

amended several times, but that part of the section referring to the appointment of experts, deputies and clerks by the county auditor, has not been materially altered, neither have any special statutes been enacted which prohibit the occupants of either of the positions you mention from performing the duties of the other.

It is to be noted that a deputy real estate assessor has not the authority or duties of a deputy county auditor, but only the power to ascertain such pertinent circumstances reflecting upon the value of real estate as will aid the county auditor in fixing its true value in money.

In view of the foregoing, it is my opinion that the office of township trustee and the position of deputy real estate assessor may be held concurrently.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2928.

TOWNSHIP CEMETERY — TOWNSHIP TRUSTEES ENJOINED BY OWNER OF A DWELLING HOUSE FROM CREATING AN ADDITION THERETO—PURCHASER OF SUCH DWELLING ENTITLED TO PROTECTION OF INJUNCTION—HOW RELEASE OR WAIVER OF PROPERTY OWNER OBTAINED.

SYLLABUS:

Where, at the suit of the owner of a dwelling house and other property in a court of competent jurisdiction, the township trustees of a township are enjoined from laying out and establishing a tract of land as an addition to a township cemetery, on the ground such tract of land is within two hundred yards from said dwelling house and other property of the plaintiff in such suit, and thereafter the owner of the dwelling house and other property, the plaintiff in such action, sells and conveys such dwelling house and other property to another person who thereafter owns and occupies such property, such person, by reason of his privity of estate with respect to the original owner in whose favor the injunction decree was rendered, is entitled to the protection of said injunction against any proceedings on the part of the township trustees to lay out and establish such tract of land for cemetery purposes.

If there are in the township treasury available moneys appropriated for the purpose, the township trustees of such township may acquire from the present owner of such dwelling house and other property a release and waiver of his property rights with respect to the establishment of said tract of land as an addition to the township cemetery and thereafter lay out and establish such lands for said purpose.

COLUMBUS, OHIO, February 9, 1931.

HON. JAY S. McDEVITT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication which reads as follows:

“Some time prior to the 7th day of June, 1921, the township trustees

of Hilliar Township, Knox County, Ohio, purchased a five acre tract of land for cemetery purposes. This tract of land lies directly across a public highway opposite an old cemetery. When the trustees began to improve said tract of land for cemetery purposes they were restrained by injunction, which injunction was later made perpetual. Thereafter, the law pertaining to cemeteries being located near dwelling houses was amended. Some time after the amendment had gone into effect, to-wit, during the year 1929, another suit was started by the trustees asking that the former injunction be set aside owing to the fact that the statute had been changed. By a brief statement of the above circumstances, I have attempted to lead up to the actual case in question which is entitled, '*Shipley vs. White*,' in the Ohio Law Abstract, Volume 7, 1929, or which is the issue of May 11, 1929, on page 284. The statement of the case appears and the opinion written by Judge Lemert of our Court of Appeals and you can have that case before you without my re-stating it here. Since this opinion by Judge Lemert has been given, White, who had been owner of the property during both matters of litigation, has sold and conveyed by warranty deed the property in question to B.

The question which I now wish to submit for your consideration is whether or not the opinion as given in the case cited is a permanent injunction which follows the land, or the title having been sold and transferred to B., would permit the trustees to proceed with the maintenance of this land for cemetery purposes. In addition to this, assuming for the sake of argument that the injunction follows the land, which I am personally inclined to believe, would the new purchaser be the owner of an appurtenance to the land by virtue of the injunction heretofore granted the former owner and if so, could he sell and could the trustees lawfully buy that vested right so that a cemetery could be established on said land?

By way of explanation further, it might be said that the present owner will sell for a consideration the privilege to the trustees of building a cemetery on the land in question. The question then arises whether or not the trustees having purchased the land heretofore, can pay an additional sum lawfully for the privilege of going ahead and building the cemetery which would be agreeable to the present owner providing he is paid for it.

I might further say that this land was bought some time ago at a high figure and is the only desirable place near the old cemetery which can be used for cemetery purposes.

I have tried to make this matter clear but if for any reason the facts are not clear to you, I shall be glad to give you further details of the matter upon request."

From the facts stated in your communication and in the report of the case of *Shipley vs. White*, referred to therein, it appears that some time in the year 1921 or prior thereto the township trustees of Hilliar Township, Knox County, Ohio, acquired by purchase the five acre tract of land mentioned in your communication, for the purpose of laying out and establishing this tract of land as an addition to the township cemetery. When the township trustees of said township attempted to lay out and establish this tract of land as a cemetery and as an addition to the cemetery then established, one White filed an action in the Common Pleas Court of Knox County, Ohio, to enjoin the township trustees from the establishment of this land as a cemetery on the

ground that said cemetery addition, if established, would be within two hundred yards of a residence building and other real property owned by said White and occupied by himself and family. Upon the hearing of said cause, the issues therein were determined in favor of White, the plaintiff in said action, and the township trustees of said township were perpetually enjoined from establishing said cemetery or addition thereto.

At the time of the acquisition of said tract of land for cemetery purposes and at the time of the institution and trial of the injunction case above referred to, the statutory provisions governing the rights of said township trustees and of said property owner, were sections 3441, 3442 and 3455, General Code. Section 3441, General Code, provides that township trustees may accept a conveyance of, or purchase, and inclose, improve, and protect such lands in one or more places within the township as they deem necessary and proper for cemetery purposes. This section further provides that if suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not to exceed ten acres, by proceedings in accordance with the provisions of law regulating the appropriation of private property by municipal corporations. Section 3442, General Code, reads as follows:

“No such appropriation shall be made until the court is satisfied that such lands can not be obtained by contract on reasonable terms, nor shall any lands be so appropriated within two hundred yards of a dwelling house, or on which there is a house, barn, stable, or other building, or an orchard, nursery, medical or mineral spring, or well yielding oil or salt water.”

Section 3455, General Code, as the same read at the time of the acquisition of said tract of land at the time of the trial of said injunction case, provided, so far as the same was material to the rights of the parties in said action, as follows:

“In any township in which there is a cemetery owned or partly owned, by such township, if in the opinion of the trustees of the township, it is desirable to add to the area of such cemetery by the purchase of additional grounds, and if suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not exceeding five acres, as provided for establishing a township cemetery, and subject to the same restrictions.”

In the case of *Henry vs. Trustees*, 48 O. S. 671, it was held that the trustees of a township can not establish a cemetery within two hundred yards of a dwelling house without the consent of the owner thereof, whether the land be acquired by the township trustees for cemetery purposes by purchase or by appropriation and in the later case of *Norton vs. Trustees*, 8 O. C. C. 335, affirmed by the Supreme Court without opinion, 54 O. S. 682, it was held that Section 3442, General Code, which provides that a cemetery can not be located within two hundred yards of a dwelling house, applies to an addition to a cemetery as well as to the establishment of a cemetery on lands originally purchased for the purpose.

It is quite evident that the Common Pleas Court of Knox County, in rendering and entering its decree enjoining the township trustees of Hilliar Township from establishing this five acre tract of land as an addition to the township cemetery, followed the earlier cases above cited construing and applying the statutory provisions herein quoted. On March 22, 1923, the legislature

passed an act amending section 3455, General Code, 110 O. L. 11. So far as the same is material to any questions here presented, said section of the General Code now reads as follows:

"In any township in which there is a cemetery owned or partly owned, by such township, if in the opinion of the trustees of the township, it is desirable to add to the area of such cemetery by the purchase of additional grounds, and if suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not exceeding five acres, as provided for establishing a township cemetery; provided, however, if any person shall erect a dwelling house within two hundred yards of an established cemetery in such case the restrictions of section 3443 shall not apply, and such additional lands shall be considered a part of such original cemetery even though separated therefrom by a road or highway."

After the amendment of section 3455, General Code, to its present form the township trustees of said township filed an action in the Common Pleas Court of said county, the nature of which action does not clearly appear, but the purpose of which was to secure a judgment and decree of said court in dissolving the perpetual injunction theretofore granted and to permit the township trustees to establish said tract of land as a cemetery, said action being predicated upon the amendatory provisions of section 3455, General Code, above quoted. It does not appear what the decision of the Common Pleas Court was upon the question thus presented nor does it appear how the case was taken to the Court of Appeals of said county. However, it does appear that when said case got into the Court of Appeals under the title of *Shipley vs. White*, 7 O. L. Abs. 284, that court held that the amendatory provisions of section 3455, General Code, as enacted by the act of 1923, above referred to, were prospective only in their operation and did not, therefore, apply in that case for the reason that it was conceded that the dwelling house of Mr. White was not erected after the enactment of the amendatory provisions in section 3455, General Code; and the court entered a judgment dismissing the petition of the township trustees for the dissolution of the perpetual injunction which had theretofore been entered against them in the action filed by Mr. White, the owner of said dwelling house.

You state in your communication that since the decision and judgment of the Court of Appeals of said county in the case of *Shipley vs. White*, supra, Mr. White has sold and conveyed the dwelling house and property in question to one B; and one of the questions here presented is as to the rights of the person designated as B in your communication under the judgment entered in favor of Mr. White by the Common Pleas Court of said county in the injunction case and under that entered by the Court of Appeals of said county in the case of *Shipley vs. White*, supra, involving the dwelling house and other property then owned by Mr. White, the predecessor in title of said B. With respect to this question, it is to be observed that the judgments of courts of competent jurisdiction, including decrees of courts of equity, are conclusive not only upon the parties to the litigation, but also upon persons in privity with them with respect to property involved in the litigation. Making applications of this general principle, Mr. Freeman in his work on Judgments, says:

"One who, by purchase or otherwise, has succeeded to an estate or interest, real or personal, is to that extent in privity with his predecessors in interest, and is therefore entitled to the benefits and subjected

to the disadvantages which by operation of final adjudications had attached to the property in the hands of its former owners. * * * A vendee or grantee is in privity with his vendor or grantor, and bound by judgments against him and entitled to the benefits of judgments in his favor rendered previous to the sale of the property."

Freeman on Judgments (5th Ed.) Vol. I, pp. 964, 965; *Thompson v. Johnson*, 201 Ala. 315, 316; *Stone v. Winn*, 165 Ky. 9; *Steinman v. Clinchfield Coal Co.* 121 Va. 611, 613, 634; *Quinn v. State ex rel*, 118 O. S. 48, 55.

In its application to a case such as that here presented, the rule above noted is further stated by Freeman in his work on Judgments as follows:

"A successor in interest is entitled to the benefits as well as the burdens of litigation to which his predecessor was a party or privy; hence, where he acquires property and rights protected by a previous decree of injunction, he is entitled to the benefits and protection of the injunction."

Freeman on Judgments (5th Ed.) Vol. I, page 966; *Gunther v. Atlantic Coast Line R. R. Co.* 200 U. S. 273.

Giving effect to the principles of law above noted to the facts stated in your communication, it follows that the person designated by you as B is entitled to the protection of the judgment and decree enjoining the township trustees of Hilliar Township from laying out and establishing cemetery lands additional to the cemetery now owned and used by said township.

Moreover, it would seem that wholly aside from the operation and effect of the judgment of the Common Pleas Court and the Court of Appeals, respectively, in the actions above referred to, said B, as the present owner of the dwelling house and property here in question, would have the right to enjoin the trustees from laying out and establishing said five acre tract as an addition to the township cemetery. He certainly would have this right unless same is precluded by the amendatory provisions of Section 3455, General Code, which was enacted before he acquired title to said property. The amendatory provisions of said section are "provided, however, if any person shall erect a dwelling house within two hundred yards of an established cemetery, in such case the restrictions of Section 3442 shall not apply, and such additional lands shall be considered a part of such original cemetery even though separated therefrom by a road or highway." Although in the amendment of said section by said act of 1923 there was stricken from said section which provides for the acquisition of additional cemetery lands, the words "and subject to the same restrictions," referring to the restrictions contained in section 3442, General Code, relating to the original acquisition of lands for cemetery purposes, the amendatory provisions of section 3455, General Code, above quoted, quite clearly carry the implication that it is only in a case where a person shall erect a dwelling house within two hundred yards of an established cemetery after the effective date of said amendatory provisions that the restrictions contained in section 3442, General Code, shall not apply for their protection against the action of the township trustees in establishing an addition to such cemetery, if such cemetery addition is within two hundred yards of his dwelling house and property. It is just as true with respect to the rights of B as it was with respect to the rights of Mr. White, so far as the establishment of this additional cemetery is concerned, that the dwelling house in question was erected before the amendatory provisions of section 3455, General Code, were enacted; and since said amendatory provisions were and are prospective only in their operation they would not preclude B from

asserting his right to enjoin the establishment of the additional cemetery grounds here in question.

Whatever may be said, however, as to the rights of said B to prevent the township trustees of said township from laying out and establishing said five acre lot as an addition to the township cemetery, independent of the operation and effect of the judgments and decrees entered in the cases before referred to, said judgments and decrees so entered are effective to protect his rights as the owner of said dwelling house and property against any such action on the part of the township trustees without his consent.

In this connection, it may be added that the rights taken by Mr. White under the judgments and decrees entered in his favor in said cases in the Common Pleas Court and the Court of Appeals of said county were rights which inured in him solely by reason of his ownership and possession of the dwelling house and other property involved in the consideration of said cases, and that having parted with his title to this property he now has no interest whatever in the judgments and decrees entered in said cases.

In your communication the question is presented whether the right vested in B with respect to the establishment of said additional cemetery, is a right which the township trustees can acquire of him by purchase. This question suggests the further inquiries with respect to the nature of the right vested in B by the prohibition of the statutory provisions above noted and with respect to the contractual right and authority of the township trustees. In the cases of *Norton vs. Trustees* and *Shipleigh vs. White*, supra, the right conferred upon the owner of a dwelling house and other property by the prohibition contained in these statutes is spoken of as "a vested right in the nature of an appurtenance" and in the opinion of the court in the first of these cases, it is said that the right of the property owner is one protected by section 19 of article I of the state constitution, which provides that private property shall ever be held inviolate. In this case it is further stated that the right of the property owner is one that might be appropriated by the township trustees under legislative authorization therefor, providing a means of compensating the owner for the right so appropriated.

The township mentioned in your communication, represented by the board of township trustees, is a body politic and corporate with full capacity to exercise such contractual and other powers conferred upon it by statute. Sec. 3244, General Code. Under the provisions of section 3455, General Code, the township trustees of this township have the express authority and power to acquire additional land for cemetery purposes, and as an incident to the express power granted they have the implied power to do whatever is reasonably necessary to make effective such express power and the purpose thereof, which is to lay out and establish cemetery grounds additional to those already laid out and established by the township trustees.

I am of the opinion, therefore, by way of specific answer to the question presented, that if there are available moneys of said township which have been or which may be appropriated for the purpose, the township trustees of said township may acquire from said B a release and waiver of the rights conferred upon him by the statutory provisions above noted, with respect to the establishment of such additional cemetery grounds.

Respectfully,

GILBERT BETTMAN,
Attorney General.