above stated, is the sum of $670.00. Likewise, as before stated, the purchase of this property has been approved by the Controlling Board, which Board has released from the appropriation account the money necessary to pay the purchase price of the property.

Subject only to the exceptions above noted, the title of Martin A. Stelzer to this property is approved as are likewise the warranty deed, contract encumbrance record and Controlling Board certificate, above referred to.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5726.

SALES TAX—HOSPITAL MEALS SUBJECT TO SUCH TAX—MEALS SERVED TO STUDENTS TAXABLE—SALES BY CHARITABLE ORGANIZATION TAXABLE WHEN.

SYLLABUS:

The furnishing of food as meals by hospitals to patients therein for a price or consideration therefor paid or to be paid by or on behalf of such patients, are taxable sales within the Sales Tax Law of this state, and this is so whether separate and segregated charges are made for such meals as the same are served or whether the charges therefor are included in the total of the several bills for the services rendered by the hospital to the patients. This does not apply to food furnished to sisters, deaconesses and to others serving as nurses in the hospital, where no charges therefor are made or paid.

Meals served to students, visitors and others in dormitories and dining halls of universities and colleges are taxable sales where the same are served for a price paid or to be paid, and with respect to meals served to students, it is immaterial whether separate charges are made therefor or the same are included in a charge for room and board. Meals served to student waiters or waitresses employed in the dining halls of universities and colleges do not constitute taxable sales where no charge of a price paid or to be paid is made therefor.

The furnishing of laboratory equipment to students in educational institutions and of materials consumed or used in connection therewith, do not ordinarily constitute a sale of such equipment or of such materials within the meaning of the Sales Tax Law of this state.

Sales of food and of other articles of tangible personal property by ladies' aid societies and by other similar organizations affiliated with churches and church work are usually casual and sufficiently isolated as to

time and character to come within the exemption with respect to casual and isolated sales provided for by the Sales Tax Act; and such sales, generally, are not taxable. However, this exemption does not extend to sales made at thrift stores maintained and conducted by charitable organizations where such sales are made regularly to customers as they apply for the goods sold at such stores.

COLUMBUS, OHIO, June 18, 1936.

The Tax Commission of Ohio, Columbus, Ohio.

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

> "Since the amendment to Section 5546-2 of the General Code, which eliminates the exemption granted sales by charitable or religious organizations, there is some question concerning the application of the Ohio sales tax imposed in that section of the General Code to certain sales by charitable hospitals, colleges, church organizations and other charitable organizations.
>
> Charitable hospitals furnish food to the patients for a consideration. In some cases the consideration for such food is not stated separately from the total bill charged by the hospital for all services rendered to the patient. Are these charitable hospitals making retail sales which are subject to the tax imposed by Section 5546-2 of the General Code when no part of the bill is paid? Are they making sales when a part of the bill is paid, or where the entire sum charged is paid?
>
> State, municipal and denominational colleges and universities in many cases maintain dormitories and dining halls. In some cases a separate charge is made by the college or university for meals served to the students. In other cases a flat sum is charged which sum includes the charge for both room and board. Are the sales of meals so served by these colleges or universities to students subject to the Ohio sales tax? Are sales of meals to visitors to the colleges or universities by the dining halls of such colleges or universities subject to the Ohio sales tax?
>
> Frequently colleges or universities employ student waitresses or waiters in the dining halls. Usually the consideration which is paid such students is in the form of meals. Are the transfers of these meals to such student employees subject to the Ohio sales tax?
>
> It is the practice of most colleges and universities to collect from the students what is commonly called a laboratory fee. Such fee covers the cost of equipment and materials used or

consumed by the students in laboratory courses. Are the colleges or universities making retail sales subject to the tax when they collect such fees?

It is the practice of most churches and religious organizations to conduct sales of various items of tangible personal property for the purpose of raising funds to support the church or religious organization. The number of these sales may vary from year to year and it is impossible to know in advance the number of such sales which will be held during a given period. Are the sales made at such functions as church suppers, church bazaars and church socials subject to the Ohio Sales Tax?

Many charitable organizations hold different type sales throughout the course of the year. Such sales are often in the form of rummage sales and in some cases a charitable organization may maintain what are commonly known as 'Thrift Stores.' Are sales made at such rummage sales and at thrift stores by charitable organizations subject to the Ohio sales tax?"

The present Sales Tax Law of this state is provided for by sections 5546-1 to 5546-24 of the General Code, all of which sections, with the exception of sections 5546-4 to 5546-7, inclusive, and sections 5546-9 and 5546-23, General Code, were enacted or amended in their present form by House Bill No. 572, enacted by the 91st General Assembly at its first special session, and which went into effect December 20, 1935. Section 5546-2, General Code, provides that for the purposes therein stated "an excise tax is hereby levied on each retail sale made in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of March, 1937," with the exceptions thereinafter mentioned and at the rates therein prescribed. Section 5546-1, General Code, is the definitive section of the act and this section, among other things, defines the terms "retail sale" and "sales at retail." These terms are defined by the section 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 directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining, farming, horticulture, or floriculture, or directly in making retail sales or directly in the rendi-

tion of a public utility service; or (c) security for the performance of an obligation by the vendor; (d) or to use or consume the thing directly in industrial cleaning of tangible personal property."

In this connection, the terms "sale" and "selling" are defined by this section 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."

This section likewise defines other terms used in the act and which may be more or less pertinent in the consideration of the questions presented in your communication. Thus, the term "vendor" is defined as "the person by whom the transfer effected or license given by a sale is or is to be made or given." Under this section, "consumer" is the "person to whom the transfer effected or license given by a sale is or is to be made or given."

"'Price' means the aggregate value in money of any thing or things paid or delivered, or promised to be paid or delivered by a consumer to a vendor in the consummation and complete performance of a retail sale without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever."

Section 5546-2, General Code, above referred to, excepts or exempts from the incidence of the sales tax therein provided for certain sales of the kind therein named. Only three of these exceptions or exemptions are pertinent in the consideration of any of the questions here presented. They are: (1) casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property; (2) professional or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made; (3) tangible personal property sold to charitable and religious organizations. In this connection and as a pertinent consideration in the construction of the provisions of the section making or granting the above noted and other exceptions or

exemptions from the incidence of the sales tax, this section further provides 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."

In the consideration of the above noted statutory provisions providing for a sales tax and prescribing the incidence of such tax, in their application to the questions here presented, regard is to be had to these statutory provisions as they have been enacted, without conjecture as to what the legislature intended to enact with respect to any of these provisions. Upon a consideration of these statutory provisions, it is seen that save as to the specific exemptions set out in section 5546-2, General Code, all retail sales of tangible personal property are subject to the incidence of the excise tax provided for by this action, and that by the term "retail sales" are meant all sales of such property except only such as are expressly excluded by the definition of the term in and by the provisions of section 5546-1, General Code. In this connection, it is to be noted that although there are well considered decisions to the contrary, the greater weight of the authorities in this country is in accord with and supports the rule that the furnishing of food as a meal or otherwise to the consumer thereof for a price or other consideration paid or to be paid is a sale of such food rather than a mere service to such consumer. Friend v. Childs Dining Hall Company, 231 Mass., 65; Smith v. Gerrish, 256 Mass., 183; Temple v. Keeler, 238 N. Y., 344; People v. Clair, 221 N. Y., 108; Clark Restaurant Company v. Simmons, 29 O. App., 220; Heise v. Gillette, 83 Ind. App., 551; Brevoort Hotel Company v. Ames, 360 Ill., 485; Commonwealth v. Phoenix Hotel Company, 157 Ky., 180; Commonwealth v. Miller, 131 Pa. St., 118; State v. Lotti, 72 Vt., 115; State v. Grays Harbor Commercial Company, 124 Wash., 227. And whether a specific and segregated charge is made for food thus furnished or such charge is included in a flat rate for board and lodging, the transaction is in either event a sale of the food so furnished. In the case of the Brevoort Hotel Company v. Ames, supra, in which the court had under consideration the gross receipts sales or occupation tax of the state of Illinois, the court held that said act applied to a restaurant or a European plan hotel furnishing meals to customers, as the food served is tangible personal property served at retail for use or consumption and not for resale; and that although a certain service is performed for the customer, the food purchased is the substance of the transaction, and that the transfer of the ownership of the food amounts to a sale within the meaning of the act there under consideration which defines a "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any

form as tangible personal property for a valuable consideration." On the other hand, it was held in the case of the People v. Clair, supra, that the furnishing of articles of food as a meal was the sale of such food notwithstanding the fact that the price for the same was included in a flat rate per diem charge for board and room made against the customer to whom such food was furnished. And where the transaction in question relates to some particular article of food served as a part of a meal, it seems that the furnishing of such article of food is a sale of the same whether such article is served a la carte or as a part of a table-d'hote meal. Commonwealth v. Phoenix Hotel Company and People v. Clair, supra.

Aside from the authorities above noted in their application to the questions here presented, it would seem to be quite clear that the furnishing of food as a part of a meal or otherwise for a price or consideration paid or to be paid constitutes a sale within the comprehensive meaning of that term as the same is defined in and by section 5546-1, General Code, wherein the term "sale" is defined to include all transactions whereby title or possession, or both, of tangible personal property, is or is to be transferred for a consideration in any manner, whether absolutely or conditionally, whether for a price in money or by exchange or barter, or by any means whatsoever. It follows, therefore, that the furnishing of food to patients in a hospital for a consideration paid or to be paid is a sale of such food whether the same is served as a part of a regular meal or otherwise and whether the hospital furnishing such food is or is not classed as a charitable hospital, and that the transaction is subject to the sales tax as a retail sale unless the same comes within one or more of the exemptions mentioned in section 5546-2, General Code, above noted. As hereinbefore noted, one class of sales which are exempted from the sales tax are "casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property." In giving effect to the term "casual" as the same is used in this statutory provision, it is to be noted that this word is sometimes used as a synonym for "accidental" and sometimes as a synonym for "occasional." Thus, in the case of Root v. Topeka Railway Company, 96 Kans., 694, it was said:

> " 'Casual' has been defined as happening or coming to pass without design and without being foreseen or expected; accidental, fortuitous; coming by chance."

As an expression of the other shade of meaning to be ascribed to the term "casual" as it appears in this statute, it may be said that a thing is casual when it is only occasional, or happens at uncertain times, or at irregular intervals, and the happening of which cannot be reasonably

anticipated as certain or likely to occur or to become necessary or desirable. Holmen Creamery Association v. Industrial Commission, 167 Wis., 470. In this connection, it is noted that in order to be exempted from the incidence of the sales tax under the statutory provisions here under consideration, the sale must not only be casual but must likewise be such as may be properly characterized as an isolated sale and must be made by a vendor who is not engaged in the business of selling tangible personal property. In the application of these statutory provisions to the usual and customary practice of hospitals in furnishing food in the form of meals to patients and to others visiting the hospital for a consideration paid or to be paid therefor, I am unable to arrive at the view that these transactions are exempt from the sales tax under the specific exemption here under consideration.

It is to be further noted that under the provisions of section 5546-2, General Code, exemption from the sales tax is given with respect to professional or personal service transactions "which involve sales as inconsequential elements, for which no separate charges are made." Although it is obvious that, as ordinarily conducted, hospitals are engaged primarily in the business of rendering professional and other personal services and that the furnishing of food to patients and, perhaps, to others as well, is to some extent only incidental to the primary services rendered by the hospital in the treatment and care of patients, yet, under the statutes, the only sales that are exempt on this ground are sales of inconsequential elements for which no separate charges are made. In the application of this statutory provision, I am unable to hold that the furnishing of food to patients and others in a hospital as the same is customarily done is on any view to be considered as a sale of inconsequential articles or elements in connection with the professional and personal services rendered in or by the hospital.

In the consideration of the questions presented in your communication, so far as they pertain to food furnished by hospitals to patients and others in connection with the services rendered by them, it is pertinent to note that prior to the amendment of section 5546-2, General Code, in and by House Bill No. 572, above referred to, an exemption was granted with respect to sales of tangible personal property made *by* charitable and religious organizations, the income of which was used in philanthropic activities. In the amendment of this section the provisions relating to charitable and religious institutions or organizations was changed so as to provide an exemption with respect to tangible personal property sold *to* charitable and religious organizations. Conformable to established rules of statutory construction, effect must be given to this change made by the legislature with respect to sales affecting charitable and religious institutions and organizations. The presumption is that the amendment of a statute is

made to perfect some purpose. Lytle v. Baldinger, 84 O. S., 1, 8. And where a section of a statute is repealed and reenacted in a different form, the fair inference is that a change in meaning was intended, and it is to be presumed that the legislature intended a change in the effect and operation of the law by a substantial change in the language of the statute. In re, Hinton, 64 O. S., 485, 492; Board of Education v. Boehm, 102 O. S., 292; State, ex rel., v. Nolte, 111 O. S., 486, 496.

I am of the view, therefore, that none of the specific exceptions or exemptions provided for in and by section 5546-2, General Code, has any application to sales of food made by a hospital to its patients or to others, and that inasmuch as such sales are not excluded from the proper meaning of the term "retail sales" by the definition of that term contained in section 5546-1, General Code, the conclusion follows that such sales are taxable. This conclusion applies, of course, only to sales of food made to pay patients and does not apply to transactions whereby food is furnished without any charge therefor and without consideration paid or to be paid by or on behalf of the person to whom the food is furnished. In this case, the furnishing of the food would not constitute a sale as that term is defined by the Sales Tax Act. The same would apply, in my opinion, with respect to the furnishing of food to sisters, deaconesses, nurses and others in the employ of a hospital where no charge of any price paid or to be paid is made for the food thus furnished.

I am of the opinion, therefore, by way of specific answer to the questions presented in your communication with respect to the furnishing of food by way of meals to patients for a price or consideration therefor paid or to be paid by or on behalf of such patient, that the same are taxable sales of such food and that it is immaterial whether separate and segregated charges are made for such meals as the same are served or whether the charges therefor are included in the total bill for the services rendered by the hospital to the patient. Neither is it material in this connection whether the bill including these charges for meals is paid in part or is paid in full.

Without further discussion on this specific point, no reason is seen why the conclusions above reached with respect to food in the form of meals furnished by a hospital to patients should not apply as well to meals served by colleges and universities in dormitories and dining halls maintained by such institutions. And I am of the opinion, in answer to the questions presented in your communication as to meals served in such dormitories and dining halls to students, visitors and others, that the same constitute taxable sales and that with respect to meals served to students it is immaterial whether separate charges are made therefor or the same are included in a charge for room and board.

Meals served to student waiters or waitresses employed in the dining

halls of colleges and universities do not, in my opinion, constitute taxable sales, where no charge of a price paid or to be paid is made therefor.

With respect to laboratory equipment furnished for the use of students, I am of the view that such transaction is not a sale of such equipment even under the comprehensive definition of that term as the same is set out in section 5546-1, General Code, and which is above quoted. Although the student may have temporary custody or charge of the laboratory equipment when the same is in use by him, there is not involved in a transaction of this kind any change of title or of possession, both of which still remain in the college or university, as the case may be. The materials used or consumed by the student in using this equipment are incidental to the use of the equipment and for the most part are inconsequential elements in the laboratory fee charged by the institution. I am of the opinion, therefore, that transactions of this kind do not constitute taxable sales.

You state in your communication that it is the practice of many churches and religious organizations to conduct sales of various items of tangible personal property for the purpose of raising funds to support the church or religious organization; that the number of these sales vary from year to year and that it is impossible to know in advance the number of such sales which will be held during a given period. Your question is as to whether sales so made at church suppers, church bazaars and church socials generally are subject to the sales tax. It is obvious that sales so made are subject to the tax unless they are exempted therefrom as casual and isolated sales made by a vendor who is not engaged in the business of selling tangible personal property. As the question is stated in your communication, it is quite difficult to give any categorical answer thereto that will apply with certainty to all sales of the kind referred to. The most that can be said is that as sales of this kind are usually conducted by ladies aid societies and similar organizations affiliated with churches and church work, they are usually casual and sufficiently isolated as to time and character to satisfy the exemption provisions with respect to casual and isolated sales provided for by section 5546-2, General Code. Speaking generally, therefore, I am of the opinion that such sales are not taxable.

With respect to sales made by thrift stores conducted by charitable organizations, a different conclusion follows if, as I assume to be the case sales made from such stores are made regularly as customers apply for the goods sold at such stores. Sales made in this way at these stores are taxable.

Respectfully,
JOHN W. BRICKER,
Attorney General.