That is to say, the only case in which interest at the rate of five per cent per annum is to be charged for failure to pay within the first year is that of an unavoidable cause, delaying and preventing payment within the first year.

It is accordingly the opinion of this department that in the case submitted, and upon the assumption above made (but not otherwise), the eight per cent rate runs from January 3, 1921, and continues to run, notwithstanding the subsequent institution of litigation. No hardship results from this rule, as it is believed that it is almost inconceivable that the persons interested in the determination of the tax would be powerless to institute litigation to determine the validity of a known claim against the estate or involving the settlement thereof.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3031.

GRISWOLD ACT—WHEN BONDS ARE NOT YET "ISSUED" WITHIN MEANING OF SECTION 2295-12 G. C.—GRISWOLD ACT APPLIES ON JANUARY 1, 1922, AND LEGISLATION MUST BE RE-FORMED SO AS TO CONFORM MATURITY OF ISSUE TO PROVISIONS OF SAID ACT IF BONDS NOT ISSUED PRIOR TO ABOVE DATE.

Bonds authorized by a vote of the people, the issuance of which is provided for by legislation of council, which have been offered to the local sinking fund trustees and the Industrial Commission of Ohio and rejected, and offered at public sale after due advertisement, and not sold for want of bidders, are not yet "issued" within the meaning of section 14 *of the Griswold act (section* 2295-12 *G. C.) nor do such bonds become "issued" by reason of having been printed, signed and sealed, and in the hands of the mayor and other municipal officers authorized under the circumstances to dispose of them at private sale, so long as no part of the bonds thus authorized to be issued have been disposed of. Accordingly, where the situation is as above stated on January* 1, 1922, *the Griswold act applies, and legislation must be re-formed so as to conform the maturity of the issue to the provisions of the act.*

COLUMBUS, OHIO, April 25, 1922.

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

GENTLEMEN:—You request the opinion of this department upon a question submitted by the clerk of council of the city of Elyria. The clerk writes a lengthy letter, from which the following may be quoted:

> "A somewhat similar question has now come up with reference to another issue of bonds of the city of Elyria known as water works bonds, series "V," but the facts in connection with this issue are sufficiently different to differentiate this question from the one submitted heretofore, so that we feel warranted in asking you to submit this question also to the Attorney-General's office.
>
> On February 3, 1919, the Council of the city of Elyria duly passed Resolution No. 1569 providing for the submission to the electors of the city of the question of whether or not the city should issue bonds in the amount of $1,000,000 for the purpose of enlarging, improving, etc., the water works system of the city. No details as to maturities, rate of interest or how the

bonds should be issued were contained in this resolution and it was simply the question as to issuance or non-issuance of bonds for said amount. This question was submitted at a special election on April 30, 1919, and resulted in a vote of 909 for the bonds and 111 against the bonds. Subsequently an ordinance providing for the issuance and sale of $350,000 of these bonds was passed and the bonds were regularly issued and sold. Later another issue of $500,000 was provided for and they also were regularly issued and sold, thus leaving the amount of $150,000 of the authorized $1,000,000 unissued.

On January 17, 1921, Ordinance No. 2454, was passed providing for the issuance of water works bonds, series "V," in the amount of $150,000 and these bonds were offered to the Elyria Sinking Fund Trustees on March 7, 1921, and duly declined the same day. They were then offered to the Board of Commissioners of the Sinking Fund of Elyria City School District on the same day and also duly declined by said board. Thereafter on March 8, 1921, the bonds were offered to the Industrial Commission of Ohio and were duly declined on March 9, 1921, and thereupon they were offered at public sale on April 12, 1921, after having been duly advertised as required by law, a copy of the advertisement being hereto attached. At the sale on April 12, 1921, no legal bids were received and the bonds were not sold, but having been once duly advertised and offered at public sale they could thereafter be sold at private sale. However, none of the bonds were sold at private sale and none have been sold up to the present time and the question of the application of the Griswold act now becomes important in determining whether or not we may now sell said bonds, conceding that they do not comply with the terms of the Griswold act in certain particulars, if the same applies. Though it is not our usual practice to have bonds printed, signed, etc., until after the transcript of proceedings relative to their issuance has been approved by the attorneys for prospective purchasers, in the case of this particular issue we did have the bonds printed and duly signed by the mayor, city auditor and secretary of the Sinking Fund Trustees and the city seal duly affixed, so that the bonds were ready for immediate delivery upon the date of the public sale.

In the consideration of the question involved, I would call attention to the fact that it is quite possible that the Griswold act does not apply to water works bonds at all, in cases where the earnings of the water department are sufficient to take care of all interest and sinking fund charges. That is the situation in Elyria and up to the present time no water works obligations have ever been paid out of money derived from taxation.

The real determination of the question involved, however, turns, I believe, on the interpretation to be given to the word 'issue' as used in the Griswold act and in the statutes generally relating to the issuance and sale of municipal bonds and notes. If the word 'issued' is to be interpreted as meaning not only the physical acts of having the bonds printed, signed, sealed and registered with the Sinking Fund Trustees, and in short, the doing of the things that are necessary to get the bonds into being so that there is something to sell, but also as meaning 'sold' in addition to these other things, then it would seem that the Griswold act does apply.

On the other hand, if to 'issue' is one thing and to 'sell' is something else in addition thereto, then it seems to me that the facts with reference to this issue of bonds in question are such that the Griswold act does not apply. I personally believe thoroughly in this latter interpretation.

Although I do not see that it has any bearing on the principles involved in the question submitted, it might be of interest that the same persons are today mayor, auditor and secretary of the Sinking Fund, re-

spectively, as were mayor, auditor and secretary of the Sinking Fund on April 1, 1921, when these bonds were signed, so that if they were being signed today it would be by the same individuals."

It will not be necessary to repeat the reasoning of Opinion No. 2923 referred to in the clerk's letter. At the outset, however, it may clear the way of some misunderstanding to state that that opinion did not hold that the word "issued" as used in section 14 of the Griswold act or elsewhere in the statute, includes the idea expressed by the word "sold." No such statement is found in the opinion. It would be a closer approximation of the meaning of the former opinion—though not necessarily an entirely accurate one—to say that the word "issued," though it refers to something entirely different from the word "sold" is descriptive of an act which in point of time usually occurs after that step, in the incurring of bonded indebtedness by municipal corporations which is described by the word "sold." In other words, it was stated distinctly in that opinion that the primary and usual meaning of the word "issue" is the delivery of a negotiable instrument by the obligor to another who becomes a holder. This is not equivalent to saying that the usual meaning of the term is one which would include the idea of sale; but it is true that in the law of sales, the act of delivery, though necessary to complete a sale, usually, if not invariably, follows a contract of sale. We say "sell and deliver" rather than "deliver and sell." So also if we were speaking in terms of entire accuracy, we would say "borrow and issue notes or bonds" rather than "issue notes or bonds and borrow," if we were describing in the ordinary sequence of time the steps incident to the borrowing of money on the faith of the borrower's negotiable instruments. So that if the word "issue" is primarily synonymous with "deliver," the meticulously accurate form of expression would be "sell and issue" instead of "issue and sell." And this would be true even though the instrument duly signed and sealed had been executed before the transaction, which might be described as a sale, took place. That is to say, if a customer of a bank desiring to borrow money should make out and sign a ninety day promissory note payable to the order of the bank, and with it in his hand approach the proper officer of the bank with a request for a loan, it could hardly be said that at that point of time the maker had "issued" his note; certainly it could not be so said in the light of the provisions of the negotiable instruments law referred to in the former opinion. But if his offer of the note were accepted and manual delivery of the note were made, then it would be "issued," not because the word "issued" includes the borrowing or the sale, but because it imports the act by which the maker has divested himself of dominion over the instrument, and has thus put out a negotiable chose in action against himself. The fact that he would not ordinarily do this until he had a binding contract to furnish the consideration, makes it true in a practical sense that the word "issued" so used imports a prior "sale."

In the former opinion a distinct difficulty in accepting in its entirely this primary meaning of the word "issued" for application to the term as used in section 14 of the Griswold act and elsewhere in the statutes was recognized as growing out of the repeated use in the statutes of the formula "issue and sell" instead of the reverse order, "sell and issue," which would be more consistent with the meaning just discussed. The statutes in which this use of the two terms appears were examined in that opinion, and the general conclusion expressed that not enough in the way of inference could be drawn from this usage to overthrow the presumption that the word "issue" was used throughout in its accurate and primary sense. It was also stated in the former opinion that this department for the purpose of that opinion was unable to find any possible connotation of the word "issue" other than the one above defined on the one hand, and the passage or adoption of the so-called "legis-

lation" authorizing the issuance or the effective date of such measure on the other hand.

Neither one of these propositions was strictly necessary to the determination of the question then before the department; for in the case then under consideration nothing had been done excepting the passage of the ordinance, the offer to the respective, Sinking Fund Trustees and Industrial Commission of Ohio and the commencement of advertising for bids for public sale. No bonds were actually in existence in the form of executed instruments retained in the possession of the municipal authorities, and the required steps looking toward a public sale had not been completed.

Nevertheless, it is true that the proposition above repeated from the former opinion if literally accepted and applied to the present case would determine this case adversely to the contention of the clerk. The present question, therefore, might be disposed of by applying these portions of the former opinion to it.

However, this department in an important and difficult question of this nature, as well as in other cases, does not feel that it ought to be bound by any expressions in one of its opinions not necessary to the determination of the exact question under consideration, and for that reason, among others, the question now submitted will be carefully examined with a view to determining whether or not it contains elements which distinguish it from that formerly before the department; and with a view also to re-examining the principles laid down in the former opinion and the correctness of the conclusion therein reached.

The strongest arguments in favor of giving to the word "issued" as used in section 14 of the Griswold act some meaning other than the primary one which imports the passing of the paper out of the possession of the municipal authorities, have already been mentioned. They are put very attractively in the letter of the clerk which has not been fully quoted, though the clerk does fall into an error in the interpretation of the former opinion which has been dealt with. To repeat, the argument is founded upon the order in which the words "issue and sell" are found repeatedly in the statute, to which the clerk adds the thought that the words "and sold" are not found in section 14 of the Griswold act, though they occur frequently elsewhere.

Another argument mentioned in Opinion No. 2923, but not referred to in the letter of the clerk, is that section 14 of the Griswold act deals with subject-matter that pertains to the "legislation" under which bonds are issued, and therefore ought to be construed as applying to no procedural step subsequent in point of time to the adoption of such legislation. The last described argument was dealt with in the former opinion, and need receive no further attention at this time.

The clerk seems to accept the conclusion that bonds cannot be "issued" merely because an ordinance or resolution authorizing their issuance may have been adopted and have become effective. Though the correctness of this proposition has been reconsidered in this department, no reason appears for receding from it, and it will be adhered to. The real contention of the clerk seems to be that when all the formal and public offers required by the statutes have been made, and the bonds appear to be in final form, signed and sealed and ready for delivery, they must be regarded as "issued."

This contention will now be examined. It will be observed that it resolves itself into two points, which require separate consideration. They may be stated as follows:

(1) Does the offering of an authorized issue of bonds to the municipal and school district Sinking Fund Trustees and Industrial Commission of Ohio, and the due advertisement for public sale, with the resultant authority to sell them at private sale, make it possible to say of the bonds that they are by reason of such premises "issued?"

(2) If the first question be answered in the negative, does the fact that bonds have been executed and are ready for immediate delivery to a prospective purchaser, make them "issued?"

In order, however, to complete the statement of the questions which ought to be considered, a third could be dealt with, namely, as to whether in the event of a negative answer to both of these questions, separately considered, the combined acts may produce a different result; that is to say, even if the completion of all the required offerings of itself does not amount to an issuance, and even if the preparation and execution of the instruments does not have that effect, do these two facts when combined produce an issuance?

For convenience, let the second question be considered first, for there has already been some discussion of it in this opinion. It seems very clear to this department that in the case of instruments running to a particular purchaser, in the first instance at least, it is impossible to conceive of their "issuance" before they are delivered, or at the very least (as likewise intimated in the former opinion), before a binding contract for their delivery is made with that purchaser. This point would cover notes, bonds and checks payable to a particular person or his order, as well as certificates of shares of stock, etc. Municipal bonds, however, are payable to bearer, and it is just possible that a distinction may be drawn from this fact. Let us see what the distinction would be.

It might be argued that when a person draws a negotiable instrument payable to bearer, and without having found anyone who is willing to pay him anything for it, or to furnish any other consideration therefor, retains it in his possession and under his control, with both power and right to destroy it, it can be said that he has issued an instrument. If so, it must be on the theory that the instrument in that form might accidentally fall into the hands of an unauthorized person who might then dispose of it to a purchaser for value without notice, and without the necessity of committing a forgery in order to realize its value. This is going too far, and it is the opinion of this department that the mere execution of a municipal bond by the officers authorized to prepare and sign it, does not constitute an "issuance" of it so long as it remains in their hands, they being agents of the municipality; for as they are agents to issue and sell, their authority is revocable. The city of Elyria, for example—or to be more particular, the council of the city—undoubtedly possesses the power at the present time to repeal the ordinance providing for the issuance of the bonds in question, and to direct the destruction of the paper instruments that have been prepared and signed. That being the case, it is impossible to conceive of them as having been issued; for it seems axiomatic to this department that the word "issued" imports a final act so far as the issuer is concerned.

It seems scarcely necessary to go through the same course of reasoning in dealing with the first question above submitted; the mere offer to the various public authorities and the mere advertisement for bids is not enough, especially when there are no instruments in existence at the time these offers and advertisements are made. The municipality still has the right to reverse its policy, and to put a stop to all proceedings looking toward the disposal of the bonds.

We thus come to the final question which requires us to consider these two facts, neither of them sufficient in itself, as they exist in combination. It might be well to remind ourselves at this point of the exact situation so that the position of the city authorities may be put in its strongest light. The proper municipal officers are authorized now to dispose of the bonds at private sale. So long as the council does not revoke that authority, they have power under the statutes, and particularly under section 3924 of the General Code to sell any part of the bonds at not less than par whenever they see fit. The statute in question provides as follows:

"* * * * when such bonds have been once so advertised, and offered

for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value, under the directions of the mayor and the officers and agents of the corporation by whom such bonds have been, or may be, prepared, advertised and offered at public sale."

Heretofore, in dealing with the first and second questions it has been assumed rather than decided after discussion that the council of the municipality might repeal the ordinance under which the bonds were to be issued at any time before they had been sold. That question ought now to be more fully discussed, and if the assumption is found to have been well taken with respect to its application to the other questions previously considered, it should be examined anew so far as it might apply to the third question. Is it true that after the bond ordinance has been passed and has gone into effect, it may be repealed? The statutes do not expressly so provide, and it is therefore arguable that the authority of the administrative officers is not revocable by the council. This is particularly true of bonds issued as these were under the so-called Longworth act.

Section 3947 provides as follows:

"If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, the bonds shall be issued. * * *"

Yet even this section cannot have the extreme effect which might be imputed to it; nor has it been given that effect by the proper authorities of the city of Elyria, for although the issuance of a million dollars in bonds was authorized by the people, the facts show that the council exercised this authority in parcels, whereas if section 3947 be read literally, council would not have had even this discretion.

It is the opinion of this department that all these sections must be read in the light of general principles, one of which is that the council as the local legislative body, has general control over the finances of the municipality (section 4240 G. C.) and has the right to repeal any authority not fully executed by the administrative officers to which it is delegated.

Accordingly, the assumption above made is believed to be correct. No reason is perceived for not applying it to the authority of the mayor and other officers under section 3924 of the General Code. That being the case, it is believed that the bonds cannot be regarded as issued, even though they are fully executed and in the hands of the mayor and finance committee or other local authority susceptible to be sold in parcels or otherwise whenever such local authorities may desire to sell them, subject to the limitation of section 3924.

For all the foregoing reasons, it is the opinion of this department that the result reached in the former opinion (No. 2923) must also be reached with respect to the question now submitted, and that the bonds of the city of Elyria, series "V," must be conformed to section 14 of the Griswold act.

It should be distinctly understood that this opinion is limited to the facts which have been considered. No opinion is expressed as to what would be the result if a part of series "V" had been disposed of by January 1, 1922. In the case under consideration this series, though covered by a blanket authorization of the electors, extending to a million dollars is a separate "issue" from the legislative standpoint, and no part of it has been disposed of.

Respectfully,
JOHN G. PRICE,
Attorney-General.