

for the purchase of Lot 53 under investigation, and of other lots desired for the use of the said Ohio State University.

I am herewith returning to you said abstract of title, warranty deed form and encumbrance estimate.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

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820.

**BURIAL COMMITTEE—APPOINTED BY COUNTY COMMISSIONERS TO PROVIDE INTERMENT OF SOLDIERS—WHEN CONTRACT WITH UNDERTAKER, UNLAWFUL—NO FINDING FOR RECOVERY WHEN SERVICES PERFORMED.**

**SYLLABUS:**

1. *A burial committee authorized under the provisions of Sections 2950, et seq., of the General Code, may not lawfully enter into a contract with an undertaker for the burial of a person described in said section, who dies without dependents and leaves an estate which is amply sufficient to defray such expense.*

2. *In the event that such burial committee has determined that the family is unable, for want of means, to defray such expenses and a contract has been entered into with an undertaker, and payments made to such undertaker who has performed his part of the contract, a recovery may not be had against such undertaker in the absence of fraud or collusion, in which such undertaker participates, notwithstanding it develops that the decedent left an estate sufficient to defray such expenses, and left no dependents.*

3. *Under such circumstances, when payments have not been made, the county commissioners or county auditor may set up as a defense to an action to recover upon such contract the fact that the same was illegally entered into on account of the financial status of the decedent.*

COLUMBUS, OHIO, September 3, 1929.

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

GENTLEMEN:—Acknowledgment is made of your communication which reads:

“You are respectfully requested to furnish this department your written opinion upon the following:

Sections 2950 to 2956 of the General Code relate to payment of expenses of burial of indigent soldiers, sailors and marines, and of their indigent mothers, wives and widows.

Question 1. When a soldier dies leaving no dependents, and leaves an estate according to the records of the Probate Court sufficient to cover the expense of burial, and the burial committee, without proper investigation, makes a contract with an undertaker for the burial, may the commissioners of the county, or the county auditor, refuse to pay the \$100 provided by law, notwithstanding the fact that the committee has made a contract with the undertaker?

Question 2. In the event that an undertaker has been paid the sum of \$100, in such cases may the examiner from this department make a finding against the undertaker, and recover the amount so paid?

We are enclosing herewith a letter from one of our examiners which will give you the details of the cases which he has under consideration."

According to the letter directed to you from one of your examiners, which you enclose, some forty-three cases in one county exist in which payments have been made to undertakers, in pursuance of contracts entered into, and in which it is claimed that the decedent had an estate sufficient for the purpose of the burial expenses. The said examiner further states that it is rather conclusively proven that the burial committees made no investigation in connection with such cases.

Section 2950, General Code, requires the county commissioners to appoint two suitable persons in each township and ward of the county who shall, with the approval of the family or friends of the deceased, contract at a fair and reasonable price with the undertaker selected by such family or friends, and cause to be interred in a decent and respectable manner the body of any honorably discharged soldier, etc., "who dies not having the means to defray the necessary funeral expenses."

Section 2951 provides that such committee shall hold their appointment "so long as they serve to the satisfaction of the county commissioners," and further provides that the committee shall use the forms of contracts described in said act. The section further limits the amount that may be contributed by the county to \$100.00, and provides that any remaining cost shall be paid by the family or friends of the deceased.

Section 2952, General Code, provides :

"Before they assume the charge and expense of any such burial, the persons so appointed shall satisfy themselves beyond a reasonable doubt, by careful inquiry, that the family of the deceased, is unable, for want of means, to defray the expenses, or that the family may be deprived of means actually necessary for their immediate support. Thereupon they shall cause to be buried such persons, and make a report thereof to the county commissioners of the county, setting forth the fact that they found the family of such deceased person in indigent circumstances, and unable to pay the expenses of burial, and the name, rank and command to which he belonged if a soldier or sailor, the date of death, place where buried, occupation while living, also an accurate itemized statement of the expenses incurred by reason of such burial."

Section 2954, General Code, describes the form of contract which is to be signed by the undertaker which requires an itemized statement of the things to be furnished in connection with such burial.

Section 2955, General Code, provides :

"The undertaker shall present his itemized bill and contract to the county auditor, upon printed blanks furnished by the auditor, and make oath that he has honestly and faithfully performed his contract, and that the bill and contract attached is a true copy of the one left with the parties who engaged his services, and covers the entire expense of such funeral, in order to obtain his warrant. County auditor shall have printed such necessary blanks, and distribute them to clerks of townships of the county from whom undertakers can procure them."

Section 2956, General Code, provides that if a saving of money is effected by reason of donations of items covered in the contract, the amount of such saving shall go to the family of the deceased or those who may have cared for the deceased in life or remain in the general fund of the county in the discretion of the committee. The section also further provides :

"If it appears that life insurance, or any fraternity funds are coming to the family of the deceased, the committee shall withhold their signatures to the contract until such matters are definitely settled."

Section 2957, General Code, provides that upon securing report from such committee and statement of expenses, the county commissioners shall transcribe all facts contained in such report and "certify the expenses thus incurred, to the county auditor, who shall draw his warrant therefor, payable to the person or persons designated by the county commissioners, upon the county treasurer, to be paid from the county fund."

In analyzing the foregoing sections, it appears that the county commissioners, after making the appointment of the burial committee have nothing to do excepting the performance of a ministerial duty of certifying the results of such committee's action to the county auditor. While such commissioners have power to appoint the committee in the first instance, and also to remove such members of the committee, they do not have the power to exercise the discretion that is vested in such committee. As a matter of law, such committee may not enter into a contract with an undertaker unless the basic facts relative to the family or friends of the decedent not having the means to defray the necessary funeral expenses, etc., exists. However, it appears within the power of the committee to determine whether or not such facts do exist, and in the absence of fraud, collusion or abuse of discretion, the committee's determination will not be disturbed.

In an opinion found in Opinions of the Attorney General for the year 1921, page 48, after mentioning the sections hereinbefore referred to, it was stated.

"It is clear from the foregoing statutes that the Legislature did not intend that the county commissioners should make the contract with the undertaker for a soldier's burial. On the contrary, Section 2950, G. C., makes it clear that it is the township or ward committee 'who shall contract' with the undertaker. Such contract is not to be made until said committee upon 'careful inquiry' have satisfied themselves 'beyond a reasonable doubt' that the family of the deceased 'is unable, for want of means, to defray the expenses, or that the family may be deprived of means actually necessary for their immediate support.' Whether a given family is in the condition described by the Legislature is to be determined by the committee in its discretion, and its judgment in that regard is, we think, binding upon the county commissioners."

Also, in an opinion found in the Opinions of the Attorney General for the year 1919, page 494, it was held, as disclosed by the first and second branches of the syllabus:

"1. The township or ward committee appointed by the county commissioners under Section 2950, by the provisions of Sections 2950 to 2957, inclusive, are empowered and authorized to enter into a contract for the burial of the deceased soldier or other person named in Section 2950, at a cost not to exceed \$75.00.

2. When such committee has so contracted for such burial, in conformity with the provisions of the above sections, and in the absence of fraud or collusion, the county commissioners are not authorized to review the action of said committee or modify their contract so made."

The status of public contracts entered into under circumstances such as you describe, is a subject somewhat difficult to determine, under decisions in Ohio. It may be stated, however, that it is definitely determined in this State that, when contracts are

entered into by public officials with reference to matters concerning which such boards have no power or right to contract; such contracts are void ab initio. Under such circumstances, recoveries for the benefit of the public treasury have been upheld even though there was no fraud or collusion and the public had been benefited by services and material furnished by the party with whom the board had contracted. The latest expression upon the subject is that of the Supreme Court of Ohio in the case of *Wright vs. Clark, et al.*, 119 O. S. 463. However, that case is clearly distinguishable from the case you present, for the reason that a statute expressly inhibits a village officer from entering into a contract with the village for the furnishing of services and supplies. In the case we are considering, the statutes expressly authorize the burial committee to make a contract, and such contract when made cannot be avoided unless it is as hereinbefore indicated, found to be entered into pursuant to fraud, collusion or abuse of discretion. I have no doubt but that if an action were instituted to enjoin the performance of such contract before either party had acted thereunder the same could probably be maintained under such circumstances as you describe. That is to say, undoubtedly an action to enjoin the undertaker from furnishing the supplies and services could be maintained. However, it is believed that a far different situation exists where, in pursuance of such a contract, such undertaker has furnished the service in the absence of any knowledge flowing to such undertaker as to the financial status of the decedent. In the case of *State vs. Fronizer*, 77 O. S., page 7, it was held in substance that when a building company had furnished material and supplies to the county under a contract, to which, through some inadvertence, the certificate of the county auditor as to the existence of the fund available for such contract was not attached, such sums as were paid to such company could not be recovered back. In other words, the case held that equity left the parties in the position in which they had placed themselves, and there could be no recovery under such circumstances for the county. This case, of course, is distinguishable from the case of *Wright vs. Clark*, supra, because it was lawful for the county to enter into such a contract if done in the proper manner. It is believed that the principle laid down in the Fronizer case is applicable here, and that a recovery of such sums as had been paid may not be had in the absence of fraud or collusion on the part of the undertaker having the contract.

The question as to whether or not a recovery may be had by the undertakers in those instances when they have not been paid is not so easy of solution. It seems a harsh rule that would require the undertaker, at his peril, to determine whether or not the facts existed which would justify the committee in making a contract. On the other hand, it would seem that if the basic facts do not exist which authorize him to enter into a contract, the contract would be illegal, and the question could probably be raised before the money is drawn from the county treasury. In the event the county commissioners refuse to certify to the county auditor or the county auditor refuses to draw his warrant in the case of certification, it is believed that if a mandamus suit should be instituted to require either the commissioners or the auditor to act, such officers could probably set up as a defense to such action the fact that the contract was entered into in violation of law. There is no question but that it is the duty of such a committee to make a proper investigation, and when they enter into a contract authorizing the burial at county expense, of persons who have property ample to bear such expense, it is a clear dereliction of duty. Such facts established in a proper proceeding will have the effect of voiding such a contract. While, as above stated, this would seem a harsh rule, it is generally held in Ohio that persons are bound to know the extent of the authority of officials with whom they transact business.

In view of the foregoing, you are specifically advised that:

- (1) A burial committee, authorized under the provisions of Sections 2950, et seq.,

of the General Code, may not lawfully enter into a contract with an undertaker for the burial of a person described in said section, who dies without dependents and leaves an estate which is sufficient to defray such expense.

(2) In the event that such burial committee has determined that the family is unable, for want of means, to defray such expenses, and a contract has been entered into with an undertaker, and payments made to such undertaker who has performed his part of the contract, a recovery may not be had against such undertaker, in the absence of fraud or collusion, in which such undertaker participates, notwithstanding it develops that the decedent left an estate sufficient to defray such expenses and left no dependents.

(3) Under such circumstances, when payments have not been made, the county commissioners or county auditor may set up as a defense to an action to recover upon such contract the fact that the same was illegally entered into on account of the financial status of the decedent.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

821.

COUNTY COMMISSIONERS—MAY MAKE SUPPLEMENTAL APPROPRIATION UNDER SECTION 9921-1c, GENERAL CODE, FOR COUNTY AGRICULTURAL AGENT IN EXCESS OF AMOUNT APPROPRIATED UNDER REPEALED SECTION 9921-4, GENERAL CODE.

**SYLLABUS:**

*Under the provisions of Section 9921-1c, General Code, enacted as a part of House Bill No. 72, passed by the 88th General Assembly, the board of county commissioners of a county may make a supplemental appropriation to be covered into the state treasury for the compensation and expenses of the county agricultural agent of such county in excess of the original appropriation for such purposes made by said county commissioners, under the then provisions of Section 9921-4, General Code, provided such supplemental appropriation, if the same, together with previous appropriations during the fiscal year for such purposes, exceeds three thousand dollars, is made by the unanimous action of all of said county commissioners, and provided further that such supplemental appropriation, together with all other appropriations against the general fund of the county, does not exceed the amount set forth as available for expenditure from such fund in the official certificate or amendment thereof filed with the county commissioners by the budget commission prior to the making of such supplemental appropriation.*

COLUMBUS, OHIO, September 3, 1929.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication, which reads as follows:

“Section 9921-4 of the General Code, authorizing county to make appropriations for support and expense of a county agricultural agent, not to exceed \$1,500.00 annually, was repealed in House Bill No. 72, enacted by the 88th General Assembly, effective July 19, 1929, and Section 9921-1c, was enacted,