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CEMETERY—TOWNSHIP TRUSTEES—RESOLUTION TO REQUIRE WORK IN CONSTRUCTION OF FOOTERS FOR MONUMENTS TO BE PERFORMED BY SEXTON OF TOWNSHIP CEMETERY—OWNER OF BURIAL LOT CAN NOT ERECT SUCH FOOTER EVEN THOUGH HE PROMISED CONFORMANCE WITH REQUIREMENTS AND WOULD BE UNDER SUPERVISION OF SEXTON.

SYLLABUS:

Where the township trustees, by a resolution, require work necessary in the construction of footers for monuments to be performed by the sexton of a township cemetery, an owner of a burial lot in such cemetery can not erect such footer even though he desires to do so in accordance with the required height and under the supervision and direction of such sexton.

Columbus, Ohio, September 16, 1949

Hon. Howard G. Eley, Prosecuting Attorney
Darke County, Greenville, Ohio

Dear Sir :

Your request for my opinion reads as follows :

"The Trustees of York Township of Darke County, Ohio, have requested that I obtain an opinion from your office as to whether they, as trustees of the township cemeteries, can by resolution require all work necessary in the construction of footers for monuments be performed by the sexton of the cemetery.

"An owner of a lot in one of York Township's cemeteries insists on erecting a footer himself, but in accordance with the required height and under the supervision and direction of the sexton. The trustees refuse to permit the owner to do so, and insist that only the sexton can do this work. The trustees state that this resolution is necessary in preserving the uniformity and conducting the maintenance and upkeep of the cemetery.

"Like resolutions have been passed by most of the township trustees of our county, and prior decisions of your office in similar cases have upheld the right of the trustees to pass such resolution.

"The lot owner has threatened suit on the ground that the resolution is unnecessary and arbitrary and deprives him of his rights."

Section 3441 of the General Code reads in part as follows :

"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. * * *"

Section 3447 of the General Code reads as follows :

"The trustees shall have such cemetery laid out in lots, avenues and paths, number the lots and have a suitable plat thereof made, which shall be carefully kept by the township clerk. *They shall make and enforce all needful rules and regulations* for its division into lots, and the allotment thereof to families or individuals, *and for the care, supervision and improvement thereof, * * **"

(Emphasis added.)

Section 3448, General Code, provides for the sale of lots and reads in part as follows:

“* * * Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute, and which shall be recorded by the township clerk in a book for that purpose, * * * .”

Section 3451, General Code, provides that the title right of possession and control to and in all public graveyards and burial grounds located without the corporate limits of any city, or village, except such as are owned by or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authority of any city, or village, shall, severally be vested in the trustees of the township where located.

From the above it is clear that the title to township cemeteries is in the township trustees and the control and supervision thereof is in such trustees. There is no provision anywhere in the statutes where the deeds to burial lots are required to be recorded in the county recorder's office, all of which indicates that the interest or title which a purchaser is vested with on procuring a deed for a cemetery lot, is not that which is procured through an absolute and unconditional sale of lands. This is borne out by Section 3450 of the General Code, which provides:

“No lot held by any individual in a cemetery, in any case shall be levied on or sold on execution.”

In the case of *Smiley, et al. v. Bartlett, et al.*, 6 O. C. C. 234, the following proposition of law is laid down in the third branch of the syllabus:

“The right of burial in a *public* or church cemetery, though conveyed by grant, is nevertheless an easement only; * * * .”
(Emphasis added.)

In the case of *Frazer v. Lee, et al.*, 8 O. App. 235, the court held:

“A document, in order to effectually pass title to a burial lot, need not take the form of a real estate deed.”

The following statement appears on page 239 in the report of that case:

“It is clear from a careful reading of this chapter (referring to Chapter 6 of Division III, Title XI of the General Code) that the deed authorized to be given to a purchaser of a burial lot con-

veys only the right of burial therein, and constitutes only an easement of burial. * * *” (Parenthetical matter added.)

From a reading of Chapter 6, above referred to, it seems clear that township trustees hold the absolute title to cemeteries such as referred to in your letter, and they are not only authorized and empowered, but have a duty to care for, supervise, beautify and improve such cemeteries and shall make and enforce all needful rules and regulations for that purpose and, as a matter of fact, the form of the habendum clause generally used in a deed for the sale of a cemetery lot by trustees reads as follows:

“To have and to hold the same * * * for the purposes of burial only, subject to the cemetery laws of this state, and the rules and regulations prescribed by the trustees of said township, or the directors of said cemetery with reference to the same.”

It appears to me that the purchaser of a burial lot in a township cemetery does not receive such a title or interest whereby he can perform such acts and erect footers or create other structures or improvements himself where same is contrary to reasonable resolutions passed by the township trustees.

In specific answer to your question, it is my opinion that where the township trustees, by a resolution, require work necessary in the construction of footers for monuments to be performed by the sexton of a township cemetery, an owner of a burial lot in such cemetery can not erect such footer even though he desires to do so in accordance with the required height and under the supervision and direction of such sexton.

Respectfully,

HERBERT S. DUFFY,
Attorney General.