

the expiration of his term of office for excess payment of taxes received during his term of office, discussed and restricted.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2087.

CEMETERY LOT—DEED THERETO EXECUTED BY TOWNSHIP TRUSTEES RECORDED WITH TOWNSHIP CLERK.

SYLLABUS:

1. *A deed executed by township trustees for a cemetery lot, pursuant to section 3448, General Code, is not an absolute conveyance of land which requires presentation to and endorsement by the county auditor under section 2768, General Code.*

2. *Such a deed is not required by law to be filed with and recorded by a county recorder, the recordation thereof being controlled by section 3447, General Code, which provides that the township clerk shall record such deed in a book kept by him for that purpose.*

COLUMBUS, OHIO, December 30, 1933.

HON. JAMES M. HOURSARE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“I am hereby presenting to you a statement of a certain condition brought about by the deed for a cemetery lot having been marked ‘Transfer not Necessary’, by the auditor.

3448 G. C. Sale of lots and deeds therefor. * * * Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute, and which shall be recorded by the township clerk in a book for that purpose, the expense of recording to be paid by the person receiving the deed. * * *

As no plat or title is shown for this or other cemetery lots in the auditor’s records, and such property being exempt as to taxes, does the auditor have authority to indicate by any statement on such deed that it had passed through his hands?”

Section 2768, General Code, provides in part as follows:

“The county recorder shall not record any deed of absolute conveyance of land * * * until it has been presented to the county auditor and by him endorsed ‘transferred,’ or ‘transfer not necessary.’”

Your question requires a determination as to the character and effect of a deed executed by township trustees for a cemetery lot, and also as to the powers and duties imposed upon the county auditor and county recorder with respect to such a deed.

In this connection, reference must be had to section 2757, General Code, which provides that the county recorder shall keep four sets of records, specify-

ing one as "a record of deeds, in which shall be recorded all deeds * * * for the absolute and unconditional sale of lands * * *."

Section 2759, General Code, provides that the "recorder shall record in the *proper* record * * * all deeds * * * or other instruments of writing *required by law* to be recorded, presented to him for that purpose." (Italics the writer's.)

At this point it might be well to examine the provisions of law relating to cemeteries under the supervision of township trustees:

The first section to which attention should be called is section 3441 of the General Code which provides:

"Township trustees may accept a conveyance of or purchase, and inclose, improve, and protect such lands * * * as they may deem necessary and proper for cemetery purposes. * * *"

By section 3444 of the General Code the trustees are given power to levy a tax in such sum "as may be necessary for the needful care, supervision, repair, and improvement of such cemeteries."

Section 3447 provides:

"The trustees shall have such cemeteries laid out in lots, avenues and paths, number the lots and have a suitable plat thereof made, which shall be carefully kept by the township clerk. They shall make and enforce all needful rules and regulations for its division into lots, and the allotment thereof to families or individuals, and for the care, supervision and improvement thereof * * *."

The pertinent part of section 3448, General Code, reads as follows:

"Upon application the township trustees shall sell at a reasonable price such number of lots as the public wants demand for *burial purposes*. Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute, and *which shall be recorded by the township clerk in a book for that purpose * * **" (Italics the writer's.)

Section 3450, General Code, says:

"No lot held by any individual in a cemetery, in any case shall be levied on or sold on execution."

In the case of *Smiley vs. Bartlett*, 6 C. C. 234, the following proposition of law is laid down in the third syllabus:

"The right of burial in a public or church cemetery though conveyed by grant is nevertheless an easment only."

In the case of *Fraser vs. Lee*, 8 O. App. 235, the court held:

"1. The disposal of the dead, from motives of sanitation and health, is a state function. The state, by legislative enactment, has given exclusive and complete control thereof to municipalities within the territorial limits of each.

2. A document, in order to effectually pass title to a burial lot, need not take the form of a real estate deed."

On page 238 of the opinion the court say:

"When this lot was sold to Potter in 1871 the usual deed was executed to him and recorded in the records of the cemetery. Whether

that deed was in form absolute on its face, or otherwise, Potter acquired no greater right than that of burial, ornamentation and erection of monuments."

On page 239 we find the following:

"It is clear from a careful reading of this chapter that the deed authorized to be given to a purchaser of a burial lot conveys only the right of burial therein, and constitutes only an easement of burial."

Further, on page 241, the court say:

"From nowhere in the statutes can the claim be deduced that any idea of barter and sale was contemplated in the legislation relating to cemeteries and the proper disposal of the dead."

While it is true that the above case of *Fraser vs. Lee* mentions municipal cemeteries, the principles involved are applicable to cemeteries under the supervision of the township trustees, and the requirements for the delivery of a deed to the purchaser are practically the same.

From an analysis of the sections of the General Code above cited and the cases above mentioned it seems clear that a deed executed by township trustees for a cemetery lot is not such an absolute conveyance which requires presentment to and endorsement by a county auditor under section 2768, General Code. It also seems clear that such a deed is not required by law to be filed with and recorded by a county recorder, but that the recordation thereof is controlled by section 3447 of the General Code which provides that the township clerk shall record such deed in a book kept by him for that purpose.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2088.

SANITARY DISTRICT—FUNDS THEREOF DEPOSITED IN BANK CONSTITUTE PREFERRED CLAIM UPON LIQUIDATION OF BANK WHEN.

SYLLABUS:

1. *When a sanitary district organized under the sanitary district act of Ohio (Sections 6602-34 to 6602-106, General Code) deposits funds coming into its possession in a bank in any other manner than that provided in Section 6602-79, General Code, such funds so on deposit, constitute a preferred claim in the event of a liquidation of the bank by reason of insolvency providing the bank had knowledge of the nature of, and ownership of the funds so deposited.*

2. *When the president or other executive officer of a bank is also an executive officer of a depositing corporation such bank should be held to have knowledge of the ownership of the funds on deposit.*

3. *When a sanitary district has illegally deposited its funds in a bank which has knowledge of the illegality of the deposit, and the bank has delivered to the sanitary district securities to insure the return of the funds on deposit such contract by reason of its ultra vires nature, is void, and neither party thereto can obtain any rights thereunder.*

4. *When a taxing subdivision is the owner of a preferred claim against a bank*