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Constitutional Law--Power to Tax Chain Stores

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has done nothing and will do nothing to prevent the collection thereof.[1]

To the four things which an assignor without recourse of a negotiable instrument warrants to the assignee,[2] our court has thus added an implied warranty. Seemingly, there have been no like holdings since the passage of the Uniform Negotiable Instruments Act, but the court cites several cases which were decided before that time,[3] stating that "the holding goes to a basic principle of fair dealing not supplanted by the negotiable instruments statute." There is also a possible inference that in some respects a negotiable instrument is a chattel and the same warranty might be implied as in the case of the sale of chattels.[4] The court further states "that it is only common sense that the law should raise and impose an implied warranty, attendant upon any assignment, that the assignor will not undermine or destroy that which he has assigned."

The result reached here seems to be justified by the facts of this particular case. As to whether the court will raise an implied warranty in all cases of this nature or will extend the application of this principle to all cases of the transfer of negotiable instruments is problematic and can only be determined by future decisions.

—MELVILLE STEWART.

CONSTITUTIONAL LAW—POWER TO TAX CHAIN STORES.—In North Carolina two statutes were passed by the legislature imposing license taxation upon chain stores. The tax was purely for revenue under both statutes, and involved no question of public regulation of chain stores. The first,[1] which was held unconstitutional, provided for a license tax upon each store in the state of a firm operating six or more therein. It was held to violate the

[1] Hoge v. Ward, 155 S. E. 644 (W. Va. 1930).

[2] W. VA. REV. CODE (1931), c. 46, art. 5, § 6.

[3] Watson v. Chesire, 18 Iowa 202, 87 Am. Dec. 382 (1865); Eaton v. Mellus, 73 Mass. (7 Gray) 566 (1856); Findley v. Smith, 42 W. Va. 299, 26 S. E. 370 (1896), (applying the principle to assignment of a judgment).

[4] Quoting from the opinion, "In Brannon's Negotiable Instruments Law, p. 609, in this statement: 'However, even without this linking of the two sections (meaning secs. 65 and 66 of Uniform Negotiable Instruments Law), sec. 65 should be construed to harmonize with the commercial law as to implied warranties in sales of chattels, since this section relates to the obligation of a seller of a negotiable instrument, which is in some respects a chattel.' "

[1] Public Laws of North Carolina 1927, c. 80, § 162.

equal protection clause of the United States Constitution and the North Carolina Constitution,[2] because the distinction under the statute between firms operating five stores and firms operating six stores was purely arbitrary and not based upon any reasonable distinction.[3] The second statute,[4] providing for a license tax upon each store over one operated by the same firm, was upheld as constitutional, because the firm operating two or more stores has a peculiar economic advantage over a firm operating only one store.[5]

The distinction between the two statutes is that under one there is a classification of independent merchants and chain stores, and under the other statute there is a classification of chain stores of five or less and of six or more. But it is submitted that this difference does not justify a different conclusion as to their constitutionality. The power of legislatures to tax certain classes of trades and occupations has been repeatedly upheld; but, if a difference in taxation is imposed unreasonably and arbitrarily upon the various members of that class, it is held to violate the equal protection clause of the Constitution.[6] The economic advantage of the firm operating two or more stores over the firm operating one store is apparent, and it would seem that the court is correct in that taxation according to that advantage does not deny the equal protection of the law.

The statute laying a tax upon each store over five operated by the same firm finds a striking analogy in the ordinary workmen's compensation acts requiring all forms employing over a certain number of men to contribute to the compensation fund or lose certain common law defenses. The Supreme Court of the United States in the case of *Jeffrey Manufacturing Company v. Blagg*[7] upholding the constitutionality of such an act said, "the fact

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[2] United States Constitution art. 14, § 1. North Carolina Constitution art. 5, § 3.

[3] Great Atlantic and Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928).

[4] Public Laws of North Carolina 1929, c. 345, § 162.

[5] Great Atlantic and Pacific Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

[6] F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 40 S. Ct. 560 (1919); Louisville Gas and E. Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423 (1927); Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817 (1906); State v. Stevenson, 109 N. C. 730, 14 S. E. 385 (1892).

[7] 235 U. S. 571, 35 S. Ct. 167 (1914). See also St. Louis Cons. Coal Co. v. Illinois, 185 U. S. 203, 22 S. Ct. 616 (1901), (upholding the constitutionality of a statute requiring mines in which more than five men are employed to be inspected at least four times a year and pay certain fees for the same); McLean v. Arkansas, 211 U. S. 539, 29 S. Ct. 172 (1901), (upholding

that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones, is conceded in argument, and, is, we think, so obvious, that the state legislature cannot be deemed guilty of arbitrary classification in making one rule for large and another for small establishments." And the Supreme Court in the case of *Ward and Gow v. Krinsky*[8] in response to the question of why begin with four workmen deemed it sufficient to reply, "It was necessary to begin somewhere; the legislature must decide where; ——."

But the Supreme Court held a statute,[9] which sought to prevent the evasion of the inheritance tax laws, unconstitutional, because the provision in the statute, that all gifts of a material part of an estate made six years before death were conclusively presumed to be in contemplation of death and subject to the inheritance tax, was a purely arbitrary discrimination between gifts made six years before death and those of a longer period.[10] Mr. Justice Holmes, however, in a strong dissenting opinion, concurred in by Justices Brandeis and Stone, said that the legislature had found "that by far the larger proportion of gifts coming under the statute actually were made in contemplation of death" and that the legislature should have the power "to make sure that its policy of taxation should not be escaped", and that the line drawn by the legislature, while arbitrary by necessity, should be upheld, if reasonable. This reasoning seems sound and would aptly apply to the store tax. The economic advantage of the firm operating many stores is not so much in its operating two or three stores, but in its operating many stores. Any distinction in taxation is to a certain arbitrary, and when the distinction is, as here, solely one of degree, the line drawn by the legislature, if reasonable, should not be held arbitrary in the sense of the equal protection clause of the Constitution. If the legislature in such case is not permitted to draw the line, it is obvious that there will be a great economic interest that will remain untaxed and thus the court will prevent that which it seeks to protect—equal taxation.

—JOHN HAMPTON HOGE.

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a statute requiring certain procedure in the weighing of coal of each miner, when ten or more persons are employed in the mine). Accord (by a divided court) 36 W. Va. 802, 15 S. E. 1000 (1892).

[8] 259 U. S. 503, 42 S. Ct. 529 (1921).

[9] Wisconsin Statutes 1919, c. 64 *ff.*, 1087-1.

[10] Schlesinger v. Wisconsin, 270 U. S. 230, 46 S. Ct. 260 (1926).