

Section 3 of the Act specifically provides that when the payment provided for in Section 1 of the Act, has been made and when the undertaking provided for in Section 2 of the Act has been entered into, *such lands shall not be entered on the foreclosure list*. No provision is made for taking lands out of the list and I must conclude that if a landowner or lienholder desires to take advantage of the Whittemore Act, he must act before the lands have been entered on the foreclosure list.

I take it that this interpretation of the law fully answers your questions Nos. 2 and 3.

Respectfully,  
 HERBERT S. DUFFY,  
*Attorney General*

333.

HOUSE BILL 226 — CONSTITUTIONALITY CONSIDERED —  
 CEMETERIES—LIMITATIONS.

SYLLABUS:

*Constitutionality of House Bill No. 226 and the proposed amendment thereto, providing for the conduct and regulation of burial and cemetery business, considered.*

COLUMBUS, OHIO, March 26, 1937.

HON. ALFRED L. BENESCH, *Director of Commerce, Columbus, Ohio.*

DEAR SIR: I acknowledge receipt of your recent communication as follows:

"I beg to enclose herewith copy of Senate Bill 226 by Senator Zoul, the purpose of which is to recodify the cemetery laws of Ohio.

One hearing on the bill has been held before the Senate Committee on Judiciary, and several legal questions were raised. I should like to secure your opinion as to the following:

1. Has the State of Ohio the right to place a limitation on the number of cemeteries to be established, and in effect declare that no further cemetery space is required?

2. Under its police power, may the State prohibit entirely operation of cemeteries for profit?

3. Is the enclosed amendment to Senate Bill 226 constitutional?

Inasmuch as the next session of the Judiciary Committee will be held on March 30, I shall be very grateful for your early reply."

House Bill No. 226 with the proposed amendment is too voluminous to set out at length in this opinion. Suffice it to say that it deals with the subject of burials and cemeteries generally.

Section 1 names the act as "General Cemetery Act," and provides that it shall be applicable to all persons, associations, trusts, copartnerships or corporations now engaged in or which shall hereafter engage in any business of a cemetery within the State and it shall apply to all property now or intended to be used for interment of the human dead.

Section 2 is the definitive and explanatory section.

Original Section 3 authorizes the organization of corporations for profit and not for profit to conduct cemetery business. That the charter of such organization shall state specifically whether it is a profit or non-profit corporation. It is further provided in effect that it shall be unlawful to engage in or transact any of the business of a cemetery within this State except by means of a corporation duly organized for such purpose.

It is proposed to strike original Sections 3, 7 and 8 from the bill and insert instead the following:

"No cemetery or burial park shall hereafter be laid out, dedicated or used for the burial or entombment of the human dead, nor shall the cemetery business pertaining thereto be conducted by any agency other than a municipality or other political subdivision of the state, a church, a religious or benevolent society, or a cemetery association incorporated pursuant to the provisions of the General Corporation Act under the sections thereof relating to the organization of corporations not for profit. The sale of burial lots, graves or rights of burial contrary to the provisions of this Act or the sale thereof for speculative purposes, or for any purpose other than the interment or entombment of the dead, is hereby prohibited, and any such sale, or any instrument to make the same effective, shall be void and of no effect. No agency authorized to lay out, own or operate a cemetery or burial ground, shall pay or incur liabilities for lands or property purchased by it in excess of the fair cash market value thereof, nor shall the income of any such agency be applied to the payment of service charges or

operating expenses in amounts exceeding the fair and reasonable worth of the same. Any agreement or contract which violates the provisions of this section is prohibited and any such agreement or contract shall be void for all purposes."

This bill presents a case of superlative regimentation and several provisions are at least questionable.

By the amendment, the cemetery business is limited to a municipality or other political subdivisions of the State, a church, a religious or benevolent society or a cemetery association incorporated pursuant to the provisions of the General Corporation Act under the sections relating to the organization of corporations not for profit. It will be seen that individuals, partnerships, voluntary associations other than those therein named, and corporations for profit, are barred from engaging in the burial or cemetery business.

The question involved here is whether or not this, in effect, amounts to unlawful discrimination or denies to anyone the equal protection of the laws. Suffice it to say that this question is not altogether new in Ohio. The Circuit Court of Lucas County, in the case of *Wachenheimer vs. Toledo & Lucas County Burial Association*, 28 C. C., p. 37, held in effect that a statute conferring upon an organization of the character of a mutual burial association, whether it be regarded as an insurance company or a beneficial society, rights and privileges differing from those bestowed upon other associations doing a similar business, is valid.

True, neither courts nor individuals outside this particular circuit district would be required to follow this decision. But the decision of any Court has its binding effect if well reasoned, and this seems to be a well reasoned case, and I am willing to accept it as law, in the absence of a holding of the Supreme Court of Ohio to the contrary.

It would follow as a converse, that if the General Assembly can invest an association with particular powers, it can deny these particular powers to other associations of a similar nature without running counter to the Constitution, and this is particularly true where the subject being treated of is a police measure. Equal protection of the law means the protection of equal laws.

*State ex rel. Webber vs. Fulton*, 77 O. S., 554.

In the matter of classification, manifestly there must be wide latitude of selection left to the legislature, and it is only when that power of selection has been abused that courts interfere.

*List vs. Burley Growers' Tobacco Association*, 114 O. S. 361.

There is no question but that any business affected with a public interest may be regulated by law. The safety referred to in the definition of the police power, means financial safety as well as personal safety.

"In the interest of public welfare, business, trades and occupation may be so regulated as to prevent extortion, fraud, restraint, monopolistic control of products or prices, etc."

*Wessell vs. Timberlake*, 95 O. S., p. 21;

*Holsman vs. Thomas*, 112 O. S., 397.

It is a well established canon of construction that every reasonable presumption be indulged in favor of the constitutionality of a statute.

*Hirn vs. State*, 1 O. S., p. 15.

and it has been reiterated in hundreds of cases since that time in the different courts of Ohio. The following text is found:

8 Ohio Jurisprudence, Sec. 63, p. 161 et seq.

"Even though a strong presumption operates in favor of the constitutionality of a statute, it is frequently quite difficult to determine the exact line where validity ceases and invalidity intervenes. Certainly, it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts are to be considered void. It is repeatedly held in Ohio that a clear incompatibility between a law and the Constitution must exist before the judiciary is justified in holding the law unconstitutional. The rule as is true in the case of the presumption favoring the constitutionality of legislation has been variously expressed. Thus to invalidate a statute, the courts of this state have declared that the repugnancy between the statute and the constitution must be *plain, clear, substantial, palpable, strong, manifest, obvious, necessary, free from doubt, and incapable of a fair reconciliation.*"

The succeeding section (63) *idem*, page 166, reads as follows:

"As shown above, there is considerable authority in Ohio to the effect that the courts shall resolve all reasonable doubts in favor of the validity of legislation. The presumption of constitutionality continues until the invalidity of an enactment appears, or, as is frequently said, until its invalidity is proved 'beyond all reasonable doubt,' or as sometimes expressed, 'beyond a rational doubt' or 'beyond every substantial doubt.'"

An examination of the authorities cited by the textwriter bears out the legal conclusions to the letter. As has been heretofore said, this bill is an exercise of the police power of the State and as such, there are only two essential inquiries, viz:

1. Is this bill unreasonable, arbitrary or oppressive?

2. Is it reasonably designed to accomplish a purpose falling within the scope of the police power?

*Davis vs. State*, 118 O. S., p. 25.

It is my opinion that as applied to this bill, it is neither unreasonable, arbitrary nor oppressive and it is reasonably designed to accomplish a purpose falling within the scope of the police power of the State.

As I view it, this bill is not a prohibition, but a regulatory measure and it in no wise infringes rights secured by the fundamental law.

We have an instance of "Prohibited Occupation" in Section 8623, General Code, which precludes corporations from engaging in professional business. While I do not find that the question of the constitutionality of this statute has been directly raised in any case, the statute has been considered by the Supreme Court in a number of cases, and in all upheld. I cite two:

*State ex rel. vs. Laylin*, 73 O. S., p. 90;

*State ex rel. vs. Association*, 103 O. S., 677.

Of course, this statute involves a corporation only. A corporation is a child of the State and has just such powers as the State sees fit to give it and which powers are evidenced by its franchise. In law a corporation is an artificial person. The law makes it and the law can unmake it.

The citizen is a natural person and as one of the "people" of the State he has all the rights that have not been delegated to the State by the people. But the citizen lives under a representative form of government. He participates in the selection of representatives to the General Assembly. He consents that his representatives shall legislate for the public welfare. If the public welfare demands that he as an individual shall not follow a particular pursuit granting that such pursuit is perfectly lawful, he must bow to the public welfare. This has been the consistent holding of the federal courts.

This bill is a regulatory measure and I fail to see wherein it is plainly, clearly, palpably and necessarily unconstitutional, from the mere fact that it denies to individuals, partnerships, voluntary associations and corporations for profit, the right to engage therein. There may be some question as to Sections 16 and 17 in that the grantee of a burial lot has imposed upon him or her, by the General Assembly, the right of the consort to burial therein. The section provides that in case of divorce, this right shall not obtain unless it be otherwise provided by the decree.

A man may be living separate and apart from his wife and although not divorced, his feeling toward her might be such that he would not want her buried within a thousand miles of him, but he would have to submit to having her sleep alongside him until judgment day because

the General Assembly of Ohio, or a Court under its authority had said so.

Likewise, the provision against alienability. Without citing the innumerable authorities, it has been universally held that even the legislature has no right to deny to a man or his heirs the right to sell what rightfully belongs to him or them. Of course this feature could be taken care of in the deed or by way of amendment and they are not such integral part of the act as to affect its other provisions.

It is the duty of the living to dispose of the dead. There was little legislation in England on the subject of burial until 1852. From that date until 1885, numerous acts were passed. (See 59 and 60 Vict. c. 14).

It was in these Acts that public health and decency were first considered in connection with burial. Hence, we have precedent that interment shall be subject to the public welfare and laws passed toward that end are in exercise of the police power and unless plainly violative of the Constitution of the State, will be upheld.

Subsequently, burial boards were provided for by statute and their proceedings outlined. Many of the provisions of this Act are facsimiles of the English Acts. Boards were given powers to purchase lands and lay out and embellish them, provide chapels, etc. The Local Government Act of England (1894) was an apparent attempt to simplify the burial laws by providing councils for the establishment, care and maintenance of burial grounds.

A Death Registration Act was passed in 1812 (52 Geo. 3\* c. 146) the purpose of which was to facilitate proof of pedigrees.

The English Burial Acts prescribed rules for the government of boards and councils, raising of funds, and provided forms for the sale and assignment of burial rights. The only essential difference between the English Acts and this proposed act being that the governing board or council was made a body corporate as a matter of law.

England is almost, if not quite, as particular concerning the rights of her citizens, as we are. This Act is constitutional, unless its provisions deprive some citizen of his constitutional rights. There is no question of confiscation of property involved herein, as I see it.

No question of lack of due process.

No question of lack of uniform operation.

No limitation upon the right and power to contract.

No interference with vested rights, as the exceptions provided for in Section 38 of the Act take care of that feature unless perhaps certain persons and organizations who have resorted to the platting and sale of burial lots and rights as a (to use a popular expression) "racket" may be prejudiced. These persons and organizations would have to

resort to a court of equity to recover their *vested rights*, and their dirty hands would preclude recovery.

I take this as a police regulation, and in my opinion it is constitutional except as herein indicated, and such holding answers all your questions.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General*

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334.

APPROVAL—LEASE OF OFFICE SPACE FOR USE BY THE  
SALES TAX SECTION OF THE TAX COMMISSION OF  
OHIO—THE BOODY BUILDING COMPANY OF TOLEDO,  
OHIO.

COLUMBUS, OHIO, March 26, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain lease executed by The Boody Building Company of Toledo, Ohio, in and by which there are leased and demised to the State of Ohio, through you as Director of Public Works, certain premises for the use of the Finance Department, Sales Tax Section of the Tax Commission of Ohio.

By this lease, which is one for a term of one year commencing on the 1st day of January, 1937, and ending on the 31st day of December, 1937, and which provides for a monthly rental of \$60.00, there are leased and demised to the state for the use of the Finance Department, Sales Tax Section of the Tax Commission, certain premises on the third floor of the Ohio Bank Building at the southwest corner of Madison Avenue and St. Clair Street in the city of Toledo, Ohio, and more particularly described as being Rooms Nos. 307 and 308 in said building.

This lease has been properly executed by The Boody Building Company, the lessor, by the hand of the Building Manager. I likewise find that this lease and the provisions thereof are in proper form.

The lease is accompanied by contract encumbrance record No. 35, which has been executed in proper form and which shows that there are unencumbered balances in the appropriation account sufficient in amount to pay the rental under this lease for two months. This is a sufficient