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Article 7

Contracts: Illegality: Unenforceability

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and the operation of the statute in question is as unjustifiable as would be a tax on tangible personal property graduated upward on each additional unit owned. To refute the contention that he who sells more is in receipt of greater proportional profit the court quotes from the case of the *United States Glue Company* v. *Town of Oak Creek,* 247 U.S. 321, 328, 38 Sup. Ct. 499, 62 L. ed. 1135 (1918), which distinguishes between the effect of a tax measured by gross sales and one measured by net income. In the instant case the court points out that the existence of large gross sales does not always indicate a high net profit, and that a tax on gross sales might spell the difference between a net loss and a net profit. This was exemplified by the actual experience of one of the petitioners who would have sustained a loss had the tax been enforced. In reconciling the holding of the instant case with that of *State Tax Commissioners v. Jackson,* 283 U.S. 527, 51 Sup. Ct. 540, 75 L. ed. 1248 (1931), where a tax on chain stores graduated with the number of unit stores operated was held valid, the court says that the graduation in that case was justified by the advantages incidental to the management of multiple store systems. In the instant case the court has no recognition for the advantages incidental to and based on a large number of sales rather than unit stores. The majority opinion concludes with the remark that nothing had been presented to show that the result sought in the instant act could not be accomplished by a flat tax on sales or a graduated profit tax.

In presenting the dissenting opinion, Justice Cardozo points out that the great bulk of the evidence seems to indicate that up to a certain point the profits of a business increase in a greater proportion than do the gross sales and relies on such cases as *State Tax Commissioner* v. *Jackson, supra,* (reconciled in the majority opinion) and *Pacific American Fisheries* v. *Alaska,* 269 U.S. 269, 46 Sup. Ct. 110, 70 L. ed. 270 (1925) (tax graduated according to the number of cases of salmon packed) to sustain the proposition that graduated taxes have been levied on enterprises on the basis of size alone with no reference to profits. The Justice quotes economic authorities to show that a flat tax is unsatisfactory because the small business man has greater difficulty in passing it on to the consumer than has the larger enterprise, and points out that the gross sales item is far easier to obtain and assess than the elusive and easily camouflaged net income figure.

In balancing the opinions, majority and dissenting, it becomes apparent that the instant case was not decided so much upon legal theory as upon the beliefs of the members of the court as to certain economic facts. The majority holds, in short, that gross sales is not positively indicative of ability to pay a tax and points to the experience of one of the petitioners. The minority concedes that some inequality and some injustice may attend the levying of the tax but holds that the law regards not invariable sequences but probabilities and tendencies. *Clark* v. *Titusville,* 184 U.S. 329, 46 L. ed. 569, 22 Sup. Ct. 382 (1901). Of this case it can be said that it is another in that long and confusing series of decisions necessitated by the efforts of the states to pass income taxes under the mask of license, revenue, and sales taxes.

ERNEST O. EISENBERG

CONTRACTS—ILLEGAL—UNENFORCEABILITY.—The plaintiff, a band director of considerable reputation, sued for money due under a contract in which he allowed the defendant the exclusive use of his name and the name of his band in the advertising of the defendant's band instruments. Plaintiff also agreed under the contract to include in all his own announcements the statement that he

and his band used the defendant's musical instruments exclusively. Upon proof that the plaintiff's band did not use the defendant's instruments exclusively the trial court denied recovery on the ground that the misrepresentation was contrary to public policy and to WIS. STAT. (1933) §343.413 (1). On appeal, *Held,* affirmed; the agreement being in violation of a penal law, no recovery may be had under it. *Kryl* v. *Frank Holton & Co.,* (Wis. 1935) 259 N.W. 828.

The statute in question originated in the 1913 session of the legislature, Wis. Laws 1913, c. 510, and forbids the use of false advertising statements by anyone interested in the sale of anything to the public. The statute provides that violation of it shall be a misdemeanor but does not determine the court's decision in a civil action in which a violation of the statute is involved. In the case of the *Street Railway Adv. Co.* v. *Lavo Co.,* 184 Wis. 395, 198 N.W. 595 (1924), a foreign corporation was denied recovery of damages for breach of contract because of its failure to obtain a license to do business in the state as required by WIS. STAT. (1921) §1770b(2) [See WIS. STAT. (1933) §226.02(1)]. However, the statute specifically provided that contracts made in violation of it should be void. WIS. STAT. (1921) §1770b (10) [See WIS. STAT. (1933) §226.02(9)]. Consistent with the holding of the *Street Railway* case, *supra,* was the decision of *Coules* v. *Pharris,* 212 Wis. 558, 250 N.W. 404 (1933), denying an alien illegally in this country the right to sue for services rendered. This case is criticized, however, in Gellhorn, *Contracts and Public Policy* (1935) 35 Col. L. Rev. 679, 696, and in (1934) 18 Marq. L. Rev. 133. In *Washington County* v. *Groth,* 198 Wis. 56, 223 N.W. 575 (1929), however, the court abandoned the doctrine of strict illegality and allowed the plaintiff county to enforce the liability of the county clerk's surety on a contract illegal because of the clerk's financial interest therein. The court in the *Washington County* case, *supra,* formulated the rule that where the contract is not strictly prohibited nor *malum in se,* or where the parties are not *in pari delicto,* the court will look to the purpose and intent of the statute. In the instant case the court might well have followed this rule.

The problem, of course, is an administrative one and while on the one side there is the danger of enforcing a statute to an end ultimately contrary to its purpose, *Short* v. *Bullion-Beck & Champion Mining Company,* 20 Utah 20, 57 Pac. 720 (1899), on the other hand it seems that the common weal will best be served by the court's refusing to listen to petitions to enforce a right obtained through the violation of a statute. In the instant case the legislature no doubt had the intention of protecting the buying public and limiting the advertising activity of selling to the public. The extension of the statute to include the fact situation of the instant case seems not unwarranted.

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MORTGAGES—CLOGGING THE EQUITY OF REDEMPTION.—In default on interest and taxes, the mortgage indebtedness also having accrued, the mortgagors, husband and wife, executed a conveyance, in form a deed absolute, to the mortgagee. The testimony is conflicting as to the nature of parol agreements made when the deed was given. The mortgagors contend that the mortgagee promised them the same right to redeem as they would have under a mortgage. The mortgagee claimed the oral agreement was to the effect that the mortgagors would be entitled to any money, exceeding $6,000, realized by a resale of the premises within a year; $6,000 was approximately the amount of the indebtedness and represented the consideration for the deed. Eight months later the mortgagee gave