Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thomas Michael Slattery v. *Joseph Naylor (for and on behalf of the Borough of Petersham), from the Supreme Court of New South Wales; delivered 24th March* 1888.

Present:

LORD HOBHOUSE.
LORD HERSCHELL.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The sole question in this case is whether a byelaw under which the Appellant has been convicted and fined is valid or invalid. The byelaw was passed by the Municipal Council of the Borough of Petersham on the 2nd of December 1884, under the provisions of the Municipalities Act 1867. The Respondent is the Inspector of Nuisances for the borough. The Appellant appealed to the Supreme Court, and the convicting Magistrate stated a case, which contains the facts on which the decision of that Court was passed. It affirmed the decision of the Magistrate, and their Lordships are now asked to decide that the affirmance was wrong.

The material portion of the byelaw is in the following terms:—

"No corpse shall be interred in any existing cemetery now open for burials within the distance of one hundred yards from

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any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place whatsoever within the borough."

A similar provision was made with respect to cemeteries afterwards opened.

Section 153 of the Municipalities Act provides that the Council may from time to time make byelaws for (among other things) regulating the interment of the dead. The byelaw was published in the New South Wales Government Gazette of the 19th January 1885, where it is stated to have been confirmed by His Excellency the Governor, with the advice of the executive Council.

On the 27th June 1885 the Appellant interred the corpse of his wife in his own family burial place in the Roman Catholic cemetery in Petersham. This cemetery had, from the year 1862 onwards, been used for the interment of members of the Roman Catholic faith; and in the year 1879 the Appellant purchased a portion of it as a permanent burial place for members of his family. No part of the cemetery is distant more than 100 yards from a place of worship, schoolroom, dwelling-house, public street, road, or place within the borough. It is admitted that the place is not a populous one.

The Supreme Court was unanimous in its decision. But of the three Judges, only the Chief Justice Sir James Martin agreed with the decision on principle. The other two, Justices Faucett and Innes would have decided the other way if they had not thought themselves bound by two previous decisions on similar byelaws of other municipalities under the same statute. Under these circumstances, the case was a proper one for appeal to Her Majesty in Council.

The Appellant takes three objections to the validity of the byelaw; first, that it is *ultra*

vires because it destroys private property; secondly, that it is *ultra vires* because the Council have only power of regulating interments, whereas in the cemetery in question they have wholly prohibited them; and, thirdly, that it is unreasonable. These objections must be judged by reference to the provisions of the Municipalities Act, the material sections being those numbered 153 and 158. The former gives to the Council the power of making byelaws to provide for the health of the municipality, as well as to regulate the interment of the dead.

In support of the first objection, their Lordships have been referred to cases in which Acts of the Legislature would, according to their full literal meaning, operate to take away private property without compensation; and in which Courts of Justice have, on account of the extreme improbability that the Legislature should have intended such a thing, sought for some secondary meaning to satisfy its expressions; such as was the case of the Windsor and Annapolis Railway Company before this Board. But a statute cannot be so construed if it shows an intention to override the private rights in question. The object of the present statute is to establish regulations for the common advantage of persons who have come to live in the same community, in a great number of matters affecting their daily life, and that cannot be done except by interference with many actions and many modes of enjoying property, which, but for such regulations, would be lawful and innocent. It is difficult to see how the Council can make efficient byelaws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others,

unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property.

The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop the burials altogether. Their Lordships hold that the byelaw in question is not *ultra vires* because in certain circumstances it may have, as in Mr. Slattery's case it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used.

The considerations applicable to the second objection have, to a great extent, been anticipated by the answer to the first. It is true that, in regulating the interment of the dead, the byelaw makes the cemetery useless for its former purpose. This, it is argued, is not regulation but prohibition, and it is pointed out that, with regard to several objects of the byelaws, prevention and suppression are expressly allowed by the Act, whereas in the case of interment only regulation is allowed. One illustration of regulation proper, as distinct from prohibition, was found in another byelaw laying down rules as to the number of corpses in a grave and their depth below the surface. Now if, at the passing of the byelaw, a grave was already so full that it could not, consistently with the byelaw, receive another corpse, the byelaw

would amount to a complete prohibition of burial, although the owner of the grave may have contemplated that in death he should be laid by those whom he loved best in life.

To regulate the place of burial is certainly one of the most important points in regulating burials for the health of a community, perhaps the most important of all. It is indeed a serious thing to prevent people from indulging their affections in a matter which they justly consider so sacred as the disposal of their dead. Such prohibitions should be well considered before they are passed. But they are undoubtedly necessary in large and growing communities. And their Lordships cannot hold that a byelaw is *ultra vires* because, in laying down a general regulation for the Borough of Petersham, it has the effect of closing a particular cemetery.

It is contended that the byelaw is unreasonable on three grounds. First, that it is not wanted, the place not being populous. Secondly, that it does not, as is usually done in England, make any provision for the case of a person who may have a special claim to use the prohibited burying place. Thirdly, that a belt of 100 yards must be kept vacant all round a cemetery, which will be onerous for all, and probably impossible for some; otherwise any private owner of land may, without regard for any interest but his own, or even from malice, place a dwelling-house in such a position as to prevent future burials.

As regards the necessity for the byelaw, there is no evidence whatever on which their Lordships can form an opinion. It is merely said that the place is not a populous one. Even supposing that the place mentioned means the Borough of Petersham, and not merely the neighbourhood of the cemetery, which is not

clear, the statement is far too vague to be of any use. It may be quite populous enough to require such a byelaw. The matter is one on which the judgment of the Local Authorities should not be lightly superseded.

The other two grounds are more substantial. It is possible that if we were now discussing how the byelaw should be framed, it might seem more wise and prudent to make it less absolute. It might be wiser, even at the expense of some inconvenience to the community, to make some concession to one of the most softening and refining of human feelings, the reverence and love that is felt for the dead, and the desire of resting in the same spot with them. It might be more prudent not to give any person the means of disturbing a cemetery by the mere building of a house. But supposing that to be so, it is quite a different question whether a byelaw like the present one is to be held unreasonable because such considerations have been overlooked or rejected by its framers.

The jurisdiction of testing byelaws by their reasonableness was originally applied in such cases as those of manorial bodies towns or corporations having inherent powers 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 byelaw 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.

We are dealing with the proceedings of a Local Authority in a colony, where the extent of area is large and population grows fast. The Act of 1867 provides methods for the more effectual establishment of local institutions. It

creates a representative Council, elected annually by the constituency, and gives to it jurisdiction over the large range of affairs enumerated in Section 153, and some other sections. By Section 158 it is enacted that all byelaws "consistent "with the provisions of this Act, and not re- "pugnant to any other Act or law in force in "the colony of New South Wales, shall have "the force of law when confirmed by the "Governor and published in the Government "Gazette, but not sooner or otherwise." And provision is made for laying copies of such byelaws before both Houses of Parliament.

It is certainly not clear that courts of law are not precluded by Section 158 from inquiry whether or no a byelaw is reasonable. Sir Horace Davey argued on this point that it is a necessary condition of every byelaw that it shall be reasonable, that a power to make byelaws means a power to make reasonable byelaws, and that no byelaw can acquire the force of law under Section 158, except such as are consistent with the implied as well as the express provisions of the Act. According to this argument, the question whether a byelaw is reasonable is only one branch of the question whether it is *ultra vires*.

If it were possible to conceive that a Council such as that of Petersham could frame, and that the Governor of New South Wales could confirm and publish, a merely fantastic and capricious byelaw, such as reasonable men could not make in good faith, such, for instance, as a byelaw providing that the Roman Catholic cemetery should be closed to the Roman Catholic community, but remain available for others, it would raise in a very crucial shape the question whether a court of law could set it aside as unreasonable. Let it be assumed, notwithstanding Section 158 of the Act, that such a juris-

diction exists. It is quite a different question whether a byelaw can be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of Judges.

Every precaution has been taken by the Legislature to ensure, first, that the Council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its byelaws shall be under the control of the supreme executive authority; and, fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of byelaws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a court of law, unless it be in some very extreme case, such as has been indicated.

In the present case, so far from there being ground for thinking the byelaw to be capricious or oppressive, there is good evidence that the communities of New South Wales consider that byelaws of this nature are reasonable and suitable to their circumstances. In the case of *ex parte* Flack, which was decided in 1880, it appeared that a byelaw had been passed by the municipality of Leichardt and gazetted on the 8th April 1875, to the same effect with the Petersham byelaw, except that the prescribed distance was 100 feet instead of 100 yards. A conviction for infraction of that byelaw was upheld by the Supreme Court. The same view was taken in Brooks *v.* Selwyn, decided in 1882, when a byelaw identical with the Petersham byelaw was passed by the borough of Newcastle, and gazetted on the 27th August 1881. In this case the Justices refused to convict, on the ground that the byelaw was

ultra vires, and the Supreme Court reversed their decision. It is clear then that, at least from the year 1875, municipal Councils in New South Wales have been passing, and Governors in Council confirming, byelaws of this kind; and it does not appear that the Houses of Parliament, on whose tables the byelaws are placed, have thought it necessary to modify the powers conferred in 1867, or to interfere with their exercise.

The result is that in their Lordships' opinion the two prior decisions are right in law; that the Court below did right to follow them in this case; that its judgement should be affirmed, and this appeal dismissed. The Appellant must pay the costs. They will humbly advise Her Majesty in accordance with this opinion.