

2978

1. CEMETERY — MAY BE CONSIDERED ABANDONED — WHEN ALL OR PRACTICALLY ALL BODIES HAVE BEEN REMOVED—NO BODIES BURIED THERE FOR MANY YEARS —CEMETERY LONG ABANDONED—IDENTITY LOST —NO LONGER KNOWN, RECOGNIZED AND RESPECTED AS CEMETERY—SECTIONS 3465 GC—517.21 RC.
2. TOWNSHIP TRUSTEES REQUIRED TO NOTIFY NEXT OF KIN—PERSONS BURIED IN CEMETERY—BEFORE REMOVING BODIES —NOTICE TO REMOVE BODIES — IF WITHIN THIRTY DAYS NEXT OF KIN FAIL TO REMOVE BODIES TOWNSHIP TRUSTEE MAY DO SO.
3. ABANDONED PRIVATE CEMETERY—NO STATUTORY DUTY IMPOSED ON TOWNSHIP TRUSTEES TO TAKE OVER OR MAINTAIN SUCH CEMETERY.

SYLLABUS:

1. A cemetery may be considered as abandoned within the purview of Section 3465, General Code, Section 517.21, Revised Code, when all or practically all of the bodies have been removed therefrom and no bodies have been buried therein for a great many years, and the cemetery has been so long neglected as entirely to lose its identity as such, and is no longer known, recognized and respected by the public as a cemetery.

2. Before removing bodies from an abandoned cemetery, the township trustees are required to notify the next of kin of the persons buried therein, to remove such bodies, but if the next of kin fail to do so within the time specified, not less than thirty days, the township trustees may do so.

3. The statutes impose no duty on the trustees of a township to take over or maintain an abandoned private family cemetery.

Columbus, Ohio, August 26, 1953

Hon. Dorothy Kennedy, Prosecuting Attorney
Brown County, Georgetown, Ohio

Dear Madam:

I have before me your request for my opinion, reading in part, as follows:

"The Board of Trustees of Perry Township have been requested to take over and maintain a private, family cemetery by the next of kin of the deceased persons buried therein, which cemetery is located in the country and could in no way be considered detrimental to the public health or welfare, on the theory that said cemetery has been abandoned by them as a burial ground for at least the past twenty years and that they have no intention of ever using it again for burial purposes. 1) What constitutes abandonment, within the meaning of Section 3465 of the General Code of Ohio? 2) What procedure is necessary to establish abandonment under Section 3465? 3) When abandonment is established, is it the mandatory duty of the township trustees to maintain such private, abandoned cemetery? * * *"

I note your further statement that the next of kin of persons who are buried in this cemetery, are anxious to have the trustees take over the cemetery, and that the trustees are disposed to take over and maintain the same, if they have authority to do so. I note, further, your statement that the cemetery in question is not in any way detrimental to the public health or welfare.

In all civilized countries, great respect is shown to the memory of

the dead and elaborate and sometimes lavish expenditures are made to beautify the grounds and buildings incidental to their burial.

To a very great extent, also, the laws of this and other states have made provisions for the establishment of publicly owned cemeteries, and regulations have been enacted for the maintenance of such grounds by private persons and associations. I am not, however, able to find any element of sentiment in the laws relating to public participation in establishing such institutions. The following statement found in Volume 10, page 487, of American Jurisprudence is perhaps typical of the entire attitude of the law toward the matter :

“Wherever there exists a status of organized society, it has been found necessary to provide for the establishment and maintenance of a burial place for the dead. Burial grounds are of concern from the standpoint of the public health, and if such places are not prepared by private enterprise, it then becomes the duty of the state to meet the necessity.”

From the earliest days in the history of Ohio, there have been statutory enactments providing in one way or another for cemeteries, and authority has been conferred upon townships, cities and villages, as well as upon private associations or corporations to establish and maintain such cemeteries. A partial review of these provisions may be found in my Opinion #817, Opinions of the Attorney General for 1951, page 606. The particular situation which you present is covered by Section 3465, General Code. This section was originally enacted in somewhat similar form in 1876, 101 O. L., 201. It reads as follows :

“When any burial ground, public or private, *has been abandoned, or* when the trustees of a township, or the trustees or directors of a cemetery association, are of the opinion that the further use for burial purposes of any cemetery or burial ground *will be detrimental to public welfare or health,* and a cemetery or burial ground in the near vicinity thereof is open for public use, such township trustees in every such case, or, in case of a cemetery association, the trustees or directors thereof, may *order such cemetery or burial ground to be discontinued, and provide for the removal of all bodies therein buried,* and for the removal of all stones and monuments marking the graves thereof, and for the re-interment of such bodies and the re-erection of such stones and monuments in suitable and public ground in the near vicinity, and pay therefor from the township treasury. They shall before providing for any such removal, first cause notice to be given to the family, friends or kindred of the deceased, if known

to them of such order and of the time within which, not less than thirty days, such removal must be made, and that it is desired that such removal be made by the friends or kindred of the dead. If at the expiration of such time such removals have not been made, the trustees or the board, as the case may be, may cause them to be made as hereinbefore provided."

(Emphasis added.)

As you suggest in your letter, this statute appears to set out two conditions under either of which the township trustees are authorized to act in the manner therein set forth: (1) When a cemetery has been abandoned, and (2) When the trustees are of the opinion that further use for burial purposes of any cemetery or burial ground will be detrimental to the public health or welfare.

By your statement you have eliminated the second of these conditions, so we may confine our inquiry strictly to a consideration of an abandoned private or public burial ground.

Accordingly, I shall turn to the several questions which you propound, and discuss them in their order.

1. What constitutes "abandonment," within the meaning of Section 3465, General Code? Neither this statute nor any other, so far as I have found, throws any direct light on this question. When we turn to authorities dealing, generally, with the significance of the word "abandonment," we almost invariably find ourselves confronted with a discussion relating to the abandonment of property or some property right. Thus, it is said in 1 Ohio Jurisprudence, 2d, page 7: "The fundamental principle in determining whether an owner has lost title to property or a property right by abandonment of it, is his intention to abandon." It is evident, however, that authorities relative to abandonment as affecting rights to property do not throw much direct light upon the use of this term as applied to the abandonment of a cemetery. Here, there is no effort to deprive a person of any property or of any right whatsoever in the property or otherwise. The principle underlying abandonment of a cemetery is more nearly akin to the case in which one abandons some legal duty, such as the abandonment of a child or of a husband or wife. There, also, the element of intent is essential, but there is no element of loss of a right; rather there is implied an escape from something in the nature of an obligation. It can hardly be said that the next of kin of deceased persons who have been buried, owe any legal obligation of reverence, or of keeping their place of burial attractive, but assuming that

there is a measure of moral responsibility, it would appear that abandonment in such case implies an escape therefrom, and an abandoned cemetery is one in which those responsible for the burial of a deceased person or those standing in such relation that they might be expected to take care of the final resting place, either deliberately or by pure indifference or neglect or for some other reason fail to render any such service.

After all, we have to deal with a piece of ground which has been in some way dedicated to the burial of the dead, and is no longer useful for that purpose, or is totally neglected. I find in Volume 14, *Corpus Juris Secundum*, page 82, a discussion of the principle of abandonment, as applied to a cemetery. It is there stated :

“A cemetery does not lose its character as such from mere disuse or because further interment in it has ceased or become impossible, and where premises have been dedicated as a graveyard, they remain subject to that use so long as bodies remain buried there, and until they are removed by public authority, or by friends or relatives.”

This authority continues with the following statement, which seems to me to go a long way toward answering your question :

“So long as a cemetery is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a cemetery, it is not abandoned, but it may be said to be abandoned where all the bodies have been removed, *or the cemetery has been so neglected as entirely to lose its identity* as such, and is no longer known, recognized, and respected by the public as a cemetery. Abandonment may result from inconsistent use, as where the public and those interested in a cemetery have permanently appropriated it to a use or uses entirely inconsistent with its purpose as a cemetery, so that it has become impossible to use it longer for cemetery purposes.”

The Ohio authorities throw a somewhat negative light on the subject. In 7 *Ohio Jurisprudence*, page 39, it is said :

“A cemetery will not be regarded as abandoned merely because interments have not been made therein for many years; because many bodies have been removed therefrom; because the municipality in which it is located has failed to keep it properly fenced; or has dug, or permitted others to dig gravel from its surface; or has installed therein water-pipes, poles, electric light wires, lights, fountains, cement walks and steps, provided such improvements are not inconsistent with its continued use and preservation as a graveyard.”

In the two cases of *Newark v. Crane*, 92 Ohio St., 537, and *Newark v. Burnette*, 92 Ohio St., 539, which are apparently related to the same controversy, it was held as shown by the court's entry:

"The court finds that, notwithstanding interments have not been made in said graveyard for many years, and that many bodies previously buried there have been removed therefrom; it appearing that many bodies still remain, there has not been a complete abandonment of said premises to purposes inconsistent with its preservation as a graveyard."

I find it impossible to give a clear, precise definition of "abandonment" as used in the statute to which reference has been made. Perhaps it is sufficient to say that a cemetery has been abandoned when most or all of the bodies have been removed or no burials have been made therein for a long period of time and the cemetery has been so neglected as entirely to lose its identity as such, and is no longer known, recognized, and respected by the public as a cemetery.

2. Your second question is as to the procedure contemplated by Section 3465, General Code. If the trustees, in the exercise of a reasonable discretion, find that a cemetery has been abandoned they may, as the statute provides, order the removal of the bodies buried therein, and the removal of all stones and monuments marking the graves, and the interment of such bodies and the re-erection of such stones and monuments in suitable and public ground in the near vicinity. Earlier in the section, it appears that their action in this respect is conditioned on the existence of a cemetery or burial ground in the near vicinity, which is open for public use. It is further provided that before ordering such removal, they shall first cause notice to be given to the family, friends or kindred of the deceased, of the time within which, not less than thirty days, such removal must be made, and that it is desired that such removal be made by the friends or kindred of the deceased. If such friends or kindred fail within the time limited to do so, then the trustees may cause that to be done at the expense of the township.

Outside of these provisions of the statute there is nothing in the law that prescribes any procedure. It is manifest that the notice to the friends and kindred of the deceased, is not an order which may be enforced, but rather a concession to their possible wishes.

3. Your third question is, when abandonment of a private cemetery

is established, is it the mandatory duty of the trustees to *maintain* such private, abandoned cemetery? In the first place, I find nothing in the statute which either requires or authorizes the trustees, when they find that a private cemetery has been abandoned, to take it under their care and maintain it. The only action mentioned, is to cause the bodies therein to be removed, and the monuments to be removed also, to another cemetery. It is well settled that a public body, such as a board of township trustees, has only such power as the legislature has seen fit to give it; and that in case of doubt as to the right of such board to expend public funds, the doubt is resolved against the grant of power. 32 Ohio Jurisprudence, page 734, and cases cited.

Certainly, there is no language in Section 3465 supra, and no other provision of the law so far as I can find, that makes it the mandatory duty of the township trustees to do anything with reference to a private cemetery, no matter how completely it may be abandoned or how sorely it may be neglected. This would furnish a sufficient answer to your third question.

I note from your letter that in the particular case you have before you, the trustees are willing to take over and maintain the private family cemetery, but I question the right of the trustees to spend township funds for the benefit of the next of kin of persons buried in a private cemetery. That might open the way for an elaborate and extended discussion. I do not consider it necessary to enter that field except to suggest that the expenditure of public funds should, as a matter of general principle, be confined to the accomplishment of a public purpose, and I know of no authority whereby public funds may be devoted to the betterment of private interests. I recognize the fact that the statute which we have been considering, suggests the right of township trustees to remove and reinter bodies from any burial ground—public or private—but the fact that the statute predicates such right in part upon a finding that further use of such burial ground would be detrimental to the public health or welfare suggests to my mind that in any case action must be predicated upon a consideration of public health or welfare and not purely on the enhancement of a private interest.

3. The statutes impose no mandatory duty on the trustees of a township to take over and maintain an abandoned private cemetery, and do not authorize the trustees so to do.

Accordingly, in specific answer to the questions submitted, it is my opinion and you are advised :

1. A cemetery may be considered as abandoned within the purview of Section 3465, General Code, Section 517.21, Revised Code, when all or practically all of the bodies have been removed therefrom and no bodies have been buried therein for a great many years, and the cemetery has been so long neglected as entirely to lose its identify as such, and is no longer known, recognized and respected by the public as a cemetery.

2. Before removing bodies from an abandoned cemetery, the township trustees are required to notify the next of kin of the persons buried therein, to remove such bodies, but if the next of kin fail to do so within the time specified, not less than thirty days, the township trustees may do so.

3. The statutes impose no duty on the trustees of a township to take over or maintain an abandoned private family cemetery.

Respectfully,

C. WILLIAM O'NEILL
Attorney General