You are therefore advised that thirty days after the proclamation of the Secretary of State, a village advanced to a city automatically becomes a health district and the officers of said city are charged with the appointment of a city district board of health.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2923.

GRISWOLD ACT—BOND ISSUE—LEGISLATION PASSED AND EFFECTIVE PRIOR TO JANUARY 1, 1922—BOND SALE ON JANUARY 13, 1922, BUT MATURITIES OF BONDS DID NOT CONFORM TO SECTION 14 OF GRISWOLD ACT, SECTION 2295-12 G. C. (109 O. L. 344)—BONDS ILLEGAL.

Where all the legislation providing for the issuance of waterworks bonds had been passed and become effective prior to January 1, 1922, *and the bonds had been offered to the trustees of the sinking fund, etc., and were advertised for sale, such sale to be held on January* 13, 1922, *such bonds were nevertheless not "issued"; so that if their maturities did not conform to section* 14 *of the Griswold Act, so-called,* 109 *O. L.* 344—2295-12 *of the General Code—the same was illegal.*

COLUMBUS, OHIO, March 9, 1922.

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

GENTLEMEN:—This department acknowledges receipt of the bureau's letter of recent date, enclosing a communication from the clerk of the council of the city of Elyria, stating the following facts:

> "On October 3, 1921, the council of the city of Elyria passed Ordinance No. 2496 authorizing the issuance of $10,000.00 of water works bonds known as Series "X," to be dated December 1, 1921, maturing serially from 1936 to 1945 at the rate of $1,000.00 per year. After the expiration of the referendum period these bonds were offered to the sinking fund trustees of the city of Elyria and declined by said board and were thereafter offered to the board of commissioners of the sinking fund of Elyria City School District and declined by said board also. Thereafter the bonds were offered to the Industrial Commission of Ohio and December 8, 1921, were declined by said commission. Upon the rejection of the bonds by the Industrial Commission, the said bonds were advertised for four weeks for sale at public sale, the sale to be held January 13, 1922, and necessarily one of the advertisements was published on January 3, 1922, in order that the notice of bond sale should be published four times, a week apart."

The letter of the clerk goes on to state that the question is now raised as to the application of the Griswold Act, so-called, 109 O. L. 336, it being contended that the maturities of the bonds do not comply with section 14 thereof, being section 2295-12 of the General Code, and that the advertising for sale and the conduct of the sale being proceedings in connection with the issuance of the bonds, section 23

of said act makes the whole act applicable to the case, so that the bonds cannot lawfully be issued at the present time.

The bureau requests the opinion of this department on the question thus raised.

Pertinent provisions of the act referred to are as follows:

> "Section 23. This act shall take effect from and after January 1, 1922, and its provisions shall govern and apply to all ordinances, resolutions, measures and proceedings pending on that date."
>
> "Section 14. All bonds *hereafter issued* by any county, municipality, including charter municipalities, school district, township or other political subdivisions, shall be serial bonds maturing in substantially equal annual installments beginning not earlier than the date fixed by law for the final tax settlement between the county treasurer and the political subdivision or taxing district next following the inclusion of a tax for such issue in the annual budget by the county auditor as provided by law and not later than eleven months thereafter."

It is true, in the opinion of this department, that the advertisement for the sale of bonds and the actual sale thereof are "proceedings" in connection with the issuance of bonds. But, as the clerk argues in his letter, it is likewise true that this fact is not conclusive. The declaration of section 23 of the act is merely to the effect that the provisions of the act shall govern and apply to proceedings pending on January 1, 1922. To ascertain how the act is to "govern and apply" to such proceedings then pending, we must turn to the act itself. Turning to section 14 the effect of which is in question, we find that it applies only to "bonds hereafter issued." We have therefore still to deal with the question as to whether on January 1, 1922, the bonds inquired about by the clerk were "issued"; for it seems to be beyond question that the word "hereafter" as used in section 14 (section 2295-12 G. C.) connotes January 1, 1922, when by the terms of section 23 supra, the act as a whole takes effect. If on January 1, 1922, then, the bonds inquired about had already been issued in the sense in which the word is used in section 2295-12 G. C. nothing in that section applies to these bonds, nor is there anything in section 23 which makes it so apply; for section 23 does not say that all the provisions of the act shall apply to all bonds with respect to the issuance, sale and disposition of which any proceedings were pending on January 1, 1922. It merely says that the act shall govern all ordinances, resolutions, measures and proceedings pending on that date; from which it follows naturally that the act does not govern any ordinances, resolutions, measures or proceedings finally disposed of before that date. Hence, a provision in the act relating to an ordinance or other proceedings in connection with the bond issue does not "govern and apply" to any particular ordinance or proceedings unless the following conditions appear:

1. The ordinance or proceeding must have been pending on January 1, 1922.

2. The provisions of the act must of itself apply to and govern proceedings of that character.

It seems, therefore, that the clerk is correct in insisting that the ultimate question is as to the meaning of the word "issued" in section 2295-12. It is the contention of the clerk that the bonds in question had been "issued" before January 1, 1922, so that section 14 governing the maturities of bonds hereafter issued, i. e., after January 1, 1922, could not apply, and could not be made to apply by any possible interpretation of section 23. Though the clerk does not define his understand-

ing of the meaning of the word "issued," it seems a fair inference from his letter that they were "issued" when the referendum period expired on the ordinance providing for their issuance; or at least when they were offered to the sinking fund trustees of the city of Elyria.

It must be admitted that the primary and natural signification of the word "issue" in connection with negotiable instruments like bonds, relates to the physical act of delivery of such instruments to obligees or purchasers.

Yesler vs. Seattle, 1 Washington, 308;
Gage vs. McCord (Ariz.), 51 Pac. 977;
Folks vs. Yost, 54 Mo. App. 55;
State vs. Pierce, 52 Kas. 521;
Bank vs. Suspension Bridge, 26 N. Y. Supp., 98;
Brownell vs. Greenville, 114 N. Y. 518;
Perkins Co. vs. DeGraff, 114 Fed. 441;
Am. Bridge Co. vs. Wheeler, 35 Wash. 40;
Bank vs. Commr's, 121 La. Ann, 269;
Zimmerman vs. Zimmerman, 193 N. Y. 468;
Austin vs. Valle (Tex.) 71 S. W. 414;
Black vs. Fishburne, 84 S. C. 451.

It has been held that bonds are "issued" when they are sold, though they are not delivered. Potter vs. Lambert (Fla.) 33 So., 251. But here the bonds had not been sold, no debt had been created, and all that had in reality taken place was the legislation authorizing the creation of a debt. On the other hand, it has been held that where the state law or constitutional provisions require the registering of bonds with state officers, bonds may be regarded as "issued" when they have been so registered. Moller vs. Galveston, 23 Tex. Civ. App. 693; Douglass vs. Lincoln County, 5 Fed. 775.

In this same connection, it may not be inappropriate to refer to the negotiable instruments law as incorporated in our code. Bonds are negotiable instruments, though perhaps not governed exclusively by the general law on that subject. Section 8295 of the General Code contains the following definition:

> "'Issue' means the first delivery of the instrument, complete in form, to a person who takes it as a holder."

As intimated, this definition may not be conclusive as to the interpretation of sections relating to the procedure of disposing of municipal bonds, but it is cumulative evidence in addition to the decisions cited as to what the primary meaning of the word is.

On the other hand, we must take account of the fact that legislatures like individuals frequently use words inaccurately, and it is by no means unthinkable that a statute containing this word might use it as referring to the act of legislation authorizing the execution and delivery of bonds to holders, rather than in its accurate sense as designating the actual execution and delivery itself. Nothing is clearer than that, once the legislative intention is definitely ascertained, that intention must be given effect; so it has been held in other states that where the sense requires it, the word "issued" may be taken as synonymous with the phrase "authorized to be issued." Wright vs. Irrigation District, 138 Fed. 313.

That the General Assembly of Ohio has been somewhat careless in the use of this term can be amply demonstrated by an examination of some of the sections re-

lating to borrowing money by municipal corporations, etc. For example, in section 3928 dealing with registration of bonds, it is provided as follows:

> "On demand of the owner or holder of any of its coupon bonds, a municipal corporation may issue instead thereof a registered bond, or bonds, of the corporation not exceeding in amount the coupon bonds offered in exchange. The registered bond or bonds shall be signed and sealed as other municipal bonds are signed and sealed, and bear the same rate of interest, be payable both principal and interest at the same time and place, as the coupon bonds for which the exchange is made, and shall be of such denomination as the holder of the coupon bonds may elect."

Here the word "issue" quite evidently refers to the physical act of executing and delivering an instrument of a particular form. It does not relate to an act of legislation, or to any other preliminary steps. See also section 3930 which uses the term in the same sense. Similarly, section 3913 dealing with borrowing money in anticipation of the general revenue fund, and being one of the sections amended by the Griswold act, so-called, provides as follows:

> "In anticipation of the collection of current revenues in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be actually received from taxes and other current revenues for such fiscal year, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent, and shall not be sold for less than par with accrued interest."

It is evident that the word "issue" as used in this section refers to the physical act of emitting commercial paper as evidence of the debt incurred by the borrowing of money. See also section 3915, a similar section in this respect.

On the other hand, the Longworth Act, so-called, being section 3939 and succeeding sections of the General Code, repeatedly uses the phrase "issue and sell." See sections 3939, 3939-1 and 3942. From this the inference might arise that the act of issuing which the legislature had in mind is something that precedes the sale. Strictly speaking of course, this is so, for a thing cannot be sold as such until it is in existence, and a bond could hardly be the subject of sale until it has been issued, and thus be regarded as in existence. Yet section 3950, and part of the same group, provides that:

> "An indebtedness shall not be deemed to have been created or incurred, within the meaning of this act, until the bonds shall have been delivered under contract of sale."

It will be observed, however, that the General Assembly carefully avoids the use of the word "issue" in this context, dealing instead with the amount of the indebtedness evidenced by bonds. Of course, if bonds can be said to be issued before they are sold, there must be such a thing as an issue of bonds which does not represent any indebtedness at all, which seems an absurdity. Yet absurd though the expression sounds, it may be that it describes an idea which has to be taken into account.

Ultimately, of course, the question turns on the interpretation of the statutes dealing with the procedure of disposing of municipal bonds. These sections are sections 3922 to 3927 inclusive. The following are quoted from the provisions of these sections:

> "When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity."

It is possible to read this provision in two ways, as if it read as follows:

> (1) "When a municipal corporation has issued its bonds, it shall first offer them," etc.

> (2) "When a municipal corporation is about to, or is issuing its bonds," etc.

In support of the first of these two interpretations, the argument already outlined might be adduced. That is to say, it might be reasoned that bonds could not be offered to anybody until they were actually in existence in the form of commodities to be dealt in. In support of the second of them, the argument would start from the proposition that the word "issue" naturally imports a manual delivery of the obligation, and that there is nothing in this context to indicate a contrary conclusion. Such an argument would insist that the offer to be made to the sinking fund trustees is itself an offer to issue. This same section goes on as follows:

> "Sec. 3922. If such trustees or other officers of the sinking fund decline to take any or all of such bonds at par and accrued interest, the corporation shall offer to the board of commissioners of the sinking fund of the city school district such bonds or so many of them, at par and accrued interest and without competitive bidding as have not been taken by the trustees of the sinking fund, and the board of commissioners of the sinking fund of the city school district may take such bonds, or any part thereof."

Section 3923 provides in part as follows:

> "Only after the refusal of all such officers to take all or any of such bonds at par and interest, bona fide for and to be held for the benefit of such corporation, sinking fund or debt, shall the bonds, or as many of them as remain, be advertised for public sale."

Section 3924 provides in part as follows:

> "Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest and best bidder, after publishing notice thereof for four consecutive weeks in two newspapers printed and of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest, and length of time the bonds have to run, with the time and place of sale."

Section 3926 contains the following:

> "Municipal corporations may issue bonds and other obligations in such denominations as the council may determine and sell them at popular subscription at a price of not less than par. Such bonds may be issued as registered or coupon bonds, or payable to bearer only, and provision may be made for the redemption, retirement or reissue of them. * * * Such advertisement shall state the time and place when tenders will be opened and the award made. All tenders shall be in sealed envelope and shall not be opened until the day and hour specified in the advertisement. At the time so specified the tenders shall be opened."

The idea that offers the difficulty is that embodied in the word "sale." This naturally suggests the thought of the transfer of title of property from a seller to a purchaser, and in order that there may be such transfer of title, it is necessary to conceive of the property as already in existence,—of the bonds as already "issued." Yet, the word "sale" itself may be used in a loose sense as indicating not a true sale but a transaction by which one party offers to take and the other party offers to issue negotiable instruments for a consideration agreed upon. When we come to section 3926 above quoted, we find the word "issue" used in its exact sense, for the advertisement of "sale" referred to in that section is required to set forth the denomination in which the bonds "will be issued" indicating that the issuance which the General Assembly had in mind at that point had not yet taken place.

It seems therefore that the only difficulty arises from the word "sale," which can be explained, and from the order in which the General Assembly customarily used the words "issue and sell," which of itself gives rise to a very slight inference. In the opinion of this department these difficulties and inferences are not sufficiently weighty to indicate any settled use of the term "issue" in the statutes relating to the incurring of debt by municipal corporations contrary to the accurate meaning of the term.

We now come to the Griswold Act itself. The first section of the act contains several definitions, one of which is of interest, as follows:

> "(e) The 'bond-issuing authority' shall, in the case of any bond issue, be the county commissioners, board of education, township trustees, city council or other board or officer who, under the provisions of law or charter, has the function of determining upon the issuance of such bonds."

Note that this definition does not imply that the city council issues the bonds, but merely that it has the function of determining upon the issuance. This definition, therefore, does not indicate that the General Assembly had in mind in beginning the framing of this act any unusual meaning of the word "issue." Section 3a of the act, originally section 5656 of the General Code, includes the phrase "borrowing money and issuing certificates of indebtedness." As previously indicated, this phraseology indicates a correct use of the word "issue." Section 4 of the act authorizes a subdivision for certain purposes to "issue bonds." This use of the term does not indicate that any unusual meaning attaches to the word "issue." Section 6 of the act, section 2295-9 of the General Code, deals with maturities, and is quite similar to section 14 in question here, save that it does not expressly use (though it certainly implies) the word "hereafter." It provides in part as follows:

"That the maturities of bonds issued by counties and other political subdivisions, including charter municipalities, shall not extend beyond the following limitations. * * *"

This section is so very similar to section 14 that no comment upon it will be made at this time.

Section 7, section 2295-10 of the General Code, is of importance. It contains the following sentence:

"Before any resolution, ordinance or other measure providing for the issuance of bonds or incurring of indebtedness of any county, or other political subdivision, including charter municipalities, is passed or adopted, the fiscal officer thereof shall certify to the bond-issuing authority the maximum maturity of such bonds or indebtedness, calculated in accordance with the provisions of the foregoing section, and no such bonds, shall be authorized or issued or indebtedness incurred with maturities extending beyond the maturities as thus certified by such fiscal officer."

Here is a strictly accurate use of the word "issued." Note that the legislature did not have in mind the thought that the resolution or ordinance would of itself constitute the issuance of the bonds. The function of the resolution is to "provide for" the issuance of the bonds. In the latter part of this sentence the phraseology "no such bonds shall be authorized or issued or indebtedness incurred with maturities extending beyond the maturities as thus certified," is very expressive of the primary meaning of the word "issue."

Section 15 of the act, section 5649-1b of the General Code, contains the following:

"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."

Here again it is clear that the issuance of the bonds is something that follows the passage of a resolution or ordinance.

We come now to section 14 which has been quoted at the beginning of this opinion and find that we must approach its consideration with the thought that nowhere in the act of which it is a part, unless it be in this section and in section 6, has the General Assembly manifested a clear intention to use the word "issue" in a sense other than its primary sense and that the instances of such inaccurate use of the term anywhere in the statute are at least rare. At this point, notice may be taken of an argument that has thus far not been considered. It might be said that inasmuch as these two sections deal with matters that must be considered by the council and determined by it in the ordinance authorizing the issuing of bonds, those sections must be interpreted as dealing with such ordinances; so that the word "issue" as used in it must have been intended to designate the passage of the ordinance. To express this meaning more accurately, a paraphrase of section 14 would be required as follows:

"All bonds, the issuance of which is hereafter provided for, shall be serial bonds," etc.

It is true that the maturities of bonds, the rate of interest which they shall bear, and other matters of this kind must be provided for in the legislation of the bond-issuing authority. It is true, moreover, that section 15, which must be read in connection with section 14, expressly provides what shall appear in the "resolution, ordinance or other measure under which bonds are issued or otherwise." So that in pursuance of a perfectly consistent legislative policy, it might have been reasonable for the legislature to use like language in section 14, and to have said that the resolution, ordinance or other measure under which bonds are issued shall if passed "hereafter" contain provisions requiring the bonds to mature in series as provided in section 14. But it is one answer to this argument to point out that the General Assembly has done no such thing, but has provided in the one section what bonds hereafter issued shall be, and in the other section what ordinances hereafter passed shall provide.

On the whole, no sufficient reason appears for giving to the word "issue" as used in section 14 of the Griswold Act any meaning or application other than that which it naturally has. It follows that the bonds inquired about had not been "issued" on January 1, 1922; for the choice must lie, it is believed, between the actual delivery of the bonds, or at the least, the making of a binding contract for the delivery on the one hand, and the going into effect of the ordinance authorizing the issuance on the other hand. None of the statutes indicate the possibility of using the term to designate any step such as the offer to the sinking fund trustees, etc., between these two steps.

For the foregoing reasons, this department is of the opinion that the Griswold Act applies to the bonds in question, and that they may not lawfully be sold and delivered, i. e., "issued" at the present time. In short, by failing to "issue" the bonds prior to January 1, 1922, the municipality simply lost the power to "issue" them in the form in which it had attempted to do so.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2924.

TAXES AND TAXATION—EFFECT OF DECISION IN CASE OF WILSON VS. LICKING AERIE OF EAGLES (104 O. S. —)—SECTION 5364 G. C. UNCONSTITUTIONAL AND SECTION 5353 G. C. CONSTITUTIONAL—WHAT PROPERTY EXEMPT FROM TAXATION THAT BELONGS TO INSTITUTION OF PUBLIC CHARITY.

1. *Section* 5364 *of the General Code is unconstitutional.*

2. *Section* 5353 *of the General Code is constitutional, but property to which it relates, in order to be exempt from taxation, must not only belong to an institution of public charity only, but must be devoted to the publicly charitable use.*

COLUMBUS, OHIO, March 10, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The Commission recently requested the opinion of this department as follows: