

5446.

BURIAL LOT—CEMETERY ASSOCIATION—CONVEYED BY DEED ONLY—SALESMEN MUST BE LICENSED BY REAL ESTATE BOARD.

SYLLABUS:

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.*

COLUMBUS, OHIO, May 2, 1936.

HON. DONALD J. HOSKINS, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: I acknowledge receipt of your communication in which you ask the following questions concerning a deed whereby a cemetery association conveys to the grantee, his heirs or assigns, the right and license to make burials in a certain described cemetery lot:

“1. Is the interest conveyed an interest in real estate such as requires a deed to pass title to real estate?”

2. Are salesmen who are employed on a commission basis by a real estate company who sell such above described ‘interests’ subject to the provisions of the General Code of Ohio relating to real estate brokers and the necessity for them to obtain licenses?”

Section 8510, General Code, reads as follows:

“A deed, mortgage, or lease of any estate or interest in real property, must be signed by the grantor, mortgagor, or lessor, and such signing be acknowledged by the grantor, mortgagor, or lessor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. Such signing also must be acknowledged by the grantor, mortgagor, or lessor before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor, or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written or printed, and subscribe his name thereto.”

Section 6373-25, General Code, provides in part :

“As used in this act :

‘Real estate broker’ means a person, firm or corporation who, for a commission, compensation or valuable consideration, sells, or offers for sale, buys, or offers to buy, negotiates the purchase or sale or exchange of real estate, or leases, or offers to lease, rents, or offers for rent, any real estate, interest therein or improvement thereon, for others.

‘Real estate salesman’ means a person, who for a commission, compensation or valuable consideration, is employed by a licensed broker, to sell, or offer for sale, or to buy, or to offer to buy, or to lease, or to offer to lease, rent, or offer for rent, any real estate, interest therein or improvement thereon.

* * *

* * *

* * *”

The answer to both of your questions depends upon whether a purchaser of a cemetery lot acquires an interest in real estate. The laws relating to the sale of real estate must be construed in the light of the obvious purpose for which they were enacted, namely the protection of the public. *Mapes v. Foster*, 266 Pac., 109 (Wyo.).

It is well settled that one who purchases a burial lot, even though it be by deed absolute in form, does not acquire a fee simple title thereto but only an easement or license which is the right to the exclusive use of the lot for burial purposes so long as the ground remains a cemetery, subject, of course, to the police power of the state or of the municipality.

The following statutes with reference to cemeteries and burial lots show an indication of an intent on the part of the legislature that the owner of a burial lot does have an interest in real estate. Section 3448, General Code, provides for the sale of lots by township trustees, and execution of the deeds therefor. Section 4201, General Code, relating to union cemeteries, provides for the execution of conveyances of burial lots. Section 10098, General Code, provides for the conveying of burial lots by cemetery associations. Section 4200, General Code, reads as follows :

“The rights and titles of lot owners, purchased prior to such sale and conveyances, shall not be questioned, and such lot owners shall continue to hold and occupy their lots, under such rules and regulations as shall be adopted for the government and regulation of the cemetery by the authorities making the purchase.”

Section 10113, General Code, reads as follows :

“All rights of lotowners in the cemetery grounds of the original association are reserved and assured to them, and made valid, without reference to the form of conveyance issued to them by the trustees of the original association.”

The last paragraph of Section 10119-1, General Code, reads as follows:

“All rights of lot owners in the cemetery ground of the original association shall not be affected by this section or by any action taken under the terms hereof.”

Section 9994, General Code, reads as follows:

“A holder of a burial privilege who did not appear in such proceeding, and who has not waived his right to receive compensation for it, may assert his right to receive from such society or corporation, compensation therefor, within five years after the final entry of such proceedings.”

This last section shows that the owner of a burial lot has a property right which has a value. The fact that it is subject to the police power of the state does not prevent its having value. The public health is intimately affected in case of burials and private property is always subservient to the public welfare and under the Constitution no compensation is required to be made by reason of the fact that a state or municipality orders the discontinuance of a cemetery in the exercise of its police power.

Section 4165, General Code, provides as follows:

“The director shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein.”

There is a conflict among the authorities as to whether the owner of a burial lot is the owner of an easement or a license, and one annotator has suggested that the authorities might be reconciled by saying that such an owner has a base or conditional fee in the lot. 67 L. R. A., 119.

The case of *Pitcairn v. Cemetery*, 229 Pa, 18, holds that it is an estate in fee with restrictions.

In this state, it has been held that the right is an easement. *Smiley*,

et al. v. Bartlett, et al., 6 C. C., 234; Fraser v. Lee, 8 O. App., 235; 7 O. Jur., 31. If it is an easement, then it is certainly an interest in real estate, because an easement is an interest in land. 27 C. J., 195; 25 R. C. L., 558; 19 O. Jur., 59. And this includes the right of burial. 27 C. J., 195; Matter of O'Rourke, 34 N. Y. S., 45. If it is a license, it is nevertheless an interest in real estate, unless it is a license only personal to the licensee, which cannot be transferred, which dies with the licensee, and which is revocable at the pleasure of the licensor. On the other hand, licenses which are coupled with an interest in land and affect the right of the owner to its exclusive possession are interests in real estate. 27 C. J., 216, 217. The cases holding that the right is a license hold that it is a license of the latter character. In other words, that it is a license to make burials in the lot purchased exclusive of others so long as the grounds remain a cemetery. The authorities are uniform that such right may be conveyed and that upon death of the owner whatever title or right he has passes to his heirs. In the case of Fraser v. Lee, 8 O. App., 235. the court said the following in the opinion:

“* * * Whether that deed was in form absolute on its face, or otherwise, Potter acquired no greater right than that of burial, ornamentation and erection of monuments. When he died his wife succeeded to just such interest in the land as her husband had. When Mrs. Potter transferred by paper writing, duly recorded in the records of the cemetery, her title or interest in the lot and vault to Mrs. Taylor, Mrs. Taylor received and acquired no greater interest than Potter obtained by deed, with the easement of burial limited to unoccupied space. When Mrs. Taylor died, her daughters acquired the same interest, which is an easement of burial, of ornamentation, of construction and maintenance of monuments, encumbered as above stated. * * *

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. * * *

* * *, we are of the opinion that the paper writing transferred to Mrs. Taylor whatever interest Mrs. Potter at the time had in said vault and land in respect to the right of burial.”

In the case of Wright v. Hollywood Cemetery Corporation, 112 Ga., 884, the court held as follows:

“Taking the allegations of the petition to be true, the defendants had no right whatever to prevent the interment of the re-

mains of Ludie Carlton in the lot in Hollywood Cemetery where the plaintiffs sought to bury them. In February, 1893, Annie Carlton, the mother of Ludie Carlton, purchased this lot from the Hollywood Cemetery Company, the then owner of the cemetery grounds, 'for a burial place for herself, her children, and the members of her family, and received a deed of conveyance to the same.' In December, 1894, she died, and her body was buried in this lot. Upon her death the title to the same descended to her children as her heirs at law. *Jacobus v. Congregation of Children of Israel*, 107 Ga., 518, 33 S. E., 853. Ludie Carlton, at the time of her death, as one of these heirs at law, owned an undivided interest in this lot, and the right of sepulture therein. Therefore whoever had the right to bury her remains had the right to inter them in this lot."

The following authorities also hold that the owner of the burial lot is the owner of an easement therein. *Roanoke Cemetery Co. v. Goodwin*, 101 Va., 605; *Hook v. Joyce*, 94 Ky., 430; *McWhirter v. Newell*, 200 Ill., 583; *Gardner v. Swan Point Cemetery*, 20 R. I., 626; *Lewis v. Walker*, 165 Pa., 30. In the case of *Sherrard v. Henry*, 88 W. Va., 315, the court held as follows:

"While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement, subject to be controlled by the state in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same character of adverse possession that will confer title to real estate will suffice to confer such right."

The court also said in its opinion:

" * * There is no doubt but that one who acquires a cemetery lot has some interest therein. He does not acquire the fee in the land. His interest is more in the nature of a perpetual easement, and it is likewise true that the exercise of this right is subject to the police power of the state. * * *

It seems to be quite as well established that this right may be acquired by adverse possession, as any other interest in real estate may be acquired, * * *."

It also seems to be well settled that the purchaser of a cemetery lot, while not acquiring title thereto in fee simple, becomes possessed of a property right which is heritable. *Catka Cemetery Assn. v. Cazeam*,

275 N. Y. Sup., 355; *Hornblower v. Cemetery Assn.*, 191 Cal., 83; *Certia v. Notre Dame DuLac*, 82 Ind. App., 542; *Brown v. Hill*, 284 Ill., 286; *Augusta v. Bredenberg*, 146 Ga., 459; *People v. Cemetery Assn.*, 353 Ill., 534; *Hertle v. Riddel*, 106 S. W., 282 (Ky.); *Trefry v. Younger*, 226 Mass., 5; *Wilder v. Synod*, 200 Wis., 163.

The following is held in the case of *Daniell v. Hopkins*, 257 N. Y., 112:

“A burial lot is real property, though the purchaser does not acquire a title in fee simple but only the right to hold the lot for burial purposes.”

It has been held that a grant of a burial lot is similar to a grant of a pew in a church. *Tefry v. Younger*, *supra*; *Sohier v. Trinity Church*, 109 Mass., 1; *Felley v. Andrews*, 191 Mass., 313; *Society v. Society*, 212 Mass., 198; *Cemetery Corporation v. Baker*, 218 Mass., 339; 5 R. C. L., 346.

The right of an owner of a pew in a church has been held to be real estate in Ohio. *Deutsch v. Stone*, 11 O. D. (Reprint), 436; 27 Cincinnati Law Bulletin, 20. To the same effect see *Newark Third Presbyterian Congregation v. Andruss*, 21 N. J. L., 323; *St. Paul's Church v. Ford*, 34 Barb., 16; *O'Hear v. DeGoesbriand*, 33 Vt., 593; *Barnard v. Whipple*, 29 Vt., 401; *Hodges v. Green*, 28 Vt., 358. In the case of *Jones v. State*, 70 O. S., 36, the court quotes the following language on page 433 from the case of *Jackson v. Parker*, 9 Cow., 73:

“Real estate, therefore, includes every possible interest in lands, except a mere chattel interest.”

In the case of *Fraser v. Lee*, 8 O. App., 235, the court said with reference to the assignment of a cemetery lot as follows:

“The plaintiff claims that the paper writing given by Mrs. Potter to Mrs. Taylor was not sufficient in form to convey any interest in this lot to her, but that the necessary document should take the form of a real estate deed to effectually pass title. With this we do not agree. In view of the fact that the burial of the dead is a matter of state supervision and has been placed exclusively within the power and control of the city, and also the regulation of the cemetery and the sale of lots therein in manner and form prescribed, we are of the opinion that the paper writing transferred to Mrs. Taylor whatever interest Mrs. Potter at the time had in said vault and land in respect to the right of burial. Whether it be called an easement, a privilege or a license, under

the circumstances a formal deed was not required to transfer whatever interest she had. 6 Cyc., 717.”

This case involved a lot in a cemetery owned by a city and did not apply to a cemetery owned by a cemetery association. The court seemed to overlook the provisions of Section 4165, General Code, which provided for the execution of a deed. However this may be, I find no statutory provisions with reference to cemeteries owned by cemetery associations which would be an exception to the requirements of Section 8510, General Code, requiring a deed to convey an interest in real estate.

I am also aware that the Municipal Court of Akron in the case of *State of Ohio v. Wolstein*, held that Section 6373-25 did not apply to salesmen employed to sell burial lots in a cemetery and that the Municipal Court of the City of New York in the case of *Cemetery Gardens, Inc., v. Blueweis*, 251 N. Y. Supp., 546, held that:

“Salesmen employed to sell burial lots in cemetery held not engaged in ‘sale of real estate’ within statute defining real estate brokers and requiring licenses.”

The court said in the opinion:

“It seems to me that, in performing his duties as a solicitor of purchasers for burial lots in the plaintiff’s cemetery, the defendant was not engaged in the sale of real estate within the purview of Section 440 of the property law.

Burial lands are endowed by the statute with certain immunities and are also subjected to certain restrictions peculiar to them. Only in a restricted sense can it be said that the ownership of a burial plot constitutes an interest in real property.”

I can see no justification for saying that some interests in real estate are within the provisions of Section 6373-25 and that other interests in real estate are not within such section when the statute applies to “any real estate, interest therein or improvement thereon”. On the other hand, the Circuit Court of Milwaukee County, Wisconsin, held that a salesman selling cemetery lots was within the provisions of the real estate brokers law. This case was reversed in *Howard v. Heinig*, 191 Wis., 166, on the ground that the services rendered were not those of a broker or salesman, the court not deciding whether or not a broker or salesman of cemetery lots was subject to the provisions of the real estate brokers law. The court said:

“Whether the men employed by him were required to have a license either as real estate brokers or real estate salesmen is a

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.

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.