

unless it be expressly so enacted. *State of Ohio ex rel. vs. Board of Public Works*, 36 O. S., 409. More immediately touching the question at hand, the Supreme Court of this state, in the case of *Emmitt vs. Lee*, 50 O. S., 662 said:

"There is no statute requiring state officers to acknowledge deeds and other like instruments by them executed in the performance of their official duties and no good reason could be given why a state officer should go before a justice of the peace or notary public and make an acknowledgment to the effect that he has performed his official duties voluntarily."

Giving effect to the rule above stated, I am inclined to the view that the lease here in question is not one which is required to be acknowledged.

On examination of the terms and provisions of the lease and of the conditions and restrictions therein contained, I find the same to be in conformity with the statutory provisions under the authority of which the lease is executed, and in conformity with other statutory provisions relating to the lease of canal lands owned by the state.

This lease is accordingly hereby approved by me as to legality and form and same, together with the duplicate and triplicate copies thereof is herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4669.

TOWNSHIP TRUSTEES—MAY ACQUIRE LAND FOR CEMETERY PURPOSES WITHIN 200 YARDS OF DWELLING WITH OWNER'S CONSENT—BINDING ON SUBSEQUENT PURCHASER.

SYLLABUS:

Township trustees, by virtue of sections 3441 and 3442, General Code, may acquire by purchase grounds for cemetery purposes within two hundred yards of a dwelling from the owner of such dwelling and with the owner's consent to the use of such grounds for such purposes, and any heir of such owner or subsequent purchaser of the dwelling would take title subject to such consent, which consent would be a defense in proceedings to compel the township trustees to cease the use of such plot for cemetery purposes or remove graves placed therein.

COLUMBUS, OHIO, October 5, 1932.

HON. JOSEPH J. LABADIE, *Prosecuting Attorney, Ottawa, Ohio.*

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

"In behalf of the Trustees of Blanchard Township, Putnam County, Ohio, will you please render me an opinion on construction of Section 3442 of the General Code of Ohio?"

The Trustees of Blanchard Township are badly in need of additional ground for their cemetery which is used as a burial ground for the majority of the deceased of the Village of Ottawa, Ohio. The best

plat of ground adjacent to their present cemetery consists of a plot of gravel which is high and dry. It is immediately across the road from a farm residence. However, the farmer occupying the residence in question owns the ground which they desire to purchase, and is ready and willing to give his written consent to the use of said ground for cemetery purposes.

I have gone into this matter to some extent for these trustees, and have carefully gone over the case of *Henry vs. Trustees*, 48 O. S. 671. The statute 3442 does not provide for consent of the owner of the land on which a dwelling house is situated which is within 200 yards of the proposed cemetery plot nor does 48 O. S. decide that land could be purchased and used for cemetery purposes which was within 200 yards of a dwelling with the owner's consent, because that question was not involved in the case.

Will you please advise me whether or not despite Section 3442 the Township Trustees can purchase ground for cemetery within 200 yards of a dwelling after having obtained the written consent of the owner of the dwelling and whether or not any heir or subsequent purchaser of the dwelling could enjoin the further use of said property as a cemetery.

Section 3678 and Section 10096 do not apply to township cemeteries.

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Section 3442, General Code, to which you refer reads:

"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 3441, General Code, which is pertinent to your inquiry reads as follows:

"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. 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."

It is a well-known rule in Ohio, as stated in the case of *The Baltimore & Ohio Railroad Company vs. Baillie, et al.*, 112 O. S. 567, that:

"The syllabus of a decision of the Supreme Court of Ohio definitely states the law of Ohio with reference to the facts upon which it is predicated, and must be read in view of the facts found in such case."

Turning to the case of *Henry vs. Trustees*, 48 O. S. 671, mentioned in your inquiry, the second branch of the syllabus reads as follows:

"Under section 1464, Revised Statutes (now sections 3441, 3442, G. C., above quoted), which authorizes township trustees to acquire by purchase or appropriation, lands for cemetery purposes, such trustees are prohibited from establishing a cemetery nearer than two hundred yards from a dwelling-house, without the consent of the owner, whether the land is acquired by an appropriation proceeding or by purchase. And when trustees are endeavoring to so establish a cemetery in violation of the section, they may be enjoined in a suit by the owner of a dwelling-house within the limit."

The plain implication contained therein is that if the owner of the dwelling within two hundred yards of a proposed cemetery plot consents to the purchase of such plot for cemetery purposes the purchase may be so made.

In the instant situation it should be noted that the farmer occupying the residence in question owns the ground which the township trustees desire to purchase for cemetery purposes and is ready and willing to give his written consent to the use of said ground for such purposes.

In the case of *Henry vs. Trustees*, above mentioned, the court stated at page 677 that:

"It is not questioned that the owner of a dwelling-house may sell to the trustees land for cemetery purposes within two hundred yards of his house, and thus estop himself from claiming the protection of the law, * *."

It follows therefrom that after such sale and consent the owner of the dwelling house, or those inheriting from him, or those obtaining his interest or title to the land by purchase, would be estopped to deny such consent if subsequent proceedings were instituted to compel the township trustees to cease the use of such plat for cemetery purposes or to remove graves already placed therein.

It might not be amiss to call to your attention section 3455, General Code, which is pertinent to the subject under consideration. Such section reads in part 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 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."

If the cemetery in question was in existence at the time the dwelling house was erected, the provision of the above section as to an addition of ground to a cemetery would apply. However, if the dwelling house was erected before the establishment of the cemetery, then the above discussion of section 3442 would be in point.

In view of the foregoing and in specific answer to your inquiry, I am of the opinion that township trustees, by virtue of sections 3441 and 3442, General Code, may acquire by purchase grounds for cemetery purposes within two hundred yards of a dwelling from the owner of such dwelling and with the owner's consent to the use of such grounds for such purposes, and any heir of such owner or subsequent purchaser of the dwelling would take title subject to such consent, which consent would be a defense in proceedings to compel the township trustees to cease the use of such plot for cemetery purposes or remove graves placed therein.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4670.

EMBALMING—PERSON UNDER AGE OF TWENTY-ONE MAY NOT
TAKE EXAMINATION FOR LICENSE.

SYLLABUS:

A person under the age of twenty-one years may not, under the provisions of Section 1342, General Code, be admitted to take the examination for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state.

COLUMBUS, OHIO, October 5, 1932.

State Board of Embalming Examiners, 6406 Franklin Blvd., Cleveland, Ohio.

GENTLEMEN:—Your recent request for my opinion reads:

"We are preparing to hold our coming examination for licensing embalmers on the 24th, 25th and 26th of October and a matter has come up for our decision which makes it necessary that we secure an opinion from your department concerning Section 1342 of our law, which section reads in part as follows:

'All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation in this state, must be made to the state board of embalming examiners in writing and contain the name, age, residence and the person or persons with whom employed, the name of the school attended together with a certificate from two reputable citizens that the applicant is of *legal age* and of good moral character, * * *.'

We have received requests from would-be applicants for this examination who are not yet of legal age but who will have attained the age of twenty-one years very soon *after* the examination. One young man will be twenty-one just ten days after our test, another twenty days, etc. We desire to know if we can, lawfully, according to Section 1342 of the General Code, permit any applicant to write our examination who is not twenty-one years of age providing we issue no license until he is of the required age. It shall be understood that we would accept no applicant unless the period of time to elapse be only a matter of a very few days."

There is no doubt but that the term "legal age" as used in the above section, has reference to the age of majority fixed by Section 8023, General Code, at twenty-one years.