

1956

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

Utah Supreme Court

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In the
Supreme Court of the State of Utah

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

SECURITIES COMMISSION OF THE
STATE OF UTAH; HAL S. BEN-
NETT, DONALD HACKING, STEW-
ART M. HANSON, Commissioners
of the Securities Commission of the
State of Utah; and M. H. LOVE, Di-
rector, Securities Commission of the
State of Utah, *Respondents,*
vs.

FUNERAL DIRECTORS AND EM-
BALMERS ASSOCIATION OF
UTAH, a corporation, *Intervenor.*

FILED

MAY 4 - 1956

Clerk, Supreme Court, Utah

Case No.
8468

UNIVERSITY UTAH

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**BRIEF OF RESPONDENTS
AND INTERVENOR**

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Case No.
8468

BRIEF OF RESPONDENTS AND INTERVENOR

STATEMENT OF FACTS

Respondents and Intervenor adopt the Appellant's Statement of Facts, except the second paragraph on page 3 of Appellant's brief.

STATEMENT OF POINTS

POINT I

THE LEGISLATURE HAS SPECIFICALLY DEFINED AS SECURITIES THE KIND OF AGREEMENTS INVOLVED IN THIS ACTION.

POINT II

REGULATION OF APPELLANTS' PROMOTIONAL ACTIVITIES BY THE SECURITIES COMMISSION IS IN THE BEST PUBLIC INTEREST.

ARGUMENT

POINT I

THE LEGISLATURE HAS SPECIFICALLY DEFINED AS SECURITIES THE KIND OF AGREEMENTS INVOLVED IN THIS ACTION.

In 1925 the Legislature included "investment contracts" in the statutory definition of Securities (Laws of Utah, 1925, Chapter 87), and in 1929 it added the phrases "burial contract" and "burial certificate" (Laws of Utah, 1929, Chapter 79). Both the contract and deed used by the Appellant are subject to regulation under each of the above phrases.

A. *Investment Contracts.* In answering the question whether a particular agreement is an investment contract and consequently subject to regulation as a security, a number of courts have used the test set forth in *Securities and*

Exchange Commission v. Bailey, D. C., 41 F. Supp. 647, at P. 650. In that case, the court said:

"An 'investment contract,' as contemplated by the Act, is one which contemplates the entrusting of money or other capital to another, with the expectation of deriving a profit or income therefrom, to be created through the efforts of other persons. Otherwise stated, it is a contract providing for the investment or laying out of capital in a way intended to secure income or profit from its employment, which will arise through the activities and management of others than the owner. *Securities and Exchange Comm. v. Universal Service Ass'n*, 7 Cir., 106 F. 2d 232, 237; *State of Minnesota v. Evans*, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165."

Whether the purchasers of the plots sold by Appellants resell them to others or keep them for their own use is immaterial. The principal benefit accruing to the owner of the plots must result from the activities of persons other than the owner. See *Holloway v. Thompson*, 42 N. E. 2d 421, 425 (Ind., 1942). Thus the contractual arrangements at issue fall squarely within the definition above set forth.

More directly in point are the cases of *State v. Lorentz*, 221 Minn. 366, 22 N. W. 2d 313 (Minn. 1946), and *Securities and Exchange Comm. v. W. J. Howey Company*, 328 U. S. 293, 90 L. Ed. 1244, 66 S. Ct. 1100 (1946), and the annotation following the report of these cases at 163 A. L. R. 1036 and 1043. In the *Lorentz* case, the Supreme Court of Minnesota construed a statute which, like ours, defined an investment contract as a security, sales of which were subject to regulation under their act. The contract there involved called for the creation by the vendor of a perpetual

care, maintenance and improvement fund to consist of 10% of all lots sold and deeded under the cemetery plan. The vendor promised to convey the lot or lots to the purchaser upon the payment of the total purchase price. The lots were to be used only for burial purposes and were subject to the then existing rules and regulations established by the vendor for controlling the use of the cemetery property and to any such regulations made in the future. The court held that the contracts and deeds were securities, and that registration was required.

In the *Lorentz* case and other cases cited in this brief, the courts have considered the fact that the lots or tracts were sold for speculative purposes and not for burial alone, or were sold under circumstances bordering on or amounting to fraud. Respondent and Intervenor acknowledge that there is no evidence, one way or the other, with respect to speculation or fraud in this case. But we point out that neither is there any guarantee against fraud or speculation in the contracts and deeds used by the Appellant, and that the Legislature included investment contracts in the definition of securities for the express purpose of governing promotional activities in which those dangers exist.

B. *Burial Certificate and Burial Contract.* Taken together, the contract and deed with which we are concerned are burial contracts within the intent of our statute. The deed shows on its face that this is no ordinary conveyance of real property. Significantly, it is denominated "DEED FOR INTERMENT RIGHTS". Its provisions subject the land to certain conditions, reservations, rules and regulations set forth therein, and use of the land is further cir-

cumscribed by the terms of the contract previously entered into. Such expressions as “* * * the purchase price for said rights in said lot * * *” (Par. 1 of the Purchaser’s Agreement, R. 21); “* * * convey the *right of interment* in said lot * * *” (Par. 4 of the Company’s Agreement, R. 21; emphasis supplied); and “* * * purchaser shall have the right to use said lot for interment at any time hereafter * * *” (Par. 5 of the Company’s Agreement, R. 21) point to but one conclusion—that the purchaser has paid money for a contract right to bury deceased Caucasians, and that is the only right he gets. The absence of normal rights to enjoyment and control of real property show clearly that these instruments add up to nothing more nor less than a burial contract. It was to reach just such transactions as these that the Legislature amended our statute to include burial certificates and burial contracts. It is respectfully urged that a remedial statute such as this, enacted for the protection of the public, should be liberally construed. *Union Land Associates v. Ussher*, . . . Ore. . . ., 149 P. 2d 568 (Ore. 1944); *Securities and Exchange Comm. v. Bailey*, *supra*; *Blackwell v. Bentsen*, 5 Cir., 203 Fed. 2d 690, 693.

POINT II

REGULATION OF APPELLANTS’ PROMOTIONAL ACTIVITIES BY THE SECURITIES COMMISSION IS IN THE BEST PUBLIC INTEREST.

People who are contacted by Appellant’s salesmen and persuaded to enter into these agreements are not buying a

10 foot by 31½ foot piece of an undeveloped 71½ acre tract. They are not bargaining on the basis of the land's present value. They are investing, instead, in a right to be buried or to bury their departed kin in a cool, restful Memorial Garden, graced by appropriate architecture and landscaped with well-trimmed shrubs, flowers and trees. Whether they ever see the realization of what they bargain for depends on the faithful performance by the Appellants of the promises which induced them to buy, and therein lies the "blue sky" aspect of these transactions. See *Securities and Exchange Commission v. Tung Corporation of America*, D. C. 32 F. Supp. 371, 374; *State v. Lorentz*, supra. The injury which the statute seeks to avoid is the failure of the Appellant and others similarly engaged to carry out their promises, with consequent loss to investors.

Appellant places some stress upon the fact that the purchaser is required to sign a "Final Report and Recommendation Form" (R. 23) in which he agrees that the purchased burial spaces are not acquired for investment or speculative purposes. The statements contained on that form are self-serving, and should be accorded no weight, since Paragraph 3 of the Mutual Agreement (R. 21) is an integration clause by the terms of which all covenants not contained therein are of no force or effect.

Appellant further relies on the fact that the Legislature in 1955 enacted a measure by which the Department of Business Regulation controls and regulates some aspects of the Appellant's operation and argues that it should not be subject to regulation by another branch of the same department. This misconceives the nature of sound regu-

latory practice, since it is the activity and not the person which a given branch of the Department is set up to regulate. It goes without saying that the Securities Commission is the agency most competent to regulate the sale of securities.

CONCLUSION

Promotional schemes such as the Appellant is now engaged in readily lend themselves to the investing public's injury. Our Legislature has enacted statutes for the protection of the public by requiring registration of securities. Appellant's contract and deed are within the statutory definition of a security, and judgment of the lower court should therefore be affirmed.

Respectfully submitted,

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