

1. That a board of education is not liable either to a pupil or other person for personal injury or property damage caused by the negligence of the driver of a motor bus used in the transportation of pupils, whether the said bus is owned by said driver or his employer and the pupils are transported by contract, or whether the bus is owned by the board of education and the driver employed to drive the same. In the event an accident occurs while said pupils are being transported, caused by the negligence of the driver of said bus and resulting in damage either to a pupil or a third person, the driver of said bus is personally responsible for said damages and the right to said damages may be enforced in an action against the said driver or his bondsmen.

2. The same observation may be made in answer to your second question as was made in answer to the first. The board of education is not liable for the negligence of the driver of a motor bus. The driver himself and his bondsman are liable if the board of education owns the bus and employs the driver to drive the same, and the same is true if the driver or his employer owns the bus and transports the pupils by contract.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2579.

CEMETERY—UNION—TRUSTEES ARE EITHER VILLAGE OR TOWNSHIP OFFICERS—SALES OF SUPPLIES BY TRUSTEES TO CEMETERY PROHIBITED.

*SYLLABUS:*

1. *Members of a board of union cemetery trustees are prohibited from being interested in the sale of personal services or supplies to the cemetery with which they are connected.*

2. *Members of the board of township trustees, members of the village council and other officers of such township and village cannot legally render services for compensation to a union cemetery formed by the joinder of such subdivisions, nor can they sell supplies thereto.*

COLUMBUS, OHIO, September 17, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Acknowledgment is made of your recent communication, as follows:

“Sections 3808, 12910 and 12912, G. C., prohibit an officer of a corporation from having any interest in the expenditure of money on the part of a corporation other than his fixed compensation.

Section 12911, G. C., prohibits anyone holding an office of trust or profit, or as agent, servant or employe of such person, from having any interest in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is not connected, when the amount thereof exceeds the sum of \$50.00, unless such contract is let at competitive bidding.

Sections 4183 to 4205, G. C., govern the selection, powers, duties, etc., of members of a board of trustees of a union cemetery. Provision is made

for the selection of one or two members of council, when a village combines with a township in establishing and operating a union cemetery, and the board thus created make their own rules and regulations and disburse the funds under their control.

*Question 1.* May members of a board of union cemetery trustees be interested in the sale of personal services or supplies to the cemetery with which they are connected?

*Question 2.* May members of the board of township trustees, members of the village council and other officers thereof legally render services to such union cemetery for compensation, and sell supplies thereto?"

The prohibitory sections of the Code to which you refer are as follows:

*Section 3808.* "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

*Section 12910.* "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

*Section 12911.* "Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

*Section 12912.* "Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

In the first place it is to be observed that Section 3808 has sole reference to municipal officers. Sections 12910 and 12911 are general in their terms, applying to officers, agents or employes of various subdivisions. Section 12912 pertains only to municipal and township officers.

Members of a board of union cemetery trustees are selected from the personnel of the council of the village and the board of trustees of the township joining in the cemetery enterprise, in the manner hereinafter discussed, and I shall assume in answering your first question that the members to which you refer are such as are either members of the council or the board of trustees in addition to having membership on the board of union cemetery trustees.

It accordingly follows that, in the event a member of council is also a member of the board of cemetery trustees, he still remains an officer of the municipal corporation, and, likewise, a member of the board of township trustees, who is also a member of the board of cemetery trustees, remains a township officer. This brings us to the consideration of whether or not such members are prohibited from being interested in the sale of personal services or supplies to the cemetery.

In the determination of this question, it is necessary to give careful consideration to the statute by virtue of which a union cemetery is authorized. Section 4183, General Code, is as follows:

"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, may unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided."

The succeeding section provides for the appropriation of lands by the municipal corporation, which, in accordance with the next section, are held in the name of the municipal corporation in trust for its inhabitants and the inhabitants of the township joining the enterprise.

Section 4189, General Code, is as follows:

"The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations, and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

You will observe that this section describes the rights and duties as to control and management as the same as where the cemetery is the exclusive property of a single corporation. The next section gives authority to pass ordinances for the preservation and regulation of the cemetery. Section 4191 is pertinent and is as follows:

"No distinction or discrimination of any kind shall be made by the trustees of the cemetery owned in common, in favor of one corporation against another, or in favor of a corporation against a township, or in favor of a township against a corporation, but the affairs of the cemetery shall in all respects be managed as though it were owned and governed in the interests of the corporation or township alone."

The succeeding section provides for a joint annual meeting of the council of the municipal corporation and the trustees of the township, at which meeting the rate of tax to be levied for cemetery purposes is determined. By the next section special joint meetings may be called and rules and regulations for the government of the cemetery adopted.

Section 4193-1 is as follows:

"At any such joint meeting or at the joint meeting provided for by section 4192 of the General Code, by a majority vote of all present counting council members and trustees, such meeting may elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting. Such board of cemetery trustees so elected, shall have all the powers and perform all the duties exercised and performed by directors of public service of municipalities under sections 4161 and 4168 inclusive of the General Code, and such board of cemetery trustees shall together with other powers herein granted have the power to create a permanent endowment fund for the express purpose of keeping such cemetery clean and in good order and may add to the price regularly charged for lots therein a sum for said purpose or may receive gifts for said purpose or may enter into separate agreements with the purchasers of such lots whereby an agreed part of the purchase price of said lot or lots shall be and constitute a permanent fund, or may receive individual gifts for said fund, the income thereof to be used for the upkeep and care of such lot or lots and when any such fund or funds shall have been received or created the same shall be a permanent fund for such use and the income therefrom shall be used for the said purpose and for no other purpose and the principal sum shall be kept and invested under the same terms and conditions fixed by law for the investment of the funds of a minor by his guardian. At the first election of such board of cemetery trustees, one shall be chosen for one year, one for two years and one for three years, together with such part of a year as may intervene between the time of such election and the first day of January next thereafter. Yearly thereafter at the joint meeting held in May one trustee shall be chosen for three years commencing on the first day of January next thereafter. Any regular or regularly called joint meeting of the township trustees and municipal council may fill vacancies occurring on the board of cemetery trustees by a majority vote of the members present, such election to be for the unexpired term.

Any member of such board of county trustees may be removed by such joint meeting on a two-thirds vote of all members entitled to sit in such joint meeting, for misfeasance or malfeasance in office, any gross neglect of duty or gross immorality, but no members shall be so removed until he shall have had at least ten days' notice in writing, together with a copy of the charges against him and shall have had opportunity to appear and defend himself either in person or by counsel."

You will observe the language used in the first sentence of this section. I construe this to mean that at least one member of the board must be a member of the municipal council and at least one member must be a member of the board of township trustees. Accordingly, if the sole representative of the municipal council on the board should go out of office as a councilman, I believe his office as a member of the board would also be vacant, and the same rule would apply to the member chosen from the board of township trustees. The statute is not clear as to the qualifications of the third member, and it is conceivable that he need not be either a member of council or a member of the board of township trustees, in which event a portion of the discussion hereinafter had would be of no value.

As to those members of the board of cemetery trustees who are also members of the legislative bodies of the subdivisions involved, the question remains whether the

prohibitory language of the sections quoted at the first of this opinion is applicable. Your inquiry extends to the sale of personal services or supplies and it is necessary to separate these in answering your inquiry.

The discussion of the statutes dealing with union cemeteries shows that there is not created any separate taxing district or unit. The maintenance of cemeteries by municipal corporations and township trustees separately is clearly authorized by other statutes. This group of sections simply provides that a municipality and a township may unite in the common ownership of a cemetery to be devoted to cemetery purposes for the inhabitants of both subdivisions. In so doing each of the subdivisions is fulfilling one of its ordinary duties as a political entity. The ownership of the cemetery is, as specifically stated in Section 4189 of the General Code, supra, in common, and all of the sections taken together indicate that it was the legislative intent that there should be a common interest in the property involved and in the maintenance and control thereof. Accordingly I feel that, in embarking on a joint enterprise of this character, each of the subdivisions is directly and financially interested therein and that that interest, while perhaps not severable from that of the other subdivisions, is still a distinct interest of the subdivision. It follows that the maintenance of this joint enterprise, or any expenditure therefor, is, in the case of a village, a municipal purpose and, likewise, in the case of a township, is a township purpose, and it is immaterial, in my opinion, that the other subdivision may also have interests in the common property.

In the light of the foregoing, consideration should be given to the prohibitory language of Section 3808 of the Code, which prohibits any member of council from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation. I am firmly of the opinion that an expenditure of funds for the purpose of the joint cemetery is an expenditure of money on the part of the village in question. The funds for such expenditure are derived in part by taxation from the village and I have no hesitancy in saying that, for a member of the board of cemetery trustees, who is also a member of the village council, to have an interest in any expenditure for personal services or supplies furnished to the cemetery, would be a violation of such section.

By the same process of reasoning, I am of the opinion that the penal provisions of Section 12910 of the General Code are also applicable in so far as the purchase of supplies are concerned. You will observe that this section makes no reference whatsoever to personal services and accordingly there would be no violation of its terms in the sale of personal services. The section is further applicable both to a member of council who is a member of the board of cemetery trustees and to a member of the township trustees who is also a member of the board of cemetery trustees.

The succeeding section is by its terms not applicable. It has bearing where the sale is to some public subdivision or institution other than that with which the officer is connected. In this instance the member of council and the member of the board of trustees are directly connected with their respective subdivisions. Section 12912, supra, is in my opinion applicable in this case. The member of council or the trustee, by the terms of this section, would be prohibited in being interested in the profits of any contract, job, work or services for the corporation or township and, in line with what has been heretofore stated, I believe this would extend to any contracts, etc., with the cemetery, since each of the subdivisions has a substantial and distinct interest therein.

As I have before indicated, there is a possibility that the third member of the board of trustees of the cemetery would be neither a member of the council of the village nor a member of the board of trustees of the township. He is selected at the joint meeting of the council and the trustees and performs functions in connection with the management and care of the cemetery which inure to the benefit of both

subdivisions. In his capacity as trustee of the cemetery he is charged with the duties with respect to the common property of the two subdivisions and, as such, I believe that he is an officer of each of the subdivisions in question. I recognize there is considerable doubt about the correctness of this conclusion, but I believe it to be consistent with the spirit of the prohibitory sections hereinabove set forth and that it would not be doing violence to their terms to make them applicable in an instance of this kind. I say this in spite of the ordinary rule that penal sections are to be strictly construed.

In so holding I am not unmindful of the prior opinion of this office, found in Opinions of the Attorney General for 1918, Vol. 1, at page 918. It was there held that the positions of Secretary of the board of cemetery trustees of a union cemetery and the clerk of a village, which is one of the subdivisions joining the union cemetery, are compatible. In the course of the opinion appears the following:

“This provision is somewhat ambiguous, and at first sight it appears that the Legislature in saying ‘of which (speaking of the board of trustees) one or more, etc.,’ intended simply that one member of the board chosen must be a member of either the village council or township trustees, but the following part of the section wherein it says ‘must be a member of each of the separate boards’ leads me to the conclusion that the Legislature intended that each separate board represented at the joint meeting must have representation on the board of cemetery trustees, or, in other words, in a case where a village united with a township for cemetery purposes, at least one member of the board of cemetery trustees must be a member of council and one a member of the township trustees represented at each meeting, but both the council and township trustees must have representation on such board.

I have gone into the discussion for the purpose of showing that the board of cemetery trustees is made up of one municipal officer and one township officer, and therefore it could not be said that the members of said board of cemetery trustees are municipal officers or that such board is a municipal department. This board, as above pointed out, is selected jointly by municipal and township officers, and neither the township nor the municipality separately has control over such board. It is a joint board, and entirely separate and distinct from each branch of local government represented, and is neither a township nor a municipal board.”

While much my predecessor has said is doubtless true, I question his statement that the board is entirely separate and distinct from each branch of local government represented, and is neither a township nor a municipal board. The board is undoubtedly a joint board, but the enterprise is one which is common to both of the branches of local government. The board is accordingly acting in the interest of each of the subdivisions and is, in my opinion, accordingly both a township and municipal board, at least for the purposes of the sections here under discussion.

From the foregoing discussion, and in answer to your second inquiry, it is fairly obvious that the establishment and maintenance of the joint cemetery, owned in common by the two subdivisions, is both a municipal and a township purpose. The funds for such enterprise are contributed by each of the subdivisions and accordingly I feel that the members of the board of township trustees, the members of the village council and other township or village officers, come within the prohibitory provisions of law in the manner hereinabove indicated.

Summarizing, and by way of specific answer to your inquiry, I am of the opinion that members of the board of union cemetery trustees are prohibited from being interested in the sale of personal services or supplies to the cemetery with which they are

connected, and members of the board of township trustees, members of the village council and other officers of such township and village cannot legally render services for compensation to a union cemetery formed by the joinder of such subdivisions, nor can they sell supplies thereto.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2580.

CEMETERY—VILLAGE—TRUSTEES MAY NOT RE-PURCHASE LOTS  
SOLD FOR BURIAL PURPOSES—EXCEPTIONS.

SYLLABUS:

1. *The trustees of a village cemetery may legally fix the terms of sale for lots in a cemetery so as to provide for the repurchase of said lots if the owner has not made use of them for burial purposes and desires to dispose of them. If, however, the terms of sale do not provide for the repurchase of the lots, no rule or regulation that might be made by the cemetery trustees would permit them to purchase lots which had once been sold, or any other lands for burial purposes.*

2. *The council of a municipality being empowered by statute, to provide lands for cemetery purposes, may purchase lots from lot owners in a municipal cemetery or authorize the purchase of the same providing said lots have not been used for burial purposes and are at the time of the purchase available and suitable for such purpose.*

COLUMBUS, OHIO, September 17, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your request for my opinion as follows:

“QUESTION: May the Trustees of a Village Cemetery, or the Council of such Village legally provide by rule or Ordinance, for the repurchase, from lot owners, of lots in such cemetery which the owners have not used, and wish to dispose of?”

By the terms of Section 3622, General Code, municipalities are empowered “to provide public cemeteries and crematories for the burial or incineration of the dead and to regulate public and private cemeteries and crematories.” Sections 4175 and 4178, General Code, read in part as follows:

Section 4175. “The Mayor of a village owning a public burying ground, or cemetery, may appoint a board to be known as the board of cemetery trustees. \* \* \*”

Section 4178. “The board of cemetery trustees shall have the powers and perform the duties prescribed in this chapter for the director of public service. \* \* \*”

The powers and duties of directors of public service in cities, with reference to public cemeteries, are set forth in Sections 4161 et seq. of the General Code. Section 4161, General Code, reads as follows:

“The director of public service shall take possession and charge, and have the entire management, control, and regulation of public graveyards, burial grounds, and cemeteries located in or belonging to the corporation,