with respect to both "used motor vehicles" and "new motor vehicles" should be supplemented by the addition on both forms of the two questions mentioned in your request, namely:

> "1. Date of manufacture.
> 2. Type of glass used in partitions, doors, windows and windshield."

Respectfully,
JOHN W. BRICKER,
Attorney General.

5053.

SALES TAX—SALES OF WATER PIPE OR SEWER PIPE BY MANUFACTURER TO CONTRACTOR FOR USE IN CONTRUCTION CONTRACT WITH MUNICIPALITY.

SYLLABUS:

Sales of water pipe or sewer pipe by the manufacturer to a contractor are taxable under the Sales Tax Act (secs. 5546-1, *et seq., G. C.) where such pipe are purchased by the contractor for use by him in carrying out a contract with a municipal corporation for the construction of a waterworks or sewer system in the municipal corporation, or of some part of such system.*

Sales of such water pipe or sewer pipe by the manufacturer to a contractor for resale by him in the form in which such pipe are received by him, for use by the municipality in the construction of a projected improvement by the use of labor and services rendered by employes of the municipality, are not subject to the sales tax provided for in said act.

COLUMBUS, OHIO, December 31, 1935.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of your recent communication in which you request my opinion upon the question of whether sales of water pipe or sewer pipe by a manufacturer to a contractor are taxable under the Sales Tax Act where such pipe is purchased by the contractor for the purpose of being used by him in carrying out a contract with a municipal corporation for the purpose of constructing a waterworks or sewer system in a municipal corporation, or some part of such system.

The question here presented requires a consideration of the pertinent

provisions of the Sales Tax Act which was enacted by the 90th General Assembly as House Bill No. 134, 115 O. L., Pt. II, 306, and which was later amended as to some of the sections thereof by acts passed by the 91st General Assembly, 116 O. L., 42, 248. Section 2 of the Sales Tax Act, which was carried into the General Code as section 5546-2 and which was later amended by an act of the 91st General Assembly approved by the Governor as an emergency act under date of March 27, 1935, provides in part as follows:

> "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, permitted 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 this act, an excise tax is hereby levied on each retail sale in this state of tangible personal property occuring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, with the exceptions hereinafter mentioned and described as follows:
>
> One cent, if the price is forty cents or less;
>
> Two cents, if the price is more than forty cents and not more than seventy cents;
>
> Three cents, if the price is more than seventy cents and not more than one dollar;
>
> If the price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, the price is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if the price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents if such excess is more than forty cents and not more than seventy cents; and three cents if such excess is over seventy cents.
>
> If the price is less than nine cents, no tax shall be imposed.
>
> The taxes hereby imposed shall apply and be collected when the sale is made, regardless of the time when the price is paid or delivered."

By section 1 of the Sales Tax Act, which is now section 5546-1, General Code, 116 O. L., 248, the term "sale", as the same is used in said act, is defined as follows:

> " '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."

Under the provisions of this act, the taxes to be levied are not levied on all sales but only on such as satisfy the definition of "retail sales" under the definitive provisions set out in section 5546-1, General Code. By this section, retail sales are defined as follows:

> " 'Retail sale' and 'sales at retail' include all sales excepting those in which the purpose of the consumer is (a) to resell 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 mining, or in the rendition of a public utility service; or (c) security for the performance of an obligation by the vendor. Farmers and horticulturists shall be considered manufacturers or processors in the interpretation of this act."

In this connection, it is noted that by section 5546-2, General Code, it is provided that "for the purpose of the proper administration of this act and to prevent the 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". By section 5546-1, General Code, the term "vendor" is defined to mean the person by whom the transfer effected by a sale is or is to be made; and by this section the term "consumer" is defined to mean the person to whom the transfer effected by a sale is or is to be made.

By section 3 of the Sales Tax Act, which is now section 5546-3, General Code, it is provided generally, subject only to the exceptions therein mentioned, that the tax imposed by the act shall be paid by the consumer to the vendor in every instance and that it shall be the duty of the vendor to collect from the consumer the full and exact amount of the tax payable with respect to each taxable sale.

Inasmuch as by the definitive provisions of section 5546-1, General Code, the term "sale", as used in this act, is not limited to a sale to the purchaser or "consumer" for his own use or consumption, it is clear that a sale of water pipe or sewer pipe by the manufacturer to a contractor for the

purpose noted in your communication, is a "sale" of such property within the meaning of this act. It is likewise clear that such sale is a "retail sale" and is taxable as such under the provisions of section 5546-2, General Code, unless the transaction is taken out of the definition of the term "retail sale" by one or more of the exceptions in the definitive provisions of section 5546-1, General Code, relating to the meaning of the term "retail sale", as the same is used in this act. In this connection, it will be noted that, so far as the question here presented is concerned, the term "retail sale", as used in this act, includes all sales excepting those in which the purpose of the consumer (in this case the contractor) is either "to resell the thing transferred in the form in which the same is, or is to be, received by him; or in which the purpose of the consumer (the contractor) is 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".

It seems quite clear in the case presented in your communication that the purpose of the contractor in purchasing the water pipe or sewer pipe from the manufacturer is not to resell such property to the municipal corporation in the form in which the same is, or is to be, received by him. The purpose of the contractor in purchasing the pipe is to use the same in the construction of a completed water or sewer pipe line or system, and to turn the same over to the municipality as a completed unit as provided in his contract with the municipality. It follows, therefore, that the sale of this pipe by the manufacturer to the contractor is not taken out of the definition of the term "retail sale" under the first exception noted in the provisions of the section above quoted defining said term.

It remains for us to consider in the case here presented whether it is the purpose of the contractor, in purchasing these pipes from the manufacturer, to incorporate the same as material or as a part of tangible personal property to be produced by him for sale to the municipal corporation, by manufacturing, assembling, processing or refining. As I apprehend the facts in the case here presented, the purpose of the contractor in purchasing this pipe from the manufacturer is neither to incorporate the pipe into tangible property nor to sell the same as such to the municipality. As above indicated, his purpose in purchasing this pipe from the manufacturer is to incorporate the same in a completed water pipe or sewer pipe line or system under his contract to furnish the necessary labor and material to construct such improvement, and to turn this improvement over to the municipality upon its acceptance of the same as a completed unit. I am inclined to the view that this transaction between the contractor and the municipality is not a sale as that term is understood either at the common law or under the definition of the term in the Sales Tax Act. On this question it was held in the case of *Chandler* vs. *De Graff,* 22 Minn., 471, that "A contract to furnish ties and other material, and to construct and complete a definite line of single-track railroad, for a

given compensation, payable in installments as the work progresses, upon monthly estimates of the amount of work done and material furnished, is a contract for work and material, and not of sale". The court, in its opinion in this case, said:

> "These contracts can only be treated as contracts for work and materials, and not of sale. The thing contemplated by each was a completed single-tracked railroad, to be constructed by the defendants out of materials contributed in part by each party to the contract. This was what defendants undertook to do, and what the other party contracted for and promised compensation. The idea of a sale of ties, as such, or any of the other materials which defendants might find it necessary to furnish, in the performance of their contracts, cannot be gathered from any of their provisions. They were furnished, not on account of any agreement for the purchase or sale of ties, but in part execution of defendants' promise to build and complete a certain line of railroad, and of such a quality, and to such an extent only, as might be necessary to fulfil that specific obligation and complete that undertaking. The risk of loss was clearly defendants' until the road was inspected and accepted as provided in the contracts."

Among the many other cases which support this rule are: *Walstrom* vs. *Oliver-Watts Construction Company,* 161 Ala., 608; *Courtright* vs. *Stewart,* 19 Barb. (N. Y.), 455; *Steiger Terra Cotta and Pottery Works* vs. *City of Sonoma,* 9 Cal. App., 698; *Flynn* vs. *Dougherty*, 91 Cal. 669; *Brown and Heywood* vs. *Wunder,* 64 Minn., 450. Moreover, the title to this pipe will not pass from the contractor to the municipality except as a part of the improvement which the contractor is completing under his contract, and then only when the completed improvement is accepted by the municipality. When the pipe line is completed as the improvement provided for in the contract, the title to the same passes to the municipality and, as I see it, so passes with the status of real property. There is some conflict in the authorities upon the question whether a pipe line, which is laid in and through lands which are not owned by the corporation or person owning and laying down such pipe line, is real or personal property. Among the cases holding that in this situation the pipe line has the character of real property are: *Miller County Highway and Bridge District,* 19 Fed. (2d), 3 (U. S. C. C., 8th Circuit); *Tidewater Pipe Line Company* vs. *Berry,* 53 N. J. Law, 212; *Robinson* vs. *City of Glendale,* 182 Cal., 211; *Colorado Fuel and Iron Company* vs. *Pueblo Water Company,* 11 Colo. App., 352; *Oskaloosa Water Company* vs. *Board of Equalization,* 84 Ia., 407; In re *Des Moines Water Company,* 48 Ia., 324; *Paris* vs. *Norway Water Company,* 85 Me., 330; *Grand Haven* vs. *Grand*

Haven Water Works, 119 Mich., 652. Among the decisions in which, for various reasons, statutory or otherwise, pipe lines are for some purposes held to be personal property, is the case of *Shelbyville Water Company* vs. *People*, 140 Ill., 545. The decision of the court in this case is directed solely to the question as to whether or not certain water mains and electric wires of the Shelbyville Water Company were to be taxed as real or personal property. In this case the court apparently recognized the general rule with respect to this question noted in the authorities above cited, but held that inasmuch as in a previous decision of the Supreme Court of that state the court, in giving effect to a statutory enactment by the legislature of that state, classifying property for the purposes of taxation, had held that engines and boilers, though permanently attached to the realty were to be considered personal property for purposes of taxation, water mains being appurtenant to the machinery used in forcing water into the mains, should likewise be assessed as personal property. In this connection it may be noted that, tested by this rule, a water pipe line in a like situation in this state would be classed as real property, for the reason that a steam boiler and engine and their usual attachments, when the same are permanently annexed to foundations resting upon the freehold, are held to be real property. *Case Manufacturing Company* vs. *Garven*, 45 O. S., 289.

However, in the case here presented the water or sewer pipe line is, as I assume, to be laid in the street or streets of the municipal corporation. In municipalities the fee simple title in the streets is in the municipality. And in this situation it can hardly be questioned but that a water or sewer pipe line permanently constructed therein would be considered as real property and pass to the municipality as such upon the completion of the improvement in and by which the pipe line is constructed, and upon acceptance thereof by the municipality. See *Monroe Water Company* vs. *Township of Frenchtown*, 98 Mich., 431. It is true, of course, that the municipality holds the fee in the streets in trust for street purposes; but this fact would not prevent a pipe line which is permanently constructed in the street from having the character of real property. See *Sandusky Bay Bridge Company* vs. *Fall*, 41 O. App., 355; *People, ex rel. City of Chicago*, vs. *Upham*, 221 Ill., 555. It follows from the considerations above noted, therefore, that in the case here presented the title to the pipe line, when the same has been constructed, passes from the contractor to the municipality, not as tangible personal property, but as real property. Moreover, before the transfer of the title in the completed pipe line from the contractor to the municipality could, on any view as to the character of such property, be considered as a sale such as would exempt from taxation the original sale of the pipe by the manufacturer to the contractor, it would have to appear under the statutory provisions here under consideration, that said pipe line was manufactured or assembled by the contractor for sale by the contractor. It is not believed that either of the

terms "manufacture" or "assemble" has apt application to a case of this kind. Giving these terms their ordinary meaning, the contractor, in constructing this pipe line in the street as a permanent improvement under his contract to furnish the necessary labor and material for such improvement, is not manufacturing such pipe line as a completed improvement. Even if the action of the contractor in connecting up the sections of pipe purchased by him from the manufacturer can, on any view, be considered an assemblying of the sections of such pipe in the pipe line, that which is constructed by the contractor under his contract with the municipality is something more than this. In this connection, I can easily see how lumber, by process of manufacture, can enter into and become a part of a manufactured table for purposes of sale as such; and, likewise, it is easily seen how the component parts of a watch may be assembled into the completed article for purposes of sale. However, it is not seen how these terms can be applied to the construction of an improvement in the streets of a municipal corporation without doing violence to their ordinary meaning.

In the consideration of the question here presented it is recognized that the term "sale" is by this act given a meaning and application beyond that recognized by the common law or by the Uniform Sales Act. In the construction of the provisions of the Sales Tax Act in which this term is defined for the purposes of said act, the following rule stated in 37 *O. Jur.*, pages 729-30, Section 409, and supported by the decisions of the Supreme Court of this state, should be observed:

> "It is presumed that no change in the common law is intended by the enactment of a statute upon the same subject unless the language employed clearly indicates such an intention. The statute is to be construed as near as possible to the rule and reason of the common law. It is not to be presumed or held that the legislature intended to abrogate or modify the common-law rule further or otherwise than the case absolutely requires, or the act expressly declares, or clearly and unmistakably imports, where reasonable effect can be given to the statute without such extension. If the language is doubtful or ambiguous, it should be resolved against the imposition of a liability, or the creation of a right, unknown to the common law. The statute ought not to be extended, or the rule of common law considered abrogated or modified, by mere implication from the language used in the statute."

Without citing at length the many decisions of the courts of this state supporting the rule of construction above quoted, it is perhaps sufficient to note that in case of *Felix* vs. *Griffiths,* 56 O. S., 39, it was held:

> "In giving construction to a provision of a statute * * * which attempts to abrogate, or modify, a well established rule of the common law, the scope of the provision should not be extended beyond the plain import of the words used if reasonable effect can otherwise be given to it."

See also *Palace Hotel* vs. *Medart,* 87 O. S., 130, 135; *Krause* vs. *Morgan,* 53 O. S., 26, 42. Inasmuch as, under the common law, the term "sale" related only to the transfer of the title of personal property as such denominated as "goods" or as "goods, wares and merchandise", no warrant is seen, consistent with the rule of construction above noted, to extend the term "sale" as used in this act to transactions other than those relating to the transfer of the title of tangible personal property as such. In no view consistent with these rules of construction can it be said that the term "sale" applies to the accession of tangible personal property to real property and in which character the title passes to the owner of the realty.

These views lead to the conclusion that the transaction by which the water and sewer pipe referred to in your communication were sold by the manufacturer to the contractor is not excepted by the definitive provisions of this act from the statutory character which it has as a retail sale. And, accordingly, taxes provided by this act are properly assessed upon the sale of the water pipe or sewer pipe by the manufacturer to the contractor; and no tax is assessable on the transaction whereby the title to this property passes to the municipality from the contractor for the reason that this transaction is not a sale of the property, not to speak of the fact that the Sales Tax Law does not apply to sales of property to municipal corporations and other political subdivisions of the state.

In the consideration of the question presented in your communication, I have had before me the opinion of the Supreme Court of the state of Illinois in the case of *The Bradley Supply Company* vs. *Ames, Director of Finance,* 359 Ill., 162, 194 N. E., 272, decided by the court under date of December 20, 1934. In this case the court held that the sale of plumbing and heating supplies to contractors for installation by them in buildings under contracts with the owners thereof, are sales for re-sale and as such are not subject to the tax provided for by the Retailers' Occupation Tax Law of that state. The tax provided for by the law of the state of Illinois, under consideration in the case above cited, is an occupational tax imposed upon persons engaged in the business of selling tangible personal property at retail in the state measured by the gross receipts from such sales in the state in the course of business done by such persons. The term "sale at retail" as used in said act is therein defined as follows:

> " 'Sale at retail' means any transfer of the ownership of, or

title to, tangible personal property to the purchaser, for use or consumption and not for re-sale in any form as tangible personal property, for a valuable consideration."

In the opinion of the court in this case it was held that inasmuch as the contractor did not purchase the plumbing supplies for his use or consumption, this transaction would not constitute a "sale at retail" and was not taxable under the act but that the transaction whereby the plumbing supplies were transeferred by the contractor to the owner of the building was a "sale at retail" and taxable as such although the title to such plumbing supplies passed to the owner at the building as a part thereof and as real property. After noting and approving the general rule above noted, that the accession of tangible personal property to a building or to other real property as a part thereof under a work, labor and material contract, is not a sale as that term is understood at common law or under the Uniform Sales Law, the court in its opinion said:

"The question before us is not whether the transaction between the contractors and owners of land is a sale of personalty as that term is defined at common law in the decisions of courts or in The Uniform Sales Act, but whether it is a transfer of tangible personal property to the purchaser, for use or consumption and not for re-sale within the meaning of the Retailers' Occupation Tax act. By defining a 'sale at retail' as 'any transfer of the ownership of, or title to, tangible personal property,' it is apparent that the legislature was not contemplating that only 'sales' of personalty, as generally defined, should come within the purview of the act. The definition is broad enough to cover the transfer of title made by a contractor who attaches tangible personal property to real estate in accordance with a contract. It is clearly a transfer of title for a valuable consideration."

The Sales Tax Law of the state of Illinois, under consideration in the case above cited, should be distinguished from the applicable provisions of the Sales Tax Law of this state in a number of particulars. In the first place, in order to constitute a "sale" or a "retail sale" under the Sales Tax Law of this state, the property is not required to be sold to the purchaser for his use or consumption, as is the case under the Illinois law. In the second place, before the transaction between the manufacturer and the contractor can be eliminated from the category of a taxable retail sale it must appear that the property purchased by the contractor from the manufacturer was purchased by him for the purpose of incorporating the property purchased as a material or a part of tangible property to be produced by him for sale by some process

of manufacturing or assembling. Consistent with the rules of statutory construction above noted, I am unable to give controlling effect to the decision of the Supreme Court of the state of Illinois with respect to the question here presented upon the facts presented in your communication and under the applicable provisions of the tax law of this state. Accordingly, I am of the opinion, by way of specific answer to the question presented in your communication, that the sale of the property here in question by the manufacturer to the contractor is taxable.

As above noted, this opinion is addressed to the question presented in your communication which, as I interpret the same, assumes that the contract between the contractor and the municipality is one for the furnishing of the necessary labor and material to construct a completed pipe line improvement as a part of the waterworks or of the sewer system of the municipality, according to plans and specifications prepared by such municipality. If, on the other hand, the contract calls only for the furnishing of water pipe or of sewer pipe to the municipality as material to be used by the municipality itself in the construction of the projected improvement by the use of labor and services rendered by employes of the municipality, it is obvious that the sale of such water pipe or sewer pipe to the municipality is not subject to the sales tax, whether the sale of such pipe is made directly by the manufacturer of the pipe or by a third person who, as contractor, purchases the pipe from the manufacturer for the purpose of selling the same to the municipality. In this case, the sale of the pipe to the municipality would not be subject to the tax for the reason that the municipality is a political subdivision of the state and, under the provisions of section 5546-2, General Code, sales of personal property made to it as the consumer are exempt from the sales tax. And, likewise, in this case the sale of the pipe by the manufacturer to a third party, who as contractor furnishes the same to the municipality, would not be subject to tax for the reason that the purpose of such third party as contractor in purchasing the pipe from the manufacturer is to resell the same to the municipality in the form in which the same is received by him, thus excepting the sale of the pipe to him from the meaning of the term "retail sale", as this term is defined in section 5546-1, General Code.

Respectfully,

JOHN W. BRICKER,

Attorney General.