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1. CEMETERIES—TITLE TO, RIGHT OF POSSESSION AND CONTROL OF ALL PUBLIC CEMETERIES — LOCATED OUTSIDE ANY MUNICIPAL CORPORATION—VESTED IN BOARD OF TOWNSHIP TRUSTEES—WHERE CEMETERY LOCATED—NO INSTRUMENT OF CONVEYANCE REQUIRED—TITLE AUTOMATICALLY VESTS BY STATUTE — SECTION 517.10 RC — EXCEPTION — CEMETERIES OWNED OR UNDER CARE OF RELIGIOUS OR BENEVOLENT SOCIETY, INCORPORATED COMPANY OR ASSOCIATION OR CONTROLLED BY ANY MUNICIPAL CORPORATION.
2. WHERE TITLE TO PUBLIC CEMETERY IS VESTED IN BOARD OF TOWNSHIP TRUSTEES—DUTY TO CARE FOR AND MAINTAIN CEMETERY VESTS IN BOARD OF TOWNSHIP TRUSTEES—SECTION 517.11 RC.

## SYLLABUS:

1. Under the provisions of Section 517.10, Revised Code, the title to, right of possession and control of all public cemeteries located outside any municipal corporation, except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any municipal corporation, is vested in the board of township trustees of the township where such cemetery is located; and no instrument of conveyance is required to vest such title, title being automatically vested by virtue of such statute.

2. Where title to a public cemetery is vested in a board of township trustees as provided in Section 517.10, Revised Code, the duty of caring for and maintaining such cemetery is placed in the board of township trustees as provided in Section 517.11, Revised Code.

Columbus, Ohio, July 30, 1954

Hon. Mary (Nicholson) Snyder, Prosecuting Attorney  
Jackson County, Jackson, Ohio

Dear Mrs. Snyder:

In your letter of June 25, 1954 you asked two questions which may be paraphrased as follows:

1. Must the township trustees of Jackson Township take over a public cemetery in Jackson Township, such trustees possessing neither a deed to such cemetery, nor any other record of its being under their jurisdiction?
2. If question one is answered in the affirmative, must the trustees of Jackson Township care for such cemetery?

Turning to the first question, Section 517.10, Revised Code, formerly Section 3451, General Code, provides:

*"The title to, right of possession, and control of all public cemeteries located outside any municipal corporation, which have been set apart and dedicated as public cemeteries, and any grounds which have been used as such by the public, but not expressly dedicated as a cemetery, except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any municipal corporation, shall, severally be vested in the board of township trustees."* (Emphasis added.)

The word "shall," used in Section 517.10, is usually considered mandatory and has been so construed in earlier opinions by this office dealing with the subject of title to public cemeteries. In Opinion No. 1960, Opinions of the Attorney General for 1930, page 898, the above-quoted section, which was then Section 3451, General Code, was under consideration. The question there raised was quite similar to the first question which you pose. The ownership of a public cemetery was unknown. The records in the county recorder's office had been checked, but no deed could be found showing any transfer to a cemetery association or church. The specific question asked was: Whether or not the title to this cemetery would automatically vest in the township trustees. The answer, as disclosed by the syllabus, was as follows:

"The title to a public burial ground located without the corporate limits of any city or village not owned or under the care

of a religious or benevolent society or an incorporated company or association, or under the control of the authorities of any city or village, which has been used by the public as a burial ground, is vested in the trustees of the township where located.”

Further in Opinion No. 2779, Opinions of the Attorney General for 1938, page 1492, it is said, at page 1493:

“Section 3451, General Code, provides for the vesting of title to certain burial grounds in township trustees by operation of law.”

Since no material change has been made in the statute since the opinions above referred to were rendered, it is my opinion that they are dispositive of your first inquiry.

It should be pointed out before proceeding to your second question that Section 517.10 has application only when:

- a) the cemetery is outside the municipal corporation.
- b) the cemetery is not owned or under the care of a religious or benevolent society, or an incorporated company or association or under the control of the authorities of any municipal corporation.

Your letter is not altogether clear as to whether either or both of these facts is extant in your particular situation. Assuming that you would have made some reference to them if they did exist, my conclusion that title to the cemetery does vest in the trustees assumes that the cemetery is *not* within a municipal corporation and is *not* owned or under the control of any of the organizations mentioned in the statute.

Since I have already concluded that title to the cemetery vests by operation of law in the trustees, Section 517.11, Revised Code, becomes applicable to your second inquiry. Section 517.11 states:

“The board of township trustees shall provide for the protection and preservation of cemeteries under its jurisdiction, and shall prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds. Where such old cemeteries are in or near village plats, and the public health is liable to be injured by further interments therein, the board shall institute suits to recover possession thereof, remove trespassers therefrom, and may recover damages for injuries thereto or any part thereof, or to any fence or hedge enclosing them or to any tomb or monument therein.

*“The board shall enclose such cemeteries with a substantial fence or hedge, and shall keep it in good repair. The board shall levy a tax for such purpose, not to exceed one half mill in any one year, upon all the taxable property of the township.”*

(Emphasis added.)

Prior to the 1953 recodification, the provisions of Section 517.11 were contained in Sections 3452 and 3453, General Code. These sections read as follows:

Section 3452: “Such trustees shall provide for the protection and preservation of such grounds and prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds. Where such old graveyards or cemeteries are in or near village or town plats, and the public health is liable to be injured by further interments therein, they shall institute suits to recover possession thereof, remove trespassers therefrom, and may recover damages for injuries thereto or any part thereof, or to any fence, hedge inclosing them, any tomb or monument therein.”

Section 3453: *“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.”*  
(Emphasis added.)

You will note that in recodification, Section 3452 and Section 3453 were combined to form Section 517.11, Revised Code. As you will also observe, certain changes in wording were effected in recodification. One of these changes occurred in the phrase which I have emphasized in both Section 517.11, Revised Code, and in Section 3453, General Code, above. This change has direct bearing on your second inquiry and hence must be explained. Section 3453 was construed in prior Opinions of the Attorney General as charging the township trustees to keep the “*burying grounds*” in “good repair.” This conclusion apparently was reached because Section 3453 employed the word “them” in describing what the trustees were required to keep in repair. The antecedent of the word “them,” as used in Section 3453, was “burying grounds” since “burying grounds” was in the plural. The only other duty imposed on the trustees by Section 3453 was to provide a substantial fence *or* hedge. Clearly the trustees could elect to erect whichever type of inclosure they chose. They were not required to provide for both. Thus, when the statute required the trustees to keep “them” in “good repair” it could not have had reference to “fence *or* hedge”

since this phrase was in the singular. Thus, the prior Opinions of the Attorney General to which I have alluded and to which I shall refer to in greater detail later held that the trustees were under a duty to care for and maintain the cemeteries under their jurisdiction.

When Section 3453 was made a part of Section 517.11, the word "them" was changed to "it." (Also, "burying grounds" was changed to "cemeteries," but the phrase remains in the plural.) Therefore, under the same reasoning outlined above, the section now appears to require the trustees to keep the "fence or hedge" in "good repair" and seems to impose no such duty with regard to the cemetery itself.

In such a situation, it is necessary to turn to Section 1.24, Revised Code, which provides:

"That in enacting this act it is the intent of the General Assembly not to change the law as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not as new enactments."

In view of this provision, it is necessary to view the first sentence of the second paragraph of Section 517.11 as if the word "them" continued to appear therein. Thus, the earlier opinions by this office on this subject are relevant and will now be considered.

In Opinion No. 2667, Opinions of the Attorney General for 1928, page 1929, the question was whether or not certain township trustees were vested with title to a cemetery previously owned by a religious society which had dissolved and became extinct. The then Attorney General, in concluding that title did vest in the trustees, made the following statement at page 1930:

"These sections of the General Code (referring to Section 3451 and Section 3453), which were enacted as part of the same act (75 O. L. 581) evince a clear legislative intention that any tract or parcel of land in a township dedicated as public burial grounds, or used by the public as such, should be cared for by some responsible authority; and to this end it is provided that if such burial grounds are not owned and cared for by some religious society or by some city or village, such grounds shall vest in the township trustees, who are required to keep the same in repair out of the funds of the township."

Moreover, in Opinion No. 2779, Opinions of the Attorney General for 1938, page 1492, it is said, at pages 1494-5:

“ \* \* \* the legislature intended to fully provide for careful and continued maintenance of burial grounds under the control of township trustees, and in order that such a purpose should be accomplished a *positive duty* has been imposed on township trustees to effectuate the legislative intent.” (Emphasis added.)

Thus, it is clear that the township trustees are required to care for the cemetery once title is vested in such trustees by Section 517.10.

It should be added that it is not necessary to rely exclusively on the interpretation which has been placed upon the first sentence of the second paragraph of Section 517.11 to sustain my conclusion that the trustees are required to care for the cemetery. Such a duty may also be derived from the first sentence of the first paragraph of Section 517.11 which reads in part as follows:

“The board of township trustees *shall provide for the protection and preservation* of cemeteries under its jurisdiction \* \* \*” (Emphasis added.)

Here too, as indicated by the emphasized clause, the legislature has evidenced its desire that the trustees take over *and* maintain certain public cemeteries. Therefore, in specific answer to your inquiries, it is my opinion that:

1. Under the provisions of Section 517.10, Revised Code, the title to, right of possession and control of all public cemeteries located outside any municipal corporation, except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any municipal corporation, is vested in the board of township trustees of the township where such cemetery is located; and no instrument of conveyance is required to vest such title, title being automatically vested by virtue of such statute.

2. Where title to a public cemetery is vested in a board of township trustees as provided in Section 517.10, Revised Code, the duty of caring for and maintaining such cemetery is placed in the board of township trustees as provided in Section 517.11, Revised Code.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General