

Said abstracts do not show that any examination was made in any of the United States courts.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

947.

APPROVAL, DEFICIENCY BONDS OF VILLAGE OF JUNCTION CITY IN AMOUNT OF \$4,500.

COLUMBUS, OHIO, January 16, 1920.

*Industrial Commission of Ohio, Columbus, Ohio.*

948.

APPROVAL, DEFICIENCY BONDS, VILLAGE OF SHAWNEE, OHIO, IN THE AMOUNT OF \$9,000.

COLUMBUS, OHIO, January 16, 1920.

*Industrial Commission of Ohio, Columbus, Ohio.*

949.

TOWNSHIP CEMETERY—PROCEEDS FROM SALE OF LOTS MAY NOT BE USED FOR PURCHASE OF ADDITIONAL CEMETERY GROUNDS.

*Proceeds from the sale of cemetery lots under section 3448 G. C. may not be used for the purchase of additional cemetery grounds under section 3455 G. C.*

COLUMBUS, OHIO, January 19, 1920.

HON. ALLEN J. SENEY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR—Acknowledgment is made of the receipt of your letter dated December 24, 1919, relative to your former request for the opinion of this department, and it is noted that copy of your opinion on this question, directed to the clerk of Oregon township was enclosed with your original request, which is as follows:

“I respectfully request your opinion upon the following questions:

The trustees of Oregon township, Lucas county, Ohio, desire to purchase approximately 17 acres of land adjoining the township cemetery, as additional land for township cemetery purposes, at a cost of approximately \$17,000. They have on hand \$4,000 in the cemetery fund, received from the sale of graves and lots in the present cemetery, and they receive annually

about \$4,000 from the sale of lots, and the expenses of maintaining the present cemetery amount to less than \$1,000 per year. An offer has been made to them by a real estate firm of this city to sell them the additional 17 acres upon land contract, and the trustees desire to know whether or not they may purchase this additional land in that manner, applying the said \$4,000 as a payment, and making the future payments on said contract from the money received from the sale of lots and graves, both in the old cemetery and in the additional land.

1. May the trustees proceed in that manner, or are they restricted to the raising of funds for such purpose by section 3455, that is to say, the levying of a tax?

2. Does section 3449 of the General Code limit the use of funds received from the sale of graves to improving and adorning the grounds, and in your opinion does the word 'improving' extend to the purchase of additional lands?

3. Has section 4188 of the General Code any application to township cemeteries, as distinguished from joint township and municipal cemeteries, so that it will allow the trustees to invest moneys derived from any source, not needed to keep in order or embellish the grounds, in the purchase of additional lands?

4. If the money to purchase additional lands must be raised by taxation, must this be submitted to a vote of the people?

5. If the trustees may purchase additional land out of the funds received from the sale of graves or lots, must this be submitted to a vote of the people?

6. Is section 5660 of the General Code, providing for the clerk's certificate that funds are in the treasury and unappropriated, applicable in case the trustees may enter into a land contract for the purchase of this property?

I am enclosing herewith a copy of my opinion to the township trustees on this matter."

From these facts it is inferred that the \$4,000.00 balance on hand is not needed for the purpose of improving and embellishing of the present cemetery grounds, and this opinion is based on that inference.

Sections 3441 to 3475, relating to cemeteries, section 4188, relating to union cemeteries, and section 5660, relating to what is known as the Burns law certificate, are pertinent to your inquiry. Because of the intimate relation of your six questions, it is believed that sections 3441 to 3475 are applicable to all of them, and that reference to these sections may properly precede consideration of each of the questions separately.

Section 3441 contains a direct grant of authority to the trustees in these words:

"Township trustees may \* \* \* purchase, and enclose, improve and protect such lands in one or more places within the township as they deem necessary and proper for cemetery purposes."

This section also empowers the acquisition of such land under certain conditions and subject to an acreage limitation by condemnation proceedings.

Section 3444 contains authority for levying a tax to defray the expenses of such acquisition and for the necessary care and improvement of such cemeteries.

Section 3445 requires the submission to a vote of the electors of the township of the question of such purchase or appropriation before the same may be made.

Section 3447 requires the trustees to have such cemetery laid out in lots, avenues and paths and to have a suitable plat thereof made and filed with the township clerk, and otherwise provides for the making and enforcing of all necessary rules for the care and supervision of such cemeteries.

Section 3448 provides in part that:

"Upon application the township trustees shall sell at a reasonable price such number of lots as the public wants demand for burial purposes."

Then follows this provision in section 3449:

"The proceeds arising from the sale of such lots shall be used in improving and embellishing such grounds."

Section 3455 relates to additional ground for cemetery purposes and gives the township trustees powers similar in character to those already enumerated, except that there is no provision for the referendum of the question of purchase of additional ground to a vote of the township, such as is provided in the acquisition of a cemetery in the first instance, and on the authority of *Norton vs. Trustees*, 8 O. C. C., 235 (affirmed without report in full in 54 O. S. 682), such question of purchase of additional land is not referable to a vote of the township.

In this case it is clear that what is now section 3445, providing for such referendum, and was then section 1465 R. S., has no application to the acquisition of additional ground under section 3455.

This is shown by the second branch of the syllabus, which is:

"The provision of section 1465 of such chapter, requiring the question of 'cemetery or no cemetery' to be submitted to a vote of the electors of the township, has no application to the acquisition of additional cemetery grounds under said section 1472."

Attention may be directed also to the latter part of this section, which provides that the land so acquired "shall become part of such township cemetery."

The solution of your questions must very largely depend upon the construction of section 3449, which on its face would seem to limit the use of the proceeds from the sale of such cemetery lots to the improvement and embellishment of the cemetery grounds. There are no decisions on this question, of which this department is aware, that will throw any light on its construction, and it is largely one of first impression.

Section 3455 must also be considered in determining whether or not the method of paying for such additional grounds by the funds raised by tax levies therein authorized is the exclusive method of acquiring such additional grounds. In this connection it may be pointed out that the language used in this regard is that

"They (trustees) *may* levy a tax \* \* \* for the purchase \* \* \* of such additional cemetery grounds."

It is noted from your statement of facts that the township trustees in this case have on hand \$4,000.00, which is the proceeds of the sale of lots in the present cemetery, and that they receive annually about \$4000.00 from such sales, and your first question is, whether such proceeds may be used in the purchase of additional land, or whether the trustees are restricted to levying a tax for the necessary funds for such purpose and whether the trustees may use the proceeds of such sales for any purposes other than for improvement and embellishment of the cemetery grounds.

The language used in section 3449 is imperative, saying in effect that the proceeds "shall be used for the purposes last mentioned." This section literally requires the trustees to expend those proceeds for improvement and embellishment only and would have the effect of impressing such proceeds with a special and limited use.

This must be so unless some reason may be found for disregarding the force of its imperative terms.

It may be claimed that this section is a grant and not a limitation; permissive and not mandatory. It may be suggested that it is a grant of authority to use all or part of such proceeds for the purpose of improvement and embellishment, without which grant the trustees would be powerless to use it for those purposes; that it may be permissive, notwithstanding the imperative term "shall" and the extent of such use is discretionary in the trustees. Otherwise construed, it may be urged, the trustees would be obliged to expend all of such funds where in their judgment possibly there was no need for improvement or embellishment. With this phase of the question in mind I have examined and considered the history of this section.

It had its beginning as section 29 of an act for the incorporation of townships passed March 4, 1853, in 51 O. L., 495. In that form it provided for the purchase of land for cemeteries by township trustees and the levying of a tax for such purposes. It also contemplated the raising and expending of a certain amount of money for improving and protecting such grounds. This latter amount was limited in the first year to \$1,000.00 and to \$50.00 a year thereafter. In this section there was then no provision for the sale of lots in the cemetery. In 1854, in 52 O. L., 72, this section was amended, providing for the expenditure of "fifty dollars in any one year \* \* \* to be applied to the improvement of the grounds as aforesaid."

There were no other amendments in the section of special bearing on the question under discussion.

In 1857, 54 O. L., 187, in an act entitled "to regulate township and other cemeteries," provision was made for the sale of lots "for the purpose of grading, improving and embellishing said cemetery grounds" \* \* \* and for the expenditure of such proceeds in this manner:

"Section 2. That it shall be lawful for the trustees of said township, for the purpose of grading, improving and embellishing said 'cemetery grounds,' after proper notice having been given, to proceed to sell, in such manner, and at such time, and upon such terms as may be, in their judgment, deemed most advantageous, such number of lots as the public wants may demand and all lots so sold, the purchasers thereof shall, upon complying with the terms of the sale, be entitled to receive a deed or deeds which the trustees aforesaid are hereby authorized and empowered to execute, and which shall be recorded in a book provided for that purpose by the clerk of said township—the expense of recording to be paid by the person receiving said deed; Provided, that no person not a resident of the township shall be allowed to become the purchaser of any lot or lots in said cemetery, nor shall any person being the owner or purchaser of any of the said lot or lots transfer his, her, or their title or claim to any person or persons not a resident of the township, without the written assent of the trustees of said township, or a majority of them.

Section 3. That it shall be lawful for the trustees aforesaid to appropriate the proceeds of the sale of the lots aforesaid, in setting out trees, shrubbery, etc., and improving and embellishing said cemetery grounds, in such manner as the means in their hands may justify, but they shall enter into no contract exceeding the means within their control."

Here the purposes of such sale expressed in section 2 quoted above, are more

general and inclusive than those stated and described in section 3 (now section 3449). The former section adds "Grading" to improving and embellishing which are contained in the latter. The legislative meaning of improvement and embellishment, as suggested in the reference to "setting out trees, shrubbery, etc.," is consistent with the Standard Dictionary's definition of embellishment, which is:

- "1. To make beautiful or elegant by adding attractive or ornamental features; beautify; decorate; adorn.
2. To add imaginary incidents or items to, so as to heighten the interests of," etc.

The legislature had by section 2 already empowered the use of such funds for such purposes (at least impliedly), and also with the grading of such grounds. But it would seem as though some doubt was entertained whether such language as they had used in section 2 would be understood to include adornment or embellishment.

In 1873, 70 O. L., 136, provision was made for obtaining additional land for cemetery purposes, and section 2 was amended so as to authorize the trustees on the application of a head of a family, resident of the township, to dispense with payment for burial where such payment "would be heavy and oppressive." No other pertinent material change was made in this article, and section 3 was unchanged. The purpose for such sale is stated in section 2 of that act to be "for the purpose of grading, improving and embellishing said cemetery ground." However, in this section there is no express authority granted to the trustees to expend the proceeds of such sales for that purpose.

The section continues in that form until the act of 1892, 89 O. L., 271, when in R. S. 1468 it was again amended to read:

"The proceeds arising from the sale of lots as herein provided shall be used for the purpose of improving and embellishing said grounds."

In determining the question of the power of such a political subdivision as a township, it must be remembered that the township is a quasi corporation of limited delegated powers and can exercise only such powers as are granted either expressly or by necessary implication, and your first inquiry may be answered by the consideration that neither section 3449, nor any other related section, authorizes the use of the fund involved in that question. This is further strengthened by the conclusion that this section, by its legislative history, shows that the sale of such lots was authorized for the attainment of certain specific purposes, viz., for grading, improving and embellishing such cemetery grounds and it is believed that notwithstanding the omission of this recitation of certain specific purposes from the present act, by reason of the change of expression noted in the amendment of section 3449 to the more mandatory form, the original character of this grant still inheres in the present act. Another part of section 3449 which has not been quoted, may not be without significance, reading that as to such cemeteries "the trustees shall build and maintain proper and secure fences around all such cemeteries, *to be paid* for from the township funds."

From a consideration of the terms of this section, its purpose and history brings this department to the conclusion that the proceeds raised from such sale are impressed with the limited and special use named in section 3449, and your first question is therefore answered in the negative.

It is believed that the discussion of your first question practically disposes of the remaining questions, and to what has already been said may be added that the word "improving," used in section 3449, cannot be construed to include the purchase of additional land, but is limited to "said grounds" mentioned in the section, and not to other additional grounds.

Section 4188 relates to Union cemeteries and is not applicable to the sections under discussion here, which relates to township cemeteries.

Consideration of the terms employed in section 5660, which include "the trustees of a township," inclines this department to the belief that that section is applicable to such a contract made by the trustees for the purchase of additional land, as it is to one "involving the expenditure of money," as defined in section 5660.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*

950.

BOARD OF AGRICULTURE—FISH AND GAME—PROSECUTION BY GAME PROTECTOR CANNOT BE LEGALLY INSTITUTED WHEN SAID OFFENSE IS NOT COMMITTED IN PRESENCE OF SUCH OFFICER WITHOUT APPROVAL OF PROSECUTING ATTORNEY OR ATTORNEY GENERAL—SUCH OFFICER NOT LIABLE TO PROSECUTION UNDER PENALTIES IMPOSED IN SECTION 1454 G. C. (108 O. L. 577).

1. *A prosecution cannot be legally instituted by a game protector or other public officer for a violation of the fish and game laws of Ohio, when said offense is not committed in the presence of such officer, without the approval of the prosecuting attorney or attorney general.*

2. *A game protector or other public officer is not liable to a prosecution under the penalties imposed in section 1454 G. C. (108 O. L. 577) by reason of having instituted a prosecution without the approval provided for in section 1444 G. C. (108 O. L. 577).*

COLUMBUS, OHIO, January 19, 1920.

HON. SUMNER E. WALTERS. *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department on the following:

"Calling your attention to reamended senate bill No. 45, an act to codify fish and game laws of Ohio, enacted into a law by the present general assembly, and found in O. L. Vol. 108, part 1, at page 577. Section 54 thereof contains the following provision:

'Prosecutions by the protector or other public officer for offense not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed, or upon the approval of the attorney-general.'

Section 64 thereof after fixing punishment for violation of section 47, 26 and 52 contains the following provision:

'Whoever violates any of the other provisions of this act shall be fined not less than \$25.00 nor more than \$200.00, and the costs of the prosecution, etc.'

I desire your reasoning and conclusion on the following hypothesis:

If a game protector or other public officer commences and completes prosecution for an offense not committed in his presence, without the approval of the prosecuting attorney or attorney-general is the protector or officer subject to the punishment imposed in section 64 for violating a provision of the act?"