1/29

IN THE PRIVY COUNCIL No. 5 of 1978

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION
IN PROCEEDINGS 762 OF 1977

FERD DAWSON CALVIN (Plaintiff) Appellant

JOHN HENRY BROWNLOW CARR (First-named Defendant)

JOHN HENRY BROWNLOW CARR, BLAKE RAYMOND PELLY,
DENIS PATRICK ROWE, SIR JOHN WORROKER AUSTIN,
ROBERT ANDREW HOWELL, WILLIAM FRASER GORDON,
JOHN HORACE INGHAM, THOMAS RENDELL STREET, REX JAMES WHITE
(Second-named Defendants)

JAMES JOSEPH MEEHAN, HECTOR JOHN MAHONEY,
DOUGLAS GEORGE McKAY, JACK BARRY HICKMAN,
THOMAS JOSEPH CARLTON, NORMAN SWAIN, BRIAN HILTON KILLIAN
(Third-named Defendants)
Respondents

RECORD OF PROCEEDINGS

PART I

Volume I

SOLICITORS FOR THE APPELLANT

Adrian Twigg & Co.,
160 Castlereagh Street,
Sydney. N.S.W.

By their Agents:

Waterhouse & Co.,
4 St.Pauls Churchyard,
London. EC FORM 8BA U.K.

SOLICITORS FOR THE RESPONDENTS

Stephen Jaques & Stephen,
A.M.P. Building,
Circular Quay. N.S.W.

By their Agents:

Linklaters & Paines,
Barrington House,
59-67 Gresham Street,
London. EC2V 7JA U.K.

Prepared by Young & Cooke, 70-76a Castlereagh St., Sydney.

IN THE PRIVY COUNCIL No. 5 of 1978

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION
IN PROCEEDINGS 762 OF 1977

FERD DAWSON CALVIN (Plaintiff) Appellant

JOHN HENRY BROWNLOW CARR (First-named Defendant)

JOHN HENRY BROWNLOW CARR, BLAKE RAYMOND PELLY,
DENIS PATRICK ROWE, SIR JOHN WORROKER AUSTIN,
ROBERT ANDREW HOWELL, WILLIAM FRASER GORDON,
JOHN HORACE INGHAM, THOMAS RENDELL STREET, REX JAMES WHITE
(Second-named Defendants)

JAMES JOSEPH MEEHAN, HECTOR JOHN MAHONEY,
DOUGLAS GEORGE McKAY, JACK BARRY HICKMAN,
THOMAS JOSEPH CARLTON, NORMAN SWAIN, BRIAN HILTON KILLIAN
(Third-named Defendants)
Respondents

RECORD OF PROCEEDINGS

PART I

Volume I

SOLICITORS FOR THE APPELLANT

Adrian Twigg & Co.,
160 Castlereagh Street,
Sydney. N.S.W.

By their Agents:

Waterhouse & Co.,
4 St.Pauls Churchyard,
London. EC FORM 8BA U.K.

SOLICITORS FOR THE RESPONDENTS

Stephen Jaques & Stephen,
A.M.P. Building,
Circular Quay. N.S.W.

By their Agents:

Linklaters & Paines,
Barrington House,
59-67 Gresham Street,
London. EC2V 7JA U.K.

IN THE PRIVY COUNCIL No. 5 of 1978

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION
IN PROCEEDINGS 762 OF 1977

FERD DAWSON CALVIN

(Plaintiff) Appellant

JOHN HENRY BROWNLOW CARR

(First-named Defendant)

JOHN HENRY BROWNLOW CARR BLAKE RAYMOND PELLY DENIS PATRICK ROWE SIR JOHN WORROKER AUSTIN ROBERT ANDREW HOWELL WILLIAM FRASER GORDON JOHN HORACE INGHAM THOMAS RENDELL STREET REX JAMES WHITE

(Second-named Defendants)

JAMES JOSEPH MEEHAN HECTOR JOHN MAHONEY DOUGLAS GEORGE McKAY JACK BARRY HICKMAN THOMAS JOSEPH CARLTON NORMAN SWAIN BRIAN HILTON KILLIAN

(Third-named Defendants)

Respondents

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

DOCUMENTS INCLUDED IN THE RECORD

Index "A"

PART II

LIST OF EXHIBITS INCLUDED IN THE RECORD

Exhibit Mark	Description	Date	Page
	VOLUME II		
	PLAINTIFF'S EXHIBITS:		
"A"	Rules of Racing (In pocket at back of Appeal Book)	1 January, 1975	
"B"	Interrogatories directed to Mr. J.H.B. Carr numbered 12 to 16 inclusive and 18-20 inclusive and answers thereto	13 August, 1977	397
"C"	Interrogatories directed to the Third Defendants numbered 1 to 9 inclusive and answers thereto	7 July, 1976	354
"D"	Transcript of Stewards' Inquiry	13 March, 1976	139
"H"	Part Transcript of Hearing before A.J.C. Committee	9 and 13 April, 1976	207
"K"	Interrogatories directed to Raymond Alexander numbered 12 to 20 inclusive and answers thereto	30 August, 1977	405
"O"	Rules of the A.J.C. Rules 1, 11 and 25	1 October, 1976	395
	DEFENDANTS' EXHIBITS:		
2	Interrogatories directed to the Plaintiff numbered 13, 14 and 17 and answers thereto	21 June, 1976	353

PART III

LIST OF FORMAL DOCUMENTS OMITTED FROM THE RECORD

No.	Description of Document	Date
1.	Summons	13 April, 1976
2.	Short Minutes of Order	13 April, 1976
3.	Affidavit of F.D. CALVIN	13 April, 1976
4.	Notice of Appearance (1st Defendant)	15 April, 1976
5.	Notice of Appearance (2nd Defendant)	15 April, 1976
6.	Affidavit of R.G. WAGLAND	15 April, 1976
7.	Copy of Court of Appeal Judgment	15 April, 1976
8.	Affidavit of J.V. COMANS	15 April, 1976
9.	Statement of Defence	17 May, 1976
10.	Notice to 3rd Defendants to answer Interrogatories	7 June, 1976
11.	Notice to 1st and 2nd Defendants to answer Interrogatories	7 June, 1976
12.	Notice to Plaintiff to answer Interrogatories	7 June, 1976
13.	Verified Statement in Answer to Interrogatories (Plaintiff)	21 June, 1976
14.	Notice of Motion	7 July, 1976
15.	Affidavit of R.G. WAGLAND	7 July, 1976
16.	Verified Statement in Answer to Interrogatories (Swain)	7 July, 1976
17.	Verified Statement in Answer to Interrogatories (Hickman)	7 July, 1976
18.	Verified Statement in Answer to Interrogatories (Carlton)	7 July, 1976
19.	Verified Statement in Answer to Interrogatories (Meehan)	7 July, 1976
20.	Verified Statement in Answer to Interrogatories (Killian)	7 July, 1976

Index "D"

No.	Description of Document	Date
21.	Verified Statement in Answer to Interrogatories (McKay)	7 July, 1976
22.	Verified Statement in Answer to Interrogatories (Mahoney)	7 July, 1976
23.	Notice of Motion	28 July, 1976
24.	Amended Statement of Defence	4 August, 1976
25.	Notice of Motion	5 August, 1976
26.	Affidavit of R.G. WAGLAND	5 August, 1976
27.	Order	4 August, 1976
28.	Amended Notice of Motion	11 August, 1976
29.	Verified Statement in Answer to Interrogatories (Carr as 1st Defendant)	13 August, 1976
30.	Verified Statement in Answer to Interrogatories (Howell)	13 August, 1976
31.	Verified Statement in Answer to Interrogatories (Street)	13 August, 1976
32.	Verified Statement in Answer to Interrogatories (Pelly)	13 August, 1976
33.	Verified Statement in Answer to Interrogatories (White)	13 August, 1976
34.	Verified Statement in Answer to Interrogatories (Gordon)	13 August, 1976
35.	Verified Statement in Answer to Interrogatories (Carr as 2nd Defendant)	13 August, 1976
36.	Verified Statement in Answer to Interrogatories (Rowe)	13 August, 1976
37.	Verified Statement in Answer to Interrogatories (Austin)	13 August, 1976
38.	Verified Statement in Answer to Interrogatories (Ingham)	13 August, 1976
39.	Supplementary Verified Statement in Answer to Interrogatories (McKay)	30 August, 1976
40.	Supplementary Verified Statement in Answer to Interrogatories (Meehan)	30 August, 1976

No.	Description of Document	Date
41.	Supplementary Verified Statement in Answer to Interrogatories (Swain)	30 August, 1976
42.	Supplementary Verified Statement in Answer to Interrogatories (Hickman)	30 August, 1976
43.	Supplementary Verified Statement in Answer to Interrogatories (Mahoney)	30 August, 1976
44.	Supplementary Verified Statement in Answer to Interrogatories (1st Defendant)	30 August, 1976
45.	Supplementary Verified Statement in Answer to Interrogatories (Carlton)	30 August, 1976
46.	Notice of Appearance (3rd Defendants)	1 November, 1976
47.	Notice of Motion	17 March, 1977
48.	Affidavit of R.G. WAGLAND	17 March, 1977
49.	Notice of Motion	29 March, 1977
50.	Short Minutes of Order	30 June, 1977
51.	Notice of Motion	30 June, 1977
52.	Affidavit of F.D. CALVIN	30 June, 1977
53.	Short Minutes of Order	1 July, 1977
54.	Notice of Motion	11 July, 1977
55.	Short Minutes of Order	27 July, 1977
56.	Affidavit of F.D. CALVIN	25 July, 1977
57.	Notice of Motion	
58.	Certificate of Deputy Registrar as to compliance with Order Granting Conditional Leave.	

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

First Defendant

J.H.B. CARR B.P. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

Second Defendants

J.J. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
B.H. KILLIAN

Third Defendants

STATEMENT OF CLAIM

1. The First Defendant is and has been at all material times the Chairman for the time being of the Committee of The Australian Jockey Club (hereinafter called "The A.J.C.") and is sued as Nominal Defendant for and on behalf of The A.J.C. pursuant to Section 4 of The Australian Jockey Club Act 1873.

2. The A.J.C. is and has been at all material times an unincorporated association the affairs of which are managed by the Committee thereof.

3. The Second Defendants are and have been at all material times the Members of the Committee of The A.J.C. and are hereinafter collectively called "the Committee".

4. The A.J.C. (by its Committee) controls and has at all

material times controlled horse racing within New South Wales (including the Australian Capital Territory).

5. There are and have been at all material times other bodies or associations controlling horse racing within other parts of Australia together comprising the whole of Australia. Each of the said bodies or associations and The A.J.C. is known as a Principal Club.

6. There are and have been at all material times rules made by or pursuant to agreement between the Principal Clubs known as "The Australian Rules of Racing".

7. There are and have been at all material times rules made by The A.J.C. known as "The Local Rules of The Australian Jockey Club".

8. The Australian Rules of Racing and the Local Rules of The Australian Jockey Club are together known as The Rules of Racing of The Australian Jockey Club and are hereinafter called "The Rules".

The Rules as in force at all material times so far as material are as set forth in the document received in evidence herein on 15th April, 1976 and marked Exhibit A which said Rules are herein incorporated by reference to the said document.

9. The conduct of horse racing in New South Wales is and has been at all material times governed by The Rules, subject to certain statutory provisions.

10. The Plaintiff is and has for some time -

(a) been a member of the A.J.C.;

(b) been a director and shareholder of a company engaged in the breeding of thoroughbred racehorses at and from the "Dawson Stud" near Cootamundra in the State of New South Wales;

(c) owned and been engaged in the racing of thorough bred horses.

11. The Plaintiff was at all material times a registered part-owner of a racehorse called "Count Mayo"; Count Mayo was a runner in a race called the Eastlakes Handicap second division at Randwick Racecourse (within the metropolitan area) on 13th March, 1976.

12. The Third Defendants are and have been at all material times the persons holding office pursuant to The Rules as stipendiary stewards to act at meetings within the metropolitan area, and as the stewards of The A.J.C.

13. The racehorse "Count Mayo" was ridden in the race referred to in paragraph 11 hereof by a jockey, Peter William Cuddihy, and at that time was trained by James Bartholomew Cummings and attended by his stable foreman, Ronald Thomas Dawson.

14. After the said race the Third Defendants other than the Defendant, B.H. Killian, (hereinafter collectively called "the stewards") conducted an enquiry relating to the running of Count Mayo in the said race. The said enquiry commenced on 13th March, 1976 and continued on 17th March, 1976, 20th March, 1976 and 26th March, 1976.

15. On 26th March, 1976 at the conclusion and as a result of the said enquiry, the Stewards -

(a) purported to find that the Plaintiff had been a party to a breach of Rules 135 (a) ~~and x (x)~~ of The Rules in that Peter William Cuddihy did not allow Count Mayo to run on its merits and that the said Ronald Thomas Dawson was also a party to the said breach.

(b) purported to disqualify the Plaintiff and each of the said Peter William Cuddihy and Ronald Thomas Dawson for twelve months as from 26th March, 1976.

16. In the conduct of the said enquiry and in the said purported finding against and disqualification of the Plaintiff neither natural justice nor fairness was observed, in that

(a) a substantial part of the said enquiry had concluded and a substantial amount of evidence had been received by the Stewards before the Plaintiff was informed that a charge of breach of Rule 135 or any charge was made or contemplated against him;

(b) the Plaintiff was not present or invited or given the opportunity to be present while substantial parts of the evidence in the said enquiry were received by the Stewards and the Plaintiff was not informed of the nature, substance or effect

of those parts of the evidence and the Plaintiff was deprived of a proper opportunity to answer the same;

(c) The Plaintiff was not informed as to the grounds on which or the respects in which the Stewards or any person claimed that the said horse was not run on its merits and the Plaintiff was deprived of a proper opportunity to answer any such claim;

(d) the Stewards took into account matters purportedly observed by certain of their number respectively without informing the Plaintiff what those matters were and the Plaintiff was deprived of a proper opportunity to answer those matters;

(e) certain of the Stewards took into account matters purportedly observed by them respectively without informing others of the Stewards or the Plaintiff what those matters were and some of such matters were inconsistent with observations made by others of the Stewards and were manifestly mistaken and the Plaintiff was deprived of a proper opportunity to answer such matters;

(f) Certain of the Stewards were absent from the said enquiry for certain periods while evidence was received and while the enquiry proceeded; yet still participated in the said purported findings and disqualifications.

(g) each of two of the said Stewards conducted part of the said enquiry and interviewed persons in relation thereto in the absence of the other Stewards and of the Plaintiff and without the Plaintiff's knowledge and without the Plaintiff being informed what those persons had stated or that such a course had been taken;

(h) two of the said Stewards adopted the role of prosecutors during the said enquiry, yet still participated in the said purported findings and disqualifications;

(i) after the Stewards had purported to find that the Plaintiff had been a party to a breach of Rule 135 (a) the Plaintiff was given no opportunity to make submissions or call evidence on the question of punishment before the Stewards purportedly disqualified him as aforesaid.

17. Upon the evidence adduced during the said enquiry no reasonable men could have formed the opinion that the Plaintiff had been a party to any breach of Rule 135.

17.A. There was no evidence adduced during the said enquiry to support the conclusion that the plaintiff was a party to any breach of Rule 135(a).

18. By reason of the foregoing matters the said purported disqualification of the Plaintiff by the Stewards was void and of no effect.

19. On 9th April, 1976 in purported pursuance of Section

32 of The Australian Jockey Club Act 1873 the Committee commenced hearing together appeals by each of the Plaintiff, the said Peter William Cuddihy and the said Ronald Thomas Dawson against the said respective purported disqualifications by the Stewards.

20. On 12th April, 1976 at the conclusion of the hearing of the said appeals the Committee purported to dismiss the appeals of the Plaintiff and of the said Peter William Cuddihy.

21. In the conduct of the said hearing and in the said purported dismissal of the appeal of the Plaintiff neither natural justice nor fairness was observed in that -

(a) the Committee, notwithstanding protest made, conducted the hearing on one day for an inordinate period approximating 13 hours ~~whereby for a substantial period of the hearing certain numbers of the Committee were, and manifestly appeared to be, incapable of giving due or proper attention and consideration to the proceedings;~~

Amended pursuant to leave granted by Mr. Justice Rath. (by M.P. Hollingdale).

(b) from time to time during the hearing certain members of the Committee were, and manifestly appeared to be, incapable of giving due or proper attention and consideration to the proceedings by reason of being asleep;

(c) for a substantial period of the hearing a member of the Committee was, and manifestly appeared to

be, incapable of giving due or proper attention and consideration to the proceedings by reason of his intoxication;

(d) certain members of the Committee had had bets on the race referred to in paragraph 13 and the existence of such bets was not (with one exception) disclosed to the Plaintiff;

(e) one member of the Committee was, and manifestly appeared to be, convinced of the guilt of the Plaintiff before the commencement of the hearing and during the hearing adopted and manifestly appeared to adopt a partisan role against the Plaintiff in the conduct of the hearing;

(f) members of the Committee took into account matters purportedly observed during the running of the said race by themselves or other members of the Committee without informing the Plaintiff what those matters were and the Plaintiff was deprived of a proper opportunity to answer those matters.

(g) notwithstanding their knowledge and belief of the facts set out in (b), (c), (d), (e) and (f) above the Committee continued to sit in the purported hearing of the appeals.

21.A. There was no evidence that the Plaintiff was a party to any breach of Rule 135(a).

22. Upon the evidence before the Committee no reasonable men could have found

(a) that there had been any breach of Rule 135(a) or that the Plaintiff was a party to any such breach;

(b) that the purported disqualification of the Plaintiff by the Stewards should stand or be given effect to.

23. The matters referred to in paragraphs 21 and 22 constitute a failure by the Committee to perform their statutory duty pursuant to Section 32 of The Australian Jockey Club Act 1873.

24. Alternatively to paragraphs 21 to 23 inclusive, by reason of the matters referred to in paragraph 18 the Committee had no jurisdiction to hear or determine an appeal from the said purported disqualification of the Plaintiff by the Stewards.

25. By reason of the foregoing matters the hearing before the Committee and the said purported dismissal of the appeal by the Plaintiff were void and of no effect.

26. Unless restrained by the Court, the A.J.C., the Second Defendant, and the Third Defendants intend to act on the basis that the said purported disqualification of the Plaintiff was valid and effective and that the Plaintiff is therefore disqualified within the meaning of the Rules whereby the Plaintiff will suffer substantial and irreparable injury and damage.

The Plaintiff claims:

1. A declaration that the purported disqualification of the Plaintiff by the Stewards on 26th March, 1976 was and is void and of no effect.

2. A declaration that the purported dismissal by the Second Defendants on 12th April, 1976 of an appeal by the Plaintiff from the said purported disqualification was and is void and of no effect.

3. A declaration that the Plaintiff is not disqualified within the meaning of the Rules of Racing of the Australian Jockey Club.

4. An order that each of The Australian Jockey Club, the Second Defendants and the Third Defendants be restrained from, by themselves and their respective officers, servants and agents -

   (a) acting upon the basis that the purported disqualification of the Plaintiff is valid or effective;

   (b) acting upon the basis that the Plaintiff is disqualified within the meaning of The Rules of Racing of The Australian Jockey Club;

   (c) communicating the purported disqualification of the Plaintiff to any other Principal Club.

5. Such further order or other relief as the nature of the case may require.

TO EACH OF THE DEFENDANTS:
All care of the Australian Jockey Club, Alison Road, Randwick, N.S.W.
You are liable to suffer judgment or an order against you

unless the prescribed form of notice of your appearance is received in the Registry within fourteen days after service of this Statement of Claim upon you and you comply with the Rules of Court relating to your defence.

PLAINTIFF: Ferd Dawson Calvin, 72 Wentworth Road, Vaucluse, Studmaster

SOLICITOR: Peter Twigg of Adrian Twigg & Co., 160 Castlereagh Street, Sydney. Tel: 26 5178

PLAINTIFF'S ADDRESS FOR SERVICE: c/- Adrian Twigg & Co., Solicitors, 160 Castlereagh Street, Sydney. Tel: 2 C.D.E. 267

ADDRESS OF REGISTRY: 225 Macquarie Street, Sydney.

Peter Twigg
Solicitor for the Plaintiff.

FILED The 5th day of May, 1976.

A.V. Ritchie
Registrar in Equity.

J. Morrissey
Clerk of the Court.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

First Defendant

J.H.B. CARR B.R. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

Second Defendants

J.J. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
B.H. KILLIAN

Third Defendants

AMENDED DEFENCE

(Amended 4th August 1976 pursuant to order of 4th August, 1976.)

(Amended 30th August 1976 pursuant to order of 24th August, 1976.)

1. The defendants and each of them admit all the allegations contained in paragraphs 1 to 15 both inclusive.

2. As to paragraph 16(a) of the Statement of Claim the defendants say that as soon as the third defendants contemplated making a charge against the Plaintiff they informed him of that fact, and that such part of the evidence which had been adduced before them before they informed the Plaintiff as aforesaid, was adduced at a time before the third defendants had contemplated making such a charge.

3. As to paragraph 16(b), the defendants say that very little relevant evidence or any kind was taken in the absence of the plaintiff, that the plaintiff was at all times aware of the nature substance and effect of the evidence which was given in his absence and that the evidence which was taken in the absence of the plaintiff was either not relevant to the charge against the plaintiff or was evidence which did not require to be answered by the plaintiff.

4. As to paragraph 16(c), of the Statement of Claim the defendants deny the allegations and each of them contained therein. The defendants further say that at the said enquiry no complaint was made by the plaintiff that he was unaware of the grounds of the offence charged against him.

5. As to paragraph 16(d) of the Statement of Claim the Defendants deny the allegations contained therein and each of them.

6. As to paragraph 16(e) of the Statement of Claim the defendants deny the allegations contained therein and each of them.

7. As to paragraph 16(f) of the Statement of Claim the defendants admit that certain of the third defendants were absent from the enquiry for very short periods of time whilst evidence was received and while the enquiry proceeded, and yet still participated in the findings and disqualifications referred to, but say

that there is no reason why they should not have so participated. The defendants further say that when the said certain third defendants returned to the said enquiry, a Transcript of the evidence which was taken in their absence was read to them or by them or they heard a tape recording of the evidence.

8. As to paragraph 16(g) of the Statement of Claim the defendants admit that one of the third defendants interviewed witnesses in the absence of the other third defendants, but save as aforesaid deny the allegations in the said sub-paragraph and each of them.

9. As to paragraphs 16(h) and 16(i) of the Statement of Claim the defendants deny all the allegations contained in each of the said sub-paragraphs.

10. In answer to paragraph 16 generally the defendants -

(a) deny that the said Stewards' enquiry was conducted with unfairness;

(b) deny that any breach of the rules of natural justice occurred during the said enquiry;

(c) deny that the third defendants were obliged by law to apply the rules of natural justice to the said enquiry; and

(d) say that if there was any unfairness during the enquiry (which they deny) or any breach of the rules of natural justice which they were bound to apply (and they deny that they were so bound to apply such rules and further deny that if they

were so bound they failed to apply them) then such defects were cured by the holding of the subsequent appeal to the second defendants.

11. The defendants deny all the allegations contained in paragraphs 17, 17A and 18 of the Statement of Claim.

12. The defendants admit the allegations and each of them contained in paragraphs 19 and 20 of the Statement of Claim.

13. As to paragraph 21(a) of the Statement of Claim the defendants say that the hearing took approximately 9½ hours on one day, but save as aforesaid, they deny all the allegations contained in the said sub-paragraph.

13A. Further as to Para 21(a) of the amended Statement of Claim the defendants say that the Court in the exercise of its discretion ought to refuse the relief claimed by the plaintiff or any relief.

Amended pursuant to leave granted by Rath J. on the 22nd day of April, 1977.

14. As to paragraph 21(b) of the Statement of Claim the defendants deny all the allegations contained in the said sub-paragraph.

15. As to paragraph 21(c) of the Statement of Claim the defendants deny the allegations therein and each of them.

16. As to paragraph 21(d) of the Statement of Claim the defendants admit the allegations contained therein; and further say that the following second defendants had the following bets on the said races:-

MEMBER	HORSE BACKED	SIZE OF BET
B.R. Pelly	Gentle James	$2.00 and $10.00
D.P. Rowe	Gentle James	$10.00
J.H. Ingham	Privet Hedge	$2,000.00
Rex J. White	Quinella - Count Mayo and 1st horse	$2.00
	Quinella - Count Mayo and 2nd horse	$2.00
	Quinella - 1st horse and 2nd horse	$2.00

Save as aforesaid, none of the second defendants had any bets on the said race.

17. As to paragraphs 21(e) and (f) and (g), the defendants deny all the allegations made in each of the said sub-paragraphs.

18. In answer to paragraph 21 generally, the defendants say -

(a) the said appeal was not conducted with any unfairness to the plaintiff;

(b) at the said appeal there did not occur any denial of natural justice.

19. The defendants deny all the allegations contained in each of paragraphs 21A and 22.

20. The defendants deny the allegations and each of them contained in paragraphs 23, 24 and 25.

21. In answer to the Statement of Claim generally the defendants submit -

(a) that if the plaintiff in his appeal referred to in paragraph 19 of the Statement of Claim

raised as a ground or grounds of appeal the allegations (or any of them) contained in paragraphs 16, 17 and 17A of the Statement of Claim, he is precluded by the rules of either issue estoppel or res judicata from maintaining those allegations in these proceedings.

(b) that if the plaintiff in his appeal referred to in paragraph 19 of the Statement of Claim did not raise as a ground or grounds of appeal the allegations (or any of them) contained in paragraphs 16, 17 and 17A of the Statement of Claim then since he could have raised the said ground or grounds in the said appeal, he is estopped from maintaining those allegations in these proceedings.

22. In further answer to the Statement of Claim generally the defendants submit that these proceedings do not lie against the first or second defendants by reason of the provisions of Section 32(2) and Section 32(3)(a) of the Australian Jockey Club Act, 1873 (as amended).

23. In further answer to the Statement of Claim the First Defendant says that the alleged cause or causes of action pleaded in the Statement of Claim is/are not a cause of action or causes of action against the Australian Jockey Club or against any of the members of the said Club as such.

24. In answer to the whole of the Statement of Claim the Defendants say:

(a) that the decision of the Third Defendants complained of by the Plaintiff was a decision made by the Third Defendants either in the exercise or in the intended exercise of a right power or authority conferred by or under the Rules of Racing;

(b) that the decision of the Second Defendants complained of by the Plaintiff was a decision made by the Second Defendants either in the exercise or in the intended exercise of a right, power or authority conferred by or under the Rules of Racing as well as in the exercise of the statutory jurisdiction of the Second Defendants under the Australian Jockey Club Act, 1873 (as amended).

25. In further answer to the whole of the Statement of Claim the Defendants say that the Plaintiff approbated the jurisdiction of the Second Defendants by lodging and prosecuting an appeal to the Second Defendants under Section 32 of the Australian Jockey Club Act and under the Rules of Racing and that the Plaintiffs are therefore precluded from reprobating such jurisdiction by claiming that the Second Defendants acted without jurisdiction.

FILED 30th August, 1976.

R. Wagland

.....
Solicitor for the Defendants

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 762 of 1976

CORAM: RATH, J.

MONDAY, 18th April, 1977.

CALVIN v. CARR & ORS.

MR. STAFF Q.C. with MR. CONTI and MR. DONOHOE appeared for the plaintiff
MR. HUGHES Q.C. with MR. MEAGHER Q.C., MR. REYNOLDS Q.C. AND MISS WEIGALL appeared for the first and second defendants.
MR. MEAGHER Q.C. with MR. REYNOLDS Q.C. and MISS WEIGALL appeared for the third defendant.

(Rules of Racing tendered by consent and marked Exhibit "A".)

(Interrogatories directed to Mr. J.H.B. Carr and answers as tendered, numbered 12 to 16 inclusive and 18 to 20 marked Exhibit "B".)

(Interrogatories numbered 1 to 5 inclusive, 7, 8 and 9 and answers by the third defendant, tendered without objection and marked Exhibit "C".)

(Transcript of the proceedings of the inquiry conducted by the Stewards tendered without objection and marked Exhibit "D".)

2.

SECOND DAY: TUESDAY, 19TH APRIL, 1977

(Answers of Mr. Alexander to interrogatories 6, 9, 12, 13, 14, 15, 16, 17, 18, 19 and 20 tendered; admitted without objection and marked Exhibit "K".)

4.

Page 2, Tender of Document marked Exhibit "D"
Page 4, Tender of Document marked Exhibit "K"

SUPREME COURT OF NEW SOUTH WALES

EQUITY DIVISION

Name of Case: (Capitals) CALVIN v. CARR AND ORS.

Coram: RATH, J.

Date of Judgment: Thursday, 23rd June, 1977.

Proceedings No.: 762 of 1976

Catch Words: Voluntary associations - Australian Jockey Club - disqualification - natural justice - alleged "bias" of stewards - stewards acting as investigators, prosecutors and judges - alleged failure to give plaintiff a fair hearing - evidence taken in his absence - no opportunity to address on penalty - appeal to Committee of the Club - whether appeal "cured" defects of stewards' enquiry - effect of s. 32 of the Australian Jockey Club Act 1873 - finality of appeal - whether a hearing de novo - alleged denial of natural justice on appeal - alleged inordinate length of hearing on one day - bets placed by members of the Committee - alleged partisan attitude of one member of the Committee: Australian Jockey Club Act 1873, ss. 31, 32; Royal Commissions Act, 1923, s. 6.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 762 of 1976

CORAM: RATH, J.

Thursday, 23rd June, 1977.

CALVIN v. CARR AND ORS.

JUDGMENT

HIS HONOUR: The plaintiff claims in this action that his purported disqualification by the stewards of the Australian Jockey Club, and the purported dismissal of his appeal to the Committee of the Club, were void and of no effect.

A statement of claim and other pleadings were filed, and on these pleadings a number of matters are admitted. The plaintiff is a member of the Australian Jockey Club (hereafter called "the A.J.C."), and has been engaged in the breeding, owning and racing of thoroughbred horses. The first defendant is and has been at all material times the chairman of the A.J.C. and is sued as the nominal defendant for and on behalf of the A.J.C. pursuant to s. 4 of the Australian Jockey Club Act 1873. The A.J.C. is an unincorporated association the affairs of which are managed by its Committee. The A.J.C. controls horse racing within New South Wales and the Australian Capital Territory. There are other bodies or associations controlling horse racing within Australia, and each of these bodies or associations and the A.J.C. is known as a Principal Club. There

are rules made by or pursuant to agreement between the Principal Clubs known as "The Australian Rules of Racing". There are also rules made by the A.J.C. known as "The Local Rules of the Australian Jockey Club". The Australian Rules of Racing and the Local Rules of Racing are together known as "The Rules of Racing of the Australian Jockey Club" and will be hereafter called "the Rules". The conduct of horse-racing in New South Wales is governed by the Rules, subject to certain statutory provisions.

The second defendants (who include the first defendant) are the members of the Committee of the A.J.C. The third defendants are the persons holding office pursuant to the rules as stipendiary stewards to act at meetings within the metropolitan area, and as stewards of the A.J.C.

The plaintiff was a registered part owner of a race-horse called Count Mayo which was a runner in a race called the Eastlakes Handicap Second Division at Randwick Race-course on 13th March, 1976. The horse was ridden in that race by a jockey named Peter William Cuddihy, and at that time was trained by James Bartholomew Cummings and attended by his stable foreman, Ronald Thomas Dawson. After the race the third defendants, other than the defendant B.H. Killian (hereafter collectively referred to as "the stewards") conducted an enquiry relating to the running of Count Mayo in this race. The enquiry commenced on 13th March, 1976 and continued on 17th, 20th, and 26th March, 1976. On 26th March, 1976, at the conclusion and as a

result of the enquiry, the stewards purported to find that the plaintiff had been a party to a breach of rule 135(a) of the Rules in that Peter William Cuddihy did not allow Count Mayo to run on its merits and that Ronald Thomas Dawson was also a party to that breach, and further purported to disqualify the plaintiff, Cuddihy and Dawson for twelve months as from 26th March, 1976.

On 9th April, 1976 in purported pursuance of s. 32 of the Australian Jockey Club Act 1873 the Committee commenced hearing together appeals by each of the plaintiff, Cuddihy and Dawson against their respective purported disqualifications by the stewards. On 12th April, 1976 at the conclusion of the hearing of the appeals the Committee dismissed the appeals of the plaintiff and Cuddihy, and upheld the appeal of Dawson.

Those are the admitted facts in relation to enquiry by the stewards and the appeal before the Committee. With regard to the stewards' enquiry and the plaintiff claims that, in the conduct of the enquiry and in the said purported finding against and disqualification of the plaintiff neither natural justice nor fairness was observed in that (a) a substantial part of the enquiry had concluded and a substantial amount of evidence had been received by the stewards before the plaintiff was informed that a charge of breach of rule 135 or any charge was made or contemplated against him; (b) the plaintiff was not present or

invited or given the opportunity to be present while substantial parts of the evidence in the said enquiry were received by the stewards and the plaintiff was not informed of the nature, substance or effect of those parts of the evidence and the plaintiff was deprived of a proper opportunity to answer the same; (c) the plaintiff was not informed as to the grounds on which or the respects in which the stewards or any person claimed that the horse was not run on its merits and the plaintiff was deprived of a proper opportunity to answer any such claim; (d) the stewards took into account matters purportedly observed by certain of their number respectively without informing the plaintiff what those matters were and the plaintiff was deprived of a proper opportunity to examine those matters; (e) certain of the stewards took into account matters purportedly observed by them respectively without informing others of the stewards or the plaintiff what those matters were and some of such matters were inconsistent with observations made by others of the stewards and were manifestly mistaken and the plaintiff was deprived of a proper opportunity to answer such matters; (f) certain of the stewards were absent from the said enquiry for certain periods while evidence was received and while the enquiry proceeded, yet still participated in the said purported findings and disqualification; (g) each of two of the stewards conducted part of the enquiry and interviewed persons in relation thereto in the absence of the other stewards and of the

plaintiff and without the plaintiff's knowledge and without the plaintiff being informed what those persons had stated or that such a course had been taken; (h) two of the stewards adopted the role of prosecutors during the enquiry, yet still participated in the purported findings and disqualifications; and (i) after the stewards had purported to find that the plaintiff had been a party to breach of rule 135(a) the plaintiff was given no opportunity to make submissions or call evidence on the question of punishment before the stewards purportedly disqualified him.

The only admissions of those matters are that certain of the stewards were absent from the enquiry for short periods of time whilst evidence was received and while the enquiry proceeded, and yet still participated in the findings and disqualifications referred to and that one of the stewards interviewed witnesses in the absence of the other stewards. It is denied that the stewards' enquiry was conducted with unfairness; that any breach of the rules of natural justice occurred during the enquiry and that the stewards were obliged by law to apply the rules of natural justice to the enquiry. It is further contended by the defendants that if there was any unfairness during the enquiry or any breach of the rules of natural justice which they were bound to apply, then such defects were cured by the holding of the appeal to the Committee.

It is further contended by the plaintiff, as to the stewards' enquiry, that upon the evidence adduced during

the said enquiry no reasonable men could have formed the opinion that the plaintiff had been a party to any breach of rule 135; and that there was no evidence adduced during the enquiry to support the conclusion that the plaintiff was a party to any breach of r. 135(a).

With regard to the appeal to the Committee, the plaintiff contends in his statement of claim that in the conduct of the hearing and in the purported dismissal of the appeal neither natural justice nor fairness was observed in that (a) the Committee, notwithstanding protest made, conducted the hearing on one day for an inordinate period approximating 13 hours whereby for a substantial period of the hearing certain members of the Committee were, and manifestly appeared to be, incapable of giving due or proper attention and consideration to the proceedings; (b) certain members of the Committee had had bets on the race and the existence of such bets was not (with one exception) disclosed to the plaintiff; (c) one member of the Committee was, and manifestly appeared to be, convinced of the guilt of the plaintiff before the commencement of the hearing and during the hearing adopted and manifestly appeared to adopt a partisan role against the plaintiff in the conduct of the hearing; (d) members of the Committee took into account matters purportedly observed during the running of the race by themselves or other members of the Committee without informing the plaintiff what those matters were and the plaintiff was deprived of a proper opportunity to

answer those matters; and (c) notwithstanding their knowledge and belief of the facts set out in (b) (c) and (d) the Committee continued to sit in the purported hearing of the appeals. The allegation (a) was amended at the hearing, and I shall refer to the amendment later.

With the exception of the allegation (b), and part of allegation (a), these allegations against the Committee are denied. As to allegation (a), the defendants in their defence say that the hearing took approximately $9\frac{1}{2}$ hours on one day, and otherwise there is a denial. The allegation (b) is admitted, and it is said that members of the Committee had the following bets:-

Member	Horse Backed	Size of Bet
B.R. Pelly	Gentle James	$2.00 and $10.00
D.P. Rowe	Gentle James	$10.00
J.H. Ingham	Private Hedge	$2,000.00
Rex J. White	Quinella - Count Mayo and 2nd Horse	$2.00
	Quinella - Count Mayo and 2nd Horse	$2.00
	Quinella - Count Mayo and 2nd Horse	$2.00

It is further contended by the Plaintiff (1) that there was no evidence that the plaintiff was a party to any breach of rule 135(a); (2) that upon the evidence before the Committee no reasonable men could have found

(a) that there had been any breach of rule 135(a) or that the plaintiff was a party to such breach; (b) that the purported disqualification of the plaintiff by the stewards should stand or be given effect to; (3) that the matters referred to in (1) and (2) constitute a failure by the Committee to perform their statutory duty pursuant to s. 32 of the Australian Jockey Club Act 1873; (4) alternatively to (1), (2) and (3), by reason of the earlier allegation that the purported disqualification of the plaintiff by the stewards was void and of no effect, the Committee had no jurisdiction to hear or determine an appeal from the purported disqualification of the plaintiff by the stewards; and (5) that by reason of these matters the hearing before the Committee and the said purported dismissal of the appeal by the plaintiff were void and of no effect. All of these allegations are denied.

In the statement of defence issues of estoppel and res judicata are raised, but no argument was addressed to the court upon these matters. It was further submitted that these proceedings do not lie against the first defendant or the Committee by reason of the provisions of s. 32 (2) and s. 32(3)(a) of the Australian Jockey Club Act 1873. In another defence it is contended that the alleged causes of action are not causes of action against the A.J.C. or against any of the members of the Club as such. This defence was not developed in argument. A further defence was related to rule 4 of the Rules, and was the subject of

submissions to the Court. Finally there was a defence of approbation, in the following terms: "In further answer to the whole of the statement of claim the defendants say that the plaintiff approbated the jurisdiction of the second defendants by lodging and prosecuting an appeal to the second defendants under s. 32 of the Australian Jockey Club Act and under the Rules of Racing and that the plaintiffs (sic.) are therefore precluded from reprobating such jurisdiction by claiming that the second defendants acted without jurisdiction."

Interrogatories were addressed by the plaintiff to Mr. Carr in relation to the stewards' enquiry, and to the stewards themselves, and answers were tendered in evidence by the plaintiff. In the stewards' answers it is said that the first time each of them contemplated (in the sense that he considered it more likely than not) that the stewards would make a charge against the plaintiff was not until the jockey Cuddihy had given evidence after the last race on 17th March, 1976. In answer to the question what the charge contemplated was, they all, with the exception of Mr. Carlton, say "a charge under Rule 135 of the Rules of Racing". Mr. Carlton did not provide an answer to that particular question. I should mention that Mr. Killian took no part in the enquiry, and all his answers are to this effect. From answers to another interrogatory it appears that before the plaintiff was charged, evidence was taken in his absence from Cuddihy and a Mr. Mason on

13th March, 1976 and a Mr. Galea and Cuddihy on 17th March, 1976; that after he was charged, evidence was taken in his absence from Galea, and a Mr. Todd and a Mr. Campbell; and that the Sydney and Melbourne bookmakers' sheets were received in his absence. One of the stewards (Mr. Meehan) had a brief telephone conversation with a Mr. Poulsen. Another steward (Mr. Mahoney) rang the V.R.C. stewards to get the Melbourne bookmakers' sheets. A third steward (Mr. Hickman) interviewed Todd and Campbell whose evidence appears in the transcript.

I shall set out the third interrogatory in full. The respective answers to it are identical, and I shall set them out after each question.

"Q. Did you inform the plaintiff as to the grounds on which or the respects in which you or the other third defendants or any of them claimed that Count Mayo was not run on its merits and if so, when, and where did you so inform the plaintiff and what was the information which you gave to him?

A. Yes, in so far as it appears in the transcript of evidence.

Q. Did you inform the plaintiff as to the grounds on which or the respects in which any other persons claimed Count Mayo was not run on its merits and if so, when, and where did you so inform the plaintiff and what was the information which you gave to him?

A. Only to the extent revealed in the transcript of

the stewards' inquiry but to the extent that it is revealed, the information was limited to the grounds on which and the respects in which the other third defendants (apart from Mr. Killian) claimed that Count Mayo was not run on its merits.

Q. What opportunity was given to the plaintiff to answer any claim that Count Mayo was not run on its merits? If an invitation was given to the plaintiff for that purpose who gave the invitation and where and when?

A. After he was charged on 17th March, 1976 he was granted an adjournment to call evidence from New Zealand and on the hearing on 26th March, 1976 he was given two further opportunities to present evidence or make submissions - these appear on pages 29 and 31 of the transcript of the stewards' inquiry."

The reference to "transcript of evidence" in the first answer is equivocal, but I think it must be taken to be what is termed in the later answers "transcript of the stewards' inquiry". The stewards were called as witnesses before the Committee, and gave evidence of their observations of the running of the race. It was not suggested during these proceedings that the stewards, in their enquiry, informed the plaintiff of their observations as set out in this evidence. What the first answer means, therefore, is that any communication by the stewards to the

plaintiff of their observations of the running of Count Mayo is to be found in the transcript of the stewards' enquiry.

From the answers to another interrogatory it appears that the stewards Meehan, Carlton and Swain were present throughout the enquiry. Mr. Mahoney stated that on 13th March he was absent for about five minutes of Mr. Mason's evidence. The evidence was read back to him later that day. On 17th March he had to leave the hearing for a few minutes but before the hearing resumed on 26th March he read the transcript of evidence taken in his absence. Mr. McKay was absent from the enquiry when evidence was taken from Mr. Bruce Galea on the morning of 26th March, but he heard a tape recording of the evidence. Mr. Hickman was on 13th March absent for about five minutes of Mr. Mason's evidence but the transcript of the evidence was read back to him later that day. Looking at the position in another way, the chairman of the stewards (Mr. Meehan) and two other stewards were present throughout the enquiry; all six of the stewards engaged in the hearing were present throughout the periods when the plaintiff, the jockey (Cuddihy) and the trainer's foreman (Dawson) were giving evidence; two of the stewards were absent during a brief period of the evidence of the witness Mason; and a third steward was absent whilst evidence was taken from the witness Galea. From another interrogatory it appears that only one of the stewards (Hickman) interviewed witnesses

who later gave evidence. The witnesses were Messrs. Todd and Campbell. Neither Galea, Todd, nor Campbell was called before the Committee, and no criticism is made of the appeal proceedings on that score.

In answer to another interrogatory each of the stewards agrees that there was discussion with other stewards as to the running of Count Mayo before the plaintiff was charged. Mr. Meehan's answer is: "Yes but I cannot recall the precise occasions except that I told Mr. Mahoney immediately after the race that I was not satisfied with Count Mayo's performance and that I would hold an enquiry (this conversation was in the stewards' box in the members' grandstand); the other discussions were all of a round table nature with the rest of the other third defendants (apart from Mr. Killian) and were all within the precincts of the Stewards' Rooms at Randwick. I expressed my observations concerning the running of Count Mayo and although I cannot recall precisely what I said, it is my recollection that I mentioned all or most of the observations I gave during the course of my evidence to the Committee of the Australian Jockey Club on 9th April 1976; and I also discussed the observations of the other stewards and queried them on certain aspects; it is also my recollection that I expressed my opinion concerning the running of Count Mayo and although I cannot remember precisely what I said from recollection it was something to the effect that I was not happy with the way Cuddihy rode the horse and that I was

not satisfied at that stage that Count Mayo had been allowed to run on its merits."

From his evidence before the Committee it appears that Mr. Meehan was, during the race, stationed in the official stand, practically in line with the winning post. The following evidence was given by him in answer to questions by Mr. Falkingham Q.C. (as he then was), senior counsel assisting the Committee:

"Q. You heard the description given to you and the other stewards by Jockey Cuddihy of the running of the race?

A. Yes.

Q. Including the statement that the horse ran with its head in the air for about 50 metres?

A. Yes.

Q. Have you any comment to make on that?

A. I dispute the fact that he ran with his head in the air for 50 metres.

Q. And that after he went about a furlong he hung?

A. I dispute that too.

Q. And that he did not run off, but hung from there to inside the last furlong?

A. No, I cannot agree with that.

Q. And that in the last furlong he started to veer to the outside?

A. He drifted off the track approximately the last furlong.

Q. It was further said by Cuddihy that the horse had hung badly over the back of the track. Was that your observation?

A. No.

Q. Did you at any time see Cuddihy flick the whip at the horse or hit it with the whip?

A. No.

Q. In your view, at any time during the race did the horse appear as though it would run off the track?

A. No. In the last bit it drifted off the track.

Q. Or was trying to hang off?

A. No.

Q. Did there appear to you to be any difficulty in Cuddihy getting the horse around the turn?

A. No, did not appear to be any trouble to me."

From cross examination it appears that during the stewards' enquiry Mr. Meehan spoke to Mr. Poulsen, senior stipendiary steward in New Zealand. Count Mayo was a New Zealand horse, and had raced there, being mostly ridden by a jockey of the name of Skelton. The stewards received from Mr. Poulsen extracts from films of Count Mayo's New Zealand races, and they had before them a statement of Mr. Skelton in which he said he never hit the horse with the whip. Mr. Meehan, from his observation of the New Zealand films, formed the opinion that Skelton had many times hit the horse with the whip. He agreed that he did not tell the plaintiff that he did not believe Skelton's statement (which the parties

were aware of), but he did not think it was material, because he was interested in what happened at Randwick. From other cross-examination it appears that Mr. Meehan's complaint of Cuddihy's riding in the race was that the jockey missed the start, then let the horse run along, and did not at any stage of the race endeavour to improve his position. In Mr. Meehan's view Cuddihy was at fault in missing the start. His observation of the whole race was that Cuddihy deliberately rode badly.

Mr. Mahoney's answer to the same interrogatory is as follows: "Yes but I cannot recall the precise occasions apart from a conversation I had with Mr. Meehan immediately after the race in the stewards' box in the members' grandstand at Randwick; I said that from my view Cuddihy had not ridden the horse in his usual vigorous manner. The other discussions were all in the precincts of the Stewards' Rooms at Randwick and were of a round table nature with the rest of the third defendants (apart from Mr. Killian); I expressed my observations concerning the running of Count Mayo and although I cannot recall precisely what I said I mentioned all or most of the observations I gave during the course of my evidence to the Committee of the Australian Jockey Club on 9th April 1976; I also discussed the observations of the other stewards and I queried certain aspects as well as making a comment on the veterinary surgeon's report which indicated no apparent abnormality except for a laceration to part of Count Mayo's mouth; I

also expressed my opinion at that stage that Count Mayo had not been allowed to run on its merits."

Mr. Mahoney was with Mr. Meehan during the running of the race. From his evidence before the Committee, it appears that he did not "particularly" observe Count Mayo's start in the race. He did not see any "hanging" (which I was informed meant "veering" or "drifting"), until he saw the horse "drifting out" towards the finish. He was not asked directly to state his reasons for thinking that the jockey had not allowed the horse to run on its merits, but he appears to have attached significance to the fact that the jockey was not "pulling the whip on the horse".

Mr. Carlton's answer to the interrogatory is as follows:- "Yes but I cannot recall the precise occasions; the discussions were of a round table nature with the rest of the other third defendants (apart from Mr. Killian) and took place in the Stewards' Rooms at Randwick; in the course of the discussions I expressed my observations concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I mentioned all or most of the observations I gave during the course of my evidence to the Committee of the Australian Jockey Club on 9th April 1976; I also expressed my opinion concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I said something to the effect I was not happy with the way Cuddihy rode the horse and that I was not satisfied at that stage that

Count Mayo had been allowed to run on its merits."

In his evidence before the Committee Mr. Carlton said he did see the horse with its head in the air after the start, for almost 50 metres. He did see the horse "hang". He would not call it "hanging" unless it was observable. He did not see the jockey use the whip at any time. He could see the horse at the entrance of the straight, and did not see the jockey touch the horse with the whip there. This witness also was not asked directly what led him to consider that the horse had not been allowed to run on its merits.

Mr. Swain's answer is as follows: "Yes but I cannot recall the precise occasions; the discussions were of a round table nature with the rest of the other third defendants (apart from Mr. Killian) and took place in the Stewards' Rooms at Randwick; in the course of the discussions I expressed my observations concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I mentioned all or most of the observations I gave during the course of my evidence to the Committee of the Australian Jockey Club on 9th April, 1976; I also expressed my opinion concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I said something to the effect that I was not happy with the way Cuddihy rode the horse and that I was not satisfied at that stage that Count Mayo had been allowed to run on its merits."

Mr. Swain was stationed during the race with Mr. Carlton in the stewards' stand near the 600 metres mark. He noticed Count Mayo move outwards just after the start with its head in the air. He did not see the horse "hang"; but it is possible that a horse might hang "very slightly" and not be noticed. He was not asked directly what were the observations he had made of the race; but he agreed that he put to Cuddihy that at a certain stage he raced on the fence, and that this was not in fact so. This last matter was not explored, and there was no suggestion that Cuddihy was deliberately misled.

Mr. McKay's answer to the interrogatory was: "Yes but I cannot recall the precise occasions; the discussions were of a round table nature with the rest of the other third defendants (apart from Mr. Killian) and took place in the Stewards' Rooms at Randwick; in the course of the discussions I expressed my observations concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I mentioned all or most of the observations I gave during the course of my evidence to the Committee of the Australian Jockey Club on 9th April 1976; I also expressed my opinion concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I said something to the effect that I was not happy with the way Cuddihy rode the horse, that he had not tried to improve his position and

that I was not satisfied at that stage that Count Mayo had been allowed to run on its merits."

Mr. McKay was stationed alone at the 900 metres mark, with a very good view of the start. In evidence before the Committee he said he saw the horse jump, and from his observation Cuddihy had a tight hold of the horse from the time it left the barrier. The horse had its head in the air for about 50 metres. He did not see the horse "hang", and did not see the jockey apply the whip.

Mr. Hickman's answer to the interrogatory was: "Yes but I cannot recall the precise occasions; the discussions were of a round table nature with the rest of the other third defendants (apart from Mr. Killian) and took place in the Stewards' Rooms at Randwick before the parties were charged; in the course of the discussions I expressed my observations concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I mentioned - (i) that Cuddihy had a good hold of the horse's head in the home straight but he did not appear to try to improve his position although he was a fair way from the leaders over the rise (ii) that the horse appeared to shift in slightly soon after straightening and then moved out ten or twelve horses in the last 50 yards. I also expressed my thoughts at that stage concerning the running of Count Mayo and although I cannot recall precisely what I said, from recollection I said something to the effect that I was not happy with the way Cuddihy rode the

horse and that I was concerned that Count Mayo had not been allowed to run on its merits." Mr. Hickman was not called as a witness before the Committee, but no point on that circumstance is taken in the present proceedings.

The course of the stewards' enquiry was as follows. After the running of the race the jockey Cuddihy was called before the six stewards and was asked a number of questions relating to the race and his knowledge of the horse. The plaintiff was not present. Cuddihy gave evidence that his instructions for the race came from the plaintiff and the foreman. These instructions were, according to him, as follows: "To jump, and they warned me to watch him early. In New Zealand he knocked a field down at his first run. The other day I rode him in a trial and he hung. He had horses outside him, and he went around all right. They said to watch him. They told me to make sure I did not pull the whip on him. Apparently if you hit him with the whip he runs everywhere". He had ridden the horse in a trial, and it "raced green". He told the trainer after the trial that the horse had "hung". He described the race as follows: "He jumped all right, but with his head in the air, and for about 50 metres. Once he went about a furlong, he hung. He did not run off, but he hung from there to inside the last furlong. In the last half furlong he started to veer to the outside". In the straight, he said, he rode him "hands and heels", and the horse "darted off". "The way he raced", Cuddihy said, "if I had hit him

I would say I would have made him worse. As soon as I took the one hand off to pull the whip he would have run straight out". If the horse "was not hanging off" he probably would have pulled the whip. When reminded that he had said his instructions were not to use the whip, he said: "The way they were talking, it was because of his hanging. If he was going straight, and if he had not hung at all and it looked like going to get to them" (that is, the horses in front) "with a hit on the backside, I would have". Cuddihy also said that the owner and trainer had told him they would back the horse.

Cuddihy withdrew, and the plaintiff and the foreman Dawson were called into the stewards' room. Both of them had seen the race. The plaintiff was not told of Cuddihy's evidence as to the giving of instructions, as to the trial or as to the running of the race; nor (so far as the transcript indicates) was he told what the stewards' own observations were. He said that he himself gave the instructions, and his account of these is substantially the same as that of Cuddihy, except that the horse was not to be hit with the whip "unless it was very desperate". When asked if he was satisfied with the way Cuddihy rode the horse, he replied: "He rode him the way I told him to. I could not see exactly what was happening to the horse - whether he got out under pressure or what. He kept veering out, and towards the finish he finished under the judge's box." Both the plaintiff and Dawson had watched

the trial. Dawson had no knowledge that the horse had "hung" in the trial. The plaintiff's evidence was that the horse seemed to go all right and that Cuddihy did not say whether the horse hung; he did say that the horse went "very fierce" early. The plaintiff gave evidence that Cuddihy rang him on the night after the trial, and suggested that the horse's teeth be looked at, that the horse had tried to bolt with him, and when he started to pull him up he threw his head.

The plaintiff gave evidence before the stewards of placing a substantial bet ($6000) on the horse. When asked whether it was a good bet for him or a medium bet, he replied: "I have not been betting that big lately. I have had bigger but it is a damn good bet for anyone." His feeling about the horse at the time was that it was "badly underdone"; he was concerned about its fitness and he really did not think the horse could win. Dawson said (in the plaintiff's presence) that he did not think there was a great deal wrong with the horse. The plaintiff said that the horse had been seen by Mr. Sykes, a veterinary surgeon, on the day before the race, and a blood count was done. Mr. Sykes was not called, but from the plaintiff's evidence it appears that there was no adverse report.

As the next race was coming up, the enquiry was adjourned. Later the plaintiff came into the stewards' room and gave particulars of bets his friends had on the horse. The enquiry then resumed in the plaintiff's absence, with

the calling of Mr. Mason, who said that the plaintiff had asked him that morning to put money on for him. Mr. Mason's evidence was to the following effect. He told the plaintiff he would get 5/2 early. He contacted "one of Mick Bartley's men" in Melbourne, and asked "them" to put "six" on. Apparently, on his account, he thought he would get a better price in Melbourne. There follows then this evidence:-

"MR. McKAY: Does Mr. Calvin know that this money went to Melbourne?

MR. MASON: Yes. I just spoke to him after the race. I did not see him. I did not know until I was called. I was in the bar. I said that I was not sure what return, but I would guarantee it would be 2/1.

MR. McKAY: Did you speak to him before the race, from the time you arrived on the racecourse until before the race?

MR. MASON: Yes, from memory I did.

MR. McKAY: Did you tell him then that the money was to be put on in Melbourne?

MR. MASON: Yes. I said I had sent some down interstate.

MR. McKAY: Some or all?

MR. MASON: I said, some. That is all I said."

Mr. Mason then withdrew, and the plaintiff was recalled, and, on being told that the stewards wanted to know how the money was put on, he replied: "I rang him" (Mason)

"this morning. He has done a few things for me before. Everyone was tipping the horse to win. I thought it would be very short. I asked him to put it on. He said, 'Where will I put it on?' I said, 'I don't care. Wherever you can get the best price'. I have seen him since. He said to me, 'I think we averaged 2/1'. That is all he has told me. I have no idea. But he has done business for me before in the past, and he is very reliable that way". Then there are these questions and answers:-

"CHAIRMAN: Did you see him before the race today?

MR. CALVIN: I saw him. But I was coming around to come into the enclosure, and I did not stop to talk to him. Then I could not find him afterwards. I could not find him until after I came into see you. All he said to me was, 'I think we have averaged 2/1'.

MR. McKAY: Was that before or after the race?

MR. CALVIN: After".

On Wednesday, 17th March, 1976 the enquiry resumed, and the plaintiff and Mason were interviewed together. Mr. Mason said that he had rung "Mr. Bartley" after the plaintiff rang him on the Saturday, and that he rang him again on Saturday night. Mr. Bartley said he put "some" on, but did not say whether he had put all the money on. Mr. Mason said that he paid Bartley $6000 in cash when he called past his house on Monday. The plaintiff, he said, had given him a cheque for $6000 on the Monday morning.

The plaintiff on this occasion was asked a number of

questions which reflect some observations that the stewards had made of the race. The questions, and the answers (in part only), are as follows:-

"MR. McKAY: Q. Did you watch the race through binoculars on Saturday?

MR. CALVIN: Yes.

MR. McKAY: Q. When the horses turned into the straight were you concerned about how far back it was in the field?

MR. CALVIN: Not necessarily ...

MR. McKAY: Were you concerned about the jockey not trying to do anything more?

MR. CALVIN: Why should he? He was flat out.

MR. McKAY: Q. From your observation of the race, at the furlong he had not moved on the horse.

MR. CALVIN: From my observation, he was making up ground all the way.

MR. MEEHAN: Q. Where do you say the horse started to veer on the track?

MR. CALVIN: About a furlong out, it seemed to me ...

MR. MAHONEY: Q. You were not concerned when the rider was sitting quietly coming to the home turn?

MR. CALVIN: That is what I would be - you have a horse underdone, you cannot do it at both ends. If I said 'Take him straight to the front', he would have been no closer and would have run ninth, back with Grey Ekardos.

MR. MAHONEY: Q. I can tell you now the stewards are very concerned about the way Cuddihy rode the horse.

MR. CALVIN: I gave him his instructions to hold him. I did not know the horse had enough brilliance to be up near the lead. I have heard it said in New Zealand they rode him in the lead all the time, but we were mainly concerned to get the horse to settle down. That is the way Mr. Cummings trains all his horses. He loves them to settle down and come home hard in a race - ridden out hands and heels. Martindale won on Saturday, ridden hands and heels like that.

MR. MEEHAN: Q. We expect all horses to be ridden out.

MR. CALVIN: I understand that. At the same time you don't do anything for a horse by driving it to the post with a whip if it is unnecessary."

There was then a short adjournment, and after the adjournment Mr. Bruce Galea gave evidence. He is the son of Mr. P. Galea, the other part owner at the time of Count Mayo. Mr. Bruce Galea said that his father was very ill, but had instructed him to have $1000 on any horse of his that "goes around", and he produced a betting ticket for his wager on Count Mayo in the race. From the answers to interrogatories it appears that the plaintiff was not present during Mr. Galea's appearance before the enquiry.

The trainer, Mr. Cummings, was then called as a witness, and from the answers to interrogatories it would seem that

the plaintiff was present. The following is part of the evidence he gave relating to Count Mayo:-

"MR. MAHONEY: Q. Did you have any discussions with Mr. Calvin as to what tactics to use?

MR. CUMMINGS: Mr. Calvin engaged Cuddihy and I told him he would have to keep in touch and ride him out hands and heels. I did not think he was going to have any problems in the race with him being wayward anyway.

MR. MAHONEY: Q. Were you aware the horse was not going to be ridden with the whip?

MR. CUMMINGS: No. I said to ride him hands and heels, if he is going well - to ride out at his own discretion.

MR. MAHONEY: Q. You did not specifically say not to use the whip on the horse.

MR. CUMMINGS: 'Only if you are going well'."

The plaintiff then saw the film of the race, and after a short adjournment Mr. Bartley was called as a witness, with the plaintiff present. He was asked how the $6000 was placed, and he replied: "It was not placed actually. It was a complicated affair and you will have to listen to the story. Whether you believe it or not, please yourself." It appeared, from his evidence (which in the transcript is notable for its obscurity), that he contacted someone in Melbourne to put the money on the horse, but in fact the bet was not made. None the less, according to him, Mr. Mason paid him the $6000 on the following Monday. He

explained that circumstance in this way: "He gave me six thousand. For instance he would have got paid if he won. For instance, if a person gave me a bet and this has happened and I just forgot about it completely, that would still be paid. You are not likely to tell anybody you forgot about a bet." One thing that is clear from this and other evidence is that there was no conversation between the plaintiff and Mr. Bartley relating in any way to the wager.

When Mr. Bartley withdrew, Mr. Meehan asked the plaintiff if there was anything further he wished to say. The plaintiff offered to pay the expenses of calling two witnesses from New Zealand (the jockey Skelton and the trainer Wallace), if the stewards would "like to have evidence from them." Mr. Meehan told the plaintiff that it was entirely a matter for him as to whether he called those witnesses. He was told that the stewards would give an adjournment for the purpose of their being present. There was no indication of any decision in the matter by the plaintiff, whether to call these witnesses or not, and he did not ask for an adjournment. After a short adjournment, the jockey Cuddihy gave further evidence. The plaintiff was not present, and he was not told what evidence Cuddihy gave (though there is nothing to indicate that he ever asked to be informed as to the nature of Cuddihy's evidence, on this or on the previous occasion).

From the jockey's evidence on this occasion it appears

that he had seen the film of the race. Cuddihy said that he thought the film showed the horse was "hanging" all the way. Mr. Meehan told him the stewards could not agree with him "on that score at all". The following further evidence was given as to his riding instructions:-

> "MR. McKAY: Q. Did Mr. Dawson, Mr. Cummings' foreman, have anything to do with the instructions you were given, or did you get them from Mr. Calvin?
> JOCKEY CUDDIHY: Mr. Calvin (sic.) did not get down to telling a lot - just told me to watch him. 'He has behaved erratically before'. He said then 'Don't pull the whip' - Mr. Calvin had already told me that.
> MR. MEEHAN: Q. Was Dawson the foreman repeating instructions to you that Calvin had given to you?
> JOCKEY CUDDIHY: Yes, in the sense that he did not have much time, he was walking to the horse."

Cuddihy went on to say that the plaintiff did not think the horse was "fully fit", but still thought it would win. At the conclusion of his evidence, Mr. Meehan said to him: "I am telling you now, we take a serious view of the way the horse was handled."

There was then a short adjournment, and after the adjournment, the plaintiff, Dawson and Cuddihy were called into the stewards' room and charged in the following words:-

> "After hearing all the evidence in this case, the stewards are not satisfied that this horse ran on its merits and we are going to charge the parties -

Mr. Calvin, Mr. Dawson and Jockey Cuddihy - under Rules 135(a) and (c)."

The transcript indicates that the rules were read to the accused. The plaintiff said that he would like to call Wallace and Skelton. He was given an adjournment to enable him to do so.

The stewards, in the absence of the plaintiff, interviewed the bookmaker, Mr. Todd, and his clerk Mr. Campbell on 26th March regarding Mr. Galea's bet of $1000 on Count Mayo. The evidence is to the effect that the bet had not been placed by Mr. Galea in person. Messrs. Galea, Todd and Campbell were again interviewed on 26th March, but not in the plaintiff's presence. Mr. Galea insisted he had himself placed the bet; Mr. Todd did not recall who had placed it; and Mr. Campbell, though still saying he thought the bet was not placed by Mr. Galea, but by someone "always with Mr. Galea", apparently was less firm in his recollection.

On 26th March, the stewards resumed the enquiry with the plaintiff. Films of Count Mayo's starts in New Zealand were shown, and then the plaintiff called Mr. Wallace. Statements from New Zealand stipendiary stewards, and from jockeys Skelton and Stacey were tendered. They were the jockeys who had ridden the horse in New Zealand. Mr. Wallace's evidence of the horse's performance in New Zealand was given, much of it in the form of a general discussion. Then the plaintiff said that he wanted "to make a general

statement regarding the horse and the race and so forth", and proceeded to address the stewards at some length. In the course of his address he stressed that it would be stupid for him "to do anything foolish in a race like this". He said, "I want to win races, I have never been before you gentlemen before, I have never had one of my horses queried." The tenor of the address was that he should be found not guilty of the charge, because from the nature of his stud business it was in his interests to win races. The reference to what might be called his previous good character was not advanced in mitigation of penalty; on the contrary it was part of his argument in support of his innocence.

The parties then withdrew, and after a short adjournment, the transcript records the conclusion of the enquiry, upon their being recalled, as follows:-

"MR. MEEHAN: The stewards have given long and careful consideration to this case gentlemen.

P. Cuddihy, we are satisfied you breached the rule and did not allow the horse to run on its merits and we are satisfied that Mr. Calvin and Mr. Dawson were parties. We have decided to disqualify all the parties for 12 months as from today's date, you have the right of appeal. No action will be taken against the horse.

MR. CALVIN: What about the horses I have in training?

MR. MEEHAN: They can be trained but they cannot race. You will have to see the Secretary about the horses being trained. (The parties withdrew)."

The following interrogatory was put to each of the stewards taking part in the enquiry:

"(a) How was opportunity given to the plaintiff to make submissions or call evidence on the question of punishment? (b) Was the plaintiff given any invitation to make such submissions or call such evidence and if so, when and by whom?"

The answers, which were in common form, were as follows:-

"(a) (b) He was given an opportunity when he was charged - this appears on page 24D of the transcript and later he was given further opportunities to do so - these appear on pages 29 and 31 of the transcript and when he was found guilty there was nothing to stop him making a submission on punishment."

Page 24D is the page on which the charge is recorded. After the charge was made, the rest of the proceedings, so far as the plaintiff was concerned, dealt with his notification that he wished to call witnesses, and arrangements for the adjournment. On page 29, after the conclusion of Mr. Wallace's evidence, he was asked if he wished to ask anything further of Mr. Wallace, and there was some discussion on this matter, concluding with the plaintiff saying: "I think that is all with Mr. Wallace." The jockey Cuddihy was asked if there was anything he wanted to ask him, and he replied no. The same question was put to Dawson, and he replied no. Mr. Calvin then (apparently without any invitation) commenced what I have called his address.

When he finished it, he was asked, and he answered a question, but no suggestion was made to him of any further subject matter for address. On page 31 Dawson and Cuddihy were asked whether they had anything further to say, and each answered no. The parties then withdrew, and were recalled, and I have set out the totality of the transcript from that point onwards. There was no oral evidence in the hearing before me relating to the stewards' enquiry.

I have set out previously the matters in respect of which it is alleged in the statement of claim that the rules of natural justice were not observed at the stewards' enquiry. Leaving aside the question whether those matters, if established, would constitute a denial of natural justice, my review of the evidence relating to the stewards' enquiry leads me to the following findings of fact upon those matters (I set them out in order they appear in the statement of claim):-

(a) (i) a substantial part of the enquiry had concluded and a substantial amount of evidence had been received by the stewards before the plaintiff was informed that a charge of breach of Rule 135 or any charge was made or contemplated against him;

(ii) there is no evidence to support the allegation in the statement of defence that as soon as the stewards contemplated making a charge against the plaintiff they informed him of that fact, or that such part of the evidence which had been adduced

before them before they informed the plaintiff as aforesaid, was adduced at a time before the stewards had contemplated making such a charge; but on the other hand there is no evidence to the contrary;

(b) (i) the plaintiff was not present or invited or given the opportunity to be present while substantial parts of the evidence in the enquiry were received by the stewards (in particular all the evidence of the jockey Cuddihy, part of the evidence of Mr. Mason, and all the evidence of Messrs. Galea, Todd and Campbell) and the plaintiff was not informed of the nature, substance or effect of those parts of evidence, and the plaintiff had no opportunity to answer the same;

(ii) the evidence of Cuddihy was relevant on all aspects of the charge against the plaintiff; and in particular that evidence (apart from the plaintiff's own evidence) was the only evidence bearing on the question of the plaintiff being a party to not allowing the horse to run on its merits;

(iii) the evidence of Mr. Mason, taken in the plaintiff's absence, was relevant to the question of the plaintiff's betting on the horse in the race, and the existence of this bet was an important circumstance on the probabilities of the plaintiff being not guilty of the charge; and there were substantial differences in the evidence of Mr. Mason and the

plaintiff in relation to this alleged betting transaction;

(iv) the evidence of Messrs. Galea, Todd and Campbell would not appear to justify any finding adverse to the plaintiff; but there is no evidence as to what weight the stewards attached to it; in particular the stewards may have formed the view that there was no acceptable evidence that a bet had been placed on the horse by the part owner (P. Galea); and they may have acted on this view adversely to the plaintiff; but on the other hand, it is correct (as alleged in the statement of defence) there was nothing in the evidence of Messrs. Galea, Todd and Campbell that was capable of being answered by the plaintiff;

(c) the plaintiff was not given in precise or detailed form particulars of the basis upon which it was ultimately held that the horse was not run on its merits; but in the course of the enquiry, when he was present, it must have been clear to him that in the stewards' view, based upon their own observations, the jockey had obviously not ridden the horse vigorously, had improperly refrained from using the whip, and had not given an acceptable account of his riding of the horse;

(d) the stewards did take into account their own observations of the riding of the horse in the race, and relied on those observations; but the substance

of those observations, as set out in (c) above, was made known to the plaintiff in the course of the enquiry, and he had, and in fact availed himself of, the opportunity of endeavouring to answer so much of the charge ultimately made as was based on those observations;

(e) the evidence does not support the allegation in the statement of claim (and is in fact generally to the contrary) that "certain of the stewards took into account matters purportedly observed by them respectively without informing others of the stewards or the plaintiff what those matters were and some of such matters were inconsistent with observations made by others of the stewards and were manifestly mistaken";

(f) certain of the stewards were absent from the enquiry for certain periods while evidence was received, and still participated in the findings and disqualifications; but the absences were short, and the stewards concerned had themselves informed of what took place in their absence; and in my view these absences were of no significance;

(g) one of the stewards (Mr. Hickman) interviewed Messrs. Todd and Campbell at Rosehill Racecourse on 17th March (as set out in the answer by Mr. Hickman to an interrogatory); this is the only evidence of such an interview; and there is no evidence as to whether the plaintiff was aware of it or not;

(h) Messrs. Meehan and Mahoney appear to have asked most of the questions during the enquiry, but there is nothing to suggest that these questions were unfair, or that they conducted themselves in any manner other than that of racing stewards honestly and fairly endeavouring to arrive at the truth;

(i) (i) after the stewards had found the plaintiff to be party to a breach of Rule 135(a) he was given no opportunity to make submissions or call evidence on the question of punishment before the stewards disqualified him;

(ii) at no stage of the enquiry, in fact, was the plaintiff given any opportunity of making submissions or calling evidence on the question of punishment; and, the allegation to the contrary in answers to interrogatories is in my opinion in all the circumstances of no weight as evidence;

(iii) in particular, after the plaintiff was found guilty, the chairman of the stewards proceeded immediately to penalty, and (notwithstanding the contrary answer to an interrogatory) there was no possible way of making submissions on penalty (short of pointedly interrupting the chairman);

(iv) after the penalty was imposed, the plaintiff might perhaps have protested; but he might reasonably feel that the enquiry had ended, and a protest would be futile;

(v) there is no evidence, one way or the other, as to whether there were circumstances in respect of the plaintiff relevant on the question of penalty (apart from his previous good record, which he had mentioned).

Rule 135 is as follows:-

"135.(a) Every horse shall be run on its merits.

(b) The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field.

(c) Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this Rule may be punished, and the horse concerned may be disqualified."

As I have mentioned the charge was made against the plaintiff on the basis of paragraphs (a) and (c) of the Rule. At both the stewards' enquiry and the Committee hearing the charge was understood by all parties to be that the jockey deliberately caused the horse not to run "on its merits," and that the plaintiff was a party to a plan designed to ensure that the horse would not win the race.

I shall first deal with the contention that there was no evidence of the charge. For the present I shall assume that this is a ground upon which the disqualification may be challenged, and shall confine myself to an examination

of the evidence. The core of the submissions was that there was no evidence of any instruction from the plaintiff to the jockey to the effect that the jockey should not allow the horse to run on its merits. It was said that the evidence of instructions was exculpatory, not incriminatory, and that even if the stewards disbelieved the evidence, this disbelief did not provide evidence of the contrary. Disbelief, it was said, could not provide a content to the instructions not supportable by the evidence. Whilst it is true that a different proposition cannot be inferred from disbelief of an assertion of a particular proposition, it would not follow in the present case that disbelief leaves a situation of no evidence that the plaintiff was a party to the jockey's conduct. If the evidence were that the jockey rode the horse in a way calculated to prevent it from winning, and if, just before the race, the jockey and the owner were heard discussing the way the horse was to be ridden, this would be some evidence that the owner was a party to the way the horse was ridden, even if there was no evidence of the discussion beyond the fact that it concerned the way the jockey was to ride the horse. In such a case, the evidence would still remain even if the jockey and the owner gave evidence of a completely innocent discussion, and that evidence, so far as exculpatory, was disbelieved. That in fact is the situation here, because the stewards would be entitled to find as a fact that the plaintiff gave the jockey riding

instructions, but reject the evidence as to what those instructions were. The fact of giving instructions is a fact separate and distinct from the instructions themselves, and there could be evidence which supported an inference of the existence of that fact, but which was silent as to what instructions were given.

However this may be, the premise of the submission, that the evidence is necessarily exculpatory, is erroneous. The instructions, according to the plaintiff, were "to take hold of the horse early, and try to let him come home - don't hit him unless you absolutely have to." The jockey's evidence was that he was told to "make sure" that he "did not pull the whip on him." There is evidence that the jockey rode the horse consistently with these instructions, in that he held the horse back early in the race, let it run at will later, and did not use the whip, even in the straight, where, notwithstanding the lack of vigour in the riding, it appeared to have a chance of going to the front. If the evidence of the instructions had been as bald as this, the stewards would have been entitled to find that the jockey was instructed not to allow the horse to run on its merits. The position in my view is not affected by the fact that both the jockey and the plaintiff gave evidence of reasons for the instructions taking this form, if the evidence of those reasons is found unacceptable. The stewards were entitled to accept the evidence of the instructions, and reject the explanation. Prior to the

charge, the evidence as to the explanation for not using the whip on the horse consisted of the plaintiff's statement of his information as to the behaviour of the horse in New Zealand. After he was charged he called evidence on this matter, but it was open to stewards to accept or reject that evidence.

These considerations are sufficient also to dispose of the contention that no reasonable men could have formed the opinion that the plaintiff had been a party to a breach of Rule 135. But there is one additional matter that I should deal with, namely the evidence as to the plaintiff's bet of $6000 on the horse. Here again it was submitted that rejection of the evidence of the placement of this bet would not of itself support an inference that no bet was placed. Reliance was placed on observations of Barwick C.J. and Gibbs J. in Steinberg v. Commissioner of Taxation (50 A.L.J.R. 43 at 46, 50), and of Barwick C.J. in Gauci v. Commissioner of Taxation (50 A.L.J.R. 358 at 360). I do not think that those observations would stand in the way of the stewards having regard to the rejection of aspects of this evidence on the question of consciousness of guilt. The evidence was very circumstantial, and presented a situation very different from that with which Barwick C.J. and Gibbs J. were dealing. A neat instance of the sort of situation to which those observations are readily applicable is to be found in the judgment of Scrutton L.J. in Hobbs v. Tinling (C.T.) and Company Limited (1929) 2 K.B. 1

where he says (page 29): "If by cross-examination to credit you prove that a man's oath cannot be relied upon, and he has sworn that he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1; there is simply no evidence on the subject". But the factual circumstances which lead to such disbelief may themselves be evidence of the contrary proposition; or the evidence which is disbelieved may be given in circumstances in which its falsehood points to the truth of contrary evidence (Eade v. The King 34 C.L.R. 154 at 158). In the enquiry before the stewards the first reference to the bet follows upon the plaintiff saying "We really did not think the horse could win". He was asked if he had a bet on the horse, replied that he did and wrote the bet down on a piece of paper. The note on this piece of paper reads: "$6000 J. Mason put on for me". After this evidence was given, the plaintiff left the stewards' room, and it appears from his evidence that he then spoke to Mason. It was apparently after this that Mason was called into the stewards' room. As Mason then gave his evidence, it would appear that he sent the money to Melbourne, with instructions that it be placed with bookmakers there. This led the chairman to say: "We will have to get the Melbourne bookmakers' sheets now, I suppose". This evidence was given on the Saturday of the race. On the following Wednesday, Mason gave evidence (in the plaintiff's presence) that he had been in contact with Bartley on the Saturday

night, and had been told by him that he had put "some" on, but Mason did not know whether the money had been put on with registered bookmakers. It further appeared that Mason did not pay Bartley until the Monday, after receiving the $6000 from the plaintiff on that same day. When Bartley was called later it appeared that he had not placed the bet with a bookmaker, or with anybody else, but regarded himself as entitled to the money, because he would have paid if the horse had won. According to Bartley, he told Mason on the Saturday afternoon after the races that the bet had not been put on. The plaintiff was then asked when he knew that the money had not been put on the horse, and he replied: "Mr. Mason told me, but he said 'You would have got paid at 2-1. That's the price he guaranteed me Saturday morning'". Bartley, however, said: "I never guaranteed him anything".

The evidence of this transaction is confusing and contradictory - indeed there are inconsistencies internally in each witness' evidence, as well as among the witnesses. The stewards could have rejected the evidence of the plaintiff and Mason as to arrangement on Saturday morning, for the making of the bet. They could in my opinion have found that the whole of the evidence relating to the bet was so implausible, and so full of contradictions, as to warrant the inference that no such arrangement had been made. It is not a matter simply of disbelief. The plaintiff is claiming a series of transactions which could explain

the absence of any written record of his bet: an arrangement with Mason that he would place the bet; Mason's arrangement with Bartley to place the bet in Melbourne (thus accounting for no reference to the bet in the Sydney bookmakers' sheets); the failure of Bartley's contact to place the bet in Melbourne (thus accounting for no reference to the bet in the Melbourne bookmakers' sheets); and finally Bartley claiming that he would have honoured the bet himself, and receiving the money for the wager on the Monday (thus presenting the plaintiff as in fact out of pocket to the extent of $6000). If this story is disbelieved, the inference seems open that it was an elaborate concoction. If the stewards were entitled (as I think they were) to take this view, then they could take the further step of finding that evidence of the bet was fabricated in order to suggest that it was unlikely that the plaintiff would be a party to not allowing the horse to run on its merits. Such a finding would support an inference that the instructions to the jockey were not innocent, or at least enable the stewards more easily to draw such an inference from the fact of riding instruction being given to a jockey who is found not to have allowed the horse to run on its merits.

I turn now to the question whether the stewards were bound to observe the principles of natural justice, and what the relevant principles are. The Australian Jockey Club is not a statutory body, though its rights and duties

are affected by the Australian Jockey Club Act 1873. There is a by-law making power vested in the Committee in respect of any lands authorised by the Act to be leased to the chairman (section 12); there is provision for the chairman being a nominal plaintiff or nominal defendant (section 4); and there is a section dealing with appeals to the Committee (section 32). Section 31 provides that a person may be refused admission to lands authorised by the Act to be leased, or may be expelled therefrom, if he is a person for the time being under a disqualification by the Committee pursuant to the rules of racing of the Club. The Club is an unincorporated body (cp. s. 30). The plaintiff was a member of the Club at the time of his disqualification, and in this regard clause 11 of the Rules and Regulations provides that any member who shall be disqualified under the Rules of Racing by the Committee of the Club, or whose disqualification by the stewards shall have been adopted by the Committee of the Club, shall upon such disqualification or adoption, ipso facto cease to be a member of the Club. There is a proviso to this rule of the Club that is not easy to apply in relation to the present Rules of Racing; but, whatever the application of the proviso may be, it would seem that, if it were not for orders of the Court restraining the Club from acting upon the purported disqualification, the plaintiff would cease to be a member of the Club.

The following Rules of Racing are relevant to the questions now being considered:-

"4. Any act done or decision made by a committee of a Club or by stewards in the exercise or intended exercise of any right power or authority conferred by or under these Rules shall except where otherwise provided in the Rules be final and conclusive.

8. To assist in the control of racing, stewards shall be appointed according to the Rules of the respective Principal Clubs, with the following powers:-

(e) To punish any person committing a breach of the Rules, or refusing to obey any proper direction of any official, or whose conduct or negligence has led, or could have led, to a breach of the Rules.

(z) To punish any person obstructing them in the exercise of their powers and duties.

175. The committee of any club or the stewards may punish:

(k) Any person who has committed any breach of the Rules.

196. Any person or body authorised by the Rules to punish any person may, unless the contrary is provided, do so by disqualification, or suspension and may in addition impose a fine not exceeding $1000, or may impose only a fine not exceeding $1000."

Rule 9 provides that a majority of the stewards present at

any meeting of the stewards shall have all the powers given to the stewards by the Rules. Rule 182 sets out the consequences of disqualification. There is no provision in the Rules dealing with procedure at meetings of or enquiries by the stewards.

The function of the stewards was in the first place to enquire into the running of the race. Although the purpose of this enquiry was to establish if there was any breach of the Rules in regard to the running of the race, there was at that stage no decision to be made, and the stewards were not therefore exercising any judicial function. But such an enquiry may (and did in this case) lead to a charge, and the stewards will sit on the hearing of the charge, and that is a judicial function. Counsel for the plaintiff submitted that it was a breach of the principles of natural justice for the same stewards to hear the charge as made the enquiry and laid the charge. I shall consider that submission later; for the present I shall assume that this circumstance did not constitute a breach of the principles of natural justice. Even upon that assumption, it seems to me that the concept of acting fairly must apply to the proceedings from their commencement, having regard to the possible consequences of the enquiry (cp. In re Pergamon Press Ltd. (1971) 1 Ch. 388 at 399). From the time when the charge was laid, the stewards were called upon to make a decision which could have serious consequences for the plaintiff in respect of his

membership of the Club, his financial position, and his reputation. In those circumstances there can be no question but that the stewards were bound by the rules of natural justice.

It was argued that Rule 4 absolved the stewards from the requirements of the rules of natural justice, because (subject to the right of appeal to the Committee) that Rule made their decision "final and conclusive". It was said that the words "intended exercise" indicated that the decision was to be final even if the decision was made outside the area of the conferred power. There is some difficulty in understanding what is the application or scope of the expression "intended exercise", and I was referred to no authority on that point. But if the Rule has the meaning contended for, then the stewards are empowered to act unfairly; and the improbability of that being the proper construction of the rule may be demonstrated by considering what its impact upon all concerned would be if the power to act unfairly was written expressly into the rule. In Dickason v. Edwards 10 C.L.R. 243 Isaacs J. said in relation to the rules of a domestic tribunal (at page 265): "No rule is better established than where two meanings are possible you must take the more reasonable one." It seems to me that the words "exercise or intended exercise" do not extend to a situation where the stewards step so far outside the area of authority entrusted to them as to deny a person affected by their decision a right to a

fair hearing. As to the words "final and conclusive", these (and like phrases) have never been held, when used in legislation, to exclude the supervisory jurisdiction of the Court, and I think they should be read as subject to a similar limitation when found in the rules of a domestic tribunal. I shall deal with the authorities on such phrases when I come to consider s. 32 of the Australian Jockey Club Act 1873.

It is to be noted that Rule 4 does not take the form of requiring an aggrieved person to exhaust his domestic remedies before resorting to the courts. If it had, then (on the authority of White v. Kuzych (1951) A.C. 585) it might have operated according to its terms, notwithstanding a denial of natural justice by the stewards. But the principle of that case affords no warrant for construing Rule 4 as being intended to have the same effect.

If, contrary to my view, Rule 4 excludes by implication the necessary observance of the principles of natural justice at a stewards' enquiry, then a question arises as to whether it would be void as against public policy. The plaintiff is a member of the Club, and the Rules of Racing are expressly referred to in its provisions dealing with cessation of membership. Even if he was not a member, there would come into being a contractual relationship arising from the entry of the plaintiff's horse in a race conducted by the A.J.C. under its Rules of Racing (cp. Trivett v. Nivison (1976) 1 N.S.W.L.R. 312 at 318). In Dawkins v.

Antrobus (1881) 17 Ch. D. 615 Brett L.J. (at page 63) gave, as one matter for a court's consideration, in the case of a domestic tribunal, whether the rules of a club are contrary to natural justice. The passage was cited with apparent approval by Barton A.C.J. in Meyers v. Casey 17 C.L.R. 90 at 99. The observations of Lord Denning in Nagle v. Feilden (1966) 2 Q.B. 633 at 644-5) and in Enderby Football Club v. Football Association Ltd. (1971) 1 Ch. 591 at 606) also support the view that a rule excluding the requirements of natural justice would be void. There are contrary expressions of opinion (see, e.g., Dickason v. Edwards 10 C.L.R. 243 at 250-1). Whatever may be the true position in the case of a purely domestic tribunal, I am of the opinion that the Australian Jockey Club could not in its Rules of Racing exclude the requirements of natural justice. The Australian Jockey Club Act 1873 provides for leases from trustees to the Club to be taken in the name of the chairman, and by s. 10 he is to hold the land "only" for "a public racecourse" (for the historical setting, see: Randwick Corporation v. Rutledge 102 C.L.R. 54 at 81-3, 87). It was at this "public racecourse", known as Randwick Racecourse (see marginal note to section 31), that the plaintiff's horse raced on March 13th. Under section 31 a person may be excluded from Randwick Racecourse or expelled therefrom if he is a person for the time being under disqualification by the Committee pursuant to the rules of racing for the time being in force. It seems to me that

those "rules of racing" in relation to disqualification should be conformable to the principles of natural justice in the same respects as statutory powers are presumed to be. With regard to a statutory racing body, Barwick C.J. has said (in Stollery v. Greyhound Racing Control Board 128 C.L.R. 509 at 517): "In my opinion, it is of the utmost importance that tribunals such as the Greyhound Racing Control Board should conduct their proceedings with scrupulous adherence to the requirements of natural justice." This view, that the Rules of Racing are to be read subject to the requirements of natural justice, is further strengthened by the consideration that the statutory appeal from the stewards to the Committee treats both the stewards and the Committee as proceeding under those Rules (section 32).

In Kanda v. Malay Government (1962) A.C. 322 Lord Denning, delivering the opinion of the Judicial Committee, said, (page 337): "The rule against bias is one thing. The right to be heard another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua; and Audi alteram partem. They have recently been put in two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations". In the present case it is alleged that the stewards shattered both of these twin pillars. The rule as to bias was, it is said, broken by the absence of Messrs. Mahoney

and Hickman for about five minutes of Mr. Mason's evidence on 13th March; of Mr. Mahoney for a few minutes on 17th March; and of Mr. McKay during the evidence of Mr. Galea on 26th March. The rule, it is said, was also broken when Mr. Hickman interviewed Messrs. Todd and Campbell on 17th March, 1976. The rule as to fairness is said to have been broken by the taking of evidence in the absence of the plaintiff, by the failure to inform him of the substance of the evidence taken in his absence, and of the observations made by the stewards of the race, and by the failure to give the plaintiff an opportunity to give evidence or make submissions on penalty.

Bias is a concept that does not necessarily involve turpitude or indeed any element, in itself, of unfairness. In the case of Re Watson; ex parte Armstrong (50 A.L.J.R. 778), in the joint judgment of Barwick C.J., Gibbs, Stephen and Mason JJ., it is said (page 785): "The question is not whether there was a real likelihood that Watson J. was biassed. The question is whether it has been established that it might reasonably be suspected by fair-minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind". Earlier their Honours had said (page 785): "It is of fundamental importance that the public should have confidence in the administration of justice. If fairminded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the

decision." These observations were made in the case of a judge of a superior court exercising strict judicial functions. Similar observations were made in respect of the Commonwealth Conciliation and Arbitration Commission in Reg. v. Commonwealth Conciliation and Arbitration Commission; ex parte The Angliss Group 122 C.L.R. 547 in the unanimous judgment of the court (at pages 553-4). There it was said: "Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it." The observation in this last sentence is important here when it is remembered that the stewards are initially a fact finding tribunal. Even after the charge was made, they were still entitled if I understand the authorities correctly, to obtain information in any way thought best (University of Ceylon v. Fernando (1960) 1 All E.R. 631 at 638B, 639F; In re Gosling 43 S.R. 313 at 318: R. v. Brewer: Ex parte Renzella (1973) V.R. 375 at 380-1). This is sufficient, having regard to the factual findings I have made, to

dispose of allegation of "bias" in so far as it relates to the stewards acting on their own observations, making their own enquiries, and interviewing witnesses in the absence of the plaintiff.

But it is said that there still remains a fundamental breach of the "bias" pillar in that the stewards acted as judges in their own cause, in that they acted in the inconsistent roles of prosecutors and judges. That conduct, it was said, was not justified under the Rules, or by any principle of necessity (see: Dickason v. Edwards 10 C.L.R. 243 at 250-1, 259). It was submitted that the Club could, and should, have different stewards hearing the charge from those who collected the evidence and made the charge. I think that this misconceives the functions of the stewards under the Rules of Racing. Their function is to "assist in the control of racing" (Rule 8). To this end they are given wide powers of discipline. Their powers include taking possession of a horse, ordering a rider down without assigning any reason, prohibiting a horse from starting, punishing (on a report from the starter) any rider who has disobeyed the starter's orders, and to disqualify a horse for inconsistent running, without an enquiry, and to punish its nominator, trainer and rider (Rule 8 (k) (l) (m) (t) and (v)). It would often be necessary for them to act promptly, sometimes urgently, and in my view it is unreal to regard them as disqualified from acting on their own observations and opinion as to the way a race is run. I

think it is a proper inference from the Rules that the stewards combine the roles of fact finding, charging and adjudicating. It is however incumbent on the stewards to act fairly. As Adam J. said in R. v. Brewer; Ex parte Reynella (1973) V.R. 375 in a similar context (page 381): "As it is the duty of the stewards to give a fair hearing to the person charged, they must of course until he has been heard keep their minds open in the sense of being ready and willing to be persuaded by the party charged". In my opinion there was no breach by the stewards of that principle of natural justice expressed in the maxim; nemo judex in causa sua.

This leaves for consideration the second principle: audi alteram partem. The following statement of the principle is pertinent to the circumstances of the present case; it comes from the opinion of the Judicial Committee in Kanda v. Government of Malaya ((1962) A.C. 322 at 337-8): "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in Board of Education v. Rice (1911) A.C. 179, 182 down to the decision of their Lordships' Board in Ceylon University v. Fernando (1960) 1 W.L.R. 223; (1960)

1 All E.R. 631. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a cause will believe he has been fairly treated if the other side has had access to the judge without his knowing. Instances which were cited to their Lordships were In re an Arbitration between Gregson and Armstrong (1894) 70 L.T. 106, Rex v. Bodmin Justices, Ex parte McEwen (1947) K.B. 321 and Goold v. Evans & Co. (1951) 2 T.L.R. 1189, to which might be added Rex v. Architects' Registration Tribunal (1945) 61 T.L.R. 445; (1945) 2 All E.R. 131, and many others."

Kanda v. Government of Malaya (above) was a case concerning the dismissal of a police officer. The adjudicating officer in respect of the disciplinary charges against him had been furnished with a copy of the findings of a board of inquiry, but the accused had not been so furnished. Their Lordships held that it was not correct to let the adjudicating officer have the report of the board of enquiry unless the accused also had it so as to be able to correct or contradict the statements to his prejudice (page 338).

In Rex v. Architects' Registration Tribunal (above) the registration tribunal, hearing an appeal relating to a refusal to grant registration as an architect to the appellant, considered certain observations in letters which were not divulged to the appellant. It was held that a writ of certiorari should issue to quash the proceedings. Lewis J. (with whom the other divisional judges agreed) said (page 447): "For the purposes of my judgment it matters not whether those observations were hostile or contained severe criticism or not, because whatever they contained was not divulged to the applicant or his advisers."

In re an Arbitration between Gregson and Armstrong was a case in which arbitrators received information from one party in the absence of the other. The award was set aside.

In Rex v. Bodmin Justices (above) the Justices received a plea of guilty to a criminal charge against a soldier, and during their private deliberations interviewed an officer who had appeared as a witness. The conviction was quashed. Lord Goddard (with whom the other judges agreed) said (page 325): "Whether the officer stayed in the room for one minute, or whether he stayed there for five minutes, does not matter. They were interviewing a person who had been in court in connection with the case and had given the justices information in connection with it; they were interviewing him in their room in the absence of the accused or his advisers. That is a matter which cannot possibly

be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused; it may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this court has said that justice must not only be done but must manifestly appear to be done. If justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what is said."

Goold v. Evans & Co. (above) was a case in which a new trial was ordered because the judge had had a view in the presence of one party, without the other party (who lost in the action) having an opportunity to be present. Somervell and Hodson L.JJ. were of the opinion that the view in the circumstances was evidence. Denning L.J. apparently was of the opinion that a view is part of the evidence in any case; but even if it were not, his opinion was that both parties must have an opportunity of being present.

Kanda v. Government of Malaya (above) and the cases referred to by Lord Denning establish that where the principle audi alteram partem is applicable the person affected must have the opportunity of correcting or contradicting any information considered by the adjudicator, and the "risk of prejudice is enough". The cases appear to establish that it is for the party to determine whether there is

in fact anything in the information to correct or contradict; the court itself will not enquire whether the information is or is not prejudicial. There must I think be some limitation, if the principle is so widely stated. There must be some information which presents no risk of prejudice, and the reasonable bystander would hardly expect proceedings such as a stewards' enquiry to be invalidated by such information being placed before the stewards without its being revealed to the affected party. It is well to remind oneself here of the often cited and much approved passage from the judgement of Tucker L.J. in Russell v. Duke of Norfolk ((1949) 65 T.L.R. 225, 231; (1949) 1 All E.R. 109, 118): "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter under consideration and so forth" (instances of citation and approval will be found in In re K. (Infants) (1965) A.C. 201 at 217-18; and Collymore v. Attorney General (1970) A.C. 538 at 550).

There is a passage in the judgment of the Judicial Committee in Durayappah v. Fernando (1967) 2 A.C. 337 which, whilst it deals with the cases in which the principle audi alteram partem will be applied, affords guidance in the present context by reason of its emphasis on "a vast area

where the principle can be only be applied on the most general considerations" (page 349). Lord Upjohn there said (349): "In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other". In Wiseman v. Borneman (1971) A.C. 297 Lord Reid said (page 308): "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules." Lord Morris of Borth-y-Gest said in the same case (308-9): "We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many cases. But any analysis must bring into relief rather their spirit and inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures

are to be applied which, in any particular situation or set of circumstances, are right and just and fair."

I am satisfied that the plaintiff was aware of the nature of the charge against him, and of the nature and significance of the stewards' observations of the race, and that there was no denial of natural justice in respect of either of those matters. But he was not present on either of the occasions when the jockey Cuddihy gave evidence, and he was not informed of that evidence, in particular the evidence that might implicate him as a party to not allowing the horse to run on its merits. I regard this as a serious defect in the proceedings. He was not present on the first occasion that Mason was questioned, and he was not at any stage informed of what Mason told the Stewards on that occasion. When he was later questioned himself, he was led into inconsistency with Mason as to the times he saw him at the course on the day the race was run. The son of the part owner was interviewed in the plaintiff's absence with regard to his betting for his father on the horse, and the bookmaker and his clerk involved in this bet were also seen in his absence. Though the evidence from these people would not appear to have been unfavourable, there were some difficulties in it, and I should think the plaintiff was entitled to an opportunity to consider it, even if it did primarily relate to matters outside his personal knowledge. In fact we do not know what use the stewards made of the evidence. It would have

been open to them to be sceptical about Mr. Galea's bet, after hearing all the evidence upon it. They were apparently not satisfied with Mr. Galea's account, even though he produced the betting ticket, for one of their number later interviewed Messrs. Todd and Campbell, and evidence was taken from them. I do not regard the fact that one of the stewards interviewed Messrs. Todd and Campbell as significant in itself; but the failure of the stewards to inform the plaintiff of the evidence, if they thought it significant, or their failure to inform him that it was not in their view significant, again seems to me to be a matter of some importance on the question of whether a fair hearing was given to the plaintiff.

For these reasons I am of the opinion that the stewards' enquiry was a proceeding to which the principles of natural justice applied, and that there was a departure from those principles. There is a further respect in which those principles may not have been observed, namely in that the plaintiff did not have an opportunity of being heard on the question of penalty. In Hall v. New South Wales Trotting Club (5th May, 1977, unreported) the majority of the Court of Appeal (Hutley and Samuels JJ.A., Mahoney J.A. dissenting) held that deprivation of such an opportunity in similar circumstances rendered a disqualification by stewards invalid and void. Hutley J.A. said: "The right to be heard in palliation of misconduct is established by authority nearly a century old (Fisher v. Keane 11 Ch. D. 353

at page 363; Marshall, Natural Justice, page 104). The duty of a domestic tribunal to hear the accused is not, in my opinion, fully performed by hearing him on part of the case. Once there is a finding of guilt, the stewards must consider penalty. The penalties which may be inflicted ... may be severe. The person found guilty cannot really address until he knows of what he has been found guilty." Samuels J.A. said: "Disqualification means automatic loss of membership of the New South Wales Trotting Club ... This was a grave matter for the appellant; and although he may be supposed to have been aware of the penalties which might be imposed upon him, and of their consequences, he should, in my opinion, have been distinctly offered the opportunity to speak in mitigation." It may be difficult to distinguish the case before me from Hall's case in any relevant respect, and accordingly on this ground alone it may be I should hold that the disqualification by the stewards was invalid and void. However, I do not rest my judgment on this ground, but on other aspects of denial of natural justice. Those other aspects were fully debated before me; whereas, although the judgment of the Court of Appeal in Hall's case was given on the last day of the hearing, and was referred to by counsel, there was no argument presented upon it, and I think the significance of it may have been overlooked.

There now arises the question whether, notwithstanding the failure of the stewards in their enquiry to observe the

principles of natural justice, the disqualification of the plaintiff is valid and effective because of its confirmation by the Committee. It has been submitted on behalf of the defendants that the disqualification is valid on a number of separate grounds. First it was said that any defect in the stewards' enquiry was cured by the appeal; secondly that the plaintiff approbated the jurisdiction of the Committee, in particular by invoking as a ground of appeal the denial of natural justice by the stewards, and cannot now reprobate by saying that the Committee had no jurisdiction; thirdly, that the provision as to the finality of the decision of the Committee in section 32 of the Australian Jockey Club Act 1873 ousted the jurisdiction of the court; and fourthly that the immunity provided by section 32(3)(a) of that Act extended to making the Committee immune from the present proceedings. With regard to the appeal to the Committee it was said that there was evidence upon which the Committee could dismiss the appeal; and, if there was not, the lack of evidence did not go to jurisdiction and could not afford a basis for a finding that the disqualification was void. It was also said that there was no violation of the principles of natural justice in the proceedings before the Committee. It was stressed that the plaintiff had the onus of proving his case.

Section 32 of the Australian Jockey Club Act 1873 (which was added by Act No. 39, 1948 section 4 and amended by Act No. 33, 1965 section 4) provides:

"32. (1) In any of the following cases, that is to say:-

(a) where the stewards of the Australian Jockey Club ... have:-

(i) disqualified ... any person,

(ii) ...

(iii) ...

(iv) ...

(b) ...

any person considering himself aggrieved thereby may appeal to the Committee of the Australian Jockey Club ...

(2) (a) Any appeal to the Committee ... under subsection one of this section shall be in the nature of a re-hearing. Such Committee in hearing any such appeal shall sit as in open court.

(b) The decision of such Committee on any such appeal shall be final and shall be given effect to by the stewards of the Australian Jockey Club ...

(3) (a) For the purpose of hearing and determining any such appeal the Committee of the Australian Jockey Club and the chairman or other person presiding at the hearing of any such appeal shall have the powers, authorities, protections and immunities

conferred by the Royal Commissions Act, 1923, as amended by subsequent Acts, on a commissioner and the chairman of a commission respectively appointed under Division 1 of Part II of that Act, as so amended, and the said Act, as so amended, section thirteen and Division 2 of Part II excepted, shall, mutatis mutandis, apply to any witness summoned by or appearing before such Committee.

(b) An appellant shall be entitled to be represented before such Committee and may be so represented by a barrister, solicitor or agent.

(4) The decision of such Committee of any such appeal shall be upon the real merits and justice of the case and it shall not be bound to follow strict legal precedent.

(5) (a) Expressions used in this section shall have the meanings respectively ascribed thereto in the Rules of Racing of the Australian Jockey Club.

(b) This section shall be construed as supplemental to and not in derogation of or limited by the Rules of Racing of the Australian Jockey Club."

The provision for the finality of the decision of the

Committee on section 32 (2)(b) does not in my opinion exclude the supervisory jurisdiction of the court. In its context I think its function is to ensure that the stewards shall have no further jurisdiction in the matter of the appeal. This view of the provision is supported by reference to parts of the section which I have omitted, and which confer appellate jurisdiction on the Australian Jockey Club in respect of disqualifications by the committee and stewards of any other club or race meeting registered by the Australian Jockey Club under the Rules of Racing of the Australian Jockey Club. In relation to this further jurisdiction, section 32(2)(b) proceeds: "or the committee or stewards of any other club or race meeting to whose jurisdiction the appellant is subject." The intention here is that there can be no further review by the committee or stewards of such other club or race meeting.

Lord Sumner, delivering the opinion of the Privy Council in The King v. Nat Bell Liquor Ltd. (1922) 2 A.C. 128 pointed out that ouster clauses were not construed as ousting the remedy of certiorari, either for want of jurisdiction, or error on the face of the record, though the Summary Jurisdiction Act of 1848 in effect secured the latter result because of its curtailment of the record. He said (pages 158-9): "Long before Jervis's Acts statutes had been passed which created an inferior Court, and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had

held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari". In the case of Annamunthodo v. Oilfield Workers' Trade Union (1961) A.C. 945 the Privy Council set aside the decision of a domestic appeal tribunal, notwithstanding a provision in the rules as to the finality of the decision, on the ground that in the course of the proceedings there had been a denial of natural justice. In Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147 the House of Lords was concerned with an ouster provision in the case of a statutory tribunal, and it was held that such a clause does not exclude the supervisory jurisdiction of the court where a tribunal in the course of its inquiry fails to comply with the principles of natural justice. There is an important passage in the speech of Lord Reid at page 171 where he explains what he said in Reg. v. Governor of Brixton Prison, Ex p. Armah (1968) A.C. 192, 234. Anisminic's case shows that lack of jurisdiction, such as to attract the supervision of the court, by the issue of a writ of certiorari or by the making of a declaration, may arise in the course of the proceedings of the inferior tribunal. It might otherwise have been thought, having regard to observations of Lord Sumner in The King v. Nat Bell Liquor Ltd. (above), that the question of jurisdiction was always determinable at the commencement of the inquiry (see his citation from and comments on Reg. v. Bolton 1 Q.B. 66 at pages 154, 160).

In Anisminic v. Foreign Compensation Tribunal (above) there are passages in the speeches of Lords Reid, Pearce and Wilberforce (pages 171, 195, 207) which show that such a limitation is not warranted. For example, Lord Pearce says (page 195): "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, whilst engaged on a proper inquiry the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction". Lord Wilberforce said (page 207): "There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter. Equally, though this is not something which arises in the present case, there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underly the remission of power to decide such as (I do not attempt more than a general reference, since the strength and shade of these matters will depend on the nature of the tribunal and the kind of question it has to decide) the requirement that a decision must be made in accordance with principles

Reasons for Judgment of his
Honour, Mr. Justice Rath

of natural justice and good faith. The principle that failure to fulfil these assumptions may be equivalent to a departure from the remitted area must be taken to follow from the decision of this House in Ridge v. Baldwin (1964) A.C. 40." Any exclusion or limitation of such assumptions must be done clearly and expressly (see, per Lord Wilberforce in Wiseman v. Borneman (1971) A.C. 297 at 318; The Queen v. Medical Appeal Tribunal (1957) 1 Q.B. 574 at 588 and Dickinson v. Perrignon (1973) 1 N.S.W.L.R. 72 at 82-3).

As to the immunity conferred by section 32(3)(a) reference was made to a number of authorities in which judicial immunity was discussed (Haggard v. Pelicier Freres (1892) A.C. 61; Anderson v. Gorrie (1895) 1 Q.B. 668; Ex p. Grout Re Myers 75 W.N. 496; and Kotsis v. Kotsis (1969) 2 N.S.W.R. 718). Section 6 of the Royal Commission Act, 1923 reads: "Every commissioner shall in the exercise of his duty as a commissioner have the same protection and immunity as a judge of the Supreme Court." The modern rule is that judges of superior courts are immune from all actions for any acts done by them in their capacity as judges (Holdsworth, History of English Law, 2nd ed., Vol. VI, page 234). The immunity of judges of the superior courts is total, and extends to an erroneous conclusion as to the ambit of jurisdiction (ibid., page 239). However, under section 6 of the Royal Commissions Act, 1923 the immunity applies to a commissioner only "in the exercise of his duty as a commissioner", and the immunity of the

Committee under section 32(3)(a) of the Australian Jockey Club Act 1873 is for "the purpose of hearing and determining any such appeal". There is absolute protection and immunity from legal action in respect of all that a member of the Committee may do or say whilst in the exercise of his duty in hearing and determining an appeal; but this protection and immunity is not extended to his conduct after the appeal has been heard and determined. Thus if the Committee, after the appeal is determined, sought to enforce the penalty it had confirmed (as by exercising its powers of expulsion under section 31 of the Australian Jockey Club Act 1873, or by treating the plaintiff as no longer a member because of rule 11), it would not be acting "for the purpose of hearing and determining" an appeal, but for the purpose of enforcing the consequences of an unsuccessful appeal. It seems to me that the immunity enjoyed during the hearing would no longer be applicable. The Committee would no longer be acting in pursuance or in furtherance of its statutory function of an appeal tribunal. Its actions would have no more protection than the actions of the committee of another club giving effect to decision of the Committee. The matter might be put in this way: the immunity protects the Committee as an appeal tribunal, not its decision. There is no inconsistency in saying, on the one hand, that the decision is void, or voidable, and, on the other hand, that the Committee is protected from legal action the only purpose of which is to establish the

voidness, or voidability of the decision. If that is so, it seems to me that section 32 (3)(a) should not be construed so as to convert the immunity of the Committee into the infallibility of its decision; in particular it should not be construed as excluding the jurisdiction of the court to correct an excess of jurisdiction by the Committee. Once the court has declared the decision of the Committee null and void, the affected person may then seek the court's aid to restrain persons (including the Committee) from acting to his detriment in purported reliance upon the decision. Thus in this case, the court may, at the instance of the plaintiff, declare that the decision of the Committee is void, and may do so in an action against any person who is acting, or threatening to act upon the decision. I do not understand it to be disputed that each and every one of the defendants would have enforced the disqualification against the plaintiff, had it not been for the interlocutory injunctions already granted; and it is not disputed that the Committee will treat its decision (if not declared void) as the basis for denying the plaintiff membership of the Club. For these reasons I am of the opinion that all the defendants are proper parties, and that the relief (if the plaintiff is otherwise entitled to it) is properly claimed against them all.

As to the argument based on election (or waiver, or approbation and reprobation, as it was variously described), the submission was, as I understood it, that the fact of

appeal amounted to an election not to approach the court for a declaration of the invalidity of the disqualification by the stewards. Particular stress was laid on the fact that the plaintiff had raised as an issue in the appeal the question of denial of natural justice by the stewards. It was submitted that, provided on the appeal the principles of natural justice were adhered to, the fact of the appeal would prevent recourse to the court, even though the appeal itself, was not of such a kind as to cure the defect in the stewards' enquiry. Thus, on this submission, the plaintiff, by appealing, is abandoning his right to complain of a denial of natural justice in the event that the appeal tribunal whilst not proceeding in such a way as to ensure fairness in the eye of the law dismisses his appeal. In my view, neither the doctrine of election nor any of the kindred principles relied upon, requires me so to hold. The remarks of Lord Reid in respect of a similar argument in Ridge v. Baldwin seem to me to be apposite (1964) A.C. 40 at 80-81).

It now becomes necessary to consider the submission that the appeal to the Committee "cured" the defect in the proceedings before the stewards. It was held by the Privy Council in Annamunthodo v. Oilfield Workers' Trade Union (1961) A.C. 945 that in the circumstances of that case the appeal had no such effect, and a view has found some favour that an unsuccessful appeal would generally not have such an effect. Thus in Hall v. New South Wales

Trotting Club Ltd. (1976) 1 N.S.W.L.R. Holland J. (at 341) considered that he should adopt this view of Annamunthodo's case, and do so in preference to the contrary view as to the effect of an appeal in a domestic forum expressed in the High Court in Australian Workers' Union v. Bowen (No. 2) 77 C.L.R. 601. The decision in Pillai v. Singapore City Council (1968) 1 W.L.R. 1278 (which I consider requires a contrary decision in the present case) was not cited to the court; nor was the decision of the High Court in the comparable case of Meyers v. Casey 17 C.L.R. 90, which would appear also to be to the contrary. In Leary v. National Union of Vehicle Builders (1971) 1 Ch. 34 a view similar to that of Holland J. was taken by Megarry J. (see esp. page 48). Pillai's case was not cited.

Mr. Meagher, senior counsel for the third defendants (the stewards) submitted that even if the decision in Annamunthodo (above) was applicable to the facts of this case, I should not follow it in preference to the High Court. The argument began by referring to the statement by Barwick C.J. in Jacob v. Utah Constructions (116 C.L.R. 200 at 207) as to the circumstances in which it was proper for a lower court to regard a High Court decision overruled by the Privy Council; and it proceeded by adding the gloss that a High Court decision, on a matter of common law, would prevail, unless the Privy Council decision was upon the common law of Australia. The basis of the submission was that it had been established in

Uren v. Consolidated Press (117 C.L.R. 221, esp. 238, 241) that there was a common law of Australia. The result would be that decisions of the Privy Council, on matters of common law, would be binding only if they were given in Australian appeals. Annamunthodo (above) was not such a decision, and accordingly (the argument ran) I should follow Australian Workers' Union v. Bowen (above) and Meyers v. Casey (above). The argument is not without its attractiveness, especially in the modern era of a Commonwealth composed of independent sovereign countries. In Kanda v. Government of Malaya (1962) A.C. 322 the advice of the Privy Council was not tendered to Her Majesty, but to the Head of the Federation. Because I consider that Annamunthodo (above) does not apply to the facts of the present case, I have not to decide this matter, and I propose to express no opinion upon it, beyond the observation that the common law is the heritage of many Commonwealth countries, and the burden of showing territorial divergency (especially perhaps on such a fundamental concept as natural justice) may lie upon him who asserts it. The attitude of the courts so far is contrary to Mr. Meagher's submission, and that attitude has been recently affirmed in Reg. v. Young (New South Wales Court of Criminal Appeal, 15th July, 1976, unreported) where (following the decisions in Mayer v. Coe 88 W.N. Pt. 1, pp. 554-555 and Ratcliffe v. Walters 89 W.N. Pt. 1, 497 at 503-505) the decisions of the Privy Council in the Jamaican appeal of Palmer v. The Queen (1971) A.C.

814 and the Hong Kong appeal of Edwards v. The Queen (1972) 3 W.L.R. 893 were preferred to the decision of the High Court in The Queen v. Howe 100 C.L.R. 448.

In my opinion the decision of the Privy Council in Pillai v. Singapore City Council (1968) 1 W.L.R. 1278 has established that a decision of tribunal, which would otherwise be vitiated by a denial of natural justice, has the defect "cured" by a hearing de novo (provided the latter hearing itself suffers from no such defect). The appellants were labourers employed by the Council, and were dismissed for failure to carry out directions relating to the work they were to do. It appears that the Head of the Department then carried out an enquiry at which the appellants were either present or represented. After the enquiry the deputy president put three questions in writing to the Head of the Department to which he received written answers. Neither the questions nor the answers were disclosed to the appellants. The appellants then appealed to the establishments committee. No attack was made on the propriety of the appeal proceedings. There were in evidence, by consent, rules which purported to lay down a procedure where the conduct of an employee was being considered with a view to his dismissal or punishment. The head of the department was to hold an enquiry which was to be conducted by a responsible officer of the department concerned. The president or deputy president was then to consider the full record of the enquiry and might cause

further enquiries to be held as he might deem necessary. The president or deputy president then made his decision which was to be conveyed to the head of the department, who was to cause the employee to be informed in writing. If the decision was to dismiss the employee, he had an appeal to the establishments committee. The rules did not provide how the appeal was to be conducted (except for the requirement of the presence of the welfare officer), but the Privy Council found that the appeal was in fact a hearing de novo.

The Privy Council first held that there was no evidence that these rules were the rules of the Council, and that the appellants must fail on that ground. But their Lordships then proceeded to consider the case on the assumption that the rules were effective. Their next finding was that the principles of natural justice did not apply at the stage when the deputy president put his questions to the head of the department and received the replies, and that, as this was the incident of denial of natural justice relied upon, the appellants must fail on this ground also. Their Lordships however went on to consider the case on the footing that the principles of natural justice were applicable at the stage when those questions were put and the replies were received, and held that the failure to inform the appellants of the answers and replies would be defective procedure; but even so their Lordships were of the opinion the defect would be

cured by the appeal. In my opinion the language of the Privy Council shows that it gave three separate and distinct grounds for its decision, and I regard the third ground as applicable to the case before me, and binding upon me.

The material part of their Lordships' judgment is as follows (pages 1285-6):-

"In their Lordships' view it is only if the president or his deputy reaches the conclusion that the circumstances warrant a decision to dismiss and that decision is conveyed to the employee ... that the principles of natural justice start to be applicable for it is only at that stage that any rights are conferred upon the employee, namely a right of appeal to the establishments committee.

The appellants' case however depends upon the submission that the failure to observe the rules of natural justice occurred at an earlier stage. After the Head of the Department carried out the inquiry ... at which the appellants were either present or represented the deputy president put three questions in writing to the Head of the Department to which he received written answers. Neither questions nor answers were disclosed to the appellants. That, it was said, was a defect in the respondent council's procedure and so Tan Ah Tah J. held, though he held it was cured by what followed. This however does not

help the appellants for the reason already given by their Lordships that at that stage the rules of natural justice had no application. Had their Lordships been of a contrary opinion their Lordships would have agreed with Tan Ah Tah J. that this procedure was defective though for reasons now to be mentioned they agree with him that what followed cured the defect.

The appellants appealed; and in accordance with rules 3(b)(vi) and (vii) there was a hearing before a sub-committee of the establishments committee which was in the nature of a rehearing and evidence was called de novo. No attack upon the propriety of these proceedings (or that it was only a sub-committee) has been made.

Their Lordships were referred to Annamunthodo v. Oilfield Workers Trade Union (1961) A.C. 945 and to the observations of Lord Denning. It was there held that the accused was entitled to complain that a new charge against him not made before the hearing tribunal but for the first time before the appellate tribunal could properly form a ground of appeal to the courts on the principle that the rules of natural justice had not been observed. Their Lordships agree.

But the complaint here was that certain evidence was wrongly received by the tribunal at first instance, in the absence of the employee, a serious complaint. But when on appeal there is a rehearing by way of

evidence de novo from witnesses it seems to their Lordships that different considerations apply. The establishments committee heard evidence de novo in the presence of the appellants or their representatives. Upon that evidence only the committee held that the appellants were rightly dismissed. That cured the alleged defect at an earlier stage and is itself conclusive against the appellants as the proceedings before the establishments committee are not attacked."

That this third finding of the Privy Council is a ratio decidendi, and hence binding upon this court, and not merely a dictum (as counsel for the plaintiff submitted) is supported by authority (see: Jacobs v. London County Council (1950) A.C. 361 at 369; Behrens v. Bertram's Circus (1957) 2 W.L.R. 404 at 419, 420; Cane v. Royal College of Music (1961) 2 Q.B. 89 at 114, 122; 79 L.Q.R. 49 at page 59). In Twist v. Randwick Municipal Council (High Court of Australia, 12 A.L.R. 379) which is a case upon the effect of the right of appeal under section 317B of the Local Government Act, 1919, Mason J. (page 387) cites Pillai v. Singapore City Council (above) as supporting the proposition that if the right of appeal from one administrative body to another is exercised and the appellate body acts fairly and does not depart from natural justice the appeal may then be said to have "cured" a defect in natural justice and fairness which occurred at first

instance. He cites, as taking the same view, the Privy Council in De Verteuil v. Knaggs (1918) A.C. 557 and the Supreme Court of Canada in Re Clarke and Ontario Securities Commission (1966) 56 D.L.R. (2d) 585 and King v. University of Saskatchewan (1969) 6 D.L.R. (3d) 120. I might add the decision of the Privy Council in White v. Kuzych (1951) A.C. 585, which upheld the effectiveness of a rule that all remedies in a domestic forum should be exhausted before a person complaining of a denial of natural justice could have resort to the courts, appears to have implicit in it the assumption that the domestic appeal might rectify an earlier denial of natural justice.

In order that the principle in Pillai v. Singapore City Council (above) should apply it is necessary on the appeal evidence should be taken de novo; that the appeal tribunal should act only upon that evidence; and that it should itself observe the principles of natural justice. As to the first requirement, that evidence should be taken de novo, it appears from the case that it is not necessary that the rules of the appellant tribunal should expressly provide that the appeal is a hearing de novo; it is sufficient if the rules permit of such a hearing, and that evidence is in fact taken de novo. Section 32 of the Australian Jockey Club Act 1873 provides that the appeal to the Committee "shall be in the nature of a re-hearing". Whether this provision directs, or permits, a hearing de novo is primarily "a question of elucidating

the legislative intent" (Builders Licensing Board v. Sperway Constructions (Syd) Pty. Ltd., High Court of Australia, 26th November, 1976, per Mason J.). In the case last cited, Mason J. (with whom Barwick C.J. and Stephen J. agreed) said: "Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect." The Committee is not a court, but the jurisdiction conferred upon it by section 32 is similar to the jurisdiction conferred on courts by way of appeal from administrative bodies. An appellant is entitled to representation; the Committee sits "as in open court"; and its decision is to be "upon the real merits and justice of the case". The Legislature might be presumed to know that stewards may be called upon to act urgently, and that their enquiries may be informal. It would be reasonable that the appeal should provide a fresh hearing so as to ensure justice and the appearance of justice. The fact that the Committee have "the powers, authorities, protections and immunities" conferred by the Royal Commissions Act, 1923 on a commissioner assimilates its position closely to that of a court. Witnesses may be summoned to give evidence and produce documents, and required to take an oath (sections 8, 9, 10, 11). Thus the Committee is empowered to take evidence, whereas the lower tribunal has no statutory powers for that purpose; and

this power is given for "the purpose of hearing and determining" an appeal, and in particular to enable the Committee to give a decision which is upon the real merits and justice of the case. The conclusion I have reached is that the Committee should presume the appellant innocent of the charge against him until he is proved guilty, and should receive and consider such evidence as is necessary to give a decision on the real merits and justice of the case. This I take to be a hearing de novo in the relevant sense. In the present case the transcript of the evidence before the stewards was tendered before the Committee without objection, and in my view this course was consistent with a hearing de novo; but generally the duty of the Committee is to hear the witnesses and examine the relevant documents for itself.

Counsel for the plaintiff submitted that the appeal to the Committee was not a hearing de novo. His argument was that section 32 does not expressly so provide; that the Rules of Racing relating to appeals make it clear that the appeal does take this form; and that, having regard to section 32 (5)(b), it is the Rules that are decisive of the nature of the appeal in this regard.

The Local Rules of the Australian Jockey Club are part of the "Rules of Racing", and would be within the meaning of that term in section 32 (5)(b). The relevant Rules are as follows:-

"L.R. 71. Subject to the provisions of the Australian

Jockey Club Act, the Committee of the Australian Jockey Club may on the hearing of the appeal:-

(a) Remit the matter in dispute to be reopened or re-heard by the committee of the club or association or stewards from whose decision the appeal is brought; or

(b) Upon the evidence already taken and any additional evidence, which in their opinion it was desirable to admit or obtain, make such order as in their opinion ought to have been made by such committee or stewards, or as in their opinion may be necessary to ensure the determination on the merits of the real question at issue; and

(c) Make such order as they may think proper for payment of the costs and expenses of the appeal ...

L.R. 72. Subject as aforesaid the Committee may at its discretion allow the appellant to be represented by counsel on the hearing of any appeal and in any case may have counsel to assist the Committee.

L.R. 73. Subject as aforesaid no fresh evidence shall be adduced on the hearing of any appeal to the Committee except by leave of the Committee."

I should agree that these Rules do not provide, as of a right, for a hearing de novo; and the directions in L.R. 71(b) to have regard to the evidence already taken, and to make such order "as ought to have been made by such committee or stewards" would have the effect that the

appeal could not be a hearing de novo. But these Rules are all subject to the provisions of the Australian Jockey Club Act, and must be so, for section 32 (5)(b) provides: "This section shall be construed as ... not ... limited by the Rules of Racing of the Australian Jockey Club". Some of the provisions of the Rules are in direct conflict with section 32 (for example, the discretionary power to allow representation by counsel in L.R. 72 contrasted with the right to counsel conferred by section 32(3)(b)) in so far as appeals coming within section 32 are concerned. But section 32 does cover the whole area of appeals to the Committee. Appeals in relation to revocation or suspension of licences as trainer, jockey or rider are limited to a revocation or suspension exceeding one month; and appeals in relation to fines may be brought only where the fine is not less than ten dollars. There is therefore an area of minor offences to which section 32 does not apply, but which falls within the Rules relating to appeals. But the Rules have no relevance on the construction of section 32 (except to the limited extent provided by section 32 (5)(a)), and, in their application to appeals under section 32, the Rules must be read subject to section 32 as independently construed. Thus an appeal to the Committee under section 32 must be heard and determined by the Committee; the Committee could not remit "the matter in dispute" to the stewards under L.R. 71. But the Rules may provide for matters of procedure relating to section 32

appeals. Rules relating to procedure (so far as not inconsistent with section 32) would be permissible under section 32(5)(b).

On the appeal Mr. Staff, senior counsel for the plaintiff, submitted to the Committee that there had been a denial of natural justice in the stewards' enquiry in the respects claimed in this court. It is not clear from the transcript what Mr. Staff was asking the Committee to do about this alleged denial of natural justice. He referred to his submission as a "submission of law", spoke of "an invalidating factor", and ended by saying: "For all those reasons we submit that Mr. Calvin's appeal should be upheld". This of course embraced his submissions on the facts of the case as well. In my opinion, however the "submission of law" is interpreted, it was irrelevant to the function the Committee had to perform, which was to hear the case afresh. The Committee made no reference to this submission, and I do not think it has any effect one way or another on the question whether the appeal was conducted as a hearing de novo. No submission was made to me on the point, except in relation to the argument based on the principle of approbation and reprobation.

The procedure before the Committee on this plaintiff's appeal closely followed that of a judge (without a jury) hearing a criminal charge. Without objection the appeals of the plaintiff, the jockey Cuddihy, and the foreman Dawson were heard together. The plaintiff and

Messrs. Cuddihy and Dawson were present and were legally represented. Mr. Falkingham of Queen's Counsel (as he then was) appeared with Mr. Reynolds to assist the Committee. All the stewards who held the enquiry (except Mr. Hickman) were called as witnesses by Mr. Falkingham, and were examined, and cross-examined. No point was taken on Mr. Hickman's absence. All the witnesses before the stewards were in attendance, and available for cross-examination, and of these Messrs. Mason, Bartley, Cummings and Wallace were called. Evidence was given by other witnesses, notably Mr. Poulsen, the New Zealand senior stipendiary steward. The plaintiff and Messrs. Cuddihy and Dawson were called as witnesses, examined by their counsel and cross-examined. The film of the race, and films of Count Mayo racing in New Zealand, were shown in the presence of the parties. Counsel addressed, and the parties and their representatives were asked to retire so that the Committee might give the matter consideration. After a short adjournment the Chairman of the Committee announced the finding in the following words: "Gentlemen, the Committee has given full consideration to the evidence and the submissions by learned counsel in these appeals, and has decided to dismiss the appeals of Messrs. F. Calvin and P. Cuddihy, and to uphold the appeal of R. Dawson". In my opinion, the appeal was conducted as a hearing de novo, and the Committee acted only on the evidence adduced before it.

It is claimed, however, that the Committee did not

itself observe the principles of natural justice. At the hearing the first allegation of denial of natural justice was amended by deleting all the words after "approximating 13 hours" in paragraph 21(a). Thus paragraph 21(a) came to read that "in the conduct of the hearing and in the purported dismissal of the appeal neither natural justice nor fairness was observed in that the Committee, notwithstanding protest made, conducted the hearing on one day for an inordinate period approximating 13 hours". Particulars were given of this amendment as follows: "Having regard to the nature of the charges and the disqualifications appealed against and the nature of the issues involved, the length of time occupied by the hearing and the period over which the hearing extended (i) was per se inordinate; or (ii) created an appearance of such inordinate length as to give rise to a reasonable suspicion on the part of a fair minded bystander that the appellant would not obtain a fair trial; or (iii) imposed excessively upon the capacities of counsel representing the parties and assisting the Committee and members of the Committee and witnesses; or (iv) gave rise to a reasonable suspicion by fair minded observers that the capacities of members of the Committee were being imposed upon excessively and that thereby the appellants might not obtain a fair hearing; or (v) was not a bona fide exercise of the power to hear and determine appeals under section 32 of the Australian Jockey Club Act 1873".

The jockey, Mr. Cuddihy, had been given leave to discontinue an action similar to the present one before this hearing commenced before this court. There was no evidence from him or his legal representatives in support of this ground of alleged denial of natural justice. Mr. Comans was the solicitor for the successful appellant before the Committee, Mr. Dawson, and was his counsel there. He was a witness before me, and his evidence was strongly to the effect that he suffered no disadvantage because of the length of the hearing on the first day. Some (but not all) members of the Committee also were called as witnesses before the court, and their evidence was unequivocally to the effect that they remained alert throughout the long day of hearing. His Honour, Judge Falkingham gave evidence to the same effect. There was no evidence at all from the plaintiff or his legal representatives before the Committee. Thus there is no evidence to support the plaintiff's contention (and the onus is upon him) that the length of the hearing on the first day had in fact any effect on the capacities of the appellants or their legal representatives, or of counsel assisting the Committee, or of witnesses, or of the members of the Committee. If this alleged ground of denial of natural justice is to have any weight, it must be because the length of the hearing might in itself suggest that justice may have been denied. The test is objective - what would a reasonable bystander think; but it is said that the plaintiff may rightly complain, if the reasonable

bystander would think justice may have been denied, even though the plaintiff does not himself so complain. It is important to bear in mind that the plaintiff did not give evidence before the court; nor did the counsel appearing for him before the Committee. There is simply no evidence before the court that the length of the hearing on the first day had any adverse effect on the plaintiff or his legal representatives, either directly or indirectly. There is evidence that the members of the Committee were not affected by the length of the hearing on the first day. The reasonable bystander test of the appearance of justice does not mean that justice is denied if the reasonable bystander might think it was; there must also be evidence that the person alleging grievance (the plaintiff here) was also dissatisfied with the conduct of his trial. As Lord Denning said in Kanda v. Government of Malaya (1962) A.C. 422 at 337-8): "No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing." Similarly the plaintiff here would not believe he had justice from the Committee if he thought that his counsel or a member of the Committee, or he himself when giving evidence, was suffering during the Committee hearing from fatigue. There is evidence that his counsel made a complaint about the length of the first day's hearing, and I shall presently review that evidence; but that evidence does not support an inference of any relevant fatigue; and in my

view there is no evidence that the length of the hearing on the first day had any effect on the plaintiff's appeal contrary to his interests, or was or is believed by him to have had any such effect.

This is sufficient to dispose of this alleged ground of denial of natural justice; but I shall consider it further on the assumption (which I believe is incorrect) that there may be a denial of natural justice, because of the length of the proceedings on a particular day, even though the plaintiff adduces no evidence in support of his claim. The appeal commenced at 10.05 a.m. on 9th April, 1976. There was an adjournment "some time" during the morning. The luncheon adjournment was at one o'clock. The appeal resumed at two o'clock, or five past two. There was an afternoon tea adjournment at about 3.40 p.m. for about five or ten minutes. The hearing then went on to 6.50 p.m., when it was adjourned for dinner. It was resumed at about ten to eight, or five to eight, and went through to 9.25 p.m., when the plaintiff finished his evidence. There was then a twenty five minute adjournment, and the hearing resumed at ten to ten, and went through to 10.50 p.m. That is the hearing time alleged to be inordinate. The case was adjourned from the Friday to the Monday, and went through from 10 a.m. to 4.40 p.m., with various adjournments.

In answer to an interrogatory, it was said on behalf of the defendants that at about 7.50 p.m. on 9th April,

1976 Mr. Staff suggested that the hearing should not proceed later that night; and he also made the points that to continue the hearing imposed excessively upon the capacities of counsel and of members of the Committee, and that further hearing should be adjourned until early Saturday morning, or until the following Sunday or Monday. As I have mentioned, there is no evidence that the continuance of the hearing "imposed excessively" upon the capacities of the counsel or of members of the Committee; and what evidence there is on the matter is to the contrary.

There was an important race the ensuing Saturday, and the plaintiff wanted to enter a horse in that race. Acceptances were to be determined on the following Tuesday, and unless the plaintiff was successful in his appeal he would not be able to enter his horse for the race. The hearing of his appeal was therefore a matter of urgency for him. This was recognized by his counsel in making his application for an adjournment; but he also said that if acceptance could be taken provisionally subject to the result of the appeal, that would overcome the immediate urgency. The chairman said that the Committee did not want to do that; it wanted to finish as quickly as possible. In evidence Sir John Austin, a member of the Committee, acknowledged that the Committee had the alternative of expediting the appeal, or of acting under R. 200 to suspend the operation of disabilities on the plaintiff of his disqualification.

It will incidentally be noted here that the appeal to the Committee did not automatically suspend the disqualification and its consequences. Though the matter is not as clear as one could wish, it appears that in Pillai v. Singapore City Council (above) the dismissal was not suspended pending the determination of the appeal (see: page 1280 D-F; though not referred to in the errata the date "May 23, 1967" must have been May 23, 1957). The rules provided for "a formal letter of dismissal", and for the employee being informed of his right of appeal. There was no provision in the rules that the lodgment of the appeal would itself affect the dismissal. If the appeal did suspend the dismissal, this was not a factor in the decision of the Privy Council. At the most, in cases such as the present, it might be a factor influencing the court to exercise its discretion to grant relief to a person disqualified by stewards, contrary to the rules of natural justice, in lieu of an appeal, or pending its hearing.

Returning to the immediate problem, it seems to me that the matters of hearing times, and length of hearing on any particular day, are peculiarly a matter for the tribunal concerned, and the court should not interfere unless the decision of the tribunal was so manifestly wrong and unjust as to warrant an inference that it was not acting in good faith. I am speaking here of course of the case where there is no evidence of fatigue or other prejudice in fact to the complainant. It would obviously be a

rare case where the court could infer an absence of good faith without any evidence of prejudice, and the present case is not one in which the inference might be drawn. There was evidence that some members of the Committee were fairly advanced in years, but this of itself is negative.

The next defect alleged is that members of the Committee had placed bets on horses in the race. The full circumstances of these bets are known. None of them gave rise to any interest in a member of the Committee that would or could be affected by the outcome of the appeal. There was no suggestion that any member of the Committee had, or could reasonably be suspected of having, any feeling of hostility to the plaintiff by reason of the failure of Count Mayo to do better than it did. I see no support for the plaintiff's case on this ground.

There is no evidence that any member of the Committee had any personal knowledge relating to any of the matters in issue in the appeal, and grounds in the statement of claim to this effect are not supportable in any way.

This leaves remaining the charge that one member of the Committee adopted a partisan attitude against the plaintiff. The member referred to is Mr. R.A. Howell. It was agreed that Mr. Howell is of Queen's Counsel, and was so at all relevant times, and was then the only legally qualified member of the Committee. In the first place there is no evidence that Mr. Howell was, or "manifestly appeared to be" convinced of the guilt of the plaintiff

before the commencement of the hearing. The transcript before the stewards was received in evidence before the Committee (without objection) during the opening address of senior counsel assisting the Committee. A discussion between Mr. Howell and senior counsel for the plaintiff during the evidence of the first witness, and other comments by him, indicate that, early in the appeal hearing, he was familiar with the evidence recorded in it, and the course of the proceedings before the stewards, but there is no suggestion in the transcript of prejudgment by him.

The transcript of the Committee hearing shows that Mr. Howell asked a number of questions of witnesses, and engaged in discussions with counsel. The discussions with counsel are unexceptionable, being typical of the interchange that in court takes place between bench and bar. According to the ascription in the transcript, there is a long series of questions addressed by Mr. Howell to Mr. Mason (they begin on page 57 and conclude on page 62). In pattern and form they constitute a vigorous and sustained cross-examination. If such cross-examination were conducted by counsel assisting the Committee, it would be proper and pertinent; but if it came from a member of the Committee a serious question would arise as to the propriety of the proceedings. However, no such question does arise, because the evidence before me established conclusively that most, probably all or nearly all, of the questions were put by counsel assisting the Committee and not

by Mr. Howell, and I understand that this was finally conceded. With this concession, no substance was left in the plaintiff's case on the alleged partisan attitude of Mr. Howell. There is another, shorter series of questions, beginning with a witness (Mr. Wallace) being shown some buff coloured documents, which are attributed to Mr. Howell. There is a ring of the cross-examiner in these questions; but again the evidence is clear that counsel assisting the Committee asked all these questions.

However, counsel for the plaintiff did not abandon his point, and I have examined all the instances of Mr. Howell's intervention. He asked questions of Messrs. Mason and Bartley, but the purpose of clarification of obscure points is obvious. The evidence of Messrs. Mason and Bartley is indeed complicated, verbose and obscure, and a judge might properly intervene in an endeavour to understand the nature of the evidence. Counsel for the plaintiff submitted that in two instances Mr. Howell's questions of Mr. Mason are open to criticism. The first instance relates to the cheque that Mr. Mason told the Committee he gave to Mr. Bartley in the afternoon of the Monday following the Saturday races. This is the context:-

"Q. What did you do with the cheque?

A. Paid it to Mr. Bartley on the Monday afternoon.

Q. He cashed it at your bank?

A. That is quite probable. Yes, that could probably be quite probable.

Q. What time Monday afternoon?

A. Was it cashed Monday afternoon?

Q. You answer us?

A. I cannot tell you when Mr. Bartley cashed the cheque.

Q. The answer is, you do not know?"

I think it is sufficient comment by me to say (as the court said Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group 122 C.L.R. 546 at 553) that the requirements of natural justice are not infringed by a mere lack of nicety.

The other instance, in a sufficient context, is as follows:

"Q. You told him (Bartley) the first ring?

A. Yes, put it on before the ring came through from the Sydney ring, thinking it would be better before the first ring.

Q. That is the s.p. price?

A. The opening quote, I would say.

Q. S.p.?

A. No, I thought s.p. was starting price, and that is the final price.

Q. You know what s.p. is?

A. Yes, but I asked him to put it on the first ring.

Q. You are a former policeman?

A. Yes, but I asked him to put it on on the first ring.

Q. The first ring meant s.p. odds?

A. I would not say that that is the correct term."

As I understood counsel for the plaintiff, he submitted that the reference to the witness' former occupation was insulting and gratuitous. To me it merely suggests that Mr. Howell is putting to the witness that as a former policeman he should be able to give a definite and clear answer as to what is "s.p." The witness' answer seems to show that he took no offence, and that he was trying to draw a distinction between "s.p." and "first ring". There was abundant evidence before me (I shall refer to it later) that Mr. Howell was throughout the proceedings calm and courteous, and I see no reason to put the suggested construction on this particular question.

Those instances seem to me to be trivial. Counsel relied also upon another instance, occurring during the plaintiff's testimony:-

"Q. (Mr. Howell) Why would you have truck with a man like Mason to invest $6000 on the horse.

A. Well, what is wrong with Mr. Mason, he bets every day and if he can get me an extra half a point for my money it is $3000.

Q. Why didn't you put your own money on.

A. I do sometimes.

Q. I know you do but why not this time.

A. I used him once before and he got me an extra quarter point and I thought the horse would start

Reasons for Judgment of his
Honour, Mr. Justice Rath

odds on and I thought possibly he could do the same again.

Q. You put $6000 through Mr. Mason on a horse that was badly underdone and badly needed a run.

A. That is right.

MR. STAFF: Q. Mr. Howell suggested to you that Mr. Mason is a man whom you should not have truck with.

MR. HOWELL: I did not suggest that at all.

MR. STAFF: Q. You heard Mr. Howell ask that.

A. That is the interpretation I took."

The question as to which particular exception is taken is the first one I have quoted. The transcript indicates that Mr. Howell did not understand his question to imply that Mr. Mason was in some way unworthy, and it does not necessarily have any such implication. The purpose of the question appears to me to be to seek an explanation (if there was one) of an alleged betting transaction that at first sight might seem extraordinary and devious. By this time evidence had been given by the stewards, Mason, Bartley, Cummings, Poulsen and Wallace; and the plaintiff had been examined and cross-examined. Mr. Howell's question might have been better phrased; but it does not evince a partisan attitude. At the most it suggests that by that time he was somewhat sceptical of the alleged betting transaction. A judge is not wanting in impartiality merely because he forms tentative views in the course of the hearing.

The plaintiff did not himself give evidence in court. Two of his friends were called as witnesses. They had attended the Committee hearing as journalists. Their evidence was to the effect that Mr. Howell asked his questions in a loud voice; that in asking questions he leant forward in his chair and pointed at the witness; that when asking questions he would jut his jaw in the direction of the witness; and a lock of his hair would fall over his face. The impression I formed of these witnesses was that they were (to adopt an expression from the statement of claim) manifestly partisan. Evidence was also given by members of the Committee, Mr. Comans (solicitor and counsel for Dawson) and his Honour Judge Falkingham. This evidence establishes clearly that the observations of the plaintiff's witnesses were erroneous and that Mr. Howell conducted himself throughout the hearing of the appeal calmly, courteously and properly.

In Jones v. National Coal Board (1957) 2 Q.B. 55 Denning L.J. (as he then was) described the function of the English judge as follows (pages 63-4):-

> "In the system of trial we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe in some foreign countries. Even in England, however, a judge is not a mere umpire to answer 'How's that?' His object, above all, is to

find out the truth, and do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'? ...

And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena, and is liable to have his vision clouded by the dust of conflict.' ... So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other ... And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost ... The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that

he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of bearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"

But Lord Denning then went on to say: "Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may outrun our sureness, and we may trip and fall". In my opinion, Mr. Howell observed these standards: he did not "trip and fall".

Thus there is no substance in the plaintiff's claim that the principles of natural justice were not observed in the appeal to the Committee.

There remain the questions relating to the sufficiency of the evidence before the Committee. There is no need to review the evidence as it was presented to the Committee. In its essentials it remained the same as it was before the stewards. For the same reasons that I advanced in relation to the stewards' enquiry, I reject the contentions that there was no evidence that the plaintiff was a party to a breach of Rule 135(a), and that upon the evidence no reasonable men could have found (a) that there had been any breach of Rule 135(a) or that the plaintiff was a party

to any such breach; or (b) that the purported disqualification of the plaintiff should stand or be given effect to. I am also of the opinion that, even if I had found the facts differently, sufficiency of evidence, put in either of these ways, is not a ground for interference with the decision of the Committee. It is true that the former writ of certiorari would issue to quash a decision of justices for error of law on the face of the record, and it is true that a decision for which there is no evidence is erroneous in law. It has been said that a decision of an inferior tribunal might be reviewed if there was no evidence to support it (The Australian Gas Light Company v. The Valuer General 40 S.R. 126 at 138). There is authority that certiorari to quash would issue to an inferior tribunal for error of law on the face of the record (see, for example, Reg. v. Medical Appeal Tribunal (1957) 1 Q.B. 574). Whether or not there is evidence to support a particular decision is always a question of law (Reg. v. Governor of Brixton Prison; ex parte Armah (1968) A.C. 192 at 234). But there was no case prior to the English Summary Jurisdiction Act of 1848 where it had been held that certiorari would issue to quash the decision of justices for a lack of evidence shown on the face of the record (R. v. Nat Bell Liquors Ltd. (1922) 2 A.C. 128 at 150-1). After that Act, the face of the record "spoke" no longer: "it was the inscrutable face of a sphinx" (ibid, page 159). But though absence of evidence is a matter of

Reasons for Judgment of his
Honour, Mr. Justice Rath

law, it does not go to jurisdiction (Reg. v. Governor of Brixton Prison, ex parte Armah, above, page 234); and it is only where there is lack of jurisdiction (in the expanded sense of the term as used in Anisminic Ltd. v. Foreign Compensation Tribunal (1969) 2 A.C. 147 esp. at 171, 194-5, 207) that the superior court will interfere. If a tribunal acts within its allotted area, it has jurisdiction to decide a question wrongly, as well as rightly, on both law and fact (Anisminic Ltd. v. Foreign Compensation Tribunal, above).

In the case of a domestic tribunal, it is well settled that insufficiency of evidence is a ground for interference by a superior court only where that insufficiency shows that the tribunal did not act in good faith (Dawkins v. Antrobus (1881) 17 Ch. D. 615 esp. 624, 629, 630, 634; Maclean v. The Workers' Union (1929) 1 Ch. 602). In my respectful view, the correct position is put by Isaacs J. in the following passage from his judgment in Dickason v. Edwards (10 C.L.R. 243 at 257-8), where he was speaking of the finding of a friendly society expelling a member: "I think that, although the Court has an undoubted right to review the finding in one sense, it has only to see whether the finding was arrived at in accordance with the rules, without any departure from the principles of natural justice, and bona fide. If those conditions are complied with, then I think that, so long as the finding is one which the Court finds it impossible to designate as

one at which no reasonable man could honestly arrive, the Court cannot review it." It is true that in the same case Griffith C.J. and O'Connor J. (at pages 249, 254) express the test as being whether a reasonable man could come to the decision. In some contexts, such a test may imply that there was evidence, but not much (as Lord Sumner put it in R. v. Nat Bell Liquors Ltd., above, page 144). But I do not think that in the context of the case before them Griffith C.J. and O'Connor J. were expressing a view different from that of Isaacs J. If they were, their views are obiter, and would not be binding and would be contrary to established authority which I consider is binding on this court.

There was considerable discussion in the argument before me on another point, namely whether a decision contrary to natural justice is void or voidable. If the stewards' decision was void, then it was said there was no decision from which an appeal could be taken under section 32 of the Australian Jockey Club Act 1873. If my view of the decision in Pillai v. Singapore City Council (above) is correct, then it is unnecessary to consider the refinements of this argument. Further, the reasoning in White v. Kuzych (1951) A.C. 585, 600 would support a construction of section 32 of that Act whereby the appeal to the Committee would be from a purported act of disqualification by the stewards. Whether that act was "void" or not, it would in fact operate against the plaintiff, unless he

took some step to have the act declared void. However this may be, so far as this court is concerned the issue of void or voidable has been settled by the Privy Council in favour of voidable (Durayappah v. Fernando (1967) 2 A.C. 337 at 354-5).

I should note also that after leave was given to amend the statement of claim at the hearing the statement of defence was amended, without objection, as follows: 10

"13A. Further as to paragraph 21(a) of the amended statement of claim the defendants say that the court in the exercise of its discretion ought to refuse the relief claimed by the plaintiff or any relief."

In the view I take of the matter it is unnecessary to consider this defence.

For these reasons I am of the opinion that the court should not make the declarations and orders claimed by the plaintiff, and that the suit should be dismissed with costs.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

(First named Defendant)

J.H.B. CARR B.P. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

(Second named Defendants)

J.J. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
B.H. KILLIAN

(Third named Defendants)

O R D E R

THE COURT ORDERS that -

1. As to the Defendants' application for further or better answers to interrogatories by the Plaintiff, the Defendants pay the Plaintiff's costs.

2. As to the Defendants' application for leave to amend their statements of defence by adding paragraphs in or to the effect of new paragraphs 23, 24 and 25 handed up, which have been initialled and placed with the papers, the Defendants have leave and the Defendants pay the costs of the Plaintiff of and occasioned by the amendment.

ORDERED 24 August 1976

3. The suit is dismissed with costs.

ORDERED 23 June 1977

4. As to reserved costs of the Defendants' notice of

motion filed 11 August 1976 and the Plaintiff's notices of motion filed 28 July 1976 and 5 August 1976 there be no order as to costs.

5. The Plaintiff pay one set of costs of the Defendants including reserved costs except the reserved costs referred to in Order 4 hereof.

ORDERED 28 June 1977 AND ENTERED 27 SEP 1977

BY THE COURT

A.G. Nevill (L.S.)
DEPUTY REGISTRAR IN EQUITY

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

First Defendant

J.H.B. CARR B.P. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.L.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

Second Defendants

J.J. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
G.H. KILLIAN

Third Defendants

O R D E R

THE COURT ORDERS that -

1. The Plaintiff be at liberty to appeal to Her Majesty in Council from the judgment and orders made herein on 23 June 1977 and 28 June, 1977 on the following conditions, namely

(a) That the Plaintiff within one month from the date of this order gives security to the satisfaction of the Registrar in Equity in the amount of $1,000 for the due prosecution of the said appeal and the payment of all such costs as may become payable to the Defendants in the event of the Plaintiff's not obtaining an order granting final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the Plaintiff to pay the Defendant's costs of the appeal (as the case may be);

(b) That the Plaintiff within fourteen days from the date of this order deposits with the Registrar in Equity the sum of $50 as security for and towards the costs of the preparation of the record for the purposes of the said appeal;

(c) That the Plaintiff within three months from the date of this order takes out and proceeds upon all such appointments and takes all such other steps as may be necessary for the purpose of settling the Index to the said Record and enabling the Registrar in Equity to certify that the said Index has been settled and that the conditions hereinbefore referred to have been duly performed;

(d) That the Plaintiff obtains a final order of the Court granting him leave to appeal as aforesaid.

2. The costs of all parties of this application shall be costs in the appeal.

3. All parties shall have liberty to apply.

ORDERED 27 JULY 1977 AND ENTERED 26 AUG 1977

BY THE COURT

A.G. Nevill (L.S.)
DEPUTY REGISTRAR IN EQUITY

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

First Defendant

J.H.B. CARR B.P. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.L.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

Second Defendants

J.J. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
B.H. KILLIAN

Third Defendants

O R D E R

THE COURT ORDERS that -

1. The Plaintiff be granted final leave to appeal to Her Majesty in Council from the judgment and orders made herein on 23 June 1977 and 28 June, 1977.

2. Upon payment by the Plaintiff of the costs of preparation of the record for the purposes of the said appeal the sum of $50.00 deposited with the Registrar in Equity as security for and towards such costs be paid out of Court to the Plaintiff.

3. The costs of this motion be the costs of the appeal.

ORDERED 14 December 1977 AND ENTERED 15 Dec. 1977.

By the Court

A.G. Nevill
DEPUTY REGISTRAR IN EQUITY

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

First Defendant

J.H.B. CARR B.R. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.L.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

Second Defendants

J.J. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
B.H. KILLIAN

Third Defendants

CERTIFICATE OF DEPUTY REGISTRAR IN EQUITY
VERIFYING TRANSCRIPT RECORD

I, ANTHONY GEORGE NEVILL of the City of Sydney in the State of New South Wales, Commonwealth of Australia, Deputy Registrar, Equity Division, of the Supreme Court of the said State do hereby certify that the sheets hereunto annexed and contained in pages numbered one to FOUR HUNDRED AND EIGHTEEN inclusive contain a true copy of all the documents relevant to the appeal by the Appellant Ferd Dawson Calvin to Her Majesty in Her Majesty's Privy Council from the judgment and orders made in the abovementioned proceedings by the Honourable Arthur Francis Rath a Judge of the said Supreme Court on 23rd and 28th June, 1977 and that the sheets hereunto annexed so far as the same have relation to the matters of the said appeal together with the reasons

for the said judgment and orders and an index of all the papers documents and exhibits in the said proceedings are included in the annexed transcript record which true copy is remitted to the Privy Council pursuant to the Order of His Majesty in Council on the second day of May in the year of Our Lord one thousand nine hundred and twenty five.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court in its Equity Division to be affixed this first day of February in the year of Our Lord one thousand nine hundred and seventy eight. 10

.....A. G. NEVILL.....
DEPUTY REGISTRAR, EQUITY DIVISION,
SUPREME COURT OF NEW SOUTH WALES.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

762 of 1976

FERD DAWSON CALVIN

Plaintiff

J.H.B. CARR

First Defendant

J.H.B. CARR B.R. PELLY D.P. ROWE
SIR JOHN AUSTIN R.A. HOWELL W.L.F. GORDON
J.H. INGHAM T.R. STREET REX J. WHITE

Second Defendants

J.H. MEEHAN H.J. MAHONEY D.G. McKAY
J.B. HICKMAN T.J. CARLTON N. SWAIN
B.H. KILLIAN

Third Defendants

CERTIFICATE OF CHIEF JUSTICE

I, The Honourable SIR LAURENCE WHISTLER STREET, K.C.M.G., K. St.J., Chief Justice of the Supreme Court of New South Wales, DO HEREBY CERTIFY that Anthony George Nevill who has signed the Certificate verifying the transcript record relating to the appeal by Ferd Dawson Calvin to Her Majesty in Her Majesty's Privy Council in the abovewritten proceedings is the Deputy Registrar, Equity Division, of the said Supreme Court and that he has the custody of the record of the said Supreme Court in its Equity Division.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court

to be affixed this first day of February.

in the year of our Lord one thousand nine hundred and seventy eight.

.....

L.W. Street

CHIEF JUSTICE OF THE SUPREME COURT OF NEW SOUTH WALES