

2749.

CEMETERY—TOWNSHIP TRUSTEES MUST BEAR ENTIRE EXPENSE
OF ERECTING FENCE ENCLOSING TOWNSHIP CEMETERY.

SYLLABUS:

By virtue of the provisions of Sections 3449 and 3453, General Code, township trustees are required to bear the entire cost of the erection and maintenance of fences inclosing a township cemetery and adjoining land owners are not subject to the provisions of Sections 5908 et seq., General Code.

COLUMBUS, OHIO, January 5, 1935.

HON. HOWARD S. LUTZ, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Your recent request for my opinion reads as follows:

“I would appreciate your opinion as to whether land owners adjoining a cemetery owned and maintained by a township is within or without the exception contained in Section 5908 of the General Code; in other words are adjoining land owners forced to contribute their equal share to the construction of a fence around the cemetery in such instances where the cemetery is surrounded by farms either partially or wholly.”

For many years the Ohio Statutes have regulated the construction and maintenance of partition or line fences. *Zarbaugh vs. Ellinger*, 99 O. S. 133: The present statute is Section 5908, General Code, which reads as follows:

“The owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them, unless otherwise agreed upon by them in writing and witnessed by two persons. This chapter shall not apply to the enclosure of lots in municipal corporations or of lands laid out into lots outside of municipal corporations or affect any provisions of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad.”

It was held in the *Zarbaugh vs. Ellinger* case, supra, that such a statute is in the nature of an exercise of the police power. Section 5908, General Code, was held constitutional in *McDowman vs. Ballard*, 94 O. S. 183.

Although by the express provisions of Section 5908, General Code, it is stated that the chapter on “Fences” shall not apply under certain circumstances, there is no statement to the effect that such exceptions shall include the cost of erecting a partition fence when such fence incloses a cemetery owned and operated by a township.

It is necessary, however, to consider the duties imposed upon township trustees for the maintenance of cemeteries. The disposal of the dead, from motives of sanitation and health, is a state function. (*Frazer vs. Lee* 8 O. App. 235). For that reason the regulation and supervision of cemeteries is within the power of the state. The legislature has made specific provision for the establishment and maintenance of cemeteries by townships and has enacted other requirements to

guide and control the township trustees in the operation of such cemeteries.

Section 3441, General Code, makes a direct grant of authority to township trustees to acquire land and inclose the same for cemetery purposes. Other provisions authorize the trustees to divide the land into lots and sell the same for burial purposes. Section 3449, General Code, directing the use of the proceeds from the sale of such lots is pertinent. It reads:

“The proceeds arising from the sale of such lots shall be used in improving and embellishing such grounds, and the trustees shall build and maintain proper and secure fences around all such cemeteries, to be paid for from the township funds.”

The provisions of Section 3449, General Code, were held to be mandatory in an opinion reported in Opinions of the Attorney General for the year 1920, Vol. I, page 89 and my opinion No. 3694, rendered December 28, 1934.

As if to emphasize the importance of properly inclosing the cemetery grounds, the legislature also enacted Section 3453, General Code, which reads:

“The trustees shall inclose such burying grounds with a substantial fence or hedge, and keep them in good repair, and levy a tax for that purpose, not to exceed one-half of one mill in any one year, upon all the taxable property of the township.”

It will be observed that in both statutes, last quoted, the legislature placed upon the trustees the duty of building and maintaining adequate fences inclosing the cemetery grounds. It would appear that this was done so that if the proceeds from the sale of lots were insufficient to properly inclose the cemetery then a tax may be levied for that purpose.

In his work, “Ohio Township Officers’ Guide” Rockel discusses the responsibility of the township trustees to bear the entire expense of erecting and maintaining a partition fence inclosing a cemetery. At page 94 he says:

“In analogy to the fence law around schoolhouses, it is probably the duty of the trustees to erect all the fence, even though it serves as a partition fence.”

Section 7620, General Code, makes it the duty of a board of education to build and keep in good repair fences including school houses. Asked if Section 5908, General Code, pertaining to partition fences applied to a board of education and an adjoining land owner the then Attorney General in an opinion appearing in the Annual Report of the Attorney General for 1911, Vol. II, page 1312, said:

“I am of the opinion that said section to which you refer, 7620 of the General Code, is mandatory and that the respective boards of education are bound to keep and maintain in good repair fences enclosing their respective school houses, because section 7620 of the General Code clearly provides and requires that boards of education shall ‘build and keep in good repair fences enclosing such school houses.’ This section is not a part of the partition fence laws, but

is entirely distinct therefrom and governs and applies to school houses which are under the control of the respective school boards of the state. Therefore, I am of the opinion that the school boards are legally bound and required to build and maintain their respective fences enclosing their respective school houses and school grounds, and that the sections pertaining to partition fences do not apply to boards of education for the reason I have already stated—that all boards of education are bound to build and maintain in good repair fences enclosing their respective school houses as provided by said section 7620 of the General Code cited above, and that said section is not a part of the partition fence laws.

Another very salient reason why I am of the opinion that school boards 'should build and keep in repair fences belonging to such school houses' is that the burden of so building and keeping such fences in repair should and ought to be borne by the tax payers and the respective school districts equally. Otherwise, the adjoining property owners of the respective school grounds in the state would be bearing more than their portion of the burden in enclosing the respective school grounds of the state. For instance, if one individual owns all of the land surrounding a school grounds he would be required to pay half of the cost and expense of building and maintaining a fence around such public property, which would not be fair; and likewise if two individual citizens of any such school district should own the land adjoining such school grounds, they would be required to bear one-fourth of the expense of keeping and maintaining in repair the fences enclosing such public grounds, which would not be fair, and so one might go on ad infinitum."

I have quoted at length from the 1911 opinion *supra*, because it is apparent to me that the statutory requirements and the circumstances in the case of erecting a partition fence inclosing school grounds is clearly analogous to that of inclosing a township cemetery.

In the construction of statutes, it is the duty of the Court where possible, to reconcile and give effect to every act of the General Assembly, and to this end the special provisions of a section relating to a particular subject matter, although apparently in conflict with the general provisions, must, nevertheless be read as an exception. *Electric Co. vs. Pomeroy*, 99 O. S. 75. Sections 3449 and 3453, General Code, are special statutes relating to a particular subject matter. They are entirely separate and apart from section 5908, which contains general provisions regulating the building and repairing of partition fences.

For these reasons I am of the opinion that the erection and maintenance of a partition fence, by a board of township trustees inclosing a township cemetery is an exception to the provisions of Section 5908, General Code.

I am not unmindful of an opinion of a former Attorney General, to be found in Opinions of the Attorney General 1927, Vol. IV, page 2684. In that opinion it was held that a cemetery association is amenable to the provisions of Sections 5908 et seq., General Code, in inclosing the cemetery grounds under its jurisdictions. This is clearly distinguishable from the instant case. Cemetery associations are authorized and regulated by Sections 10093 to 10110-1, General Code. There are no express statutory provisions imposing the duty upon

cemetery associations which is found placed upon township trustees by Sections 3449 and 3453, General Code, with reference to fences.

It is my opinion that by virtue of the provisions of sections 3449 and 3453, General Code, township trustees are required to bear the entire cost of the erection and maintenance of fences inclosing a township cemetery and that adjoining land owners are not subject to the provisions of Sections 5908 et seq., General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3750.

WITNESS—STATE HIGHWAY PATROLMAN ENTITLED TO WITNESS
AND MILEAGE FEES IN CRIMINAL PROSECUTION WHEN.

SYLLABUS:

Where a State Highway Patrolman is subpoenaed to appear before the Grand Jury or in a criminal prosecution before a Court of Common Pleas as a witness in a case in which he made the arrest, such patrolman is entitled to his witness and mileage fees, which in the event he is paid his salary and traveling expenses, while so testifying, by the State Highway Department, should be turned back into that Department.

COLUMBUS, OHIO, January 5, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

If a state highway patrolman, appointed under the provisions of Section 1181-2 of the General Code, is transferred from one district to another, and is subpoenaed to appear before the grand jury or the common pleas court in the district from which he was transferred as a witness in a case in which he made the arrest, is such patrolman entitled to witness fee and mileage?”

I am informed that the State Highway Patrolmen in question receive their salaries and their traveling expenses from the State Highway Department during the period they are required to testify in criminal prosecutions.

The question of whether or not any witness may receive the statutory mileage and witness fees depends upon whether or not his attendance at the trial could have been required by compulsory process. This is also true where a witness voluntarily reports to the court upon notice to do so and is there served with a subpoena. In this connection see the case of *Wylie vs. Duffy*, 1 N. P. (N. S.) 353. Section 13436, General Code, provides that a person may be subpoenaed any-