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PROPERTY IN CHURCH-PEWS, MARKET-STALLS AND LOTS IN CEMETERIES.

(*Continued from January No., ante, p.* 11.)

HAVING thus seen, from the foregoing decisions, the analogy existing between property in pews and in market-stalls, respectively, it only remains to briefly consider the nature of the property acquired by a holder of a lot in a church cemetery, and wherein such lot resembles a pew in a church. The holder of a particular lot for burial purposes, claiming under a deed or by virtue of a certificate under seal issued to him by the corporation, where such certificate is declared by its charter, or by the local law of the state, to be equivalent to a deed, has an easement in the land, and not a title to the freehold, and takes such easement subject to such changes as the altered circumstances of the congregation or the neighborhood may render necessary. Washburn, in his work upon Real Property, after speaking of pews, says: "Of the same character is the right of burial in a public burying-ground. It is not a property in the soil nor to compensation for the same, if, upon the ground having ceased to be used for burial purposes, the friends of the persons buried therein are required to remove the remains."

The question as to whether the holder of the lot possesses an easement therein or not, depends upon whether he received a deed therefor, or a certificate, declared by the charter or local law as aforesaid, to be equivalent to and have the same effect as a deed duly executed, acknowledged and recorded. In the absence of such deed or certificate, the person making interments in the cemetery, would do so under a mere license, and his exclusive right to make such interments in a particular lot would

be limited to the time during which the ground continued to be used for burial purposes, and upon said ground ceasing to be used for such purposes, all that he could claim, would be, that he should have due notice, and an opportunity to remove the bodies and monuments to some other place of his own selection, if he desired to remove them himself, and in default of his doing so, that said remains should be decently removed by others. Where, however, the holder has an easement in the land belonging to the corporation, his rights are, in some respects, more extended. Washburn, in his work on Easements and Servitudes, says: "Rights of burial in churchyards and pew rights in churches, although acquired by deed of a particular lot or pew, are only easements in land belonging to the religious society which owns the church and churchyard. It is an easement in, not a title to a freehold, and is to be understood as granted and taken, subject with compensation of course, to such changes as the altered circumstances of the congregation or the neighborhood may render necessary."

The case of *Bryan* v. *Whistler*, 8 B. & C. 288, will afford an illustration of the rights conferred by a mere license. It appeared in that case, that the plaintiff had paid 20*l.* to the rector of the church for permission to erect therein, for his exclusive use, a vault, with tablet above the same. The receipt taken by him from the rector, said nothing with reference to the plaintiff having an exclusive use of the vault, which he afterwards built at his own expense, and made an interment therein. Subsequently the rector opened the vault and placed another body in it, whereupon the plaintiff brought an action on the case. The defence was that the plaintiff had no such interest in the vault as would enable him to maintain the action, because there was no conveyance or other instrument, vesting in him the exclusive right to the vault. The verdict being for the plaintiff, the defendant moved for a nonsuit, and the Court of King's Bench, upon entering a nonsuit, says as follows: "No memorandum was in this instance signed, except the receipt. If it be not an interest in land, it is an easement, or the grant of an incorporeal hereditament, which could only be effectually granted by deed, and no such instrument was executed." * * * "Case, therefore was the proper remedy, as it is for the disturbance of a pew, the right to which is granted for the special purpose of attending divine service. But whether the grant were for a special purpose, or general for all purposes, the right could not pass without deed or writing."

In *Wood* v. *Leadbitter*, 13 M. & W. 841, which was a case as to the distinction between an easement in land and a mere license to come upon the same, the court refers to the case of *Bryan* v. *Whistler*, with approval, and after stating that the principle of easement does not depend upon the quality of interest granted, but upon the subject-matter, says, "A right of common, for instance, which is a profit *à prendre*, or a right of way, which is an easement or right in nature of an easement, can no more be granted or conveyed for life or for years, without a deed, than in fee-simple."

See also, *McCrea* v. *Marsh*, 12 Gray 211; *Burton* v. *Scherpf*, 1 Allen 133.

In the case of *Windt* v. *German Reformed Church*, 4 Sandf. Ch. Rep. 471, it appeared that the religious corporation became seised of the ground, and converted it to the purposes of a cemetery. The complainants had relatives interred therein, none of whom had received deeds from the corporation in which the whole title remained. After stating that the complainants could only in the character of corporators in the society owning the ground, have any interest in the cemetery, or exercise control over it, the vice-chancellor says, "The only protection afforded to the remains of the dead interred in a cemetery of this description, is by the public laws prohibiting their removal except on the prescribed terms, and in a still stronger public opinion. Probably these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvellous rapidity, and whose wants leave but little room for the remains of the dead in the dense and crowded haunts and thoroughfares of the living." Returning to the subject of a permit or license to enter, he adds, "It confers the privilege of sepulture for such body, in the mode used and permitted by the corporation, and the right to have the same undisturbed so long as the cemetery shall continue to be used as such, and so long also, if its use continue, as such remains shall require for entire decomposition, and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture.' He also takes occasion to say in another part of his opinion that, "Where vaults or burying-lots have been conveyed by religious corporations, rights of property are conferred upon the purchasers," and refers to 3 Edwards Ch. Rep. 169, which was a case in which the Brick Presbyterian Church filed a petition for the sale of the

church and churchyard, to which a number of pew-holders and vault-owners, the latter claiming under deeds, objected. The petition was dismissed, and the vice-chancellor, after stating that the objection of the pew-holders did not constitute an insuperable obstacle to the granting of the application, held as follows, as to the vault-owners: "The intention obviously was to sell and dispose of the *land*, and not to grant a mere temporary use or privilege to construct vaults in the land, with a reserve of the title to the church. It was a grant of the land itself, such as passed the title to the purchasers or lessees. And hence the form of the conveyances describing each lot or parcel by metes and bounds, with all the apt words generally used to pass the title to land." * * * "This view of the case renders it unnecessary to examine into the expediency or propriety of the proposed sale and removal of the church. If the petitioners have not the right without obtaining the consent of the vault-holders, then it cannot be done, however much it may be desired by a large portion of the congregation." This case goes to the full extent of declaring that the lot-holders claiming under deeds formally executed, took title to the fee, and that the property could not be sold as long as they objected.

In the case of *Richards* v. *The Northwest Protestant Dutch Church*, 32 Barb. 42, an injunction was applied for by the representatives of the original grantee of a lot in the churchyard, to restrain the officers of the church from removing remains and destroying the vault. In denying the complainant's right to the relief asked for, the court said: "The right of burial, it seems to me, when confined to a churchyard, as distinguished from a separate, independent cemetery, although conveyed with the common formalities of 'heirs and assigns for ever,' must stand upon the same footing as the right of public worship in a particular pew of the consecrated edifice. It is an easement in and not a title to the freehold, and must be understood as granted and taken, subject (with compensation of course) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary. * * * Like the sale of a church pew, which gives the mere right to worship in the particular place while the church stands and is occupied for religious purposes, the sale of a church vault gives, it would seem, the mere right of interment in the particular plot of ground, so long as that and the contiguous ground continues to be occupied as a churchyard. The owner of the ease-

ment may be, in case of disturbance, and no doubt is, entitled to a reasonable compensation or equivalent; but he cannot interpose a veto to the disposition of the soil, should the court, as was actually the case in this instance, on application of the legitimate church officers, deem such disposition proper and order it accordingly."

The effect of this decision is to materially modify the decision in 3 Edwards Ch.

It may be as well to state here, that it is not the purpose of this paper to go into the subject of independent cemeteries, in which, it would seem, whether they be joint-stock companies or corporations, the holders of lots would possess fee-simple titles, and could exercise rights of ownership and control over the same, consistent with the purposes for which said lots were sold, in as full a manner as over any other real property of which they might hold the absolute title.

In the case of *Sohier* v. *Trinity Church*, 109 Mass. 21, it was held that "rights of burial under churches or in public burial-grounds are peculiar, and are not very dissimilar to rights in pews. They are so far public that private interests in them are subject to the control of the public authorities having charge of public regulations."

In the case of *The Buffalo City Cemetery* v. *The City of Buffalo*, 46 N. Y. 503, an effort was made by the appellant to give such a construction to the rights acquired by its lot-holders, under the conveyances to them, as to make them liable, and itself exempt, from an assessment levied by the city for the paving of a sidewalk constructed along the land of the said cemetery. But the court held that the lot-holders were not liable, and used the following language in delivering its opinion: "The effect of such conveyances, under the statute from which the plaintiff derives its powers, is, we suppose (for no copy of any conveyance is laid before us), no more than to confer upon the holder of a lot a right to use it for the purposes of interments. No such estate is granted as makes him an owner in such sense as to exclude the general proprietorship of the association. The association remains the owner in general, and holds that relation to the public and to the government; while subject to this, the individual has a right exclusive of any other person to bury upon the subdivided plat assigned to him. He holds a position analogous to that of a pew-holder in a house for public worship."

In the Matter of Kincaid's Appeal, 66 Penn. St. 411, the facts

were substantially as follows: The Methodist Episcopal Church purchased certain ground for the purpose of a graveyard, and it was so used. In process of time it ceased to be used for interment, and many of the bodies having been removed to other cemeteries, it was much neglected and became a nuisance. Thereupon the legislature passed an act for its vacation and sale, and for the removal of the bodies therefrom, and that after such removal, it should no longer be used for burial purposes. The act also directed that the commissioners named in the act, of whom the appellant was one, should be authorized to purchase suitable lots in the cemeteries in the vicinity of the city, and should remove thereto all the remaining bodies, and have them decently interred; and also remove and set up over the new graves the monuments and tombstones now standing over the present graves; and that said commissioners should also, by publication, give due notice of their intention to act in the premises. The act further provided that the commissioners, after such removal, should sell the ground to the best advantage, and that the proceeds therefrom should be distributed, firstly, to pay expenses of removal, including cost of the new lots; and secondly, to compensate the lot-holders.

The bill of complaint set forth that the persons filing the same, together with other lot-holders, were the owners of nearly all the cemetery, having bought or inherited the same, and that whatever title the corporation held was for their use, and that the Act of Assembly under which the commissioners assumed to act, was unconstitutional. The lower court granted a preliminary injunction, from which this appeal was taken. In the Supreme Court of the state, SHARSWOOD, J., by whom the decree below was reversed, referred to the certificate (which was filed in the case as being the one given by the church to its lot-holders respectively, and which was under seal), and said, "The plaintiffs may be divided into two classes: holders of certificates and holders of interment permits. The certificate set out in the bill states that the subscriber, in consideration of $10 paid by him, is entitled to 'two burying-lots in burying-ground of said church, to have and to hold the said lots for the use and purpose, and subject to the conditions and regulations mentioned in the deed of trust to the trustee of said church.' This deed of trust is not produced or annexed to the bill. We have printed in the appendix of the paper-book of the appellants the deed of Keating and wife to the Methodist Episcopal church of the

city of Pittsburgh; but in this deed no trustees are named. It is a direct grant to the church; expresses no trust, not even the object for which the ground was conveyed. The appellants admit, however, in their paper-book, that the deed to the trustees contains no conditions or regulations on the subject. We will assume this to be so. We cannot, however, consider the certificate as evidence of a grant to the lot-holders of any interest or title in the soil; and if this is so, of course not the interment permits. Had it been so intended, it would surely have contained words of inheritance. * * We hold that it was the grant of a mere license or privilege to make interments in the lots described, exclusively of others, as long as the ground should remain 'the burying-ground of the church.' Whenever by lawful authority it should cease to be burying-ground, his right and property would cease. The lot-holder purchased a license, nothing more, irrevocable as long as the place continued a burying-gound, but giving no title to the soil. Whether it was an incorporeal hereditament descendible to him, or passed on his death to his personal representatives, it is unnecessary to decide." After referring with approval to the cases of *Windt* v. *The German Reformed Church*, and *Richards* v. *The Northwest Protestant, &c.*, the court closed its opinion by saying: "The grant of a pew in a church edifice creates a kind of right which appears to be in all respects analogous to that of a burial-lot in a graveyard. In regard to pews there have been many more determinations than in regard to burial-lots, and the voice of the authorities is uniform and clear." And in upholding the constitutionality of the Act of Assembly as to the removal of remains, he adds: "As to those recently interred, the necessity, with a view to public health and comfort, of removing them, is as apparent as the prohibition of future interments." * * * "They may direct the removal in such manner and upon such terms as to them may seem wisest and best, having due regard to the feeling of reverence and attachment which all men naturally have to the spot where the ashes of their departed ancestors and friends repose, and the strong desire that, if possible, they should not be disturbed. Even these feelings, however, must yield to the higher consideration of the public good."

In the case of *Partridge et al.* v. *The First Independent Church of Baltimore*, 39 Md. 631, the facts were as follows: The appellee had purchased in fee a parcel of land for a burial-ground, and it was used for many years for that purpose. The persons from whom the

appellants had derived the lot in question, had purchased the same from the appellee and had acquired a certificate therefor in the form issued to lot-holders by the appellee, which was neither sealed, acknowledged nor recorded, but professed to convey a certain designated lot to the party, his heirs and assigns for ever, subject to the regulations of the church trustees. It was simply signed by the chairman of the trustees, and attested by the register. The purchaser had constructed an expensive vault, in which he had interred different members of his family. The burial-ground having ceased to be suitable for such purpose, the appellee filed a bill against the lot-holders for a sale thereof, and trustees were accordingly appointed to sell the same, and were directed by the decree to see that the remains of all persons interred therein were removed, and decently re-interred elsewhere at the cost of the church corporation, except where parties interested desired to do so themselves, in which case they were to bear any excess in the cost attending such removal. The trustees faithfully performed their duties. Months before the filing of the bill, the appellants had removed their dead, leaving the empty vault, which the trustees reserved from the sale, with the right to remove the same from the premises. The appellee was ready and willing to pay to the appellants the sums paid for their lot, but they claimed out of the proceeds of the sale such sum as would enable them to construct elsewhere a vault similar to the one they had built in the cemetery of the appellee, and filed a petition praying the allowance of said sum. The court having dismissed their petition, they appealed. The only questions which arose upon the appeal were: 1st, as to the nature and extent of the interest of the lot-holders; and, 2d, whether, and to what extent, they were entitled to distribution of the proceeds of sale, for and in respect to improvements placed on the lots.

After reciting the facts, and stating that the certificate was neither under the seal of the corporation, nor acknowledged, nor recorded, the court, in affirming the decree, say: "We think it clear that it conferred no title or estate in the soil, nor could it operate as a grant of an easement, because it was not under seal, nor was it acknowledged and recorded, so as to be effective to convey such an interest. The right to an easement must be founded upon a grant by deed, or upon prescription, for it is a permanent interest in another's land, with a right of enjoyment; whereas a mere license

is but an authority to do a particular act or series of acts, upon another's land, without possessing any estate therein. At most, then, the certificate, such as we have here, conferred only a privilege or license to make interments in the lot described, exclusively of others, as long as the ground remained a burying-ground or cemetery. Whenever, therefore, by lawful authority, the ground ceased to be a place of burial, the lot-holder's right and privilege ceased, except for the purpose of removing the remains previously buried." The court then refers with approval to *Kincaid's Appeal*, 66 Penn. St. 411, and then passing to the second question, which was to whether the lot-holder is entitled to compensation or re-imbursement, out of the proceeds of the sale of the burying-ground, for improvements or erections placed on the lot, says:

"We are not aware of any principle upon which this claim can be allowed. There can be no application to this case of the principle upon which beneficial improvements are allowed for, nor is the nature of the privilege, evidenced by the certificate, such as to entitle the holder to any distributive proportion of the proceeds of the sale of the estate itself. The most that the lot-holders could claim to receive is the price paid by them for the license. If their interest was in the estate, then they would be entitled to distribution according to that interest; but as they had no interest in the estate, and only an authority to do certain acts on the land, they can claim no part of the proceeds of sale, as being the equivalent of any interest therein. * * * All monuments and erections capable of being removed, placed on the burial-lots under a license like the present, would be regarded as the personal property of the lot-holder; and he would have the right to remove the same, upon the lot ceasing to be used for the purpose of burial. * * * To the assertion of this right the lot-holders must resort, instead of claiming compensation for the cost of the erection or improvement."

In the late case of *Craig* v. *First Presbyterian Church, &c.*, to be reported in 88 Penn. St., the facts were, so far as it is material to state them, substantially as follows: An Act of the General Assembly, passed on the 18th of April 1877, provided that when from any cause any burial-ground belonging to or in charge of any religious society or church, directly or through trustees therefor, has ceased to be used for interments, the Court of Quarter Sessions, upon petition of the managers, officers or trustees of such society or church, setting forth that the erection, extension or

improvements of buildings for religious purposes of such society or church are hampered or interfered with, and the welfare of such society or church is injured, and after notice being given and an election held by the church members as provided in said act, may, after full hearing, authorize and direct the removal of the remains of the dead from so much of said burial-ground as may be needed for buildings for religious purposes only, by the managers, officers and trustees of such society or church. The trustees of the First Presbyterian Church petitioned the court, reciting the above act and setting forth that the burial-ground was no longer used for interments, and praying the passage of a decree directing them to remove the dead from so much of the burial-ground of the church as might be required for buildings for a Sabbath school and lecture-room. Two members of the church appeared in court and filed exceptions upon various grounds, which being overruled, the record was removed to the Supreme Court upon writ of *certiorari*. The only question involved in the case which it is material to here refer to is that with regard to the right of the trustees to remove the dead. Upon this point the court (Mr. Justice PAXSON delivering the opinion) held as follows: "The remaining question is one of power. The church having granted the privilege of interment in its grounds to certain persons, it is contended that as against the corporation such persons have a right to have the bodies remain undisturbed. In other words, that they had certain rights of property in said burial-ground which could not be taken away except for public purposes, and upon making compensation therefor; and that the Act of April 18th 1877 was transgressive of art. 1, sect. 17 of the Constitution, which prohibits the legislature from passing any law impairing the obligation of a contract." * * * "We have no accurate information as to the precise nature of the relations between the church and those privileged to bury in its grounds. It does not appear that any one of them had any right to or title in the soil, nor any right of sepulture in any particular lot or place in the yard. We have nothing in this entire record upon this subject except the statement of Robert Dalzell. He says in his cross-examination: 'My impression is that pew-owners were entitled to burial without paying anything for the ground. There was a book which showed all orders for interments of pew-owners and others: that book has been lost. I think that all persons, except pew-owners, paid for the privilege of burying in the churchyard, unless it was the poor of the church, and as to them

I am not sure.' The most that can be made of this is that the church granted a mere license or privilege to inter in its ground. To pew-holders it appears to have been granted without cost—to strangers upon a consideration. What rights does such a license confer upon its grantee?" The court having, in answer to this query, referred with approval to *Kincaid's Appeal*, 16 P. F. Smith 420, and *Church* v. *Wells, &c.*, 12 Harris 249, affirmed the judgment. From this decision Chief Justice AGNEW dissented, holding that it offended against natural feeling and constitutional law, and after admitting the right of the state in the exercise of her police power to regulate graveyards, for the public good, and to remove, in the exercise of eminent domain, where great public interests require it, upon making compensation to those who have acquired a right of sepulture by contract, he says, "In my judgment it is equally against the constitutional inviolability of contracts. Can a private association, corporate or unincorporate, sell a right of sepulture to-day, and to-morrow or next year retake the ground for a lecture or school-room? It is immaterial whether a grant of sepulture confers an estate or a privilege; it is a purchased right founded in contract, which no law can violate, except for a public necessity."

It has thus been seen what is the nature of a license and of an easement respectively, in ground used for the purposes of sepulture and wherein the same resemble each other so far as they are both granted subject to such changes or alterations as circumstances may render necessary. The cardinal difference between them would seem to be, that in the case of an easement the holder thereof is entitled to compensation if deprived thereof by sale or otherwise, upon the ground that he possesses a permanent interest in the land, with a right to enjoy the same; whereas by a license no such right is conferred, but only permission to do a certain act or series of acts so long as the land continues to be used for the purposes contemplated at the time of granting the permit.

In many of the states the estate of the owner of a burial-lot is declared by statute to be real estate and descendible to heirs, and devisible by will, or may be disposed of by the owner by sale, with the approval of the corporation. It is also protected from attachment or execution for debt, and is not affected by the insolvent laws of the state. Freeman, in his work on Execution, says that "at common law neither a churchyard nor the glebe of a parsonage or vicarage, could be extended under an elegit. They were regarded