

estates, and that the legislature in substituting the word "fiduciary" for the words "executor or administrator" in the next to the last paragraph of section 10506-41, General Code, meant to require the trust companies and other fiduciaries to be subject to the exception theretofore relating only to executors and administrators, namely, that the approval of the probate court must be obtained for investments that section 10506-41, General Code, authorized.

The construction of section 10506-41, General Code, herein set forth, is harmonious with the article appearing in Vol. 5, Cincinnati Law Review, pages 429 to 441, entitled "Investments by fiduciaries under the new Ohio Probate Code."

In view of the foregoing and in specific answer to your question, I am of the opinion that section 10506-41, General Code, as amended (115 O. L. 396-397), requires all fiduciaries, including trust companies administering an estate, with funds to be invested, to obtain the approval of the probate court for investing in the classes of investments authorized by said section.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2781.

UNION CEMETERY—BOARD OF TRUSTEES NOT ENTITLED TO CUSTODY OF PROCEEDS OF TAXES LEVIED FOR CEMETERY PURPOSES BY COUNCIL OF VILLAGE AND TRUSTEES OF TOWNSHIP.

SYLLABUS:

Where a union cemetery is established and maintained by a village and township, the board of trustees of such cemetery, appointed by virtue of section 4193-1, General Code, has no right to the custody of the proceeds of taxes levied for cemetery purposes by the council of the village and trustees of the township.

COLUMBUS, OHIO, June 4, 1934.

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

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

"Sections 4183 et seq. refer to the establishment of a union cemetery and the method of procedure in keeping up the same. Section 4193-1 provides for the appointment of cemetery trustees.

QUESTION: In the establishment of a union cemetery by the joining of a village and a township for cemetery purposes, may the funds arising from taxes levied by the council of the municipality and the trustees of the township be turned over to the cemetery trustees, or are such funds to remain in the treasuries of the village and the township and be expended upon the order of the cemetery trustees?"

Section 4183 General Code, provides for the uniting by the councils of two or more municipal corporations or of one or more such corporations and the

trustees of a township or townships in the establishment and management of a cemetery. Section 4186, General Code, provides that appropriation of land for such purpose, when necessary, shall be made by the municipal corporation, or if there be more than one municipality, then by the one having the largest population at the last Federal census. Section 4187, General Code, provides that the title to such lands shall be held by the municipal corporation making the appropriation in trust for the use of the inhabitants of the subdivisions uniting for such cemetery. Sections 4188, 4189, 4192 and 4193, General Code, read as follows:

Section 4188. "The expense of the purchase, or of the proceedings in case of appropriation, and the damages awarded, or both, shall be borne by the corporations and townships in proportion to the property of each on the duplicate for taxation. The amount of bonds issued by each in any case, for such cemetery purposes, shall be in the same proportion, and the percentage of taxation for all such cemetery purposes shall be the same in the corporations and townships, but moneys in the hands of the trustees of the cemetery, derived from any source, not needed to keep in order or embellish the grounds, by resolution of the council and trustees of the municipalities and townships interested, may be applied to the expenses of purchase, or appropriation and damages awarded, or both, in securing additional lands for the cemetery."

Section 4189. "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."

Section 4192. "In case of a union for cemetery purposes between a municipal corporation and a township, the council of the corporation and the trustees of the township shall have a joint meeting at the council-chamber of the corporation, on the day of the first regular meeting of the council in the month of May of each year, for the purpose of determining the rate of tax to be levied upon the taxable property of the corporation and the township for the purposes herein required. Upon the passage of a joint resolution by a majority of the members of the council and the trustees, fixing the rate of taxation, the clerk of the corporation shall certify such rate to the auditor of the county for assessment and collection. If there is more than one municipal corporation or township united for such purposes, the councils and trustees of the townships shall become such joint body with the same powers as if there had been one such corporation and township, and the clerk of the corporation containing the greatest number of inhabitants shall certify to the auditor as above provided, the rate of taxation."

Section 4193. "The trustees of such township or townships, or the council or councils of such municipal corporation or corporations may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise."

Section 4193-1, General Code, reads in part 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. * * *

Your question relates only to the proceeds of taxes levied by the subdivisions involved for cemetery purposes. It has been held in Opinions of the Attorney General for 1918, Volume I, page 918, that money received from gifts and sales of lots are not turned into the municipal or township treasury but are under the control and charge of the cemetery trustees. The same conclusion was reached in Opinions of the Attorney General for 1921, Volume I, page 509. While the board of cemetery trustees may create a permanent endowment fund, and for such purpose may add to the price of burial lots and receive gifts, there is nothing in the statutes which would give them the right to the custody of funds raised by taxation. Section 4193-1 provides that they shall have all the powers and perform all the duties exercised and performed by directors of public service of cities under sections 4161 and 4168, inclusive, General Code. Although, these statutes provide that the director of public service shall have the entire management, control and regulation of a city cemetery, there is nothing therein which would give him the custody of such funds. Section 4169, General Code, provides that all moneys received by him for endowment purposes shall be turned over to council, and it was held in Opinions of the Attorney General for 1912, Volume II, page 1747, that moneys so received by council shall be placed in the custody of the city treasurer. In Opinions of the Attorney General for 1931, Volume III, page 1488, it was held that the trustees of a county tuberculosis hospital had no right to the custody of funds raised by taxation for such hospital, because there was no statutory authority therefor. It is significant that in the case of district tuberculosis hospitals maintained by two or more counties section 3152-1, General Code, expressly provides that the proceeds of taxes levied therefor shall be paid to the

board of trustees and the trustees, who are required to give bond, are authorized to receipt therefor and to deposit said funds in a bank or trust company. I find no such authority with reference to the trustees of a union cemetery.

Consequently, I am of the opinion that where a union cemetery is established and maintained by a village and township, the board of trustees of such cemetery, appointed by virtue of section 4193-1, General Code, has no right to the custody of the proceeds of taxes levied for cemetery purposes by the council of the village and trustees of the township.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

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DISAPPROVAL, ABSTRACT OF TITLE, WARRANTY DEED, CONTRACT ENCUMBRANCE RECORD AND CONTROLLING BOARD CERTIFICATE RELATING TO THE PROPOSED PURCHASE OF A PARCEL OF LAND IN STARK COUNTY BY THE STATE OF OHIO.

COLUMBUS, OHIO, June 6, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You recently submitted for my examination and approval an abstract of title, warranty deed, contract encumbrance record No. 1433, and Controlling Board certificate relating to the proposed purchase by the State of Ohio for the use of your department of a parcel of land in Tuscarawas Township, Stark County, Ohio, which parcel of land is owned of record by one Mary Jarvis Rider and which is more particularly described as follows:

“Being a part of the S. E. $\frac{1}{4}$ Section 10, Township 12, Range 10 Stark County, and bounded and described as follows: Beginning at the point where the west line of said Quarter Section intersects the center line of Massillon-Wooster Road, State Highway No. 69, also known as the Lincoln Highway, U. S. Route No. 30; thence along said Quarter Section line in a northerly direction, a distance of 789.60 feet to a point; thence in an easterly direction at right angles to aforesaid Quarter Section line, a distance of 576.22 feet to a point in the west line of Tudor Avenue, as recorded on the plot of Country Club Allotment; thence in a southerly direction along the west line of Tudor Avenue, a distance of 822.48 feet to a point in the center line of said Massillon-Wooster Road; thence in a westerly direction along said center line, a distance of 577.16 feet to the place of beginning and containing 10.66 acres of land, more or less.”

Upon examination of the abstract of title submitted which is certified by the abstracter under date of May 24, 1934, I find that I am unable to approve the title of Mary Jarvis Rider in and to the above described tract of land, or to