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## Civil Rights--Exclusion of Patron from Race Track (Madden v. Queens County Jockey Club, 296 N.Y. 249 (1947))

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## RECENT DECISIONS

**CIVIL RIGHTS—EXCLUSION OF PATRON FROM RACE TRACK.**—Plaintiff, a citizen of good repute and standing, was barred from defendant's race track under the mistaken belief that plaintiff was a bookmaker. Plaintiff commenced an action seeking a judgment declaring that he had a right, as citizen and taxpayer, to enter the race course and patronize the pari-mutuel betting if he paid the required admission price. Defendant asserted an unlimited power of exclusion. Plaintiff's complaint was dismissed. *Held*, dismissal affirmed. *Madden v. Queens Country Jockey Club*, 296 N. Y. 249, 72 N. E. 2d 697 (1947), *cert. denied*, — U. S. —, 92 L. ed. 18 (1947).

At common law a distinction was drawn between persons engaged in a public calling, such as an innkeeper or common carrier, and keepers of public places of amusement and resort, such as bath houses and theaters. The former were deemed to be under a general duty to the public to serve all persons who sought accommodations from them.<sup>1</sup> On the other hand, keepers of public places of amusement and resort, including a race course, were under no such duty but could discriminate arbitrarily and serve whomever they chose.<sup>2</sup> The common law power of exclusion continues today, except as modified by legislation.<sup>3</sup> In New York the only restrictive legislation explicitly covering "race courses" is the Civil Rights Law § 40, which limits the power by prohibiting discrimination because of race, creed, color or national origin.<sup>4</sup>

In the case at bar plaintiff asserts his right as founded upon the constitutional guaranty of equal protection of the law.<sup>5</sup> Plaintiff's argument is based upon two assumptions: first, that the license to conduct pari-mutuel betting constitutes the licensee an administrative agent of the state in the execution of the law, and second, that the license to conduct horse racing is a franchise to perform a public purpose.

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<sup>1</sup> See *People v. King*, 110 N. Y. 418, 18 N. E. 245 (1888). See also Whyman, *Public Callings and the Trust Problem*, 17 HARV. L. REV. 156, 159 (1903). The author therein states, "The innkeeper is in a common calling under severe penalty if he do not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he is so minded."

<sup>2</sup> *Woolcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916); *People ex rel. Burnham v. Flynn*, 189 N. Y. 180, 82 N. E. 169 (1907); see *Aaron v. Ward*, 203 N. Y. 351, 357, 96 N. E. 736, 738 (1911).

<sup>3</sup> *Christie v. 46th St. Theatre Corp.*, 265 App. Div. 255, 39 N. Y. S. 2d 454 (3d Dep't 1942), *aff'd*, 292 N. Y. 520, 54 N. E. 2d 206 (1942).

<sup>4</sup> See also N. Y. PENAL LAW §§ 514, 700.

<sup>5</sup> U. S. CONST. AMEND. XIV, § 1.

As to the first argument propounded by the plaintiff the New York Pari-Mutuel Revenue Law § 9 provides that the licensee of a race course shall retain 10% of the total deposits and pay therefrom "to the state tax commission as a reasonable tax by the state for the privilege of conducting pari-mutuel betting," an amount equal to a certain percentage of the total pool. This tax is imposed upon the licensee for the privilege of *conducting* pari-mutuel betting and not upon the bettor for the privilege of betting. Therefore, the licensee is not acting as an administrative agent in collecting a tax imposed upon the bettor for the privilege of betting. If the plaintiff's reasoning, based upon the first assumption, were to be followed the proprietor of any business which required a license or which was taxed would necessarily be considered an administrative agent of the state. Such is not the law in New York.<sup>6</sup>

The plaintiff's second assumption is that the license to conduct horse racing is a franchise to perform a public purpose. The case of *Grannan v. Westchester Racing Association*<sup>7</sup> advanced the theory that a racing association is a corporation organized for a public purpose, enjoying a public franchise, and therefore, the public had an interest which required the corporation to admit to its racing course all persons who applied for admission and paid the entrance fee. In other words, it placed a race course ". . . in the same category with bridge, ferry, transportation companies, and others, in which the public has rights firmly secured which may not be denied either to it or to individuals composing it."<sup>8</sup> That theory was rejected by the Court of Appeals.<sup>9</sup>

The operation of a race track is not a public function; it is essentially a place of amusement and ". . . amusement of the populace has never been regarded as a function or purpose of government."<sup>10</sup> The mere licensing, plus the incidental advantage of improving the breed of horses, does not make the purpose a public one and the license, in effect, a franchise.<sup>11</sup> A franchise is "a special privilege conferred by government upon an individual or corporation which does not belong to the citizens of the country generally, of common right."<sup>12</sup>

<sup>6</sup> *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. 2d 697 (1947).

<sup>7</sup> *Grannan v. Westchester Racing Ass'n*, 16 App. Div. 8, 44 N. Y. Supp. 790 (2d Dep't 1897).

<sup>8</sup> *Id.* at 14.

<sup>9</sup> *See Grannan v. Westchester Racing Ass'n*, 153 N. Y. 449, 47 N. E. 896 (1897). Plaintiff was a jockey, and the court in that case dealt with the reasonable regulations of the jockey club. Court refused to answer the question as to whether the racing association had the right to admit as spectators those whom it may elect, and to exclude others solely of its own volition.

<sup>10</sup> *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 254, 72 N. E. 2d 697, 699 (1947).

<sup>11</sup> *People ex rel. Empire City Trotting Club v. State Racing Commission*, 120 App. Div. 484, 485, 486, 105 N. Y. Supp. 528 (2d Dep't 1907) (by implication), *aff'd*, 190 N. Y. 31, 82 N. E. 723 (1907).

<sup>12</sup> BLACK'S LAW DICTIONARY 810 (3d ed. 1933).

The privilege of conducting horse races for stakes exists at common law and though rendered illegal, except as specially authorized, a license to conduct horse racing does not create a privilege, but merely removes the statutory bar to exercising that privilege.<sup>13</sup> A license is no more than "a permission to exercise a pre-existing right which has been subject to regulation in the interest of the public welfare."<sup>14</sup> The granting of a license to promote the public good, in and of itself, makes neither the purpose a public one nor the license a franchise. Nor does it place the licensee under an obligation to the public by making his enterprise a public one.<sup>15</sup>

Plaintiff had no common law right to enter the race track, since the defendant had an absolute right of exclusion (except as noted heretofore), nor did the legislature create a right of entry for the plaintiff.<sup>16</sup>

The principal case follows the traditional New York view. As to other jurisdictions, the common law rule is subject to the abrogating statutes which have been passed by the respective legislatures.

J. P. M.

CRIMINAL LAW—FAIR TRIAL—DUTY OF PROSECUTOR TO REFRAIN FROM OVER-ZEALOUS ADVOCACY.—The defendant makes an application for a new trial after having been found guilty of murder in the first degree and sentenced to death. His conviction was affirmed by the Court of Appeals. At a later date the sentence was commuted by Governor Dewey to life imprisonment. Apparently, the prosecuting attorney had been led to believe that the defendant had been previously convicted of a number of other crimes. The prejudicial effect of questioning the defendant on this mistaken information was not mitigated by the denials of the accused. *Held*, motion for a new trial granted. *People v. Fishgold*, — Misc. —, 71 N. Y. S. 2d 830 (1947).

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."<sup>1</sup> Generally it is up to the trial judge to decide to what extent the district attorney may cross-examine a witness as to matters that may discredit him,<sup>2</sup> but

<sup>13</sup> *Corrigan v. Coney Island Jockey Club*, 2 Misc. 512, 22 N. Y. Supp. 394 (Sup. Ct. 1893).

<sup>14</sup> *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 255, 72 N. E. 2d 697, 699 (1947).

<sup>15</sup> Cases cited note 2 *supra*.

<sup>16</sup> N. Y. CIVIL RIGHTS LAW § 40. This statute pertains only to discrimination based upon creed, color, race or national origin.

<sup>1</sup> Canons of Professional Ethics, American Bar Association, Canon V.

<sup>2</sup> *Cf. Friedel v. Board of Regents*, 296 N. Y. 347, 73 N. E. 2d 545 (1947); *La Beau v. The People*, 34 N. Y. 223, 33 How. Pr. (N. Y. 1866).