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AUDITOR OF STATE—A DEED TO CEMETERY LOT ISSUED AND EXECUTED BY A BOARD OF TOWNSHIP TRUSTEES DOES NOT REQUIRE THE ACKNOWLEDGMENT OF DEEDS, MORTGAGES AND LEASES—§§517.07, 5301.01, R.C.

SYLLABUS:

A deed to a cemetery lot issued and executed by a board of township trustees pursuant to Section 517.07, Revised Code, does not require the acknowledgment provided in Section 5301.01, Revised Code, dealing in general with the acknowledgment of deeds, mortgages, and leases.

Columbus, Ohio, June 13, 1961

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have your request for my opinion in which you ask questions as follows:

“1. Must a deed to a cemetery lot issued by township trustees be acknowledged before notary public or other officer as provided in Section 5301.01 of the Revised Code?”

“2. If such a deed must be so certified, is the charge for certification a proper charge against the township?”

Section 517.07, Revised Code, relating to the sale of cemetery lots by a board of township trustees, reads:

“Upon application, the board of township trustees shall sell at a reasonable price such number of lots as public wants demand for burial purposes. Purchasers of lots, upon complying with the terms of sale, may receive deeds therefor which the board shall execute, and which shall be recorded by the township clerk in a book for that purpose, and the expense of recording shall be paid by the person receiving the deed. Upon the application of a head of a family, living in the township, the board shall, without charge, make and deliver to such applicant a deed for a suitable lot for burial of his family, if, in the opinion of the board and by reason of the circumstances of the family, such payment would be oppressive.”

While the sale of a cemetery lot does not convey land in fee simple, there appears to be no doubt that it constitutes the conveyance of an interest in real property. In this regard, I stated in the first paragraph of the syllabus of Opinion No. 643, Opinions of the Attorney General for 1959, page 335:

“Township trustees are not authorized to sell and convey in fee simple burial lots in a township cemetery, but under the provision of Section 517.07, Revised Code, they may convey for burial purposes such lots as public wants demand.”

Also, I stated in Opinion No. 2018, Opinions of the Attorney General for 1961, issued on February 23, 1961, as follows:

“It is well settled that one who purchases a cemetery lot, even though it has been conveyed by a deed in fee simple absolute, 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 for so long as the ground remains a cemetery. While there is a conflict among authorities as to whether the owner of a burial lot is an owner of an easement or license, the majority rule in Ohio holds that it is an easement. *Smiley, et al., v. Bartlett, et al.*, 6 C.C., 234; *Fraser v. Lee*, 8 Ohio App., 235, 7 Ohio Jurisprudence, 31. If it is an easement, then it is certainly an interest in real property, because an easement is an interest in land. 19 Ohio Jurisprudence, 59, 27 Corpus Juris, 195.

“Further, ownership of a burial lot is a right which may be conveyed and, upon the death of the owner, whatever right or title which he possessed inures to the heirs. *Fraser v. Lee, supra.* As was stated in the case of *Sherrard v. Henry*, 88 West Virginia, 315:

“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.

“* * * there is no doubt but that one who acquires a cemetery lot has some interest therein. He does not acquire the fee to 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. * * *”

Section 5301.01, Revised Code, referred to in your letter of request, requires that a deed of any interest in real property must be signed by the grantor and acknowledged before a notary public or other officer specified in the section. In Opinion No. 5446, Opinions of the Attorney General for 1936, page 523, the first paragraph of the syllabus reads :

“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.”

Section 8510, General Code, referred to in the 1936 opinion, is now Section 5301.01, *supra*.

The question, therefore, is whether a deed issued by a township should be distinguished from that issued by a cemetery association. In Opinion No. 1234, Opinions of the Attorney General for 1918, page 729, it was held that under the then existing Section 8510, General Code, a deed of a municipal cemetery must be acknowledged. The then Attorney General stated, at page 730 :

“* * * It might be argued that section 8510 G.C., in providing that ‘such signing also must be acknowledged by the grantor’ refers the signing by the grantor and that inasmuch as the deeds of a municipality are not signed by the grantor, but by an agent or representative of the grantor, the provision of said section 8510, requiring acknowledgment, is without application in the case of deeds by municipalities. However, inasmuch as it has been the universal custom to require these deeds to be acknowledged, I am not inclined to consider this contention and shall, in the absence of any judicial decisions to the contrary, assume that section 8510 G.C. applies to deeds by municipalities, as well as to deeds by private individuals.”

On the other hand, however, Section 517.07, *supra*, does provide a specific procedure for the execution of township cemetery deeds and for the recording of such deeds. It is an accepted rule of law that a statute covering a specific subject matter takes precedence over a general statute which deals with that subject matter but also deals with other subject matter (*Fisher Bros. Co., v. Bowers*, 166 Ohio St., 191 (196)).

Further, when a deed is issued under Section 517.07, *supra*, it is executed by a public body (the board of trustees) in the performance of a public duty, and having been so executed in accordance with the terms of the section, there would appear to be no reason why the execution should

require acknowledgment. On a similar point, it was stated in the case of *Emmitt v. Lee, et al.*, 50 Ohio St., 662, at 666:

“Another and further objection is made to the competency of this lease as evidence, based on the ground that the officer who signed the lease, on the part of the state, did not also acknowledge the same before a justice of the peace, or other officer, as is required in the execution of deeds by private individuals.

“This objection is not well taken. There is no statute requiring state officers to acknowledge deeds and other like instruments by them executed, in the performance of their official duties. And no good reason can be given, why a state officer should go before a justice of the peace or notary public, and make an acknowledgment to the effect that he has performed his official duties voluntarily. The uniform course of business has been for the board of public works to execute such leases without acknowledgment, and we think such course is fully warranted by law.”

In the *Emmitt* case the statute concerned, Section 7675-2, Revised Statutes, provided that leases deposited in the office of the board of public works should be recorded in suitable books to be provided for that purpose. It was alleged that the officer who signed the lease on the part of the state did not acknowledge the same. As noted in the above-quoted language the court held that acknowledgment was not required.

In view of the foregoing, therefore, I am constrained to conclude that members of a board of township trustees in executing a deed pursuant to Section 517.07, *supra*, are not required to comply with the provisions of Section 5301.01, *supra*, as to acknowledgment of signature.

Accordingly, it is my opinion and you are advised that a deed to a cemetery lot issued and executed by a board of township trustees pursuant to Section 517.07, Revised Code, does not require the acknowledgment provided in Section 5301.01, Revised Code, dealing in general with the acknowledgment of deeds, mortgages, and leases.

Respectfully,

MARK McELROY

Attorney General