

any part of the cost of said improvement out of its contingent fund or to levy a tax for said purposes."

Since the sidewalk in legal contemplation is deemed a part or portion of the street and the term "streets" includes sidewalks, it is obvious that the conclusion of the opinion equally affects the sidewalks of such streets as abut upon public school property, exempting them against special assessment by the city for purposes of improvement. It is true, section 3866 G. C. provides that when deemed necessary by a municipal corporation to build or repair sidewalks, curbing or gutters along that portion of a street, alley or public highway which passes by or through public wharves, market spaces, parks, cemeteries, public grounds or buildings, the proper proportion of the estimated expenses thereof shall be, by the council of such corporation levied, certified and collected in the manner provided for street improvements. It is doubtful, however, if school property may be said to come within the provisions of this section, since the public ground or property referred to by this section, seemingly is such as is controlled by the corporation as an entity. However, if school property may be termed public grounds within the meaning of this section, the same difficulty remains, since the school property is exempt from execution under the provisions of section 4759 G. C. and there apparently would be no way for the city to collect such an assessment. Thus it would seem that by reason of the exemption of school property from assessment, and the discretionary authority of council over the sidewalks of the corporation, the peculiar situation arises wherein the board of education may not compel the city to construct sidewalks at city expense, neither can the city compel the board of education to construct the same at school expense, since it is obvious that the city could not enforce collection of assessment by reason of said exemption. It would seem then under such circumstances that practical solution to such a difficulty may only be had by mutual agreement between the city and the board of education for the payment of the cost of the sidewalk improvement, either jointly or separately as they may agree, since the law unquestionably vests in either the authority to proceed to such an improvement.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3886.

GRISWOLD ACT—A NUMBER OF QUESTIONS ANSWERED RELATIVE
 TO SINKING FUND TRUSTEES' AUTHORITY UNDER SAID ACT.

1. *Sinking fund trustees may administer the general sinking fund under their control at their absolute discretion, applying the money in securities in their possession to the discharge of any obligations which it is their duty to discharge or for expenses, unless the withdrawal of such moneys will cause an overdraft in a fund produced by the receipt of premiums and accrued interest in the sale of assessment bonds or unexpended balances of the proceeds of any bonds issued prior to January 1, 1922.*

2. *There can be no "surplus" in a fund devoted to the retirement of particular bonds and available for no other purpose, until the fund equals the amount required to pay accrued interest and fully to retire the principal.*

3. *The council with the approval of the sinking fund trustees, acting under section 5649-1b of the General Code, may certify a surplus in the general sinking fund to the county auditor to be deducted from the tax levy for any bond fund; without the approval of the sinking fund the council may take like action in the case of a surplus in any particular bond retirement fund for the retirement of bonds issued since January 1, 1922.*

4. *The fund to be raised for the purpose of retiring bonds issued since January 1, 1922, is no part of the sinking fund of a municipal corporation which is the fund raised and maintained for the purpose of retiring generally bonds issued prior to that date.*

5. *Council, with the approval of the sinking fund trustees, may certify the amount received from inheritance taxes by the sinking fund trustees in a current year to the county auditor to be deducted from the current year levy for retirement and interest of any bond fund council may designate.*

6. *The sinking fund trustees may use the amount of inheritance taxes received by them for any sinking fund purposes they may deem proper.*

7. *The council of a municipal corporation may not under section 5649-1b G. C. appropriate and certify to the county auditor an amount consisting of a surplus in the sinking fund or otherwise to be reduced from the levies otherwise to be made by the county auditor for the retirement of bonds issued since January 1, 1922 and the payment of interest thereon, without specifying the particular bond fund, the levy for which is to be so reduced.*

COLUMBUS, OHIO, January 6, 1923.

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

GENTLEMEN:—The Bureau has requested the opinion of this department on several questions arising out of the enactment of the so-called Griswold Law, 109 O. L. 336. From the letter referred to the following is quoted:

“Our understanding of section 5649-1b G. C. is that each separate bond issue must be treated as a separate fund within the sinking fund, and all transfers of unexpended balances of bond money, (section 3804 G. C.) and premium and accrued interest, (section 3932) must be credited by such sinking fund trustees to the proper bond fund and so much thereof as may be necessary in the current year may be appropriated by council and certified to the county auditor and the tax levy for the current year reduced by the amount thereof, for the specific bond fund containing such surplus.

Frequently the amount of premium, accrued interest and unexpended balances of the bond fund transferred to the sinking fund within a current year will exceed the amount to be levied by the budget commissioners for said bond fund for the current year. As we understand said section 5649-1b G. C., council could certify to the county auditor only such amount as could be levied by the budget commission for the current year for the particular bond fund.

Under these conditions the balances would be left in the sinking fund bond fund.

Question 1. In view of the provisions of section 4517, as amended, 109 O. L. 336, that:

'For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or moneys in their possession,'

could the trustees of the sinking fund use such surplus receipts of the bond fund over the requirements for sinking fund and interest for the current year for the liquidation of other bonds, interest or expenses at their discretion?

Question 2. Has council with the approval of the sinking fund trustees authority to certify a surplus in the sinking fund bond fund to the county auditor to be deducted from the tax levy for another and different bond fund?

Question 3. Is it the meaning of section 5649-1b G. C. that each bond fund be kept separate and apart within the sinking fund?

Question 4. Could council with the approval of the sinking fund trustees certify the amount received from inheritance tax by the sinking fund trustees in a current year to the county auditor to be deducted from the current year levy for sinking fund and interest of any bond fund said council would designate?

Question 5. Could the sinking fund trustees use the amount of such inheritance tax for such sinking fund purposes as they deem proper?

Question 6. Is it permissible under the Griswold Act, 109 O. L. 336, that council appropriate and certify to the county auditor a lump sum based on surplus balances in the sinking fund bond fund and the amount of inheritance tax, said lump sum to be deducted by the county auditor from the total levy for sinking fund and interest purposes for the current year without regard to specific bond funds?"

The Bureau refers to a number of sections of the constitution and laws as bearing upon the questions thus submitted, which so far as necessary for the purpose will be quoted in connection with the discussion of the questions submitted.

First, however, account may well be taken of the different conditions which might conceivably give rise to a surplus in a sinking fund or bond retirement fund of a municipal corporation. One has been mentioned in the Bureau's letter as above quoted, namely, premiums and accrued interest from the sale of particular bonds and unexpended balances in particular bond funds. The first of these receipts (premiums and accrued interest) are under section 3932 to be transferred to the general sinking fund of the corporation if the bonds are general tax bonds, but to a special sinking fund within this general fund if the bonds are assessment bonds. In other words, premiums and accrued interest received from the sale of general tax bonds go into the general sinking fund, which, as the Bureau has previously been advised, continues to exist in a municipal corporation, notwithstanding the enactment of the Griswold law, until all bonds to be retired by means of a sinking

fund have been retired; but such premiums and accrued interest when received from the sale of assessment bonds can be applied only to the payment of the principal and interest of the bonds from the sale of which they were received and no others.

At this point a question arises under the Griswold law which will be encountered elsewhere, and may well be considered now. Section 5649-1b of the General Code referred to in the Bureau's communication, is a part of the Griswold law, and provides as follows:

"The resolution, ordinance or other measure under which bonds are issued or authorized shall contain a levy of taxes sufficient to pay the interest and principal of the bonds as they mature and every such resolution, ordinance or measure shall be certified by the fiscal officer of the political subdivision to the county auditor of the county in which the subdivision is located. Thereafter, the county auditor, without further action by the tax-levying authority of the subdivision, shall include said annual levies in the appropriate annual budgets submitted by him to the budget commissioners as provided in section 5649-3c of the General Code, including the county budgets; provided, however, that the county commissioners of any county, board of education of any school district, trustees of any township, or council or chief legislative body of any municipality or other political subdivision may in any year appropriate for the purpose of paying any part of the annual interest or principal of such bonds of the political subdivision *any surplus in the sinking fund or other bond retirement fund of the political subdivision not required for the purpose for which the said sinking or other bond retirement fund was raised* and certify such appropriation to the county auditor, and thereupon the tax levy of the subdivision for the current year for the interest and principal of said bonds and the sum submitted by the auditor to the budget commissioners for said purpose shall be reduced by the amount so certified, and the sum appropriated as aforesaid shall not be used or expended for any purpose other than the payment of the interest and principal for which appropriated until and unless said interest and principal be otherwise fully paid or liquidated; provided that no such appropriation shall be made from the sinking fund without the approval of the sinking fund trustees or commissioners. The sum thus included in any budget submitted to the budget commissioners shall not be reduced by said commissioners and shall be given by said auditor and commissioners and other taxing authorities all the precedence and priorities provided by law for interest and sinking fund levies."

In the opinion of this department when special assessment bonds remain outstanding any proceeds of premiums and accrued interest received from their sale cannot be regarded as a "surplus" within the meaning of the section just quoted, even though such premiums and accrued interest might exceed in amount the immediate sinking fund or retirement requirements of the particular issue. In other words, wherever the statute under which particular bonds are issued requires that particular revenues be devoted exclusively to the retirement of those bonds, then until that object is fully satisfied, no surplus exists. While there is discretion in the trustees of the sinking fund by virtue of section 5649-1b, that discretion does not go so far as to determine, as against the positive requirements of such a statute as has been considered, that a surplus exists.

Section 4517 of the General Code is also referred to in this connection, though this section has been recently amended, the particular language referred to by the Bureau has always been in it since its enactment in 1902. In the opinion of this department, the language is not to be understood as authorizing the trustees of the sinking fund for the satisfaction of an obligation under their supervision, to use securities or money in their possession to the point of depleting or creating deficiencies in specific funds which are required to be kept intact. The language merely means that so long as the funds are kept intact, any particular securities or moneys may be used for this purpose. The situation is analogous to a distinction between the funds on an auditor's books and the moneys in the treasurer's possession. The funds are separate but the moneys are all one commingled mass. The sinking fund trustees not only keep books on the transactions over which they exercise jurisdiction, but also have custody over the moneys and securities administered by them. Just as a treasurer draws on his general balances to pay bills which are payable out of particular funds, so the sinking fund trustees are by this language authorized to use "any of the securities or moneys in their possession" in meeting any obligation; but this falls far short of authorizing them to extinguish an *account*, such as section 3932 by necessary implication requires them to keep with each issue of special assessment bonds.

Another source of possible surplus which has been referred to, is unexpended balances of bond money. Section 3804 to which the Bureau refers, provides with respect to such balances that they shall "be applied in the payment of the bonds." The purport of this language is unmistakable. Unexpended balances can only be used to retire the particular bonds, the sale of which has produced the fund, which has not been entirely exhausted, for which the bonds were issued. Accordingly, the above remarks made with respect to the premiums and accrued interest from the sale of assessment bonds apply to these balances.

Another source of accruals to the sinking fund or bond retirement fund consists of the one-half of the city's portion of inheritance taxes, with respect to which section 5348-11 of the General Code provides:

"Fifty per centum of the gross amount of any tax * * * shall be credited, one-half to the sinking fund, *if any*, of such municipal corporation * * * and the residue to the general revenue fund thereof."

The money thus passing to the sinking fund belongs, in the opinion of this department, to the general sinking fund so long as such fund continues to exist. It is in the same situation as the premiums and accrued interest from the sale of general tax bonds, and as the proceeds of tax levies made under sections 4506 and 4513 of the General Code as amended by the Griswold Act. The machinery for levying taxes for sinking fund bonds as distinguished from serial bonds need scarcely be explained in this opinion, as it has previously been explained to the Bureau. It is sufficient to say that the amount needed for sinking fund purposes on account of sinking fund bonds and for securing the interest on all such bonds accruing during the year is taken as a unit, ascertained by the trustees of the sinking fund, by them certified to council, and by council placed in the tax ordinance in preference to all other items. When collected it is paid over to the sinking fund trustees under section 4517 above referred to and by them used indiscriminately for the satisfaction of all obligations under their supervision. Prior to the enactment of the Griswold Act it was even used, as the Bureau is well aware, for the satisfaction of judgments final, but this is no longer the case.

There may be some other possible sources of revenue in the sinking fund as such, but these, if any, need not be considered.

From the foregoing, it will be seen that even as to sinking fund bonds (i. e. those issued prior to January 1, 1922, or thereafter under legislation terminated prior to that date, as the Bureau has been previously advised) there was a diversity of provisions with respect to the allocation of sinking fund moneys. The great bulk of such moneys were in a single fund, but some of them had to be separately accounted for and applied to particular obligations.

Inasmuch as the Bureau cites section 5649-1b in the preface to its specific inquiries, it is felt that it is appropriate to remind the Bureau that there is a distinction here between the sinking fund which is a piece of fiscal machinery for the retirement of bonds issued under the old scheme of things and a bond retirement fund which is the means of retiring bonds issued under legislation completed after January 1, 1922. It is to such funds and to such only that the general machinery of section 5649-1b above quoted applies, in one sense at least; that is to say, it is only a bond retirement fund that can be made the subject of the kind of levy that is provided in section 5649-1b. The Bureau is correct in its assumption that these bond retirement funds are separate instead of being lumped together as the old sinking fund was and still is where it exists. The question now arises as to whether or not, and under what circumstances a surplus can exist in a bond retirement fund as such.

Retracing the steps previously taken it is noted that premiums and accrued interest on general tax bonds are to go into the general sinking fund so far as the provisions of section 3932 are concerned. That is to say, while it might be more consistent with the general policy of the Griswold Act to provide that premiums and accrued interest derived from the sale of serial bonds issued under the Griswold Act go into the particular bond retirement fund, yet the Griswold Act which is in large part a series of amendments to existing statutes, did not actually amend section 3932 nor did it destroy the general sinking fund at once, leaving that fund to be gradually extinguished as the sinking fund bonds are retired. Implied repeals are not favored, and implied amendments are still harder to support. This department is forced to the conclusion that in the absence of any amendment to section 3932 of the General Code, premiums and accrued interest received from the sale of general tax serial bonds belong in the sinking fund, if any, and not in the particular bond retirement fund. In other words, so far as serial bonds are concerned, this department is of the opinion that the first assumption made by the Bureau is erroneous.

Of course, from what has been said it will be apparent that unexpended balances in a fund created by the sale of bonds issued under the Griswold Act do virtually belong in the particular bond retirement fund; and thus from that source a surplus in such a fund might arise.

Coming now to the proceeds of inheritance taxes, in the opinion of this department such revenues do not accrue to any bond retirement fund. As the statute is now framed, they go to the sinking fund, if any, as heretofore stated. The sinking fund and the bond retirement fund are two distinct things. Therefore, no surplus could accrue to a bond retirement fund from the receipt of proceeds of inheritance taxes, though a surplus might be created in the sinking fund, and though also under section 5649-1b, such surplus in the general sinking fund is just as subject to transfer for the purposes of that section as is the surplus in a particular bond retirement fund.

Coming now to the one specific question not completely dealt with in the foregoing analysis, it is the opinion of this department that any amount in a particular bond retirement fund derived in whole or in part from unexpended balances in the fund created by the sale of the particular bonds, could not be regarded, as a surplus not required for the purpose for which the said "bond retirement fund was raised" within the meaning of section 5649-1b unless such amount, together with other avails of the fund at the particular time, were greater than the total retirement requirements of the bonds as distinguished from the requirements of the particular year. It is true that in a sense any amount over and above the interest and principal accruing during the tax collection year would not be required for the immediate purposes of the bond retirement fund, but on the other hand, the statutes still provide that the money derived from unexpended balances can be used only to retire the particular bonds, and in that sense it is "required" (by law) for the purpose of the bond requirement fund. It is only by inference that any other conclusion can be supported, and the inference is not strong enough in the opinion of this department to enable us to work out of section 5649-1b an implied amendment or repeal of the appropriation provision of section 3804 G. C.

On the basis of the foregoing discussion, the answer to the Bureau's first question is, in the opinion of this department, that any moneys which belong in the sinking fund as such as distinguished from a specific bond retirement fund may be used for the liquidation of any bonds or for interest or expenses, at the discretion of the sinking fund trustees, unless the withdrawal of such moneys will cause an overdraft in one of the interior accounts of the old sinking fund made up of premiums and accrued interest from the sale of assessment bonds of unexpended balances of the proceeds of any bonds.

It is further the opinion of this department that there cannot be said to be a "surplus" in a particular bond retirement fund as the same is herein defined unless the amount standing to the credit of the fund is in excess of the total requirements thereof as distinguished from the particular annual requirement thereof.

Also on the basis of the above discussion, the Bureau's second question is in the opinion of this department to be answered by the statement that the council, with the approval of the sinking fund trustees may certify a surplus in the general sinking fund to the county auditor to be deducted from the tax levy for any bond fund to which the machinery of section 5649-1b applies, viz., a tax levy for the annual accruals of an issue of bonds made since January 1, 1922; and that the council without the approval of the sinking fund trustees may make like certification of any surplus as herein defined in a particular bond retirement fund of this character, it being understood that no such surplus can be said to exist until the entire, as distinguished from the annual requirements of such bonds are provided for.

In the opinion of this department the third question submitted by the Bureau really involves a misconception. It is not that each bond fund must be kept separate and apart within the sinking fund, but that each bond fund must be kept separate and apart *from* the sinking fund and from each other. The bond fund as herein defined for the purposes of this opinion is no part of the sinking fund.

For reasons which are perhaps already sufficiently apparent, the answer to the Bureau's fourth question is unqualifiedly in the affirmative.

The same answer is to be given to the Bureau's fifth question.

The Bureau's sixth question must be answered in two ways, this being a result of the fact above stated that the sinking fund is separate and apart from the bond retirement fund, the one being administered by the sinking fund trustees and levied for by the council, the other being administered through the county auditor in the

manner provided by section 5649-1b. It is permissible under the Griswold Act for council to take into account balances in the general sinking fund and levy a lump sum based upon the existence of such surplus balances in the sinking fund proper. Such action, if preceded by the proper action of the sinking fund trustees under section 4513 of the General Code as amended, is exactly in conformity with that section.

But such action would in no wise affect the particular bond retirement fund levies which are required to be made under section 5649-1b. These levies are in legal theory separate for each issue, and if the levying authorities desire to reduce the amount of a particular bond retirement fund levy or levies, such particular levy or levies must be specifically designated in the resolution of appropriation and certification under section 5649-1b.

Moreover, the process of appropriation and certification referred to in section 5649-1b cannot be used to affect the levy for general sinking fund purposes at all. In other words, the only purpose for which action under section 5649-1b can be taken is to reduce bond retirement fund levies as distinguished from the general sinking fund levy. The county auditor knows nothing whatever about general sinking fund levies until they are made and certified to him as levies by the joint action of sinking fund trustees and council; on the other hand, he is officially apprised of the amount needed for each bond retirement fund levy and will proceed to fix the proper rate to produce such amount on the duplicate as provided in section 5649-1b unless he receives an appropriation and certification which is effective to reduce that amount.

These statements render necessary a general negative answer to the Bureau's sixth question, qualified as above.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3887.

APPROVAL, BONDS OF HOLMES-LIBERTY RURAL SCHOOL DISTRICT,
CRAWFORD COUNTY, \$90,000, TO PURCHASE SITE AND CON-
STRUCT FIRE PROOF SCHOOL BUILDING.

COLUMBUS, OHIO, January 6, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.