UNREASONABLENESS IN REGARD TO MUNICIPAL BY-LAWS.

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A by-law is defined by Lord Russell of Killowen in *Kruse v. Johnson*[1] as "an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not to do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation." It is legislation by a subordinate law-making body exercising delegated authority and consequently, to be valid, it must fall strictly within the ambit of that authority.

Subject to any special statutory provisions, such as section 232 of the *Local Government Act* 1946, which provides a method of testing its validity, courts have, almost since the inception of subordinate legislation, claimed and exercised jurisdiction to declare a by-law invalid if it went beyond the powers granted to the body making it. By-laws have, however, been attacked on the ground of unreasonableness even where they are literally within the powers granted and unreasonableness has been treated as an independent ground of attack.

It is the purpose of this note to discuss the questions as to what now is the test of unreasonableness and whether it can be treated as in itself a ground of attack. This enquiry is, however, limited to municipal by-laws as the tests are not quite the same when one comes to consider by-laws made by bodies which are not representative institutions. The distinction was first made expressly by the Privy Council in *Slattery v. Naylor*[2] where it was said—"The jurisdiction of testing by-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."

The distinction was developed in *Kruse v. Johnson*. "The great majority of cases in which the question of by-laws has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should zealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public

1. [1898] 2 Q.B. 91, at p. 96.
2. (1888) 13 App. Cas. 446, at p. 452.

representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint."[3]

The " checks and safeguards " mentioned above are—

(*a*) Antecedent publication of the by-law.
(*b*) The by-law is to have no force until it is forwarded to the Secretary of State.
(*c*) The Executive Council may disallow the by-law.
(*d*) The authority making the by-law, acted upon by public opinion, may alter or repeal the by-law.
(*e*) The Legislature may modify or take away the power it has delegated.

All these safeguards save (*b*) are present under the *Local Government Act* 1946 and in some cases provision is made for a by-law to be confirmed by the Governor-in-Council before it comes into force. Section 204 makes it necessary for a by-law to be made by special order, which under section 189 requires two resolutions by the Council, the time for holding the second meeting and the substance of the resolution being advertised. Section 207 provides for the publication of a by-law and section 229 gives to the Governor-in-Council power to repeal any by-law by order published in the *Government Gazette*. Substantially then a municipal by-law falls within the principles enunciated in *Kruse v. Johnson* and the tests of unreasonableness there set out will apply.

These are stated as follows :—

" But, unreasonable in what sense ? If, for instance, they were found to be partial and unequal in their operation as between different classes ; if they were manifestly unjust ; if they disclosed bad faith ; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say—

' Parliament never intended to give authority to make such rules ; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."[4]

The narrow meaning given to unreasonableness in this sense was underlined by Griffith C.J. in *Widgee Shire Council v. Bonney*[5] : " With regard to the objection that the by-law is unreasonable I think that since the cases of *Slattery v. Naylor* and *Kruse v. Johnson* it is very difficult to make a successful attack on a by-law on this ground. . . . The existence of a power and the expediency of its exercise are quite different matters. The question of the existence of the power can always be determined by a Court of law. But in my opinion the expediency of the exercise of a power is not a matter for determination by a Court.

3. [1898] 2 Q.B. 91, at p. 99.
4. *ibid.*
5. (1907) 4 C.L.R. 977, at pp. 982-3.

What might be regarded by everyone as a reasonable and proper by-law to make in a city . . . might in the case of a small country township . . . be regarded by some persons as unreasonable. But it is obvious that the question whether the circumstances of the locality warrant the exercise of a power is one of expediency and not of competency. Otherwise the validity of a by-law would have to be determined upon extrinsic evidence as to the circumstances of the particular locality. I do not know of any instance in which such a doctrine has ever been suggested." Lord Tomlin in *Robert Baird, Ltd. and Others v. City of Glasgow*[6] said, "Unreasonableness in regard to by-laws of this kind is something which can never be made out except upon a case of great strength and clearness." In 1941 Starke J. in *The Mayor etc. of the City of Brunswick v. Stewart*[7] defined unreasonable as "so oppressive or capricious that no reasonable mind can justify it. . . ." It may therefore be said that to succeed on the ground of unreasonableness it must be shewn clearly, that, quite apart from any particular person's idea of what is reasonable, the provisions of the by-law are so manifestly unjust that no reasonable man would have made it. In other words it offends against the basic principles of justice which are agreed to by all thinking men. It follows from this that (assuming an irrebuttable presumption that law-makers are thinking men) a body making such a by-law must be assumed to have had an ulterior motive.

This immediately raises the question as to whether unreasonableness is, in fact, a separate ground of attack in any sense, or whether it is merely an example of a body exceeding the powers delegated to it. In other words a power granted for one purpose cannot be exercised to achieve another and unauthorised purpose even although the form of its exercise may colourably be within the authorised power. In a subsequent passage in his judgment in *Widgee Shire Council v. Bonney*[8] quoted above Griffith C.J. goes on to say: "In my opinion, the legislature has deliberately and intentionally made the local authority, subject to the approval of the Governor-in-Council, the sole judge of such matters, subject only to this qualification, that, if a by-law is such that no reasonable man, exercising in good faith the powers conferred by the Statute, could under any circumstances pass such a by-law, it might be held invalid on that ground as being an abuse of the power, and therefore not within it." The proposition is explicitly stated by Dixon J. in *Williams v. The Mayor etc. of the City of Melbourne*[9]: "The by-law was impugned as . . . unreasonable. Although in some jurisdictions the unreasonableness of a by-law made under statutory powers by a local governing body is still considered a ground of invalidity . . . in this court it is not so treated . . . To determine whether a by-law is an exercise of a power it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is

6. [1936] A.C. 32, at p. 43.
7. (1941) 65 C.L.R. 88, at p. 97.
8. (1907) 4 C.L.R. 977, at p. 983.
9. (1933) 49 C.L.R. 142, at p. 154.

intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connexion between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power."

A final quotation may be given from the judgment of Gavan Duffy J. in *Proud v. City of Box Hill*[10]: "It is perfectly well established now that the fact that a by-law is apparently harsh, and that it may cause inconvenience to people and that it is not of a type that would recommend itself to the judges trying the matter, is immaterial. The question of how the power should be exercised and how far it is necessary to exercise it, and what is reasonably required, is left by Parliament to the regulation-making authority. The only remnant of the old doctrine, once occasionally expressed somewhat widely, appears to be this: that when you find that a by-law involves 'such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men,' the Court may in such a case hold that, although on the face of it this might first appear to be within the words of the power, it is obviously not an exercise of the power at all: it is not a *bonâ fide* attempt to exercise the power given to the regulation-making authority."

It would therefore appear clear that unreasonableness is not in itself a ground for attacking a by-law, but merely one method of approach in deciding whether or not a by-law is within the powers granted by the legislature. The question is not, in fact, whether or not a by-law is reasonable in any real sense. This is a question of "expediency" on which the decision of the municipality is decisive. The sole question is whether the by-law is made within the ambit of the powers granted by the legislature. If it is within such powers in fact and not merely colourably, there is no room for consideration of its reasonableness. If, however, it is so oppressive or capricious, having regard to the power granted and the object of that power, that no ordinary man would make such a by-law, then and only then a court must assume that the by-law was made with an ulterior motive and not for the purpose of exercising such power. It would be beyond that power in the same sense as a by-law absolutely prohibiting all traffic would be beyond a power to regulate traffic.

10. [1949] V.L.R. 208, at p. 210.