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:

"In the recent decision of the Supreme Court in the case of Wilson vs. Licking Aerie of Eagles, it was held that the property of this organization is not exempt from taxation and the court also made some observations with reference to sections 5353 and 5364 G. C.

The Commission requests your opinion as to the effect of this decision on the validity of these sections, and also as to what institutions of 'public charity or institutions used exclusively for charitable purposes' or what institutions other than those of a charitable nature, are now exempt from taxation."

The following is quoted from the syllabus and opinion in the case referred to:

"2. The provision in section 2, article XII of the Constitution, that institutions 'used exclusively for charitable purposes * * * may, by general laws, be exempted from taxation,' does not authorize the general assembly to exempt from taxation the property of benevolent organizations not used exclusively for charitable purposes."

"The defendant in error contends that its real estate described in the petition is exempt from taxation by the provisions of section 5364 and 5353, General Code.

The pertinent part of section 5364 is as follows: 'Real or personal property belonging to * * * a religious or secret benevolent organization maintaining a lodge system * * * shall not be taxable and the trustees of any such organization shall not be required to return or list such property for taxation.'

Section 5353, General Code, reads: 'Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision thereof for public purposes, and property belonging to institutions of public charity only, shall be exempt from taxation.'

Section 2, of article XII, of the Constitution, prior to the amendment in September, 1912, contained the following provisions: 'Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, * * * but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, * * * may, by general laws, be exempt from taxation.'

In September, 1912, that section of the Constitution was amended. The amendment changed the phrase 'Institutions of purely public charity' and substituted for it the phrase 'institutions used exclusively for charitable purposes,' and provided that they may by general laws be exempt from taxation.

In Myers, Treas. vs. Rose Institute, 92 Ohio St., p. 238, the same section of the Constitution as it stood prior to the amendment in September, 1912, was involved, and the phrase 'institutions of purely public charity' was considered.

The decisions of this court touching the subject were examined and it was found that it has been constantly recognized, and held by this court

that the phrase 'institutions of purely public charity' was a broad one and that the terms might be applied by the legislature to the organization which administered the charity or to the establishment, the physical property or buildings, in which its operations are carried on.

'The term "institution" is sometimes used as descriptive of the establishment or place where the business or operations of a society or association is carried on; at other times it is used to designate the organized body. * * * As used in the constitutional provision, the term may be applied by legislation in either sense.'

Gerke vs. Purcell, 25 Ohio St., 242; Humphries vs. Little Sisters of the Poor, 29 Ohio St., 201; Library Assn. vs. Pelton, 36 Ohio St., 253; Davis vs. Camp Meeting Assn., 57 Ohio St., 257; Little Treas. vs. U. B. Seminary, 72 Ohio St., 417.

The change in the respects referred to made by the amendment in 1912 to this section was discussed in State ex rel. vs. Fulton, 99 Ohio St., 183. It is there said: 'This phrase (institutions of purely public charity) was included in the original section as adopted in the Constitution of 1851. From time to time, covering a period of over 60 years, it had received the consideration of this court in a number of cases, and the disposition of the general assembly was towards the passage of law enlarging exemptions which had been permitted under that provision. Serious question as to the extent of exemptions allowable under this clause began to be raised.

'At the time of the making of the original constitutions the provision name was doubtless sufficient to meet the requirements. As the state grew and expanded new relations grew up. There came to be great benevolent and fraternal societies and orders in our midst, which maintained hospitals, homes and institutions for the care and maintenance of their aged and infirm members, their widows and orphan children. But for them, much of the charitable work of these organizations would have to be done by the state itself.

'This phase of the development of our social fabric is only one of many gratifying and similar elements in our growth. * * *

'When the Constitutional convention met in 1912, in response to this great benevolent spirit and to a compelling sense of justice toward those maintaining such institutions, the phrase "institutions of purely public charity" was changed so that it should read "institutions used exclusively for charitable purposes." This clause includes the institutions to which we have referred. They are, in many cases, not purely public charities, yet they devote themselves exclusively to charitable purposes. Under the 1851 provision they would not be entitled to the exemption. Under the 1912 provision, of course, they would.'

The pertinent part of section 2, of article XII of the Constitution as now in force is as follows: 'Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, * * * institutions used exclusively for charitable purposes, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value five hundred dollars, for each individual, may, by general laws, be exempted from taxation.'

In view of these constitutional and statutory provisions and the decisions of this court construing them, is the real estate of the defendant in error exempt from taxation? Is it shown by the record that it is an institution used exclusively for charitable purposes?

(The court here quotes from the record to show that the property in question was used primarily for the comfort and convenience of the members of the order, though there was a fund which after being first dedicated to the relief of widows and orphans of members of the order, was available for public donations as determined upon by the local organization within the order.)

From this undisputed evidence we are clearly convinced that it cannot be said that the defendant in error and the real estate described in the petition is an 'institution used exclusively for charitable purposes.' It would not be competent for the legislature to enact a statute exempting the property of the organization from taxation unless it was shown to be an institution used exclusively for charitable purposes. The constitution itself determines the question in this case in the light of the undisputed evidence as to the nature of the defendant in error and the use made of its property.

What has been said would be sufficient to dispose of the case we have before us. However, the defendant in error relies on statutory provisions. Those provisions are included in section 5364, General Code, viz.: 'Real or personal property belonging to * * * a religious or secret benevolent organization maintaining a lodge system * * * shall not be taxable.' And in section 5353, General Code, 'property belonging to institutions of public charity only, shall be exempt from taxation.'

Section 5364, General Code, was enacted before the adoption of the amendment in 1912, but it is contended by the defendant in error that even if the quoted provision in that section was unconstitutional when enacted because it covers institutions not of purely public charity, yet it would be valid under the amended section of the Constitution and that it is preserved by the schedule adopted in 1912, which provides that 'All laws then in force, not inconsistent therewith shall continue in force until amended or repealed.'

It is declared in Sutherland Statutory Construction, 2nd edition, section 107, that an after acquired power cannot *ex proprio vigore* validate a statute void when enacted.

And in the recent case of Newberry vs. United States, decided in May last, the Federal Supreme Court held that 'The validity of the Federal Corrupt Practice act antedating the 17th Amendment must be tested by powers possessed by Congress at the time of its enactment. An after acquired power cannot *ex proprio vigore* validate a statute void when enacted.'

But even if the section, as it now stands were re-enacted it could not exempt the property of any organization not used exclusively for charitable purposes. The same observation must be made concerning the provisions of section 5353, General Code, which was enacted after the amendment in 1912, viz.: 'property belonging to institutions of purely public charity only, shall be exempt.' Such property can only be exempt under the Constitution when used exclusively for charitable purposes.

Under the amendment adopted in 1912, the hospitals, homes, asylums and institutions for the care and maintenance of the aged and infirm members, their widows and orphan children, of the great benevolent and fraternal societies which have grown up in our midst, in the last fifty years, may of course be exempt from taxation by general laws to that effect. Such institutions while not purely public charities, yet are devoted exclusively to charitable purposes.

As we have shown, there has been a growing disposition by the constitution-makers and the legislature to exempt property devoted to that end. It is not only necessary that the exemptions be made by general laws, but the laws must conform to the constitution. The legislature should exercise its authority to the fullest extent within the constitution to encourage these worthy organizations in the accomplishment of their object, but is not within the court's power to extend exemptions beyond the authority granted by the constitution or the acts of the legislature passed pursuant thereto. The constitution is the superior law and the ultimate criterion. The court's sole duty is to enforce it.

Therefore, the judgment of the court of appeals will be reversed and the cause remanded to that court with instructions to dismiss the petition of the plaintiff below."

Section 5364 of the General Code is only partly quoted in the above opinion. It provides in full as follows:

"Real or personal property belonging to an incorporated post of the Grand Army of the Republic, Union Veterans' Union, Grand Lodge of Free and Accepted Masons, Grand Lodge of the Independent Order of Odd Fellows, Grand Lodge of the Knights of Pythias, association for the exclusive benefit, use and care of aged, infirm and dependent women, a religious or secret benevolent organization maintaining a lodge system, an incorporated association of ministers of any church, or incorporated association of commercial traveling men, an association which is intended to create a fund or is used or intended to be used for the care and maintenance of indigent soldiers of the late war, indigent members of said organizations, and the widows, orphans and beneficiaries of the deceased members of such organizations, and not operated with a view to profit or having as their principal object the issuance of insurance certificates of membership, and the interest or income derived therefrom, shall not be taxable, and the trustees of any such organizations shall not be required to return or list such property for taxation."

This section was enacted, as the court states, prior to the amendment of the Constitution in 1912, and at a time when the Constitution permitted the exemption of "institutions of purely public charity" only. Without going through the list of organizations mentioned in section 5364, it is rather clear that most of them however charitable their activities might be, are not institutions of "purely public charity." It will not be necessary to refer to decisions to establish these elementary distinctions. While the opinion of the court studiously refrains from definitely holding that section 5364 which on this reasoning must have been regarded as unconstitutional prior to 1912 still remained unconstitutional after the permissive amendment of article XII, section 2, yet the intimations to that effect in the opinion are very strong, particularly the quotation from Sutherland on Statutory Con-

struction and the reference to Newberry vs. The United States. In this connection, the Commission is reminded that a former Attorney-General went into this very question in an opinion found in the Annual Report of the Attorney-General for the year 1914, Volume 1, page 1051, and came to the conclusion that section 5364 was unconstitutional, and was not validated in any respect by the subsequent amendment of article XII, section 2, authorizing enlarged exemptions. The reasons for this conclusion, in addition to those suggested in the opinion of the court in the recent case under examination, are that the exemption provisions of article XII, section 2, are with one exception permissive only, and that the legislature not having availed itself of its permission to enlarge the exemptions in favor of charitable institutions, since it was empowered to do so, section 5364, which was passed at a time when that authority was lacking, could acquire no new validity from the permission thus extended.

In view of the reasoning in the Eagle's case, this department sees no reason for departing from its former holding on this point.

The Commission is therefore advised that section 5364 of the General Code is entirely unconstitutional, it being impossible to separate those parts of it that might have been justified by the constitution prior to 1912 from those parts of it which are clearly in contravention thereof.

As a matter of fact, it is felt that the reasoning of the recent case would justify also the conclusion that the section is unconstitutional under the amended constitution, but it is unnecessary to go into that question in view of the conclusion already reached.

With respect to section 5353 of the General Code, however, the question is entirely different. Though this section has been amended since article XII, section 2, was passed in 1912, it still uses the phrase "institutions of public charity only" which is the fair equivalent of "institutions of purely public charity," instead of "institutions used exclusively for charitable purposes" in accordance with the language of section 2 of article XII as amended. In other words, though the constitution has been changed, the fair import of section 5353 is such as that it has not been changed. It stands then just as it stood prior to the amendment. As a matter of fact, the language "public charity only" in lieu of "purely public charity" was in the section when the constitution was amended in 1912, the change having been made in the codification of 1910. Other changes made in the section of which section 5353 was a part at the same time as this change, gave rise to the questions discussed in Myers vs. Rose Institute, 92 O. S. 238 and Rose Institute vs. Myers, 92 O. S. 252. Those cases stand then as an authoritative interpretation of the section so far as the present question is concerned, for the change made in 103 O. L. 548, is immaterial.

In Myers vs. Rose Institute and Rose Institute vs. Myers, supra, section 5353 was not held invalid, but was merely given an interpretation consistent with the constitution. The interpretation given, in the language of the syllabi is as follows:

> "Section 5353, General Code, when enacted and when this suit was brought, was within the authority granted to the general assembly by section 2, article XII of the Constitution, as then in force, and exempted from taxation the personal property of institutions of purely public charity, including endowment funds which belong exclusively to them and which, with the income arising therefrom, are devoted solely to their support." (Page 238.)

> "The real estate belonging to an institution of purely public charity is exempt from taxation only when used exclusively for charitable purposes, and if such real estate is rented for commercial and residence purposes it is not exempt, although the income arising from such use is devoted wholly to the purpose of the charity. (Page 252.)

In these cases the question as to what charitable uses are public and what are not public was not involved, but a long line of cases preceding these cases has drawn the distinction which has already been stated. See:

Morning Star Lodge vs. Hayslip, 23 O. S. 144;
Gerke vs. Purcell, 25 O. S. 229;
Little vs. Seminary, 72 O. S. 417;
Library Association vs. Pelton, 36 O. S. 253.

This being the meaning of section 5353 at the time it was amended, and the language of the section remaining the same, it is not believed that the change in the constitution made subsequent to the time when the present words got into the statute, can affect the meaning of the statute. The proposition that the meaning of a statute is unaffected by a subsequent constitutional change is even clearer than the other proposition hereinbefore referred to that its validity is not so affected.

It is the opinion of this department, therefore, that section 5353 is a valid statute, and that nothing in the opinion in the recent case affects its validity.

These observations seem to answer the principal question submitted by the Commission. The Commission also asks "what institutions of 'public charity or institutions used exclusively for charitable purposes' or what institutions other than those of a charitable nature, are now exempt from taxation." This question is too general to be made the subject of an opinion. Each case in which a claim of exemption under section 5353 of the General Code is advanced, must be considered on its merits. The following observations, however, may be made.

(1) By virtue of section 5349, lands and buildings connected with public colleges, academies and other public institutions of learning, not used with a view to profit, are exempt. As suggested in Myers vs. Rose Institute, supra, the test here is one of use. The mere fact that lands or buildings belong to a public college or academy are not enough. They must also be used for the purposes of the institution and not with a view to profit. See Kenyon College vs. Schnebly, 12 C. C. (N. S.) 1.

(2) Section 5353-1 purports to exempt all

> "Property, real, personal, and mixed, the net income of which is used solely for the support of institutions used exclusively for children's homes for poor children, the real estate on which said institutions are located, and the buildings connected therewith," * * *

This section is of doubtful constitutionality in view of the decision in Rose Institute vs. Myers, supra, in so far as it purports to exempt real property which is rented for commercial or residence purposes, even though the income be used exclusively or solely for the support of such institutions. It is constitutional so far as personal property, such as securities the income of which is so used, may be concerned. Myers vs. Rose Institute, supra.

(3) Under section 5353 all property belonging to institutions of public charity and satisfying the tests of use indicated by the decisions above cited, is exempt from taxation.

Section 5365 exempting property the income from which is used for the support of the poor of a certain religious society, may be disregarded. That section is either unconstitutional or its subject-matter covered by section 5353, section 5365-1 is unconstitutional. It purports to exempt the funds of all fraternal benefit societies. The reasoning of Wilson vs. The Order of Eagles invalidates this section.

Coming then to the general language of section 5353, it will be impossible for the reasons above stated to enumerate all the possible kinds of institutions of public charity only without quoting or citing the decisions. These tests may be laid down in a general way:

(1) The property must belong to an *institution,* i. e., some sort of organization for a definite purpose. An individual is not an institution; nor is a group of individuals not associated for a definite purpose, such an institution.

(2) The purpose of the organization must be charitable. This statement answers one of the Commission's questions, which is "what institutions other than those of a charitable nature are now exempt from taxation." The answer is, no institution not of a charitable nature is exempt from taxation, save those expressly mentioned in the constitution and laws, such as houses of public worship, public school houses, burying grounds, etc.

(3) The word "charitable" is to be given a rather broad meaning and not limited merely to the dispensing of alms, or direct relief of the poor. Thus, a library, a museum of art, a school, an athletic association—all of these have been held to be "charities" when they satisfy the test about to be mentioned. The test is that the enterprise is not conducted with a view to private gain.

(4) The charity must be public. While this is no longer required by the constitution, it is still required by section 5353, which does not go so far as the constitution now permits the legislature to go. That is to say, the use of the institution or the benefits to be derived from it must be available to all persons on the same terms. Such use may be limited territorily, as to the inhabitants of a given city or township. It may be even limited racially, or by any other natural line of cleavage, but it cannot be conditioned by membership in a particular society or religious denomination.

(5) Returning to the word "charity," the term does not include other things that are specifically mentioned in the constitution and statutes. Thus a church is not a charitable institution within the meaning of section 5353.

All these matters are covered in numerous previous opinions of this department. It may be sufficient for the Commission's purposes to state that none of such opinions on the subject of exemptions from taxation is in any wise affected by the recent decision.

Respectfully,
JOHN G. PRICE,
Attorney-General.