

Opinion No. 56

Cemetery District—Acquisition of
Property for Cemeteries—Lease.

Held: A cemetery district established under Chapter 221, Laws of 1943, as amended by Chapter 16, Laws of 1945, may hold TITLE to property by grant, gift, devise or any other method—but leasing of property should be done only with great caution due to the constitutional provisions cited herein, and then only where complete control is vested in the district.

August 12, 1947

Mr. Oscar Hauge
County Attorney
Hill County
Havre, Montana

Dear Mr. Hauge:

You have requested my opinion regarding the power of a cemetery district to acquire property for cemeteries and the method or methods whereby such acquisitions may be effected.

Section 8 of Chapter 221, Laws of 1943, as amended by Chapter 16, Laws of 1945, provides:

“Said district may maintain a cemetery or cemeteries within said district; may hold title to property by grant, gift, devise, lease, or any other method; and perform all acts necessary or proper for the carrying out of the purposes of this act, including the selling or leasing of burial lots.” (Emphasis mine).

The legislative assembly very obviously intended the cemetery district to hold “title” to whatever property it

might hold; but the use of the word "lease" in the above quoted section presents certain complications. Grants, gifts and devises specifically mentioned above will—except in the extremely rare case—vest full title in the cemetery district. Likewise the "any other method" mentioned above is a broad enough term so that the cemetery district should proceed only in such a fashion as to secure "title."

A lease does not vest title in the lessee. As ordinarily employed it implies a term and a reversion to the owner of the land after its termination, and only a chattel interest passes thereunder. (32 Am. Jur., Landlord and Tenant, No. 2).

The Montana Supreme Court has held that an oil and gas lease takes the character of an interest or an estate in the land itself, and is an interest in the land, although incorporeal, sufficient to support an attachment. (*Herigstad v. Hardrock Oil Company*, (1935), 101 Mont. 22, 34, 52 Pac. (2d) 171).

The Court has also held the granting of a lease is not a "conveyance" of real property except for purposes of recordation. (*Tuohy's Estate, Pauwelvn, Executor*, (1899), 23 Mont. 305, 309, 58 Pac. 722, 724).

This latter holding was based upon the reasoning the term "convey" is appropriate to the transfer of a title to a freehold, but is not applicable to the passing of a chattel interest in realty such as a lease.

The danger of a cemetery district's leasing cemeteries lies in certain constitutional prohibitions. Article XIII, Section 1, of the Montana Constitution provides:

"Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law."

Inasmuch as many cemeteries are owned by churches, religious organizations and sectarian organizations, Article XI, Section 8, of the Montana Constitution is in point:

"Neither the legislative assembly, nor any county, city, town, or school district, or other public corporation, shall ever make **directly or indirectly**, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect, or denomination whatever." (Emphasis mine).

Although the office of the Attorney General has, upon occasion in the past, held certain statutes to be unconstitutional in whole or in part, I have long felt there is some question whether the Attorney General may hold a statute unconstitutional. The holding of a law unconstitutional falls within the province of our Courts. Hence, I must merely point out to you here the dangers which I think may exist if a cemetery district should attempt to lease cemeteries from private associations and corporations or from churches, religious organizations, or sectarian organizations. Public monies would be budgeted, appropriated and expended for the purpose of maintenance, development, expansion and impovement of cemetery properties to which the cemetery district would not hold title, and which would revert to the lessor upon termination of the lease contract. Such payment from public monies, to be sure, would not be direct aid or donation or grant, but would be indirect in that it would be an aid to the lessor upon termination of the lease agreement, when the property would be returned in an improved and developed condition—and thus would fall within the prohibition of the Constitution.

It is, therefore, my opinion a cemetery district established under Chapter 221, Laws of 1943, as amended by Chapter 16, Laws of 1945, may hold

title to property by grant, gift, devise or any other method—but leasing of property should be done only with great caution due to the constitutional provisions cited herein, and then only where complete control is vested in the district.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General