1956

Memorial Gardens of the Valley, Inc. v. Securities Commission of the State of Utah et al : Brief of Appellant

Utah Supreme Court

S. N. Cornwall; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellant;

In the
Supreme Court of the State of Utah

MEMORIAL GARDENS OF THE VALLEY, INC., a corporation,
Appellant,

v.

SECURITIES COMMISSION OF THE STATE OF UTAH; HAL S. BENNETT, DONALD HACKING, STEWART M. HANSON, Commissioners of the Securities Commission of the State of Utah; and M. H. LOVE, Director, Securities Commission of the State of Utah,
Respondents,

v.

FUNERAL DIRECTORS AND EMBALMERS ASSOCIATION OF UTAH, a corporation,
Intervener.

Case No.
8468

BRIEF OF APPELLANT

S. N. CORNWALL,
VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
Attorneys for Appellant.

ARROW PRESS, SALT LAKE

TABLE OF CONTENTS

AUTHORITIES CITED

CASES:

TEXT:

In the
Supreme Court of the State of Utah

MEMORIAL GARDENS OF THE VALLEY, INC., a corporation,
Appellant,

v.

SECURITIES COMMISSION OF THE STATE OF UTAH; HAL S. BENNETT, DONALD HACKING, STEWART M. HANSON, Commissioners of the Securities Commission of the State of Utah; and M. H. LOVE, Director, Securities Commission of the State of Utah,
Respondents,

v.

FUNERAL DIRECTORS AND EMBALMERS ASSOCIATION OF UTAH, a corporation,
Intervener.

Case No. 8468

BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an action for a declaratory judgment brought under the provisions of Title 78, Chapter 33, Utah Code Annotated, 1953.

No issue of fact is involved. The parties, through their counsel, stipulated to an agreed statement of facts (R. 18-24). The statement discloses essentially the following facts: Appellant is a Utah corporation organized for profit. It owns a parcel of land in Salt Lake County, Utah, embracing 71.5 acres, which it has dedicated as a cemetery and is now engaged in the development and operation of this property for such purposes. In the development of this cemetery and the sale of lots therein, the lot purchaser signs a proposed contract together with a written statement in the form of the instruments shown at R. 21 and R. 23. Upon approval of the statement and the form of contract as signed by the purchaser, appellant signs and delivers the contract to the purchaser. Upon payment of the stipulated purchase price and funds for perpetual care, appellant delivers a deed to the burial space in the form of the instrument shown at R. 22.

The contract among other things requires appellant to design and construct a garden or gardens, to expend certain funds for development, to provide for care and maintenance and to issue a deed upon payment of the lot purchase price and the funds for perpetual care.

Salesmen for appellant in selling burial spaces explain to the purchaser the proposed plan of development of the cemetery and that the burial spaces will increase in value as the development is carried out. The statement signed by the purchaser, however, contains provisions that the property is being acquired for burial purposes only and not for investment or speculative purposes and that appellant does not agree or promise to resell the lot purchased.

The deed identifies the burial space purchased and contains a certificate by the appellant as grantor that pursuant to the contract, appellant has placed certain funds in trust, the income from which shall be used for the care, maintenance and protection of the cemetery.

Other cemeteries in the State of Utah sell burial spaces under contracts and deeds similar to those of the appellant. Some, but not all cemeteries provide for perpetual care of the cemetery grounds and burial spaces. Of the cemeteries providing for perpetual care, some establish a fund either voluntarily by their charter, or by agreement with the purchasers of the burial spaces. None of such cemeteries other than Aultorest Memorial Corporation has registered its contracts, deeds or other instruments similar to the contract and deed of appellant as a security with the Securities Commission of Utah. The contract of Aultorest Memorial Corporation registered as a security is in the form of the instrument shown at R. 24. The Aultorest agreement in addition to providing for the sale of a burial space embodies provisions for a burial contract or a burial certificate. No such provision is contained in the contract or deed of appellant.

The question presented here is whether the contract and deed of appellant are a security within the provisions of Section 61-1-4, Utah Code Annotated, 1953. The trial court, on the basis of the facts presented, held that these instruments are a security. From such determination, this appeal is taken.

STATEMENT OF POINTS RELIED ON

I.

THE CONTRACT AND DEED ARE NOT A SECURITY AS DEFINED BY THE UTAH STATUTE.

(a) *The instruments are not within the express definition of the statute.*

(b) *The instruments are not commonly known as a security.*

II.

THE ENACTMENT OF CHAPTER 11, LAWS OF UTAH, 1955, REMOVES ANY PUBLIC NEED OR POLICY FOR CONSTRUING THE CONTRACT AND DEED AS A SECURITY.

ARGUMENT

There is no suggestion in this case that appellant is engaged in promoting or carrying out any fraudulent scheme or plan. Sale of lots are made by appellant for burial purposes in the usual course of its business. No representations are made that purchase of lots should be undertaken as an attractive speculation or as a means of reaping profits but on the other hand the buyer is required to sign a statement that the purchase is made for burial purposes only. It is readily admitted that purchasers are informed that lots acquired in the early development of the cemetery will be more valuable as such development is carried on and completed. This is a natural and necessary result from the development and beautification of a cemetery.

The cost of providing a resting place for human remains is one of the necessary and inescapable expenses of this existence. It is desirable and proper that this expense should be discharged at a moderate cost. If one may do so, by purchasing a lot in a cemetery under development, he should have an opportunity to do so. This is not a matter of embarking on a speculative venture or one entered into for profit but simply a case of exercising common sense in minimizing a necessary expenditure.

The question as we see it here is therefore essentially one of whether a contract for the sale of a cemetery lot under which the cemetery agrees to perform certain duties with respect to the development of the cemetery, to care for and maintain the same and to create a fund to insure such care and maintenance coupled with a deed to the lot pursuant to the contract, constitutes a security under Utah law.

I.

THE CONTRACT AND DEED ARE NOT A SECURITY AS DEFINED BY THE UTAH STATUTE.

The controlling statute here is Section 61-1-4, Utah Code Annotated, 1953. It has two general features. It includes by express definition certain instruments which are a security and then has a general provision including any other instrument commonly known as a security. In the presentation of the problem we think it orderly, therefore, to consider the two features of the statute.

(a) *The instruments are not within the express definition of the statute.*

Section 61-1-4, Utah Code Annotated, 1953, which defines a security, provides as follows:

> "(1) 'Security' shall include any note, stock, treasury stock, bond, debenture or evidence of indebtedness; certificate of interest or participation or certificate of interest in a profit-sharing agreement; certificate of, contract for, or any conveyance or other instrument conveying, representing, or purporting to convey or represent, an interest or any right in, to or under any oil, gas or mining lease or permit; collateral trust certificate, preorganization certificate, or preorganization subscription; any transferable share, investment contract, service certificate, burial certificate or burial contract; investment-trust certificates, shares or units, or beneficial interest in or title to property, profits or earnings; certificate of membership in, contract or agreement given, made or issued by, any corporation, association or organization wherein a discount, reduction in price or other advantage, privilege or right in or to the purchase of merchandise are held out or agreed to be given or made; and any other instrument commonly known as a security, including any plan or scheme wherein townsites, town lots, or acreage, or any other land division in fee or in leasehold shall be used in connection with the gift or sale of any security as herein defined."

All of the instruments expressly identified above under the facts involved in this case, with the exception of one category may, we believe, be dismissed as being inapplicable to the case at bar. The classification "any transferable share, investment contract, service certificate, burial certificate or burial contract" requires some further consideration. Under the facts of this case where the purchaser must

expressly agree that he acquires the property for burial purpose only and not for investment or speculative purposes with the understanding that the appellant does not promise or agree to resell the lot purchased, we think the contract and deed must clearly not be considered to be an investment contract. These instruments are not a service certificate because the covenants of appellant relate only to obligations with respect to the development, preservation and care of the cemetery property. They do not extend any services to an individual. An examination of the contract and deed will disclose that there are no provisions therein for the funeral or burial of a decedent. In this respect the contract under investigation is to be distinguished from that of Aultorest Memorial Corporation (R. 24) which contains such provisions. It is for this reason that registration as a security was required in the case of the Aultorest contract, but not in the case of the contract and deed under investigation.

It therefore appears to us that the instruments under investigation do not fall within the specific definitions of the statute and if within its terms must be within the designation of "any other instrument commonly known as a security".

(b) *The instruments are not commonly known as a security.*

If the instruments involved here are not included in the express definitions of the statute, then in order to be within its terms they must be commonly known as a security.

Deferring for a moment the consideration of cases which have involved this problem, and approaching it from the standpoint of the business man, there would seem to be little doubt that the purchase of a cemetery lot for burial purposes would not be regarded as an investment for profit or commonly considered as a security.

It is common knowledge that cemeteries which have no provision for care and maintenance may become most depressing and unsightly areas. Provisions in contracts covering the purchase of cemetery lots and in deeds for the conveyance of the same which are designed to insure care should be in the interest of the individuals involved as well as the public generally and should not, in our judgment, have any real bearing on the question of whether the instruments are commonly known as a security.

Courts in many cases have had occasion to define the words "security" or "securities". For our purposes here we deem it unnecessary to cite numerous authorities. The subject was carefully considered in *Equitable Trust Co.* v. *Marshall,* 17 A. 2d 13, (Delaware) where the Court at page 15 said:

> "Strictly and technically, the word 'security', when used in connection with matters of a pecuniary nature, may, perhaps, mean 'that which renders a matter sure; an instrument which renders certain the performance of a contract'. 2 Bouv. Law Dict., Rawle's Third Rev., p. 3032. In discussing the meaning of that word, the statement is made in Black's Law Dictionary that 'the term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor to make sure the payment or performance of his debt by furnishing the creditor with

the resource to be used in case of failure in the principal obligation'. Strictly construed, originally the kindred word 'securities' was, therefore, primarily 'a general term for written assurances for payment of money; evidences of debt.' Abbott's Law Dict. In other words, the strict primary meaning of that word was at one time confined to a secured obligation or promise to pay of some nature, and did not include either corporate stocks or mere debentures. Scott on Trusts, 1228; Restatement Law of Trusts, Vol. 1, p. 657; *In re Waldstein,* 160 Misc. 763, 291 N. Y. S. 697. But at the present day, by common usage, the word 'securities', though standing alone and unaided by the context of the instrument in which it is used, has acquired a broader and more general meaning, and is frequently used as synonymous with words which originally may have had quite a different meaning. *Fidelity Union Trust Co.* v. *Lowy,* 123 N. J. Eq. 90, 196 A. 369; *In re Vanderbilt's Estate,* 132 Misc. 150, 229 N. Y. S. 631; *City Bank Farmers Trust Co.* v. *Lewis,* 122 Conn. 384, 189 A. 178; 2 Schouler on Wills, 6th Ed., 1228; 56 C. J. 1279, 1282. In this connection, Mr. Schouler aptly says: 'Present usage gives (to that word) a generous scope far beyond its literal meaning'. 2 Schouler on Wills, 6th Ed., 1288, supra. Modern dictionaries have recognized this change in the meaning of the word 'securities,' and have defined it as 'an evidence of debt or of property as a bond, a stock certificate or other instrument, etc.; a document giving the holder the right to demand and receive property not in his possession'. Webster's New Inter. Dict.; 7 Cent. Dict. 5460. Most courts and text writers have, therefore, held that certificates for shares of corporate stock are 'securities,' notwithstanding the fact that they merely represent the particular interest of the owner in the corporate capital and in its surplus assets on dissolution. *Fi-*

delity Union Trust Co. v. *Lowy,* 123 N. J. Eq. 90, 196 A. 369; *In re Vanderbilt's Estate,* 132 Misc. 150, 229 N. Y. S. 631; *In re Waldstein,* 160 Misc. 763, 291 N. Y. S. 697; *City Bank Farmer's Trust Co.* v. *Lewis,* 122 Conn. 384, 189 A. 178; Scott on Trusts 1228; Restatement Law of Trusts, Vol. 1, p. 697. This is conceded by the residuary devisees and legatees. Moreover, in reaching that conclusion, courts have necessarily and logically recognized the fact that in the ordinary vocabulary of modern life, the term 'securities' is usually applied to almost any instrument which is used for the purpose of financing and promoting a business enterprise of some nature, and which is intended as an investment of a pecuniary nature. *In re Waldstein,* 160 Misc. 763, 291 N. Y. S. 697; *Fidelity Union Trust Co.* v. *Lowy,* 123 N. J. Eq. 90, 196 A. 369; *In re McGraw's Estate,* 337 P. 93, 10 A. 2d 377; *In re Vanderbilt's Estate,* 132 Misc. 150, 229 N. Y. S. 631; 56 C. J. 1279; see, also, Romer, L. J., *In re Rayner* (1904) 1 Ch. 176. But that term does not ordinarily apply to the evidence of title to land, as such, or to any share or interest therein. *Storm* v. *Waddell,* 2 Sandf. Ch. 494; *Pratt* v. *Worrell,* 66 N. J. Eq. 194, 57 A. 450; *Narragansett Mut. Fire Ins. Co.* v. *Burnham,* 51 R. I. 371, 154 A. 909; *First Nat. Bank* v. *Rawson,* 56 Ohio App. 388, 11 N. E. 2d 110; *Senior* v. *Braden,* 295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520, 100 A. L. R. 794."

In considering the definition of the word "securities" in relation to the Blue Sky Law, the Court in *Prohaska* v. *Hemmer-Miller Development Co.,* 256 Ill. App. 331, held that:

> The term "securities" as used in the Blue Sky Law means written assurances for the return or payment of money except where specific definitions are

given by the statute, and it means the investment of funds in a designated portion of the assets and capital of a concern with a view of receiving a profit through the efforts of others than the investors.

Turning to the precise question of instruments involving the sale and purchase of cemetery lots, the general rule is stated in 79 C. J. S. Security; Securities, page 949 as follows:

> "* * * A conveyance of a cemetery lot, or a certificate granting the right of burial in such a lot, ordinarily is not regarded as a security since usually it is not considered to be an investment, and is an interest in real estate, but when such interests become the subjects of speculation in connection with the cemetery enterprise the courts have held such conveyances or certificates to be securities."

An annotation on the subject is found in 163 A. L. R. 1075, where the editor states substantially the same rule thus:

> "While undoubtedly documents purporting to convey or vest an interest in a cemetery lot for the use of the purchaser or his family would not be classified as 'securities' under most 'blue sky laws,' it has been held under the circumstances involved in some cases that instruments relating to the sale of such lots to a buyer expecting profits from their subsequent resale constituted 'securities' subject to regulation."

The cases cited in C. J. S. and included in the A. L. R. annotation substantially support the rule as stated. The case of *State* v. *Lorentz*, 22 N. W. 2d 313 (Minn.) is the most recent on the subject which we have been able to find.

In that case where cemetery lots were being sold on a wholesale basis, for speculative purposes, the majority of the court determined that the sale of such lots was a security under Minnesota law. The Court in doing so, however, at page 316 of the report pointed out that:

> "* * * where burial lots are sold in the usual course for burial purposes, the statute of course does not apply."

The phrase "any other instrument commonly known as a security" appears to have been brought into the Utah Code by the provisions of Section 2, Chapter 87, Laws of Utah, 1925. We have been unable to find any decision of this Court defining this phase. So far as we have been able to determine, no contract for the sale of a cemetery lot or deed in connection therewith in the form of the instruments involved here has been registered as a security in this jurisdiction. In making this statement we are not unmindful of the Aultorest contract attached to the agreed statement. That contract, however, as we have observed, has express provisions for a burial contract or burial certificate which brings it within the express definition of our statute.

In the thirty years which have passed since the enactment of said Chapter 87, Laws of Utah, 1925, without any regulation under the Securities Act, thousands of cemetery lots must have been sold in this state under contracts embodying provisions for perpetual care. A practice so long employed is persuasive of the view that such instruments have not been commonly known as a security.

Tested by the rule stated above, the facts in this case, it seems to us, compel the conclusion that the contract and deed under investigation here are not a security within the meaning of our statute.

II.

THE ENACTMENT OF CHAPTER 11, LAWS OF UTAH, 1955, REMOVES ANY PUBLIC NEED OR POLICY FOR CONSTRUING THE CONTRACT AND DEED AS A SECURITY.

The legislature by the enactment of Chapter 11, Laws of Utah, 1955, made comprehensive provisions for the operation, maintenance, and regulation of all cemeteries within this state except those operated by religious and fraternal organizations, and by cities and towns and other political subdivisions.

Without considering the Act in detail, an examination of its provisions will show that it is intended thereby to bring cemeteries within the Department of Registration in the Department of Business Regulation, and to subject such institutions and their operations to stringent regulations, particularly with respect to the creation and maintenance of their endowment funds, and to require the procurement of an annual certificate of authority for the conduct of a cemetery operation.

The legislature concluded that the operation of cemeteries, other than those excluded from the Act, should be placed under careful regulation. We have no quarrel with that conclusion. The legislature further concluded that the

appropriate agency to administer such regulation is the Department of Registration within the Department of Business Regulation. No amendment was made of said Section 61-1-4 and no provision is found indicating that any registration or regulation is to be administered by the Securities Commission.

Having vested jurisdiction of these institutions in one branch of the Department of Business Regulation, we think the legislature wisely and properly concluded that they should not be subjected to regulation by another branch of the same department. The confusion and possible conflicts which might result from such dual control are obvious. The provisions of said Chapter 11 for close supervision and control of cemeteries, coupled with those for an annual certificate of authority, and for revocation or suspension of such authority upon violation of any of the provisions of the Act, afford adequate protection to the public.

CONCLUSION

The judgment of the Trial Court construing the contract and deed of appellant to be a security should be reversed.

Respectfully submitted,

S. N. CORNWALL,
VAN COTT, BAGLEY,
CORNWALL & McCARTHY,

Attorneys for Appellant.