

571.

CORPORATION—ORGANIZATION FOR OPERATING CEMETERY FOR
PROFIT UNAUTHORIZED—POWER OF FOR-PROFIT COMPANIES
TO ACT AS AGENTS FOR CEMETERY ASSOCIATIONS.

SYLLABUS:

1. *Under the decisions of the courts in the cases of Frey vs. Nowlin, 19 N. P. (N. S.) 484, and State ex rel. vs. Meyer, 19 Ohio App. 436, there now exists no authority for the organization of a corporation for profit for the purpose of operating and maintaining a cemetery.*

2. *Corporations may be organized for profit under the General Corporation Act for the purpose of laying out, platting and improving cemeteries by landscaping, erecting buildings thereon, or otherwise, for cemetery associations organized not for profit, and also for the purpose of selling cemetery lots or crypts for such not-for-profit associations.*

COLUMBUS, OHIO, June 28, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“During recent months this department has received numerous requests for information as to whether or not it is possible to incorporate a corporation for profit purposed for cemetery purposes. The department has advised that a cemetery association must be incorporated not-for-profit. However, there is the further question as to whether or not a corporation can be formed for profit in the nature of a holding company working in conjunction with a not-for-profit cemetery association. The general plan of such corporation is outlined in the case of *State versus Meyer, 19 Ohio App. 436*. Although in that case the holding company or association was not incorporated.

You will find herewith letter from former Attorney General F. S. Monnett, which discusses and raises certain questions. Please return Mr. Monnett's letter.

In particular your opinion is requested as to whether or not a for profit corporation can be formed for cemetery or mausoleum purposes, also whether or not a for profit corporation may be incorporated whose sole purpose is that of providing a vehicle for taking profits in a cemetery association.

Your early reply is requested.”

The letter enclosed with your communication is as follows:

“I desire to have your construction, of the right of the Secretary of State to issue a certificate of incorporation, for profit, to a corporation to engage in the business of conducting and maintaining a cemetery for profit.

Whether a corporation organized for profit can own real estate, and erect a mausoleum thereon, and buy and sell the crypts for profit in the face of the strict limitations of the statutes for corporations to acquire and hold lands for cemetery purposes.

Cemetery purposes, as defined by the statute, and by the text-books, would necessarily include a building used for burial purposes and a plat of ground in which there are graves and mausoleums.

In the case of *Frey vs. Nowlin, 19 N. P. (N. S.) 484*, the court held

that the restrictions for cemetery purposes cannot be enlarged so as to permit a corporation for profit to engage therein.

In the case of *State vs. Meyer*, 19 Ohio App. 436, the court uses the term 'cemetery purposes' and construes the cemetery statutes, which would indicate that a corporation for profit could not hold land for cemetery purposes in the way of a mausoleum.

The public policy flowing from the historical purposes for which burial grounds are used would all prohibit the ownership of such plats of ground for such purposes of a corporation for profit.

Under Sections 10093 and 10119, General Code of Ohio, there are none of the restrictions incident to such investments, to conserve the perpetuity of the institution.

Such a corporation, for profit, would be subject to taxation. There would be no profit except at the temporary time while filling the vaults with bodies. There is nothing to bring in an income to pay taxes. There is no limitation as to what assets they should invest their surplus. There is nothing to prevent, not only a very early bankrupt, but a revocation of the charter under the general statute, when they fail to pay their many debts or fail to pay taxes.

To my notion, it is against the spirit of the statute, and against public policy to deceive patrons in this way."

Considering, first, your inquiry as to whether or not a corporation may be organized under the laws of Ohio as a corporation for profit for cemetery or mausoleum purposes, it is expressly provided in Section 8623-3, General Code, being part of the General Corporation Act, that a corporation for profit may be formed under that act for any purpose or purposes for which natural persons lawfully may associate themselves. There are only two exceptions set forth to this grant of privilege, first, that a corporation for profit may not be formed under the General Corporation Act for carrying on the practice of any profession, and, second, that a corporation for profit may not be formed under the General Corporation Act in case there are made in the General Code special provisions for the filing of articles of incorporation of designated classes of corporations. There appears to have been made in the General Code no special provision for the filing of articles of incorporation of corporations organized for cemetery or mausoleum purposes, so that in so far as the provisions of Section 8623-3 are concerned, it would appear that a corporation may be organized for such purpose under the General Corporation Act for profit.

Section 8623-97, General Code, being part of the General Corporation Act, provides that a corporation not for profit may be formed under that act for any purpose or purposes not involving pecuniary gain or profit for which natural persons may lawfully associate themselves. There is one exception to this grant of privilege contained in this section, which is that where the General Code makes special provision for the filing of articles of incorporation for designated classes of corporations not for profit, such corporation shall be formed under such provisions and not under the General Corporation Act. As previously stated, there appears no provisions for the filing of articles of incorporation of corporations organized for cemetery or mausoleum purposes other than in the General Corporation Act, so that, in so far as this section is concerned, a corporation may be organized not for profit under the General Corporation Act for cemetery or mausoleum purposes.

Section 8623-132 of the General Code, being also part of the General Corporation Act, provides as follows:

"When special provision is made in the General Code for the incorporation, organization, conduct or government of corporations formed for

any specified purpose, this act shall not apply, but the special provision shall govern unless it clearly appears that the special provision is cumulative."

Sections 10093 to 10119-1, General Code, inclusive, contain special provisions for the conduct or government of cemetery associations. These sections are contained in Title IX, Division VI, Chapter 7 of the General Code, and constitute this entire chapter headed "Cemetery Associations." Title 9 is a provision of the General Code relative to private corporations. Division VI is made up of seven chapters under the heading "Corporations not for profit." It would appear, therefore, that in so far as corporations organized for cemetery purposes not for profit are concerned, special provision is made in the General Code for the conduct or government of such corporations and therefore, under Section 8623-132, the General Corporation Act shall not apply except when it is clear that such special provisions are cumulative.

The question with which we are concerned, however, is whether or not these provisions of Chapter 7, Division VI, Title 9 of the General Code, under the heading of "Corporations not for profit" were enacted or are applicable to corporations for profit, and whether or not there is any statutory inhibition as to corporations being organized for cemetery or mausoleum purposes as corporations for profit. Unless special provision is made in the General Code for the incorporation, organization, conduct or government of profit corporations formed for cemetery or mausoleum purposes, and unless such special provisions are not cumulative, the provisions of the General Corporation Act, and in this case particularly Section 3 thereof, authorizing corporations for profit, shall apply.

The first paragraph of Section 10093 is as follows:

"A company or association incorporated for cemetery purposes may appropriate or otherwise acquire and may hold, not exceeding six hundred and forty acres of land; also, take any gift or devise in trust for cemetery purposes, or the income from such gift or devise according to the provisions of such gift or devise, in trust, all of which shall be exempt from execution and from being appropriated for any other public purpose, and shall be exempt from taxation, if held exclusively for burial purposes, and in no wise with a view to profit."

The second paragraph of this section provides for the sale of unsuitable lands and the application of the proceeds by the *trustees* of *such* company or association, the reference being presumably to a corporation not for profit.

Section 10095 provides for the acquisition of lands by appropriation, but makes no reference to corporations for profit or corporations not for profit. It clearly refers to the power of appropriation contained in the preceding section granted to such company or association.

Section 10096 provides for the location of land appropriated by an *association* incorporated for cemetery purposes or by benevolent or religious societies. It should be noted that even prior to the enactment of the General Corporation Act corporations for profit were not authorized or referred to as "associations" but only as companies or corporations. Section 8625 provided that the name of corporations organized for profit must begin with the word "the" and end with the word "company," "corporation," "incorporated," or "inc." Corporations not for profit were referred to as "associations." See Sections 8651 and 8652, General Code, as in force prior to the enactment of the General Corporation Act. Section 8660 expressly provided that the corporate powers, business and powers of corporations shall be exercised by a board of directors, or, if there is no capital stock, by the board of trustees. Section 8655 provided for the election of five trustees of corporations not for profit. The

provision for directors in the case of corporations for profit and trustees in the case of corporations not for profit still apply under the General Corporation Act. The reference, therefore, in Section 10093 to the *trustees of such* company or association can only be to corporations not for profit. Throughout this chapter appears reference to "such company or association" and to "trustees." Only in Section 10108 is there any reference to directors. This is apparently an all inclusive provision relating to cemetery day and night watchmen. I am inclined to the view that, excepting perhaps Section 10108, the entire chapter relates only to corporations not for profit.

There appears no provision in Chapter 7 of Division 6, Title 9, General Code, which division, as previously mentioned, is headed "Corporations not for profit," to the effect that a corporation organized for cemetery or mausoleum purposes may not be organized for profit. Does the fact that these provisions have been enacted governing such corporations not for profit preclude the organization of such corporation for profit, in the absence of any express inhibition? A consideration of the other six chapters of the division becomes pertinent and very enlightening.

In Chapter 1, under the heading "Salvage," it is expressly provided in Section 9873 that a corporation not for profit may be organized under the General Corporation laws and, as hereinafter provided, for the purpose of discovering and preventing fires, etc. Section 9875 provides what the articles of incorporation of such a company shall contain and further provides that "except as in this chapter provided, such company shall be subject to the general corporation laws of this state." The stipulation that a salvage company shall be subject to the general corporation laws, except as in chapter 1 provided, would undoubtedly preclude the organization of such company for profit, on account of the fact that Section 9873 expressly provides that such corporations may be organized not for profit. Chapter 2 provides for the organization of agricultural societies and, like Chapter 7, relating to cemetery associations, contains no provisions for filing the articles of incorporation of such corporations. There are express provisions relative to the conduct or government of corporations organized as agricultural societies not for profit, as in the case of cemetery associations organized not for profit.

In the case of *State ex rel. vs. Kerns, Auditor*, 104 O. S. 550, consideration was had of whether or not an agricultural society incorporated for profit, but which had in fact operated as a corporation not for profit, was entitled to financial assistance available, under Section 9880-1, to such corporations not for profit. The question of whether or not a corporation so purposed may be organized for profit in view of the express provisions of Chapter 2, applicable to such corporations not for profit, was not before the court. However, in the opinion of the court at page 554, it was apparently recognized that corporations could be formed for such purpose for profit. The following language is indicative of this recognition:

"On the other hand, if it be assumed that the company was at one time properly organized as a corporation for profit and that it is therefore impossible to change its character, or if it be assumed that it is at the present time, as claimed by counsel for defendants in error, a *de facto* corporation for profit, it is difficult to find any statutory bar to its being given the aid provided for independent agricultural societies. * * * * ."

Chapter 3 contains provisions for the conduct or government of corporations organized for the purpose of promoting education, religion, morality or the fine arts. There are no provisions in this chapter for the filing of articles of such corporation.

Section 9980 provides that the board of trustees of a university or college in this state, organized as a stock corporation and not under ecclesiastical patronage, may surrender and cancel its outstanding shares and upon the performance of other re-

quirements therein set forth "shall continue its corporate existence as a corporation not for profit." It is apparently recognized here that such corporations may be organized for profit. The number of business colleges, schools and institutions of this nature which are incorporated for profit are so numerous as to preclude any contention that the mere provision in the General Code for such corporations not for profit, shall preclude there being organized for such purposes corporations for profit.

Chapter 4 refers to religious and benevolent corporations and expressly provides for the filing of articles of such corporations. Clearly, therefore, under the provisions of Section 8623-3 and Section 8623-97, General Code, there is no authority for the incorporation for such purposes except under this chapter (4).

Chapter 5, providing for humane societies, is subject to the same comment as just made upon Chapter 4, relating to religious and benevolent corporations.

Chapter 6 relates to charitable trusts and under the provisions of Section 10086, providing for the filing of articles of incorporation of such companies, is subject to the same comment as Chapters 4 and 5, just mentioned.

In view of the fact that in the case of *State ex rel. vs. Kerns, Auditor*, commented upon above, the Supreme Court of Ohio has recognized that agricultural corporations may be incorporated for profit, provisions for which are made the same as in the case of cemetery associations, it cannot be said that the mere fact that the Legislature has made special provisions for the conduct or government of corporations of a designated class, organized not for profit, therefore such a corporation may not be organized for profit, when the Legislature has made no provision for the filing of articles of such corporation and has not expressly provided that a corporation so purposed shall be subject to the special provisions applicable to such corporations not for profit.

A consideration of other sections of the General Code, relative to the exemption from taxation of lands used as burial grounds, does not clarify the question. Section 5350, General Code, provides as follows:

"Lands used exclusively as graveyards, and grounds for burying the dead, except such as are held by a person, company or corporation with a view to profit, or for the purpose of speculating in the sale thereof, shall be exempt from taxation." (Italics the writer's.)

It could be said that the Legislature has here recognized that burial grounds may be held by a corporation for profit.

In the case of *Cemetery vs. Brooks*, 8 O. C. C. 439, this section was under consideration in passing upon the question as to whether or not certain lands held by a cemetery association not for profit were taxable. In view of the fact that certain lands held by cemetery associations incorporated not for profit may be in some instances taxable, it could hardly be said that Section 5350 was indicative of the legislative intent that such lands may be held by a corporation organized for cemetery purposes for profit.

Section 5362, General Code, is as follows:

"Real estate held or occupied by an association or corporation, organized or incorporated under the laws of this state, relative to soldiers memorial associations, monumental building associations, or cemetery associations or corporations, which in the opinion of the trustees, directors or managers thereof, is necessary and proper to carry out the object intended for such association or corporation, shall be exempt from taxation." (Italics the writer's.)

It could be said that here is an expression of a legislative intent indicative of the

fact that the object of all cemetery corporations shall be one not for profit. As previously stated, however, the sections relative to the exemption from taxation of lands held exclusively for burial purposes throw no clear light on the question of whether or not a corporation may be organized for such purposes for profit, and are rather contradictory.

The authorities outside of Ohio on the question appear to be in conflict. As stated in 11 Corpus Juris, p. 53:

"In some jurisdictions, the declared policy of the law prevents the organization of cemetery associations, to be conducted for the purpose of profit either to the corporations or to its members. In other jurisdictions, associations may be either charitable or for the purpose of making a profit for their shareholders from the sale of burial lots."

There appear to be only two cases directly in point in Ohio. In the case of *Frey, et al., vs. Nowlin, et al.*, 19 N. P. (n. s.) 484, decided in the Common Pleas Court of Franklin County, March 1, 1917, the first branch of the syllabus is as follows:

"The restrictions found in the Ohio statutes render it impossible that a private corporation should engage in the business of platting, conducting and maintaining a cemetery for profit."

In the opinion of the court, at page 488, appears the following:

"Such corporations are not permitted to use their income as are ordinary private corporations. Nor are they permitted to incur debts except in the original purchase of the land, and in laying out, inclosing and embellishing the grounds and avenues, these being limited as provided by Section 10098. Lands thus acquired are forever committed to public burial purposes, being exempt from taxation, execution, attachment or lien. Burial lots sold by such companies or associations shall be sold for interments, *and in no wise with a view to profit.* Section 10101.

The law does not contemplate that they shall be sold in 'job lots' long in advance of intended use, with a primary purpose of profit (Section 10101), as Mr. Nowlin admits is his purpose.

Section 10109 provides that:

'No part of the proceeds of land sold, or of the funds of such company or association, shall ever be divided among its stockholders or lot owners. All its funds must be used exclusively for the purposes of the company or association, as hereinabove specified, or invested in a fund the income of which shall be so used and appropriated.'

The manner of holding and investing the money is regulated by statutes (Sections 10118, 10119). Clearly this shows that lands cannot be held and sold by a corporation for profit with a view to the profit of its stockholders.

Corporations may be organized for profit, and not for profit. According to Section 8623 of the code, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves. Natural persons cannot acquire, own and maintain a private cemetery for their profit. Restrictions prescribed by Sections 10097, 10102, 10109, 10118 and 10119 clearly make it impossible to incorporate a private corporation for profit for the purpose of engaging in the business of laying out, conducting and maintaining a cemetery."

The opinion refers to Section 10101, as authority for the statement that "burial lots sold by such companies or associations shall be sold for interments, *and in no wise with a view to profit.*"

Section 10101 provides as follows:

"Burial-lots sold by such company or association shall be for the sole purpose of interments, be subject to the rules prescribed by the company, or association, and be exempt from taxation, execution, attachment, or any other claim, lien or process whatever, if used exclusively for burial purposes, in no wise with a view to profit."

The only reference in this section to the matter of profit is to the effect that if used exclusively for burial purposes and in no wise with a view to profit, such burial lots shall be exempt from taxation, etc. Section 10109, cited by the court, refers to the application of receipts and income of such a company or association, the reference being clearly to a corporation not for profit. The court in this case based the holding that a cemetery company may not be incorporated for profit upon the further reasoning that individuals may not associate themselves for such purpose. As stated on page 488:

"Natural persons cannot acquire, own and maintain a private cemetery for their profit."

The other case referred to is the case of *State ex rel. vs. Meyer*, 19 O. App. 436, decided January 24, 1925, the syllabus of which is as follows:

"It is a fundamental principle of law that in the absence of a statutory prohibition, an individual may engage in and conduct any legitimate business without legislative assent.

In Ohio a natural person or any association of them (not a corporation) may own and operate a cemetery for profit, subject to the regulations which may be enacted by the state in the reasonable exercise of its police powers."

In holding that a natural person or any association of them may own and operate a cemetery for profit, the court of appeals has overruled the Frey case, *supra*, to the extent that it can no longer be said that corporations may not be organized for profit for cemetery purposes because natural persons may not associate themselves for such purposes.

The question of whether or not a corporation may be organized for profit for cemetery or mausoleum purposes was not before the court in this case. However, the wording of the opinion of the court is decidedly pertinent as to this point. At page 450, the following language is used:

"It is true, of course, that the legislative branch of our government, in the proper and reasonable exercise of its police powers, may and has passed certain regulations in regard to the use of land for cemetery purposes, but it nowhere has prohibited individuals, or an association of them, from devoting privately owned real estate to cemetery purposes, *and it is a fundamental principle of law, well recognized and fully established, that in the absence of a statutory prohibition, an individual may engage in and conduct any legitimate business without legislative assent.*

The fact that the Legislature has given the power to individuals to organize a corporation for any purpose for which natural persons may law-

fully associate themselves (except for professional business), does not deprive natural persons of the rights which they previously possessed, nor militate against the use of the same by them, and in so doing the Legislature has given to corporations thus organized the right to conduct and operate any business which natural persons had a right to do, and not otherwise."

A reading of the opinion of the court up to this point would at least raise the presumption that the court is here ready to state that cemetery corporations may be organized for profit. However, the opinion of the court continues as follows:

"The corporation law of this state therefore gives the right to individuals to organize and operate a cemetery corporation not for profit, which right a natural person always has had and still possesses, and the fact that this right has also been given to corporations by the Legislature, does not thereby take such right away from natural persons.

Further, the Legislature has not yet been fit to permit cemetery corporations to be organized for profit, but it likewise has not seen fit to prohibit individuals from exercising the natural rights which they have always had so to do, leaving the question whether they desire to engage in such business to be decided by the individuals themselves.

If the fact that the Legislature has seen fit to permit all kinds of corporations to be formed for all kinds of purposes would establish a public policy which would take from natural persons the rights which they had always formerly possessed, then little or no business could be done in this state by natural persons, except in the professions, because private and public corporations are now formed everywhere to do those things which formerly only natural persons did.

We are therefore unanimously of the opinion that a natural person, or an association of persons (not a corporation), may, subject to the regulations which have been passed by the Legislature of this state under its police power, own and operate a cemetery for a profit, or otherwise, as they may see fit."

Although the question of whether or not a cemetery corporation may be organized for profit was not before the court of appeals, by way of obiter dicta the court has expressly stated that "the Legislature has not yet seen fit to permit cemetery corporations to be organized for profit." There is no reason stated for this conclusion and there is no section of the General Code cited or referred to indicative of a lack of authorization to incorporate for such purpose for profit. The court has stated the Legislature has given the power to individuals to organize a corporation for any purpose for which natural persons may lawfully associate themselves and has held in this case that natural persons may lawfully associate themselves to own and operate a cemetery for profit.

I am frank to say I have been unable to discover any definite legislative provisions upon which to predicate an opinion to the effect that corporations may not be organized for profit for cemetery or mausoleum purposes. Irrespective of that fact, however, and in accordance with the policy of this office, until the question has been further adjudicated I cannot do other than advise you that, in the light of the Frey and Meyer cases, you have no authority to file articles of incorporation of a corporation organized for the purpose of operating and maintaining cemeteries or mausoleums under the General Corporation Act for profit.

Coming now to your second question, you inquire whether a for-profit corporation may be incorporated for the sole purpose of providing a vehicle for taking profits in a cemetery association. I am further advised that this question has arisen on

account of the recent practice of organizing corporations for profit for the purpose of constructing mausoleums and promoting cemetery projects. The activities of such corporations are largely confined to the acquisition of land suitable for cemetery purposes, the organization of cemetery associations not for profit, to which association such land is conveyed under an agreement whereby the corporation for profit is to have the exclusive right to develop the property and sell lots and crypts as agent. The association not for profit is organized to operate and maintain a particular cemetery or mausoleum. The for-profit corporation then contracts with the cemetery association to improve the property and sell the lots or crypts. It appears that such corporations organized for profit are not engaged in operating or maintaining a cemetery but are rather agents of such cemetery associations organized not for profit, employed for the purpose of improving the property and selling the lots or crypts under contract. To hold that a corporation may not be organized to contract with cemetery corporations for such purposes would be to say that a corporation for profit may not engage in the construction business and erect buildings for corporations not for profit.

The mere fact that a profit corporation, engaged in the business of laying out and improving cemeteries and selling lots and crypts, causes the non-profit cemetery association to be organized, does not change the character of the business of the profit corporation. As an illustration, contractors specializing in hotel construction may devote considerable attention to the promotion of hotel projects by causing hotel companies to be organized in various towns. Such contractors do not thereby subject themselves to the laws relating to innkeepers, on the theory that they are operating and maintaining a hotel. Consequently, this for-profit corporation that promotes a cemetery association for the purpose of constructing a mausoleum, and roadways, etc., is not subject to the laws relating to those corporations that operate and manage cemeteries. As to selling lots or crypts for a cemetery association, which this for-profit company has caused to be incorporated, the situation is no different. A security house may promote numerous projects for the express purpose of selling the securities, but such activities do not constitute the security dealer as other than a security dealer. A manufacturing corporation would be unable to function without capital usually procured from the sale of its securities. A private cemetery or mausoleum would be in the same position if none of its lots or crypts were sold. There is unquestionably no inhibition against the organization of corporations for profit for the purpose of contracting with cemetery associations organized not for profit to act as agent of such associations in improving cemetery property by the erection of mausoleums, landscaping, etc., and selling lots and crypts under contract for such cemetery associations.

In conclusion, and in specific answer to your questions, I am of the opinion that :

1. Under the decisions of the courts in the cases of *Frey vs. Nowlin*, 19 N. P. (n. s.) 484, and *State ex rel. vs. Meyer*, 19 Ohio App. 436, there now exists no authority for the organization of a corporation for profit for the purpose of operating and maintaining a cemetery.

2. Corporations may be organized for profit under the general corporation act for the purpose of acquiring lands for cemetery purposes, laying out, platting and improving such lands by landscaping, erecting buildings thereon, or otherwise, for cemetery associations organized not for profit, and also for the purpose of selling cemetery lots or crypts for such not-for-profit corporations.

Respectfully,

GILBERT BETTMAN,

Attorney General.