

one large schoolhouse to serve the entire territory involved as a result of the two districts having become one district.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

2146.

TOWNSHIP CEMETERY—WITHIN MUNICIPALITY—LEGALITY OF EXTENSION TO WITHIN ONE HUNDRED FEET TO DWELLING HOUSE ERECTED TWO HUNDRED YARDS AWAY SINCE SAID CEMETERY WAS ESTABLISHED.

SYLLABUS:

A cemetery within the corporate limits of a municipality which is under the control of a board of township trustees may be extended to within one hundred feet of a dwelling house which was erected within two hundred yards of such cemetery and since the establishment thereof.

COLUMBUS, OHIO, July 23, 1930.

HON. GEORGE C. MCKELVEY, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“We are writing you for an opinion as to the construction of Section 3455 of the General Code of Ohio which is as follows:

‘Addition to cemetery grounds. 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 cannot 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.

Tax levy for payment. For such purpose, they may levy a tax not to exceed one-half of one mill, on the taxable property of the township, for a period not exceeding five years, which shall be collected as other taxes, and appropriated for the purchase or appropriation of such additional cemetery grounds which shall become part of such township cemetery, and be governed in all respects as provided by law.’

The trustees of Union Township, in our county, have asked us for an opinion as to whether or not they would be permitted to purchase additional land increasing the area of an old cemetery which is located within the corporation limits of the village of Morristown, Ohio, and said cemetery being under the control and supervision of the trustees of said township.

The trustees can secure this property by purchase and it will not be necessary for them to secure same by appropriation proceedings but the additional area will be within about one hundred feet of buildings of abutting property owners. These houses were erected since the establishment of the

original cemetery of which this new addition is to be a part and said buildings were built before July 9, 1923. In the section that we have hereto referred to it appears that the township trustees would not be permitted to establish such additional part to such cemetery within less than two hundred yards of such dwelling house.

The case entitled *Shipley, et al., Trustees, vs. White*, as found in the Ohio Law Bulletin and Reporter, page 194, it seems very clear that if this cemetery was located outside of a municipality and the dwelling houses were built before July 9, 1923, then the trustees could not make such additional area within the two hundred yards of said newly added grounds to such territory but this case differs from the one that was just cited inasmuch as it appears that the location of that cemetery was outside of the municipality and the one over which the trustees of Union Township have control is located within the corporation limits of the village of Morristown. Sec. 3678, of which the following is a part, we wish to refer to:

'Provided, however, that for the purpose of making a necessary enlargement of an existing cemetery, any municipal corporation which shall own, or shall acquire by purchase, any lands suitable for such enlargement may devote and use the same for cemetery purposes as such enlargement of such existing cemetery, if the said land shall be distant from any dwelling house not less than one hundred feet or the width of any existing street or alley intervening. The addition of any land across a street or public road, as now located or which shall be hereafter established, shall not be considered an enlargement of an existing cemetery under the provisions of this section.'

Also Sec. 10096 which applies to cemetery associations and which part we wish to particularly refer to, which is as follows:

'Where the cemetery lies within or adjoins a municipal corporation the association or corporation owning such cemetery, without such consent, may appropriate property within one hundred feet, or the width of a street, or alley of any dwelling house.'

The question is, would these limitations upon acquiring additional territory for a cemetery also apply to Sec. 3455? It appearing that these laws were passed to protect public health, we cannot see but what they could be made to apply also to Sec. 3455 when they are made to apply to Sections 3678 and 10096. Of course it is understood that the trustees will not be able to get the consent of the property owners, which abut upon this additional territory to this cemetery, in writing.

We would appreciate it if you would give us an opinion."

Section 3442, General Code, referred to in Section 3455, which you quote, provides as follows:

"No such appropriation shall be made until the court is satisfied that such lands cannot 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."

The proviso contained in Section 3455, General Code, to the effect that a dwelling house erected within two hundred yards of an established cemetery shall not be considered as within the restrictions of Section 3442, was enacted in 1923. You state that the dwelling house in question was erected prior to such date, and will be about one hundred feet from the cemetery as extended. The case of *Shipley, et al. vs. White*,

which you mention, decided by the Court of Appeals of the Fifth District, April 4, 1929, and reported in the Ohio Law Abstract of May 11, 1929, held that this proviso of Section 3455, General Code, had no effect upon dwelling houses which were constructed within two hundred yards of an established cemetery prior to its enactment, when the trustees had been perpetually enjoined from extending a cemetery to within less than two hundred yards of the dwelling house on June 7, 1922. This injunction was issued by the Common Pleas Court of Knox County before the enactment of the proviso of Section 3455 here under consideration. The Court of Appeals held that by the enactment of this proviso in the year 1923 the legislature could not take away rights which had been vested by a judgment. The first part of the opinion of the court is clear upon this point:

"We believe that it is not within the power of a legislature to take away rights which have once been vested by a judgment.

Legislation may act on subsequent proceedings, may abate actions pending but when this action has passed into judgment the power of the legislature to disturb the rights created thereby ceases.

In the *64th Ohio State 39*, and the *101st Ohio State 235*, it is held that a statute which imposes a new or additional burden, duty, obligation or liability, as to past transactions, is retroactive and in conflict with that part of Section 28, Article Two of the constitution, which provides, that 'The General Assembly shall have no power to pass retroactive laws.'

'It is a well settled principle that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying or impairing a final judgment previously rendered by a court of competent jurisdiction.'

In the instant case 'the prohibition against locating a cemetery within two hundred yards of a dwelling, Section 1453, Revised Statute, confers on the owner of the dwelling a vested right in the nature of an appurtenance which cannot be taken away by repeal after he has begun an injunction suit.' *4 Ohio C. D. 422. 54 O. S. 682, 101 O. S. 387.*

It is true that some of the language of the court of appeals in the latter part of the opinion might be construed as authority for a holding to the effect that if the dwelling house were erected prior to the amendment of Section 3455, the rights of the owner of such dwelling house would not be affected by the amendment even though no injunction suit had been instituted prior to 1923. I do not think, however, that this case is authority for such a holding in view of the case of *Morlock vs. Horstman, et al.*, 10 O. C. C. (N. S.) 599, the first branch of the syllabus of which is as follows:

"The change in Section 3573, whereby the distance from a dwelling at which a cemetery may be located was made not less than one hundred yards instead of not less than two hundred yards, cannot be construed as an infringement on the vested rights of a property owner who purchased and made his improvements prior to such change, especially where the land which it is proposed to devote to such use adjoins an established cemetery in a rapidly growing town."

This case was affirmed by the Supreme Court, 60 O. S. 629.

In your letter you make no mention of injunction proceedings having been instituted prior to 1923 to enjoin the trustees from extending the cemetery in question up to one hundred feet of the dwelling house, and I therefore assume that no such action has been taken.

In view of the foregoing, I am inclined to the view that since the dwelling house to which you refer was erected since the establishment of the cemetery in question, the cemetery may be extended up to within one hundred feet of such house, notwithstanding the fact that such house was erected prior to 1923.

It is observed that one hundred feet is the limitation applicable to the extension of a municipal cemetery as set forth in Section 3678, which you quote. Perhaps the views which I have herein expressed would not be applicable in case the proposed extension were to bring the township cemetery within the municipality up to within less than one hundred feet of the dwelling house under consideration. Since you state that the extension is to bring the cemetery to a distance of one hundred feet from the dwelling house, I do not deem it necessary to go into the situation which would prevail if the distance were less than one hundred feet, the distance provided in the case of an extension of a municipal cemetery under Section 3678.

While you have not expressly so stated, I have assumed that the dwelling in question was erected not only since the establishment of the cemetery but within two hundred yards thereof. Of course, if such dwelling had been erected more than two hundred yards from the original cemetery, the provision contained in Section 3455 would probably not apply and the limitations of Section 3442 would prevail.

In view of the foregoing and in specific answer to your inquiry, it is my opinion that a cemetery within the corporate limits of a municipality which is under the control of a board of township trustees may be extended to within one hundred feet of a dwelling house which was erected within two hundred yards of such cemetery and since the establishment thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2147.

CERTIFIED CHECK—CERTAIN INDORSEMENT ON FACE OF CHECK
HELD TO AMOUNT TO CERTIFICATION.

SYLLABUS.

Sufficiency of certification of check under Ohio law discussed.

COLUMBUS, OHIO, July 23, 1930.

HON. MARCUS C. DOWNING, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads:

“Under the law, bidders on public work are required to file a certified check with each bid. Please advise if the following indorsement on the face of a personal check, made payable to the proper party, is a certified check, under the law.

‘Good when properly indorsed for One Thousand Dollars (\$1,000.00).
The A. Banking Company, By John Jones, Cashier.’

It is my opinion that such an indorsement on a personal check is sufficient to comply with the requirements of the statute. The moment the indorsement is stamped upon the check and signed by the proper officer, the amount specified is set aside, from which this check is paid at the time it is pre-