

**Cemetery, Dedication of. Cemetery, Private Ownership of. Cemetery, Title by Adverse Usage. County Clerk, Fees for Recording Cemetery Plat. Fees, of County Clerk for Recording Cemetery Plat.**

A town, in order to acquire title to a cemetery must use the same continuously, without interruption, for a period of five years, under such circumstances as are necessary to establish title by adverse usage.

A private party has the right to establish a cemetery and charge a fee for lots situated therein.

A county clerk in recording a cemetery plat should charge the same fees as provided for recording plats of townsites.

Helena, Montana, July 9, 1909.

Hon. George A. Horkan,  
County Attorney,  
Forsyth, Montana.

Dear Sir:

I am in receipt of your letter of July 1st, requesting an opinion upon the following statement of facts and questions :

"On September 7th, 1899, the Northern Pacific Railway Company deeded to two inhabitants of the town of Forsyth a tract of land containing, approximately, ten acres situated about one half mile from Forsyth and outside the corporate limits of such town. For a number of years prior to this conveyance, said land was used by the people of this county as a cemetery, and since said conveyance from the Northern Pacific it has been continuously used as such. The parties who purchased the land from the Northern Pacific charged a specified sum for each lot disposed of in said cemetery. The land has again been sold with the reservation in the deed that it shall not be used for any other purpose than cemetery purposes. This cemetery has been used as such for a period of twenty-three years. The records of this county do not disclose the fact that said land has ever been dedicated as public cemetery."

Upon the above statement of facts you submit the following question:

"Is the title to said tract of land vested in the inhabitants of this community under section 1988 of the revised codes?

2. Can the person who at the present time holds the fee simple title to said tract of land sell and dispose of lots in said cemetery for burial purposes, or must he permit bodies to be buried therein without any charge for said lots?"

You also state the owner of this land has recently had it surveyed and properly laid out in burial lots, and now desires to record a plat or map of said cemetery.

Upon these facts you ask what fees the county clerk should charge him for recording said plat or map.

In answer to your first question will say we are unable to determine from the facts stated whether the use of this land prior to September 7th 1899 was such as to vest the title thereto in the inhabitants of the town of Forsyth or not. If the owner of this land, prior to September 7th, 1899, merely permitted bodies to be buried there under a verbal license, and at all time reserved his rights as the absolute owner of said land in fee simple, it seems that such use would not vest the title to the land in the town.

See *City of Stockton v. Weber*, 33 Pac. 332 where a similar statute was construed in California.

In our opinion the city or town would have to use such land continuously, without interruption, for a period of five years, and under such circumstances as are required to establish title by adverse usage.

Your attention is also called to the fact that there was no law in this state similar to Section 1988 prior to the adoption of the codes in 1895; therefore, there was no law prior to that date under which the city could acquire title to lands, other than the general statute relating to adverse user. As such use of this land after the codes went into effect had not continued for five years prior to September 7th, 1899, the date on which the same was sold by the Northern Pacific Company, it follows that if the purchaser of this land from the railroad refused to allow persons to be buried there without first paying for the lots, that it was an interruption of the continuous use of the land for five years after the law went into effect which provided for the vesting of title in a town upon such continuous use for that period.

In answer to your second question, you are advised that in our opinion if the title to this land had not vested in the town prior to September 7th, 1899, that the person who then purchased the land from the railroad would have a right to sell the lots used for burial purposes in such cemetery and to refuse to permit the burial of bodies unless the lots were purchased. In such case it was a public cemetery owned by a private party, but, of course, he would not have the right to refuse to sell a lot to any person who desired to have bodies buried there.

In answer to your third question you are advised that in our opinion the county clerk should charge the same fees for recording and platting such cemetery as are charged for recording and platting a townsite or map; that is, for each lot up to and including 100, twenty-five cents, for each additional lot in excess of 100, five cents, as provided in Section 3168 of the Revised Codes, for you will notice that the last paragraph of this section provides that.

"For filing or recording any other instrument not herein expressly provided for, the same fee as hereinbefore provided for a similar service shall be charged."

Yours very truly,

ALBERT J. GALEN,

Attorney General.