

question not now before us. Under the allegations of the complaint construed favorable to the pleader, a cause of action is stated against the defendants. As sales manager and director of the sales force the plaintiff was not offering for sale or negotiating the sale of defendants' property and was therefore not required to be a licensed real estate broker. The fact that gross sales were made the basis for determining the amount of plaintiff's compensation does not alter the legal relation of the parties.

It is not necessary for us to determine now the nature of the interest which a person acquires by purchase of a lot in a cemetery. It is a difficult and vexed question upon which the courts are greatly divided."

While there is a conflict of authority as to the nature of the interest which a purchaser of a cemetery lot acquires, there seems to be no doubt but that it is an interest in real estate rather than personal property and consequently would be subject to the provisions of Sections 8510 and 6373-25, General Code.

Answering your questions, therefore, I am of the opinion that:

1. A burial lot in a cemetery owned by a cemetery association can be conveyed only by a deed executed in accordance with Section 8510, General Code.

2. Brokers and salesmen who sell for compensation cemetery lots are subject to the provisions of the General Code relating to real estate brokers and real estate salesmen.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5447.

TOWNSHIP CEMETERY—TOWNSHIP TRUSTEES MAY REQUIRE COST OF DIGGING GRAVES BE PAID IN ADVANCE—EXCEPTIONS.

*SYLLABUS:*

*Township trustees may legally require in their rules and regulations concerning a township cemetery under their jurisdiction that all work done, such as the digging of graves, be paid for in advance or before burial is made, excepting in the cases of burial of indigent persons who, under the last sentence of section 3447, General Code, and section 3495, General Code, are required to be buried at the expense of the township.*

COLUMBUS, OHIO, May 2, 1936.

HON. JOHN M. KIRACOFE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR: Your recent inquiry reads:

"The trustees of Washington township, Preble county, Ohio, have requested that I get your opinion on the following question:

Have the trustees a legal right to require, in their rules and regulations concerning Cemeteries over which they have charge, all work such as the digging of graves, to be paid for in advance or before burial is made, excepting, of course, indigent cases wherein the township must provide burial?

Such a rule has recently been passed by these trustees and as yet no test has come but they feel that your opinion would be appreciated as to its legality."

Sections 3441 et seq., General Code, relate to township cemeteries, and from your communication, I assume that the subject matter of your inquiry involves a township cemetery.

Section 3447, General Code, provides as follows:

"The trustees shall have such cemetery laid out in lots, avenues and paths, number the lots and have a suitable plat thereof made, which shall be carefully kept by the township clerk. They shall make and enforce all needful rules and regulations for its division into lots, and the allotment thereof to families or individuals, and for the care, supervision and improvement thereof, and they shall require the grass and weeds to be cut and destroyed at least twice each year in all such cemeteries. Suitable provision shall be made therein for persons whose burial is at the expense of the township."

It will be observed that the foregoing section authorizes township trustees to make all the needful rules and regulations for the supervision of a township cemetery within their township.

In Opinions of the Attorney General for 1929, Vol. II, page 1210, my immediate predecessor held, as disclosed by the first paragraph of the syllabus of an opinion:

"Under the provisions of Section 3447, General Code, township trustees may make rules and regulations to the effect that only a sexton or caretaker having a contract with the township

trustee for such purposes may participate in digging graves in such a cemetery.”

After quoting section 3447, General Code, *supra*, the then Attorney General stated at page 1211:

“From the section above quoted and other related sections, it appears to be clear that the township trustees are charged with the control and management of township cemeteries. Under Section 3464 authority is given to township trustees to appoint three directors to take charge of any cemeteries in the township under their control. When and if such directors are appointed, it would seem they perform the same duty with reference to management of cemeteries as are required of township trustees.

In view of the duties imposed upon the township trustees, by implication, undoubtedly they have the right to employ some person to supervise and care for the cemeteries. While there seems to be no express authority authorizing such employment, under the well known rules of construction to the effect that such a board has sufficient implied power to carry into effect the express powers granted, I have no difficulty in reaching the conclusion that township trustees may employ a sexton or caretaker under a contract in the manner set forth in your communication. Inasmuch as Section 3447, *supra*, expressly authorizes township trustees to make all the needful rules and regulations for the supervision of such cemetery, I am inclined to the view that they may provide that graves should be dug by the person so employed, or under his supervision. *In other words, it would seem to be obvious that the method employed in digging graves is a proper subject for regulation by the management of such a cemetery.*” (Italics the writer’s.)

If, as stated in the foregoing opinion, the method employed in digging graves in a township cemetery is a proper subject for regulation by the supervisors of such cemetery, under the language of section 3447, General Code, *supra*, it seems to me that the provision for method to be employed in payment for the services of a person in the digging of such graves is equally a proper subject for regulation under such language of section 3447, General Code.

In the case of Cedar Hill Cemetery Company vs. Lees, Appellant, 22 Pennsylvania Superior Court Reports, 405, decided on March 12, 1903, by the Superior Court of Pennsylvania, the court had under consideration the reasonableness and validity of a regulation and by-law of a cemetery association, which provided as follows:

"Lot owners and others, who desire to have their lots and graves sodded, grass cut, flowers and shrubbery planted or trimmed, must apply to the superintendent who will see that the work is performed in a satisfactory manner *and to whom the charge for the work done must be paid previous to the work being done*, taking his receipt for the same; and if not satisfied with the same after completion, or the same not being done according to order, must make complaint within thirty days at the office of the company, when the trustees will see that the default is remedied without delay." (Italics the writer's.)

At page 410, the court stated:

"1. It is not denied that the plaintiff company has full authority to make all reasonable rules and regulations for the government of its cemetery, but the principal ground upon which the validity of the by-laws referred to is attacked *is that of their unreasonableness.*" (Italics the writer's.)

The court then reasoned that a person's ownership of a lot in a cemetery is in the nature of an easement only, to make interments in the lot and the persons in charge of the cemetery retain the right to make reasonable rules to preserve the rights of the cemetery and other lot owners, and concluded at page 411:

"Upon all grounds, therefore, it seems to us clear that the by-laws are not only reasonable but necessary to efficiency and successful administration."

It may here be pointed out that the Ohio courts seem to be in line with such conclusions. For in the case of *Smiley v. Bartlett*, 6 C. C. 234, the court held as shown by the third paragraph of the syllabus:

"The right of burial in a public or church cemetery though conveyed by grant is nevertheless an easement only."

Moreover, in the case of *Fraser v. Lee*, 8 O. App., 235, the court held, as disclosed by the first paragraph of the syllabus:

"1. The disposal of the dead, from motives of sanitation and health, is a state function. The state, by legislative enactment, has given exclusive and complete control thereof to municipalities within the territorial limits of each."

While the latter case involved a municipal cemetery, the same legal principles are applicable to township cemeteries. At page 239 of the Fraser case the court said:

“It is clear from a careful reading of this chapter that the deed authorized to be given to a purchaser of a burial lot conveys only the right of burial therein, and constitutes only an easement of burial.”

Furthermore, the provisions of section 3450, General Code, are pertinent. Such provision reads:

“No lot held by any individual in a cemetery in any case shall be levied on or sold on execution.”

Inasmuch as the security which might be otherwise available to meet the cost of work done in connection with a lot in a township cemetery does not exist under the foregoing statutory provision, it would seem arguable that the regulation about which you inquire would be reasonable for the protection of the cemetery, the payment of the cost of maintenance of which comes partly from payment of fees by lot owners for personal services rendered in connection with the cemetery.

While the foregoing Cedar Hill Cemetery Company case involved a by-law made by a private cemetery association, and your instance involves a proposed rule for a public township cemetery, I am unable to see where such factor would differentiate the court's conclusion in the aforementioned case.

Section 3447, General Code, specifically gives the township trustees authority to make needful rules and regulations, and as in the Cedar Hill Cemetery Company case, *supra*, the only question is as to whether such rule, being conceded to come within the scope of the said delegation of rule making power by the legislature, is a reasonable regulation. The court in the foregoing case, as already stated, did specifically hold a similar rule reasonable.

I am therefore of the opinion, in specific answer to your question, that township trustees may legally require in their rules and regulations concerning a township cemetery under their jurisdiction that all work done, such as the digging of graves, be paid for in advance or before burial is made, excepting in cases of burial of indigent persons who, under the last sentence of section 3447, General Code, and section 3495, General Code, are required to be buried at the expense of the township.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*