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RACE TRACK OWNERSHIP—SECTION 3769.07 RC PROHIBITS ISSUANCE OF A LICENSE (PERMIT) “TO THE SAME PERSON, ASSOCIATION, TRUST OR CORPORATION * * * EXCEPT AT ONE RACE TRACK, PLACE OR ENCLOSURE”—PURPOSE, TO PREVENT A MONOPOLY OR TENDENCY TOWARD MONOPOLY OF RACE TRACK OWNERSHIP AND CONTROL IN THIS STATE—MINIMUM TEST BY WHICH ELIGIBILITY FOR PERMITS IS TO BE DETERMINED — TWO OR MORE FIRMS OR CORPORATIONS—RULE MAKING POWER OF STATE RACING COMMISSION — PURPOSE AND SPIRIT OF STATUTE.

SYLLABUS:

The prohibition in Section 3769.07, Revised Code, of the issuance of a license (permit) “to the same person, association, trust or corporation * * * except at one race track, place or enclosure” is designed to prevent a monopoly, or tendency toward monopoly, of race track ownership and control in this state. Such provision states only the minimum test by which eligibility for permits is to be determined in the case of two or more firms or corporations, and the imposition of a further and more stringent test, whereby regard is given to a substantial identity of ownership and control as to two or more corporations, is, therefore, a proper subject of the exercise of the rule-making power of the state racing commission with the object of promoting the purpose and spirit of the statute.

Columbus, Ohio, December 29, 1953

Ohio State Racing Commission
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

“Certain questions have arisen with regard to Section 7 of the Horse Racing Act (R.C. 3769.07). This commission deems it wise to seek your guidance by presenting a series of hypotheticals, and asking your opinion as to whether persons, associations, trusts or corporations encompassed by such hypotheticals come within the following prohibition contained in Section 7:

“‘nor shall any license (sic) be granted to the same person, association, trust or corporation for the holding or conducting of a horse racing meeting *except at one race track, place or enclosure in this state.*’

"Attached hereto please find separately stated the three hypothetical fact situations upon which your opinion is sought."

The attached material descriptive of the three hypothetical fact situations is as follows:

"FIRST HYPOTHETICAL

"Permit Seekers A and B are both corporations. They seek to operate a running horse meeting and a night harness meeting, respectively, at different locations, on different dates of the same year.

"Both corporations have the same president and the same treasurer. The vice president of A is the secretary of B. The secretary of B is the general manager of A. B's vice president is not connected with A.

"A has a total of three directors and stockholders all of whom are directors of B; B has two additional directors, and all of its stock is held by a third corporation, the stockholders of which are undisclosed.

"SECOND HYPOTHETICAL

"Permit seekers C and D are both corporations. They seek to conduct two running horse meetings at different locations on different dates of the same year.

"The president of C is vice president of D. One of C's vice presidents is president of D; C's other vice president is treasurer of D. One man is secretary of both; C's assistant secretary is the second vice president listed above, so also treasurer of D. C's treasurer is president of D; C's assistant treasurer is neither an officer nor director of D but is one of D's five stockholders. C and D each have two assistant secretaries, and these are the same.

"C has five directors and D has four; all four of D's directors are also directors of C.

"C has 138 share-holders; D has 5; and four of D's five share-holders also hold shares in C.

"C also owns the land and buildings where D proposes to race.

THIRD HYPOTHETICAL

"Permit seekers E, F, G and H are, respectively, a partnership and three corporations, all having their offices and principal places of business at the same address in the same city. They wish to conduct four running horse meetings at different locations on different dates of the same year.

"For the sake of simplicity, the four partners of E are re-

ferred to hereafter as Smith, Jones, Brown and Black. E's profits are divided evenly between a) the four partners and b) the owners of the land and buildings upon which E's plant is located.

"The corporate officers of F are: President Smith and Secretary-Treasurer Jones. The directors are Smith, Jones, Brown and Black. All stock or shares in F is owned by Smith, Jones, Brown and Black. Land and buildings are not owned by the corporation.

"The corporate officers of G are: President Jones, Vice President Black and Secretary Smith. It is presumed that all stock or shares in G are owned by Smith, Jones, Brown and Black. Land and buildings are owned by the corporation.

"The corporate officers of H are: President Black, Vice President Brown, and a close relative of Black's as Secretary-Treasurer. The corporate directors are Black, Brown and the secretary-treasurer. All stock and shares in H are owned by Black and the secretary-treasurer. Land and buildings are owned by the corporation."

Although the statutory provision quoted in your inquiry is set out in somewhat awkward language, it fairly appears to be designed to prohibit the issuance of a license (permit) to the same person, etc., for the conducting of a racing meeting at *more than* one race track, etc.

In the several hypothetical situations you have described it would appear that in no case is there a precise identity of applicants for permits although there is evident in each instance a very substantial identity of ownership and control of the partnerships and corporations involved.

The statute, however, employs the expression "the same * * * corporation" and this might be supposed to refer merely to separate corporate entities without regard to identity of ownership and control of two or more corporations. It may be argued that the Legislature in the choice of this language was aware of the widespread modern business practice of interlocking ownership and control of separate corporate organizations and having chosen to employ the expression "the same * * * corporation" without further qualification it would not appear that this language could be construed to forbid more than the issuance of more than one permit to the identical corporate entity.

It will be immediately apparent that such a construction of this provision relative to "the same * * * corporation" makes largely ineffective, as a practical matter, the inhibition relative to "the same person," for it

would permit a single individual, or a group of individuals, to do indirectly, through two or more corporate organizations, what they could not do directly. If we may assume that this provision as a whole was intended to prevent the growth of a monopoly, or a tendency thereto, in the field of race track operation it must be admitted that the legislative language employed is markedly inept, although perhaps not distinctively so in a statute which in its entirety can scarcely be regarded as a model of precise expression.

The circumstance that the use of this inept language seemingly results in the failure to attain fully the suggested legislative objective gives rise to the question of the power of your commission to impose by rule a more stringent test by which corporate applicants for a permit may be considered. The rule-making power of the commission is conferred in Section 3769.03, Revised Code, which reads in part :

“The state racing commission may prescribe the rules, regulations, and conditions under which horse racing shall be conducted, and may issue, suspend, diminish, or revoke permits to conduct horse racing as authorized by sections 3769.01 to 3769.14, inclusive, of the Revised Code.”

It may readily be conceded that an executive agency is without power to promulgate a rule which is contrary to existing law or which undertakes to repeal or abrogate any provision of law. Rather such agency is confined to the making of rules designed to promote the spirit and purpose of the legislation by which the rule making power is conferred. 42 American Jurisprudence, 353, 354, Section 49.

In the instant case, therefore, it becomes necessary to inquire whether a rule of the commission imposing a more stringent test of corporate identity among applicants for permits would contravene any provision of existing law.

It will be observed that the statute prohibits the issuance of more than one permit “to the same * * * corporation.” I cannot see that a rule of the commission which would deny, for example, permits to two corporations under substantially identical ownership and control, would be contrary to this statutory provision. In this connection I do not perceive in this statutory prohibition any implication that the test therein stated should be the *sole* test to be applied. Rather, it seems to me that the statute states, in this regard, the *minimum* test to be applied, and that it

leaves to the discretion of the commission, in the exercise of its rule-making power, the imposition of such further and more stringent tests as the public interest may require.

It may be anticipated, of course, that the objection will be raised that the statutory language here involved, by implication, prescribes the *sole* test which may be applied. This argument may be readily met, however, by recalling that a statute such as that here under consideration must be strictly construed and every reasonable doubt raised by its provisions must be so resolved as to limit the powers and rights claimed under its authority. 24 American Jurisprudence, 404, Section 9. I conclude, therefore, that the subject of the eligibility of corporate applicants for permits, where there is a substantial identity of ownership and control, is a proper subject for the exercise of the rule-making power of your commission.

As to the particular hypothetical situations which you have described, it is obviously impossible for me to supply a categorical answer, not only for the reason that the commission has not adopted any rule on the subject, but also because any decision in the matter could be reached only after consideration of all the detailed facts and circumstances in each case. Moreover, such consideration would presumably involve a measure of administrative discretion by your commission, and is, therefore, a function which is wholly beyond the province of the Attorney General.

Accordingly, in answer to your inquiry, it is my opinion that the prohibition in Section 3769.07, Revised Code, of the issuance of a license (permit) "to the same person, association, trust or corporation * * * except at one race track, place or enclosure" is designed to prevent a monopoly, or tendency toward monopoly, of race track ownership and control in this state. Such provision states only the minimum test by which eligibility for permits is to be determined in the case of two or more firms or corporations, and the imposition of a further and more stringent test, whereby regard is given to a substantial identity of ownership and control as to two or more corporations, is, therefore, a proper subject of the exercise of the rule-making power of the state racing commission with the object of promoting the purpose and spirit of the statute.

Respectfully,

C. WILLIAM O'NEILL

Attorney General