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SYLLABUS:

1. A cemetery association organized under the laws of Ohio, has authority to convey title to its cemetery lands to a municipal corporation, for cemetery purposes subject to the rights of those who have acquired burial rights therein.
2. A municipal corporation has the authority to accept a conveyance by way of sale or gift from a cemetery association of cemetery lands, and to assume responsibility for the care and maintenance of the same.
3. If cemetery lands have been conveyed by a cemetery association to a township, said township and a conveniently located village may pursuant to Sections 4183 to 4201, General Code, join in the operation of such cemetery property.
4. When the trustees of a cemetery association have accepted endowments and bequests in trust the income from which is to be used for the maintenance of its grounds, such association, in case it conveys such grounds to a village or township or both, may with the approval of a court of equity, transfer such trust funds to such grantee or grantees, to be by them administered in accordance with the terms under which such trust was created.

Columbus, Ohio, October 15, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

This will acknowledge your request for my opinion, which reads as follows :

“We have a request from Mr. B. attorney for the Village of B., Ohio, for information concerning the authority for a municipality to acquire cemetery property (lots and lands) which have been under the custody and control of a cemetery association for approximately 100 years, and to assume responsibility for their care and maintenance.

“After considerable research and study we are unable to find any statutory authority for the transfer of cemetery lands and property from a cemetery association to a municipal corporation when all lots have been sold and revenues therefrom have declined to the point where it is difficult to operate and maintain such cemetery. The only Attorney General opinions or rulings on said question which we are familiar with, are as follows :

Attorney General Opinion No. 13, of the year 1937 ;

Attorney General Opinion No. 2446 of the year 1928.

“Neither of these opinions is in point with the question submitted by Mr. B. We are enclosing a copy of Mr. B.'s letter for your information, and respectfully request that you give consideration to the following questions and furnish us with your formal opinion in answer thereto :

“1. Is it lawful for a cemetery association to convey title to cemetery property consisting of lands divided into lots and sold for burial purposes?

“2. Is it lawful for a municipal corporation to accept title to such cemetery lands after the lots have been sold, and to assume responsibility for the care and maintenance of such cemetery?

“3. If said cemetery lands were accepted and taken over by the trustees of the township in which such cemetery is located,

would it be legal for the village to join with the township in the operation of said cemetery under the provisions of Sections 4183 to 4201 of the General Code as a union cemetery?

“4. When the trustees of a cemetery association have accepted endowments and bequests, the principal amount of which is to be held in trust and the income only used for the care and maintenance of certain lots in the cemetery, or for general maintenance of the cemetery, how shall such endowments be disposed of upon transfer of the cemetery to a public taxing subdivision, either township or village?”

It is said in Volume 10, p. 487, of American Jurisprudence:

“Wherever there exists a status of organized society, it has been found necessary to provide for the establishment and maintenance of a burial place for the dead. Burial grounds are of concern from the standpoint of the public health, and if such places are not prepared by private enterprise, it then becomes the duty of the state to meet the necessity.”

Accordingly, Ohio has provided by law, running back into her early history, not only for regulating cemeteries established by private persons and associations, but also for cemeteries to be maintained by cities, villages and townships. Also, laws were passed authorizing the incorporation of cemetery associations and outlining their powers. Most of these laws have remained on the statute books to the present day, without change.

In 1869 there was enacted a law providing for the organization and government of municipal corporations, 66 O. L., 149. Chapter 26 of this act related to cemeteries. In addition to cemeteries to be maintained by cities and villages, provision was made for “union cemeteries” to be maintained by a municipality and a township jointly. Those statutory provisions, with some additions but few changes are embodied in the present municipal code as Sections 4154 to 4205, inclusive, of the General Code.

Prior to the above enactments laws had been enacted authorizing townships to provide burial places. 65 O. L., 68 and 203; 66 O. L., 37. These statutes now appear, with some early changes and additions, as Sections 3441 to 3475, General Code.

As early as 1848 there are to be found fragmentary provisions in the statutes relating to incorporated cemetery associations. Without

attempting to trace their history, we find Chapter 7 of Division 6, Title IX, of the General Code devoted to cemetery associations. The subject of the entire Title is "private corporations," and of Division 6, "corporations not for profit." Chapter 7 comprises Sections 10093 to 10119-1, inclusive, of the General Code. Reference will be made to the outstanding provisions of the statutes directly relating to cemetery associations, although some of the sections relating to municipal and township cemeteries are also pertinent. I shall take up your questions in their order.

1. *As to the power of a cemetery association to convey its property to a municipality.* I believe it to be a fundamental proposition in the law of corporations that a corporation has inherent power to acquire property necessary for its purpose, and to convey the same at will. This, of course, subject to limitations or restrictions imposed by law. It is stated in American Jurisprudence, page 817:

"A corporation has full power to alienate its property both real and personal, *unless restricted by its charter, statute or considerations of public policy.*" (Emphasis added.)

This proposition is supported by an early case decided by our Supreme Court, *Reynolds v. Commissioners*, 5 Ohio, 204, in which it was held:

"Where real estate is vested absolutely in the county commissioners, for public purposes, they may dispose of it in the same manner as individuals could."

While that case related to a public corporation, to wit, a county, yet as I shall show, an incorporated cemetery association is also regarded as a public corporation, and I see no reason why the decision should not apply to it as well as to a county. The language of Judge Lane in the opinion is impressive. He says:

"A corporation is an artificial person, and by the terms of its creation it possesses the same capacity, to purchase or to sell, that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time."

The court further suggests that if the property is impressed with a trust, the purchaser would take it subject to that burden. There is also

the principle of implied powers which enables a corporation to do many things that are not expressly authorized by its charter. As stated in 10 Ohio Jurisprudence, page 818:

“It is not to be inferred, however, that even before the enactment of the General Corporation Act a corporation was restricted to the exercise of powers expressly conferred by its charter. The modern doctrine is to consider corporations as not only having such authority as is specially granted by the act of incorporation, but also such as is necessary for the purpose of carrying into effect the powers expressly granted. In other words, corporations, in addition to the powers expressly granted, have by necessary implication power to do whatever is necessary to carry into effect those granted, and to accomplish the purpose of their creation, unless the particular act is forbidden by the law or charter.”

Citing *Larwell v. Hanover*, 40 O. S. 274, 282, and other cases.

But we are not relegated entirely to the principle of inherent or implied powers for a determination as to the power of a corporation of the character under consideration to make a conveyance of its property. Section 8623-97, General Code, which is part of the General Corporation Act, relating to corporations not for profit, reads as follows:

“A corporation not for profit may be formed hereunder for any purpose or purposes not involving pecuniary gain or profit for which natural persons may lawfully associate themselves, provided that where the General Code makes special provision for the filing of articles of incorporation of designated classes of corporations not for profit, such corporation shall be formed under such provisions and not hereunder.”

I do not find in the statutes relating to cemetery associations, any provisions whatsoever as to the *incorporation* thereof, and so must conclude that in their incorporation, they are governed by the general statutes relating to corporations not for profit. Section 8623-99, General Code, outlines the general powers and authority of such corporations, generally. That section reads as follows:

“Upon filing the articles the incorporators and the other members, if any, designated in the articles, and their successors and assigns, from the date of such filing, be and constitute a body corporate, with perpetual succession and with capacity possessed

by natural persons to perform all acts within or without this state not repugnant to law; and in furtherance, but not in limitation, of the foregoing every such corporation shall have authority:

“1. To sue and be sued, contract and be contracted with;

“2. To adopt, use and at will alter a common seal, but failure to affix a seal shall not affect the validity of any instrument;

“3. To acquire, hold, convey, lease, mortgage or dispose of all property, real or personal, necessary or expedient to accomplish its purposes;

“4. To borrow money and contract debts to accomplish its purposes;

“5. To become an incorporator or member of any other corporation not for profit organized under the laws of this state.”

Accordingly, unless we find in the laws relating specifically to the powers of a cemetery association, some provision which restricts its power to make a conveyance of its property, we are bound to conclude that it may convey at will.

Turning, then, to the statutes directly relating to cemetery associations, I note that by Section 10,093, General Code, such association is given authority to appropriate or otherwise acquire land for the purpose of a cemetery, not exceeding 640 acres; that such land shall be exempt from execution and from being appropriated for any other purpose, and shall be exempt from taxation, “if held exclusively for cemetery burial purposes and no wise with a view to profit.” Its personal property used for cemetery purposes is also exempt from execution and from taxation.

By Section 10,101, General Code, it is authorized to sell burial lots for the sole purpose of interments, subject to its rules. Although the statute speaks of “selling” these burial lots, it is settled that there is conveyed nothing except an easement for burial, and a conveyance of such lots need not take the form of a real estate deed. *Fraser v. Lee*, 8 Oh. App., 235.

By Section 10,102, General Code, such association is authorized to convey by deed in fee simple to a corporation organized not for profit, for the purpose of erecting and maintaining a monument or memorial

to any distinguished deceased person, such portion of its real estate as is not used by the association and has not been disposed of by it for burial purposes. Section 10,115, General Code, authorizes such association to sell its entire property in case it is abandoned for burial, or in case the association is involved in debt which it is unable to pay, such sale to be made upon petition to and authorization by a court of common pleas, but only after arrangements have been made for removal of the dead buried in such cemetery. Section 10,119-1, General Code, authorizes the transfer of the property of such association to another association incorporated for like purpose, such conveyance to be first authorized by a majority vote of the members of such association.

Section 3471, General Code, provides as follows:

“When a public burying ground in a township is not under the control of a municipal corporation and the title or control thereof is vested in an association or trustees thereof, or is vested in a religious society, whether incorporated or not, or the trustees thereof, and such burying ground is used exclusively for cemetery purposes, such association, society, or the trustees thereof may convey such grounds to the trustees of the township and their successors in office. Subject to the rights of the original grantor, his heirs or assigns, the trustees of such township shall accept and take possession of such grounds, and take care of, keep in repair, hold, treat and manage them in all respects as required by law relating to public burying grounds in and belonging to such township.”

It is notable that this section is not found in the laws relating to corporations generally, or in that chapter of the General Code relating to cemetery associations, but is contained in the chapter relative to township cemeteries. It appears to me, therefore, not to have been intended primarily to confer power on the association to sell its ground to the township, but rather to compel the township trustees, in the public interest, to take it over and maintain it.

In Opinion No. 13, Opinions of the Attorney General for 1937, page 17, it was held that this section in requiring the township to accept such conveyance, is mandatory.

It might be argued that the specific grants of power to convey made in the statutes to which I have referred, would call for the application of the familiar maxim “*expressio unius est exclusio alterius.*” This

maxim is frequently resorted to in the construction of statutes where a power is granted, the effect being to raise a presumption that the legislature in granting a certain power of a particular class meant to exclude all other powers except those granted.

If we were here depending upon the statutes to which I have called attention, for the original grant of power to a corporation having *no powers* in the matter, then the maxim would clearly apply, but such, in my opinion, is not the case. If I am correct in my conclusion that corporations generally have inherent powers in disposing of their property, and that the general assembly has given general authority in this respect, then it certainly does not follow that when the legislature for reasons of its own, sees fit to grant a specific power of disposition, such grant would have the effect of taking away all other powers which a corporation had in the matter of disposing of its property. Where such specific authority is superimposed on an existing general authority, it certainly will not be so construed as to wipe out all general authority, except as to the specific power mentioned, unless the intent to do so is clearly expressed.

The case of *Weill v. State, ex rel. Gaillard*, 250 Ala., 328, appears to me to set forth the real purpose and effect of the maxim quoted. It was there held:

“The maxim ‘*expressio unius est exclusio alterius*’ although not a rule of law, is an aid to construction, and is applicable where, in the natural association of ideas, that which is expressed is so set over by way of contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.”

An example of the way in which the principle of this maxim could be abused, is found in the case of *People vs. Lim Cal.*, 111 P. 2nd, 429, where it was held:

“The statutes enumerating certain specific acts as nuisances do not support the conclusion legislature intended to exclude all other acts known to be such at the common law, under the maxim ‘*expressio unius est exclusio alterius*’.”

This was an action to enjoin a public gambling place as a nuisance. The defendant claimed that because the statute defining public nuisances did not include public gambling, the maxim would apply, and public gambling

could not be enjoined as a nuisance. The court said in the course of its opinion:

“There is nothing in the statutes referred to which would support a conclusion that the legislature in enumerating certain specific acts as nuisances, intended to exclude all those acts known to be such at the common law. When the maxim ‘*expressio unius est exclusio alterius*’ is invoked, the decision must rest upon a determination of the legislative intent, and, under the well settled doctrine that repeals by implication are not favored, it must clearly appear from the legislation that the abrogation of settled rules of the common law was intended before it will be held that the statutes brought that result.”

Applying that principle to the case at hand, it appears to me that it cannot be claimed that the specific grants of power to a cemetery association would have the effect of destroying the general power which, as I have pointed out, was already lodged in such corporation. It is my opinion that a cemetery association, organized under the laws of Ohio, has authority to convey its cemetery property to a municipal corporation, subject to the rights of those who have acquired lots therein for burial purposes.

2. Turning to the powers of municipal corporations relative to cemeteries, I find in Section 3939, General Code, specific authority listed among the powers of municipal corporations.

“(9) To provide grounds for cemeteries or crematories, to enclose *and embellish* them and to construct vaults or crematories.”
(Emphasis added.)

Under Section 3631, General Code, a municipality has authority to acquire real and personal property by “purchase, gift, devise, condemnation or otherwise.”

Under Section 3677, General Code, municipalities are authorized to appropriate property within their corporate limits for the purpose, among others, of “providing crematories and cemeteries.”

Section 4154, General Code, provides:

“The council may provide a place for the interment of the dead outside the corporate limits and the police power of the corporation shall extend to those places.”

Section 4138, General Code, authorizes "the councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of a township or townships, when conveniently located for that purpose," to unite in the establishment and maintenance of a cemetery known as a union cemetery. Section 4198, General Code, reads in part, as follows:

"The council of a municipality, and the trustees of a township, may purchase of an incorporated cemetery association the lands, lots, and improvements of such cemetery association remaining unsold, for cemetery purposes, and take a conveyance thereof, but the purchase money in such cases shall be applied to the payment of the legal debts of the association, and to the embellishment and preservation of the land purchased, and such other purposes as the trustees of the cemetery may direct."

In this connection, we may note Section 4199, General Code, which authorizes a municipality or a township, or both to convey their cemetery lands to a cemetery association, thus strengthening the conclusion that the legislature intended the fullest interchange of service and facilities in relation to cemeteries, between these public bodies and cemetery associations.

In view of this express authority for the council of a municipality and the trustees of a township to purchase the lands of a cemetery association, it seems to me that the implication is irresistible that the cemetery association is presumed to have the power to make the conveyance and if it has authority to convey to the municipality and the trustees of a township jointly, it would be a narrow conclusion to hold that it lacked the power to convey to one or the other. Moreover, as already pointed out, Section 3471, General Code, expressly recognizes the authority of the cemetery association to convey its grounds to the township, and manifestly the township in turn could convey an interest in the same to the municipality in forming the union. In this connection, it may be noted that under Section 4196, General Code, either the municipal corporation or the township which had formed such union may withdraw from the same and relinquish its interest in the cemetery property to the other. Thus, it would be quite feasible, and certainly within the law, for a cemetery association to accomplish by indirection what I maintain it has the right to do directly.

All in all, it appears to me that the underlying and primary purpose

of the law is to make abundant provision for proper places for the burial of the dead, and for the accomplishment of that purpose abundant authority has been given to municipalities and townships and also to private organizations of a quasi-public nature.

In addition to the powers conferred by the statutes aforesaid, it is my opinion that a municipality would have a clear right under its home rule powers granted by Article XVIII, Section 3 of the Constitution, and without any statutory grant, to acquire by purchase or gift, grounds already in use for or designed for a public cemetery; that being a matter of local concern as contemplated by the constitutional grant above referred to.

Lands which have been set aside and used for burial purposes, are impressed with a trust which cannot be abandoned and which limits to some extent the power to convey such lands. This principle is stated in 10 American Jurisprudence, page 491, in the following words:

“When a tract of land has been dedicated as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose. * * * In fact, a cemetery corporation, upon dedication of its lands, becomes, in effect, a trustee to sell and convey the lots for the purposes specified, and to carry out the purposes enumerated in the statute, with the right to appropriate the proceeds of the sale to itself in payment of the land. One who purchases property which has been devoted to burial purposes takes subject to the trust. Where a conveyance is made of land, a portion of which has been dedicated and used as a public burying ground, the purchaser, having notice of the public right, takes subject to such right, although no reservation is made in his deed.”

Accordingly, a cemetery association would be without authority to convey its grounds dedicated for the purpose aforesaid, to a private person or corporation, to be used for any purpose foreign to the trust. The only exception to this principle is found in the statute to which I have called attention, which provides the circumstances under which a cemetery may be wholly abandoned.

I believe, further, that it is the settled policy of the law that out of respect for the dead, and for the feelings and sentiments of those persons who survive them and who are most closely interested, it is the right and duty of any association or public body who acquires or owns such cemetery,

to maintain it in good condition and to prevent it from becoming neglected and unsightly. That consideration would appear to me to support the right of a township or municipality to take over a cemetery which may in some instances have been filled by burials to all or nearly all its capacity, and assume the burden of their maintenance. Aside from the legal right to maintain a cemetery in a decent condition, we may point to an almost universal practice extending over a long period of time, of maintaining public cemeteries as places of great beauty, in many places, as public parks.

In the light of the foregoing, it is my opinion that either a municipal corporation or a township, or both of these subdivisions jointly, has the authority to accept the conveyance of cemetery lands by a cemetery association and to operate, care for and maintain the same.

3. What has already been said practically covers your third question. As already pointed out, Section 4183, General Code, authorizes a municipality and township, "when conveniently located", to unite in the establishment and operation of a cemetery, "by the purchase or appropriation of land therefor." Section 4187, General Code, reads as follows:

"The title to such cemetery grounds, whether by purchase or otherwise, shall vest in and be held by the corporation making the appropriation, in trust for the use of its inhabitants and the inhabitants of the other corporations or townships in common, and provisions shall be made for the interment in such cemetery of all persons buried at the expense of the corporation or townships."

Section 4188, General Code, provides in part:

"The expense of the purchase, or of the proceedings in case of appropriation, and the damages awarded, or both, shall be borne by the corporations and townships in proportion to the property of each on the duplicate for taxation. * * *"

The sections which follow, provide for joint management of such cemetery.

Accordingly, in answer to your question it is my opinion that if cemetery lands are conveyed by a cemetery association to a township, such township and a conveniently located village may join in the operation of such cemetery under the provisions of Sections 4183 to 4201, of the General Code.

4. Your fourth question is as to the power of a cemetery association

which has accepted an endowment or bequest to be held in trust, the income to be used for the care and maintenance of certain lots or general maintenance of its cemetery, to transfer such endowments to a public taxing subdivision in case of a conveyance of the cemetery to such subdivision.

Cities are authorized by the express provisions of Sections 4168 and 4169, of the General Code, to accept gifts, devises and bequests of moneys, to be held and invested, the income to be used for the care of a cemetery. Townships are given like authority by Section 3457, General Code. While there is no specific provision of like character in the laws relating to village cemeteries, there is abundant authority found in Section 18 of the General Code, whereby it is provided:

“The state, a county, a township or cemetery association, the commissioners or trustees thereof, a municipal corporation * * * may receive by gift, devise or bequest lands or other properties * * * and hold and apply the same according to the terms and conditions of the gift, devise or bequest.”

In 7 Ohio Jurisprudence, page 172, it is said:

“A municipal corporation may receive and hold the real or personal property of a charity in the same manner and to the same extent as private persons may do, provided the trust be not repugnant or inconsistent with the proper purposes for which the corporation is created, and the management of charitable trusts is a duty.”

Citing *Cincinnati v. McMicken*, 6 O. C. C., 188.

Funds so given, are regarded as in the nature of a public charitable trust. It is said in 10 American Jurisprudence, page 636, under the heading of “charities”:

“It is the general rule that a valid charity is established where the purpose for which it is created is the maintenance or repair of a public cemetery, or the erection and repair of monuments for a designated class.”

To like effect, see 14 Corpus Juris Secundum, page 442; 7 Ohio Jurisprudence, page 153; *Mannix v. Purcell*, 46 Ohio St., 102.

The care and supervision of charitable trusts is one of the well recognized functions of courts of equity. It is stated in 10 American Jurisprudence, page 611:

“The general rule, aside from statutory changes and regardless of whether the statute of uses is in force or not, on general grounds of public policy, is that if the object of a charitable trust is lawful and sufficiently specific and definite to enable the court to execute it, it will not be permitted to fail for want of a trustee; a court of equity, by its general inherent jurisdiction over charitable trusts, will supply one.”

The same principles are enumerated in 14 *Corpus Juris Secundum*, at page 428. See also, to like effect, 7 *Ohio Jurisprudence*, page 167, where it is said:

“By an ancient and well settled rule a charitable trust will not be permitted to fail because of lack of a trustee to carry it into execution. The Ohio courts have adhered to this rule and the court, when applied to, will appoint a trustee.”

Le Clercq v. Gallipolis, 7 *Oh. pt. 1*, p. 217; *Landis v. Wooden*, 1 *Ohio St.*, 160.

I conclude, therefore, that in the event that a cemetery association having received moneys in trust for the care of a cemetery, finds it impossible to continue its operations, and conveys its property to a municipality or village, and such association is dissolved, or sees fit to relinquish its trust, it would not have the right in itself to appoint a successor trustee; but such municipality or township may properly be appointed by a court of equity as such successor trustee, and the trust funds, in accordance with the decree of the court, may be turned over to such successor.

Accordingly, in specific answer to the questions submitted it is my opinion:

1. A cemetery association organized under the laws of Ohio, has authority to convey title to its cemetery lands to a municipal corporation, for cemetery purposes subject to the rights of those who have acquired burial rights therein.

2. A municipal corporation has the authority to accept a conveyance by way of sale or gifts from a cemetery association of cemetery lands, and to assume responsibility for the care and maintenance of the same.

3. If cemetery lands have been conveyed by a cemetery association to a township, said township and a conveniently located village may

pursuant to Sections 4183 to 4201, General Code, join in the operation of such cemetery property.

4. When the trustees of a cemetery association have accepted endowments and bequests in trust the income from which is to be used for the maintenance of its grounds, such association, in case it conveys such grounds to a village or township or both, may with the approval of a court of equity, transfer such trust funds to such grantee or grantees, to be by them administered in accordance with the terms under which such trust was created.

Respectfully,

C. WILLIAM O'NEILL
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