and obtain a new certificate from him and proceed under the provisions of Amended House Bill No. 140 of the second special session of the 90th General Assembly.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3989.

SALES TAX—MOTOR TRANSPORTATION COMPANY IF PUBLIC UTILITY EXEMPT FROM PAYING TAX WHEN PROPERTY PURCHASED USED IN RENDITION OF PUBLIC UTILITY SERVICE.

SYLLABUS:

A motor transportation company which is defined as a public utility by sections 614-2 *and* 614-2a, *General Code, and which is a public utility in fact, is included within the meaning of the term "public utility" as the same is used in the provisions of section* 5546-1, *General Code, defining the term "retail sale" and "sale at retail," and sales made to such motor transportation company for the purpose on its part as the consumer to use or consume the property sold to it in the rendition of its normal and ordinary service as a public utility, are exempt from the sales tax provided for by section* 5546-2, *General Code.*

COLUMBUS, OHIO, March 2, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of your recent communication which reads as follows:

> "The tax commission requests your answer on the construction which should be given
>
> 'to use or consume in the rendition of a public utility service'
>
> as set forth in 5546-1, paragraph 6 of the General Code.
>
> The question is whether or not 'to use or consume in the rendition of a public utility service' should include utility companies as defined in section 614-2 and 614-2a, known as motor transportation companies, and those companies as defined in section 5415, General Code, or should the exemption be limited to those companies as set forth in section 5546-2, paragraph 6 of the General Code."

The question presented in your communication requires a construction of certain pertinent provisions of Amended House Bill No. 134, which was enacted by the 90th General Assembly, providing for a levy and collection of a tax upon sales of tangible personal property at retail, and which has been carried into the General Code as sections 5546-1 to 5546-23, inclusive.

Section 5546-1, General Code, provides that for the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, per-

mitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering said act, an excise tax is levied on each retail sale of tangible personal property in this state made during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, which taxes so provided are at the graduated rates specified in said section.

It will be noted that the tax provided for in this section is one levied "on each retail sale." For the meaning of the term "retail sale" we are required to look to the definitive provisions of section 5546-1, where this term and the terms "sale" and "consumer" are defined as follows:

> " 'Retail sale' and 'sale at retail' include all sales excepting those in which the purpose of the consumer is (a) to re-sell the thing transferred in the form in which the same, is, or is to be, received by him; or (b) to incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing or refining, or to use or consume the thing transferred in manufacturing, retailing, processing or refining or in the rendition of a public utility service; or (c) security for the performance of an obligation by the vendor."
>
> " 'Sale' and 'selling' include all transactions whereby title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange or barter, and by any means whatsoever."
>
> " 'Consumer' means the person to whom the transfer effected or license given by a sale is or is to be made or given, or to whom the admission is granted."

With respect to the question here presented, the term "retail sale" or "sale at retail" may be defined to include all sales excepting those in which the purpose of the consumer is * * * to use or consume the thing transferred * * * in the rendition of a public utility service. The precise question here presented is whether a motor transportation company, which is a public utility in fact and which is classified as such for purposes of regulation in and by sections 614-2 and 614-2a, General Code, is a public utility within the meaning of that term as the same is used in the above quoted provisions of section 5546-1, General Code, defining the term "retail sale," and whether the sale of tangible personal property to a motor transportation company is taxable where the purpose of such motor transportation company as the "consumer" in the purchase of such property is to use or consume the property in the rendition of its service as a motor transportation company.

In consideration of the question here presented, it is to be noted that section 5546-2, General Code, which provides for certain exemptions to the tax thereby imposed, further provides that "for the purpose of the proper administration of this act and to prevent evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

In this, as in every other case involving the construction of statutes, the primary duty in the construction of the statute in question is to give effect to the intention of the legislature enacting it. "Such intention is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to

the paramount object to be attained." *Cockrel* vs. *Robinson,* 113 O. S. 526. And in this connection the question is not as to what the legislature intended to enact, but is as to the meaning of that which it did enact. With respect to the quesion here presented, it is assumed that the motor transportation companies referred to in your communication, referred to as being defined as public utilities in and by sections 614-2 and 614-2a, are public utilities in fact; and this for the reason that it would not be competent for the legislature to define any person or corporation as a public utility for purpose of regulation, unless the business and activities of such person or corporation were carried on in such a manner as to give them the status of public utilities in fact. In this view, a motor transportation company is a public utility within the above quoted provisions of section 5546-1, excepting from the definition of the term "retail sale" sales made to a consumer where the purpose of the vendee is to use or consume the thing transferred in the rendition of a "public utility service." In other words, a motor transportation company as a public utility in fact is within the letter of this statute. However, in this connection it has been stated as a familiar canon of construction "that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." 25 R. C. L. page 969. This rule of statutory construction is stated somewhat comprehensively in 59 Corpus Juris, 964, as follows:

> "In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit of intention which prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter although not within the spirit, is not within the statute."

Among the many decisions which lend support to this rule, the following Ohio cases are noted:

Burgett vs. *Burgett,* 1 Ohio 469;
Tracy vs. *Card,* 2 Ohio State 431;
Brigel vs. *Starbuck,* 34 Ohio State 280, 285.

From the language in your communication submitting this question to me, I assume that the question of whether sales made to motor transportation companies are excluded from taxation under the definitive provisions of section 5546-1, General Code, above quoted, with respect to the meaning of the term "retail sale," arises in your mind by reason of the fact that although, subject to certain exceptions, sales made by public utilities as vendors are exempt from taxation under the provisions of section 5546-2, General Code, this exemption is accorded only to such public utilities as are mentioned and defined in sections 5415 and 5416, General Code, which sections define the public utilities therein named for purposes of property and excise taxes on such public utilities.

By the provisions of section 5546-2, General Code, above referred to, the tax thereby levied does not apply to:

> "Sales of artificial gas by a gas company as defined in section 5416 of the General Code, of natural gas by a natural gas company, as so defined, of electricity by an electric light company, as so defined, of water by a waterworks company, as so defined, if in each case the thing sold is delivered to consumers

through wires, pipes or conduits; and all sales by any other public uitlity as defined in section 5415 of the General Code."

Motor transportation companies are not defined as public utilities by either section 5415 or 5416, General Code, nor are they in anywise mentioned in the provisions of these sections. Apparently giving effect to the provisions of these sections, you have adopted special sales tax ruling No. 36, in which, after noting that section 1 of Amended House Bill No. 134 (section 5546-1, G. C.) excludes from the definition of "retail sale" sales where the purpose of the consumer is to use or consume the thing transferred in the rendition of a public utility service, it is stated that "to be exempt, the sales must be limited to a public utility as defined in section 5415 of the General Code of Ohio."

The question here presented is, as above noted, as to the meaning of the term "public utility" as used in the definitive provisions of section 1 of the act (section 5546-1, G. C.), which except from the sales tax sales made to a public utility for the purpose therein stated. By the provisions of section 2 of said act (section 5546-2, G. C.) sales made by public utilities, with certain exceptions applicable to gas companies, natural gas companies, electric light companies and water-works companies, are exempt from the sales tax provided for by this section. This exemption, however, is limited to sales made by the public utilities mentioned in sections 5415 and 5416, General Code. In other words, the term "public utility," as the same is used in section 2 of this act (section 5546-2, G. C.), clearly means some one of the public utilities mentioned in sections 5415 and 5416, General Code. Then from this you have apparently concluded that the legislative intent in the enactment of the definitive provisions of section 1 of the act (section 5546-1, G. C.) was to except from the tax sales made to only such public utilities as are mentioned in these sections of the General Code.

As a matter of statutory construction, there is much to be said in support of this conclusion. Touching this question, it is noted in the case of *Rhodes* vs. *Weldy,* 46 O. S. 234, that:

> "Where the same word or phrase is used more than once in the same act in relation to the subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction."

In the case of *Raymond* vs. *Cleveland,* 42 O. S. 522, 529, it is said:

> "Where the meaning of a word or phrase in a statute is doubtful, but the meaning of the same word or phrase is clear where it is used elsewhere in the same act or an act to which the provision containing the doubtful word of phrase has reference, the word or phrase in the obscure clause will be held to mean the same thing as in the instances where the meaning is clear."

As an apparent application of this rule of construction, it has been further held that where terms used in one section of an act are subject to certain qualifications or limitations, these terms are subject to the same limitations and qualifications when used in other sections of the act. Thus in the case of *Cobble* vs. *Farmers Bank,* 63 O. S. 528, where the court had under consideration an act of the legislature requiring the registration of a partnership doing business in this state under a fictitious name, it

was held that where in one section of the act an exception was made in the case of a "banking partnership, whose capital stock is represented by shares or certificates of stock transferable on the books of the concern," another section of the act in the case of a "banking partnership" is limited only to a banking partnership whose capital stock is represented by shares transferable on the books of the bank. The court in its opinion upon this point said:

> "It seems but reasonable that where the legislature in one section makes an exception in favor of 'banking partnerships,' having a capital stock divided into shares transferable on the books of the company, and in an immediately following section, makes another exception in favor of 'banking partnerships,' the exception is not to apply generally to all banking partnerships, but to such as are defined in the previous section, unless some reason should appear why the term adopted in the latter section should not have the same meaning given to it in the previous one."

Although the rule of construction above noted is in line with the more general rule that the several provisions of a statute should be construed together and in such way as to make all the parts of the act harmonize with each other, and make them consistent with the general scope and object of the statute, this rule of construction is not always controlling in ascertaining the legislative intent in the use of some particular term in a section or part of the statute under consideration. Addressing itself to this question, the Supreme Court of this state in the case of *Henry* vs. *Trustees,* 48 O. S. 671, held:

> "In the construction of a statute, it is, as a general rule, reasonable to presume that the same meaning is intended for the same expression in every part of the act. But the presumption is not controlling, and where it appears that by giving it effect an unreasonable result will follow, and the manifest object of the statute be defeated, a court is at liberty to disregard the presumption, and attach a meaning to the words in question, which will make the act consistent with itself, and carry out the true purpose and intent of the law makers."

Upon this point the Supreme Court of the United States in the case of *Atlantic Cleaners and Dyers* vs. *United States,* 286 U. S. 426, 433, said:

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Courtauld* vs. *Leigh,* L. R. Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed."

Even in the light of the rules of statutory construction above noted, and keeping the same in mind as best we may, the question here presented is to me one of extreme difficulty; and is one which cannot be solved with any degree of certainty without some assurance of the reason which actuated the legislature in excepting from the incidence of the sales tax sales made to public utilities for use or consumption for the purpose specified in the section of the act making the exception. If the legislature in making this exception had in mind only such public utilities that, in addition to the payment of property taxes by them, are required to pay excise taxes based on their gross receipts or earnings, as the case may be, this consideration would support the view that the only public utilities which the legislature meant by the use of the term "public utility" in the section of the act defining taxable sales, are those mentioned in sections 5415 and 5416, General Code, which are the only public utilities that are required to pay such excise taxes; and this consideration would, perhaps, afford a sufficient basis for a classification which would have the effect of excluding sales to motor transportation companies from the exception from the tax accorded to sales to the different kinds of public utilities mentioned in sections 5415 and 5416, General Code. And it is possible that some thought of this kind was in the legislative mind in the use of the language here in question; for it is certain that the more or less obvious considerations which caused the legislature to except from the sales tax sales of property made for use or consumption in manufacturing, retailing, processing or refining, could not apply generally as the reason supporting the exception from the sales tax of sales made to public utilities.

However, this whole matter as to the reasons which actuated the legislature in excepting from the sales tax sales made to public utilities for use in the rendition of their different services as public utilities, rests very largely in the field of conjecture. And inasmuch as in giving point to the rule of construction stated in its integrity in the case of *Atlantic Cleaners and Dyers* vs. *United States,* supra, the provisions of section 5546-2, General Code, exempting from the sales tax sales made by the public utilities therein referred to, do not have such necessary connection with the provisions of section 5546-1, General Code, above quoted, excepting from the incidence of the sales tax sales made to public utilities for use in the rendition of their different services as public utilities, as to require the conclusion that the term "public utility" as used in stating this exception necessarily has the same meaning accorded to it by the legislature in the language used by the legislature in providing for the exemption with respect to sales by public utilities, we are remitted in our consideration of the question of the meaning of the term "public utility" as used in the definitive provisions of section 5546-1, General Code, above quoted, to the term itself and to the connection in which it is there used. The exception from the sales tax here in question is with respect to sales made to public utilities where the purpose of the purchaser is to use or consume the property sold to it "in the rendition of a public utility service." The motor transportation companies referred to in your communication are public utilities, and when they are engaged in the normal conduct of their business as motor transportation companies, they are engaged in public utility service. To exclude sales to motor transportation companies from the exception from the sales tax accorded to sales made to "public utilities" under the provisions of this section, would require us to except motor transportation companies from the term "public utility," as therein used, and to thereby make an exception to this term not suggested by the term itself or by any language in the statute in connection with which it is used. This we are not permitted to do. See *Morris Coal Company* vs. *Donley,* 73 O. S., 298. Moreover, recognizing, as we must, that the meaning of the term "public utility," as here used, is doubtful, we are admonished by the court in the case of *Burgett* vs. *Burgett,* supra, that "should a case occur in which the intention of the legislature is doubtful, the literal and obvious

interpretation of the terms ought to be adhered to." Giving effect to this rule, I am constrained to the opinion that the term "public utility," as used in the provisions of section 5546-1, General Code, defining the term "retail sale," includes motor transportation companies as public utilities, and that sales made to such motor transportation companies where their purpose in purchasing the property is to use or consume the same in the rendition of their regular normal service as public utilities, are excepted from the sales tax provided for in this act.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3990.

OLD AGE PENSION—PENSION WARRANT VOID IF PAYEE DIES BEFORE INDORSEMENT—VALID IF DEATH OCCURS AFTER INDORSEMENT BUT PRIOR TO CASHING SAME.

SYLLABUS:

Where a recipient of aid, under the Old Age Pension Law, dies prior to his indorsement of a warrant drawn by the Auditor of State, in which such pensioner is the payee, said warrant is void. The death of a pensioner subsequent to his indorsement of said warrant, as payee, but prior to the payment thereof by the Treasurer of State, has no effect upon the validity of the warrant.

COLUMBUS, OHIO, March 2, 1935.

HON. HENRY BERRODIN, *Chief, Division of Aid for the Aged, Columbus, Ohio.*

DEAR SIR:—Your immediate predecessor in office requested my opinion on the following matter:

> "Will you please furnish this Division with a written legal opinion on the following subjects:
>
> The warrants issued by the Auditor of State in payment of aid by this Division have printed on the face thereof the following statements:
>
> 'Void if any alterations or erasures appear hereon, and must be returned *if payee is deceased.*'
>
> also,
>
> 'This warrant may be collected through bank within sixty days from date *unless payee is deceased.*'
>
> We should like your opinion on the following questions with reference to the statements underscored:
>
> 1. Are these warrants absolutely void if the applicant dies before the warrant is cashed?
>
> 2. Are these warrants void if the applicant has, prior to his death, endorsed the same, but the warrant is not cashed by the endorsee until after the applicant's death?
>
> 3. Are these warrants void if, prior to his death, the applicant delivers the warrant to his wife or someone else without endorsement but with the understanding that the warrant is to be used for the purpose of providing for medical or other needs?