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Nelda Crawford and David Beesley, Dha Beesley Monument & Vault Company v. City of Manti, A Municipal Corporation, Frank J. Garbe, Its Mayor, Margaret anderson, Ben Kjar, Lloyd R. Nielsen, Ray P. Cox and R. Morgan Dyreng, Its City Council, and Clarence Robert Hall, Its Sexton : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

NELDA CRAWFORD and DAVID BEESLEY, dba BEESLEY MONUMENT & VAULT COMPANY,

Plaintiffs-Respondent,

vs.

CITY OF MANTI, a Municipal Corporation, Frank J. Garbe, its Mayor, Margaret Anderson, Ben Kjar, Lloyd R. Nielsen, Ray P. Cox and R. Morgan Dyreng, its City Council, and Clarence Robert Hall, its Sexton,

Defendants-Appellants.

No. 10,392

APPELLANTS' BRIEF

I.

What the Case Is About

Action for a declaratory judgment to establish a right claimed by plaintiff Nelda Crawford but denied by the defendants to mark the grave of her deceased husband with a granite headstone of a specified size, shape and

design, so installed as to stand above the level of the ground; and to have her own grave, when she is interred therein marked in the same manner.

II.

The Disposition by the Lower Court

1. Defendant David Beesley, dba Beesley Monument & Vault Company, went out of the case as a party on a summary judgment against him.

2. The case was tried on the issues raised by the pleadings between plaintiff Nelda Crawford and defendants. There was no jury. In his findings of fact, conclusions of law and judgment the trial Judge decided, held and found that the ordinance of Manti City, which is Section 180 of the Revised Ordinances of Manti City, 1941, as amended by an ordinance passed and approved October 25, 1948, insofar as it requires all markers to be installed flush with the ground, under the facts found in this case, is unreasonable, insofar as it has been attempted to be enforced by the defendants against the Crawford lots; and that it cannot be enforced against the plaintiff Crawford nor said lots; because the Crawford family, or some member thereof, had conceived and partly carried into completion a plan for improving the appearance of the lots and memorializing their dead.

The court restrained the city and its officers from enforcing the amended ordinance against the plaintiff Craw-

ford and against said lots; and entered judgment against defendants for costs.

The defendants appeal from this judgment.

III.

The Relief Sought On the Appeal

Point 1:

That the court amend the Findings of Fact made by the trial court by deleting therefrom the following sentence, appearing in paragraph 5 on page 3 thereof: "that the defendant tore out the installation so made."

Point 2:

That the court hold that the trial court erred in its conclusions of law to the effect that the amended ordinance which requires grave stones and markers to be installed flush with the surface of the ground is unreasonable when applied to the facts found in this case and cannot be enforced against respondent nor against the Crawford family lots; also that the court hold that the trial court erred in entering the judgment in favor of plaintiff Crawford declaring that she is entitled to erect at said graves two small pillow monuments identical with the three monuments which have heretofore been erected at the heads of the three graves to the south for other members of the Crawford family and in completion of the monument pattern commenced and established on said lots; and that the court erred in restrain-

ing the appellants, and in entering judgment for costs against the respondents. Also that the judgment be reversed and judgment entered for the appellants.

IV.

STATEMENT OF THE FACTS

The following facts are not in dispute, being either admitted in the pleadings or else shown in evidence which is not impeached:

1. Burial rights in the lots involved were acquired by James Crawford, Jr., an old resident of Manti, in 1911; they are evidenced by a "Cemetery Lot Certificate." Exhibit 4. The present ownership of the two burial spots of present concern is vested in Nelda Crawford, surviving wife of Edmund Crawford, who was a son of James Crawford, Jr.

2. During the period between 1911 and the effective date of the amended ordinance of October 25, 1948, the regulations prescribed by the ordinances of the city relative to the manner of marking graves with head stones and monuments did not require that such structure be flat and level with the surface of the ground. It was permissible to install them so that they stood above the surface.

3. In 1948, however, Manti City decided to improve and beautify the landscaping of the cemetery by changing its appearance, so far as possible, especially in the

newer subdivisions, from the conventional churchyard type to a lawn type. This change involved limiting the up-right stones and markers to those already in place; maintaining lawn throughout the whole area providing for perpetual care by the city at rates which would be inviting to all lot owners. So on October 25, 1948, the city council passed and the mayor approved an amendment to Section 180 which states that thereafter all markers, monuments and such be installed so as to be flush with the surface of the earth.

4. During the period 1911-1948, three members of the Crawford family had been interred in three of the burial spots, a son Stanley, James himself and his wife Christena, all side by side in a row along the west end, leaving two places for two graves next to them on the north.

Also during that period surviving members of the family had caused to be erected a large monument at the foot of the graves and at the head of each grave a small granite marker, called a "pillow" type, the large monument being inscribed with the word "CRAWFORD" and each smaller ones with the name of the occupant.

This monument and these three markers evidently were intended by the people who provided for their installation to be in partial fulfillment of a plan which they intended to have carried into completion when the two remaining burial spots became occupied. Exhibits 1, 2 and 3, photographs, show this plan and give a sharper understanding of the situation than many words can do.

The marking of the graves in this manner, when it was done, was entirely legitimate; it violated no ordinance or regulation of the city.

5. Plaintiff's husband, Edmund, died in 1963, and his body was interred in grave No. 4, numbering from south to north; and in March or April, 1964, she employed David Beesley, (Tr. p. 9) a dealer in grave stones and monuments, to supply and install at the head of Edmund's grave a marker exactly like the other three, except for the inscription, which was to be of his name. Beesley sent his servants down with the marker, they unloaded it at the place but before they set it up on a foundation, the city sexton notified them that it could not be installed in an upright position because the ordinances had been amended to require all markers and monuments to be flush with the surface of the ground. Beesley came down and presented an argument to the mayor and city council for permission to set it up like the others were, but his request was denied. Then plaintiff and her attorney appealed by letter to the mayor and city council for permission to place the marker so as to carry one step nearer completion the plan or design which had been conceived for the memorials to the memory of the James Crawford, Jr., family. (See: David Beesley's testimony, Tr. 8)

This request was also denied for two reasons; One that ordinances had been amended so as to require that all markers be laid flush with the ground; and, second, that in the interim, since October, 1948, there had been many similar requests by persons whose lots were in exactly the same condition as the Crawford lots, all of which had been

denied; and that the ordinance had been uniformly enforced in all such cases.

TESTIMONY SUMMARIZED

Clarence Robert Hall was called as a witness for the defendants; (Tr. 24) His testimony is summarized as follows:

> He is 55 years old, born and lived in Manti all his life. Was sexton in 1948-1949; and also has been sexton since January 1, 1963. He identified the map, Ex 7, which was admitted into the evidence.
>
> He proposed to the mayor and city council in 1948 that Section 180 of the Ordinances of 1941 be amended so as to provide that all markers, grave stones and monuments be installed so as to lie flush with the ground, which regulation had been adopted for the east block of Plat "B" by the Revised Ordinances of 1941. (Sec. 181.)
>
> He gave his reasons for making the proposition. The city was starting to beautify the cemetery. For this purpose it could use only the interest from the perpetual care fund, which was insufficient. So they found that if they could eliminate upright stones in the rest of the cemetery, especially in the newer part, which includes all of Plat "B," in addition to the east part thereof, they could eliminate trimming, a lot of extra work; also in the problem of watering. If the people would agree to let the city take care of the lots—perpetual care—this could be done at a very low figure. (Tr. 33) The overall plan for the improvements involved putting all into lawns, flowers and shubbery; we did not

intend to have any bare spots or parts of it growing up to weeds and looking rough.

There are eighteen other lots in situations identical with that of the Crawford lots. Ex. 8 is a list of them. In several of them the small headstones are exactly like those on the Crawford lots. In all these cases the owners desired to complete their designed plans for a central monument with a suitable inscription for the head of the family and smaller upright stone markers at the head of each grave. But in all of these cases the city required that the markers be laid flush with the ground; the ordinance had been enforced in all such cases since its amendment and before plaintiff's husband died.

Further, (Tr. p. 52) on cross examination:

"The whole purpose as we outlined it to start with in 1948 was to eliminate the unsightly lots surrounding the lots that were being taken care of. Many lots there was no lawn on them. They were just bare spots. They were never taken care of from —possibly the people would come on Decoration Day, clean them off, decorate them, then they would stand there for a year. And those spots were an eye-sore to our cemetery. So we instigated the perpetual care system and when we did that, we got many of these people who have been residents of this Valley and of this City too, and have moved away, to put in perpetual care of that lot. Consequently, we have the whole cemetery now in lawn. It has added to the beauty of all of the lots. It has made the cemetery one of the prettiest in the state." . . . There are no spots in the cemetery where weeds are allowed to grow . . . It has made the Crawford lots and all the other lots in the cemetery much more beautiful and they have been maintained at a minimum of cost."

Frank J. Garbe, called by defendants testified: (Tr. 78)

He is Mayor of Manti City. Was a member of the city council in 1948, when Section 180 was amended.

The proposal was made that Section 180 be amended so as to provide that all stones, markers and monuments be amended installed so as to lie flat with the surface of the ground.

The proposal was referred to a committee of the city council, which investigated the subject and reported back recommending that the amendment be made; and the ordinance was passed and approved.

He summed up the reasons (Tr. 82) as follows:

"Well, let's out it this way. We had to change the cemetery. We have to change some of our ordinances . . . as we go along. Now, we investigated what was going on in other communities. And as far as the city ordinance was concerned, and cemetery perpetual care, which brought about many changes over the old type cemetery—and, of course, in 1941 I think there was discussed the ordinance that only took part of the cemetery. I think probably at time since then, from 1941 to 1948, Manti City ran into obstacles of maybe showing a difference; you can erect a monument here and you can't erect a monument there. So we made it a universal rule."

Edwin Nielson, a witness called by defendants, (Tr. p. 93) testified:

He was sexton from Feb. 8, 1950, to the day of 1963.

He required that all markers and monuments installed be placed flush with the surface of the ground. He did this because that was the instruction which he received. Several persons applied for permission to put in upright markers, but we always refused this, made them put the markers down.

VI

ARGUMENT

Point 1:

THE COURT ERRED IN FINDING THAT "THE DEFENDANT TORE OUT THE INSTALLATION SO MADE." See: Finding No. 5 on page 3.

Our first objection to this finding is that it is not supported by the evidence. Two witnesses testified as to what was done when David Beesley's servants unloaded the marker at the grave. The first was David Beesley, called by the plaintiff. Tr. 8. It is respectfully submitted that his testimony does not warrant said finding. Furthermore, what he testified to on the subject was hearsay, hence incompetent. The other witness to the subject was Sexton Hall. Tr. 24. Neither does his evidence support the finding. Finally this finding, and the allegation upon which it is based, sound in tort.; while this is an action for a judgment declaring a claimed right of the respondent, no damages being alleged or demanded. The allegation and

finding has no place in this action. They afford no support for the judgment. We had a right to assume, we think, that the trial court would not incorporate the finding as a support for the judgment. The sentence carries overtones, suggests an attitude on the part of the city officials which is not otherwise reflected in the record. We therefore respectfully move that it be deleted from the record.

Point 2

A) THE COURT ERRED IN FINDING AS CONCLUSIONS OF LAW THAT THE QUESTIONED REGULATION IS UNREASONABLE AND THAT IT CANNOT BE ENFORCED AGAINST THE PLAINTIFF NOR AGAINST THE CRAWFORD LOTS AND THAT DEFENDANTS OUGHT TO BE ENJOINED FROM INTERFERING WITH HER RIGHT TO INSTALL THE MARKER IN AN UPRIGHT POSITION; BECAUSE NONE OF SAID CONCLUSIONS OF LAW IS SUPPORTED BY THE EVIDENCE AND THE FACTS FOUND, AND EACH OF THEM IS CONTRARY TO LAW.

B) THE COURT ERRED IN ENTERING JUDGMENT DECLARING THAT PLAINTIFF HAS THE RIGHT TO MARK THE TWO REMAINING GRAVES IN THE CRAWFORD PLOT WITH STONES WHICH STAND UPRIGHT AND ENJOINING DEFENDANTS FROM ENFORCING THE REGULATION WHICH REQUIRES THAT ALL MARKERS BE INSTALLED FLUSH WITH THE SURFACE OF THE GROUND: FOR THE REASON THAT THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE NOR THE FACTS FOUND AND THAT IT IS CONTRARY TO LAW.

The plaintiff's case is built upon the theory that she has a vested right, as an incident to the ownership of burial rights in the Manti City Cemetery, to mark the two remaining graves with stones like the three which were installed before the ordinance was amended, in 1948, to require head stones to be placed flush with the surface of the ground. The argument seems to be that since or inasmuch as three of the graves were so marked and the central monument erected, all at considerable cost, there was thereby established a memorial pattern by the Crawford family for the group of claims, which pattern has acquired a quality of immortality; carrying the implnication that she owns the air space above the markers and the graves and an ipsi dixit conclusion that the regulation is unreasonable when applied to the facts above and therefore will not be enforced by the court.

The conclusions do not necessarily follow from the facts found by the trial court. The trial judge thought the regulation is unreasonable because it inhibits the completion of the memorial pattern. That is the conclusion of one person. But seven other men, good men and true, concluded otherwise. There was the witness Hall, who was sexton in 1948, and recommended the regulation, five members of the city council at that time, one of whom is the mayor now, and the then mayor, all of whom doubtless had in mind the situation of the Crawford lots on October 25, 1948, when the council passed and the mayor approved the amending ordinance; for there were eighteen additional plots in exactly the same state with respect to monuments and markers installed and in contemplation. The

effect of the rule upon all of these lots was doubtless taken into consideration by these men. They concluded that it was to the best interest of Manti City and of all concerned to put into operation a different plan for maintaining the cemetery. They decided to adopt a plan, which was foreshadowed in 1941, and which was put into operation with respect to the lots in the east block of Plat "B," providing for lawn type motive of landscaping and for the perpetual care of all lots by the city. For reasons of economy in maintenance, they decided that all monuments and markers installed after the effective date of the October 25, 1948, amendment to Section 180, should be placed flush with the surface of the ground. This regulation, the evidence shows, has been enforced in all cases since that time.

The word "unreasonable" means beyond the limits of reason or moderation, or immoderate; not having any sound basis or justification in reason. 66 C. J. 56.

The Manti City Cemetery is owned by Manti City. The land is dedicated as a place for interment of the dead. It is a public institution. It has been set apart to the stated purpose for well over one hundred years. Burial rights are granted by instruments called Cemetery Lot Certificates. (Ex. 4) They purport to grant "burial rights," nothing else. Their management and control are under the jurisdiction of the city, exercised by the city council.

Section 10-8-62, Utah Code, Annotated, 1953, is the law of Utah on the subject. It provides:

Point 3.

> That cities may purchase, hold any pay for lands within or without the corporate limits for the burial of the dead; . . .have and exercise police jurisdiction . . . over any cemetery used by the inhabitants of the city . . . and pass rules and ordinances for the protection and governing of such grounds.

There is no other law in Utah or court holding which in any way limits the powers thus granted to cities to regulate the use of city owned cemeteries. Nor is there any holding of our court which has specific reference to the issue in this case. The following texts and cases have been consulted; some of them are interesting and educational, but not one of them touches the exact point at issue here. All, however, seem to recognize and many of them hold that the title to burial lots in cemeteries is not a fee simple title but is the ownership of only a right of burial; which is always subject to the reasonable rules and regulations prescribed by the owner of the fee.

> 11 C. J. Cemeteries. Pages 50, Sec. 2, A; page 51, 3, B.

> 14 C.J.S. Cemeteries. Page 65, Sec. 3, a; page 92, Sec. 33.

> 10 Am. Jur., Cemeteries, Sec. 29, page 507; Sec. 19, pp. 500-501. Page 509, Sec. 23.

> Laural Hill Cemetery v. San Francisco, 152 Cal. 464, 93 Pac. 70, 27 L. R. A. (N. S.), 260, 14 Ann. Cas. 1080, affirmed in 216 U.S. 358, 54 L. ed. 515, 30 S. Ct. 301.

Mrs. A. S. Abell vs. Proprietors of Green Mountain Cemetery, (.....Md.....), 174 ALR 971, 56 A2d 24.

There is no claim by the defendants in this case that plaintiff Crawford does not have a right to place a grave stone, suitably engraved with his name, at the head of her husband's grave; also to provide for a similar stone to designate her own grave when she joins him there. Nor does she or her counsel now claim that Manti City did not have the power under the statutes of the state to ordain the regulation that all grave stones and markers thereafter installed should be placed flush with the surface of the ground. The validity of the regulation in all cases except for this particular case is assumed or taken for granted by the court. It is a reasonable regulation; the reasons for its ordination have been testified to by two witnesses, with nothing whatsover to impeach their veracity.

We respectfully submit that the following proposition is sound:

WHEN JAMES CRAWFORD, JR., OBTAINED THE BURIAL RIGHTS IN THE MANTI CITY CEMETERY EVIDENCED BY HIS CERTIFICATE (Ex. 3), HE RECEIVED HIS TITLE SUBJCT TO ALL RULES AND REGULATIONS THEN IN FORCE AND ALL THAT MIGHT THEREAFTER BE ORDAINED BY THE CITY COUNCIL OF MANTI CITY.

Furthermore, there is no sound reason shown by the evidence, or the findings of fact, or in law or in equity, to

support the conclusions of law and the judgment of the court in this case. Just because some one in the family became sentimentally attached to the particular design of monuments and markers which have been purchased at great expense and placed on three of the graves, and plaintiff desires to complete the design, we suggest is not a sound reason for concluding that the enforcement is unreasonable, unfair, unjust, or that it is beyond the limits of reason or moderation, or that it does not have any sound basis or justification in fact.

As a final proposition, we respectfully submit:

THE COURT HAS NO RIGHT TO OVERRULE THE ACTION OF THE CITY COUNCIL IN ENFORCING THE REGULATION IN THIS AS IN ALL OTHER CASES WHEREIN MARKERS AND MONUMENTS ARE INSTALLED SINCE THE EFFECTIVE DATE OF THE AMENDMENT TO SECTION 180.

The case of Abell v. Proprietors of Green Mountain Cemetery, cited above, is authority from a sister state for this proposition. In that case the plaintiff desired to mark her deceased husband's grave with two marble figures of lions, which sculptored objects she had purchased in Italy some 80 years ago.

The proprietors refused her request for permission to place the sculptured lions on the graves. Plaintiff brought this action to enjoin the proprietors from preventing her from placing the lions on the grave, since in their judgment the objects were not in harmony with the

prevailing style of markers. The trial court decided for the defendants; plaintiff appealed. Held, affirmed.

It appears that one of the conditions set forth in the certificate of ownership was that "All enclosures, monuments, or other structures upon the said lot shall be of such design as may be approved by the officers of the said corporation, . . ."

There is not similar reservation written into the certificate with which we are concerned in this case. But in our case, since the power to make regulations concerning markers and monuments is granted by the legislature to the city council of Manti City, and since James Crawford, Jr., received his certificate with such power implied though not written therein, it must follow that his lots, as well as all other lots in the cemetery, might at any time be brought within the operation of any regulation which the city, in its judgment expressed through the agency of the city council, upon the subject of markers.

In such cases the sole power to decide what regulation is necessary or proper must be in the city council. It is not in the courts. There are certain limitations, to be sure, upon what the owners of the land may do. But none of them are material to this case at this time, in view of the way the trial court has disposed of it.

It is only when the action is arbitrary or the result clearly unreasonable that the courts have a right to interfere and overrule the decisions of the governing body. The

action in this case is not arbitrary; there is no discrimination against the plaintiff. She in this case is asking the court assistance to compel the city to discriminate in her favor and against all others who might wish to improve their burial grounds in the same manner. We suggest that the action of the city council is not unreasonable, for its members acted upon good and sufficient reasons in making the regulation, as is made to appear by the evidence, undisputed, in this case, much less is it clearly unreasonable. (Abell v. Proprietors of Green Mountain Cemetery, cited above, at 174 ALR, page 975, Head note 8.)

CONCLUSION

The appellants respectfully pray that the conclusions of law and judgment be disapproved and set aside; and that judgment be entered declaring that respondent does not have a right to install markers on her graves which do not lie flush with the surface of the ground; but that she does have a right to mark them with headstones which lie flush with the surface, as required by Section 180 of the Revised Ordinances of Manti City, 1941, as amended by an ordinance passed and approved on October 25, 1948.

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