

6350

CEMETERY—MONEYS FROM GENERAL FUND OF A TOWNSHIP MAY NOT BE EXPENDED TO ACQUIRE LAND TO ESTABLISH CEMETERY — SECTION 3441 G. C. — PROVISIO, UNLESS VOTE TAKEN—SECTION 3445 G. C.

SYLLABUS:

Moneys from the general fund of a township may not be expended to acquire land to establish a cemetery, as provided for by Section 3441, General Code, unless a vote is taken with respect thereto as provided for by Section 3445, General Code.

Columbus, Ohio, September 10, 1943.

Hon. Joel S. Rhinefort, Prosecuting Attorney,
Toledo, Ohio.

Dear Sir:

Your request for my opinion reads:

“The trustees of ‘X’ township, in Lucas County, have requested that I ask for your opinion in the following matter:

The existing township cemetery is insufficient for present needs, and the surrounding conditions are such that it is impossible to enlarge the same by the acquisition of adjacent territory. The trustees therefore desire to purchase ground for cemetery use in another part of the township. Money for this purpose can be appropriated from the General Fund, and the trustees do not intend to levy a tax.

General Code 3445 requires the submission of the question of establishing a cemetery to the electors at a regular annual election.

General Code 3455 requires no such submission where additional area is added to an already existing cemetery.

The trustees desire to know whether, in the instant case, it is necessary to submit the question to the electors of the township, in view of the fact that no tax is to be levied to pay for the new ground.”

The legislation in this state with reference to township cemeteries is incorporated in Sections 3441 to 3475, inclusive, of the General Code.

Provision is made for the procedure to be followed for the establishment of cemeteries. And after the same have been so established, provision is further made for adding to the area of the same. I deem it advisable at the outset, to quote the legislative enactments that seem to me to be pertinent to your inquiry, to wit:

Section 3441: "Township trustees may accept a conveyance of, or purchase, and inclose, improve, and protect such lands in one or more places within the township as they deem necessary and proper for cemetery purposes. If suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not to exceed ten acres, by proceedings in accordance with the provisions of law regulating the appropriation of private property by municipal corporations."

Section 3442: "No such appropriation shall be made until the court is satisfied that such lands can not be obtained by contract on reasonable terms, nor shall any lands be so appropriated within two hundred yards of a dwelling house, or on which there is a house, barn, stable, or other building, or an orchard, nursery, medical or mineral spring, or well yielding oil or salt water."

Section 3444: "To defray the expenses of such purchase or appropriation, inclosing and improving of such lands, the trustees may levy for one or more years a tax sufficient for that purpose, not to exceed two thousand dollars in any one year, and each year thereafter such sum as may be necessary for the needful care, supervision, repair, and improvement of such cemeteries."

Section 3445: "Before such purchase or appropriation is made or conveyance accepted the question of establishment of such cemetery, on the order of the trustees, or the written application of any six electors of the township, shall be submitted to a vote of the electors of the township at a regular annual election. Such order or application shall specify as near as may be the proposed location of such cemetery, and the estimated cost thereof, including inclosing and improving it."

Section 3446: "On the making of such order or the filing of such application, and at least twenty days before the election, the clerk shall post written notices in at least three public places in the township, that the vote will be taken. The electors who favor the proposition shall place on their ballots for township offices the word 'cemetery'. If a majority of the votes given at such election on such proposition is in favor thereof, the trustees shall procure the lands for that purpose and levy taxes as hereinbefore provided."

Section 3455: "In any township in which there is a cemetery owned or partly owned, by such township, if in the opinion of the trustees of the township, it is desirable to add to the area of

such cemetery by the purchase of additional grounds, and if suitable lands can not be procured by contract on reasonable terms, they may appropriate lands therefor, not exceeding five acres, as provided for establishing a township cemetery; provided however, if any person shall erect a dwelling house within two hundred yards of an established cemetery in such case the restrictions of section 3442 shall not apply, and such additional lands shall be considered a part of such original cemetery even though separated therefrom by a road or highway.

For such purpose, they may levy a tax not to exceed one-half of one mill, on the taxable property of the township, for a period not exceeding five years, which shall be collected as other taxes, and appropriated for the purchase or appropriation of such additional cemetery grounds which shall become part of such township cemetery, and be governed in all respects as provided by law."

It will be observed that Section 3455, supra, to which you have directed my attention, relates solely to the right of the township trustees to add to the area of an existing cemetery. I can find no language therein or in any subsequent provisions of said legislation which necessitates the holding of any election when it is the intention of the trustees to act thereunder. Support for the statement that such election is not contemplated seems manifest in view of the holding of the court in the case of Norton v. Trustees of Montville Township, 8 O. C. C., 335, decided at the February, 1894, term of court. At page 338 of the opinion the court said :

"We are of the opinion that the provision of section 1465, 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 lands for the extension of the area of a cemetery already established according to the requirements of such section."

I have made a careful examination of the legislation then in force and effect, which differs to some extent from that presently in existence. However, I do not consider it necessary to set forth herein the several provisions of law which the court had under consideration in the aforementioned case. Suffice it to say that I am convinced of the soundness of that decision. If the question therein raised were before the courts today, I am satisfied the same conclusion would be reached in construing the current legislation. However, since it is my opinion that Section 3455, supra, is not controlling because of the facts stated in your letter, I do not regard it necessary to devote further time to the procedure to be followed when township trustees contemplate adding to the area of an existing cemetery. I say this, because your letter discloses that the trustees propose to purchase lands in another portion of the township which is not adjacent

to an existing cemetery. The other sections therefore, which have been above quoted have particular application to your situation.

The wording of Section 3445, *supra*, is clear and unambiguous. Before the township trustees are authorized to purchase lands to establish a cemetery, there must be an election. I can find no language therein to the effect that one rule prevails when it is sought to defray the cost of such purchase by a levy against the township property and another rule should prevail when the cost of such land is to be paid for from the general funds of the township. It seems to me that it could be said the fundamental or underlying reason for the submission to the township electorate of the question of whether or not lands should be purchased is two-fold. First, to give said electors the right to determine whether it is necessary to establish a cemetery. Second, if it is so determined, to thereby authorize the levying of a tax against the township property.

Your question concerns the matter of the expenditure of public funds. Such right is always subject to the limitations that such public funds can only be disbursed by clear authority of law and upon compliance with the statutory provisions relating thereto.

See *State, ex rel. v. Pierce*, 96 O. S. 44; *State, ex rel. v. Maharry*, 97 O. S. 276; *Board of Education v. Clermont County Board of Education*, 19 O. App. 18.

In further support of my conclusion as herein stated, I call attention to the case of *Weaver et al., Trustees vs. Cherry et al.*, 8 O. S., 564, which was decided in 1858. I do not believe I need to quote the legislation which was then in effect. As in the case of *Norton v. Trustees of Montville Township, supra*, said legislation does not differ materially from that in force at this time. Sufficient facts are stated in the headnote of the first mentioned case to disclose the nature of the question the court had before it. Said headnote reads:

“Where township trustees are authorized by one section of a statute, to purchase land for a cemetery, and to assess a certain per centum upon the taxable property of the township to pay for the land purchased; and another section provides that before such assessment shall be made, it shall be necessary to submit the question to the voters of the township at an election for that purpose duly called—Held: * * *

2d. That by a reasonable construction of the two sections of the statute, an election, and vote in favor of the tax, are preliminary requisites indispensable to authorize the trustees to pro-

ceed under the statute to purchase a cemetery, and to direct township orders to be issued in payment thereof.

3d. Where, in such a case, the land has been purchased, deed delivered, and township orders issued in payment, upon application of the trustees, the contract of purchase should be rescinded, the land reconveyed, and the orders surrendered up to be canceled."

In specific answer to your question it is therefore my opinion that, moneys from the general fund of a township may not be expended to acquire land to establish a cemetery, as provided for by Section 3441, General Code, unless a vote is taken with respect thereto as provided for by Section 3445, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.