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FOREST LAWN CEMETERY COM- } APPELLANT;  
 PANY (*Defendant*) . . . . . }

1955  
 \*May 20  
 \*Oct. 4

AND

CORPORATION OF THE DISTRICT } RESPONDENT.  
 OF BURNABY (*Plaintiff*) . . . . . }

ON APPEAL FROM THE COURT OF APPEAL FOR  
 BRITISH COLUMBIA

*Cemetery Companies—Powers—Municipal By-Laws. application thereto—  
 Cemetery Companies Act, R.S.B.C. 1948, c. 59—Municipal Act, R.S.B.C.  
 1948, c. 232, s. 58 (73), (74).*

The *Municipal Act*, R.S.B.C. 1948, c. 232, s. 58 provides that in every municipality the Council may pass by-laws . . .

(73) For entering into agreements with cemetery companies for the provision of cemetery facilities within . . . the municipal limits.

(74) For prohibiting the burial of human bodies except in such places . . . as may be authorized.

The appellant was incorporated in 1935 under the *Cemetery Companies Act*, now R.S.B.C. 1948, c. 59, and with the approval of the respondent Municipality acquired land within the latter's limits for the purpose of a burial ground. In 1951 it acquired two additional parcels for similar purposes. The respondent under the authority of a by-law passed under s. 58 (74) of the *Municipal Act* refused approval of such use of the additional lands and, upon the appellant commencing to so use the lands without its consent, brought action to restrain such use. It was contended for the appellant that the Act under which it was incorporated was a special Act and that powers granted it upon

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\*PRESENT: Kerwin C.J. and Rand, Kellock, Estey and Locke JJ.

(1) (1897) 14 T.L.R. 98.

(2) (1878) 3 App. Cas. 459.

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its incorporation included authority to establish its cemetery in the respondent municipality and that it was not subject to the municipal by-law here in question. The trial judge, Coady J., gave judgment for the municipality and upon the appellant's appeal to the Court of Appeal for British Columbia that court affirmed his judgment. Upon appeal to this Court:

*Held:* That the appeal should be dismissed.

*Held* (By Rand, Kellock, Estey and Locke JJ.): That the *Cemetery Companies Act* does no more than provide the means by which a public cemetery corporation may be brought into being and endowed with certain powers, those powers so far as the actual location of a burying ground is concerned, to be subject to the *Municipal Act* as to the consent of the municipality within whose boundaries the cemetery is proposed to be established.

Kerwin C.J. would have dismissed the appeal for the reasons given by the trial judge concurred in by the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), unanimously affirming the judgment of Coady J. (2) at trial, wherein there was granted to the Plaintiff Corporation an injunction restraining the appellant company from using certain lands within the limits of the Plaintiff Corporation for cemetery purposes.

*E. G. Gowling, Q.C.* and *J. A. MacInnes, Q.C.* for the appellant.

*C. K. Guild, Q.C.* and *C. C. Bell* for the respondent.

THE CHIEF JUSTICE:—This appeal should be dismissed with costs for the reasons given by the trial judge, concurred in, as they were, by the Members of the Court of Appeal for British Columbia.

The judgment of Rand, Kellock, Estey and Locke JJ. was delivered by:—

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1). Following its incorporation in 1935 under the provisions of the *Cemetery Companies Act*, now c. 59, R.S.B.C., 1948, the appellant company acquired for the purposes of its operations a parcel of land in the respondent municipality. Subsequently, in 1951, it obtained title to two additional parcels, eight acres

(1) [1954] 4 D.L.R. 850.

(2) (1953) 9 W.W.R. (N.S.) 433;  
 [1953] 3 D.L.R. 213.

and forty acres respectively, intending to use these additional lands for the same purpose for which it was already using its original lands, namely, as a burial ground.

The respondent, acting upon the footing of a prohibitory by-law passed in 1919, refused approval of such use of these additional lands, although its approval had been given in 1935 in connection with the first parcel. Upon the appellant company commencing to use these lands without the consent of the respondent, this action was brought to restrain such use. The appellant was unsuccessful at the trial as well as in the Court of Appeal.

The appellant contends that the Act under which it was incorporated is a special Act and that the powers granted to it upon its incorporation, which appellant contends include authority to establish its cemetery in the respondent municipality without regard to the view of the latter, are not subject to the municipal by-law here in question, which was passed under the provisions of s. 58(74) of the *Municipal Act*, (R.S.B.C. 1948, c. 232). It is further contended that, in any event, the respondent is estopped by its conduct from withholding its consent.

*The Cemetery Companies Act* (R.S.B.C. 1936, c. 43), by s. 3, provides that any five or more persons may form an incorporated company under the Act for the purpose of establishing and maintaining a public cemetery without the limits of a municipality incorporated as a city or city municipality. By s. 4, s-s. (1), it is provided that the persons desiring to form the company shall execute in duplicate an instrument showing the place where the cemetery is to be located, which document is to be transmitted to the Registrar of Companies together with certain moneys as provided by the section. S-s. (2) provides that upon compliance with these requirements, the Registrar or a person authorized to perform his duties under the Companies Act shall issue under the seal of the Registrar a certificate showing that the company is incorporated and "the place where the cemetery will be". S. 5 provides that from the date of the certificate of incorporation, the subscribers and such other persons as may from time to time become shareholders in the company shall be a body politic and corporate by the name contained in the certificate "with

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the powers and subject to the provisions in this Act contained." S. 7 provides that for the "purposes of its cemetery" the company may acquire, hold, improve, develop, manage and dispose of "any" real and personal property.

In support of its contention that such a company is empowered to establish its cemetery at any place within the municipality named in the certificate without regard to the provisions of a by-law passed under the *Municipal Act*, the appellant points to the opening words of s. 58:

The Council may from time to time make, alter, and repeal by-laws not inconsistent with any law in force in the Province,

and contends that the italicized words have in view a statute such as the *Cemetery Companies Act*, the effect of these words being to except such a company from any such by-law.

The essential provisions of the *Cemetery Companies Act* were originally enacted by c. 5 of the statutes of 1879, entitled "*The Cemeteries Act*". That statute provided not only for the incorporation as above of cemetery companies but, by ss. 32 and 33, also authorized ten or more persons desiring to establish a burying ground not belonging exclusively to any particular denomination, to appoint trustees to whom land might be conveyed for that purpose. In the revision of the statutes in 1897, the sections dealing with cemetery companies became c. 14 under the title "*Cemetery Companies Act*", while the sections dealing with trustees of undenominational cemeteries were continued in the *Cemeteries Act*, which became c. 15.

In 1908, by c. 10, the *Cemetery Sites Approval Act* was passed, prohibiting the opening of any new cemetery or graveyard for the burial of bodies without the approval of the Board of Health with respect to the site of the proposed cemetery as fit for such purpose. In the revision of 1911, this statute became c. 33 and by subsequent enactment, the Minister of Health was substituted for the Board.

Since the revision of 1911, para. 74 of s. 58 of the *Municipal Act* has read as follows:

For prohibiting the burial of human bodies except in such places and under such conditions as may be authorized:

The original of this provision does not appear to have been in force in 1879 when the *Cemeteries Act* was enacted, but as early as 1896, c. 50 provided, by s. 50(31), for by-laws

of the above character save that instead of the words "as may be authorized", the paragraph read "as the by-law may authorize".

As the predecessor of para. 74 of s. 58 stood prior to 1911, the places where cemeteries might be located and the condition to which they should be subject thus required to be set out in the by-law itself. Any objection of such a character is not now open under the present wording of the paragraph and no argument was put forward by the appellant on the ground of any insufficiency for present purposes of the by-law in question. Indeed, it was assumed that, unless the appellant could succeed in its contention as above, it was prohibited from the intended use of its recently acquired lands.

In my opinion there is no substance in the argument of the appellant. It would require more express language to compel a construction of the *Cemetery Companies Act* to give to the act of an official such as the Registrar of Companies the authority to determine, without regard to the wishes of the municipality concerned, the location of cemeteries within its boundaries. I see no more compelling necessity in the statutory language in the case of such companies than in the case of trustees of undenominational cemeteries, provision for both of which was made in the original statute of 1879.

In my opinion, the *Cemetery Companies Act* does no more than provide the means by which such a corporation may be brought into being and endowed with certain powers, these powers, however, so far as the actual location of a burying ground is concerned, to be subject to the *Municipal Act* as to the consent of the municipality within whose boundaries the cemetery is proposed to be established. That such is the intendment of the provincial legislation is, I think, confirmed by the presence in the statute of para. 73 of s. 58, first enacted in 1945 by c. 52, s. 4. This paragraph reads:

- (73) For entering into agreements with cemetery companies for the provision of cemetery facilities within or without the municipal limits:

If a cemetery company were entitled to locate anywhere within the municipality named in its certificate of incorporation without the consent or approval of the council,

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such a provision as the above, authorizing the latter to enter into an agreement with the company to provide a cemetery in the municipality, would be somewhat incongruous. In my opinion, there is no room for the contention that para. 74 is to be read as excepting such a company from its provisions.

Nor do I think that the provisions of s. 2 of the *Cemeteries Act*, formerly contained in the *Cemetery Sites Act*, prohibiting the opening of any new cemetery without the approval of the Minister of Health, affects the question. The Minister, as provided by the section, gives or withholds his approval from the standpoint of the fitness or otherwise of the site for burial purposes. It is obvious that the interest of the municipality involves other considerations as well in the location of a cemetery.

I do not think it necessary to deal with the contention of the appellant based on derogation of grant. In my view no such question arises.

With regard to estoppel, the appellant contends that although in February, 1951, the respondent took the position it would not then consent to the use of the additional lands for burial purposes, nevertheless by agreeing to the closing of that part of Westminster Avenue which separated the forty acre from the eight acre parcel in consideration of the dedication of the land for a new street running easterly from Westminster Avenue along the northerly boundary of the eight acre parcel, the respondent lost its right to invoke the provisions of the prohibitory by-law.

I do not think this result follows even assuming that the consent of the municipality could be given in such a manner. The appellant, owning both parcels, desired to close the street which separated them. I do not think the agreement above referred to should be construed as involving anything beyond its actual terms or any representation that the respondent would consent to the use as a cemetery of the lands as altered by the amended plan.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *MacInnes, Arnold & McCabe.*

Solicitors for the respondent: *Bell, Munn & Sheppard.*

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