148 Pac. 937. Ariz. Rev. Code 1928 sec. 1521; approved in *Brought v. Howard* (1926) 30 Ariz. 522, 249 Pac. 76; *Gold v. Killeen* (1934) 33 Pac. (2d) 595, 94 A. L. R. 448. The statutes of these two states differ from the New York act only in specifying that the contingency is the "lifetime of the promisor" whereas the New York law provides more broadly for "a lifetime."

Prior to the enactment of the amendment there had been two conflicting lines of decisions in New York. One line approved the general rule. *McKinney v. McClaskey* (1879) 76 N. Y. 594; *Kent v. Kent*, supra; *Gallagher v. Finch, Pruyn & Co.* (1925) 207 N. Y. Supp. 403. The other view did not consider death so "time destroying" and personal covenants for a period of over one year were held to be within the statute. *McGirr v. Campbell* (1902) 75 N. Y. Supp. 571; *Shapiro v. Balavan* (1924) 205 N. Y. Supp. 208.

The utility of the new provision will depend largely upon the application it receives at the hands of the courts. The judges in applying the provision should keep in mind the original purpose of the statute of frauds, *i. e.*, to prevent frauds and perjuries, and no provision, old or new, should be so construed as to provide an avenue of escape from the fundamental principle of justice.

W. F. '37.

TAXATION—EQUAL PROTECTION—GRADUATED GROSS SALES TAX.—Plaintiffs, a domestic corporation and a domestic partnership, each operating a department store in Louisville, a Dela ware corporation having 21 department stores in Kentucky, and an Ohio corporation (Kroger Stores, Inc.) maintaining 289 grocery stores in the Commonwealth, brought bills in the United States District Court of Kentucky to enjoin the state officers from enforcing an act of that Commonwealth (Ky. Acts of 1930, c. 149, p. 475) which purported to impose on all "retail merchants" an "annual *license* tax for the opening, establishing, operating, or maintaining of any store or stores. . . ." Sec. 2 of the act provided for a graduation of the rate of the tax in eight steps, from 1/20 of one percent on the first $400,000, to 1 percent on the excess of gross sales over $1,000,000, the increased rates being applicable, however, only in respect of sales in each successive bracket. By definition the act provided that all department and chain store systems be considered as single units for the purpose of the tax, and expressly exempted sales of farm and gardening products by the producers thereof. Plaintiffs charged that the classification in the act denied them the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. At final hearing the District Court sustained the act, and dismissed the bills. On appeal;—*Held: Reversed.* The court is not bound by the title or description of the tax in the act, in determining its nature and effect. The tax in substance is merely an excise on the activity of making a sale. Although the lower court found that "generally speaking" there was a relation between gross sales and net profits, the evidence indicates no constancy of progression, nor even a rough uniformity within wide limits of tolerance, and the application of different rates based solely on the volume of sales

receipts is unequal and arbitrary. Even if the tax be considered an excise on the privilege of merchandizing at retail, the classification remains arbitrary, since no reasonable relation is discoverable between the amount demanded and the privilege enjoyed. Hence the act denies the equal protection of the laws and is unconstitutional. *Mr. Justice Cardozo, dissenting,* contended that a respectable body of statistical evidence supported the theory that, despite occasional aberrations, gross sales bear a direct relation to net gain and net worth, or more simply, that capacity to pay increases, by and large, with an increase of receipts. It is further asserted that the relation remains constant even when the increase is expressed in terms of correlated percentages. This relation justifies the discrimination incident to the graduation of the tax rate. It is not the function of the court to be arbiter between competing economic theories professed by honest men on grounds not wholly frivolous. *Stewart Dry Goods Co. v. Lewis* (1934) 79 L. Ed. Adv. Op. 539.

The antipodal disagreement between the majority and the dissenting opinions in this case is not founded upon a variance in legal principles, but is a difference of minds concerning the weight to be accorded conflicting economic theories. The legal principle is static. In general, to be in harmony with the equal protection clause of the Fourteenth Amendment, classification for tax purposes must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *The Great Atlantic and Pacific Tea Co. v. Maxwell* (1930) 199 N. C. 433, 154 S. E. 838; *Ohio Oil Co. v. Conway* (1930) 281 U. S. 146; *Schlesinger v. Wisconsin* (1926) 270 U. S. 230; *F. S. Royster Guano Co. v. Va.* (1919) 253 U. S. 412; Black, *Constitutional Law* (2nd ed. 1897) pp. 391-395; Cooley, *Taxation* (4th ed. 1924) pp. 259, 269. The application of this principle, like the interpretation of the "due process" clause of the United States Constitution, is largely a matter of judicial inclusion and exclusion, based upon the peculiar facts of the individual case. The economic theory, rejected here by the majority as a substantial basis for the condemned classification, is that "capacity to pay increases with the increase of receipts", or that there is a definite relation between gross sales and net profit. In support of this proposition the dissenting opinion adduces the following authorities: *Harvard Bureau of Business Research, Bulletins* 74, 78, 83, and 85 (This authority advances the more significant thesis that the increment may be expressed in terms of a proportional percentage increase); Haig and Shoup, *The Sales Tax in the American States,* Columbia University Press (1934) pp. 159. et seq.; *Moore v. State Bd. of Charities and Correction* (1931) 239 Ky. 729, 40 S. W. (2nd) 349, and texts cited. For the contrary view that such a relation is variable, and that the *highest* percentages of profit are earned when capital and sales are moderate, see: Epstein, *Industrial Profits in the United States* (1934) pp. 45, 46, 131, 132. However, this authority does not deny that *on the average* the net earnings increase *absolutely,* though not proportionately, as the sales increase in volume. It is also pertinent to remember that the act creates no discrimination between sales within each bracket.

The instant decision is the latest adjudication resulting from the states'

legislation generated against the "chain-stores" early in the decade. See: Krueger, *The Tax of the Chain Stores* (1933) 11 Tax Mag. 412-415, 440-441; Jacoby, *Conflicting Interpretations of Retail Sales Laws* (1934) 2 U. of Chi. L. Rev. 78-98; Note (1931) 40 Yale L. J. 432, 437, and stats. cited; Becker and Hess, *The Chain Store License Tax* (1929) 7 N. Ca. L. Rev. 113; Comment (1932) 12 B. U. L. Rev. 174; Legis. (1931) 31 Col. L. R. 35; Legis. (1931) 44 Harv. L. R. 456, 1295; Legis. (1931) U. of Pa. L. Rev. 289; Comment (1931) 40 Yale L. J. 431; Note (1934) 43 Yale L. J. 1022. The disposition of the court, as reflected in the relevant precedents, has been generally tolerant towards this "emergency" legislation. See: *State Tax Comrs. v. Jackson* (1930) 283 U. S. 527; *Louis K. Liggett Co. v. Lee* (1932) 288 U. S. 517; *Fox v. Standard Oil Co. No. 69*, Oct. term 1934, decided Jan. 14, 1935, 293 U. S.—, ante 339. (All of these cases sustained the classification of chain stores for taxation at rates higher than those applicable to single stores, and graduated upward on each store as the total number of units in one ownership increased). *Clark v. Titusville* (1901) 184 U. S. 329 (Here a license tax was sustained, the rate varying progressively with the amount of gross sales). Cf.: *Metropolis Theatre Co. v. Chicago* (1912) 228 U. S. 61; *Pacific American Fisheries v. Alaska* (1925) 269 U. S. 269; *Maine v. Grand Trunk R. Co.* (1890) 142 U. S. 217; *Dow v. Beidelman* (1887) 125 U. S. 680; *Chi., etc. R. Co. v. Iowa* (1875) 94 U. S. 155, 164; *Spreckels Sugar Refining Co. v. McClain* (1903) 192 U. S. 397; *Heisler v. Thomas Colliery Co.* (1922) 260 U. S. 245; *Louisville Gas and E. Co. v. Coleman* (1927) 277 U. S. 32. In general, these cases ilustrate that there may be classification for tax purposes according to the nature of the business, its size, and those factors of which size is an exponent.

In view of these decisions it is clear that if the soundness of the rejected economic maxim were postulated, and the classification sanctioned, the result would in no wise be a startling anacoluthon in the sequence of judicial expression. In truth, the majority view seems more of an anomaly than the dissenting opinion, in the light of the modern juristic resource to the oracle of Economics. In sustaining the tax in the case of *State Tax Comrs. v. Jackson* (supra), the court stressed the advantages incident to the conduct of multiple stores, and the obvious differences in chain store methods of merchandizing as contrasted with those practiced in the operation of a single store. In *Clark v. Titusville* (supra), the purpose was to charge a larger license fee to a larger business. In the *Metropolis Theatre Co.* case (supra), the court sustained the exaction of a larger license fee from theatres charging a higher price for tickets than from those charging lower prices. If the additional advantages concededly attending the larger business in those cases had no relation to net profit, what was the justification for the discrimination? The court did not state that the sanction was a "greater capacity to pay," but it assumed that fact without the aid of the statistical evidence available in the case at bar. At p. 69 of the *Metropolis Theatre Co. case* (supra) the court said: "It will immediately occur upon the most casual reflection that the distinction the theatre itself makes is not artificial and must have some relation to the success and ultimate profit of

its business. In other words there is a *natural* relation between the price of admission and revenue, some advantage certainly that determines the choice . . . ." If such a debatable generality could be adopted without argument it is obscure why the court should later blind itself to a statistical record in denying the existence of a *calculated* relationship between the volume of sales and the net return. It is submitted that the above decisions together with the statistical evidence presented in the lower court provide a reasonable and logical basis upon which the present act might have been sustained. It is significant, perhaps, to note that the Kentucky legislature anticipated the judicial mood with remarkable accuracy, and shortly *before* this act was held unconstitutional, resorted to a flat tax on sales. Ky. Acts, Spec. Sess. (1934) c. 25.

A. J. B. '36.