H. C. OF A. 1910.

ROSENTHAL v. ROSENTHAL.

estate. Costs of application and of respondent Rosenthal as between solicitor and client to be paid out of estate.

Solicitors, for the appellants, *Braham & Pirani.*

Solicitor, for the respondent Rosenthal, *C. H. Lucas.*

Solicitor, for the respondent the Master-in-Equity, *Guinness,* Crown Solicitor for Victoria.

B. L.

Foll *Boral Resources (Qld) Pty Ltd v Johnstone Shire Council* [1990] 2 QdR 18

Cons *Boral Resources (Qld) Pty Ltd v Johnstone Shire Council* 69 LGRA 261

Foll *Barnett v Minister for Housing & Aged Care* (1991) 31 FCR 400

Refd to *Kelly v Toowoomba City Council* [1995] QPLR 3

Refd to *Bongers v Byron SC* (1999) 105 LGERA 274

[HIGH COURT OF AUSTRALIA.]

RANDALL . . . . . APPELLANT;

AND

THE COUNCIL OF THE TOWN OF NORTHCOTE . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1910.

MELBOURNE, *May* 26, 27, 30, 31, *June* 1.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Local Government—Registration of place of amusement—Discretion of Municipal Council—Mandamus—Local Government Act 1903 (*Vict.*) (*No.* 1893), *sec.* 197; *Thirteenth Schedule, Part VI.*

A Municipal Council had adopted Part VI. of the Thirteenth Schedule to the *Local Government Act* 1903 (Vict.) which requires the occupier of any ground in which public amusements are conducted to register the ground each year, imposes a penalty upon the causing or permitting of any public amusement on an unregistered ground, and provides that the Council on the application of the occupier may, if they see fit, cause any ground to be registered and grant a certificate of registration thereof.

Held, that mandamus would lie to compel the Council to exercise their discretion as to granting or refusing an application for registration.

Held, also, that in exercising their discretion the Council might properly take into consideration the facts that the ground sought to be registered

adjoined a public house of which the applicant was the licensee, that the applicant intended to use the ground for the purpose of making money for himself, and that the ground if licensed would enter into competition with a public recreation ground of which some of the councillors were trustees and on which the Council had spent money of the municipality.

Per Higgins J. :—No duty is imposed on the councillors to "hear and determine" in the judicial sense ; and *Semble*, if the councillors took grounds into consideration which ought not to have been taken, mandamus to hear and determine is not the appropriate remedy. The councillors are in a position analogous to that of trustees.

Decision of the Supreme Court of Victoria (*R.* v. *Town of Northcote* (1909) V.L.R., 492; 31 A.L.T., 106) affirmed.

APPEAL from the Supreme Court of Victoria.

On the application of John James Randall an order *nisi* was issued calling upon the Council of the Town of Northcote to show cause why a writ of mandamus should not issue commanding the Council to register at the office of the Council a piece of ground known as the Croxton Park Recreation Reserve as a ground on which public amusements might be conducted in accordance with the provisions of the *Local Government Act* 1874 as adopted by the by-laws of the town, and to issue to Randall a certificate of such registration in accordance with law; or in the alternative commanding the Council to hear and determine according to law the application of Randall to the Council for the registration of the Croxton Park Recreation Reserve as a ground in which public amusements might be conducted in accordance with such provisions. On the return of the order *nisi* the matter was referred to the Full Court.

From the affidavits it appeared that Randall was the owner of five acres of land in the Town of Northcote which adjoined an hotel of which he was the licensee. This land Randall prepared as a place for public sports, expending considerable sums of money in erecting stands and other buildings and conveniences for the public and in otherwise equipping the ground for the purpose. In June 1908 the Council of the Town of Northcote, which had adopted the provisions of Part VI. of the Thirteenth Schedule to the *Local Government Act* 1903, granted registration of the ground as a place of public amusement, and issued a cer-

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

tificate of registration, the engineer for the town having approved of the ground. In June 1909 Randall again applied to the Council for registration of the ground and a certificate, and the engineer approved of the ground and recommended the granting of the application. On 19th July 1909 the Council by a majority of 8 votes to 6 resolved that the renewal of the registration should not be granted, but no reasons for the refusal were assigned in the resolution. During the discussion on the resolution certain statements were alleged to have been made by various councillors the nature of which is sufficiently stated in the judgments hereunder.

The Full Court having discharged the order *nisi*, with costs (*R.* v. *Town of Northcote* (1)), Randall now appealed to the High Court.

Dr. McInerney (with him *T. M. McInerney*), for the appellant. Under Part VI. of the Thirteenth Schedule to the *Local Government Act* 1903 the Council has a discretion which it must exercise in a judicial manner, and the words "if the Council see fit" do not give a wider discretion than the Council would have if those words were not used: *R.* v. *London County Council*; *Ex parte Akkersdyk* (2); *R.* v. *Bowman* (3); *Julius* v. *Bishop of Oxford* (4); *R.* v. *Boteler* (5); *Partridge* v. *General Council of Medical Education and Registration* (6); *Hughes* v. *Trew* (7); *R.* v. *London County Council*; *In re Empire Theatre* (8); *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* (9); *Tinkler* v. *Board of Works for the Wandsworth District* (10). All the Council should consider is whether in regard to the public who desire to go to sports meetings all the provisions for safety, convenience and health are satisfactory. If they take into consideration circumstances which they ought not to consider they have not exercised their discretion, and the Court will compel them by mandamus to exercise it: *R.* v. *Bishop of London* (11); *R.* v. *Vestry of St. Pancras* (12); *R.* v. *Adamson* (13).

(1) (1909) V.L.R., 492; 31 A.L.T., 106.
(2) (1892) 1 Q.B., 190.
(3) (1898) 1 Q.B., 663.
(4) 5 App. Cas., 214, at p. 228.
(5) 4 B. & S., 959.
(6) 25 Q.B.D., 90, at p. 96.
(7) 36 L.T. (N.S.), 585.
(8) 71 L.T., 638.
(9) (1892) 1 Q.B., 431.
(10) 1 Gif., 412.
(11) 24 Q.B.D., 213, at p. 225.
(12) 24 Q.B.D., 371.
(13) 1 Q.B.D., 201.

[ISAACS J. referred to *R.* v. *De Rutzen* (1).]

If no reasons are assigned by the Council for their refusal to register, the Court will look into the circumstances to see what the reasons were: *R.* v. *Dodds* (2); *Keighley's Case* (3); *Allinson* v. *General Council of Medical Education and Registration* (4).

[ISAACS J.—If good and bad reasons are given there is one decision that the exercise of the discretion will be supported: *R.* v. *Gayer* (5).]

Here the reasons are found in the speeches and statements of the councillors when the matter was being discussed, and they are founded on matters that the Council were not entitled to take into consideration, viz., the facts that the appellant made money out of his ground, that his ground competed with the Council's recreation ground, and that the appellant's ground adjoined a hotel. Those of the councillors who were trustees of the municipal recreation reserve were pecuniarily interested and were absolutely disqualified from dealing with this matter: *Attorney-General* v. *Mayor &c. of Emerald-Hill* (6); *R.* v. *Hain* (7).

Starke, for the respondents. The Council have a discretionary power, and the grounds upon which they exercise their discretion are not cognizable in this Court provided only that they act *bonâ fide*: *Julius* v. *Bishop of Oxford* (8). So long as the Court is satisfied that the discretion has not been exercised *malâ fide* it will not interfere. Mandamus will only go to compel the performance of a public duty. If the duty has been performed, though dishonestly, the remedy is *certiorari*. It is only when the tribunal takes into consideration matters which they are prohibited by law from taking into consideration that the Court will say that there has been a refusal of jurisdiction. None of the grounds of objection are such as to vitiate the decision. Even if some of the councillors might have been disqualified that would not be a ground for a mandamus, though it might be for *certiorari*.

Dr. McInerney, in reply, referred to *Sugden on Powers*, 8th ed., p. 609.

(1) 1 Q.B.D., 55.
(2) (1905) 2 K.B., 40.
(3) 10 Rep., 139*a*.
(4) (1894) 1 Q.B., 750.
(5) 1 Burr., 245.
(6) 4 A.J.R., 135.
(7) 12 T.L.R., 323.
(8) 5 App. Cas., 214, at p. 228.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

[The following authorities also were referred to during argument: *Sharp* v. *Wakefield* (1); *Davis* v. *Bromley Corporation* (2); *R.* v. *Cotham* (3); *R.* v. *Lord Leigh*; *In re Kinchant* (4); *R.* v. *Woodhouse* (*Leeds Justices*) (5); *R.* v. *Justices of the West Riding* (6); *Vane* v. *Dungannon* (7).]

Cur. adv. vult.

June 1.

GRIFFITH C.J. This is an appeal from a judgment of the Supreme Court of Victoria refusing a mandamus to the respondents to hear and determine an application by the appellant for a licence for a sports ground within their municipal district. By sec. 197 of the *Local Government Act* 1903 municipal authorities are empowered to make by-laws for various purposes, two of which only need be mentioned, first, for adopting any of the provisions of the Thirteenth Schedule to the Act, and secondly, for controlling, managing and preserving commons and public reserves of which the management is vested in the Council. The Thirteenth Schedule contains, amongst other provisions, some relating to buildings and grounds used for public meetings and amusements. Clause 1 of Part VI. provides that "Every occupier of any hall or other building used for public meetings, or of any building, or any ground in which public amusements are conducted, shall in each year register at the office of the Council such building or ground, together with the situation and description thereof, and the purpose being such as aforesaid for which the same is to be kept, and the name of such occupier." Clause 2 provides that "the Council, upon the written application of any such occupier as aforesaid stating the particulars aforesaid, may if upon inspection by the proper officer the premises have been found to be secure and proper for the purpose stated, and if the Council see fit, cause the premises to be registered in a registry book to be kept for that purpose." If the place is not registered a person using it is liable to a penalty of £10 a day under clause 1. The appellant is the owner of a piece of land of about five acres in

(1) (1891) A.C., 173.
(2) (1908) 1 K.B., 170.
(3) (1898) 1 Q.B., 802.
(4) (1897) 1 Q.B., 132.
(5) (1906) 2 K.B., 501.
(6) 1 Q.B., 624, at p. 630.
(7) 2 Sch. & Lef., 118, at p. 130.

the municipality, and in 1908 he applied for registration of it as a sports ground and the application was granted. Applications being required to be made annually, the appellant again applied in 1909 but the application was refused. The appellant now asks for a mandamus to compel the Council to do their duty in the matter.

As to the nature of mandamus I venture to quote the words I used in *R.* v. *Arndel* (1):—"Mandamus is a prerogative writ, issued nominally in the name of the Crown, but really on the relation of an individual, to compel an officer to do an act which the applicant is entitled to have done, and without the doing of which he cannot enforce or enjoy some right which he possesses. If the act sought to be compelled to be done is a discretionary act, mandamus does not go further than to command the exercise of the discretion, and can never go to command its exercise in a particular manner." Of course the word "officer" may be applicable to an officer of a municipal corporation. The case of *R.* v. *London County Council*; *In re Empire Theatre* (2), cited in argument, shows sufficiently clearly that a municipal authority charged with the granting of licences without which a man cannot enjoy a right which he has at common law is within that rule. But the mandamus can only be to exercise the discretion, and the foundation of the application is that the Council have not in substance exercised the discretion entrusted to them.

It was contended at the outset, but the point was not pressed very seriously, that under Part VI. of the Thirteenth Schedule the Council are bound to grant licences almost as a matter of course, but the words "if the Council see fit" exclude that contention.

As to the meaning of the discretion which is to be exercised, it is stated clearly by Lord *Halsbury* L.C. in *Sharp* v. *Wakefield* (3). That was an application to justices for a publican's licence, which I conceive to be for this purpose analogous to the application now in question. He said (4):—"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that

(1) 3 C.L.R., 557, at p. 566.
(2) 71 L.T., 638.
(3) (1891) A.C., 173.
(4) (1891) A.C., 173, at p. 179.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Griffith C.J.

something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall* (2)."

Allcroft v. *Lord Bishop of London* (3) was an application for a mandamus to the Bishop of London to hear and determine an application to him to proceed according to the *Public Worship Regulation Act* 1874. Arguments were addressed to the House of Lords showing that the construction sought to be put upon the Act by the Bishop might lead to inconvenience. Similar arguments were addressed to us by Dr. *McInerney*. On that point Lord *Herschell* said (4):—"Arguments were addressed to your Lordships with a view of showing the inconvenient and mischievous consequences which might flow from such a discretion if uncontrolled; but with this your Lordships have nothing to do; your duty is to administer the law according to its plain interpretation, and not to modify it, even though you should think that by so doing a more just and expedient result would be ensured. One can conceive cases, such as were suggested in argument, in which it might be shown that the Bishop had not exercised his discretion at all; if, for example, he determined never to permit proceedings under the Act, or laid down some arbitrary rule by which his action was to be governed, independently of the circumstances of the particular representations he might receive, in such an event the Courts might well interfere, just as they have done in similar circumstances in the case of justices who were empowered by law to exercise a discretion." The same proposition is often stated in the books in the form that the authority required to exercise a discretion has declined to exercise it.

That being the law applicable to such matters, it only remains to apply it to the facts of this case. The appellant, as I have said, is the owner of this piece of land, and he is also the licensee of a public house immediately adjoining. When the application

(1) 5 Rep., 100*a*.
(2) 4 T.R., 753, at p. 755.
(3) (1891) A.C., 666.
(4) (1891) A.C., 666, at p. 681.

came before the Council for consideration there was a debate, and we have had a report of what was said by the various councillors placed before us. The refusal of the registration was carried by a majority of 8 to 6, and an argument was founded on the speeches of the eight councillors who formed the majority that in substance they did not exercise any discretion at all, but were actuated by entirely extraneous considerations. The objections are grouped under three heads. First, some councillors thought that the appellant made money out of the ground. If that may fairly be taken to mean that those councillors determined that under no circumstances would they allow a sports ground to be licensed in favour of an individual who would make money out of it, it might perhaps be said that a refusal to grant registration on that ground was a declining to exercise discretion at all within the language of Lord *Herschell* in *Allcroft* v. *Lord Bishop of London* (1). But, when that objection is considered with reference to the facts of the case, it is clear that that would not be a fair construction. Of course it is a circumstance that the sports ground, if licensed, may be a source of profit to the appellant, but I do not think it can be inferred from the evidence that the councillors came to the conclusion that under no circumstances would they allow a licence in respect of ground from which the owner might derive a profit.

The second objection was that some of the councillors would not grant registration because the appellant's ground would enter into competition with a public reserve in the municipality, the control of which, though not formally vested in the Council within the section I have referred to, was managed by a committee of whom five were elected by the Council and four by ratepayers. No doubt, if there are two sports grounds in a municipality and the popular game of football cannot be played on both, there may be competition as to which ground shall get the patronage of the players. There was some divergence of opinion. Some of the councillors thought that, as there was a reserve for the management of which they were practically responsible and on which it appears they had spent money, they should not allow a private person to come into competition with

(1) (1891) A.C., 666.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Griffith C.J.

them. It was pressed before us that the interest of the Council was in the nature of a pecuniary interest—not the interest of any particular councillor but of the Council as a body—and that they allowed the desire to make money for their constituents to overbear their duty to exercise their discretion. If that argument is sound it proves too much, because under those circumstances no licence could be granted at all since the Council would be incompetent to deal with the matter. That cannot be the law. As we pointed out in *Dickason* v. *Edwards* (1), although the objection of pecuniary interest is generally a fatal one as to any body which has to exercise a judicial or *quasi*-judicial discretion, yet the circumstances of the case may show that the rule does not apply. Looking at the nature of this case, the nature of the discretion and the subject matter, I think that the rule does not apply when the only pecuniary interest is that of the ratepayers as a whole. So that I do not think we can say that the councillors were disqualified by the fact of this interest or by the fact that the interest was present to their minds.

The third objection pressed was that many of the councillors thought that it was not desirable that a sports ground should be in the immediate neighbourhood of a public house—that both should be practically on the same ground, and the one an appanage of the other. It was objected that that was a matter which the Council had no right to take into consideration. No one doubts that in granting a licence of a public house the licensing authority is entitled to consider the situation of the house—that it is in immediate proximity to a sports ground, a church, a school, a factory, a racecourse or any other particular place. If they think that the opening of a public house in such a position is likely to encourage drunkenness or disorder, that is a very good reason for refusing a licence to the public house. If that applies to the granting of a licence to a public house in the vicinity of a sports ground, it must also apply to the licensing of a sports ground in the vicinity of a public house. That matter, therefore, was very properly taken into consideration by the Council.

Under these circumstances I not only fail to see that it has been established that the Council did not exercise their discretion,

(1) 10 C.L.R., 243.

but I fail to see that it has been established that they took into consideration anything which they ought not to have taken. Whether, if it could be established that they took into consideration matters which they ought not, as well as matters which they ought, to take into consideration, the Court would interfere, is a question as to which the authorities are somewhat scanty, and as to which it is not necessary to express any opinion in the present case. In my opinion the appellant has entirely failed to establish that the Council declined to exercise jurisdiction, and, therefore, the appeal must fail.

O'CONNOR J. read the following judgment:—Amongst the many duties imposed on Municipal Councils in Victoria is that of licensing public amusement grounds. An owner of property is prohibited from allowing public amusement to take place on his premises unless the Council have registered them for that purpose and issued to him a certificate of registration. But clause 2 of Part VI. of the 13th Schedule entitles him, if his premises are in conformity with certain requirements of the section, to apply for registration, and it authorizes the Council to register the premises "if the Council see fit." Although it is entirely within the discretion of the Council to grant or refuse the application, their consideration of the application is the discharge of a public duty, in the performance of which they are bound to exercise their discretion not only honestly but within the limits of their duty. The law applicable to the discharge of such a duty and the circumstances under which the Court will compel its performance is stated by *Wills* J. in *R.* v. *Cotham* (1) in the following terms:—"I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of mandamus. That is so whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their

(1) (1898) 1 Q.B., 802, at p. 806.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

O'Connor J.

jurisdiction, and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law."

In that case an administrative duty of the justices was under consideration, and there are many cases in which the same principle has been applied in determining whether public bodies have discharged their duties. The London County Council's power to issue licences for places of public amusement comes within that principle. In illustration of this several instances were cited during the argument: *R.* v. *London County Council, Ex parte Akkersdyk* (1); *R.* v. *London County Council, In re Empire Theatre* (2). Confusion I think has been caused in some statements of the law by use of the word "judicial." The Council are not for the purposes of the application a judicial tribunal, nor are they exercising judicial functions, and many restrictions on the exercise of discretion by Courts and safeguards against bias in judicial tribunals have no application to cases such as this. But the discretion conferred on public bodies in the discharge of merely administrative functions must in many cases be exercised in what some Judges have described as "a judicial spirit." What is meant by that phrase is explained by Lord *Halsbury* L.C. in *Sharp* v. *Wakefield* (3) in these words:—"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (4); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall* (5). So in *Reg.* v. *Boteler* (6), where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the Statute had

(1) (1892) 1 Q.B., 190.
(2) 71 L.T., 638.
(3) (1891) A.C., 173, at p. 179.
(4) 5 Rep., 100*a*.
(5) 4 T.R., 753, at p. 757.
(6) 33 L.J.M.C., 101.

said was in their discretion to do or leave undone. So, again, in the case of overseers who were required by 3 & 4 Vict. c. 61, to certify whether applicants for beer licences were real residents and ratepayers of the parish, it was held that they were not entitled to refuse the certificate on the ground that in their opinion there were already too many public-houses, or that the beer shop was not required. So a discretion which empowered justices to grant licences to inn-keepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a licence to everybody who would not consent to take out an excise licence for the sale of spirits: *Reg.* v. *Sylvester*" (1). The real ground of interference by the Court in cases of this kind is that set forth by this Court in *R.* v. *Arndel* (2) in the passage quoted by my learned brother the Chief Justice. The Court will command a public officer to perform a duty which he owes to any member of the public. That principle is equally applicable to the discharge of a public duty by a public body, and the Court will always insist that the exercise of discretion by such a body in the discharge of its duty is a real exercise of discretion.

Applying these principles to the facts before us I may first clear the ground of some of the considerations urged upon the Court by Dr. *McInerney*. It is not suggested that there was anything dishonest or corrupt in the action of the Council, but it was contended that there was good ground for supposing that the Mayor and at least two other councillors entered upon the discussion with a bias against licensing the applicant's premises. Except in so far as the objections of these councillors were based on reasons of public interest there is no ground whatever in my opinion for that contention. The only part of the case as to which I have found any difficulty is in the determination of the limits within which the Council may be at liberty to give effect to its views of what is in the public interests. "Public interest" is a wide expression and there are many considerations of public interest having relation to the general morality and welfare of the community with which the Council have no concern, and which could not properly enter into the

(1) 31 L.J.M.C., 93.

(2) 3 C.L.R., 557, at p. 566.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

O'Connor J.

exercise of their discretion. But the interests of the public are in many matters entrusted to them by the Statute, and in my opinion they are entitled in exercising their discretion to give effect to any views they may honestly and reasonably hold as to what is or what is not in the public interest in respect of any of those matters. It is clear that in the granting of licences to public amusement grounds they may consider that it is in the best interests of persons within the municipality that public amusements should be carried on in an orderly fashion, that nothing should be allowed to take place in or in the neighbourhood of public amusement grounds that would be offensive or shocking to ordinary notions of decency and good order. The fact that an hotel carried on by the applicant adjoined the ground in which football would be played and watched by crowds, probably by excited crowds, and the facilities afforded for drinking and the likelihood of drunkenness in the crowd under these circumstances, were clearly facts and considerations which might properly influence the exercise of the discretion. But there was another matter which entered into the discussion, namely, the advisability of refusing to license an amusement ground carried on for private gain which would compete with the Council's own public amusement ground. I take the view that there is no reason why that aspect of the question might not be legitimately taken into consideration. It might not unreasonably be thought to be more in the public interest of the ratepayers that public amusements should be held on the ground which the municipality controlled and which was formed and maintained by the ratepayers' money than on a competing ground conducted for private gain by an hotel-keeper in the immediate neighbourhood of his own hotel. But it is in reality not necessary to decide that question. The Council undoubtedly took into consideration the public interests in relation to the orderly and decent carrying on of public amusements within the municipality and the conduct of crowds attending them. That was in itself quite a sufficient ground for exercising their discretion in refusing the application. If the other reason which I have mentioned operated also, even assuming it was not proper to be considered, the action of the Council should not in this case

be interfered with. When it is sought to prove that a discretion has been exercised on a ground which is in law deemed to be no ground at all it must be shown that the alleged ground really affected the exercise of the discretion. It is not, in my opinion, necessary that that circumstance should appear on the face of the resolution or other form of expressing their determination which the public body may have adopted. If such a requirement were insisted on in all cases, the power of the Court could seldom be exercised. It is enough if the Court on consideration of the whole of the material before it comes to the conclusion that the public body has acted on a ground which it was not open to it to consider. In a case such as the present the difficulty is, in my opinion, solved when it is remembered that mandamus is a discretionary writ. Looking at the whole course of the discussion, the topics considered, and conduct of the councillors, I have come to the conclusion that there were good and legitimate grounds for their action which did operate on the minds of the councillors, and I see no reason why the Court should exercise its discretion to disturb their decision merely because some other ground not proper for their consideration may have also been a determining factor in their conclusions. I think, therefore, the Supreme Court were right in refusing the mandamus, and this appeal should be dismissed.

ISAACS J. read the following judgment:—The appellant claims a mandamus to compel the respondent Council to hear and determine according to law his application for registration of Croxton Park as a ground for public amusements. The Council did in fact consider the application, they fully discussed it and determined by a majority in the way prescribed by the *Local Government Act* to refuse it. The appellant's case is that the Council allowed what may be called extraneous circumstances to enter into their consideration, and he contends that the determination of the Council is thereby vitiated, and that they have in point of law not determined at all—that they have declined jurisdiction. If the Council—to apply the train of reasoning of Lord *Herschell* in *Allcroft* v. *Lord Bishop of London* (1)—had determined never

(1) (1891) A.C., 666, at p. 682.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Isaacs J.

to permit any such registration or laid down some arbitrary rule to govern their action in such matters, independent of the merits of the particular case, the Court could interfere because it would then be the actual fact that no discretion whatever had been exercised; that the specific application had never been considered, and the statutory duty remained wholly unperformed. But it is, to say the least, perfectly consistent with the appellant's case that considerations of an admittedly legitimate nature also moved the Council in their action, and formed part of the reasons upon which every member constituting the majority as well as the minority acted.

It may at some future time have to be considered how far the simultaneous presence of good and bad reasons—perfectly independent of each other and each sufficient to sustain a refusal—will avoid a determination of this nature. Lord *Esher* M.R. in *R.* v. *Bishop of London* (1) said he thought the Bishop would have exceeded his jurisdistion if he had considered something which was not a circumstance of the case and acted upon it, but it would not be enough to show he merely considered it, it would have to be shown he acted upon it. Whether his Lordship meant his observations to refer to a determination founded solely or substantially upon the extraneous circumstance, or to one also in which that circumstance was one of several actuating reasons, I do not know, and as the question is not necessary to determine I do not pursue it further.

But the important point to bear in mind on the facts of this case is that a mandamus is not a substitute for an ordinary appeal, and cannot be utilized to perform its functions. It is a means of enforcing the performance of a public duty.

A duty may be unperformed because jurisdiction is unintentionally declined, or for some other reason; but the ground of the Court's interposition is the fact of the duty remaining unfulfilled, and not the reason of that fact. In *R.* v. *Mayor &c. of Fowey* (2), *Abbott* C.J. said:—"The general principle of the Court, in issuing a mandamus, is very well defined to be, that whenever it is the duty of a person to do an act, the Court will order him to

(1) 24 Q.B.D., 213, at p. 226.

(2) 2 B. & C., 584, at p. 590.

do it," and *Best* J. said (1):—"A mandamus now will lie for the performance of any public duty." In *R.* v. *Payn* (2) Lord *Denman* C.J. observed:—"I disclaim entering into the general merits of the case. It is enough that a public duty is left unperformed."

The first question in every case where a mandamus is sought is to inquire what is the public duty. If it be a single ministerial act not involving discretion, as the affixing a corporate seal, the Court may compel its performance specifically (*per* Lord *Kenyon* C.J. in *R.* v. *Beeston* (3)). But if it be an act involving discretion the Court will only see that the discretion is exercised. Whatever the power is, that, and that alone, the Court enforces. The general principle applicable to this case is thus stated by Lord *Cairns* L.C. in *Julius* v. *Lord Bishop of Oxford* (4):—"Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised." I therefore examine the by-laws to ascertain the duty and its nature.

The persons are defined by the first by-law of Part VI., and the appellant is one of them. The conditions upon which the Council were bound to perform the duty of consideration were fulfilled, viz., written application and the officer's favourable opinion of the premises.

The duty is "if the Council see fit," to cause the premises to be registered in a book. There is a consequential duty of a peremptory nature to grant a certificate of registration, but that is dependent on the prior fact of registration. The words are primarily permissive, namely, "may . . . . if the Council see fit"; but only in a certain sense. There is, first of all, an absolute duty to consider, then a discretionary power to decide one way or the other, and in the event of a determination in the applicant's favour there is again an absolute duty to register and afterwards to grant a certificate. Has there been any failure in the primary

(1) 2 B. & C., 584, at p. 596.
(2) 6 A. & E., 392, at p. 399.
(3) 3 T.R., 592, at p. 594.
(4) 5 App.Cas., 214, at p. 225.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Isaacs J.

absolute duty to consider? It cannot be denied that persons entrusted with a statutory duty must, as Lord *Loreburn* L.C. expresses it in *Leeds Corporation* v. *Ryder* (1), "act . . . . honestly, and endeavour to carry out the spirit and purpose of the Statute." There lies the key to the whole position.

Doubtless, if the appellant could show that the Council had acted from some dishonest motive, casting aside the obligation of their public duty, not using their power, but misusing it, and making their official position a cloak for some purpose foreign to the object for which it was created, then he could properly say the public duty remained unperformed. But there is not a trace of any *mala fides*. If the Council have exceeded their power they have done so without the smallest intention to transgress the limits assigned. But have they transgressed those limits at all? It is urged almost as the pivotal point of the appellant's argument that their function was judicial. In the strict sense it certainly was not. *Davis* v. *Bromley Corporation* (2) is an instructive and decisive case on this point. The plaintiff there had submitted building plans for the defendant's approval, which were refused for alleged non-compliance with by-laws. Plaintiff contended that the plans complied with the by-laws and that the rejection was not *bonâ fide*. *Vaughan Williams* L.J., in delivering the judgment of himself and Lords *Gorell* and *Mersey* (then *Sir Gorell Barnes*, President, and *Bigham* J.), said (3):—"It is not contested that the legislature has given power to this body to decide whether they will sanction such works or not; it is not suggested that in so deciding the Council are exercising judicial functions, and in fact they are not doing so; they are exercising a discretion vested in them by Statute." The learned Lord Justice continues, "and the whole object of this action is really to see if, by this means, the plaintiff can overrule the Council's decision." Altering the word "action" to "application" it seems to me that his final observation is very apposite to the present case.

It need not be denied that the Council are bound to approach the consideration of the question in a judicial spirit, if by that is meant a fair spirit, a desire to act justly and to look at all the

(1) (1907) A.C., 420, at p. 423. (2) (1908) 1 K.B., 170.
(3) (1908) 1 K.B., 170, at p. 172.

circumstances of the application, regarding alike the private interests of the applicant, and the interest of the public corporate body of which they are the representatives and not acting capriciously. But there is only one legal limitation to their discretion that I can perceive. It is that it must be a discretion exercised from the standpoint of a municipal Council, deriving its status and powers from the *Local Government Act*, and having no reason for its existence or action except to further the purpose of the Statute. I will refer to one or two sections to indicate my meaning. Sec. 197 enables the Council by by-laws to control an enormous range of public care and conduct, embracing regulations for health, traffic, transport, decency, cleanliness, and good order, building, water supply, advertisements, public amusements, and generally maintaining the good rule and government of the municipality. Broadly speaking, the ambit of the Council's governmental powers includes all public welfare of a specially local character.

Further, by Part XIV. extensive borrowing powers are given for permanent works and undertakings. By sec. 347, sub-sec. (10), these include the providing of pleasure grounds and places of public resort and recreation. Public debts must be paid, and rating powers are given for the purpose.

Turning once more to the second by-law, we find an utter absence of any express restrictions or conditions upon the Council's power to refuse. The legislature when it desired to dictate conditions at all did so with reference to the security and propriety of the buildings—a matter for expert knowledge—otherwise it has reposed unbounded confidence in the justice and ability of the Council.

Further, even after registration the Council is given unqualified power to suspend or cancel the registration. No application, notice or hearing is prescribed as a condition precedent to the action, and it is plain that the insecurity of the building or some intended improper use of it might necessitate immediate action. This is put beyond doubt by the express requirement to give notice of the suspension and cancellation itself which must happen after the event.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Isaacs J.

If, therefore, the legislature has reposed this unqualified confidence in the Council, no Court can refuse it.

To justify interference I am of opinion that the reasons actuating the Council must be such that no reasonable men could honestly view them as coming within the wide, indefinite and elastic limits of the powers of local self-government as conferred by Parliament.

In view of those extensive limits, I am at a loss to see how any of the circumstances suggested as vitiating the refusal are outside the bounds of fair consideration of practical and reasonable men, honestly endeavouring to fulfil their public duty on the lines of the Statute. I need not enter into any analysis of the facts, because I entirely agree with what has fallen from the learned Chief Justice in his references to them.

But if that is the result to which we are led, it seems to me that to yield to the appellant's arguments would be substituting the Court's discretion for that of the Council. That would, of course, be contrary to the will of Parliament. It is not what the Court or any other body of men considers reasonable that is to govern the fate of the application, it is the opinion of the Council alone.

It is said that to concede to municipal Councils the power contended for is to enable them to work great injustice and to monopolize some forms of public entertainment. The answer is that the grant of any power confers the possibility of doing injustice in particular cases, and the legislature assumes a reasonable and honest use of the power given. But beyond requiring it to be exercised for the purpose for which it was created, the Court has no function to perform in connection with the matter. "If," said Lord *Tenterden* C.J., "a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power according to the best of his judgment":

R. v. *Mayor &c. of London* (1). The only course we can take consistently with these deeply-rooted principles is to dismiss the appeal.

I would add that I entirely agree with what has fallen from my learned brothers as the inapplicability to such a case as the present of the doctrine of bias. So far as such a principle applies at all, it is found enacted in the Statute. If bias exists and leads to a dishonest exercise of the power, then its effect is cognizable, but as a mere fact it is immaterial.

HIGGINS J. read the following judgment:—This rule, so far as the applicant's counsel seeks to have it made absolute, is for a mandamus to compel the Council of the Town of Northcote to hear and determine his application to have certain ground registered for public amusement.

The application is based on Part VI. of the Thirteenth Schedule to the *Local Government Act* 1903. Anyone who causes any public amusement to be conducted on premises not registered is liable to a penalty; and, on the written application of the occupier, stating certain particulars, and if upon inspection the premises be found to be secure and proper for the purpose stated, "and if the Council see fit," the Council "may" cause the premises to be registered in a registry book, &c.

I am of opinion that there is not imposed on the Council the duty to hear and determine, in the judicial sense, at all. It is the duty of the Council to consider the application, and to decide whether it ought to be granted. There is no duty to "hear" the applicant and his evidence, or any opponents and their evidence. The Council is in a position analogous to that of trustees. As it is the duty of trustees to exercise their powers with a view to the interest of their beneficiaries as prescribed by the will, so it is the duty of the Council to exercise its powers with a view to the interest of the public—in particular, the public of the town—as prescribed by the Act; but in the one case there is no obligation to "hear" the beneficiaries; and in the other case there is no obligation to "hear" the public or the applicant. If the ratepayers do not like the mode in which the affairs of the town are

(1) 3 B. & Ad., 255, at p. 271.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Higgins J.

administered, their remedy is generally to be sought in the pressure of public opinion at the polling booth. Even if we treat the mandamus as being in substance an order merely to "consider" the application, the position is not much better for the appellant. For the application has been considered; and there is no obligation on the Council to consider any one written application more than once. The Council certainly has not declined to consider the application.

"But," says the appellant, "the application has not been considered according to law. The Council has been influenced by improper reasons in refusing to register." Some of the members said that every amusement ground should be under municipal control; some, that this ground competed with the amusement ground on which the Council had spent the ratepayers' money, and raised money by mortgage of the ground; some, that the appellant's hotel is on this ground, and would tempt players and spectators to drink; some that the play had improved of football and other clubs that put the drink away from their premises. Even if these grounds ought not to have been taken into consideration, I venture, notwithstanding certain cases which have been cited, to think that mandamus will ultimately be found not to be the appropriate remedy in view of the provisions of the *Local Government Act* 1903 and the Thirteenth Schedule. But, assuming that mandamus is the remedy, the question is, have the members of the Council been influenced in fact by considerations which should not have been taken into account in their decision. "If the Council see fit," it "may" register. It is what the Council "see fit," not what any Court sees fit. The official answer of the town clerk to the application was that "the application was considered at a meeting of the Council on the 19th inst. and it was decided that the renewal be not granted." The voting took place at a meeting of the Council to which the public were admitted as spectators, and the councillors spoke freely for and against the application. The principal arguments expressed against the application were as I have stated; but whether the arguments used were sound or not, there is not any reason for disbelieving the sworn affidavits of the opposing councillors to the effect that they gave their votes "*bonâ fide*

and in the honest belief that the granting of such application would not be in the best interests of the said Town of Northcote." This is a sufficient answer to the order *nisi*, if true. As in the case of trustees, so also in the case of councillors, they must exercise their powers "*bonâ fide* for the end designed": *Aleyn* v. *Belchier* (1); *Hodgson* v. *Halford* (2); *Wainwright* v. *Miller* (3). A councillor has merely to apply his mind to carry out his duty according to the councillor's oath (sec. 54)—"faithfully and impartially according to the best of my skill and judgment execute all the powers and authorities reposed in me." If (to revert to the arguments expressed by individual councillors) one councillor is dominated by a theory—even a fad—as to the advantages of municipal undertakings; if another believes that the application should be refused on mere financial grounds—because his ground would be a dangerous competitor to the public park, and leave the park and its debt as a burden on the ratepayers; if another thinks that the proximity of the applicant's hotel to the applicant's ground would lead to drink, disorder and vice; if another thinks that young men play better football when they have not easy access to beer; these beliefs, these prepossessions, may possibly be all wrong, but the councillors are elected to act "according to the best of" their "skill and judgment"—not the skill and judgment of others. It has been said that every man is a bundle of prejudices; and councillors are not expected to be immune from prejudices when they approach the Council table. Even anger or resentment against objects of a power will not vitiate the exercise of the power: *Vane* v. *Lord Dungannon* (4). I have tried to find whether there is any and what limitation to be implied in the words "may . . . . if the Council see fit"; and I can find none, except that the discretion conferred must be exercised honestly with a view to the public interest. This limitation is to be implied from the nature of the position—the position of men elected by the public to manage public concerns, exercising public functions, raising rates from the public and spending public money. There is, moreover, a section expressly forbidding councillors to vote when they have any pecuniary

(1) 1 Eden, 132, at p. 138.
(2) 11 Ch. D., 956.
(3) (1897) 2 Ch., 255.
(4) 2 Sch. & Lef., 118, at p. 130.

H. C. OF A. 1910.

RANDALL v. NORTHCOTE CORPORATION.

Higgins J.

interest in the subject of the voting (*Local Government Act* 1903, sec. 181). There are many other points suggested by Dr. *McInerney's* numerous and carefully collected cases; but considerations of time and space forbid me to do justice to them. If this application for a mandamus were successful, a serious blow would be struck at the freedom of action and the efficiency of municipal bodies; and the Courts would be forced continually into elaborate inquiries into the precise motives operating on the minds of individual councillors and the wisdom of their decision. In my opinion, the Courts are not placed by the Victorian legislature in a position so absurd. The Courts have not the functions of councillors; and councillors have not the functions of Courts.

I agree that this appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *McInerney, McInerney & Wingrove.*

Solicitor, for the respondents, *D. H. Herald.*

B. L.