In the case of Ed Tumey vs. the State of Ohio, the court was not called upon to go further than to hold the conviction voidable, which it did. However, in the case of Emanuel Williams vs. the State of Ohio, the Court of Appeals for Perry County, on a supplemental petition in error raising the question of the jurisdiction of the justice of the peace, held in substance that a justice of the peace in a prosecution under the Crabbe Act was without jurisdiction and discharged the defendant. In other words, the Court of Appeals of Perry county went a step further than the Supreme Court of the United States and said that such judgments were not merely voidable but void.

At the request of Honorable B. F. McDonald, Prohibition Commissioner, the case of Emanuel Williams vs. the State of Ohio will probably be taken to the Supreme Court for the purpose of settling definitely the question of whether such judgments are void or merely voidable.

In several cases of habeas corpus brought before Judge Kinkead of the Franklin county Common Pleas Court, writs were granted and the defendants discharged. However, in the case of In Re Paulus, Judge Blouser of the Ross county Common Pleas Court refused to issue a writ of habeas corpus.

Respectfully,
EDWARD C. TURNER,
Attorney General.

300.

CIGARETTES—LICENSE—DEFINITION OF WHOLESALE AND RETAIL DEALERS.

SYLLABUS:

A company which buys bankrupt and fire sale stocks in which it acquires cigarettes and makes continued and repeated sales of such cigarettes in large quantities to retail dealers who re-sell the same in smaller quantities to consumers, and also sells such cigarettes at retail is engaged in both the wholesale and retail business of trafficking in cigarettes and is required to pay the wholesale license for engaging in such business in addition to the retail license which such company pays for engaging in the retail business.

COLUMBUS, OHIO, April 8, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your request under date of April 1, 1927, for my opinion upon the following:

> "We have received from the auditor of Williams county the following inquiry:
>
> 'We have in this county a company who buys bankrupt and fire sale stocks and in some of these stocks they get cigarettes. This company takes out a retail license, but not a wholesale. We are informed that they sell cigarettes in large quantities to retail dealers at the same price they retail them from their store, therefore they claim that since they sell at one price to all that they do not come under the head of wholesalers. They sell any amount of cigarettes that a purchaser desires.'
>
> You are respectfully requested to render this department your written opinion as to whether Sections 5894 to 5902 inclusive, of the General Code, would require this company to pay a wholesale license for the sale of cigarettes."

Sections 5894 to 5902 of the General Code, both inclusive, cover the annual tax on the sale of cigarettes. Section 5894 of the General Code provides:

> "A person, firm, company, corporation, or co-partnership, engaged in the wholesale business of trafficking in cigarettes, cigarette wrappers or a substitute for either, shall annually be assessed and pay into the county treasury the sum of two hundred dollars, or, if so engaged in such traffic in the retail business, the sum of fifty dollars for each place where such business is carried on by or for such person, firm, company, corporation or co-partnership."

The question as to what constitutes a wholesale dealer, or a retail dealer has often been before the courts of the various states particularly in connection with taxes on wholesale and retail sales of intoxicating liquors. No hard and fast rule has been evolved which can be used to determine whether a dealer engaged in the sale of goods can be classified as a wholesaler or a retailer. In some states the terms "wholesaler" and "retailer" as applied to persons engaged in the sale of intoxicating liquor have been defined by statute. The cases seem to lay down four distinct rules for determining what constitutes a wholesale sale as distinct from a retail sale of liquor. Perhaps the most generally accepted rule is that the distinction depends upon the quantity sold, that is, sales in large quantities are sales at wholesale, while sales in small quantities are sales at retail. Massachusetts seems to adhere to this rule although it was said in the case of *Commonwealth vs. Greenwood*, 205 Mass., 124:

> "We do not mean to say that the apparent purpose with which purchases are made would not be an important circumstance in this connection. It might be the case that one who bought for the purpose of selling again would desire to buy a larger quantity than one who was purchasing for his own consumption; and the attention of the jury properly might be called to this, as well as to all the other circumstances of whatever sales might be in evidence; but the decisive point is the quantity sold rather than the purpose of the purchaser."

Other courts have based the distinction upon the "usual course of trade" doctrine. In other words, the distinction between wholesale and retail sales depends upon whether the particular sale in question was considered by the trade itself as a wholesale transaction or a retail transaction. Other courts have accepted the original package theory; it being held that a wholesale transaction implies sale in unbroken pieces and that a retail sale implies the breaking up or dividing of goods held in larger packages into smaller quantities, and the selling of the same in such smaller quantities. The fourth rule laid down by some of the courts is that of the "purpose of the purchase", that is, whether the purchase of the goods is for the purpose of consumption or for resale. Thus in *State vs. Tarver*, 11 Lea. 658; 79 Tenn. 658, it was held:

> "The distinction between a wholesale and retail dealer did not depend upon the quantity sold by either, but that sales to purchasers of packages or quantities for the purposes of trade or being resold constituted a wholesale dealer; and sales to persons or customers for purposes of consumption constituted a retail dealer."

The above case was followed in the case of *J. M. Leidy vs. Metz Brothers Brewing Company.* 129 N. W. (Neb.) 443; 32 L. R. A. (N. S.) 622. The first branch of the syllabus reads:

"A manufacturer of beer who sells his product to unlicensed consumers for their use 'sells at retail', within the meaning of chapter 82, Neb. Laws 1907."

Webster's Standard Dictionary defines wholesale and retail as follows:

"'Wholesale': 1. Selling in quantity, not at retail; as a wholesale druggist; 2. Done in buying and selling in quantities as the wholesale trade * * *. Sale of goods by the piece, bulk or quantity; opposed to retail."

"'Retail': To sell in small quantities *such as are immediately called for by the consumer;* * * * the selling of goods in small quantities especially *by those who have bought in larger quantities to resell at a profit.*"

In Words and Phrases (Second Series) I find the following definition:

"The primary and usual meaning of the word 'wholesale' is the selling of goods in gross to retailers who sell to customers." *State vs. Spence*, 53 So. 595, 597; 127 La. 536.

I have been able to find but two Ohio cases which are at all helpful in this discussion. The case of *Markle vs. Town Council of Akron*, 14 Ohio 587, seems to adhere to the rule first announced above, that is, that the distinction depends on the quantity sold, namely, sales in large quantities are sales at wholesale, while sales in small quantities are sales at retail. On page 792 it is said:

"But to retail, is to dispose of in small quantities, and may be either for or without a consideration. It may be the distribution of a whole into parcels."

In the later case of *Kaufman vs. Village of Hillsboro*, 45 O. S. 700, however, our Supreme Court follows the fourth test above referred to, namely that the *purpose of the purchase* is the criterion, that is, whether the purchase is for consumption or for resale. In that case the proof was that Kaufman sold twenty-five quarts of beer at one time to one Rhoades in quart bottles and that said beer was sold to Rhoades to be consumed by him as a beverage. The opinion of the court is as follows:

"A sale, by one who is not a manufacturer, of twenty-five quarts of beer, put up in bottles of one quart each, not upon the prescription of a physician, nor for any known mechanical, pharmaceutical or sacramental purpose, but to be drank by the person to whom sold, is a sale at retail within the meaning of the eleventh section of the act known as the Dow Law; and the keeping of such place where such sales are made is a violation of the ordinance of a village prohibiting ale, beer and porter houses and other places where intoxicating liquors are sold at retail for any purpose or in any quantity, other than as permitted by the eighth section of said act."

In your letter you state that the company in question sells "cigarettes in large quantities to retail dealers at the same price they retail them from their store." From this statement it appears that the company maintains a store or place of business from which I assume that it sells cigarettes indiscriminately to any one, be he a consumer or a purchaser for the purpose of re-sale, that is, a retailer.

In the first of the four rules above discussed the test applied by the Supreme Court of Massachusetts (Commonwealth vs. Greenwood, supra) is: "the decisive point is the quantity sold rather than the purpose of the purchaser." In your letter it is stated that the company sells cigarettes in large quantities.

The second test above stated is based upon "the usual course of trade" doctrine. No argument should be required to demonstrate that a company which makes continued or repeated sales of cigarettes in large quantities to retailers who re-sell such cigarettes to the consumer, would be considered by the trade as being engaged in the wholesale business.

As to the third test above mentioned, the original package theory, no facts are furnished. You do not state that the cigarettes are sold in unbroken cartons or packages of cartons to the retailer who divides the goods and sells the same in small quantities. But since the company sells, as you state, in large quantities, such must undoubtedly be the case. If this be true, the company under consideration is clearly engaged in the wholesale business of trafficking in cigarettes within the original package rule, as well as engaged in such traffic in the retail business.

In so far as the fourth test above set forth is concerned, which is the test applied by the Supreme Court of Ohio in the case of *Kauffman vs. Village of Hillsboro*, supra, clearly this company is engaged in the wholesale business of trafficking in cigarettes and in the retail business as well.

I find no opinions of the courts giving any consideration to the price at which the goods are sold in determining whether or not the business be wholesale or retail, and I am of the opinion that the fact that the company in question sells large quantities to retailers at the same price at which it sells small quantities to consumers in no way affects the question under consideration.

It is my opinion, therefore, that since from the facts stated in your letter it appears that the above company has been making continued and repeated sales of large quantities of cigarettes to retailers who again re-sell the same to consumers, and also sells such cigarettes at retail, the company described in your letter is engaged in both the wholesale and retail business of trafficking in cigarettes and should pay the license required of wholesalers in addition to the license which this company pays to engage in the retail business.

Respectfully,
EDWARD C. TURNER,
Attorney General.

301.

PERSONAL PROPERTY—REQUIREMENTS FOR EXEMPTION FROM TAXATION.

SYLLABUS:

Where under the provisions of Section 5374-1, General Code, exemption from listing personal property for taxation is claimed, the owner must, in compliance with said section, produce a certificate from the proper taxing officer showing that said property has been listed and assessed for the current year in another state, or subdivision thereof, in the manner and form required in said state.

COLUMBUS, OHIO, April 8, 1927.

HON. OSCAR A. HUNSICKER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Acknowledgment is hereby made of your recent communication in which you request my opinion as to the construction of Section 5374-1 of the General Code of Ohio, and you state that: