Approved 2/29/84
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Edward F. Reilly, Jr. at
Chairperson

11:00 a.m. on February 24, 1984 in room 254-E of the Capitol.

All members were present except: ~~xxxxxxx~~

Committee staff present:
Fred Carman, Assistant Revisor of Statutes
Russell Mills, Legislative Research
Emalene Correll, Legislative Research
June Windscheffel, Secretary to the Committee

Conferees appearing before the committee:

Senator Gus Bogina
Jim Yonally, Roselawn Cemetery
Ed Carpenter
John Peterson, Kansas Cemetery Association
Jim Snyder, Kansas Funeral Directors Association
Larry McElwain, Lawrence Funeral Director
Dan Belden, Leavenworth Funeral Director
Steve Ryan, Salina Funeral Director

The Chairman introduced Senator Bogina who appeared with a proposed draft of a proposed bill dealing with personal property taxation, with the request that it be introduced as a Committee bill. A copy is a part of these Minutes as Attachment #1. Senator Morris moved that the legislation be introduced. 2d by Senator Francisco. Motion carried.

Senator Bogina asked/that legislation dealing with utilities and the powers of the state corporation commission be introduced. He explained the proposal and it is a part of these Minutes as Attachment #2. Senator Morris moved that it be introduced as a Committee bill. 2d by Senator Francisco. Motion carried.

SB744 - an act relating to cemetery corporations; concerning the undedication and disposition of cemetery property.

The Chairman recognized Jim Yonally, who appeared to represent the Roselawn Cemetery in Salina, Kansas, on SB744, as a proponent of the legislation. He stated that he felt SB744 makes it possible for a cemetery corporation to undedicate a portion of their cemetery land for the purpose of selling or leasing that land. If the property is sold or leased he said that any net proceeds from such proceeds would be paid into the permanent maintenance fund of the cemetery and that any undedicated lands would then be placed on the tax rolls and taxed as any other land in the area. He stated that at the present time it is difficult to use the land for anything other than burial purposes. He said that the proposed legislation would make it possible for the cemetery corporation to use the land for something other than burial purposes.

Senator Francisco asked about the matter of the Roselawn Court Case. Jim Yonally stated that with the permission of the Chairman he would ask Ed Carpenter to apprise the Committee. Mr. Carpenter said the Roselawn land was dedicated by plat in the 1920's. A portion of that was put into 8 lots along Crawford Street and utilized for a mortuary. The purpose of the lawsuit was to stop the operation of the funeral home, because the land was dedicated for cemetery purposes and could not be used for that purpose. The result was that the funeral home was cut down by an injunction. The county put the land back on the tax rolls and the Court of Appeals has ruled that even though it was dedicated but is used as a mortuary it is taxed as a mortuary. There are three ways to dedicate cemetery property: 1. to bury someone; 2. to put a note on the plat when you file the plat; and 3. by restrictive covenant as you might see in a subdivision. He stated that because of this lawsuit it

his frank opinion that after land has become dedicated that it cannot be used for anything else.

John Peterson then spoke on behalf of the Kansas Cemetery Association in support of SB744. He said that this statute would provide a mechanism where land that is dedicated but has never been used for burial purposes could be un-dedicated and placed back on the tax rolls. All of the proceeds or loss of that property would have to go into the permanent maintenance fund of that cemetery so that money would then be available to provide permanent maintenance for the part of the money that is being used.

The Committee asked about undedication and discussed various abandoned cemeteries.

Jim Snyder was recognized by the Chairman. Mr. Snyder introduced Larry McElwain, who presented testimony concerning SB744. Mr. McElwain's written statement is a part of these Minutes as Attachment #1. It gives the concerns and feelings of the Kansas Funeral Directors Association concerning SB744. They stated that they have no criticism of the dedicated property being tax exempt. However, they feel that approval of SB744 would create property being dedicated as a cemetery and as the area was developed and thus became more valuable, that by just using the method to undedicate part or all of it, might be put back on the tax rolls, but that no taxes would have been paid on it for the entire period of its dedication.

Mr. McElwain said that concerning dedication there are two definitions: legal dedication and also the dedication of that cemetery corporation to serving the people. He said they also need to consider the residents in the surrounding area and that the statutes are vague as to what land can be used for in the proximity of the cemeteries. Mr. McElwain said that the most important reason is the fact that cemeteries are tax-exempt. He stated they feel that SB744, if passed, would over-turn the judicial in the decision concerning Roselawn; and they feel it will do harm to customers and residential neighborhoods.

A question was asked about undedicating ground and Steve Ryan was recognized by the Chairman. He said there is a statute for undedicating ground, parks and roads, but it doesn't include cemeteries. He said it was used in Wyandotte County but that was never tested. He said that the city has to approve the process andthe county has to undedicate it. There is serious question if any court in the state of Kansas would allow that to happen, according to Mr. Ryan. He said the process has never been proved in a court of law.

The question was then posed about a proviso in the statute which would make paying back taxes mandatory if land were undedicated. Mr. McElwain said it was his personal feeling that it would be an overwhelming situation to go back and figure property values and taxes and thought it would be very cost-prohibitive for cemeteries.

Dan Belden, who had been very active in 1974 at the time of the court case in the Kansas Funeral Directors, was introduced. He said that he had another perspective to relate. He said the matter or undedication does have an economic impact. He said he appreciated the concerns expressed by Committee but that he was here as a funeral director because that 99% of the time when a problem arises with cemetery plots he is the one to whom the consumer goes for help and consultation. He said that if SB744 were to pass this would in effect reduce the inventory of the cemetery to where it would no longer be profitable. He said that the cemetery has access to the funds and it is fraught with danger. There is no supervision of the funds, and he said that at one time the agency that was to be monitoring the funds was not aware they were responsible for monitoring the funds. When asked what elements were important in selecting a cemetery he said that the appearance of a cemetery and whether it was well-maintained and its cost to a family at the time of sale.

When questioned, Steve Ryan said that cemeteries with the dedicated grounds have certain buildings they can build on the ground such as mausoleums or a chapel to be used in conjunction with the final services. He said that the cemeteries that have mortuaries built in conjunction with them have had the foresight to keep that ground out of dedication. He stated that Wichita tried to put their parking lot on the dedicated ground but the City would not let them use it. He feels it goes back to the original zoning board hearings.
He said that he felt the courts were trying to defend the people who bought those lots (referring to the lawsuit which had been a class action suit) under the impression that the lots would be as shown in the pictures.

The question was asked about the laws to undedicate. He answered that the vast majority of the cemeteries are run by a township board, church or city; but in the rural cemeteries as long as they have spaces there are different ways that people have used the ground.

The Chairman announced that this would conclude the hearings on SB744, and that because there was no time left this morning that Bingo would be taken up by the Committee on Tuesday, February 28, 1984.

Senator Vidricksen asked that proposed legislation concerning the board of accountancy and certain of their records be introduced as a Committee bill. 2d by Senator Parrish. Motion carried. A copy of the proposed legislation is a part of these Minutes as Attachment #3.

The meeting was adjourned at noon.

2/24/84
Attachment #1

3 RS 2281 Begina

AN ACT concerning taxation; relating to personal property.

Be it enacted by the Legislature of the State of Kansas:

Section 1. If any owner of personal property which is used for business purposes surrenders or transfers such property to another after the date such property is assessed and before the tax thereon is paid, whether by agreement, voluntary repossession, sale of business or any other voluntary act, then the taxes on the personal property of such taxpayer shall fall due immediately, and a lien shall attach to the property so surrendered or transferred, and shall become due and payable immediately. The county treasurer shall issue immediately a tax warrant for the collection thereof and the sheriff shall collect it as in other cases. The lien shall remain on the property and any person taking possession of the property does so subject to the lien. The one owing such tax shall be liable civilly to any person taking possession of such property for any taxes owing thereon, but the property shall be liable in the hands of the person taking possession thereof for such tax. If the property is sold in the ordinary course of retail trade it shall not be liable in the hands of the purchasers. No personal property which has been transferred in any manner after it has been assessed shall be liable for the tax in the hands of the transferee after the expiration of three years from the time such tax originally became due and payable.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

JW 2/24/84 Attachment #1A

REMARKS RELEVANT TO SENATE BILL 744
BEFORE THE SENATE FEDERAL AND STATE
AFFAIRS COMMITTEE, FEBRUARY 24, 1984

Mr. Chairman, members of the Committee.

The Kansas Funeral Directors Association, represented here by Larry McElwain, Lawrence; Dan Belden, Leavenworth; Steve Ryan, Salina; Mike Turnbull, Emporia; Jeff Newcomer, Topeka; and Jim Snyder, Topeka. opposes the passage of Senate Bill 744. While on first glance, being able to sell unused dedicated cemetery ground--after first undedicating it--might be all right, it is not in the public's best interest.

In addition, we felt the committee should be aware as to why the introduction of this bill was requested.

In 1974, construction began on a mortuary building being built upon dedicated cemetery property in Roselawn Cemetery, Salina. A lawsuit was filed two weeks later alleging unproper usage of cemetery property. And, instead of delaying construction until the lawsuit was settled, the owner elected to complete the building which was opened as a mortuary.

The District Court imposed an injunction against operating the mortuary on dedicated cemetery land and this was appealed to the Court of Appeals. This court approved the District Court's injunction in 1978 and the Kansas Supreme Court affirmed the Court of Appeals action by denying a review of the action. As a result, the building remains closed as a mortuary.

Now, five years later, Senate Bill 744 would not only overturn that judicial process, but more importantly would create many concerns throughout Kansas with problems for the public.

As was stated by the court, in every dedication of property, there are three interested parties--the dedicator, the general public, and property owners with special interests--in the case of cemeteries, the lot owners. It states further, "When land is dedicated for a special and limited use, use

Attachment #1A

for any other purpose is unauthorized....In any case, however, such use is authorized as is fairly within the terms of the dedication and reasonably serves to fit the property for enjoyment by the public in the manner contemplated. The dedicator is presumed to have intended the property to be used by the public, within limitations of the dedication, in such way as will be most convenient and comfortable and according to not only the properties and usages known at the time of the dedication, but also to those justified by lapse of time and change of conditions."

In addition, Kansas court cases involving cemeteries have been limited to statements generally as "All lots and tracts of land contained within the boundaries of a cemetery platted by a cemetery corporation are dedicated exclusively for burial purposes and cannot be used for any other purpose."

It seems logical then, if a person purchases a lot in a dedicated cemetery, and that person usually is shown a map of the entire dedicated area and not just the part already platted in detail, the consumer should expect that entire amount of land to remain as a cemetery.

Now, also consider those residents of an area adjacent to or nearby a cemetery. Certainly we're not contending that their view might be obstructed by the sale of part of the cemetery for other purposes, but that could depend upon for what use the land would be sold or leased. Since cemeteries usually are placed in residential areas, present residents might be subjected to activities which could create nuisances, lower values, and in general be detrimental.

But the most important reason to be considered by the Committee is the cemeteries tax-exempt status. Cemetery land...dedicated cemetery land is tax-exempt. And for this tax-exemption the dedication is a permanent one.

Since private cemeteries began, Kansas law has exempted them from taxation. The present law, K.S.A. 79-201c Third, states "All lands used exclusively as graveyards" to be exempt from all property or ad valorem taxes levied under the laws of the state of Kansas. An attempt was made in 1974 by the Legislature to tax that property not already sold to individuals, but this was ruled unconstitutional by the Supreme Court in 1975 and so cemeteries still enjoy their tax exemption.

We have no criticism of dedicated property being tax exempt. However, if you approve Senate Bill 744, it could create property being dedicated as a cemetery and then as the area was developed and became more valuable, just using the simple and unappealable method proposed in Senate Bill 744 to undedicate part or all of it...sell it or lease it...and not pay one penny of taxes for that period of dedicated time. This also holds true for present cemeteries who's property has increased in value through the years.

We are certain the Kansas Legislature will not permit legislation of this type to occur and we strongly urge an unfavorable report on Senate Bill 744.

2/24/84
Attachment #2

3 RS 2613 - Bogina

SENATE BILL NO. 818

AN ACT concerning utilities; relating to the powers of the state corporation commission; amending K.S.A. 66-104 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 66-104 is hereby amended to read as follows: 66-104. (a) The term "public utility," as used in this act, ~~shall be construed to mean~~ means every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than ~~fifteen (15)~~ 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, or for the operation of any trolley lines, street, electrical or motor railway doing business in any county in the state; ~~also~~ and all dining car companies doing business within the state, and all companies for the production, transmission, delivery or furnishing of heat, light, water or power. No cooperative, cooperative society, nonprofit or mutual corporation or association which is engaged solely in furnishing telephone service to subscribers from one telephone line without owning or operating its own separate central office facilities, shall be subject to the jurisdiction and control of the commission as provided herein, except that it shall not construct or extend its facilities across or beyond the territorial boundaries of any telephone company or cooperative without first

Attachment #2

obtaining approval of the commission. As used herein, the term "transmission of telephone messages" shall include the transmission by wire or other means of any voice, data, signals or facsimile communications, including all such communications now in existence or as may be developed in the future.

The term "public utility" ~~shall also include~~ also includes that portion of every municipally owned or operated electric or gas utility located outside of and more than three ~~(3)~~ miles from the corporate limits of such municipality, but nothing in this act shall apply to a municipally owned or operated utility, or portion thereof, located within the corporate limits of such municipality or located outside of such corporate limits but within three ~~(3)~~ miles thereof except as provided in K.S.A. 66-131a, and amendments thereto.

Except as herein provided, the power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any ~~city~~ municipality or principally operated for the benefit of such ~~city~~ municipality or its people, shall be vested exclusively in such ~~city~~ municipality, subject only to the right to apply for relief to the corporation commission as hereinafter provided in K.S.A. 66-133 and ~~to the provisions of K.S.A.~~ 66-131a, and amendments thereto. A transit system principally engaged in rendering local transportation service in and between contiguous ~~cities~~ municipalities in this and another state by means of street railway, trolley bus and motor bus lines, or any combination thereof, shall be deemed to be a public utility as that term is used in this act and, as such, shall be subject to the jurisdiction of the commission.

(b) The term "municipality means (1) any city and (2) any county designated as an urban area pursuant to K.S.A. 19-3524, and amendments thereto.

Sec. 2. K.S.A. 66-104 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

(574 P.2d 971)

No. 49,123

MAURICE R. CONNOLLY and JAMES L. GEISENDORF, on behalf of themselves and all others similarly situated, *Appellees*, v. ROBERT F. FROBENIUS, individually and as president of The Union Cemeteries Association, and Union Cemeteries Association, Inc., and as incorporator and president of Roselawn Service Company, Inc.; UNION CEMETERIES ASSOCIATION, INC.; ROSELAWN SERVICE COMPANY, INC.; and THE UNION CEMETERIES ASSOCIATION, *Appellants*.

Petition for review denied 223 Kan. clxxi.

SYLLABUS BY THE COURT

1. CLASS ACTIONS—*"Coextensiveness of Interests" Requirement—Representative's Interests May Go Beyond Those of the Class.* The mere fact that the representative has interests which go beyond those of the class is not enough to defeat the action, as long as the representative has interests which are at least coextensive with the class interest.
2. SAME—*Proportion of Representatives to Total Class—Not Test for Propriety of Class Action.* Most courts now reject the view that the proportion of the representatives to the total class is an element in determining whether a class action is proper.
3. SAME—*Discretion of Trial Judge.* The trial judge must be afforded substantial discretion in the decision-making process as to the maintenance of a class action.
4. CIVIL PROCEDURE—*New Trial—Newly Discovered Evidence.* Whether to grant a new trial for newly discovered evidence is a matter within the sound discretion of the trial court. The burden is on the party seeking the new trial to show that the new evidence could not with reasonable diligence have been produced at trial.
5. SAME—*New Trial—Newly Discovered Evidence.* A new trial should not be granted unless the new evidence is of such materiality as to be likely to produce a different result upon re-trial.
6. EQUITY—*Laches.* The doctrine of laches is equitable, depends upon all the surrounding circumstances, and must be determined on a case-by-case basis.
7. CEMETERIES—*Challenge to Unauthorized Use of Dedicated Land.* Although the owner of a cemetery lot may be bound by reasonable and uniform rules and regulations established by the cemetery corporation, such does not preclude a challenge to any use of the land dedicated for cemetery purposes, deemed to be inconsistent with those purposes.
8. PROPERTY—*Land Dedication—Ambiguities in Dedication.* In matters of dedication, all ambiguities must be resolved against the dedicator and in favor of the public.
9. EQUITY—*Injunctive Relief.* There is an obvious distinction between injury and damage that is not always observed in dealing with the question of injunctive relief, and courts of equity will interpose in a proper case to protect a right, without any reference to the question of actual damage.
10. PROPERTY—*Dedication of Land—Interested Parties.* In every dedication of property, there are three interested parties—the dedicator, the general public, and property owners with special interests.
11. CEMETERIES—*Challenge to Unauthorized Use of Dedicated Lands—Interested Parties.* The owners of lots in a dedicated cemetery, as well as the owners of crypts in a mausoleum situated on that cemetery, are possessed of sufficient special interests to entitle them to seek relief from any unauthorized use to be made of the cemetery by means of injunction.
12. PROPERTY—*Dedication of Land—Diversion from Purpose of Dedication.* Whether a particular use amounts to a diversion from the purpose for which the dedication was made, depends on the circumstances of the dedication, but any use is authorized that is fairly within the terms of the dedication and reasonably serves to make the property fit for enjoyment by the public in the manner contemplated.
13. SAME—*Dedication of Land—Public Use.* The dedicator is presumed to have intended the property to be used by the public, within the limits of the dedication, in such a way as is most convenient and comfortable to the public, and this is true not only to usages known at the time of the dedication, but also to those uses justified by change of conditions.
14. CEMETERIES—*Dedication of Land—Use Exclusively for Burial Purposes.* As a general rule, all lots and tracts of land contained within the boundaries of a cemetery platted by a cemetery corporation are dedicated exclusively for burial purposes and cannot be used for any other purpose.
15. SAME—*Challenge to Unauthorized Use of Dedicated Land—Building of Mortuary Unauthorized.* Under the facts and circumstances set forth in this opinion, it is *held* that the construction and operation of a mortuary on the real estate here involved (which was dedicated for purposes of sepulture), or any other commercial use of any portion of that area not directed to the selling of cemetery lots with proper access thereto or for the maintenance and beautification of the area, constitutes use in a manner not contemplated by the original dedication, not fairly within the terms of that dedication, and not within the scope of the statutes of this state regulating cemetery corporations.

Appeal from Saline district court, division No. 1; MORRIS V. HOOBLER, judge. Opinion filed January 13, 1978. Affirmed.

Aubrey G. Linville and *Bruce Keplinger* of Clark, Mize & Linville, Chartered, of Salina, for the appellants.

John Q. Royce of Hampton, Royce, Engleman & Nelson, of Salina, for the appellees.

Before HARMAN, C.J.*, ABBOTT and SPENCER, JJ.

* This opinion was approved by Harman, C.J., prior to his retirement.

SPENCER, J.: The named plaintiffs, as owners of lots and graves in the cemetery operated by the Union Cemeteries Association, Inc., Salina, Kansas, and as owners of crypts in the Mausoleum Williamsburg located in that cemetery, commenced this class action on behalf of themselves and all other persons similarly situated to permanently enjoin the construction and operation of a mortuary and other commercial development on land platted and dedicated as a cemetery. The injunction was granted and defendants have appealed.

The facts in this case have been stipulated and are essentially as follows:

Defendants Union Cemeteries Association and Union Cemeteries Association, Inc., are one and the same cemetery corporation, duly organized under the laws of Kansas on April 27, 1927. The cemetery operated by the corporation has been at various times referred to as "Memorial Park Cemeteries," "Memorial Park Gardens," "Roselawn Memorial Park Cemetery," and "Roselawn Cemetery," but all relate to one cemetery located on the real estate hereinafter described.

On July 21, 1927, the cemetery corporation caused a plat of the northeast quarter of the northeast quarter of section nineteen, township fourteen south, range two, west of the Sixth Principal Meridian, containing forty acres more or less, to be placed of record in the office of the register of deeds, Saline County, Kansas. The certificate to that plat, executed and acknowledged by the then president and secretary on behalf of the corporation, is in part as follows:

". . . The Union Cemeteries Assn. of Ottawa, Franklin County, Kansas, is the owner of the following described property, to wit;

"[Real estate description] and have the same to be subdivided into Lots and Sections, with Streets, Avenues and Walks for the purposes of Sepulture.

"The foregoing described tract of land as subdivided and platted is dedicated to the purpose herein mentioned and the faith of the organization is pledged for its preservation and improvement. . . ."

Following the filing of the plat, the corporation advertised the area as a park plan cemetery and offered for sale and sold lots in the cemetery to members of the public. At the time of this suit, more than 6,000 persons had purchased lots or plots within the cemetery and more than 3,500 burials had been made therein.

Defendant Robert F. Frobenius first acquired an interest in the cemetery corporation in April, 1952. At the time this action was commenced, he was president of the corporation and, together with members of his immediate family, owned all of the issued and outstanding stock of the cemetery corporation. Frobenius is also president of defendant Roselawn Service Company, Inc., which was incorporated under date of February 25, 1974, and he, together with members of his immediate family, own all of the issued and outstanding stock of that corporation.

On October 20, 1959, the north 200 feet of the 40 acres in question were annexed into the city of Salina and, in 1960, the corporation constructed a mausoleum on the cemetery.

On July 25, 1960, plaintiff Geisendorf purchased a crypt in the mausoleum and received a deed which provided that the purchase was subject to the rules and regulations of the corporation, then existing or thereafter adopted.

On September 19, 1972, the cemetery corporation caused a replat of the north 200 feet of the 40 acres (that portion previously annexed into the city) to be filed in the office of the register of deeds. This area comprises lots one through eight, block one, on the replat of Union Cemetery Addition to Salina, Kansas. On October 5, 1972, the city rezoned this area to authorize, among other commercial uses, the construction and operation of a mortuary. Plaintiffs appeared at that meeting in opposition to the rezoning, but did not appeal from the results.

On March 13, 1973, plaintiff Connolly purchased cemetery lots and received a deed which was also subject to the rules and regulations of the corporation, then existing or thereafter adopted.

At a meeting of the board of directors of the cemetery corporation held November 16, 1973, the corporation agreed to sell to the defendant Frobenius and his wife, lot seven, block one, of the replat of Union Cemetery Addition, for the sum of $5,500. The agreed consideration was handled by means of a bookkeeping entry made on the books of the cemetery corporation, reducing notes payable by the corporation to the defendant Frobenius and his wife by that amount. No part of the recited consideration was deposited with the permanent maintenance fund of the cemetery. However, that deed was never executed by the corporation and, on March 9, 1974, the corporation executed a deed for the same property to Roselawn Service Company, Inc., pursuant to an agreement by defendant Frobenius to exchange that property at the agreed value of $33,000 for 33,000 shares of stock of Roselawn Service Company, Inc.

On May 21, 1974, a building permit was issued for the construction of a mortuary on lot seven, and construction of that building commenced on or about May 23, 1974. This action was commenced on June 6, 1974, and from the record before us it appears that the work on the mortuary continued and that the building is now completed and is being operated as a licensed mortuary. The record also reveals that the cemetery, mausoleum, and mortuary are listed for tax assessment purposes in Saline County.

On August 16, 1974, it was determined by the trial court that this action be maintained as a class action and that letter notice of the action be given to all members of the class whose names and addresses could be reasonably ascertained. Following such notice, twenty-seven persons joined the action as plaintiffs.

While the main thrust of this appeal is the legality of the mortuary on the land in question, defendants have presented other issues which we elect to give prior consideration.

Defendants argue that this is not a proper class action because Connolly and Geisendorf are not proper representatives for the class, in that their claims are not typical under K.S.A. 60-223(*a*)(3), and they do not adequately represent the class under K.S.A. 60-223(*a*)(4).

It is said that plaintiffs are moved to litigation by motives which are unique unto themselves; that Geisendorf is the owner of a mortuary which competes with defendants and he seeks to restrain that competition; that Connolly was involved in a dispute with defendant Frobenius over the placing of a monument at Connolly's wife's grave and is motivated by personal animosity.

K.S.A. 60-223(*a*) provides in part:

"One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Defendants refer to four factors enumerated in 3B Moore's Federal Practice, § 23.07(1) at 23-352-353 for testing adequate representation. The factors relied upon as indicative that Connolly and Geisendorf could not adequately represent the class are (1) coextensive interests with other members of the class, and (2) proportion of the representatives to the total membership of the class.

Defendants' principal argument is that there is no coextensiveness of interest in this case. They base their argument on the claim that "coextensive" means "having the same scope or boundaries."

In *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345, rev. denied, 222 Kan. 749, 571 P.2d 345, this court considered the adequacy of the representation requirements of K.S.A. 60-223(*a*)(3) and (4). Six factors were listed as determinative of whether the representation was adequate. Coextensiveness of interest is one of those recognized factors. In the course of the opinion, it was stated:

"The coextensiveness requirement does not mandate that the positions of the representative and the class be identical; rather, only that the representative and class members 'share common objectives and legal or factual positions.' (7 Wright & Miller, Federal Practice and Procedure, Civil § 1769, p. 655.) . . ." (1 Kan. App. 2d at 536.)

Moreover, it has specifically been held that the mere fact that the representative has interests which go beyond those of the class is not enough to defeat the action, as long as the representative has interests which are at least coextensive with the class interest. *First American Corporation v. Foster*, 51 F.R.D. 248 (N.D. Ga. 1970); *Bucha v. Illinois High School Association*, 351 F. Supp. 69 (N.D. Ill. 1972). See also, 7 Wright & Miller, Federal Practice and Procedure, Civil § 1768, pp. 646-647, where it is stated:

". . . The main consideration is 'the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process.' Therefore the fact that plaintiff may have an ulterior motive in bringing the action . . . does not in and of itself demonstrate that his interests are antagonistic to those of the class."

Although Connolly and Geisendorf may have other interests in bringing this action, it is undisputed that they are lot or crypt owners; that each has a relative buried in the cemetery; and that the subject matter of the action is the use made of the cemetery land.

Helmley also noted as a factor "quality of the named representative, not quantity." (1 Kan. App. 2d at 535.) As stated in 7 Wright & Miller, Federal Practice and Procedure, Civil § 1766, p. 631, most courts now reject the view that the proportion of the representatives to the total class is an element in determining whether a class action is proper. Most courts now assess the

character of the representation rather than looking to numbers alone.

Defendants also argue that the class action was unnecessary since an injunction granted one person would have the same effect as that granted to the entire class. K.S.A. 60-223(*b*) provides in part:

"An action may be maintained as a class action if the prerequisites of subdivision (*a*) are satisfied, and in addition:

"(1) The prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

The trial court found that this action was maintainable under both K.S.A. 60-223(*b*)(1)(B) and (*b*)(2). Many recent decisions, in an attempt to reduce the number of class actions, and no doubt in response to the abuse to which they have been put, have denied class treatment when confronted with class actions seeking only declaratory or injunctive relief on the ground that an award for plaintiff alone necessarily would benefit all the class members. See 7 Wright & Miller, Federal Practice and Procedure (1976 Supp.) § 1754, p. 61, and cases cited therein. There may be instances where such a denial would be proper, even though the statute would otherwise seem to allow the class. As *Helmley* noted, the trial judge must be afforded substantial discretion in the decision-making process as to the maintenance of a class action. (1 Kan. App. 2d at 535.) With this in mind, we hold that the trial court did not err in conducting this matter as a class action.

In support of their motion for new trial, defendants offered the affidavit of H. D. Bledsoe, vice president of the National Association of Cemeteries, which indicates that the national trend is to locate mortuaries in cemeteries, or immediately adjacent thereto, as a matter of convenience for the public. Defendants suggest error by the trial court in refusing to consider that affidavit.

Whether to grant a new trial for newly discovered evidence is a matter within the sound discretion of the trial court. The burden

is on the party seeking the new trial to show that the new evidence could not with reasonable diligence have been produced at trial. K.S.A. 60-259(*a*); *State v. Johnson*, 222 Kan. 465, 471, 565 P.2d 993; *McHugh v. City of Wichita*, 1 Kan. App. 2d 180, 184, 563 P.2d 497, rev. denied, 221 Kan. 757. A new trial should not be granted unless the new evidence is of such materiality as to be likely to produce a different result upon re-trial. *State v. Johnson*, supra, Syl. 3.

The proffered affidavit was of questionable relevance, and the showing made by defendants that they could not have secured the evidence contained in that affidavit prior to trial was not clearly convincing. Under the circumstances, we find no abuse of discretion by the trial court in not considering the contents of the affidavit and in denying the new trial. See *McHugh v. City of Wichita*, supra.

Defendants make note of the fact that the land in question was rezoned by the city of Salina on October 5, 1972; that plaintiffs took no action to challenge the rezoning; and that the present action was not filed until one and one-half years later, two weeks after construction had begun on the mortuary. They argue that the delay constitutes laches and that plaintiffs are estopped to deny the validity of the rezoning, such being a matter of legislative record, citing 28 Am. Jur. 2d, Estoppel and Waiver § 2, p. 600. Plaintiffs treat this argument rather lightly, however, contending that there was nothing for them to contest until the construction began. This is not correct. Under K.S.A. 12-712, plaintiffs could have brought an action to challenge the reasonableness of the zoning ordinance. As the land was dedicated for "purposes of sepulture," it might well be that the city was without authority to authorize other uses merely by rezoning it to accommodate such other uses. *Cooper v. City of Great Bend*, 200 Kan. 590, 438 P.2d 102; *The State, ex rel., v. City of Manhattan*, 115 Kan. 794, 225 Pac. 85. The zoning was for "office district" which included a mortuary. May it reasonably be argued that any type of office building may be located on the land, simply because the city has zoned it that way? Such would be the result if plaintiffs were estopped to challenge uses not within the ambit of "purposes of sepulture."

It has been held that, as to lands dedicated to the public and vested in the control of the city, neither laches nor estoppel will lie.

"Those rights, duties, and privileges conferred and imposed upon a municipal corporation exclusively for the public benefit cannot ordinarily be lost through nonuse, laches, estoppel, or adverse possession, and statutes of limitation are not ordinarily applicable thereto." *Douglas County v. City of Lawrence*, 102 Kan. 656, Syl. 4, 171 Pac. 610.

See also, *Devine v. City of Seward*, 174 Kan. 734, 737, 258 P.2d 302. Although plaintiffs here are private parties, the rule against laches and estoppel in the defense of a dedication should apply equally to them. If not, an important element in the protection of dedicated land might be lost, for it is not uncommon for the city government to be the advocate in the alteration of a dedicated use, rather than a defender of it. See *e.g. Cooper v. City of Great Bend*, supra. On the other hand, it has specifically been said that "[a]ctions seeking to enjoin interference with dedicated property will be barred by laches if not brought with reasonable promptitude after notice of such interference." 26 C.J.S., Dedication § 73, p. 570. As noted, plaintiffs had notice of the rezoning for some time but did nothing. The action was not filed until construction on the mortuary had begun. Defendants had expended considerable time and money by that time. However, defendants are not here with completely clean hands. We are informed that the mortuary is now complete, which can only mean that the building was completed after notice of the suit. Although no temporary injunction was sought, can defendants properly "shore up" their laches argument by pointing to a now complete building? Defendants correctly note that the doctrine of laches is equitable, depends upon all the surrounding circumstances, and must be determined on a case-by-case basis. *Clark v. Chipman*, 212 Kan. 259, 510 P.2d 1257. We hold that the trial court did not err in failing to apply the doctrine of laches or estoppel to defeat plaintiffs' claim.

We are reminded that the deeds executed to the plaintiffs and all members of the class provided that the recipients were taking the deeds subject to the rules and regulations of the cemetery corporation, then existing and thereafter adopted. Defendants direct attention to the corporate charter which initially provided for "[b]uilding & maintaining a Park Plan Cemetery & selling lots in same for the purpose of sepulture," but which was amended under date of December 20, 1954, and again under date

of July 22, 1971, to finally authorize the corporation to "maintain cemeteries, mortuaries, mausoleums, vaults, chapels and other buildings and improvements for the protection, preparation for the burial . . . of the dead; the construction, purchase and operation of greenhouses, conservatories, maintenance buildings and office buildings to include collecting departments, savings and loans, insurance, trust departments and other things necessary and incidental to laying out, paving its streets, collection of accounts . . . ornamentation, maintenance and management of such cemetery . . . ." Defendants suggest that plaintiffs are bound by the rules of the corporation set forth in the charter, as amended, and cannot now seek to enjoin the construction of a mortuary or other buildings incidental to the cemetery business.

It is to be noted that plaintiffs do not here challenge the power of the corporation to operate a mortuary, but rather the power to do so on land dedicated as a cemetery. Taken to its logical conclusion, the defendants' argument would seem to indicate that the owners of lots and crypts in the cemetery would be bound to accept whatever enterprise the corporate directors might elect to pursue on the dedicated premises, however remote from the ordinary operation and maintenance of the cemetery itself.

Imprinted on the reverse side of each of the deeds in question is the general rule that "the owners of Roselawn Memorial Park, in order to preserve and maintain uniformity, harmony and beauty, to provide for stability and against decay and deterioration, to safeguard the sanctity of each lot or grave against future inefficient care, reserves for itself, its successors and assigns, the right to make any and all rules, regulations, limitations and restrictions, that it may deem necessary to protect and provide for the future welfare of Roselawn Memorial Park . . . all of which it binds itself to do." Although the owner of a cemetery lot may be bound by reasonable and uniform rules and regulations established by the cemetery corporation (14 Am. Jur. 2d, Cemeteries § 38, p. 745), such does not preclude a challenge to any use of the land dedicated for cemetery purposes, deemed to be inconsistent with those purposes. The California case cited by defendants (*Wing v. Forest Lawn Cemetery Assn.*, 15 Cal. 2d 472, 101 P.2d 1099 [1940]), which is discussed in more detail in following portions of this opinion, is distinguishable on this point as

involving an attempt to read into the deed a restrictive covenant prohibiting the mortuary on land owned by the cemetery association-grantor. It is true that the rule in Kansas is that restrictive covenants are to be construed strictly with any doubt being resolved in favor of the free use of the land. *South Shore Homes Ass'n v. Holland Holiday's,* 219 Kan. 744, 549 P.2d 1035. However, that is not the rule as to dedication. Far from supporting defendants' position here, *City of Russell v. Russell County B. & L. Assn.,* 154 Kan. 154, 159, 118 P.2d 121, provides that, in matters of dedication, all ambiguities must be resolved against the dedicator and in favor of the public.

Defendants say there is no evidence in the record of any injury caused the plaintiffs in their capacity as cemetery lot owners by the operation of a mortuary, and in such situation, the granting of an injunction is improper. We accept the rule that injunctive relief will not ordinarily be granted without a showing of substantial and positive injury. *Dill v. Excel Packing Co.,* 183 Kan. 513, 331 P.2d 539. However, in 43 C.J.S., Injunctions § 22, p. 440, it is stated:

". . . [T]here is an obvious distinction between injury and damage that is not always observed in dealing with the question of injunctive relief, and courts of equity will interpose in a proper case to protect a right, without any reference to the question of actual damage . . . ."

In 42 Am. Jur. 2d, Injunctions § 29, p. 765, it is stated:

". . . [T]here is an obvious distinction between injury and damage, which is not always observed in dealing with the question of injunctive relief. Whatever invades a man's right of dominion over his property is a legal injury, whether damage ensues or not. It is a right for the violation of which the law imports damage, and courts of equity will interpose in a proper case to protect the right, without any reference to the question of actual damage; a showing of specific money damage is not necessary to support an injunction."

Defendants suggest one example of injury is that plaintiffs have an interest in property upon which the alleged unauthorized business is being conducted. That is precisely the issue. In every dedication of property, there are three interested parties—the dedicator, the general public, and property owners with special interests, such as owners of lots. *The State, ex rel., v. City of Manhattan,* supra. There is no doubt in the minds of this court that the owners of lots in a dedicated cemetery, as well as the owners of crypts in a mausoleum situated on that cemetery, are possessed of sufficient special interests to entitle them to seek

relief from any unauthorized use to be made of the cemetery by means of injunction. See *Hagaman v. Dittmar,* 24 Kan. 42.

We come now to the vital issue on this appeal. May a mortuary properly be constructed and operated on land dedicated "for purposes of sepulture."

Admittedly, the precise issue here presented has not previously been before the appellate courts of this state. Although it is stipulated in this case that at least four other mortuaries in Kansas are located adjacent to or within the boundaries of cemeteries, the circumstances by virtue of which those mortuaries exist are not revealed.

It must be borne in mind that the real estate here involved was platted and dedicated on April 23, 1927, for the purpose of building and maintaining a park plan cemetery and selling lots therein for the "purpose of sepulture" and for no other stated purpose. Defendants correctly suggest that, whether a particular use amounts to a diversion from the purpose for which the dedication was made, depends on the circumstances of the dedication, but any use is authorized that is fairly within the terms of the dedication and reasonably serves to make the property fit for enjoyment by the public in the manner contemplated. Also, the dedicator is presumed to have intended the property to be used by the public, within the limits of the dedication, in such a way as is most convenient and comfortable to the public, and this is true not only to usages known at the time of the dedication, but also to those uses justified by change of conditions. They cite 23 Am. Jur. 2d, Dedication § 67, pp. 57-58, wherein it is stated:

"When land is dedicated for a special and limited use, use for any other purpose is unauthorized . . . . In any case, however, such use is authorized as is fairly within the terms of the dedication and reasonably serves to fit the property for enjoyment by the public in the manner contemplated. The dedicator is presumed to have intended the property to be used by the public, within the limitations of the dedication, in such way as will be most convenient and comfortable and according to not only the properties and usages known at the time of the dedication, but also to those justified by lapse of time and change of conditions."

See also, 14 Am. Jur. 2d, Cemeteries § 19, pp. 723-724.

There are conflicting views as to whether a mortuary is a use which may properly be made of land dedicated for burial purposes. The state of California, as reported in *Wing v. Forest Lawn Cemetery Assn.,* supra, and *Sunset View Cemetery Assn. v.*

Kraintz, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1961), clearly adheres to the position that a cemetery corporation empowered to hold land "exclusively as a cemetery for the burial of the dead" may operate a mortuary thereon as a use incidental to the use authorized by statute. In *Wing*, the California court noted cases which had authorized such operations as greenhouses, vault and grave marker production and sale, and concluded that a mortuary was a much more intimate incident of burial than any of those. See Annotation, 130 A.L.R. 130. The rule adopted in *Wing* is:

". . . [C]emetery lands may be used for such purposes as are incident to the burial of the dead, so long as the rights of the lot owners in their own lots and their rights of egress and ingress are not invaded. [Citations omitted.]" (15 Cal. 2d at 478.)

An opposite view appears to have been adopted by the state of Georgia in the case of *Greenwood Cemetery, Inc. v. MacNeill*, 213 Ga. 141, 97 S.E.2d 121 (1957), wherein it was held:

". . . [T]he property of Greenwood Cemetery, Incorporated, here involved, including the proposed site of the mortuary, is dedicated for cemetery purposes . . . . When a tract of land has been dedicated as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose . . . . 'The owner of the fee is subject to a trust for the benefit of those entitled to use the land as a place of burial. He has no right to recover the use of the land for any enjoyment or purpose of his own. Again, while the owner of a cemetery has a perfect right to sell and convey it as such, he can do nothing which interferes with the use of the land as a cemetery . . . .' 10 Am. Jur. 491, § 8 . . . .

". . . [I]t must be held that the property in question can only be used as a place for burying the dead, and any other attempted use is an unlawful attempt to appropriate property dedicated for cemetery purposes to other uses, which cannot be done. It therefore follows that the judgment of the court below enjoining the construction of the mortuary here involved was not error." (213 Ga. at 142-143.)

It was apparently on the basis of the Georgia authority that the trial court entered its findings of fact and conclusions of law.

The Kansas courts have often stated the general rule that property dedicated for a particular purpose cannot be used for any other purpose. Some cases have involved clear deviations. In *Cooper v. City of Great Bend*, supra, it was held that the city could not construct a parking lot on land dedicated as a park. In *Comm'rs of Wyandotte Co. v. Presbyterian Church*, 30 Kan. 620, 1 Pac. 109, it was held that land dedicated for church purposes could not be used for a courthouse. In *State, ex rel., v. City of Kansas City*, 189 Kan. 728, 371 P.2d 161, it was held that land

dedicated as a park may not be used for a library and school offices and that, vice versa, land dedicated for school purposes may not be used as a park. It has also been held that land dedicated for a particular purpose cannot be sold to a private party, and the proceeds then used for the dedicated purposes elsewhere. See *Comm'rs of Franklin Co. v. Lathrop*, 9 Kan. 453; *The State, ex rel., v. City of Manhattan*, supra.

As to incidental use, the court has recognized that land dedicated as a street may be put to any incidental use "which reasonably conduces to the public convenience and enjoyment. . . ." *Wood v. National Water Works Co.*, 33 Kan. (2d ed.) 590, 596, 7 Pac. 233; *Cummins v. Summunduwot Lodge*, 9 Kan. App. 153, 58 Pac. 486.

Kansas cases involving cemeteries have been limited to statements of the general rule.

". . . All lots and tracts of land contained within the boundaries of a cemetery platted by a cemetery corporation are dedicated exclusively for burial purposes and cannot be used for any other purpose. (K.S.A. 17-1302, *et seq.* [Weeks 1969]; *Earhart v. Holbert*, 116 Kan. 487, 227 Pac. 351; *Davis v. Coventry*, 65 Kan. 557, 70 Pac. 583.) . . . ." *Topeka Cemetery Ass'n v. Schnellbacher*, 218 Kan. 39, 44, 542 P.2d 278.

Defendants argue that the dedication was for purposes of sepulture, by definition synonymous with burial, which has been defined as "the act or ceremony of burial" and, by applying these definitions, a mortuary for the conduct of funeral services is clearly within the purposes of "sepulture."

Surely no one will argue with the fact that the services of a licensed mortician in Kansas are intimately associated with the act of burial of the dead. By the same token, it is doubtful that anyone will argue with the fact that services ordinarily provided by a mortuary in Kansas are competitive commercial enterprises, with aims and goals not solely for the enjoyment and use of the public. K.S.A. 65-1713, *et seq.* Where will the line be drawn? The general rules set forth on the deeds to the cemetery lots and to the crypts give no indication to the more than 6,000 purchasers that any part of the area in which they have selected lots to bury their loved ones, or in which they themselves may eventually be buried, will be used for any commercial enterprise, whether it be the operation of a mortuary or buildings housing offices for collection departments, savings and loans, insurance, trust departments, or others. In fact, the record here is indicative of the

contrary—that purchasers of lots and crypts in the dedicated cemetery had every reason to believe that no part of the dedicated area would be used for any purpose other than for human interment, and certainly not for commercial purposes.

The statutes governing cemetery corporations are K.S.A. 17-1302, *et seq.* Essentially, cemetery corporations are empowered to convey burial lots for burial purposes only (K.S.A. 17-1309), and the corporation is required to set aside not less than fifteen percent of the purchase money for the permanent maintenance fund of the cemetery (K.S.A. 17-1311). Upon the sale of all of the burial lots in the cemetery, or upon a vote of two-thirds majority of the stockholders of the corporation, the corporation may be dissolved and thereupon the permanent maintenance fund, together with all investments and all books, records and papers of the corporation, shall be turned over to the city treasurer of the city in which, or adjacent to which, the cemetery is situated. The governing body of the city is then required to provide for the investment of the funds and to care for and maintain the cemetery (K.S.A. 17-1313).

Plaintiffs direct attention to the fact that no portion of the consideration paid by Roselawn Services, Inc., for lot seven, on which the mortuary was erected, has been paid into the maintenance fund.

Defendants counter that "burial purposes" include the operation of a mortuary; that the land conveyed for the mortuary was never platted into burial lots and, therefore, the statute requiring sale for "burial purposes" only and contribution to the maintenance fund does not apply. At this point, we make the observation from the copies of the plat and the replat provided us that, although lot seven on which the mortuary was erected does not appear to have been subdivided into burial lots, a sizable portion of the north 200 feet of the 40 acres in question was initially so divided, and the replatting of the north 200 feet of the cemetery has the effect of eliminating a sizable number of those burial lots.

Defendants also argue that the pledge of the original dedication "for its preservation and improvement" somehow justifies the construction of the mortuary for "a building is normally considered to be an improvement upon the land of its situs" and, therefore, the construction of the mortuary is an improvement and consistent with the dedication and the Kansas statutes. We do

not believe this to be the type of improvement ever intended by the dedicator.

We conclude that the construction and operation of a mortuary on the real estate here involved (which was dedicated for purposes of sepulture), or any other commercial use of any portion of that area not directed to the selling of cemetery lots with proper access thereto or for the maintenance and beautification of the area, constitutes use in a manner not contemplated by the original dedication, not fairly within the terms of that dedication, and not within the scope of the statutes of this state regulating cemetery corporations.

Judgment affirmed.

No. 47,690

TOPEKA CEMETERY ASSOCIATION, *Plaintiff-Appellee*, v. GEORGE SCHNELLBACHER, Assessor, Shawnee County, Kansas, *Respondent-Appellant*.

(542 P. 2d 278)

SYLLABUS BY THE COURT

1. TAXATION—*Exemptions—Power of Legislature to Exempt.* The legislature has the authority to provide that property other than that named in Article 11, Section 1, of the Kansas Constitution may be exempt from taxation; but this exemption must have a public purpose and be designed to promote the general welfare.
2. SAME—*When Public Property Not Involved—Test for Exemption Stated.* Where public property is not involved, a tax exemption must be based upon the use of the property and not on the basis of ownership alone.
3. CONSTITUTIONAL LAW—*Equality and Uniformity of Taxation—Federal and State Constitutions Similar.* The equal protection clause of the federal constitution and Article 11, Section 1, of the Kansas Constitution pertaining to equality and uniformity of taxation are substantially similar and, in general, what violates one will contravene the other, and vice versa.
4. TAXATION—*Rule of Uniformity.* The rule of uniformity may be violated as effectively by arbitrary exemptions as by arbitrary impositions.
5. SAME—*Corporately Owned Cemetery Land Subject to Taxation—Exempting Land Purchased by Individuals for Grave Sites—Unconstitutional.* That portion of Chapter 429 of the Laws of 1969 (K. S. A. 79-201 *Second* [Weeks 1969]), which would subject to taxation lands dedicated to public use as a cemetery where the ownership of the cemetery lands is held by a cemetery corporation, while exempting from taxation cemetery lands which have been purchased by individual owners to be used exclusively as grave sites, is discriminatory and unconstitutional as a violation of Article 11, Section 1, of the Kansas Constitution.
6. STATUTES—*Effect of Invalidity of Repealing Act.* Where a legislative act, expressly repealing an existing statute and providing a substitute therefor, is invalid, the repealing clause is also invalid unless it appears that the legislature would have passed the repealing clause even if it had not provided a substitute for the statute repealed.
7. SAME—*Repeal—Validity.* The attempted repeal of K. S. A. 1968 Supp. 79-201 *Second* by Chapter 429, Section 3, Laws of 1969, must fall along with the attempted amendment.

Appeal from Shawnee district court, division No. 3; E. NEWTON VICKERS, judge. Opinion filed November 8, 1975. Affirmed.

Matthew J. Dowd, county counselor, argued the cause, and was on the brief for the respondent-appellant.

Hart Workman, of Crow and Skoog, of Topeka, argued the cause, and *Sam A. Crow*, of the same firm, was with him on the brief for the plaintiff-appellee.

The opinion of the court was delivered by

PRAGER, J.: This is an action by a taxpayer attacking a statutory tax exemption on the ground that it is discriminatory and hence in violation of the Kansas Constitution. The facts in the case have been stipulated and essentially are as follows: The Topeka Cemetery Association, plaintiff-appellee, is a Kansas cemetery corporation created pursuant to statute. The cemetery association owns property in Topeka which has been platted and dedicated exclusively as a cemetery. The Topeka Cemetery Association has been in existence for many years. The great majority of the lots have been sold to provide individual or family burial lots. A number of the lots have not been sold and are owned by the corporation and available for future sale. The unsold cemetery lots, driveways, lawns, and areas used for maintenance of the cemetery are dedicated to burial purposes and under the association's charter cannot be used for any other purpose.

Prior to 1969 the legislature by statute exempted from taxation all lands used exclusively as graveyards. (K. S. A. 1968 Supp. 79-201 *Second.*) In 1969 the legislature by Chapter 429, Laws of 1969, amended 79-201 *Second* to provide as follows:

"79-201. . . . That the property described in this section, to the extent herein limited, shall be exempt from taxation:

. . . . . .

"*Second.* All lots or tracts of land located within cemeteries, which have been purchased by individual owners and are used or to be used exclusively as a grave site or sites by said individual owner or the family thereof." (K. S. A. 79-201 *Second* [Weeks 1969].)

Section 3 of Chapter 429 repealed K. S. A. 1968 Supp. 79-201 along with other statutes. The effect of the statute was to classify cemetery lands into two groups for tax purposes. Lots or tracts of land owned by individual owners for present or future use as grave sites are declared exempt from ad valorem taxation. Lots or tracts of land owned by a cemetery corporation are not exempt from ad valorem taxation and are required to be assessed and taxed by state taxing officials.

The defendant-appellant, George Schnellbacher, Shawnee county assessor, proceeded to place upon the tax rolls for tax years after 1969 all land owned by the Topeka Cemetery Association which had not been purchased by individual owners. The cemetery association challenged the constitutionality of the statutory classification by appealing to the State Board of Tax Appeals. The board held the statute to be constitutional and ordered the taxing officials of Shawnee county to place on the tax rolls all lots or tracts of land owned by the Topeka Cemetery Association at the appraised valuation found by the board to be correct. The cemetery association appealed to the district court of Shawnee county pursuant to K. S. A. 74-2426. The district court permitted George Schnellbacher as Shawnee county assessor to intervene as a party defendant in the action. The parties stipulated as to the facts and the district court in a memorandum decision found the 1969 statute, K. S. A. 79-201 *Second* (Weeks 1969), to be unconstitutional as a violation of Article 11, Section 1, of the Kansas Constitution. The Shawnee county assessor has brought a timely appeal to this court.

The sole issue presented on this appeal is one of law and simply stated is as follows: Is K. S. A. 79-201 *Second* (Weeks 1969) unconstitutional as a violation of Article 11, Section 1, of the Kansas Constitution? At the time the case was tried Article 11, Section 1, provided as follows:

"§ 1. System of taxation; classification; exemption. *The legislature shall provide for a uniform and equal rate of assessment and taxation,* except that mineral products, money, mortgages, notes and over evidence of debts may be classified and taxed uniformly as to class as the legislature shall provide. All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and all household goods and personal effects not used for the production of income, shall be exempted from taxation." (Emphasis supplied.)

This section of the constitution was amended in 1974 but such amendment did not affect the issue presented to the court in this case. The exceptions mentioned in the section are not applicable in the present case and will not be discussed. Specifically, the Topeka Cemetery Association contends that K. S. A. 79-201 *Second* (Weeks 1969) violates that portion of Article 11, Section 1, which requires the legislature to provide for a uniform and equal rate of assessment and taxation.

This constitutional provision has been before this court for interpretation on many occasions since the provision was adopted as a part of the original constitution of Kansas. It would be helpful to consider some of the general principles of law which this court has followed in applying the constitutional provision to specific taxing statutes enacted by various state legislatures down through the years. As a general proposition all property is subject to taxation except property which is specifically exempted either

by the constitution or by statute. Constitutional and statutory provisions exempting property from taxation are to be strictly construed and the burden of establishing exemption from taxation is upon the one claiming it. (*Lutheran Home, Inc., v. Board of County Commissioners*, 211 Kan. 270, 505 P. 2d 1118.) The *constitutional* exemptions provided for in Article 11, Section 1, of the Kansas Constitution extend to all property *used* exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes and all household goods and personal effects not used for the production of income. We have held that the *constitutional* exemptions depend solely upon the exclusive use made of the property and not upon the ownership or the character, charitable or otherwise, of the owner. (*Lutheran Home, Inc., v. Board of County Commissioners*, supra.)

The legislature has the authority to provide that property other than that named in the constitution may be exempt from taxation, but this exemption must have a public purpose and be designed to promote the public welfare. (*Alpha Tau Omega v. Douglas County Comm'rs*, 136 Kan. 675, 18 P. 2d 573; *City of Harper v. Fink*, 148 Kan. 278, 80 P. 2d 1080.) Some statutory exemptions have been based upon public ownership of property by the United States government. Without congressional action there is immunity from state and local taxation, implied from the United States Constitution itself, of all properties, functions and instrumentalities of the federal government. (*Smith v. Davis*, 323 U. S. 111, 89 L. Ed. 107, 65 S. Ct. 157.) Statutory exemptions also have been created to apply to property owned by the state or one of its political subdivisions. (*City of Harper v. Fink*, supra; *City of Newton v. Board of County Commissioners*, 209 Kan. 1, 495 P. 2d 963.) In *City of Harper v. Fink*, supra, this court stated that under statutes granting tax exemptions to city property, *ownership* rather than exclusive use is the test of exemption from taxation. It is obvious that statutory exemptions based upon *public* ownership of property may have a rational basis and that a public purpose may be served thereby.

Throughout our judicial history a different test has been applied in situations where public property is not involved and where the statutory tax exemption pertains to property owned by private individuals or corporations. We have consistently held that where public property is not involved, a tax exemption must be based upon the use of the property and not on the basis of ownership alone. The reason for the rule is that a classification of private property

for tax purposes based solely upon ownership unlawfully discriminates against one citizen in favor of another and therefore is a denial of equal protection of the law. In *Associated Rly. Equipment Owners v. Wilson*, 167 Kan. 608, 208 P. 2d 604, we stated that the equal protection clause of the federal constitution and state constitutional provisions pertaining to equality and uniformity of taxation are substantially similar and that, in general, what violates one will contravene the other and vice versa. In 1887 it was held in *M. & M. Rly. Co. v. Champlin, Treas.*, 37 Kan. 682, 16 Pac. 222, that a distinction made in the taxation of property in a township belonging to residents and nonresidents was unconstitutional and void and in violation of Article 11, Section 1, of the Kansas Constitution.

The terms "equality" and "uniformity" were explained in *Wheeler v. Weightman*, 96 Kan. 50, 149 Pac. 977, where the court stated as follows:

". . . The essentials are that each man in city, county, and state is interested in maintaining the state and local governments. The protection which they afford and the duty to maintain them are reciprocal. The burden of supporting them should be borne equally by all, and this equality consists in each one contributing in proportion to the amount of his property. To this end all property in the state must be listed and valued for the purpose of taxation, the rate of assessment and taxation to be uniform and equal throughout the jurisdiction levying the tax. The imposition of taxes upon selected classes of property to the exclusion of others, and the exemption of selected classes to the exclusion of others, constitute invidious discriminations which destroy uniformity. . . ." (p. 58.)

In *Voran v. Wright*, 129 Kan. 1, 281 Pac. 938, opinion on rehearing 129 Kan. 601, 284 Pac. 807, it is declared that the classification permitted by Section 1, of Article 11, of the Kansas Constitution applies to property and not to owners thereof. At page 606 of the opinion on rehearing it is stated:

". . . A classification as to owners is not now permissible. The only classification authorized or tolerated by this constitutional provision is that of property, and it makes no difference by whom it may be owned, whether by individual, merchant, manufacturer, banking institution or other corporation. . . ." (pp. 606, 607.)

The rule of uniformity may be violated as effectively by arbitrary exemptions from taxation as by arbitrary impositions. In *Mount Hope Cemetery Co. v. Pleasant*, 139 Kan. 417, 32 P. 2d 500, this court had before it a factual situation and a statute quite similar to that presented in this case. In that action the Mount Hope Cemetery Co. brought an original proceeding in mandamus in the su-

preme court to require the state tax commission to order stricken from the tax rolls of Shawnee county certain land lying near Topeka which had been conveyed to the cemetery in trust for cemetery purposes. Prior to 1931 it was provided by statute that all lands used exclusively as graveyards shall be exempt from taxation. In 1931 the legislature enacted R. S. 1933 Supp. 17-1314 which reads:

"All lands held and owned by cemetery corporations or associations shall be subject to assessment and taxation: *Provided,* That where lands are held or owned by municipal corporations for cemetery purposes, such lands shall be exempt from taxation: *And provided further,* Where such lands are divided or platted in burial lots and the same have been sold to a person for burial purposes, such lot or lots shall be exempt from assessment and taxation, and also shall not be subject to attachment or execution."

This court held that that portion of the statute of 1931 which sought to subject plaintiff's public cemetery to taxation on the ground of corporation ownership of the fee title to the property violated those provisions of the state and federal constitutions which guarantee to all persons, corporate and individual, within the jurisdiction of the state the equal protection of the law, and which forbid unjust discrimination among individuals and corporations in respect to taxation of their properties. In the later case of *Mount Hope Cemetery Co. v. City of Topeka,* 190 Kan. 702, 378 P. 2d 30, the earlier case of *Mount Hope Cemetery Co. v. Pleasant,* supra, is cited and it is stated in syllabus ¶ 3 that ownership is not the test of whether property is liable to taxation but rather the uses to which property is devoted may exempt it therefrom.

When we turn to the undisputed facts and the statute under consideration in this case and apply the principles of law discussed above, we are compelled to conclude that the statutory classification contained in K. S. A. 79-201 *Second* (Weeks 1969) is discriminatory and unconstitutional as a violation of Article 11, Section 1, of the Kansas Constitution. All lots and tracts of land contained within the boundaries of a cemetery platted by a cemetery corporation are dedicated exclusively for burial purposes and cannot be used for any other purpose. (K. S. A. 17-1302, *et seq.* [Weeks 1969]; *Earhart v. Holbert,* 116 Kan. 487, 227 Pac. 351; *Davis v. Coventry,* 65 Kan. 557, 70 Pac. 583.) Since all lands in the cemetery are dedicated exclusively for burial purposes, we find no rational basis for treating differently land owned by individuals and that owned by the corporation, except ownership, which is not a permissible basis for classification. In our judgment the rationale of *Mount Hope Cemetery Co. v. Pleasant,* supra, is controlling in this case.

Since we have determined that the 1969 amendment to 79-201 *Second* is unconstitutional, we must next determine whether or not the statutory exemption which prior law granted all lands used exclusively as graveyards stands repealed by the repealing clause contained in Section 3 of Chapter 429, Laws of 1969. In this regard the general rule is stated in *City of Kansas City v. Robb,* 164 Kan. 577, 190 P. 2d 398, to be as follows:

"Where a legislative act expressly repealing an existing statute, and providing a substitute therefor, is invalid, the repealing clause is also invalid unless it appears that the legislature would have passed the repealing clause even if it had not provided a substitute for the statute repealed." (Syl. ¶ 2.)

In applying this rule we must determine whether the legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed, K. S. A. 1968 Supp. 79-201 *Second.* We have concluded that that question must be answered in the negative. We think it highly questionable that the legislature would have completely wiped out the statutory exemption heretofore provided for land used exclusively as graveyards. *Mount Hope Cemetery Co. v. Pleasant,* supra, contains a history of the statutory exemption for burial grounds in this state. In the opinion Mr. Justice Dawson points out that from the formation of the state, burial grounds have been exempted from taxation. The underlying philosophy for the statutory exemption for burial grounds is that provision for the decent interment of the dead and for the seemly and dignified maintenance of property set apart for its accomplishment is a public purpose. We have concluded that it is highly unlikely that the legislature would have totally repealed the tax exemption for burial grounds contained in K. S. A. 1968 Supp. 79-201 *Second* without providing a substitute. Hence we hold that the attempted repeal of K. S. A. 1968 Supp. 79-201 *Second* by Section 3, Chapter 429, Laws of 1969, must fall along with the attempted amendment of said section by Section 1 of Chapter 429. We wish to make it clear that our decision here does not affect in any way other provisions of Chapter 429 which have to do with statutory tax exemptions not involved in this case. We therefore hold that the statutory exemption for lands used exclusively as graveyards as provided by K. S. A. 1968 Supp. 79-201 *Second* as it existed prior to the attempted amendment in 1969 was still in full force and effect

for the tax years involved in this case and that the lots and tracts of land owned by Topeka Cemetery Association in its platted cemetery are exempted from ad valorem taxation.

The judgment of the district court is affirmed.

MILLER, J., not participating.

2/24/84
Attachment #3
3 RS 2470

Vidricksen

June
Set for Consideration
Ed

SENATE BILL NO. _____

AN ACT concerning the board of accountancy; concerning certain records thereof; amending K.S.A. 1-202 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1-202 is hereby amended to read as follows: 1-202. (a) Each year the board shall meet and organize by electing a chairperson and a vice-chairperson from its membership. The board shall appoint a secretary, who need not be a member of the board. The board may adopt such rules and regulations as it ~~may--deem~~ deems necessary for the proper administration of its duties and the carrying out of the purposes of this act. The board shall meet at the call of the chairperson but not less than twice each year and shall have a seal. The chairperson and the secretary of the board shall have the power to administer oaths.

(b) The board shall keep records of all proceedings and actions ~~by-and-before-it~~ of the board. In any proceedings in court, civil or criminal, arising out of or founded upon any provisions of this act, copies of such records which are certified as correct by the secretary of the board under the seal of the board shall be admissible in evidence and shall be prima facie evidence of the correctness of the contents thereof.

(c) The board, from time to time, shall: (1) Adopt, amend, and revoke rules of professional conduct;

(2) give examinations, provide for certification and registration and issue permits to practice in accordance with the provisions of this act;

(3) keep accounts of its receipts and disbursements;

(4) keep a register of Kansas certificates issued by the

Attachment # 3

board;

(5) revoke, suspend and reinstate certificates, registrations and permits;

(6) initiate proceedings and hold hearings and do all things necessary to carry out the intent of this act.

(d) A majority of the board shall constitute a quorum for the transaction of any business at any meeting of the board.

(e) Annually, in July of each year, the board shall have printed and published for public distribution an annual register which shall contain the names arranged alphabetically of all persons holding permits to practice under this act, the names of the members of the board and such other information as may be deemed proper by the board. Copies of the register shall be mailed to each certified public accountant holding a permit to practice.

(f) The names and addresses of persons applying to take the certified public accountant examination shall be released to organizations providing professional educational materials or courses to such persons, for the sole purpose of providing such persons with information relating to the availability of such materials or courses. The requesting organization shall pay the reproduction costs for furnishing this data.

Sec. 2. K.S.A. 1-202 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.