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FINAL JUDGMENTS—EFFECT OF GRISWOLD ACT UPON FISCAL OFFICER OF SUBDIVISION IN CERTIFYING LEVY FOR PAYMENT OF SAID JUDGMENTS—ANTICIPATE IMMEDIATE AND FUTURE NEEDS—SECOND SENTENCE OF SECTION 2295-13 G. C. INOPERATIVE—TREASURER OF SUBDIVISION NOT AUTHORIZED TO INVEST PROCEEDS OF JUDGMENT FUND LEVY IN SECURITIES.

1. *The fiscal officer of the subdivision in certifying the levy for the payment of final judgments provided for by section 5649-1c G. C. should anticipate so far as possible the amount needed for the payment of future judgments as well as that needed for the immediate payment of judgments already rendered.*

2. *The second sentence of section 2295-13 G. C. is inoperative; and the treasurer of the subdivision is not authorized to invest the proceeds of the judgment fund levy in securities.*

COLUMBUS, OHIO, July 1, 1922.

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

GENTLEMEN :—The bureau recently submitted to this department a question concerning the interpretation of section 5649-1c of the General Code, 109 O. L. 345, which provides as follows:

“On or before the first Monday in May of each year, the fiscal officer of the municipal corporation or other political subdivision shall certify to the council, county commissioners, board of education or other tax levying authority of his political subdivision the amount of tax necessary to provide for the payment of final judgments against the political subdivision, except in condemnation of property cases, and said tax levying authority shall place such amount in the annual tax levying ordinance, resolution or other measure for the full amount certified.”

The inquiry partly put in the language of the city solicitor who has raised the question, is as follows:

“I am unable to understand how the fiscal officer of the city can comply with section 16 of the Griswold bill, by certifying to council the amount necessary to provide for the payment of final judgments against the city, unless this section means final judgments which have already been obtained. If that be true, that a person obtains a judgment against the city and such person would have to wait until the amount could be certified, as provided in section 16, then the city would have to pay interest for quite a while, as a judgment would naturally bear interest until it was paid.

Question: Or is it the meaning of this section that a fiscal officer shall merely approximate how much money will be needed to pay final judgments for the coming year?”

It may be said generally of the feature of what is known as the Griswold act (of which the above quoted section is a part) that is exemplified by the section which is quoted that the act in this respect aims to effect a separation of the fiscal operation of paying final judgments from that of retiring funded debt. Prior to

the enactment of the law in question these functions were united in municipal corporations. The former law (see sections 4506 to 4522 inclusive of the General Code) provided for the creation of a single fund known as the "sinking fund" from which the funded debt and interest and final judgments were indiscriminately paid. This fund was administered by the board of trustees of the sinking fund. This fiscal scheme produced unfortunate results in smaller municipalities whenever a considerable amount of judgments had to be paid, and an impairment of the sinking fund from the point of view of the requirements of the funded debt resulted. As the practice (now recognized and required by the Griswold act) of issuing serial bonds grew up in many of these places, this procedure tended to force the issue as between refunding of the bonded debt (a questionable procedure from the constitutional point of view) and temporary default.

The situation was aggravated by the necessity existing in some of these places of permitting certain classes of claims really current to go to judgment, the practical result of which was in many instances to raid the sinking fund for current expenses, and to live today by the expedient of avoiding the payment of yesterday's debts; or, put in another way, by preferring simple contract creditors to bondholders.

These evils are met in the Griswold act not only by the new provision above quoted, but by appropriate amendment of sections 4506, 4513 and 4517 of the General Code striking from each all reference to the levy of taxes for sinking fund purposes that shall include the payment of final judgments, and by the enactment of section 2295-13 of the General Code which provides as follows:

"All moneys collected from taxes or other sources for the payment of final judgments against the political subdivision (other than condemnation of property cases) shall go into a *separate fund* of the subdivision, to be known as 'Judgment Fund.' All powers and obligations now vested by law in any board of sinking fund trustees or commissioners of any county school district, municipality or other political subdivision relating to the receipt, investment and application of funds raised by taxation or otherwise for the payment of said final judgments are hereby transferred to the treasurer of the subdivision. By an affirmative vote of not less than three-fourths of the members elected or appointed thereto, the county commissioners, board of education, city council or other chief tax levying authority of a political subdivision may transfer to the judgment fund from the bond payment or other fund of the subdivision any surplus in the latter not needed for the purpose of meeting the interest and retirement of the funded debt of the subdivision and which it deems necessary for the prompt payment of the said final judgments; provided that no such transfer shall be made from the sinking fund without the approval of the sinking fund trustees or commissioners."

But though this separation has been thus clearly made, it is the opinion of this department that there is discernable in this legislation no intent to alter the method of providing for the payment of final judgments further than by creating a separate fund for that purpose. This is clear we believe from the second sentence of section 2295-13 above quoted, which transfers to the treasurer of the subdivision the powers and obligation formerly vested in the sinking fund authorities "relating to the receipt, investment and application of funds raised * * * for the payment of * * * final judgments." In other words, by this simple legislative method of transfer the general assembly has declared it to be its intention that the treasurer shall do with the separate judgment fund, once it is raised, precisely what the

sinking fund authorities were formerly authorized to do. This point is important and will be referred to again in this opinion.

Approaching the problem from a slightly different angle, it is worthy of note that the phraseology of section 16 immediately under examination closely follows that of original section 4513 of the General Code, which section, as previously pointed out, was amended by the Griswold act so as to eliminate therefrom all reference to the payment of final judgments. The original section read as follows:

“Section 4513. On or before the first Monday in May of each year, the trustees of the sinking fund shall certify to council the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation for the payment of final judgments, except in condemnation of property cases, for the payment of interest on bonded indebtedness, and the rents due on perpetual leaseholds of the corporation not payable from a special fund, and the expenses incident to the management of the sinking fund. The council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full amount certified. Such taxes shall be in addition to all other taxes authorized by law.”

In this section it was rather clear that the fund for the creation of which the rate was required to be certified was a sinking fund—that is, a fund raised in anticipation of future obligations. That is to say, the amount of tax levied was not based upon immediate requirements in the sense of accrued obligations, but was predicated upon estimates or calculations as to future requirements. So much is apparent from the phraseology “to provide a sinking fund for the future payment of bonds, * * * for the payment of final judgments, * * * for the payment of interest.”

But this meaning becomes increasingly apparent under the original law when certain other sections are examined. Section 4514 provides:

“The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed * * *.”

See also section 4517 (amended in the Griswold act so as to eliminate reference to payment of final judgments as previously stated) which provided as follows:

“The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession.”

In short, the sinking fund trustees under the original scheme were to raise by taxation (or otherwise) a fund which was to be invested in securities or held in reserve to meet anticipated obligations. It is the opinion of this department that

Under the original law it was the duty of the sinking fund trustees to provide a reserve or sinking fund for the payment of judgments that might be rendered in the future. The policy was exactly the opposite of that suggested by the form of the solicitor's inquiry; that is, it was that the municipality should have a reasonable reserve on hand so that its judgment creditors could be promptly paid without the necessity of resort to drastic remedies or delay incident to the levy and collection of a tax after the judgment had been rendered. In short, judgment creditors were to be put, so far as practicable, in the same category with bondholders. And, as a matter of fact, they were in that category, for the trustees of the sinking fund were authorized to and did customarily draw upon general sinking fund balances, as above stated, in satisfaction of final judgments.

Coming now to the Griswold act, it will be observed that section 16 as already stated, is very similar to old section 4513 of the General Code so far as the latter refers to payment of final judgments. The only difference between the two is that whereas section 4513 expressly provided that there should be one sinking fund, the purpose of which should be in part to pay final judgments, present section 5649-1c does not refer to the proceeds of the tax for which it provides as a "sinking fund," but describes the amount of the tax as that necessary to provide for the payment of final judgments. This difference standing alone might become the basis of an argument to the effect that the intention of the general assembly was to change the procedure and limit the power and duty of the fiscal officer to the certification of the amount of tax necessary to provide for the payment of final judgments previously rendered. That this was not the intention of the general assembly is, however, made clear by the second sentence of section 2295-13, above quoted, wherein the general assembly attempts by the simple expedient of transfer above referred to, to authorize the treasurer of the subdivision to exercise all the powers and submit to all the obligations of the sinking fund trustees with respect, among other things, to the investment of funds raised for the payment of final judgments. This makes it clear that the intention of the general assembly was, as above stated, merely to separate the two funds without in any wise changing the nature of that part of the former fund which was raised for the purpose of paying final judgments.

It is therefore the opinion of this department that the words "to provide for the payment of final judgments" as used in section 5649-1c of the General Code are to be taken in the sense of provision by anticipation. This would seem to be the natural meaning of the words even if the other *indicia* of legislative intent were not present in the act; for had the legislature intended that the taxes should be raised for the purpose of paying judgments already rendered, it would doubtless have omitted the words "provide for." But all doubt on this point is resolved not only by the considerations previously mentioned, but also by the fact that the first sentence of section 2295-13, above quoted, provides for the existence of a judgment fund. Now, the word "fund" imports a continuing account. The legislature would not have created a fund for the payment of judgments if its intention had been that only judgments rendered prior to the tax levy should be paid therefrom.

All these conditions then require this department to answer the question submitted by the statement that the fiscal officer of the subdivision under section 5649-1c must anticipate or estimate how much money will be needed to pay final judgments for the coming year. Of course, if some judgments have previously been rendered and are unpaid for want of funds, and are of such character that bonds cannot be issued for their immediate payment under section 2295-8 of the General Code, there will be to that extent an element of certainty in his estimate; but it is clearly the intention of the general assembly that he shall anticipate the future on the basis of the experience of the past.

This department is regretfully obliged in passing to point out that the second sentence of section 2295-13, above quoted, which has been referred to as indicative of the legislative intent is probably inoperative. It will be observed that it attempts to transfer "all powers and obligations now vested by law in any board of sinking fund trustees or commissioners of any county, school district, municipality or other political subdivision relating to the receipt, investment and application of funds raised by taxation or otherwise for the payment of said final judgments." Had the former sections of the General Code, such as 4517, remained in force without amendment this transfer clause would have been operative. Unfortunately, however, the general assembly at the same time amended all such sections so as to strike out of them all reference to any powers and obligations "relating to the receipt, investment and application of funds * * * for the payment of said final judgments." So that there are now no statutes in the state (unless some unimportant ones have been overlooked) giving any sinking fund authorities any powers or imposing upon them any obligations with respect to the management of funds raised for the purpose of paying final judgments. Hence, the second sentence of the section must fail.

"The provision of section 16 of article II of the Constitution of Ohio, providing that no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, is mandatory. The inclusion, by reference, of the provisions of a repealed statute is in violation of this provision of the Constitution of Ohio and void.

The statute defining the duties, powers, liabilities and penalties imposed upon deputy assessors being repealed, the provisions of section 17 of the act of the general assembly of Ohio, passed May 7, 1915 (106 O. L., 246), that the elected assessor 'shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed,' are unconstitutional and void."

State ex rel. vs. O'Brien, 95 O. S. 167.

The result of this situation is that literally there is no authority on the part of any one to pay final judgments, though perhaps enough authority can be construed by inference from the valid portions of sections 5649-1c and 2295-13 for this purpose; at any rate, there is no authority on the part of the treasurer of a subdivision or any one else to invest the judgment fund in securities. Being general moneys of the subdivision it may of course be placed in depositories under the general laws. This situation should be remedied by legislation.

Respectfully,

JOHN G. PRICE,

Attorney-General.