

# The 1949 Revision of the Membership Corporation Law in Regard to Cemetery Corporations

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The amendment effects no change in the existing law of this state, but is simply a codification of the decisional law on the subject. The new Section 212, by its integration of all the provisions relating to permissive joinder of parties, plaintiff and defendant, eliminates the necessity of having a multiplicity of sections.

Section 258 of the Civil Practice Act, as amended, merely puts into statutory form that which has been the law, by expressly authorizing the joinder of inconsistent or alternative causes of action. By expressly authorizing joinder of causes of action where there are multiple parties, it adopts the view of the New York Court of Appeals<sup>3</sup> and settles conclusively the doubt created by the case of *Ader v. Blau*.<sup>4</sup>

This act, dealing with permissive joinder of parties and causes of action, is a forward step in the New York Judicial Council's efforts to streamline our law by eliminating outdated and useless statutes, and consolidating and clarifying the others. For its model, it has chosen the most concise, but very effective, Federal Rules of Civil Procedure.<sup>5</sup>

LOUIS E. MATTERA.

#### THE 1949 REVISION OF THE MEMBERSHIP CORPORATION LAW IN REGARD TO CEMETERY CORPORATIONS

##### *Historical Background*

"The People of this State have a vital interest in the establishment, maintenance and preservation of burial grounds and the proper operation of the corporations which own and manage the same."<sup>1</sup> While this maxim has been true from time immemorial, the people through their public officers have been lax in assuring the bereaved of solace and comfort at time of death. Because of inadequate laws, or impossibility of enforcing those existing,<sup>2</sup> a certain group of individuals have been allowed to take advantage of persons mourning

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<sup>3</sup> *Great Northern Telegraph Company v. Yokohama Specie Bank*, 297 N. Y. 135, 76 N. E. 2d 117 (1947).

<sup>4</sup> 241 N. Y. 7, 148 N. E. 771 (1925). This was a wrongful death action against one defendant for erecting and maintaining an iron picket fence said to be an attractive nuisance, which was alleged to be the sole cause of the death of plaintiff's intestate, and against the physician, for negligent treatment of the intestate, which negligence was alleged to be the sole cause of the intestate's death. The court denied the plaintiff the right of joinder.

<sup>5</sup> Fed. R. Civ. P., 20. (Also adopted by Arizona, Colorado, New Jersey, New Mexico and Texas.)

<sup>1</sup> Laws of N. Y. 1949, c. 533.

<sup>2</sup> *Application of Kensico Cemetery*, 193 Misc. 479, 83 N. Y. S. 2d 73 (Sup. Ct. 1948).

the departure of loved ones and have turned personal loss to their own benefit and gain.

Some of the most active abuses may be enumerated as follows:

(1) It was the practice of many cemeteries to offer the position of superintendent to the highest bidder. The person obtaining the position had the full power to set prices for the various services rendered in connection with burials and care of the plots enabling him to realize huge profits. This would hardly seem to be in keeping with the principles of a "non-profit" cemetery.

(2) When parents sought to bury a still-born child, the usual custom was to charge a flat price for burial with the stipulation that the interment would be in an "unmarked grave." Actually the body would be placed in the space between two standard occupied graves and the place of burial was withheld from both the parents and the owners of the plot in which the child was buried.

(3) Assessments would often be made arbitrarily and would be unknown to the plot owners until such times as there was actual need to use the grave, when permission to bury would be refused until those assessments were paid.

(4) It was the custom of the officers of cemetery corporations to buy large number of plots *in their own cemeteries* at fantastically low prices and then offer them for resale at enormous profits. A frequent consequence of this practice was insolvency and dissolution of the cemetery corporation. The cemeteries would soon afterward take on the appearance of abandoned wilderness because of lack of care.

(5) It formerly was the custom to have iron railings around grave plots. The cemeteries soon realized that it would be much cheaper to maintain the graves if they did not have the inconvenience of working around these railings. Without railings a gasoline lawnmower could easily mow an entire row of graves in a short time. The cemeteries therefore initiated an ingenious system for their removal. A chalk mark would be placed on a railing. This railing would then be photographed. In the photograph, the chalk mark would appear to be a crack in the railing. The railings would then be removed and sold as scrap metal before an examination was possible by the plot owner. While it was the plot owner who paid for the railing, the profit that was realized from the sale of the scrap went to the corporation. However, the need for this device was eliminated by the beginning of the war. At that time, the officers of the corporations made an appeal to the patriotism of plot owners to donate the railings as scrap metal to the war effort. While the plot owners' donation was entirely gratuitous, the corporation would sell

the donated metal to scrap dealers and in this way realize a handsome profit.<sup>3</sup>

(6) The cemetery would dig a shallow trench behind an entire row of graves and pour one continuous foundation for the headstones for these graves. Every fourth or fifth foundation would be dug to standard depth but the rest would be too shallow to support a normal headstone. This resulted in many headstones toppling over whenever a grave was dug for burial on that plot. However, whenever a plot owner requested that a gravestone foundation be dug, he would be informed that every foundation was dug separately on order, and he was charged a fee for a "custom-made" foundation.<sup>4</sup>

There was little difficulty in ferreting out these *moral crimes*. Indeed many of the acts were recognized as perfectly lawful under existing laws. The Attorney General found himself powerless to correct abuses because of the impotency of the existing laws. The difficulty arose from the fact that cemetery corporations came within the scope of the Membership Corporations Law but this law did not adequately provide for the peculiarities of a cemetery corporation.

Remedial action was imperative. With this in view, a joint resolution of the Legislature brought about an investigation to probe into the conduct of cemetery corporations.<sup>5</sup> The findings showed that many of the corporations, rather than serving a public function, existed as no more than "lucrative commercial ventures."<sup>6</sup> On receipt of this report, the Governor addressed a letter to the Legislature calling for immediate revision of the existing laws.<sup>7</sup> The outgrowth of the investigation was the present act to take effect September 1, 1949.<sup>8</sup> The revision consists of amendments to existing statutes, new statutes and the creation of a cemetery board to supervise the administration of cemetery corporations.

### *The New Law*

The new statute is, generally speaking, a revised and amended copy of chapter 133 of the laws of 1847. Section 71-a provides for the creation of a cemetery board. Its membership consists of the Secretary of State, the Attorney General, and the Commissioner of Health. Each is authorized to designate a deputy from his department to serve in his absence. However, any action taken by the board which is subject to judicial review must be the act of a board consisting of two of the appointed members and not their deputies.

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<sup>3</sup> N. Y. World Telegram, May 26, 1948, p. 29, col. 1.

<sup>4</sup> See note 3 *supra*. For descriptive pictures of abuses, see REP. ATT'Y GEN., LEG. DOC. No. 7 (1949).

<sup>5</sup> REP. ATT'Y GEN., LEG. DOC. No. 7 (1949).

<sup>6</sup> *Ibid.*

<sup>7</sup> Letter of the Governor to the Legislature, February 14, 1949.

<sup>8</sup> Laws of N. Y. 1949, c. 533.

Technical and legal services are to be provided for the most part by the departments of health, state and law. These services are to be rendered without additional compensation to the designated public officials and members of their departments. Any other necessary services may be compensated for out of the appropriation of \$50,000 and the funds realized by the board from its assessments of the several cemeteries.<sup>9</sup>

#### *Powers and Duties of the Cemetery Board*

The express powers granted to the cemetery board are as follows:

- (1) To adopt rules and regulations for the administration of the board.<sup>10</sup>
- (2) To order any cemetery corporation to comply with the provisions of the article, and the rules and regulations of the board.<sup>11</sup>
- (3) To enforce its orders by mandamus or injunction.<sup>12</sup>
- (4) To maintain a civil action to recover a penalty.<sup>13</sup>
- (5) To accept service of notice in any civil action to which a cemetery corporation is a party, and to appear as the public interest may require.<sup>14</sup>
- (6) To receive and investigate complaints of plot owners and others in regard to the activities of cemetery corporations.<sup>15</sup>

#### *The Cemetery Corporation*

The cemetery corporations covered by this act are the non-sectarian, non-municipal membership corporation cemeteries. They are to be operated upon a non-profit basis. The powers and duties of such a corporation have long been enumerated in our statutes,<sup>16</sup> but methods of assuring compliance have been lacking. The revision seeks to install a method of supervision to correct this laxity. Cemeteries are now required to submit various reports on their administration and surveys of the cemeteries must be made from time to time as conditions require. Maps must be filed with the board and copies

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<sup>9</sup> *Ibid.* § 29. N. Y. MEM. CORP. LAW § 107(1).

<sup>10</sup> N. Y. MEM. CORP. LAW § 108(1).

<sup>11</sup> *Id.* § 108(2).

<sup>12</sup> *Id.* § 108(3).

<sup>13</sup> *Id.* § 108(4).

<sup>14</sup> *Id.* § 108-a; § 106.

<sup>15</sup> *Id.* § 107(3).

<sup>16</sup> *Id.* § 71.

of these maps must be kept available for public inspection in the offices of the corporation.<sup>17</sup>

Trust funds must be set up for permanent maintenance, current maintenance and perpetual care. On or before the fifteenth day of March in each calendar year, every cemetery corporation must file with the cemetery board an accounting and report of these trust funds.<sup>18</sup>

Cemetery corporations may promulgate rules, regulations and charges.<sup>19</sup> Those in effect prior to this amendment remain in effect unless, after a submission thereof to the board, changes are deemed necessary. Any cemetery corporation, organized subsequent to this amendment, must submit their proposed rules, regulations and charges to the board for approval. Changes may be made by filing in the same manner as the original filing. The rules, regulations and charges of every cemetery corporation shall be refiled on or before the fifteenth of March of every calendar year, and the approved list must be conspicuously posted by the corporation in each of its offices, subject to a fine of \$25.00 per day for failure to do so.<sup>20</sup>

A cemetery corporation may levy a tax not exceeding \$2.00 per year on each plot when necessary, subject, however, to the approval of the board. The basis of the assessment may be determined by the directors of the corporation. This tax may be increased to \$5.00 per year by the written consent of two-thirds of the plot owners or by a vote of the majority of the plot owners present at an annual meeting, or at a special meeting called for such purpose. If the funds are necessary for the improvement of the plots, a sum sufficient to accomplish this purpose may be levied in the first instance, but no more than \$5.00 may be collected in any one calendar year. If this tax remains unpaid for more than thirty days after service of notice, the president and secretary of the corporation may issue a warrant to the treasurer thereof who is empowered to act in the same manner as a school collector in regard to delinquent school taxes.<sup>21</sup>

The corporation may issue certificates of indebtedness for lands purchased for cemetery purposes or for services rendered or material furnished in connection with the necessary and proper preservation or improvement of its cemetery.<sup>22</sup> The interest thereon may not exceed 6%. Permission to issue certificates must be obtained from the cemetery board. The directors of the corporation must keep an account of the number and value of these certificates and the persons to whom they are issued. A verified copy of this account shall be filed with the cemetery board on or before the fifteenth of

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<sup>17</sup> *Id.* § 80.

<sup>18</sup> *Id.* § 86-a.

<sup>19</sup> *Id.* § 82.

<sup>20</sup> *Id.* § 82-a.

<sup>21</sup> *Id.* § 90.

<sup>22</sup> *Id.* § 97.

March of each calendar year. In addition, a verified statement must be filed setting forth all the changes made in this account during the previous calendar or fiscal year. The directors shall set apart such portion of the proceeds from the sale of lots, plots and parts thereof as they deem necessary to pay such certificates as they mature.

### *The Lot Owner*

"The purchaser of a cemetery plot acquires no title to the soil but merely an easement or right of burial."<sup>23</sup> When a person undertook to buy a burial plot, he seemed to acquire few rights but many responsibilities. The present law seeks to ameliorate the status of the lot owner. As aforementioned the directors must fix and determine the price of lots, plots and parts thereof. Unless the certificate of incorporation otherwise provides, the corporation must make its lots available to anyone. The location of lots must be designated upon a map on display in the offices of the corporation and the prices of the lots must be listed on an accompanying schedule.<sup>24</sup> If a corporation shall sell a lot for a price in excess of the scheduled one, such corporation and its agent in the sale shall each forfeit to the State of New York a sum equivalent to three times the excess amount so paid.<sup>25</sup> The instrument of conveyance shall include the actual amount paid therefor, and the description of the property by block and plot numbers, as they appear on the cemetery map. All lots, plots and parts thereof which have been conveyed shall be indivisible except with the consent of the lot owner and the corporation, or as otherwise provided for in the law.<sup>26</sup>

After the death of the lot owner, the power of alienation of the lot is governed by Section 84(7) of the Membership Corporation Law. Where more than one person is entitled to possession of the lot, those entitled must designate one of their number and file such designation with the corporation.<sup>27</sup> Failure to so designate gives the directors of the corporation the power of designation.

The cemetery corporation usually has the sole power of alienability. The only exception to this rule occurs in the following case. Where the corporation has conveyed a plot to an individual who later decides not to make use of it, the plot owner is required to offer the plot for resale to the corporation at its original price plus 2% per annum interest.<sup>28</sup> The cemetery corporation has the option of accepting or refusing to purchase. If it refuses to buy the owner is permitted to sell on the open market, subject to the prior approval

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<sup>23</sup> *Matter of Rosen*, 173 Misc. 433, 17 N. Y. S. 2d 794 (Surr. Ct. 1940).

<sup>24</sup> N. Y. MEM. CORP. LAW § 84(3).

<sup>25</sup> *Id.* §§ 84(4).

<sup>26</sup> *Id.* §§ 84(6).

<sup>27</sup> *Id.* §§ 84(10).

<sup>28</sup> *Id.* § 85.

of the cemetery board. This provision is aimed at preventing the sale of large blocks to individuals who might thereafter resell for enormous profits. In short, "the middleman" is eliminated from the business of profiteering on burials.

By purchasing a lot, an owner of full age becomes a shareholder in the corporation. Ownership of a lot carries with it the right to one vote at corporate meetings. Where lots are subdivided into plots and parts thereof, the joint owners determine among themselves who shall exercise the voting power. The voting power is subject to the owner's payment of assessments. Delinquency in this matter brings about disenfranchisement.<sup>29</sup> Under the voting power, owners may pass upon the levy of taxes amounting to more than \$2.00 per year,<sup>30</sup> and elect the directors of the corporation.<sup>31</sup>

The purchase money of a lot must be allotted to certain designated purposes. The corporation is required to form two trust funds: a permanent maintenance fund and a current maintenance fund. These trusts are to be formed by investing in certain approved securities. Ten per cent of the purchase price must be invested in the permanent maintenance fund and fifteen per cent must be invested in the current maintenance fund.<sup>32</sup> After the deductions for these purposes and for the expenses of the sale, at least one-half of the residue must be allocated to the purchase price of real property acquired by the corporation.<sup>33</sup> The remainder of the proceeds shall go towards preserving, improving, and embellishing the cemetery grounds and discharging the corporate liabilities and expenses.

Prior to the enactment of these provisions many cemetery corporations had purchased land under agreements whereby the grantor was to receive a certain flat percentage of the sale price of a lot with no provision for any primary deductions such as those listed above. The new legislation will not contravene the constitutional guarantee against impairment of contracts, because the act provides that where such contracts are outstanding, they shall remain in force unless the written consent of the grantor to conform to the new schedule is obtained.<sup>34</sup>

No cemetery corporation shall hereafter purchase land for more than its fair and reasonable market value, and the purchase price must be approved by the Supreme Court of the county wherein the land is located. Notice that the approval of the Supreme Court is sought, must be given to the cemetery board.<sup>35</sup>

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<sup>29</sup> *Id.* 74.

<sup>30</sup> *Id.* 90(1).

<sup>31</sup> *Id.* 45.

<sup>32</sup> *Id.* 86-a.

<sup>33</sup> *Id.* 87(1).

<sup>34</sup> *Id.* 87(1).

<sup>35</sup> *Id.* 87(3).



An additional charge is usually made to the lot owner for perpetual care. Where an amount is fixed as a charge for such care, the corporation shall include a covenant in the deed to care perpetually for the lot, plot or part thereof to the extent that income derived from the amount paid will permit.<sup>36</sup>

### *Certificates of Indebtedness*

As already stated, a cemetery corporation need not meet all of its obligations with cash, but may issue certificates of indebtedness in satisfaction thereof.<sup>37</sup> These certificates were formerly used in speculative practices. According to the Attorney General, at least ten brokerage houses dealt in them in the same manner as other securities. The certificates were issued at such an inflationary value that one with a face value \$70.00 could not command an open market price of 65¢. Speculators were purchasing the certificates and in many instances the directors of the corporations, in breach of their fiduciary duty, were becoming claimants against the corporation for enormous sums at little expense to themselves. The certificates carried with them voting power at corporate meetings, so that even if the members of the corporation attempted to prevent the abuse, they could easily be voted down. Furthermore, there existed no legal machinery to correct this condition.

Now certificates of indebtedness are subject to close surveillance by the cemetery board. Their issuance is dependent upon approval of the board.<sup>38</sup> The requirement of yearly reports guards against the issuance of non-approved certificates, and the further requirement that funds be allotted to amortization prevents control of the corporation from vesting in any group of certificate holders for too long a time.<sup>39</sup> It appears, however, that there still exists one evil in respect to these certificates that has not been remedied. A cemetery corporation, being a membership corporation, should be under the control of its members. It is questionable if there is any valid purpose for connecting voting power with certificates of indebtedness. In corporations, partnerships, or sole proprietorships, there is no instance of creditors obtaining any control in the administration of a business unless there has arisen a default or other financial crisis. The admission of individuals whose sole interest is profit-making is anomalous to a situation where the most immediate concern of those in whom the final power of decision is vested should be the maintenance of a well kept cemetery on a non-profit basis. The taint of commercialism, which should be as far removed as possible, is introduced and sanctioned by the law now governing this matter. Per-

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<sup>36</sup> *Id.* § 91.

<sup>37</sup> *Id.* § 97.

<sup>38</sup> *Id.* § 97(2).

<sup>39</sup> *Id.* § 97(3).

mitting the creditor to vote at corporate meetings would seem to be in disharmony with the non-profit purposes of these corporations for he is a party whose only interest is financial gain. It is submitted that a certificate of indebtedness should have no more force than a negotiable instrument.

### *Fraternal Societies*

Many fraternal societies and organizations include among the benefits arising out of membership the privilege of burial in a section of a cemetery maintained by the society. This practice may continue unaffected under the new law. Societies are precluded, however, from making any charge for papers authorizing the burial in the society's grounds,<sup>40</sup> and violation of this restriction will constitute a misdemeanor. The new statute seeks to prevent the "middleman" from appearing in any guise whatsoever. Yet it does not seem to prevent a group of individuals from forming a sham society to cover up dealings in burial plots. It would be a welcome addition to the law if each cemetery corporation were required to submit a list of organizations that have acquired burial rights for the benefit of their members. This would serve a two-fold purpose: it would enable the board to discover sham societies and would further provide the board with a list of valid societies subject to investigation under the penal provisions of the statute.

### *Religious Corporations*

In general, religious corporations are expressly excluded from the requirements of the new statutes.<sup>41</sup> They are, however, required to maintain a perpetual care fund, subject to the same regulations as corporations included in the statute.<sup>42</sup> Religious corporations would also seem to be subject to the new amendments to the Penal Law,<sup>43</sup> *i.e.*, that all advertising in connection with the sale of lots, plots or parts thereof, must be true and accurate, and must state the exact location of the cemetery, and of the individual lots.

The exemption of religious corporations depends to a great extent upon the good faith of the parties involved. The question of good faith of a religious cemetery corporation does not appear to be a matter of inquiry for the cemetery board. Since the board has jurisdiction only over those cemetery corporations not expressly excluded, the question of bad faith must be decided by some other body. This question might arise, however, in a civil action brought by or against a religious cemetery corporation, or in a criminal action brought by

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<sup>40</sup> N. Y. PENAL LAW § 450.

<sup>41</sup> N. Y. MEM. CORP. LAW § 71

<sup>42</sup> *Id.* § 92.

<sup>43</sup> N. Y. PENAL LAW § 449.

the Attorney General. In either case, it will be a matter for the courts to decide. If bad faith is found, then the board would have jurisdiction. Instances of bad faith have occurred where a group of lay promoters have sought to associate themselves as a religious denomination in order to disguise what would otherwise be a purely non-sectarian affair. The law, however, allows only reasonable wages to be paid by these exempt corporations.<sup>44</sup> Thus it would appear that a group of lay promoters might fraudulently avail themselves of this exemption provision by keeping their profits low so as to avoid notoriety.<sup>45</sup>

### Conclusion

In the beginning of this article numerous abuses were catalogued. It will be interesting to review them and to see to what extent they might continue under the new law.

(1) The practice of letting out the position of superintendent on a concession basis is not forbidden. However, the rigid requirements pertaining to charges that may be made have left this position worthless as a source of illegal excise.

(2) The new statute requires that the directors of all cemetery corporations enact a rule forbidding the burial of a body in any lot, plot or part thereof, not entitled to burial therein.<sup>46</sup> The practice of putting the bodies of still-born infants in plots belonging to others will be discontinued.

(3) The statute fairly eliminates any possibility of a burial being delayed because of unpaid charges or assessments unknown to the plot owner. Charges must be listed and approved by the board. Charges that cannot be reasonably fixed in advance may be levied, but they are reviewable by the board and if it is determined that they are excessive, unauthorized or improper, the corporation may be compelled to pay the individual so charged, three times the price he originally paid.<sup>47</sup>

(4) Fraudulent "middleman" practices have been guarded against for now the cemetery corporation alone may sell the plots.

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<sup>44</sup> N. Y. MEM. CORP. LAW § 71.

<sup>45</sup> Actually, the proof of good faith may be found in the affidavit which the federal government requires to be filed by all corporations seeking an exemption from the payment of taxes. From this affidavit may be discovered the amount of wages and other expenditures of such corporations. Any information that the board might desire as to the operations of the excluded corporations can easily be found in this exemption affidavit. Exemption Affidavit, form 1023, required to be submitted to the Collector of Internal Revenue by those Religious, Charitable, Scientific, Literary, or Educational Organizations, claiming tax exemptions under INT. REV. CODE § 101(6).

<sup>46</sup> N. Y. MEM. CORP. LAW § 82(1).

<sup>47</sup> *Id.* § 82(5).

Under the statute, employees of the corporation may receive commissions for the sale of plots, but since the sale price of a plot is subject to approval by the board, the commissions paid will probably be small and will offer little temptation to fraud.<sup>48</sup>

(5) There is no express remedy offered to counteract the fraudulent practices concerning railings and mass-production gravestone foundations mentioned previously. But these acts were always considered illegal since they involved fraud, and prevailed only because they were not discovered. Now, however, we have in the cemetery board a supervisory body that can more easily look into the practices of the corporations, and insure that these fraudulent practices are discontinued.

The requirement that various reports and financial accounts be regularly submitted to the board, coupled with the power of the board to punish for violations, insures that persons will hesitate before attempting to circumvent the law. These amendments will go far to restore the non-profit and public use concepts of a cemetery corporation.

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<sup>48</sup> *Id.* § 85(4).