *Armstrong* v. *Kane* [1964] N.Z.L.R.369; and a subtle form of bias is a characteristic of sporting administrators anxious to "keep the sport clean". Finally there is the hazard of the sheer ineptitude of honest and well meaning gentlemen with little or no training in judicial work. The judgment of Racing's "House of Lords" (Lords Willoughby and Rosebery and the Duke of Norfolk) is remarkable for its brevity rather than for its logic: *Russell* v. *Duke of Norfolk* [1949] 1 All E.R.109, 112.

It may be taken for granted the courts will be reluctant to intervene on behalf of one who has no proprietary interest to protect and who is not a party to a contract with the governing body; and no doubt they would in cases of real injustice stretch the meaning of these phrases to the uttermost. It is suggested, however, this is unsatisfactory and unnecessary. This is a new problem whose solution calls for a new approach, as found in *Orchard* v. *Tunney* (supra). There Rand J. (at pp.446-447) said " . . . . they brought about as they intended to do, a nullification of the respondent's legal rights as a union member

to continue in the employment specifically of the employer, a dairy company, and generally of a union shop. This was a direct infringement of or trespass upon that right which of itself gave rise to a cause of action against those committing it." This attitude is consistent with the views of Hosking J. in *Gould* v. *Wellington Watersiders' Union* (supra) and of K. M. Gresson J. in *King* v. *Foxton Racing Club (Inc.)* [1953] N.Z.L.R.852, 855. Courts may understandably be slow to equate the right to work with a right to play competitive sport, but it is submitted the step will be taken when it is realised that exclusion from competition, with its suggestion of misconduct, is of sufficient importance or will make a sufficient impact on a player's life to warrant judical intervention.

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