

1167.

VILLAGE CEMETERY TRUSTEES—WHERE MONEY RECEIVED FROM
ENDOWMENT FUNDS, CARE OF LOTS AND SALES, PLACED—
SUCH MONEY EXPENDED BY APPROPRIATION OF COUNCIL—
—EXECUTION OF DEEDS—NOTARY FEE.

SYLLABUS:

1. *Moneys received by a board of cemetery trustees of a village from the sale of lots in a cemetery belonging to such village must be deposited in the village treasury to the credit of a special cemetery fund.*

2. *Such moneys may not be expended by a board of cemetery trustees without an appropriation by council.*

3. *Moneys received from lot owners for the care of lots should be deposited in the village treasury to be paid out on warrant of the village clerk pursuant to appropriation made by council.*

4. *When, through wills of persons deceased and other trust agreements, village cemetery trustees have been specifically made trustees of funds, the income from which is to be used for the care of lots, such endowment funds should be turned over to the village council for investment.*

5. *The income from investment of cemetery endowment funds should be deposited in the village treasury to be expended pursuant to appropriation by council.*

6. *A deed for a lot in a village cemetery should be executed in the name of the village by the mayor and clerk.*

7. *A notary or other fee for service in connection with the preparation or verification of such deed should be paid by the village, and if such services are performed by a village official whose duty it is to render such service to the village, no charge should be made therefor.*

COLUMBUS, OHIO, November 8, 1929.

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

GENTLEMEN:—Your letter of recent date is as follows:

“Sections 4160 to 4173 G. C., relate specifically to cemeteries in cities; Sections 4174 to 4182 G. C., to cemeteries in villages. Section 4178 G. C., provides that a village board of cemetery trustees shall have the powers and perform the duties prescribed in this chapter for the Director of Public Service. Section 4300 G. C. reads:

‘The treasurer shall receive and disburse all funds of the corporation including the school funds, and such other funds as arise in or belong to any department or part of the corporation government.’

Section 5625-9 G. C., as amended in House Bill No. 426, 113 O. L., specifies the funds each subdivision shall establish, and Section 5625-12 G. C., as amended in House Bill No. 426, 113 O. L., provides that, with the approval of the Bureau, a municipality may establish a cemetery fund.

Question 1. Must a board of cemetery trustees of a village deposit moneys received by them from the sale of lots in the village treasury?

Question 2. May such moneys be expended by a board of cemetery trustees without an appropriation by council?

Question 3. May the trustees of a village cemetery retain and disburse moneys received from lot owners for the care of lots, or must such

moneys be deposited in the village treasury, to be paid out on warrant of the village clerk, pursuant to appropriation made by council?

Question 4. When, through wills of persons deceased and other trust agreements, village cemetery trustees have been specifically made trustees of funds, the income from which is to be used for the care of lots, must such endowment funds be turned over to the village council for investment?

Question 5. Must the income from investment of cemetery endowment funds be deposited in the village treasury, to be expended pursuant to appropriation by council?

Question 6. Who is the proper person or persons to execute a deed for a lot in a village cemetery?

Question 7. May a notary, or other fee, for services, be collected by any village official for executing deeds for cemetery lots?"

Your inquiries all have reference to certain powers and duties of cemetery trustees of a village as distinguished from such powers and duties of directors of public service of cities. Section 4178, General Code, however, provides as indicated in your letter that a village board of cemetery trustees shall have the powers and perform the duties with relation to municipal cemeteries prescribed for the director of public service, and references are accordingly made herein to Sections 4160 to 4173, General Code, inclusive, relating to city cemeteries.

As to your first question, Section 5625-9, General Code, as amended by the 88th General Assembly, provides in part as follows:

"Each subdivision shall establish the following funds:

* * * * *

(f) A special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose.

* * * * *

(h) A trust fund for any amount received by a subdivision in trust for any lawful purpose."

Section 5625-10, General Code, as amended by the 88th General Assembly, provides, inter alia, that:

"All revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose."

It becomes necessary in view of the provisions of these sections to determine whether or not money received by a municipality from the sale of lots of a municipally owned cemetery is required by the law to be used for a particular purpose.

Sections 4165, 4166 and 4167, General Code, provide as follows:

Sec. 4165. "The director shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein."

Sec. 4166. "No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the

grounds, and provision shall be made for the interment in such cemetery of persons buried at the expense of the corporation."

Sec. 4167. "The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. He may receive donations by bequest, devise, or deed of gift, or otherwise, or money, or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment, or care of the cemetery grounds generally, or for any particular part or parts, lot or lots therein, as the donor directs, or as the director may from time to time determine if no direction is given. He shall sell lots, receive payment therefor, direct the improvements, and make the expenditures, under such rules and orders as he prescribes, and invest, manage, and control property received by donations and surplus funds in his hands from any source whatever."

It is evident that, although there may be considerable latitude as to how funds received from the sale of cemetery lots may be expended, nevertheless it is clearly contemplated that such expenditures shall be for the general maintenance and embellishment of the cemetery grounds. It has been held by this office that funds received by a cemetery for the purpose of keeping in order and embellishing a city cemetery and for the purpose of caring for lots in said cemetery are received for a specific purpose. Opinions of the Attorney General, 1918, Vol. I, p 219.

I have little difficulty in concluding that moneys received from the sale of cemetery lots are required to be used for a particular purpose. It follows that in the event a municipality owns a cemetery and sells lots in such cemetery, moneys received from such sales must, under the provisions of Section 5625-10, General Code, as amended by the 88th General Assembly, be deposited in a special fund established by the municipality. Such moneys should, accordingly, be deposited in the village treasury.

Regarding the matter of the expenditure of such moneys without an appropriation by council, it is expressly provided in Section 5625-33, General Code, that no subdivision or taxing unit shall "make any expenditure of money unless it has been appropriated as provided in this act," the reference, of course, being to the Budget Law. Prior to the enactment of Sections 5625-1 to 5625-39, inclusive, General Code, by the 87th General Assembly, this office held in an opinion appearing in Opinions of the Attorney General for 1914, Vol. II, p. 1515, as disclosed by the syllabus:

"The director of public service of a city, under favor of Sections 4167, 4171 and 4172, General Code, has power to sell cemetery lots, receive the money therefor and expend the same for authorized purposes without an appropriation of the same being first made by the city council."

There is no question but that a consideration of Sections 4160, et seq., standing alone, which have not been amended since the rendition of this opinion, would lead to such a conclusion. However, the Budget Law being a later enactment, which places a specific limitation upon the expenditure of money of subdivisions, would govern. Upon this point, attention is directed to the language in 36 Cyc., 1077, where it is said:

"When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. Where, how-

ever, a later act covers the whole subject of earlier acts and embraces new provisions, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter even if the former acts are not in all respects repugnant to the new act."

Your second question must, accordingly, be answered in the negative.

You next inquire as to the disposition of moneys received from lot owners for the care of lots. Section 4167, *supra*, has reference not only to funds received from the sale of lots, but also moneys received by way of donations, bequests, devise and deed of gift or otherwise, to be used for improvements or care of the cemetery grounds generally, or for any particular part thereof or for any lot or lots therein as the donor directs. My views with reference to funds received from the sale of lots, as hereinabove set forth, are equally applicable to moneys received from lot owners for the care of lots, and I am, therefore, of the opinion that the provisions of Section 4167, General Code, with relation to the director of public service, or in the case of villages the cemetery trustees, making the expenditures under such rules and orders as the director of public service or cemetery trustees may prescribe, are repealed insofar as inconsistent with the Budget Law, and, accordingly, moneys received from lot owners for the care of lots must be deposited in the village treasury in a separate fund to be paid out on warrant of the village clerk pursuant to an appropriation made by council.

Coming to your fourth question, when village cemetery trustees have been specifically made trustees of funds by bequest or otherwise, such endowment funds should ordinarily be deposited in a special fund created to carry out the purpose of the trust in accordance with the provisions of Section 5625-9, General Code, which section provides that each subdivision shall establish a trust fund for any amount received by a subdivision in trust for any lawful purpose. Section 4169, General Code, provides as follows:

"The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed by its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property."

In the event the will or trust agreement were to negative the provisions of Section 4169, *supra*, such funds should be held in accordance with the terms of such will or trust agreement by the trustees and not turned over to council. You do not, however, present such a statement of facts and in their absence I assume for the purposes of this opinion that they do not exist. I am of the opinion, there-

fore, that upon the facts presented your fourth question should be answered in the negative.

As to the income from the investment of cemetery endowment funds, the principal having been deposited in a trust fund under Section 5625-9, created for the express purpose of the trust, viz. the care of lots by the income from the fund, it necessarily follows that such income may only be used for the care of such lots for which the fund was established. Section 5625-10, General Code, provides that "Money paid into any fund shall be used only for the purposes for which such fund is established." This income should be appropriated by council as provided in Section 5625-30, General Code, "only for the purposes for which such fund is established."

In the event a lot in a village cemetery is sold, I am of the view that the deed should be executed by the mayor and the auditor or clerk. It is expressly provided in Section 4160 that the title to municipal cemeteries is vested in the municipality. The statutes in Ohio do not prescribe the form of conveyance by a city. *City of Tiffin vs. Shawhan*, 43 O. S., 178. As stated by Judge Dillon in his work on Municipal Corporations, "Conveyances of real estate should in general be executed in the corporate name and under the corporate seal."

Coming next to the matter of acknowledgment, Section 8510, General Code, requires that all deeds be acknowledged. There are no exceptions contained in this section and it has been held in the case of *Rhodes vs. Sims*, 1 O. 281, that a sheriff's deed must be acknowledged. It would, accordingly, follow that a deed for a lot in a village cemetery is subject to the same requirement as to acknowledgment as any other deed. It is, of course, customary that any cost in connection with the preparation or execution of a deed be borne by the grantor. If, therefore, a deed for a cemetery lot executed by the mayor on behalf of the village were verified before a notary public, the notary's fee should be paid by the village. If the acknowledgment should be taken before a village official, whose duty it is to take acknowledgments for the village, such official would probably not be authorized to collect a fee therefor. In any event, however, the matter would be of no concern to the purchaser of the lot.

Summarizing and in specific answer to your questions, I am of the the opinion that:

1. Moneys received by a board of cemetery trustees of a village from the sale of lots in a cemetery belonging to such village must be deposited in the village treasury to the credit of a special cemetery fund.

2. Such moneys may not be expended by a board of cemetery trustees without an appropriation by council.

3. Moneys received from lot owners for the care of lots should be deposited in the village treasury to be paid out on warrant of the village clerk pursuant to appropriation made by council.

4. When, through wills of persons deceased and other trust agreements, village cemetery trustees have been specifically made trustees of funds, the income for which is to be used for the care of lots, such endowment funds should be turned over to the village council for investment.

5. The income from investment of cemetery endowment funds should be deposited in the village treasury to be expended pursuant to appropriation by council.

6. A deed for a lot in a village cemetery should be executed in the name of the village by the mayor and clerk.

7. A notary or other fee for services in connection with the preparation or verification of such deed should be paid by the village, and if such services are

performed by a village official whose duty it is to render such service to the village, no charge should be made therefor.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1168.

APPROVAL, BONDS OF GEAUGA COUNTY—\$15,400.00.

COLUMBUS, OHIO, November 8, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1169.

APPROVAL, BONDS OF GEAUGA COUNTY—\$9,520.00.

COLUMBUS, OHIO, November 8, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1170.

APPROVAL, BONDS OF FAIRVIEW VILLAGE, CUYAHOGA COUNTY—
\$80,000.00.

COLUMBUS, OHIO, November 8, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.