

Note from the Attorney General's Office:

1972 Op. Att'y Gen. No. 72-031 was modified
by 2009 Op. Att'y Gen. No. 2009-006.

OPINION NO. 72-031**Syllabus:**

A board of township trustees may not appropriate, or otherwise regain title to, unused cemetery lots sold under authority of Section 517.07, Revised Code.

To: Robert D. Webb, Ashtabula County Pros. Atty., Jefferson, Ohio
By: William J. Brown, Attorney General, April 14, 1972

Your request for my opinion states the pertinent facts and the question arising therefrom as follows:

"I have been asked by the New Lyme Township Trustees the proper legal action concerning a problem in some township cemeteries where the lots have been deeded out in groups of five or six graves. There are only one or two bodies buried on these lots and since the families have moved away to California or Florida and cannot be contacted, it is now necessary

for the cemetery to go out and buy land for a new cemetery or find some way to get the lots back in the Township Trustees names so they can be resold.

"Would it be possible that they could pass a resolution calling for advertisement three times in the paper of general circulation and a certified mail to the last known address of the owners, and if there was no response the title to the lots would automatically go back to the Township Trustees?"

The statutory provisions governing township cemeteries are found in Chapter 517, Revised Code. The original acquisition of land for a cemetery is covered by Section 517.01, Revised Code, which reads in pertinent part as follows:

"The board of township trustees may accept a conveyance of, or purchase, and enclose, improve, and protect lands in one or more places within the township as it deems necessary and proper for cemetery purposes. If suitable lands cannot be procured by contract on reasonable terms, such board may appropriate lands therefor, not to exceed ten acres, by proceedings in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code."

The sale of lots in the cemetery is provided for in Section 517.07, Revised Code, which reads in pertinent part as follows:

"Upon application, the board of township trustees shall set at a reasonable price such number of lots as public wants demand for burial purposes. Purchasers of lots, upon complying with the terms of sale, may receive deeds therefor which the board shall execute, and which shall be recorded by the township clerk in a book for that purpose, and the expense of recording shall be paid by the person receiving the deed. * * *"

Section 517.13, Revised Code, which regulates additions to cemetery grounds, provides in pertinent 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 board of township trustees, 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, the board may appropriate lands therefor, not exceeding five acres, as provided by section 517.01 of the Revised Code. * * *"

Chapter 163, Revised Code, the Ohio Uniform Eminent Domain Act, prescribes a distinct and complete procedure which must be complied with if any interest in land is to be appropriated under the power of eminent domain.

A deed to a cemetery lot does not convey fee simple ownership, but only an easement for purposes of burial. In Opinion No. 643, Opinions of the Attorney General for 1959, my predecessor quotes the first two sentences of Section 517.07, supra, emphasizing the phrase, "for burial purposes", and then states, at page 336:

"While this paragraph speaks of a sale and deed, it is obvious that the intention is not to authorize an outright deed of conveyance in fee simple, but only such instrument as will evidence the right of the purchaser to use the lot or lots for burial purposes. * * *"

It is stated in 14 Am. Jur. 2d 732, Section 25, as follows:

"According to the rule prevailing in nearly all jurisdictions, one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only a right of burial therein which has been variously designated as an easement or as a license or privilege."

Ohio case law agrees with this rule. In Fraser v. Lee 8 Ohio App. 235, 238 (1917), the court discusses the property right in a particular lot in the following language:

"When this burial 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. * * *"

See also Persinger v. Persinger, 54 Ohio L. Abs. 295, 39 Ohio Ops. 316 (1949).

Yet a cemetery lot is a special kind of easement. According to 14 Am. Jur. 2d, supra:

"The sentiment of all civilized peoples regards the resting place of the dead as hallowed ground and requires that in some respects it be not treated as subject to the laws of ordinary property. It follows that an interest in a burial lot is of a somewhat peculiar nature, * * * or that it is even sui generis."

Section 517.09, Revised Code, reads as follows:

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

Once a body has been placed in a space on a burial lot or in a vault, the easement on that particular space becomes perpetual. In Fraser v. Lee, supra, at 8 Ohio App. 246, the court states:

"* * * The dead * * * are entitled to remain there until their removal is sought by their next of kin; or until the authorities,

in the exercise of their care for the public health, deem it advisable to remove them by virtue of a sale or abandonment of the cemetery."

A burial lot is generally regarded as property in which title may descend to heirs. Persinger v. Persinger, *supra*. Title to a burial lot can be alienated, but the right to remove bodies already buried cannot be. Fraser v. Lee, *supra*. The board of trustees has, however, authority to remove all the bodies in an abandoned cemetery, or one whose further use would be detrimental to welfare or health, under Sections 517.21 and 517.22, Revised Code.

Having outlined the nature of a cemetery lot easement, I turn to the question of whether, and how, it may be terminated. An easement is "property" within the meaning of the constitutional prohibition against the taking of property without just compensation, and any extinguishment of such property right must, of course, be strictly in accord with statutory requirements. Kiser v. Commissioners, 85 Ohio St. 129 (1911). Your question suggests an appropriation, but that course is clearly not available, for the procedure you mention does not comply with the requirements of Chapter 163, Revised Code, the Ohio Uniform Eminent Domain Act. Besides, a township board of trustees does not have the power to appropriate such individual grave sites. It possesses only such powers as are conferred or necessarily implied by statute. Opinion No. 802, Opinions of the Attorney General for 1951. The statutes confer only the power to appropriate land for a new cemetery (Section 517.01, *supra*) or to enlarge an existing cemetery (Section 517.13, *supra*). The presumption is against the delegation of the power of eminent domain. Miami Coal Co. v. Tipton, 19 Ohio St. 560 (1869); Pontiac Co. v. Commissioners, 104 Ohio St. 447, 454-458 (1922). Only a clear implication would confer the appropriation power in question, and there is apparently no implication at all.

It may be suggested that a burial easement, like other types of easements, may be extinguished by abandonment. I have, however, found no authority which applies such a rule to a cemetery lot easement. The elements of the theory are stated in West Park Shopping Center v. Masheter, 6 Ohio St. 2d 142, 144 (1966), as follows:

"An abandonment is proved by evidence of an intention to abandon as well as of acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement."

See also Schenck v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 11 Ohio App. 164 (1911); Wheaton v. Fernenbauch, 8 Ohio App. 182 (1917). While these Opinions recognize the theory of extinguishment of an easement by abandonment, they do so only in dictum. It has actually been applied in Ohio law rarely, if at all.

Because of the special characteristics of a cemetery lot easement, I am reluctant to analogize it to other types of easement. Hence, the mere fact that a theory of extinguishment applies to, e.g., a footpath or railway easement, does not mean that it also applies to an easement for burial purposes. In addition, it is difficult to see how the theory could be applied. Its elements are nonuser plus clear evidence of intention to

abandon. Nonuser could not be established, because a lot may not be needed for a great many years, and of course it is not used until needed. Intention to abandon could not be clearly inferred, since there is always the possibility that someone in a family which has moved away may wish his body returned for burial. It must also be remembered that title to the easement remains in the heirs. I conclude, therefore, that an easement for burial purposes cannot be extinguished by abandonment.

Since I know of no other theory which could be used to return title to these lots to the board of township trustees, I must conclude that it cannot be done.

In specific answer to your question it is my opinion, and you are so advised, that a board of township trustees may not appropriate, or otherwise regain title to, unused cemetery lots sold under authority of Section 517.07, Revised Code.