

2779.

CEMETERY—BURYING GROUNDS—TOWNSHIP TRUSTEES  
—POSITIVE DUTY TO ENCLOSE CEMETERY WITH  
A FENCE—SECTION 3453 G. C.

*SYLLABUS:*

*The provisions of Section 3453, General Code, by the use of the word "shall," impose on township trustees a positive duty to enclose with a fence burying grounds, the title to which is vested in such officials by operation of law.*

COLUMBUS, OHIO, August 2, 1938.

HON. MARCUS SHOUP, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR: This will acknowledge your recent communication which reads as follows:

"Situated in Bath Township, this county, is a cemetery commonly known as the Cost Graveyard, which was abandoned some time ago, and in which there have not been interments in recent years. This cemetery, as I understand the facts, while originally designed for a family burial plot, was used as a public place of burial, and it is estimated the same contains over two hundred bodies. The cemetery is located approximately three miles from the Village of Fairfield.

Available records do not establish whether there was at any time a conveyance to the trustees of the township, nor can it be shown whether this cemetery was ever vested in or controlled by an association or religious society. Due to the lack of care and other neglect, a request has been made by some individuals and patriotic organizations that the trustees repair or build a proper fence, there being about one acre in the enclosure. The trustees are unwilling to take this action, and I, therefore, respectfully request your opinion as to the duties, if any, required of such trustees. The investigation does not disclose whether the County Commissioners ever enclosed said cemetery. Section 3475 G. C. provides that where the County Commissioners have enclosed such properties with a fence, all abandoned public burial grounds in the county from which the remains of the dead have not been removed, the township trustees shall keep said fence in good repair, etc. Interpreting the said above quoted section, the inference or implication arises

that where there is no fence, it would be the duty of the trustees to erect and maintain the same.

A recent decision O. A. G. 1937, No. 13, involves a question of the duties of the trustees upon the tendering of a deed of burial grounds from a church association or religious society. The opinion concerns the provisions of Section 3471 G. C.

I have found no decision or ruling applicable to the question presented, and therefore solicit your opinion as to whether or not the township trustees are required to care and maintain the fence of this abandoned cemetery."

According to this statement of facts, the County Commissioners of your county have never erected a fence around this graveyard so as to impose on the Township Trustees the duty of maintaining such a fence as is provided for in Section 3475, General Code, which reads as follows:

"Where the county commissioners of a county have enclosed with a substantial fence of stone, iron, or posts and boards, all abandoned public burial grounds in the county, from which the remains of the dead have not been removed, the township trustees shall keep the fence in good repair, and shall remove the undergrowth and weeds from such cemetery at least once a year and pay the expenses thereof from township funds."

I do not believe that these provisions can be interpreted so as to impose on township trustees the implied duty of erecting a fence to enclose such property, in view of the fact that the express duty of township trustees is that they "shall keep the fence in good repair" and this express duty is conditioned on the county commissioners having previously acted in erecting a fence.

However, township trustees are charged with certain duties in connection with burial plots to which they have acquired title and among such duties is that of enclosing such plots with fences. Therefore, in seeking to place the responsibility of ownership on the Township Trustees, it is first necessary to determine whether the Trustees of Bath Township have title to the Cost Graveyard. Section 3451, General Code, provides for the vesting of title to certain burying grounds in township trustees by operation of law. The provisions of this section were considered in Opinions of the Attorney General, 1930, Vol. II, page 898, the syllabus of which reads 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.”

The facts of the case presented therein are so similar to those presented by you that the proposition of law stated therein is equally applicable to the disposition of that part of your question which requires a determination of the ownership by the Township Trustees of the cemetery in question. However, the opinion referred to considered only the matter of the vesting of title in the township trustees by operation of law and did not touch on the consequent duties which are imposed on township trustees as a result of their acquiring ownership in this manner.

Proceeding on the basis that the facts in this case fulfill the conditions as set forth in Section 3451, General Code, to vest title to the Cost Graveyard in the Township Trustees, the next step is to inquire as to what duties are thereby imposed on these officers. Section 3453, General Code, reads as follows :

“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.” (Italics, the writer’s.)

It is necessary for our purpose to determine whether the word “shall” is mandatory or merely directory. Generally, the interpretation of the word “shall” depends upon a number of considerations, among which is the identity of the parties to whom the language is addressed, the purpose of the statute, and the results which would follow from a failure to perform the function indicated.

Ordinarily, the use of the term “shall” is mandatory and excludes the idea of discretion when addressed to a public official. Words and Phrases (1905 Ed.) Vol. 7, page 6467. This factor alone appears to be dispositive of the question as to whether it is a positive duty of the Township Trustees in this case to enclose the burial ground with a fence and to keep it in good repair. However, additional weight can be found in determining the general intent of the legislature by reading the particular sections in question in connection with the complete enactment. Such a course leads to no other conclusion than that 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. This conclusion is in accord with that stated in O. Jur., Vol. 7, page 21.

Therefore, in view of these considerations, it is my opinion that the Township Trustees of Bath Township are, under the provisions of Section 3453, General Code, charged with the duty of erecting and maintaining a fence around the Cost Graveyard.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

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2780.

APPROVAL—BONDS CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$50,000.00—PART OF ISSUE SEPTEMBER 1, 1931—OPINION No. 2512, APRIL 13, 1934.

COLUMBUS, OHIO, August 2, 1938.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio*  
GENTLEMEN :

RE: Bonds of City of Cleveland, Cuyahoga County,  
Ohio, \$50,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated September 1, 1931. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of April 13, 1934, being Opinion No. 2512.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*