

DARTNELL, J.J. At the date of the plaintiff's incorporation by Letters Patent, there was only one way of obtaining incorporation of a cemetery company as such, viz., by R.S.O. (1887), c. 175, formerly R.S.O. (1877), c. 170, again derived from C.S.U.C., c. 67. The statute enabling cemetery companies under that name and for burial purposes to become incorporated by Letters Patent (R.S.O., c. 176, formerly 43 Vict., c. 23) was not passed until after the organization of the real plaintiffs herein.

It cannot be contended that the Joint Stock Companies' Letters Patent Act, under which they derive their corporate existence, contains any provisions exempting any property of such Company from taxation.

I cannot find any authority, statutory or otherwise, incorporating the provisions of R.S.O., 175 or 176, into the charter of any Company organized under the "Joint Stock Companies' Act." The real plaintiffs could have become incorporated under the Cemetery Act existing at the date of their incorporation, and would then be entitled to claim the exemption from taxation they now put forward; but by choosing another form of corporate existence and acquiring the privilege of a commercial rather than a benevolent body, I conceive that they cannot be heard to claim the benefit of an Act whose provisions they either practically abnegated, or at least declined to take advantage of. It is an inference fairly to be deduced, that, having elected to become incorporated in the way they did, this Company have expressly renounced any privileges incident to the Cemeteries' Act, and subjected themselves to all the obligations of a Joint Stock Company, including taxation.

The judgment will be for the defendants. There will be no costs, provided the amount claimed by the defendants be paid forthwith, otherwise judgment for the defendants with costs.

After handing out the above judgment, I was asked to take into consideration the further contention on the plaintiff's part, that even if the Company's cemetery be one incorporated under either ch. 175 or 176, R.S.O., the words of ss. 3 of s. 6 of the Assessment Act, R.S.O., c. 193, are broad enough to exempt their lands from taxation. This sub-section reads, "Every place of worship and land used in connection therewith, churchyard and burial ground."

Upon this Chief Justice Harrison makes

the following comments: "Whether the exemption extends to all burying-grounds, or only those used in connection with the place of worship, is a question not yet determined." *Harrison Mun. Man. p. 714 (5th ed.)*.

It will be seen that the question is now to be considered without reference to any authority, and must be decided on reasoning and analogy. The Act respecting the Property of Religious Institutions, R.S.O., c. 237, and also the various Acts respecting the Church of England in Canada, empowers any religious society or congregation to acquire, among other things, "a site for a burial ground." Probably it was the burial grounds acquired under these Acts that the Legislature had in view when providing for the class of exceptions set out in the sub-section quoted.

The word "cemetery" is of Greek derivation, signifying "a sleeping place," and was adopted by the early Christians as the name for the place of burial for their dead. These places were always extra-mural. The custom of using the church or churchyard as places of sepulture did not begin to prevail until the seventh or eighth century of the Christian era. The difference between a cemetery and a churchyard or burial ground appears to be that in the latter a grave or burial plot cannot be obtained in perpetuity, while in the former it can. The freehold is vested in the vicar or rector. The distinction is thus expressed in Wharton's Legal Lexicon: "A cemetery differs from a churchyard by its locality and incidents; by its locality as it is separate and apart from any sacred building, used for the performance of divine service; by its incidents, that inasmuch as no vault or burying-place in an ordinary churchyard can be purchased for a perpetuity—in a cemetery, or permanent burying-place, it can be obtained."

Under the Cemeteries' Acts, R.S.O., c. 175, a Company incorporated under its provisions is specially exempt from taxes.

It is unaffected by the Registry laws and cannot be sold or mortgaged or become liable to any judgment or execution, and in fact their lands are dedicated in perpetuity to burial purposes.

In this case the Company, being a mere commercial corporation, I submit could sell or mortgage such portions of their lands as are not needed for cemetery purposes, and are not laid out or used therefor. Or they might wind up,