

1506.

BOND PAYMENT FUND—BALANCE REMAINING IN FUND—TRANSFER OF FUNDS AFTER JANUARY 1, 1928—SECTION 5625-13, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. When all outstanding bonds of a county, municipality or a school district, issued prior to January 1, 1922, have been paid, any balance remaining in the sinking fund of said taxing district shall be paid to its treasurer and placed and held by him in a separate fund to be known as the "bond payment fund" and shall be applied by him to the purposes for which the sinking fund had theretofore been applicable.

2. Prior to January 1, 1928, unexpended balances remaining in funds created by bond issues no longer needed for the purposes for which the fund was created, are by virtue of law transferred to the sinking fund or the bond payment fund of the taxing sub-division, as the case may be.

3. Upon the establishment by a subdivision of a sinking fund, or a bond retirement fund or both, on January 1, 1928, any funds which had previously been in the sinking fund or bond payment fund of the subdivision should be credited to the sinking fund or bond retirement fund so established.

4. When on January 1, 1928, a subdivision has no outstanding bonds, notes or certificates of indebtedness payable from the bond retirement fund except those for the retirement of which specific provision is made by law, and there is a balance in the bond payment fund of the subdivision a bond retirement fund should nevertheless be established and it should be credited with the funds which had previously been in the bond payment fund of the subdivision.

5. There is no provision of law by which any of the funds which make up the bond payment fund of a taxing district, or which will compose the bond retirement fund of a subdivision after January 1, 1928, may be transferred from said funds or used for any other purposes than the retirement of bonds, notes or certificates of indebtedness.

6. On and after January 1, 1928, when in a proper case funds may be transferred by authority of Section 5625-13, General Code, it is not necessary to secure a court order therefor, said section expressly providing that the transfers authorized may be made by a three-fourths vote of the taxing authority.

COLUMBUS, OHIO, December 31, 1927.

HON. R. H. BOSTWICK, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication as follows:

"1. The Munson Rural School District, Board of Education, some time ago issued bonds for the building of a school building, and when the bonds were sold the money was placed in a debt fund. A balance of Eighteen Hundred (\$1,800.00) Dollars remained in this fund after the payment of all expenses in connection with the construction of their school building.

No great necessity has ever arisen for the transfer of this money, and it has lain in this fund for some time. Now the Board of Education is anxious to have the use of this money for general expenses, and would like to transfer same to their general fund. As I view it Sections 2296 to 2302 under which such funds could be formerly transferred are repealed effective August 10, 1927, and Section 5625-13 apparently was passed to take its place. So far as I can interpret this last section there is no means provided for a transfer such as I refer to. I would like your opinion on the manner of transferring the above funds.

2. I further wish you would advise me whether or not under Section 5625-13 any order of Court is now necessary. If I have not made these questions entirely clear to you, kindly notify me to that effect, and I will explain more fully if possible."

Section 7614, General Code, reads as follows:

"The board of education of every district shall provide by a tax levy for the payment of the annual interest on its bonded indebtedness, for the payment of its serial bonds as they mature, and for a sinking fund for the extinguishment of its other bonded indebtedness, which funds shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of-----'(inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that, in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district. * * *"

Former Section 3804, General Code, repealed by the 87th General Assembly (112 O. L. 409), read as follows:

"When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

Section 2295-14, General Code, reads as follows:

"The board of sinking fund trustees of any county or municipality or the board of sinking fund commissioners of any school district shall continue to exercise the powers provided in Sections 2976-18 to 2976-27 inclusive, 4511 to 4522 inclusive, 3932 and 7613 to 7619 inclusive of the General Code and all other provisions of law relating to its powers until all outstanding bonds of such county, municipality or school district issued previous to January 1, 1922, shall have been paid; and thereupon it shall be deemed to be abolished and its functions and powers relating to the purchase and sale of securities, receipt, deposit and investment of taxes, assessments and other funds raised for the payment of bonds and funded debts, the application of such funds to the payment of bonds and other indebtedness and all its other powers and functions as set forth in said provisions of law as amended in this act (G. C. 2295-6 to 2295-15), shall be deemed to be transferred to the treasurer of the county, municipality or school district, and all monies, securities and other assets then in the custody and possession of such board shall be transferred and delivered to such treasurer. Thereafter all said monies, securities and assets and all monies received by the county, municipality or school district for the payment of the interest and principal of its bonds or other funded debts and all inheritance taxes and all other taxes and revenues which were theretofore payable, by virtue of provision of law, into its sinking fund shall be paid to its treasurer and placed and held by him in a separate fund to be known as 'bond payment fund' and, subject to the provisions of law relating to transfer to other funds, said fund shall be applied by him to the purposes for which the sinking fund had theretofore been applicable."

Sections 5625-1, 5625-9, 5625-13, and 5625-39, General Code, (112 O. L. 391 et seq.) provide in part, as follows:

5625-1. "The following definitions shall be applied to the terms used in this act:

(a) 'Subdivision' shall mean any county, school district, except the county school district, municipal corporation or township in the state.

* * *

Sec. 5625-9. "Each subdivision shall establish the following funds:

(a) General fund.

(b) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds.

(c) Bond retirement fund, for the retirement of serial bonds, or of notes or certificates of indebtedness.

(d) A special fund for each special levy.

(e) A special bond fund for each bond issue.

(f) A special fund for each class of revenue derived from a source other than the general property tax which the law requires to be used for a particular purpose.

(g) A special fund for each public utility operated by a subdivision.

(h) Special funds to be created by transfer in accordance with the provisions of this act.

(i) A trust fund for any amount received by a subdivision in trust for any lawful purpose."

Sec. 5625-13. "No transfers shall be made from one fund of a subdivision to any other fund, by order of court or otherwise, except that transfers may be made from the general to special funds established for purposes within the general purposes of the general fund, and from such special funds to the general fund; but no transfers shall be made from any such special fund to the general fund, except of monies theretofore transferred from the general fund. Such transfers shall only be made by authority of an appropriation in the annual or supplemental appropriation measure, or by resolution of the taxing authority adopted by a three-fourths vote. Before any transfers shall be made, the fiscal officer of the subdivision shall certify in writing that the amount so to be transferred is not encumbered by any obligation or appropriation, and is in the treasury or in process of collection. At the end of a fiscal year any balance in a special fund to which a transfer has been made shall revert to the general fund but not in excess of the amount that was originally transferred during such fiscal year. In determining the balance in the general fund at the close of such fiscal year, balances which have so reverted shall be included."

Sec. 5625-39. " * * * That this act shall in no manner affect existing funds established in any subdivision or the expenditures therefrom until January 1, 1928, but upon such date all provisions of this act as to funds shall go into force and effect, and the balance, if any, in any special fund derived from a special tax levy within the fifteen mill limitation that is abolished by this act shall be credited to the appropriate general fund unless otherwise provided by law. * * *"

When the bonds referred to in your letter were sold, the proceeds of such sale became a building fund for the construction of a school building. If, after the building was constructed there remained an unexpended balance in said building fund

which was no longer needed for the purpose for which the fund was created, such balance automatically became transferred by virtue of Section 3804, supra, to the sinking fund of the school district if the bonds had been issued prior to January 1, 1922, or to the bond payment fund if the bonds were issued after said date.

It will be observed that by the terms of former Section 2295-12, General Code, all bonds issued subsequent to the effective date of said section were to be serial bonds, and that by the terms of Section 2295-14, supra, their retirement was provided for by the creation of what is termed the "bond payment fund" in the custody of the treasurer of the school district and to be applied by him to the purposes for which the sinking fund had theretofore been applicable, namely the retirement of the bonds.

The pertinent provisions of former Section 2295-12, General Code, read as follows:

"All bonds hereafter issued by any county, municipality, including charter municipalities, school district, township or other political subdivision, shall be serial bonds maturing in substantially equal semi-annual or annual instalments. * * *"

This section including the foregoing provision was first enacted in 1921, to become effective January 1, 1922 (109 O. L. 344 to 348). It was repealed by the 87th General Assembly in House Bill No. 80 (112 O. L. 409), but the terms of said house bill in no manner affect existing funds or the expenditures therefrom until January 1, 1928 (Section 5625-39, supra).

After said unexpended balance in the building fund became a part of the sinking fund or bond payment fund, it then became available for, and should have been used for the retirement of so much of the bond issue as it would meet, and tax levies for the retirement of these bonds should have been reduced proportionately, so that by their adjustment the needs of the district for bond retirement and interest purposes would be met by the addition of the unexpended balance in the building fund to the funds raised by taxation.

If the officials in charge of the payment of interest on these school building bonds and their retirement when due, the sinking fund commissioners or the treasurer of the district, as the case may have been, failed to use this unexpended balance of the building fund for bond retirement purposes and to meet interest charges on said bonds, and the bonds are now all paid, this unexpended balance is still in the sinking fund or the bond payment fund as the case may be.

There is no way provided by law by which an unused balance in a sinking fund or bond payment fund of a school district, after the retirement of all the bonds of the district, may be transferred to any other fund. It can only be left to accumulate until a new issue of bonds is made. It then becomes available and should be applied to bond retirement purposes, and tax levies for the retirement of the new issues adjusted accordingly.

Sections 2296, General Code to 2302, General Code, providing for the transfer of funds in some instances, by application to the common pleas court, have been repealed as you state, but even before their repeal the court had no authority to order the transfer of public funds which were the proceeds or balances of special levies, loans or bond issues. Any unexpended balances of a building fund which were the proceeds of a bond issue, as the one you speak of was, and which by virtue of law became a part of the sinking fund or bond payment fund, could not have been transferred by order of the court because the law (former Section 2296, General Code) specifically forbade it.

House Bill No. 80, supra, enacted by the 87th General Assembly provided for an entire realignment of the funds of each subdivision in the state by authorizing the creation of certain funds and the distribution of the monies of the subdivision among

the several funds so created. The provisions of said act with reference to funds do not become effective until January 1, 1928.

There is no direction in said House Bill No. 80, and I know of no specific provision of law by which the governing authorities of a subdivision may be guided in the establishing of the several funds authorized by Sections 5625-9, General Code (House Bill No. 80), in the first instance except what may be gathered from the enumeration of the purposes of the funds to be created. It seems unlikely however, that the legislature intended these funds to be established by arbitrarily crediting them with such amounts as the officials might desire to place to their credit, irrespective of their needs or the amounts which previously had been in funds corresponding in purpose.

It seems clear that if there previously had been monies in the sinking fund they should be placed in the sinking fund upon the establishing of that fund on January 1, 1928, and likewise, if there were funds in a bond payment fund, the bond retirement fund when created should be credited with that amount.

It might be contended that it would be a vain thing to create a bond payment fund if there were no obligations to be paid from such a fund.

The statute itself, requires the establishing of a sinking fund only when the subdivision has outstanding bonds other than serial bonds. No similar provision is made with reference to the establishing of a bond retirement fund, the statute expressly providing that a bond retirement fund shall be established.

It is my opinion that monies which previous to January 1, 1928, had stood to the credit of a bond payment fund, should, when the bond retirement fund for the subdivision is established, be placed to the credit of the said bond retirement fund. This conclusion is fortified by the fact that this disposition of said monies serves to carry out the purpose of their original inception, and the further fact that the law makes no provision for the placing of such monies in any other fund.

When funds once become a part of a bond retirement fund there is no way provided by law by which their transfer to some other fund may be effected and they must be left in the bond retirement fund until such time as they may be used for the purposes for which the fund is created.

Provision is made by the terms of Section 5625-13, supra, for the transfer of funds in certain instances but under no circumstances would a transfer from or to the bond retirement fund or sinking fund come within the provisions of this statute.

As bearing on your second question, it will be observed that when transfers may be made by virtue of the authority conferred by Section 5625-13, supra, no provision is made for an application to the court therefor or for the securing of a court order, Section 5625-13, supra, expressly providing that such transfers shall be made by a three-fourths vote of the taxing authority.

In specific answer to the questions submitted, I am of the opinion:

First, that if the \$1800.00 referred to in your inquiry is a part of the proceeds of bonds issued prior to January 1, 1922, and all of said bond issue has not been retired, or if the district has other bonded indebtedness incurred prior to January 1, 1922, the said money is now in the sinking fund of Munson Rural School District and should be used for interest and bond retirement purposes, and tax levies for that purpose should be adjusted accordingly. If the said \$1800.00 is a part of the proceeds of the sale of bonds issued subsequent to January 1, 1922, the said money is now in the bond payment fund of the district and the same direction as to its use should be followed as though it were in the sinking fund.

If the district has no outstanding bonds, this \$1800.00 is in the bond payment fund of the district. On January 1, 1928, the effective date of Section 5625-9, General Code, this money will become a part of the sinking fund or bond retirement fund of the district, as the case may be, and should be used for the retirement of the obligations of the district if any there be. If there be no bonds outstanding, said \$1800.00 re-

mains in the bond retirement fund until such time as there are obligations to be met by the fund, or until some provision is made by law for its transfer to some other fund. In the present state of the law, there is no provision whereby it may be transferred from the bond retirement fund.

Second, when transfers are made by virtue of Section 5625-13, General Code, it is not necessary to make application to a court for permission to make such transfer, nor does the court have any authority to order a transfer of funds of a subdivision from one fund to another, in any case.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1507.

APPROVAL, BONDS OF THE VILLAGE OF WILLOWICK, LAKE COUNTY,
OHIO—\$43,000.00.

COLUMBUS, OHIO, December 31, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1508.

DAMS—LIABILITY FOR DAMAGE CAUSED BY BREAKAGE CONSIDERED.

SYLLABUS:

Liability of one who negligently constructs or maintains a dam to respond in damages to county commissioners for injuries to and destruction of county bridges and retaining walls, caused by escape of impounded waters, considered.

COLUMBUS, OHIO, December 31, 1927.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

“An individual dammed a creek which runs through this county for the purpose of making a private lake with the intention of forming a park on his place for the purpose of deriving revenue therefrom for himself. Last night the dam broke and the water rushed down the creek destroying one or two county bridges, which cross the creek and are a part of the property of the county. It also tore out some retaining walls erected by the county.

Please advise me whether or not the individual constructing the dam is liable to the county for the loss of the bridges and retaining walls?”