It is further noted that in the official roster of the Division of Insurance the surety heretofore mentioned has been duly authorized to transact business in Ohio.

In view of the foregoing, I have approved said bond as to form and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

269.

HOUSE BILL NO. 340—CLASSIFYING STORES FOR THE PURPOSE OF TAXATION—UNCONSTITUTIONAL.

SYLLABUS:

House Bill No. 340 classifies stores for the purpose of taxation under a plan whereby stores as therein defined are classified, first, as to volume of business done and, second, as to who operates them. The second classification is sub-classified into various classes: stores individually operated, two-store chains, three-store chains, etc. Each sub-classification is taxed at a different rate. An individual store doing a given volume of business, if it is the second store of a two-store chain, is taxed at a different rate from a store doing the same volume of business if it is the third store of a three-store chain.

A tax based upon the foregoing classifications is unreasonable, arbitrary, discriminatory, and levied upon the same subject on a different basis, depending upon who owns or operates the subject, is class legislation in violation of the Fourteenth Amendment of the Constitution of the United States, which guarantees equal protection of the laws to all citizens; following Great Atlantic and Pacific Tea Co. vs. *Doughton,* 144 *S. E.* 701; *State of Missouri* vs. *Wyatt,* 48 *L. R. A.* 265.

COLUMBUS, OHIO, April 5, 1929.

HON. JOHN A. HADDEN, *Chairman, Taxation Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion as to whether or not the provisions incorporated in House Bill No. 340, would, if enacted into law, be constitutional. The bill, the title of which is "A Bill—To license stores," reads as follows:

> "Section 1. Any place where foodstuffs of any description, dry goods, notions, footwear, headwear, clothing of all description, millinery, hardware, queensware, all cooking utensils, sporting goods, furniture, coffees, teas, spices, beverages of all kind, milk stations, radios, electric fixtures and supplies of all kinds, musical instruments, automobiles, automobile supplies and accessories, motorcycles, bicycles, building materials and supplies of any description, tobacco in any form, drugs, prescriptions, candies, confections of all kinds, jewelry of all descriptions, fuel of all kinds, gasoline, oils, greases, cosmetics, perfumes, or any other articles of merchandise are sold, shall be termed and considered a store for the purposes of this act.
>
> Section 2. Every person, corporation, firm, company, or copartnership operating, or causing to be operated, in the State of Ohio, one or more whole-

sale or retail stores shall annually pay into the state treasury a license fee hereinafter stated, said fee to be based upon and determined by the annual volume of business transacted in each store and the number of stores operated, or caused to be operated, in the State of Ohio by said person, firm, company, corporation, or copartnership.

Section 3. For the purposes of this act all stores operated in the State of Ohio shall be classified according to the annual volume of business transacted into five classes as follows: Class 1, those transacting a volume of not more than $12,000.00 annually; class 2, those transacting a volume of more than $12,000.00 but not over $30,000.00 annually; class 3, those transacting a volume of more than $30,000.00 but not over $60,000.00 annually; class 4, those transacting a volume of more than $60,000.00 but not over $100,000.00 annually; class 5, those transacting a volume of more than $100,000.00 annually.

Section 4. Every person, firm, company, corporation, or copartnership operating, or causing to be operated, in the State of Ohio one store shall pay annually, as prescribed hereinafter, into the state treasury a fee of $5.00 if said store belongs to class 1, $10.00 if to class 2, $20.00 if to class 3, $30.00 if to class 4, and $40.00 if to class 5. Every such person, firm, company, corporation, or copartnership, operating or causing to be operated, in the State of Ohio two stores shall pay into the state treasury annually a fee of $10.00 for the second store if it belongs to the first class, $20.00 if to class 2, $40.00 if to class 3, $60.00 if to class 4, and $80.00 if to class 5. Every person, firm, company, corporation, or copartnership operating, or causing to be operated, in the State of Ohio, three stores shall pay into the state treasury annually a fee of $20.00 for the third store if it belongs to class 1, $40.00 if to class 2, $60.00 if to class 3, $80.00 if to class 4, and $100.00 if to class 5. Every such person, company, firm, corporation, or copartnership operating, or causing to be operated, in the State of Ohio, four stores shall pay into the state treasury a fee of $40.00 for the fourth store if it belongs to the first class, $60.00 if to class 2, $80.00 if to class 3, $100.00 if to class 4, and $200.00 if to class 5. Every person, firm, company, corporation, or copartnership operating, or causing to be operated, in the State of Ohio, five stores shall pay into the state treasury a fee of $80.00 for the fifth store if it belongs to class 1, $120.00 if to class 2, $160.00 if to class 3, $200.00 if to class 4, and $400.00 if to class 5. Every person, firm, company, corporation, or copartnership operating, or causing to be operated, in the State of Ohio, more than five stores shall pay annually into the state treasury for each store over five the fee of $100.00 if it belongs to class 1, $200.00 if to class 2, $300.00 if to class 3, $600.00 if to class 4, and $750.00 if to class 5.

Section 5. For the purpose of this act the store designated as the first store shall be that one in the state doing the least annual volume of business, the second store shall mean the one transacting the next to the least volume, the one known as the third store shall be the one transacting the next higher volume of business above that one known as the second store, the one known as the fourth store shall be the one doing the next larger volume above that one designated as the third store, and the fifth store shall be the one having the next higher volume of business above that store designated as the fourth store.

Section 6. The license fees enumerated in this act shall be paid by such person, firm, company, corporation, or copartnership on or before the first Monday of August, 1929, and annually on or before said date of each succeed-

ing year. Application shall be made for license to the Auditor of State upon a form furnished by the State Auditor and shall plainly state the kind of business that seeks a license, location of the store, the name of the owner or owners, the volume of the business done the preceding year and the average amount of stock carried. Whenever a new store shall be established, the person, firm, company, corporation, or copartnership opening such store shall make application on a blank furnished by the State Auditor's office, stating the place and nature of the business, the amount of stock to be maintained and the estimated volume of business the store will probably do the remainder of the license year. There shall accompany said application a fee based upon the estimate of the volume of business to be transacted and the length of the remainder of the current license year, but in no case shall said fee be less than one-fourth of the annual fee for a store of the class which accompanying estimate indicates said store will be.

Section 7. It shall be the duty of the Auditor of State upon receipt of all satisfactory applications and the proper payment of license fees to issue license for stores. Said license shall be displayed in a conspicuous place in all stores, and any person, firm, company, corporation, or copartnership failing to display said license for the current license year on or after August 20 thereof, and in all new stores within ten days after said store is opened for the transaction of business, shall be fined not less than $15.00 nor more than $50.00 for the first offense, and not less than $100.00 nor more than $500.00 for each offense thereafter.

Section 8. Every person, firm, company, corporation, or copartnership operating, or causing to be operated, in the State of Ohio, one or more stores shall keep for each store a set of books showing the monthly and annual volume of business transacted, and said books shall at all times be open to any agent of the State Auditor's office, and any such person, firm, company, corporation, or copartnership, or any agent thereof who shall fail to keep the required books, or who refuses access to said books to any agent of the Auditor of State, shall be fined not less than $25.00 nor more than $100.00 for the first offense and not less than $100.00 nor more than $500.00 for each offense thereafter.

Section 9. Whenever any person, firm, company, corporation or co-partnership discontinues a store, a refund application shall be made to the Auditor of State giving such information as may be required, and the Auditor of State shall issue warranty on the Treasurer of State for the pro rata amount to be refunded to said applicant, but refunds shall be based upon periods of 9 months, 6 months, and 3 months only.

Section 10. On or before September first of each year, the Auditor of State shall certify to the Treasurer of State the amount so collected, and on the first of each month thereafter all collections shall be certified into the Treasurer of State.

Section 11. Upon receipt of taxes herein provided for(the Treasurer of State shall place the first $25,000.00 collected in a special fund to be known as the store license tax rotary fund. Thereafter as required by the depletion thereof he shall place to the credit of said fund the amount sufficient to make the total fund at the end of each quarter period of the fiscal year (commencing the first Monday of August) to be not less than $25,000.00.

Section 12. After the credits to said rotary fund have been provided for the Auditor of State shall, on or before the first of October of each year by vouchers and warrants in equal proportion to each county treasurer of each

> county within the state, divide the first $440,000.00 so collected that each county may draw the sum of $5,000.00, which shall be used for the sole purpose of aiding and keeping the mother's pension fund in operation within all counties of the state. The remainder of all funds so collected shall be placed by the State Treasurer to the credit of the general fund of the state."

At the outset it should be noted that this bill does not impose a property tax. There is a dual classification in this plan for the purpose of taxation, to wit: stores are classified, first, as to volume of business done and, second, there are classifications as to who operates them, that is, whether a given store is individually operated, or operated as one of a chain of stores and as to how many stores are in the chain. The tax imposed is determined by the joint effect of these two classifications. The bill must, therefore, be considered in the light of an excise tax upon the privilege of doing business. When so considered a serious question as to its constitutionality arises.

As a privilege tax the Legislature may undoubtedly classify persons and property for revenue purposes. Instances of such classifications are so numerous and so well known as to preclude the necessity of citing authorities. Laws of this nature have been uniformly upheld in State and Federal courts, providing the classifications for the purpose of taxation are based upon substantial grounds and are not arbitrary, discriminatory or unreasonable. The particular constitutional provisions raised in passing upon legislation of this nature is the Fourteenth Amendment to the Constitution of the United States, which prevents any state from denying to citizens of the United States the equal protection of the laws. Accordingly, if the bill does deny equal protection, it must fail. If, however, the classification is based upon a *real* difference between the subjects constituting the various classes and excludes the idea of arbitrary selection, the courts have uniformly held such legislation not in violation of the Fourteenth Amendment to the federal Constitution. *Northwestern Life Ins. Co.* vs. *Wisconsin,* 247 U. S., 142.

Two states have recently passed so-called "Anti-Chain Store Legislation", Maryland and North Carolina. The Maryland law made it illegal for chain stores to operate more than five units and required them to pay a license of five hundred dollars for each unit operated. The validity of the law was tested by the Keystone Grocery &Tea Company, and on April 21, 1928, the Circuit Court of Allegheny County, Maryland, held the law to be unconstitutional.

The North Carolina statute was enacted nominally for the purpose of raising revenue for the payment, in part, of the expense of the state government. The statute reads:

> "Section 162. Branch or Chain Stores. That any person, firm, corporation or association operating or maintaining within this state, under the same general management, supervision or ownership, six or more stores or mercantile establishments, shall pay a license tax of $50 for each such store or mercantile establishment in the state, for the privilege of operating or maintaining such stores or mercantile establishments."

The constitutionality of this statute was attacked by the Great Atlantic & Pacific Tea Company and others, upon the ground that the classification made by the statute for the purpose of taxation, was arbitrary, unreasonable and unjust, there being no real and substantial difference between those merchants who were required to pay and other merchants doing a like or similar business who were not required to pay.

The Supreme Court of North Carolina in this case held, 144 S. E., 701 that the license tax was illegal for the reason that the statute was in violation of the Consti-

tution, both of that state and of the United States, as an arbitrary and unreasonable classification of subjects for the purpose of taxation.

It must be kept in mind that the Legislature has great latitude in the imposition of a tax of the character here involved. The only limitation upon that power is that the unit of measurement must have some reasonable relationship to the basis upon which classifications are made.

Watson vs. *State,* 254 U. S. 122;
Stebbins vs. *Riley,* 268 U. S. 137;
State ex rel. Evans vs. *Kozer,* 242 Pac. 621;
Lehigh Portland Cement Co. vs. *Commonwealth,* 135 S. E. 669.

There can be little question as to the validity of a graduated tax according to gross receipts. Were the tax fixed at a definite sum for each unit or store, no difficulty would be encountered. The present bill, however, has a dual classification, first, as to gross receipts of individual stores; second, as to the number of stores in the chain. The combination of classification has the effect of imposing a tax which increases as the number of stores increase in a given chain.

It is neither the function of the court nor of the Attorney General when his opinion is called for by committees of the Legislature, to inquire into the motives back of any legislation. The present discussion must be limited to the constitutional power of the Legislature to act, unaffected by any consideration of legislative policy. The rule deducible from the authorities is that the Legislature may tax any occupation, or make classifications within an occupation, provided that there is a reasonable basis for distinction. As is pertinently stated by Cooley in his work on Constitutional Limitations, at page 379:

> "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the Legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised."

For the purpose of this opinion, it must be assumed that the Legislature, if the bill be passed, has determined that there is a reasonable basis for classification. The courts may, however, determine that the legislative act has been in violation of the supreme law of the land where there is a plain departure from a specific constitutional safeguard. If it can be said that there is not a substantial difference between stores individually operated and stores operated in common with other stores, or between stores of the same output when operated in chains of different number, the act cannot be sustained. It is quite true that there are certain differences between stores individually owned and those which are a part of a system. These differences may be largely accountable for the economic benefits claimed to have resulted in the phenomenon of the so-called "chain store" developments. Mass production and buying standardization and spread of overhead are available to the stores of this character in a way denied to the individual store owners. In one sense it may be properly said that there is a difference between a store which is a member of a chain and its competitor, the individually owned store, although they may be dealing in the same class of com-

modities and have the same amount of gross business. Whether that difference is substantial to the point of warranting classification is another matter, concerning which there is grave doubt. In the North Carolina case, to which reference has already been made, the court refused to recognize the difference as substantial, as appears from the following language on page 705 of 144 S. E. Reports:

> "The classification made in the statute, by which a license tax is imposed upon retail merchants, who maintain or operate, under the same general management, supervision, or ownership, six or more stores or mercantile establishments, and by which other retail merchants, who maintain or operate a less number of stores or mercantile establishments than six are exempt from such tax, cannot be held as founded upon a real and substantial difference between the two classes. The classification attempted for the purpose of imposing a license tax upon merchants falling within one class, and exempting merchants falling within the other class, is, we think, under the authorities, clearly arbitrary, and if enforced would result in depriving merchants who are within the first class, of the equal protection of the laws of this state. It is immaterial that persons, firms, corporations, or associations, liable under the terms of the statute for a license tax, are designated therein as owners of chain stores. Their business differs from the business of other merchants, not taxed by the statute, only in matters of detail and methods of buying and selling merchandise. No question of public policy with reference to chain stores is presented on this record."

Here is language of a court of last resort passing upon the direct point here involved. The court further pointed out that there was no justification for the imposition of the tax on the basis of the police power. This reasoning would be applicable to the bill now under consideration.

There is also an interesting case based upon a tax measure which is almost parallel with the one here under consideration. I refer to the case of *Wyatt* vs. *Ashbrook,* a Missouri case arising in 1900 and reported in 48 L. R. A. p. 265. There the Legislature of Missouri had attempted to single out for classification department stores, by requiring all who dealt in more than one class or group of goods designated in the act to pay a tax, while exempting others. Quite obviously the purpose of the bill was to check the economic development of the department store, which is now a matter of history. In holding the act unconstitutional, the court indulges in some very strong language which is pertinent here, as follows:

> "While the Legislature, under its vested authority and power, may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the Constitution, or that will entitle it to the designation of 'the law of the land', or that will make the act 'due process of law' by which alone the liberty of the citizen may be restrained, or his property burdened or disposed of. As said above, no reason has been given or suggested and, to our minds, none can be conceived, why the arbitrary selection of persons and corporations having or exposing for sale, in the same store or building, under a unit of management or superintendency, at retail, in the cities of the state having a population of 50,000 inhabitants, any articles of goods, wares, or merchandise

set out and named in Section 1 of the act in question of more than one of the several classifications or groups therein designated, when fifteen or more persons are employed, was named or made, for the imposition of the license fee provided in the act, from which all other persons and merchants of the state are exempted. Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to deny suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly 'classification run wild'. It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this act."

We have, therefore, upon a review of the authorities, two cases in courts of last resort, one rejecting the classification on the basis of a multiplicity of units dealing in the same class of commodities, and the other rejecting the classification on the basis of a single business of various enterprises which ordinarily were conducted separately. In each case the Legislature attempted to single out for the purpose of taxation the one class of business to the exclusion of other merchants of substantially similar character. Quite obviously in each case the underlying purpose was to attempt to control by taxation an economic development. I am not, as previously stated, concerned with or interested in the purpose behind the bill, but before its constitutionality can be sustained, there must exist a substantial difference between those taxed at a given rate and those who are taxed differently, or not at all.

In the light of the foregoing consideration of principles of constitutional law, it now becomes necessary to more thoroughly consider the detailed provisions of this bill in order to reach a conclusion upon the reasonableness of the classifications therein contained. Three typical illustrations may be considered:

First: Under the provisions of this bill, one store which does an annual volume of business of one million dollars would pay, if not operated in conjunction with any other store, $40.00 a year, while another organization doing a volume of one million dollars per year and operating one hundred stores, each doing a business of $10,000.00 per year would pay $9,665.00 per year.

Second: There may be two stores side by side, each doing a business of $12,000.00 per year. One of these two stores, on account of being individually operated, would pay $5.00 per year, and the neighboring store, if being one of a chain of more than five stores, doing the same volume of business, would pay $100.00 per year.

Third: There may be two stores side by side, engaged in the same business, each doing a volume of $12,000.00 per year. The one store, if the second of a chain, would be compelled to pay an annual tax of $10.00, and the other store, if the fifth of a chain of five like stores, would be compelled to pay an annual tax of $80.00.

Examples might be endlessly multiplied. When it is remembered that the whole justification for the tax imposed is upon the privilege of doing business, is it not unreasonable and arbitrary to tax one merchant for the privilege of doing a million dollar business $40.00 a year if he does it in one store, and $9,665.00 a year if he does the same amount of business in one hundred stores; or, changing the illustration, $220.00 a year if he does it in a chain of three stores, and $9,665.00 if in a chain of one hundred stores? As between chains, the same output store in different chains is taxed at a different rate, increasing as the number in the chain increases. Is not this discriminatory? Is not this determining the amount of tax by looking to see who pays the tax—clearly a violation of the 14th amendment of the United States Consti-

tution, which guarantees equal protection of the laws to all citizens. Taxation for the same thing according to the size of the operator is class legislation.

Upon the subject of arbitrary discrimination, the following language is pertinent—Ruling Case Law, Vol. 26, at page 260:

> "The courts have not hesitated to strike down, as unconstitutional, excises purporting to establish a classification of subjects of taxation but which are really intended to drive out of business persons trading in a legitimate way but in such a manner as to outstrip their competitors, or which are intended to favor a particular class in the community."

I am confronted with the decision of two courts of last resort upon questions substantially similar to those that are involved here. In each case the conclusion of the court was that the Legislature had exceeded constitutional bounds. In view of these authorities, and in spite of the fact that the courts and this department are required to approach questions of constitutionality with hesitancy and due regard to the power of the Legislature, I am constrained to the conclusion that the bill, if enacted into law, would be unconstitutional on the ground that the classifications for the purpose of taxation therein contained are without substantial basis and accordingly arbitrary, discriminatory and unreasonable.

Respectfully,
GILBERT BETTMAN,
Attorney General.

270.

APPROVAL, LEASE TO OFFICE ROOMS IN THE ULMER BUILDING AT PUBLIC SQUARE, CLEVELAND, OHIO.

COLUMBUS, OHIO, April 6, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted by Hon. Ross Hedges, Assistant Director, Department of Industrial Relations, a lease granting to you, as Superintendent of Public Works, for the use of the Department of Industrial Relations, certain office rooms, as follows:

Lease from the Public Square Improvement Company of Cleveland, Ohio, for rooms 701 to 707, inclusive, in the Ulmer Building at Public Square, Cleveland, Ohio. This lease is for a term of twenty-one (21) months, beginning on the first day of April, 1929, and ending on the thirty-first day of December, 1930, by the terms of which the State will be required to pay three hundred and seventy-five dollars ($375.00) per month on the first day of each and every month in advance.

You have also submitted encumbrance estimate No. 4817 of the Director of Finance, made in pursuance of Section 2288-2, General Code. In addition, a certificate is enclosed, signed by the secretary of the Public Square Improvement Company, to the effect that the president and secretary are authorized to enter into leases on behalf of said company, pursuant to its regulations.

Finding said lease in proper legal form, I hereby approve it as to form and return it herewith, together with all papers submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.