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Green v. Crowell, Deputy Com'r (1934) 69 Fed. (2nd) 762; *Bethlehem Shipbuilding Corp. v. Monahan* (1932) 57 Fed. (2nd) 217; *Kropp v. Parker* (1934) 8 Fed. Supp. 290. In *Krentz et al. v. Durning* (1934) 69 Fed. (2nd) 802, 804, the court said, "were not its scope (*Crowell v. Benson*) so confined, it would have overthrown the accepted procedure of the Interstate Commerce Commission, the Federal Trade Commission, the Shipping Board, the Board of Tax Appeals, and we should suppose, the assessment of damages in admiralty by a commissioner."

The present case relies on *Mfr's R. v. United States* (1918) 246 U. S. 457, at 480-490, as holding that new evidence is admissible on the issue of confiscation. In that case the United States contended that the findings of the Commission upon the subject of confiscation were not subject to attack upon evidence not presented to the Commission. The Court said, "We can not sustain this objection in its entirety." It went on to say, that though correct practice required that all pertinent evidence should first be submitted to the Commission, and that thus it could not approve the procedure in this case, since the issue of confiscation was in the case the Court should deal with it. Except in this doubtful precedent, it has been held, in non-reparation cases, that the courts are limited to a review of the evidence taken before the Commission. *United States v. L. & N. R. Co.*, supra; *I. C. C. v. Union Pac. R. Co.*, supra; *L. & N. R. Co. v. United States* (1914) 218 Fed. 89; *Oregon R. R. & N. Co. v. Fairchild* (1912) 224 U. S. 510; *I. C. C. v. Ill. Cent. R. Co.* (1910) 215 U. S. 452. Thus it seems that the court in the principal case has relied upon a solitary case rather than upon much more clearly defined counter authority.

P. A. M. '36.

ORAL CONTRACTS—STATUTE OF FRAUDS—NOT TO BE PERFORMED IN ONE YEAR.—Plaintiff sued defendant on an oral promise to pay a note of defendant's brother, renewed for one year, from proceeds of an insurance policy insuring the life of his brother, when received by the promisor as beneficiary, if the maker died before the end of a year. *Held*, that the oral promise was invalidated by the statute of frauds provision adopted in New York in April, 1933 (chap. 616 of Laws of 1933, amending sec. 31 of the Personal Property Laws), which provision declares void all agreements not in writing "performance of which is not to be completed before the end of a lifetime." *Terminello v. Bleecker* (July, 1935) 280 N. Y. Supp. 326.

The instant case is the first reported case to adjudicate upon the statute as amended, and the case is directly within the provisions of the act since the alleged promise did not become operative until the death of the promisor's brother, therefore, the performance of the contract by the promisor was not to be completed before the end of the maker's lifetime.

The statutes of most jurisdictions do not include such a provision: (that they do not) see R. S. Mo. 1929 sec. 2967; Cahill's Ill. Rev. Statutes, chap. 59, sec. 1; but provide only that contracts not to be performed within one year, to be valid, must be in writing. Most jurisdictions, therefore, hold that where an obligation is to continue during the lifetime of a specified

person, or where the contract is of such a personal nature that the death of the promisor would terminate the agreement, the statute does not apply, for it is possible that the contingency on which it is based may happen within the year. *Doyle v. Dixon* (1867) 97 Mass. 208; *Elwell v. Assurance Co.* (1918) 230 Mass. 248, 119 N. E. 794; *Foster v. McO'Blenis* (1853) 18 Mo. 88; *Winters v. Cherry* (1883) 78 Mo. 345; *Green v. Whaley* (1917) 271 Mo. 638, 197 S. W. 355; *Kent v. Kent* (1875) 62 N. Y. 560; *Thorp v. Stewart* (1887) 44 Hun. 232; *Frost v. Tarr* (1876) 53 Ind. 390; *Henry v. Reed* (1909) 80 Kans. 380, 102 Pac. 846; *Quirk v. Bank* (C. C. A. Tenn. 1917) 244 Fed. 682; *Seder v. Grand Lodge* (1922) 35 Idaho 277, 206 Pac. 1052; *Ford Motor Co. v. Maddox* (Tex. Civ. App. 1926) 3 S. W. (2d) 911; *Boggs v. Snoddy* (Va. 1926) 131 S. E. 830; *Eiseman v. Schneider* (1897) 60 N. J. L. 291. Furthermore, contracts which are to be performed upon the death of a certain person are not governed by the statute of frauds. *Wells v. Horton* (1826) 4 Bing. 40, 130 Eng. Rep. 683; *McNamara v. Madden* (Ky. 1897) 39 S. W. 697. The test of whether a contract is within the statute of frauds is whether at the time such agreement was made it could have been performed within a year, and not whether in fact such contract was so performed, hence, if performance within one year is possible, the contract is not repugnant to the statute. *Mutual Life Ins. Co. v. Ritscher* (1915) 196 Ill. App. 27. Such a test supplies the rationale for those cases which hold personal service contracts not to be within the statute since the contract would be terminated by the death of the party making it. *Hill v. Jamieson* (1861) 16 Ind. 125.

Where, however, the agreement is such that it cannot be completed within a year, the fact that it may be terminated, or further performance excused or rendered impossible of performance by the death of one of the contracting parties, or of another person, during the year, is not sufficient to take it out of the statute. *Doyle v. Dixon*, supra; *Mallett v. Lewis* (1883) 61 Miss. 105. It is only where death would leave the agreement fully performed that it is not within the statute (as for example, an agreement to give one employment for life). *Jackson v. R. R.* (1898) 76 Miss. 607, 24 So. 874; *Harrington v. R. R.* (1895) 60 Mo. App. 223; 2 Page, *Law of Contracts* (1920) sec. 1305. Some cases have failed to recognize this distinction, *Hill v. Jamieson*, supra; *Great A. & P. Tea Co. v. Warren* (1932) 44 S. W. (2d) 510; *Peters v. Westborough* (1837) 19 Pick. (Mass.) 364. There are just causes to criticize this distinction on the grounds that practically speaking it is of little concern whether the death of the promisor be regarded as working a performance of his agreement, or as rendering impossible his performance of it. Browne, *Statute Of Frauds* (1880) sec. 282a, but the proposition is too well established in American case law to permit a change. The distinction is accepted by eminent authorities. 1 Williston, *On Contracts* (1931) sec. 972; Page, *Law of Contracts*, supra.

The provision of the New York statute, upon which the principal case depends, although realitively unique, was preceded by Arizona and California acts of some years' standing. Cal. Stats. 1907 p. 563, Code of Civ. Pro. (1923) sec. 1973; approved in *Hagan v. McNary* (1915) 170 Cal. 141,

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