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Ex parte WHITE.

Evershed L.J.

thereto of well-established forms of remedy, the court will not be afraid to extend the older principles to new circumstances. But the present case is not, in my judgment, of that character. We are not considering the application of established principle to a new jurisdiction, but the scope of the principle itself in regard to a jurisdiction no less ancient than the principle.

For the reasons which I have attempted to state, I am of opinion that, as a matter of principle, the ecclesiastical courts administering ecclesiastical law must at all times be treated as outside the ambit of the writ of certiorari, and for that reason the present appeal must, in my judgment, fail.

Appeal dismissed.

Solicitors for appellants: *Evill & Coleman.*

Solicitors for respondents: *Tamplin, Joseph & Flux, for Gudgeons, Peacock & Prentice, Stowmarket.*

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Nov. 7, 10.

Lord Greene M.R., Somervell L.J. and Singleton J.

Cinematograph — Sunday performances — Licence — Condition that "no children under the age of fifteen years shall be admitted to any "entertainments whether accompanied by adult or not"—Action by licensees — Claim for declaration that condition ultra vires or unreasonable—Sunday Entertainments Act, 1932 (22 & 23 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1.

By s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932, an authority having power in any area to grant licences for cinematograph performances under the Cinematograph Act, 1909, is given power to allow a licensed place to be open and used on Sundays, "subject to such conditions as the authority think fit "to impose."

When a local authority granted to the plaintiffs leave for Sunday performances subject to the condition that no children under fifteen years of age should be admitted to Sunday performances with or without an adult:—

Held, that the local authority had not acted unreasonably or ultra vires in imposing the condition.

In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded

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matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.

Harman v. *Butt* [1944] K. B. 491 approved.

Theatre De Luxe (Halifax), Ld. v. *Gledhill* [1915] 2 K. B. 49 considered. Dissenting judgment of Atkin J. explained and preferred.

APPEAL from Henn Collins J.

The plaintiff company, the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted by the defendants who were the licensing authority for that borough under the Cinematograph Act, 1909, a licence to give performances on Sunday under s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932 (1); but the licence was granted subject to a condition that " no children under the age of fifteen " years shall be admitted to any entertainment whether accom- " panied by an adult or not." In these circumstances the plaintiffs brought an action for a declaration that the condition was ultra vires and unreasonable.

Henn Collins J. dismissed the action, following *Harman* v. *Butt* (2) and holding that the decision in *Theatre de Luxe (Halifax), Ld.* v. *Gledhill* (3) was not in pari materia. The plaintiffs appealed.

Gallop K.C. and *Sidney Lamb* for the plaintiff. Henn Collins J. has followed a judgment of Atkinson J. in *Harman* v. *Butt* (2), in which he held that a similar condition was intra vires. The licensing of cinematographs was first imposed by the Cinematograph Act, 1909. On the question which arose under that Act whether the power to make regulations was confined to matters relating to safety or extended to wider questions of public policy, there have been conflicting opinions. When the opening of cinemas on Sunday was permitted by the Sunday Entertainments Act, 1932, it

(1) The Sunday Entertainments Act, 1932, s. 1, sub-s. 1, provides: " The authority having power, in " any area to which this section " extends, to grant licences under " the Cinematograph Act, 1909, " may, notwithstanding anything " in any enactment relating to " Sunday observance, allow places " in that area licensed under the " said Act to be opened and used on " Sundays for the purpose for " cinematograph entertainments, " subject to such conditions as " the authority think fit to " impose."

(2) [1944] K. B. 491.

(3) [1915] 2 K. B. 49.

referred back to the Act of 1909, but the power to make regulations is differently worded. During the war, Defence Regulation 42B gave power to a competent naval, military or air force authority to certify that Sunday opening was desirable and to the local authority to permit opening in accordance with such certificate. There are thus three different positions: (1.) weekday opening under the 1909 Act; (2.) Sunday opening under the 1932 Act; (3.) Sunday opening under reg. 42B which is in force till the end of 1947. The present case has to do only with (2.).

In *Theatre de Luxe (Halifax), Ld.* v. *Gledhill* (1), the majority judgment to some extent limited the scope of the power to make regulations under the Act of 1909. Atkin J. delivered a dissenting judgment, favouring a wider interpretation, but the decision has never been dealt with by the Court of Appeal. That decision was under the Act of 1909, but in the Act of 1932 the words are "subject to such conditions as the authority think "fit to impose," and the question is whether there is any limitation or whether those words enable the authority to say that no man or woman may take his or her child under fifteen to the cinema on Sunday. It is admittedly on the party attacking the regulation to establish that it is unreasonable. The true view seems to be that the court looks on such conditions benevolently, but does not treat the decision of the local authority as binding. In *Harman* v. *Butt* (2) Atkinson J. held a similar condition reasonable, and in the present case Henn Collins J. followed that decision, without forming an independent judgment. Though the subject matter of *Roberts* v. *Hopwood* (3) was very far from the present case, there are passages in the opinions which throw light on the attitude of the court in considering the validity of regulations.

It is material that in the present case there had been a poll of the electorate in favour of Sunday opening.

[Lord Greene M.R. That does not seem to carry the matter any further. The vote was merely for opening the cinema on Sunday "subject to such regulations as the authority think "fit to impose."]

On an analysis the electorate has to consider whether it wishes the local authority to allow performances on Sunday. That, in effect, means that it wishes for performances, subject to conditions, but it cannot intend to leave the conditions to be

(1) [1915] 2 K. B. 49.
(2) [1944] K. B. 491.
(3) [1925] A. C. 578.

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imposed at large. It must at least intend any condition imposed to be reasonable. Whether this condition is reasonable is a matter for the court as being a high matter of policy. Of course unreasonableness has to be established but it is for the court to exercise its own judgment on the facts established. No reasonable authority could have imposed the condition preventing the persons who have voted for Sunday performances taking their children under fifteen with them. Where what has been done is unreasonable, the plaintiffs are entitled to go for relief to the court: *Rex* v. *Burnley Justices. Ex parte Longmore* (1). It is true that the authority had wrongly delegated their powers but the actual decision was based on the unreasonableness of the condition. Henn Collins J. was wrong in not accepting the obligation to decide as to reasonableness. The exclusion of children accompanied by their parent or parents is unreasonable if not also ultra vires: see the majority decision in *Theatre de Luxe (Halifax), Ld.* v. *Gledhill* (2). [They referred also to *London County Council* v. *Bermondsey Bioscope Co.* (3); *R.* v. *London County Council. Ex parte London & Provincial Electric Theatres, Ld.* (4); and *Ellis* v. *Dubowski* (5).]

FitzGerald K.C. and *Vernon Gattie* for the defendants. [Lord Greene M.R. We do not require to hear you but will you say if there is any authority that we ought to have in mind.] They referred to *Short* v. *Poole Corporation* (6) and *Mills* v. *London County Council* (7).

LORD GREENE M.R. In the action out of which this appeal arises, the plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires. The action was dismissed by Henn Collins J. and, in my opinion, his decision was clearly right. The powers and duties of the Local Authority are to be found in the Sunday Entertainments Act, 1932. That Act legalized the opening of cinemas on Sundays, subject to certain specified conditions and subject to such conditions as the licensing authority think fit to impose. The licensing

(1) (1916) 85 L. J. (K. B.) 1565.
(2) [1915] 2 K. B. 49.
(3) [1911] 1 K. B. 445.
(4) [1915] 2 K. B. 466.
(5) [1921] 3 K. B. 621.
(6) [1926] Ch. 66.
(7) [1925] 1 K. B. 213.

authority are the licensing authority set up under the Cinematograph Act, 1909, and in this case are the council of the borough of Wednesbury. Before the Act of 1932, the opening of cinematograph theatres on Sundays was, in fact, illegal. Local authorities had purported in some cases to allow Sunday opening under the licences which they granted, but that permission was strictly irregular. The position under the Act now with regard to licensing is stated conveniently by Atkinson J. in *Harman* v. *Butt* (1). He there says: "It is "apparent that there are at least three totally different "occasions on which licensing justices may be called on to "exercise their discretion to issue a licence and to determine "on what conditions the licence shall be issued. The appli- "cation may be under the Cinematograph Act, 1909, relating "to six days of the week, excluding Sundays. It may be one "relating solely to Sundays under the Sunday Entertainments "Act, 1932, where in the case of a borough the majority of the "local government electors have expressed a desire for Sunday "performances. Thirdly, it may be one where the local "government electors have expressed no such wish, but where "the application is made for the benefit of those members of "the forces who are stationed in the neighbourhood for the "time being." Under a regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing authority and the case of *Harman* v. *Butt* (2) was, in fact, a case where that had taken place.

The actual words in question here are to be found in s. 1, sub-s. 1, of the Act of 1932. [His Lordship read the sub-section.] The power to impose conditions is expressed in quite general terms. The sub-section goes on to refer to certain conditions which must be imposed, but with those we are not concerned. In the present case, the defendants imposed the following condition in their licence: "No children under the age of "fifteen years shall be admitted to any entertainment, whether "accompanied by an adult or not." Mr. Gallop, for the plaintiffs, argued that it was not competent for the Wednesbury Corporation to impose any such condition and he said that if they were entitled to impose a condition prohibiting the admission of children, they should at least have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His argument was that the

(1) [1944] K. B. 491, 493. (2) Ibid. 491.

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imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation. The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word " unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word " unreasonable " in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting " unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short* v. *Poole Corporation* (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the present case, it is said by Mr. Gallop that the authority acted unreasonably in imposing this condition. It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition

(1) [1926] Ch. 66, 90, 91.

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should be attached to the grant of this licence. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider. Here Mr. Gallop did not, I think, suggest that the council were directing their mind to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent ground for attacking the decision of the authority; but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case. Once that is granted, Mr. Gallop is bound to say that the decision of the authority is wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the local authority. It is just there, it seems to me, that the argument breaks down. It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set

up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority, but reference has been made to a number of cases. I can deal, I think, quite shortly with them. First, Henn Collins J. followed a decision of Atkinson J. in the case I have mentioned of *Harman* v. *Butt* (1). In that case a condition of this character had been imposed and I think the only difference between the two cases is that in *Harman* v. *Butt* (1) the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Atkinson J. dealt with the matter thus (2): "I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not ultra vires on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community." Then he goes on to deal with the question of reasonableness. That was a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is *R.* v. *Burnley Justices* (3), and another not dissimilar case on one point, *Ellis* v. *Dubowski* (4). Those were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body. Another case on which Mr. Gallop relied is *Roberts* v. *Hopwood* (5). That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4*l.* a week to their lowest grade of workers. That particular sum had been

(1) [1944] K. B. 491.
(2) Ibid. 499.
(3) 85 L. J. (K. B.) 1565.
(4) [1921] 3 K. B. 621.
(5) [1925] A. C. 578.

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fixed by the local authority not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that they had not fixed 4*l.* a week as wages at all and that they had acted unreasonably. When the case is examined, the word " unreasonable " is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4*l.* they had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax), Ld.* v. *Gledhill* (1). That was a decision of a Divisional Court as to the legality of a condition imposed under the Act to the following effect: " Children " under fourteen years of age shall not be allowed to enter into " or be in the licensed premises after the hour of 9 p.m. " unaccompanied by a parent or guardian. No child under the " age of ten years shall be allowed in the licensed premises " under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Atkin JJ. The majority, consisting of Lush and Rowlatt JJ. held that the condition was ultra vires as there was no connexion, as the headnote says, " between the ground upon which the condition was imposed, " namely, regard for the health and welfare of young children " generally, and the subject-matter of the licence, namely, the " use of the premises for the giving of cinematograph " exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Atkin J. on the other hand, delivered a dissenting judgment in which he expressed

(1) [1915] 2 K. B. 49.

the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was " that the conditions must " be (1.) reasonable ; (2.) in respect of the use of the licensed " premises ; (3.) in the public interest. Subject to that " restriction there is no fetter upon the power of the licensing " authority." If I may venture to express my own opinion about that, I think that Atkin J. was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he used any justification for thinking that it is for the court to decide on the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Atkin J. says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take

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into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs.

SOMERVELL L.J. I agree that the appeal must be dismissed for the reasons which have been given by the Master of the Rolls, and I do not desire to add anything.

SINGLETON J. I agree.

Appeal dismissed.

Solicitors: *Norman, Hart & Mitchell; Sharpe, Pritchard & Co., for G. F. Thompson, Wednesbury.*

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Oct. 27, 28

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

GOTT *v.* MEASURES.

Malicious killing of animals—Dog chasing game—Dog killed by person owning sporting rights—Game not reduced into possession—Shooting dog in defence of property — Claim by owner of dog — Malicious Damage Act, 1861 (24 & 25 *Vic., c.* 97), *s.* 41.

The appellant's dog was shot dead by the respondent on land over which the respondent had full sporting rights. The dog was seen by the respondent shortly before it was killed tearing a hen pheasant to pieces and later the respondent saw the dog chasing a hare on the land. When the respondent shot the dog it was about forty yards away from the hare. On the hearing of an information by the owner of the dog against the respondent under s. 41 of the Malicious Damage Act, 1861, the justices held that the respondent shot the dog on land over which he had the full sporting rights, and without malice, and they, accordingly, dismissed the information :—