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# Property Tax Revenue Assessment Levels and Taxing Rates: The Kentucky Rollback Law

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## PROPERTY TAX REVENUE ASSESSMENT LEVELS AND TAXING RATES: THE KENTUCKY ROLLBACK LAW

The problem areas of property taxation are innumerable but one basic consideration is the sufficiency of revenue to meet governmental demands. Revenue is affected by many factors, two of the most prominent being the level of assessment and the rate of taxing levy. The purpose of this note will be to explore the interrelationship between these two factors to illustrate their effect upon revenue production in Kentucky. This will be accomplished by first focusing upon the somewhat unique history of the property assessment practices as found in the judicial interpretations of the Kentucky law. Additionally, attention will be given to the subsequent legislative reaction to the judicial activity—a reaction that short-circuited the normal effect of the assessment level and taxing rate upon the amount of revenue produced. The result of this legislative action was production of an amount of revenue which bore only minimal resemblance to the needs of the particular taxing authority. This latter result is the final focus of the note.

Before proceeding the reader should be forewarned that the material he is about to read is, to say the least, somewhat confusing. Although a large part of the responsibility must lie with the author, the Kentucky General Assembly must accept its share. The Legislature, in its wisdom, chose to utilize not only the inverted sentence structure of most statutes but also chose to further cloud the issues by employing one word or phrase for more than one meaning or situation.

### I. JUDICIAL HISTORY

Section 172 of the Kentucky Constitution provides:

All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its *fair cash value*, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law. (Emphasis added).

Similarly various sections of the Kentucky Revised Statutes [hereinafter KRS] provide for assessment of property at its "fair cash value" as a part of the statutory scheme for implementing the property tax.<sup>1</sup> Close reading of these requirements reveals no intention, indication, or even method of assessing property at less than its fair cash value. Yet, for at least seventy-five years tax officials assessed property at less than this standard and both the public and the courts have condoned such assessments.<sup>2</sup> Because of the *clear* requirement for fair cash value assessment contained in the law the most important facet of the development of under-assessment, for present purposes, lies in the judicial acceptance, and in some cases sanction, of the practice. To understand how this acceptance came about it is necessary to trace the case history of the fair cash value requirement from its first affirmation to its resurgence. Brevity demands that only a representative sample of the cases<sup>3</sup> be dealt with.

The initial affirmation of the standard of fair cash value was, apparently, in the 1899 case of *Louisville Railway Co. v. Commonwealth*.<sup>4</sup> In that case the railroad was protesting the assessment of its property at fair cash value, claiming that the vast majority of other property owners in the state were being assessed at less than fair cash value. Although acknowledging that fair cash value was the constitutional standard, the railroad sought a *lower* assessment for its property because of the prevailing practice of lower assessment.<sup>5</sup> The response of the Court of Appeals to this claim has two important facets. First, the opinion stated flatly that the constitution required assessment at fair cash value and that failure to assess at that standard was illegal. To lower the railroad's assessment would violate a clear constitutional command. The Court admitted, but hesitated to take judicial notice of, the occurrence of underassessment which it believed to be unfair and illegal; disregard of the law would not, however, be a

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<sup>1</sup> See KY. REV. STAT. [hereinafter cited as KRS] §§ 132.440, 132.450, 133.150 (Baldwin's 1969).

<sup>2</sup> *Luckett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879, 882 (Ky. 1960). See also *Russman v. Luckett*, 391 S.W.2d 694, 697-98 (Ky. 1965) and cases cited.

<sup>3</sup> See cases cited at note 2 *supra*; Note, *100% Assessment In Kentucky*, 54 Ky. L.J. 98, 104-14 (1965).

<sup>4</sup> 49 S.W. 486 (Ky. 1899).

<sup>5</sup> *Id.* at 487.

basis for nullifying fair cash value assessment.<sup>6</sup> Consequently the Court refused to lower the assessment.

The second facet of the opinion involves what the Court did not do. Although aware of the practice of underassessment, the court opinion made no attempt to rectify the situation or to remedy the unfairness inherent in the treatment of the railroad. The Court recommended that wherever such instances occur interested taxpayers could bring criminal actions against the assessors to remove them from office or to force compliance with the fair cash value standard.<sup>7</sup> This failure to act was to have important consequences in the subsequent interpretation of the opinion for the United States Supreme Court would later find that this opinion discovered no redress in the courts of the state for the problem of underassessment.<sup>8</sup> Likewise, later opinions of the Court of Appeals would declare an absence of power to deal with the problem.<sup>9</sup> Whether these were correct interpretations is subject to some debate,<sup>10</sup> but the fact remains that until 1965 no decision seriously questioned these interpretations.

The next important development involved the first court-sanctioned retreat from the fair cash value standard. In *Greene v. Louisville & I.R. Co.*<sup>11</sup> the plaintiffs brought suit in federal district court claiming violation of the equal protection and due process clauses of the fourteenth amendment. The alleged violation arose as a result of assessment of their corporate property at 75% of value while other taxable property was assessed "systematically and intentionally at not more than 52% of actual value."<sup>12</sup> The district court entered an order assessing the property at not more than 60% of actual value and defendants

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<sup>6</sup> *Id.* at 488.

<sup>7</sup> *Id.*

<sup>8</sup> *Greene v. Louisville & I.R. Co.*, 244 U.S. 499, 512-13 (1917).

<sup>9</sup> See *e.g.*, *Lockett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879, 882 (Ky. 1960).

<sup>10</sup> The basis for these interpretations probably arose from the statement of the Court in *Louisville Railway* that the constitutional provisions are capable of being put into execution only through the selection of proper assessing officials. 49 S.W. 486, 488 (Ky. 1899). While this can be read to mean the only remedy is through the election process, if "proper" is emphasized and modified by "only" then the statement may read that only *proper* assessing officers are capable and should be elected, with no indication one way or the other as to judicial means of correcting improper action. When the Court's statement concerning the possibility of criminal action against an assessor is read in conjunction, it seems even more likely that the opinion was not excluding judicial remedy in these cases, only indicating that it would not act in this instance.

<sup>11</sup> 244 U.S. 499 (1917).

<sup>12</sup> *Id.* at 502.

appealed directly to the Supreme Court of the United States which affirmed.<sup>13</sup> The Supreme Court's decision was not based on the provisions of the United States Constitution, but upon mandates of the Kentucky Constitution.<sup>14</sup> The Court looked at section 172 and read it in light of sections 171 and 174, which required taxing corporate and individual property at a uniform value and identical rates.<sup>15</sup> When so read, the Court found the primary purpose of the taxing scheme was uniformity rather than some particular level of assessment.

Therefore, the principal if not the sole reason for adopting "fair cash value" as the standard for valuations, is as a convenient means to an end—the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose.<sup>16</sup>

Quite obviously this decision was contradictory to the result reached in *Louisville Railway*; indeed the relief granted in *Greene* was precisely the relief which the Kentucky Court of Appeals had ruled was prohibited by the Kentucky Constitution and which, if granted, would result in unacceptable distortion of the taxing scheme.<sup>17</sup> In *Greene*, the relief was granted on the grounds that this was the only means of *saving* the essence of the taxing scheme.<sup>18</sup> The latter reasoning was apparently based upon an interpretation of *Louisville Railway* to the effect that there was no judicial remedy for the unequal assessment problem in the Kentucky court system.<sup>19</sup> Thus, of the three possible alternatives which faced the courts—lowering the assessment of the complaining taxpayer, raising the assessments of all property owners to fair cash value, or allowing the unequal assessment to continue—

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<sup>13</sup> *Id.* at 503.

<sup>14</sup> *Id.* at 516, 519.

<sup>15</sup> *Id.* at 515.

<sup>16</sup> *Id.* at 516.

<sup>17</sup> See note 6 *supra* and accompanying text.

<sup>18</sup> See note 16 *supra*.

<sup>19</sup> See note 8 *supra*. As to the validity of this interpretation see note 10 *supra*.

the Court of Appeals chose the third while the Supreme Court chose the first.<sup>20</sup>

In less than a year, the decision in *Eminence Distillery Co. v. Henry County Board of Supervisors*<sup>21</sup> placed the Kentucky Court squarely in line with holding and rationale of *Greene*. The fact situation in *Eminence* was almost identical to those in *Louisville Railway* and *Greene*. In that case, as in the prior ones, the plaintiff sought to have the assessment on its property lowered to equalize it with property of other taxpayers;<sup>22</sup> no attempt was made to obtain equalization by increasing the percentage assessment of other taxable property.<sup>23</sup>

In its opinion the Court first read the Kentucky Constitution as being primarily concerned with equality of taxation and the imposition of a uniform burden upon the taxpayer.<sup>24</sup> The Court concluded that unequal assessment would result in non-uniform tax burdens, thus making differing assessment percentages of fair cash value violative of the constitutional demand for equality and uniformity.<sup>25</sup> Having concluded that unequal assessment practices were discriminatory, and since the parties agreed that such was the case with the appellants,<sup>26</sup> the only remaining problem was the remedy. It was at this point, determination of the remedy that *Louisville Railway* and *Greene* had parted ways and it was here that the Court chose to follow *Greene*. In determining what the remedy would be the Court in *Eminence* turned first to the contention that there was no judicial relief available to appellant.<sup>27</sup> In dealing with this problem the Court analyzed the two alternative remedies that would equalize the assessments:

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<sup>20</sup> In ensuing decisions the second alternative was quite abandoned and the choice, for all practical purposes, lay between the other two and the Court of Appeals soon adopted the *Greene* rationale. See note 21 *infra* and accompanying text. The possibility of raising the assessment of property owners not before the Court was not seriously considered until the *Russman* case. See note 58 *et seq. infra*.

<sup>21</sup> 200 S.W. 347 (Ky. 1918).

<sup>22</sup> *Id.* at 350-51. "All of the witnesses, including the county assessor, agree that real property in Henry County was uniformly and systematically valued and assessed by the assessor and the county board of supervisors for taxation purposes, for the year 1916, at a sum which would not exceed 60 per centum of its fair cash value. . . ." *Id.* at 349-50.

<sup>23</sup> *Id.* at 349.

<sup>24</sup> *Id.* at 350.

<sup>25</sup> *Id.* at 350-51.

<sup>26</sup> *Id.* at 351.

<sup>27</sup> It was this belief which prompted the Supreme Court to act in *Greene*. See notes 18-19 *supra* and accompanying text.

raising all assessments to the fair cash value level or lowering the plaintiff's assessment to the level used for other property. As to the first alternative, the Court found that it had no power to effect such a remedy.<sup>28</sup> Thus an implication which may or may not have been intended in the *Louisville Railway*<sup>29</sup> has become a part of the law, solemnly pronounced so in *Eminence*, but conspicuously lacking in precedent and supported only by somewhat questionable logic.<sup>30</sup> Nevertheless the decision was followed until 1965.

Having concluded that the only practicable, effective remedy was to lower the corporation's assessment to equal that of other property owners, the only remaining hurdle was the constitutional requirement for assessment at fair cash value. Without hesitating the Court turned to a quotation from *Greene*,<sup>31</sup> adopting the rationale that the primary purpose of the constitutional requirements was uniformity and equality of assessment rather than assessment at fair cash value.<sup>32</sup> Thus, with the advent of *Eminence*, the constitutional mandate of full cash value assessment (affirmed in *Louisville Railway*) gave way to the "uniformity" interpretation of *Greene*.

While all constitutions will require interpretation from time to time, and indeed the Kentucky Constitution is particularly suited for producing strained interpretations,<sup>33</sup> the key requirement prior to such interpretation is *necessity*. In this instance both the United States Supreme Court and the Kentucky Court of Appeals had declared such necessity based upon their inability to provide other remedies.<sup>34</sup> While it may be true that necessity knows no

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<sup>28</sup> 220 S.W. 347, 351 (1918)

The quarterly court, the circuit court, and this court are without necessary powers to effect the remedy in that way. Such a remedy the appellant cannot make effective, and the result is that it is no remedy at all as to it.

*Id.*

<sup>29</sup> See note 10 *supra*. Doubt as to the possibility that the opinion in *Louisville Railway* intended to give such an implication is strengthened by the failure of the *Eminence* Court to cite that case or any other as a basis for its holding that it had no power.

<sup>30</sup> The apparent basis for the holding that the Court had no power to raise the assessments of other property owners not before the Court was that the appellant could not force compliance with such a decision. This ignored prior statements of the Court to the effect that criminal charges could be brought against an assessor who failed to meet his responsibility. See note 7 *supra* and accompanying text.

<sup>31</sup> See text at note 16 *supra*.

<sup>32</sup> 200 S.W. 347, 352 (1918).

<sup>33</sup> See, e.g., *Matthews v. Allen*, 360 S.W.2d 135 (Ky. 1962).

<sup>34</sup> See note 18, 28 *supra* and accompanying text.

law, it is possible that other remedies did exist which would have met the plain meaning of the constitutional language,<sup>35</sup> indeed, the Kentucky Court was later to decide that such a course should be followed.<sup>36</sup>

In the years following the decision in *Eminence* many cases were decided—some on very nearly the same point,<sup>37</sup> some testing the outer limits of the ruling<sup>38</sup>—but for the present purposes only two need be dealt with. The first of these was *Rogers v. Pike County Board of Supervisors*.<sup>39</sup> The problem in that case arose from a somewhat different fact situation than previous cases, in that a parcel of land had been reassessed at a value higher than either the purchase price or the agreed upon fair cash value of the property.<sup>40</sup> This over-valuation was the abnormal result of applying the standard assessing procedure used throughout the county.<sup>41</sup> The plaintiff sought to reduce the assessment to fair cash value as required by section 172 of the Constitution,<sup>42</sup> while the defendant county argued that prior decisions of the Court had interpreted the law to require only equality of assessment with no concern for fair cash value.<sup>43</sup> The Court rejected the defendant's argument, holding that property could be assessed at *lower* than fair cash value because in that range the constitutional concern for equality and uniformity are paramount.<sup>44</sup> However, when the valuation rises *above* fair cash value, the equality principle must take second place to the constitutional intent to place upper limits on the property tax. Thus, "property may not be assessed for taxation at a valuation in excess of its fair cash value."<sup>45</sup>

The second case involved an application of the equality doctrine in a slightly different manner. The issue was not whether the value of appellee's property was to be equalized with similar

<sup>35</sup> See note 30 *supra*.

<sup>36</sup> See note 62 *infra* and accompanying text.

<sup>37</sup> See *Russman v. Luckett*, 391 S.W.2d 694, 697-98 (Ky. 1965); *Luckett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879, 882 (Ky. 1960); KY. LEGISLATIVE RESEARCH COMM'N, RESEARCH REPORT NO. 44, STATE AND LOCAL TAXES [hereafter 44 LRC] 8-9 (1967) and cases cited therein.

<sup>38</sup> See 44 LRC 8-10 and cases cited therein.

<sup>39</sup> 157 S.W.2d 346 (Ky. 1941).

<sup>40</sup> *Id.* at 347.

<sup>41</sup> *Id.* at 347-48.

<sup>42</sup> *Id.* at 347.

<sup>43</sup> *Id.* at 348.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



property, but at which step in the assessment scheme was the equalization to occur. *Luckett v. Tennessee Gas Transmission Co.*<sup>46</sup> involved the application of a franchise tax based upon the assessed value of the capital stock of the corporation and the step in the assessment process at which the value should be equalized with the assessed value of similar property. The procedure for applying the franchise tax was comprised of several steps which finally resulted in determination of the amount of property subject to tax.<sup>47</sup> The Department of Revenue wanted to evaluate the property at the completion of *each* step and equalize the assessment thereon, while the appellee sought to equalize only the final value subject to taxation. In upholding the appellee's contention, the Court, quoting from an earlier case on the point,<sup>48</sup> reasoned that the primary object of the statutory scheme is determination of the franchise value and that the concept of equalization can be applied only to the final, ascertained value which is itself subject to the tax.<sup>49</sup> The important aspect of the case lies with the refusal of the Court to allow the equalizing principle to interfere with or permeate the property tax scheme beyond very simple, gross adjustments of final assessment values. This attitude seemed to indicate that the Court, although willing to accept the strained interpretation in *Greene* and *Eminence*, was determined to confine the concept to its narrowest possible application.<sup>50</sup>

To briefly summarize the position of the law at this point, the constitutional requirement that all property subject to taxation should be assessed at its fair cash value had been interpreted to mean that all property should be assessed equally—at the same percentage of fair cash value. The Court had limited the application of the equalization principle, *viz.* adjustments could be made to value property at its fair cash value or less, but no

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<sup>46</sup> 331 S.W.2d 879, 881 (Ky. 1960).

<sup>47</sup> See KRS § 136.160 (Baldwin's 1969). The process involved determining the value of appellee's capital stock within the state, fixing the value of tangible property within the state, and subtracting the latter from the former to determine the value of the property subject to taxation.

<sup>48</sup> *Louisville v. Howard*, 208 S.W.2d 522 (Ky. 1947).

<sup>49</sup> *Lucket v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879, 883 (Ky. 1960).

<sup>50</sup> It is also interesting to note that the case contains one of the earliest and strongest attacks upon the equalization below fair cash value concept: "It is difficult to understand why 'equality' should not be reached at the top, i.e. 'fair cash value' rather than at a percentage of that value. . . ." *Id.* at 881. Yet the Court accepted the idea because of judicial precedent, passive legislative approval, and the belief that since the parties were not before the Court no action could be taken against them. *Id.* at 882.

property was to be assessed at more than fair cash value regardless of equality of assessment. Likewise the concept was applied only to final valuation subject to tax; the statutory assessment scheme itself was not to be interfered with until the last possible moment. This then was the state of affairs prior to *Russman v. Lockett*.<sup>51</sup>

## II. RUSSMAN V. LUCKETT

In discussing the judicial adventures of fair cash value assessment little mention has been made as to the practical effects of these decisions upon both the administration of the tax and the revenue it was producing. For present purposes, a sufficient indication can be gathered from the attitude of the Court of Appeals as it reversed the history of fair cash value:

It is apparent the situation is bad from almost any standpoint, is becoming worse, is unfair, is administratively inefficient, and gives tax Commissioners an unwarranted and arbitrary control of the tax base.<sup>52</sup>

It was the existence of these conditions plus "the fact that the current method of assessment [was] in direct violation of clearly written mandatory laws"<sup>53</sup> that prompted the 1965 decision in *Russman*.

In each of the cases previously discussed, property owners were seeking a reduction of their assessments rather than an increase in the assessments of others, and this was the fact situation in almost all fair cash value cases prior to *Russman*.<sup>54</sup> However, in *Russman* the Court was faced with a slightly different approach in that those attacking the underassessment were seeking a declaration of rights and relief under a mandamus action<sup>55</sup>

<sup>51</sup> 391 S.W.2d 694 (Ky. 1965).

<sup>52</sup> *Russman v. Lockett*, 391 S.W.2d 694, 695 (Ky. 1965). Further indications of the effect of the previous decisions arise when the statewide median real estate assessment ratio of approximately 27 percent is coupled with the constitutional limits upon the rate of taxation. This state of affairs obviously severely curtailed the amount of revenue available to the taxing authority.

<sup>53</sup> *Id.*

<sup>54</sup> See *Lockett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879 (Ky. 1960) for a discussion of these cases.

<sup>55</sup> *Russman v. Lockett*, 391 S.W.2d 694, 696 (Ky. 1965). There were actually three cases before the Court at this time. *McDevitt v. Lockett*, 391 S.W.2d 700 (Ky. 1965), was an action brought by the owners of intangible property. The suit presented the question of equal protection and sought a declaration of rights against the commissioner of revenue and some county tax commissioners. The Franklin County circuit court dismissed the suit ruling that there was no justiciable

(Continued on next page)

rather than a lowering of their own particular assessments. Indeed, some of the appellants were not taxpayers or property owners at all but were students whose education was intimately connected with the property tax.<sup>56</sup> In reversing the lower court orders dismissing the complaints, the Court of Appeals cast the issue in terms of two questions: first, who had standing to challenge the status quo, and second, what should and could be done about it? This was the first attempt to reconsider these threshold questions since the decision in *Eminence* and it was to prove a dramatic reconsideration.

The question of standing presented the court with its first hurdle. As previously indicated the earlier cases had involved an individual seeking adjustment of the assessment of his own property. Perhaps it was because of the absence of other property owners that the Court had felt constrained to lower one individual's assessment rather than raise the assessment of those not before the Court.<sup>57</sup> In this instance the appellants were not seeking adjustments of their assessment but rather a declaratory judgement as to their right to have the assessment of other property owners increased.<sup>58</sup> When considered in the light of previous decisions of the Court of Appeals any remedy sought which involved changing the assessment of property owners not before the court was clearly beyond reach.<sup>59</sup> Since this was exactly the remedy sought, the lower court dismissed the complaint for lack of a justiciable issue.<sup>60</sup>

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controversy, or other remedies were available, or that assessment was a matter of discretion. 391 S.W.2d at 701. The third case was *Miller v. Layne*, 391 S.W.2d 701 (Ky. 1965), in which the taxpayers simply sought to remove the Jefferson County tax commissioner on the grounds that his continuing assessment of property below fair cash value was a violation of the law which called for his dismissal under KRS § 132.307(3). The Jefferson County circuit court dismissed the case ruling that the tax commissioner had not violated the law. *Id.* at 702. The Court of Appeals reversed the lower court in each instance, adopting the reasoning and opinion set out at length in *Russman*.

<sup>56</sup> *Russman v. Lockett*, 391 S.W.2d 694, 696 (Ky. 1965); Brief for Appellant at 6, *Russman v. Lockett*, 391 S.W.2d 694 (Ky. 1965) [hereinafter Brief for Appellant].

<sup>57</sup> See notes 27-29 *supra* and accompanying text.

<sup>58</sup> 391 S.W.2d at 696.

<sup>59</sup> See *Lockett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879 (Ky. 1960).

<sup>60</sup> Brief for Appellants at 2. The transition from "standing" to "justiciable issue" is made as follows: The Court had held that an individual did not have standing to challenge the assessment of property whose owner was not before the court. Thus where such challenge was attempted there was no issue for the court to decide because the challenger had no standing. See generally (Continued on next page)

In reaching the decision that appellants had standing to bring the issue the Court of Appeals shifted the focus on fair cash value assessment. In *Eminence*, and the cases following, the Court had felt that the primary thrust of the requirement was to deal with the assessment relationship *between* property owners rather than as some controlling standard over assessment of all property owners as a whole.<sup>61</sup> The decision in *Russman* that the parties had standing to bring the issue of necessity required a finding that there was an issue of controversy to bring.<sup>62</sup> It is submitted that the finding of a justiciable controversy, in spite of the fact that no property owner was seeking a readjustment of his assessment in relation to the property of others, was based upon the altered view that the requirement of fair cash value provided a method of *administering* the property tax.<sup>63</sup> Under this view any individual or group designated by law to receive the benefits resulting from the imposition of the property tax might bring an action to enforce proper administration of it.

Having determined that a controversy did exist and that appellants were proper parties to bring the issue the Court, as a means of determining the proper remedy, turned to the merits of the controversy. It must be remembered that, although the Court would allow appellants to challenge the concept, case law apparently still held that fair cash value was to be equated with equality of treatment.<sup>64</sup> To change this standard the Court first examined the constitutional and statutory passages dealing with fair cash value.<sup>65</sup> This examination led to the conclusion that:

Obviously the constitutional provision and the cited statutes exhibit a very specific purpose and a practical plan by which all property in the Commonwealth (not exempted by the Constitution) shall be assessed for taxing purposes at its

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(Footnote continued from preceding page)

Brief for Appellees, at 3R-6R; *Russman v. Lockett*, 391 S.W.2d 694 (Ky. 1965) [hereinafter Brief for Appellees].

<sup>61</sup> This attitude was best revealed in *Lockett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879, 882 (Ky. 1960).

<sup>62</sup> Suffice it to say that in our considered judgment a justiciable controversy is presented. There are no other adequate remedies which may be invoked by these plaintiffs and they have a right to bring these two actions and to obtain a declaration of rights. 391 S.W.2d at 696.

<sup>63</sup> On this point see Brief for Appellant at 9-16.

<sup>64</sup> Brief for Appellees at 3R-6R.

<sup>65</sup> See Ky. Consr. § 172, KRS §§ 132.440, 132.450(1), 133.150, 131.020(1) (Baldwin's 1969).

*fair cash value*. Nothing in [the] record suggests any uncertainty, impracticability or inequity in either the purpose or the plan.<sup>66</sup>

Viewing the law in this light, the fair cash value standard as interpreted in previous court decisions required an application which went beyond the plain meaning of the term.<sup>67</sup> At this point the Court then turned to appellee's arguments which sought to continue the "equality" interpretation.

The appellee's first contention was that the constitutional provision and the statutes were without "any legal effect [being] abrogated by a contrary custom or public policy of 75 years standing."<sup>68</sup> The reasoning was that, although the law was clear in its requirements, it has repeatedly and continually been violated to such an extent that it had been given judicial notice in *Greene*.<sup>69</sup> And, when a law has been so abandoned, it would be unfair and against the public interest to revive such a law or attempt to return it to its original meaning. In support of this argument appellees cited three cases, two of which were Supreme Court decisions. However, one dealt with the carryover effect of the Spanish Civil Code<sup>70</sup> while the other involved a moot decision.<sup>71</sup> The third case was an 1840 Iowa state court decision which declared the revival of a law to be contrary to "Anglo-Saxon liberty."<sup>72</sup> In rejecting this proposition the *Russman* Court found no authority supporting appellee's arguments. The Iowa case was dismissed by questioning its soundness. Likewise, the Supreme Court cases were properly rejected as not being in point. In addition the Kentucky Court cited another Supreme Court case for the proposition that the executive branch cannot, by failure to enforce a law, cause it to be repealed or modified.<sup>73</sup> Beyond this the Court said:

In any event, we are dealing with our fundamental law. It is not outdated, or obsolete, or contrary to any policy we know

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<sup>66</sup> 391 S.W.2d at 697.

<sup>67</sup> See, e.g., *Lockett v. Tenn. Gas Trans. Co.*, 331 S.W.2d 879 (Ky. 1960).

<sup>68</sup> 391 S.W.2d at 697.

<sup>69</sup> See text at note 16 *supra*.

<sup>70</sup> *Adams v. Norris*, 64 U.S. (23 How.) 353 (1860).

<sup>71</sup> *Poe v. Ullman*, 367 U.S. 497 (1961). See *100% Assessment In Kentucky*, *supra* note 3, at 105-06 for a discussion of these cases and their applicability to the *Russman* facts.

<sup>72</sup> *Hill v. Smith*, 1 *Morris* 95 (Iowa 1840).

<sup>73</sup> *District of Columbia v. John R. Thompson*, 346 U.S. 100 (1952).

of. The public has acquiesced in its non-observance simply because private rights were not adversely affected and citizens heretofore have not been inclined to take the initiative to compel executive compliance. This law today is just as vital and enforceable as it was the day it was written into the Constitution.<sup>74</sup>

This reasoning allowed the Court to treat *Russman* as presenting a new issue in contrast to *Eminence* and its kin and, as will be seen, the Court pursues this idea throughout the opinion.<sup>75</sup>

The second major contention advanced by the appellees was that previous judicial interpretation of the pertinent law completely and irrevocably substituted equality and uniformity for fair cash value. While appellees advanced many cases in support of their argument<sup>76</sup> the Court focused upon only one.<sup>77</sup> That case involved extreme disparities in the assessment of intangible property and real property and the Court there refused to lower the intangible property assessment. Since the Kentucky Constitution would permit classification of property for tax rates the court had held that equality of assessment *between* classes of property was *not* required. The *Russman* Court interpreted that decision to have no bearing upon fair cash value.<sup>78</sup> The Court also discussed the history of the interpretation of fair cash value and explained that previous decisions had lowered assessments because that was the only practical remedy available to the Court.<sup>79</sup> The Court felt that when *Eminence*, *Tennessee Gas* and similar cases were read in this light it was obvious that the original meaning of fair cash value remained intact. Only the absence of a properly structured action had prevented earlier enforcement of the law; not a *total* absence of power to deal with the problem.<sup>80</sup>

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<sup>74</sup> 391 S.W.2d at 697.

<sup>75</sup> See notes 80-81 *infra* and accompanying text.

<sup>76</sup> See Brief for Appellees, *supra* note 60, at 9R-12R.

<sup>77</sup> *Kentucky Finance Co. v. McCord*, 290 S.W.2d 481 (Ky. 1956).

<sup>78</sup> As a matter of fact the case seems to be entirely out of place, either in the argument or the opinion. However, rejection of appellees' premise on this foundation seems particularly weak.

<sup>79</sup> The recognition that the reduction in assessment was the only practical remedy was further explained in [*Tenn. Gas*]. It was noted that the court's duty was to dispense justice in the individual case and that the only effective way to achieve equality for that particular plaintiff was to reduce his assessment to the general level. 391 S.W.2d 698.

<sup>80</sup> "As a matter of fact, [this Court] has consistently recognized what the Constitution and the statutes require but until now has never had presented to it the kind of proceeding in which those provisions appropriately could be enforced." *Id.*

The acknowledgement of this power clearly separates *Russman* from *Eminence* making the former the long awaited follow-up to *Louisville Railway Co. v. Commonwealth*.<sup>81</sup>

The final contention of the appellees in *Russman* was that mandamus was not the proper basis for the action. The majority opinion rejected that as being clearly erroneous.<sup>82</sup> Having answered the appellee's arguments the only remaining obstacle for the Court was the remedy to be given. It was at this point that *Louisville Railway* had faltered, planting the seed which had led to the course taken in *Greene* and *Eminence*.<sup>83</sup>

In attempting to provide a remedy the Court first rejected some of appellants' requests. Any attempt to remove or otherwise punish tax officials for their previous failure to comply with the law would not be allowed. To do so would be unfair to those practicing a universal, but illegal procedure and, in any case, the most important thing was to correct the situation.<sup>84</sup> Likewise, the Court rejected any suggestion that property be reassessed retroactively; to do so would be both impossible and unjust.<sup>85</sup> Finally, the change to full assessment could not be implemented immediately in view of the prodigious amount of adjustment required.<sup>86</sup> For these reasons the Court declared that full assessment would become effective January 1, 1966, thus giving the taxing authorities and the legislature six months to prepare for the change. After that any failure to positively comply with the fair cash value standard "would certainly be willful."<sup>87</sup>

### III. RESPONSE TO RUSSMAN

With the order for compliance to fair cash value under the

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<sup>81</sup> 49 S.W. 486 (Ky. 1899). See note 7 *supra* and accompanying text.

<sup>82</sup> The defendants argued that the tax commissioner must have the discretion to equalize property valuation. See KRS 133.150 (Baldwin's 1969). Such discretion on the part of an executive officer would make a mandamus action inappropriate. Brief for Appellees at 14R-19R. The opinion rejected this argument on the basis that the pertinent statute gave discretion only as to the percentage change necessary to bring property to full fair cash value; it did not give discretion as to the ultimate standard for assessing property. "There is nothing discretionary about these basic duties. While there may be optional methods of performance, it is absurd to suggest that the county tax commissioners or the Commissioner of Revenue may comply with the law or ignore it in their discretion." 391 S.W.2d 698-99.

<sup>83</sup> See note 10 *supra*.

<sup>84</sup> 391 S.W.2d at 699.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 699-700.

“new” interpretation of that phrase the Court had come full circle; returning to the business left unfinished in *Louisville Railway*. In so doing the Court engendered a fear of exorbitant increases in the property tax; a fear which gathered such strength that it forced the calling of a special session of the General Assembly.<sup>88</sup> It is possible that the Court anticipated just such a reaction and had attempted to allay such fears by declaring that:

In the performance of our duty we are not, by this decision, in any sense changing the law of taxation, or the tax structure, or increasing the tax burden. We are simply declaring and enforcing the law, and the law is made by the people.<sup>89</sup>

In spite of this disclaimer an intense public reaction did set in. The result was the so-called “rollback” law that was produced by the special session of the legislature in the fall of 1965.<sup>90</sup> Because the law effectively nullified the immediate impact of *Russman* it is necessary to understand the force which prompted this special legislation.

Prior to *Russman* the assessment of property at fractional values had become a statewide practice and the percentage of assessment was continually declining.<sup>91</sup> As the demand for services grew the taxing authorities were faced with the necessity of gathering more revenue and as a result tax rates were increased to the legal limits.<sup>92</sup> With tax rates at the legal maximum, the *Russman* requirement for fair cash value assessment would produce almost a threefold tax increase.<sup>93</sup> *Of course this increase would occur only if the local officials responsible for establishing tax rates maintained them at their maximum level.*

The immediate response to *Russman* was generally favorable. Those who commented on the new assessment level were encouraged that the responsibility for establishing the amount of revenue had been removed from the local assessing official and returned to the local governmental unit responsible for setting the

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<sup>88</sup> See notes 99-112 *infra*.

<sup>89</sup> 391 S.W.2d at 700.

<sup>90</sup> See note 114 *infra* and accompanying text.

<sup>91</sup> Brief for Appellants, *supra* note 56, at 3-4.

<sup>92</sup> See 100% Assessment in Kentucky, *supra* note 3, at 101.

<sup>93</sup> The median assessment was 27 percent, thus a jump in assessment to 100 percent with the application of the old rates would produce more than three times as much revenue.



tax rate.<sup>94</sup> It seemed to be generally assumed among the officials queried that tax rates would go down as the assessment level increased.<sup>95</sup> Indeed, some city<sup>96</sup> and school<sup>97</sup> officials pledged to reduce the rates under their control in an attempt to retain revenue at *pre-Russman* levels.<sup>98</sup>

In spite of these assurances and the admonition by the Court<sup>99</sup> an adverse public reaction set in almost immediately. Although the elected officials should have been responsive to local sentiment concerning the tax rate the consensus was that legislative action on a statewide basis was required. The Farm Bureau demanded legislative enforcement of decreased rates and expressed fear of disastrous increases for already hard-pressed farmers.<sup>100</sup> Officials expressed fear that industrial recruiting would be damaged by the requirement for 100 percent assessment, regardless of rate reduction.<sup>101</sup> Fears were expressed that the distilleries would be driven from the state.<sup>102</sup> The news media contributed to the confusion as to exactly what effect the Court of Appeals decision would have with headlines such as "Court Ruling, If Unmodified, Could Triple City Tax Bills"<sup>103</sup> and "Only Slight Tax Rise Due—In Theory";<sup>104</sup> articles such as one which calculated the hypothetical tax increase if rates remained the same,<sup>105</sup> and editorials which declared "that property tax bills will (eventually) increase in varying degrees" and admonished the school authorities to beware of a legislative counter-attack.<sup>106</sup> In the face of such uncertainty and with suspicion being voiced that tax rates might not be lowered by local officials,<sup>107</sup> public opinion soon solidified in opposition to the concept of fair cash value.<sup>108</sup> Letters to the newspapers soon began expressing the certainty that a tax increase

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<sup>94</sup> Courier-Journal (Louisville), June 9, 1965, § 1, at 1, col. 7.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*, June 10, 1965, § 2, at 1, col. 1.

<sup>97</sup> *Id.*, June 12, 1965, § 2, at 1, col. 3.

<sup>98</sup> At least for the time being.

<sup>99</sup> See note 89 *supra*.

<sup>100</sup> Courier-Journal (Louisville), June 9, 1965, § 1, at 8, col. 1.

<sup>101</sup> *Id.*, June 9, 1965, § 1, at 1, col. 7.

<sup>102</sup> *Id.*, June 11, 1965, § 1, at 16, col. 5.

<sup>103</sup> *Id.*, June 9, 1965, § 1, at 8, col. 6.

<sup>104</sup> *Id.*, June 10, 1965, § 1, at 1, col. 1.

<sup>105</sup> *Id.*, June 11, 1965, § 1, at 16, col. 5.

<sup>106</sup> *Id.*, June 10, 1965, § 1, at 1, col. 1.

<sup>107</sup> See notes 103-04 *supra*.

<sup>108</sup> Fair cash value, to the public, could only mean tremendous increases in the tax burden.

would occur and that local officials would do nothing to prevent the increase.<sup>109</sup> The Governor received letters indicating that there was no alternative for the individual "but to move out of the state."<sup>110</sup> Public reaction grew to the extent that the Governor was booed during an appearance at a Louisville racetrack.<sup>111</sup>

It did not take long for some political figures to come forward to do battle for the "oppressed" taxpayer. In basing his campaign for re-election on providing tax relief, one state legislator declared that the incumbent administration planned to foist the tax burden "on the back of the small farmer, homeowner, and people who are on fixed incomes with this trick of oppressive taxation."<sup>112</sup> Reports began to circulate that the Lieutenant Governor would call a special session of the legislature to deal with the situation if the Governor left the state.<sup>113</sup> In the face of these pressures the Governor called for a special session of the legislature to begin August 23, 1965 to consider means of controlling the effect of fair cash value assessment. In explaining the need for a special session the Governor cited the public reaction to *Russman* explaining that it was necessary to insure that local officials *would* act to prevent large increases in the tax burden.<sup>114</sup>

To minimize the effect of the jump in assessment which would occur in 1966, as a result of full cash value assessment under

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<sup>109</sup> See, e.g., *Courier-Journal* (Louisville), June 13, 1965, § 4, at 2, col. 5.

Why local officials would be less responsive to citizen demands is unclear. The limited scope of their authority should render them less attractive to special interest lobbying groups whose goals may not coincide with those of the general public. In such a situation the primary influence upon the elected official could well be the voter attitude toward the local tax rate.

<sup>110</sup> *Id.*, June 14, 1965, § 2, at 1, col. 5.

<sup>111</sup> *Id.*, July 18, 1965, § 4, at 2, col. 2.

<sup>112</sup> *Id.*, June 14, 1965, § 2, at 1, col. 7.

<sup>113</sup> *Id.*, July 21, 1965, § 1, at 1, col. 7. Prior to the *Russman* decision Governor Breathitt had pledged to call a special session of the legislature to deal with the revenue crisis in the Louisville and Jefferson County School System. The Governor postponed the special session following the Court action. *Id.* June 11, 1965, § 1, at 1, col. 8.

<sup>114</sup> The special session was to consider, in addition to the tax issue, the calling of a constitutional convention and the adoption of the twenty-fifth amendment to the United States Constitution. The pressure for a special session came essentially from three sources; the first was, as mentioned above, the lieutenant governor; the second was those local officials who would have to administer the rates under full assessment, apparently they did not want that responsibility and its possible consequences and sought relief in legislative action; the third source was Democratic legislators under pressure from constituents who had equated the Court of Appeals action with the administration. *Courier-Journal* (Louisville), July 21, 1965, § 1, at 1, col. 7. The general consensus of those seeking a special session was a desire to produce some type of temporary legislation which would hold tax rates down for some time, perhaps two years, with an allowance each year for approximately 15 percent growth.

*Russman*, the legislature had to find some means of adjusting the property tax revenue on a broad, statewide scale. Complicating its considerations was the property tax structure across the state. There are 120 counties in Kentucky and within each one there are three major taxing authorities *viz.* the county itself, the city, and the school districts.<sup>115</sup> In most cases the *pre-Russman* assessment level differed from county to county and thus fair cash value assessment would have a different impact upon the increase in revenue depending upon the prior assessment ratio.<sup>116</sup> Likewise within a county the demand for additional revenue might differ between districts. Any attempt to regulate, on a statewide basis, the revenue taken in by these authorities so as to prevent any sudden, large increase in the property tax would of necessity have to adapt itself to the convolutions of the structure in each county.

The legislative response was to develop a two level approach. First, the budgeting authority of a particular district was to be limited in the amount of revenue it could demand through budget requests. The limits on these budgets were determined in reference to the amount of revenue gathered in 1965. No budget was to be presented "which would require more revenue from ad valorem taxes than would be produced by application of the preceeding year's [1965] rate to the preceeding year's assessment."<sup>117</sup> The determination both of this amount and the rate necessary to gather it were the focus of the second aspect of the legislative action. That action provided that the amount of revenue gathered was to be limited by establishing a maximum tax rate. To make this determination the legislature developed the concept of the "*compensating tax rate*."<sup>118</sup>

The statute defined compensating tax rate as the rate applied to the 1966 (fair cash value) assessment of property [which had been subject to taxation in 1965], that would produce an amount

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<sup>115</sup> There are other types of taxing authorities such as library districts and public utilities districts but the present focus will be upon these three taxing authorities. They constitute the primary area of conflict.

<sup>116</sup> Address by J. E. Luckett, Kentucky Commissioner of Revenue, National Tax Association Conference, Denver, Colorado, September 27, 1966.

<sup>117</sup> See *e.g.* KRS § 164.470 (Baldwin's 1969).

<sup>118</sup> KRS § 132.010(6) (Baldwin's 1969). This rate was to be calculated separately for each county by multiplying the 1965 *tax rate* by the 1965 *assessment percentage*. In other words, the *assessment ratio* for 1965 became the ratio of the fair cash value rate to the fractional assessment rate thus if the assessment ratio in 1965 was 1 to 3 the fair cash value rate was to be one-third of the *pre-Russman* rate.

of revenue approximately equal to that produced in 1965.<sup>119</sup> Because the amount of revenue gathered under any tax levy will depend upon the rate, establishment of a maximum rate will effectively control the amount raised. If the maximum *rate* is determined by comparison to the *amount* raised in a previous year, any subsequent change in assessment values will have no effect upon the revenue gathered in later years;<sup>120</sup> the amounts must correspond, thus forcing the local authority to adjust the rate (in the usual sense) so as to produce this legislatively fixed amount.<sup>121</sup> For the individual, since the total amount of revenue to be gathered remained the same, his tax burden would remain essentially as it was prior to *Russman*.<sup>122</sup> In this manner the legislature was able to negate the effect of *Russman* on a state-wide basis with a procedure which was adaptable to the specific circumstances of each taxing structure. This rate—the “compensating tax rate”—was to be determined separately for each county by multiplying the 1965 *tax rate* by the 1965 *assessment* [percentage].<sup>123</sup>

As indicated above the roll-back amendments used direct budgetary limits as another form of control in specific instances. Practically speaking, however, this was not a separate device but rather a statement which simply codified the *effect* of applying the compensating tax rate, *i.e.* limiting available revenue to the amounts gathered in 1965. The advantage of these budget limits is that they are clear and direct, but they can only be applied where the levying power is coupled with the budget formulation.<sup>124</sup> Conversely, the compensating tax rate, being a rate, can be utilized *whenever* a tax is levied.

#### IV. EFFECT OF “ROLLBACK” ON TAXING AUTHORITIES

The rollback law was not actually a single piece of legislation; rather, House Bill I consisted of amendments and additions to the

<sup>119</sup> See KRS § 132.010(6) (Baldwin's 1969).

<sup>120</sup> Obviously such would not be the case were revenue determined solely by the assessment ratio.

<sup>121</sup> See 44 LRC, *supra* note 37, at 11.

<sup>122</sup> For example the effect on the individual property owner would be as follows: property assessed in 1965 at \$100 with a tax rate of \$1.50, in 1966 at 100 percent assessment the property now worth \$200 will be subject to a tax rate of \$.75 per \$100 or \$1.50 total tax.

<sup>123</sup> See 44 LRC at 11.

<sup>124</sup> The School Building Fund as provided by KRS § 160.476 (Baldwin's  
(Continued on next page)

various enabling statutes of each particular taxing authority.<sup>125</sup> Since the changes were not uniform, it is necessary to examine the three basic taxing authorities (school districts, counties, and cities) individually, to understand the effect of the rollback law on revenue production.

### A. School Districts

With regard to school districts, the legislation basically limited the amount of money a district board of education could budget or collect. The amount which a district school board could budget was limited to the maximum amount of revenue which could have been collected under the prior fractional assessment system. The three exceptions to this limitation were for a net assessment growth, a ten percent increase (following a public hearing) and the voted tax levy.<sup>126</sup> Because one or more of these exceptions are provided for all three taxing authorities, further elaboration is appropriate.

The normal growth in the value of property would ordinarily produce increased revenue even though the tax rate remained the same. However, because the rollback limitations on both budgets and tax rates were couched in terms of a given amount the additional value would not be permitted to produce extra revenue unless an exception was made. This "net assessment growth" was specifically provided for by section 7 of House Bill 1.<sup>127</sup> The additional revenue from increased assessments due to improvements and new property was not to be included in the computations of the budgetary *limits*, thus allowing the amount of money available to the taxing district to expand.<sup>128</sup> The rate

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(Footnote continued from preceding page)

1969) illustrates the point. The statute only provides for levying a tax (for a specific purpose) but there is no provision for submission of a budget. As a result the amendment of this statute by the special session was cast solely in terms of the compensating tax rate.

<sup>125</sup> See Ky. Acts, ch. 2 (First Extra Session 1965).

<sup>126</sup> KRS § 160.470(2), (4) (Baldwin's 1969). A further exception to these limitations was provided by allowing public vote on proposed levies. See note 137 *infra* and accompanying text.

<sup>127</sup> This became KRS § 132.425 (Baldwin's 1969) which states:

All state and local assessing officials shall maintain a list of all properties which are subject to taxation for school purposes, both real and improvements thereon and tangible personalty, which are added to the tax rolls each year and a list of all such properties which are deleted from the rolls.

<sup>128</sup> See, e.g., KRS § 60.24(6) (Baldwin's 1969) dealing with the county taxing authority.

at which this "new property" was to be taxed was the "effective rate" of the preceeding year.<sup>129</sup> This rate is the same as the actual rate levied under the compensating tax rate provision; the term "effective rate" was used to dispel any connection with the amount limitation contained in the compensating tax rate concept.<sup>130</sup>

As noted, net assessment was limited to improvements and new property under the newly created statute. From 1965 until 1971 this growth did not include adjustments to assessment values that did not involve new or improved property.<sup>131</sup> Thus, action by the Department of Revenue to equalize assessments across the state did not produce net assessment growth even where the equalization adjustment was upward.<sup>132</sup> Beginning January 1, 1971, however, the situation was changed. By amendment,<sup>133</sup> KRS § 132.425 now provides that net assessment growth will consist of the difference in the *total* valuation of property rather than merely improvements or new property increases. Obviously this change will increase the amount of revenue which may be gathered *in addition* to the amount determined under the compensating tax rate.

A second procedure, for increasing the amount of revenue, was made available to the taxing district officials. It was bound indirectly to previous amounts of revenue. This authority was limited and could be exercised only within the two year period immediately following the enactment of the rollback law.<sup>134</sup> The increase allowed was a ten percent budget increase over the previous year, thus limiting the total increase to 20 percent of the amount budgeted under fractional assessment. To qualify for such an increase, the budgeting authority was required to give public notice that hearings would be held to explain the amount and need for the increase. Only after the hearing could a budget be

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<sup>129</sup> The year immediately preceding the enactment of this statute was 1965, thus the tax level of that year was perpetuated for each succeeding year. See, e.g., KRS § 160.470(3)(b) (Baldwin's 1969) dealing with the school board.

<sup>130</sup> See note 125 *supra* and accompanying text.

<sup>131</sup> See note 127 *supra*.

<sup>132</sup> The problems of attempting to reach full fair cash value assessment are not discussed in this paper. For discussion of the problems, particularly the blanket equalization, from two viewpoints see J. E. Lockett *supra* note 116; 44 LRC, *supra* note 37, at 13, 39. The latter contains citation to many of the equalization cases.

<sup>133</sup> Ky. Acts, ch. 260 (1970).

<sup>134</sup> See, e.g., KRS § 160.470(4)(a)(b). Failure to exercise this right within the two year limit did not provide a means of using this exception in later years. 68 OP. KY. ATT'Y GEN. 222 (1968).

submitted which called for the additional revenue.<sup>135</sup> These requirements are substantially identical for all three taxing districts, with the exception that the provision dealing with the cities is written in terms of tax rate rather than budgetary amount.<sup>136</sup>

The sole means of exceeding the limits on budgetary requests lies with a public referendum under KRS § 157.440.<sup>137</sup> Only by submitting the budgetary requests directly to the eligible voters of the taxing district may the revenue be substantially increased with the freedom to apply it to needed areas which might be beyond the statutory guidelines. The only changes made in this statute by the rollback amendments were to limit levies approved *prior* to the amendments to the compensating tax rate and to allow a rate sufficient to meet the indebtedness of the school district.<sup>138</sup>

The effect of these provisions is to prevent, following the 1967-68 school year, any increase in budget except that provided by net assessment growth and the tax referendum provisions.<sup>139</sup> While these ten percent increases had the value of being certain, there was very little relationship between the amount of money available and the amount needed.

The basic budgetary limitations on the school board were directly challenged in *Miller v. Nunnolley*.<sup>140</sup> The Board of Education of the Louisville Independent School District submitted a budget for the 1970-71 school year which required the levy of a property tax rate in excess of that authorized by KRS § 160.470 as amended by the rollback law of 1965. In support of the unconstitutionality of the amendments, appellees stressed two arguments. First, that the legislation perpetuated the unconstitutional assessment ratios which were struck down in *Russman*. The amend-

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<sup>135</sup> *E.g.*, KRS § 68.240(8) (Baldwin's 1969).

<sup>136</sup> KRS § 132.027 (Baldwin's 1969). This construction presents some problems of application. See note 164 *infra* and accompanying text.

<sup>137</sup> There are other provisions for the utilization of the public referendum; however the money gathered may be used only for statutorily designated purposes. See notes 150-151 *infra* and accompanying text.

<sup>138</sup> KRS § 160.470(7) (Baldwin's 1969). These provisions are similar to those discussed *infra* at notes 151-152 and accompanying text.

<sup>139</sup> See generally 44 LRC, *supra* note 37, at 10-12.

<sup>140</sup> — S.W.2d — (Ky. 1971). The Board of Alderman refused to levy a rate for any amount greater than the limitations of the 1965 amendments, but did levy one to the full amount under the restrictions. The Board of Education brought suit to force the aldermen to levy the entire amount. The circuit court held the rollback budget limitation to be unconstitutional, whereupon the aldermen appealed.

ments limited the rates so as to produce amounts similar to those gathered prior to *Russman* and these amounts were based upon less than fair cash value assessment. The Board of Education argued that continuing *post-Russman* conditions was a perpetuation of an unconstitutional situation and a complete frustration of that holding and a violation of section 172 of the Kentucky Constitution.<sup>141</sup>

The Court rejected this argument, reasoning that the amendments did *not* freeze the revenue available to the school board. All that the budgetary limitation achieved was a freeze on the amount of revenue the school board had the *discretion* to budget. As to the money the school district could raise, it was unlimited, so long as the levy was approved by public vote.<sup>142</sup> Since an increase in revenue could be achieved, "unconstitutional assessments [were] not perpetuated and *Russman* . . . [was] not frustrated."<sup>143</sup>

The validity of this argument depends almost entirely upon that view point. If the purpose of *Russman* was merely to force the assessment ratio up to the constitutional level the amendments *not* affecting the *assessment level* would not touch upon the *Russman* rationale. If, however, the action was taken with a view to providing some relief for the needy school system, then any attempt to limit revenue, regardless of method, could be considered as frustrating *Russman*. Although argument as to the purpose of *Russman* may be presented on both sides, the effect of the *Miller* decision was judicial selection of the former.

The second argument advanced by appellees was that establishment of maximum rates for each county violated section 59 of the Kentucky Constitution, which prohibits special legislation and the equal-protection clause of the fourteenth amendment

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<sup>141</sup> *Id.*

<sup>142</sup> See KRS § 160.476, 160.477, 157, 440 (Baldwin's 1969).

<sup>143</sup> *Miller v. Nunneley*, — S.W.2d — (Ky. 1971). The Court also disposed of appellees' argument that the amendments violated the uniformity requirements of section 171 of the Kentucky Constitution. This provision requires uniformity only within the territorial bonds of the levying authority and the Court refused to construe the state as being the levying authority although it exercised great control over the intracounty districts. — S.W.2d at —. Section 171 also provides that any legislation classifying property shall be subject to a public referendum upon demand within four months of the adjournment of the legislature which passed the provision. See 44 LRC 11. However, such demand was not made probably because a referendum would have overwhelmingly supported the 1965 amendments. See notes 120-27 *supra* and accompanying text.



to the United States Constitution.<sup>144</sup> The Court cast the issue as: "the proposition that legislation fixing among the various districts different *maximum* basic tax rates that school boards may select constitutes special and local legislation and denies equal protection of the law."<sup>145</sup> The court in refuting this argument based its decision on the theory that a classification on the basis of conditions prevailing at a particular time is acceptable so long as the classification has a reasonable basis. The court felt the purpose of the legislation was to prevent sudden increases in the tax burden and the means adopted were the only effective ones available. Thus, while it is true that the maximum rate would differ from district to district that disparity was a result of previous unequal assessment by the district and *not* as a result of legislative action.<sup>146</sup> Since the amendment merely codified the existing situation for every county, the Court reasoned that there was no special legislation and thus did not violate section 59.<sup>147</sup> Based upon these conclusions the Court reversed the lower court's holding and supported the refusal of the alderman to levy the excess tax.<sup>148</sup>

In addition to the basic budgetary limits, other activities of the school authorities were affected by the rollback amendments. School districts have the authority to levy a tax to provide the revenue for a school building fund. The statute authorizing such funds was amended by the special session so that no levy for 1966, or any subsequent year, could be sought which would

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<sup>144</sup> *Miller v. Nunnolley*, — S.W.2d — (Ky. 1971).

<sup>145</sup> *Id.*

<sup>146</sup> The Court confused reasonable *basis* for classification and a reasonable *need* for a classification. In this instance there was fear that large increases in the tax burden were about to occur and this the Court felt was justification for making some type of classification, as it may well have been. However, selection of the basis for this classification is another matter; it was based upon factors which the Court of Appeals had previously ruled unconstitutional. It makes no difference if these unconstitutional factors were created by the legislature or someone else, they are unconstitutional and per se unreasonable as a *basis* for classification.

<sup>147</sup> Obviously this begs the question of future changes, since the power to change lies solely with the legislature.

<sup>148</sup> *Miller v. Nunnolley*, — S.W.2d — (Ky. 1971). There were two companion cases handed down, each supporting the rollback amendment. *Northern Kentucky Area Planning Comm'n v. Hensley*, — S.W.2d — (Ky. 1971) presented two arguments. The first of which was essentially the same as that in *Miller* and the Court rejected it here adopting the *Miller* rationale. The other argument contended that the rollback limitations as they applied to area planning commissions were removed by 1968 amendment to KRS § 147.660. The Court rejected this contention out of hand. The other case was *Ashland v. Webb* see note 171 *et seq. infra* and accompanying text. Sources connected with the *Miller*

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exceed the compensating tax rate.<sup>149</sup> In addition to the permissive increase for school building, the school board by KRS § 160.477 may submit a resolution to the qualified voters of the district which would produce revenue in excess of the limits established by law.<sup>150</sup> The purposes for which this revenue may be used are limited to the school lands and buildings and regardless of the referendum, levies above the compensating tax rate are prohibited.<sup>151</sup> The only exception to the compensating tax rate is the allowance for higher levies where necessary to meet the interest and principal payments which were outstanding at the time of the amendment.<sup>152</sup> Apart from these procedures a public referendum may be held which, if approved by a majority of the voters, may authorize the levy of any amount, to be used for any purpose.<sup>153</sup>

Having observed how the rollback law sought to limit the revenue available to school districts the mechanics of the controls may now be clearer. In each instance where the school board had authority to raise revenue the special legislation limited the *increases* to very specific occasions by imposing a maximum rate which froze (for the most part) revenue at the 1965 levels regardless of changing conditions. The same general approach was utilized in controlling both county and city taxing districts—only particular applications differ.

### B. Counties

The county taxing unit was also affected by the rollback legislation. In the attempt to hold the line on tax increases the legislature amended three statutes. First, KRS § 68.240, which gives the county budget commission authority to promulgate a budget, was amended to limit the amount of money the commission could request. This was done in essentially the same manner as with

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(Footnote continued from preceding page)

case indicate an intention to appeal directly to the United States Supreme Court and if that fails to begin anew with the district court. Lexington Leader, July 7, 1971, at 25, col. 1.

<sup>149</sup> KRS § 160.476(4) (Baldwin's 1969). See Board of Educ. v. White, 410 S.W.2d 612 (Ky. 1966) for an interpretation of this statute.

<sup>150</sup> KRS § 160.470(2) (Baldwin's 1969).

<sup>151</sup> *Id.* § (1)(9), (6). Rates approved by voters prior to this amendment but which have not been levied must be reduced to the compensating tax rate before they may be levied. *Id.* § (6).

<sup>152</sup> KRS § 160.470(6) (Baldwin's 1969).

<sup>153</sup> See note 138 *supra*.

the school budgeting authorities; the amount allowed to be budgeted was limited so as not to require more revenue from ad valorem taxes than would have been produced under the *pre-Russman* conditions.<sup>154</sup> The only exceptions were the net assessment growth, the permissive ten percent increase with notice and hearings, and those levies approved by public vote.

As with the budget controls on the school boards, these limitations were soon faced with a court challenge. Indeed, *Rea v. Galatin County Fiscal Court*<sup>155</sup> was brought some four years prior to *Miller v. Nunnolley*.<sup>156</sup> The end result in both cases was the same; the Court found the questioned statutes to be constitutional. In *Rea* the issues were framed so as to question the legislature's power to set a maximum rate lower than that prescribed by the Kentucky Constitution as being the maximum permissible rate. The challengers contend that once the constitution set such a limit the legislature did not have the authority to set a lower rate.<sup>157</sup> In rejecting this argument the Court apparently<sup>158</sup> held that, although the constitution set a maximum rate, it also conferred the taxing authority upon the state. When the state delegated this authority to local subdivisions of government an inherent power to set limits lower than those contained in section 157 remained with the state. Having exercised such rights in the establishment of the budget limitations there could be no question as to the constitutional soundness of the amendments.<sup>159</sup>

The second statute affected was KRS § 178.200 which empowers the fiscal court to sell bonds to raise revenue to construct roads and bridges. The fiscal court is also empowered to levy a tax of up to 20 cents per 100 dollars of assessed property in the county. The rollback amendment altered the statute to the extent that "for 1966 and all subsequent years" the compensating tax rate would determine the amount of revenue to be gathered for bonds issued prior to the amendment.<sup>160</sup> Just as with the "School Build-

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<sup>154</sup> See note 141 *supra* and accompanying text.

<sup>155</sup> 422 S.W.2d 134 (Ky. 1967).

<sup>156</sup> — S.W.2d — (Ky. 1971).

<sup>157</sup> 422 S.W.2d 134, 135-36 (Ky. 1967).

<sup>158</sup> It is difficult to determine, from this opinion, exactly what the Court held. However, a later decision was more emphatic. See *Ashland v. Webb*, — S.W.2d — (Ky. 1971).

<sup>159</sup> 422 S.W.2d at 137-38.

<sup>160</sup> KRS § 178.200(3) (Baldwin's 1969). The amendments also provide for rates in excess of the compensating tax rate where necessary to meet outstanding indebtedness. *Id.* § (4).

ing Fund" the effect is to limit the revenue to the amount contemplated by the fiscal court (and apparently the voters if there has been an intervening election) when the bonds were issued.<sup>161</sup> However, contrary to the school situation, the statute is silent as to bonds issued *subsequent* to the amendment.<sup>162</sup> Apparently such bonds may be retired by levy of a tax with the rate in excess of the compensating tax rate.<sup>163</sup> Why the fiscal court would present less danger of rapid tax increase than elected school board officials is uncertain. Perhaps the answer lies not with the officials but with the voters and their attitudes toward the two groups.

The third and final amendment to the county taxing power involved KRS § 178.210. This statute authorized the fiscal court to submit to special election the levying of a tax to build roads and bridges. This statute differs from KRS § 178.200 (discussed above) in that *no* bonds are issued, rather the money is produced directly by the tax levy. The 1965 amendments limited the amount which could be collected on such levies as were approved prior to the amendment to the compensating tax rate. As in KRS § 178.200, no limit was placed upon levies submitted to a vote following adoption of the amendment.<sup>164</sup> This freedom to elect levies as desired corresponds to that contained in KRS § 157.440 dealing with the election of a school levy.<sup>165</sup>

### C. Cities

In contrast to the similarities in the treatment of the school and county taxing authorities, the approach taken to controlling the revenue gathered by the city districts is somewhat different. The special session enacted a new statute, KRS § 132.027, to provide the limitations. The first paragraph of that statute simply provides that no city may levy a rate greater than the compensating tax rate. The only exception provided is the ten percent permissive increase, each year for two years. There is no explicit provision for net assessment growth or for direct public vote on higher levies. The apparent result of the new statute was

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<sup>161</sup> See note 149 *supra*.

<sup>162</sup> There is a limit, however, upon the total amount of indebtedness which the county may incur. KRS § 66.310 (Baldwin's 1969).

<sup>163</sup> Not to exceed \$.20 per \$100 of assessed value.

<sup>164</sup> The amount of indebtedness allowed is limited. See note 160 *supra*.

<sup>165</sup> See note 137 *supra* and accompanying text.

to limit the available revenue to the 1965 level with two ten percent increases and no more.

However, a 1966 case involving the voted levy exception provided the cities with that means of increasing revenue. *Raque v. Louisville*<sup>166</sup> involved a tax levied to retire bonds issued under a law,<sup>167</sup> which allowed such issue and levy following a public referendum. The amount of the bonds issued, although within the debt limitations imposed on the city, would require a levy of a rate in excess of the compensating tax rate set forth in KRS § 132.027. A taxpayer brought the suit to declare the rate in excess of the rollback limits to be void.<sup>168</sup> The argument was based on the absence of a provision allowing the levy of voted rates above the compensating tax rate. In the case of school or county taxing authority this exception was clearly made and the taxpayer contended that the absence of a similar provision for the cities evidenced an intent to deny such exception to cities.<sup>169</sup>

In rejecting this interpretation the Court pointed out that such a reading of the statute would bring it into conflict with section 159 of the Kentucky Constitution which requires any taxing unit which is to assume debt must also levy a tax sufficient to retire the debt. That the city had the authority to assume debt upon vote of a majority of the taxpayers was the settled construction of section 157. With this reasoning the Court held the excess levy to be proper.<sup>170</sup>

The next court test for the rollback amendments as they applied to the cities came in *Ashland v. Webb*.<sup>171</sup> The facts were quite simple. The city of Ashland had adopted an ordinance authorizing the levying of a tax in excess of the limits of KRS § 132.027. A taxpayer brought suit to enjoin collection of the excess and an injunction was granted by the circuit court. On appeal, the decision was affirmed by the Court of Appeals.<sup>172</sup> The appellants brought only two arguments to the Court. First, that the statute setting a maximum tax rate lower than that

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<sup>166</sup> 402 S.W.2d 697 (Ky. 1966).

<sup>167</sup> KRS § 66.050 (Baldwin's 1969).

<sup>168</sup> 402 S.W.2d 697-98 (Ky. 1966).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 698-99.

<sup>171</sup> *Ashland v. Webb*, — S.W.2d — (Ky. 1971). This was one of the two companion cases to *Miller v. Nunnolley*. See note 148 *supra*.

<sup>172</sup> *Ashland v. Webb*, — S.W.2d — (Ky. 1971).

prescribed by section 157 of the Kentucky Constitution was unconstitutional. The Court rejected this contention citing *Rea v. Gallatin Fiscal Court* as controlling on the issue.<sup>173</sup> The second contention was that the cities were not given the benefit of net assessment growth as a means of increasing the available revenue. Such condition was alleged to be unconstitutional discrimination. The response from the majority was that it was "not entirely convinced that cities [were] denied net assessment growth;"<sup>174</sup> and even if they were so denied, there was no constitutional requirement that cities "be treated the same as counties as far as concerns the extent of their tax levying powers."<sup>175</sup> With this the Court affirmed the denial of Ashland's authority to authorize tax levies in excess of the compensating tax rate.

The decision in *Raque* applies only to levies used to retire *indebtedness* incurred by vote.<sup>176</sup> In this respect the city taxing authority now has the same power as the county and school units. However, the latter two governmental units are also able to present their qualified voters with the opportunity to vote higher levies in the absence of indebtedness.<sup>177</sup> Indeed, this was the aspect relied upon by the Court in *Miller* to overcome the constitutional challenge that the rollback law perpetuated the unconstitutional *pre-Russman* situation.<sup>178</sup> There is no similar provision by which the cities may increase the amount of revenue available to them. The obvious question then is whether the rollback amendments, as applied to cities, are constitutional. Although declared to be so in *Ashland*, that case dealt *only* with the two proffered arguments and the decision was based upon the answers to those particular arguments.<sup>179</sup> The success of a challenge supported by the above reasoning remains to be seen.

#### V. EFFECT OF ROLLBACK ON INCREASING REVENUE PRODUCTION

Having examined the effect of the rollback law on the individual taxing authorities, the impact of these changes on local

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<sup>173</sup> See notes 155-59 *supra* and accompanying text.

<sup>174</sup> *Ashland v. Webb*, — S.W.2d — (Ky. 1971).

<sup>175</sup> *Id.*

<sup>176</sup> See note 166 *supra* and accompanying text.

<sup>177</sup> See notes 137-38, 164-65 *supra* and accompanying text.

<sup>178</sup> See note 142 *supra* and accompanying text.

<sup>179</sup> *Ashland v. Webb*, — S.W.2d — (Ky. 1971).

government should be evident. Kentucky's local governing bodies rely primarily on the revenue produced by property taxes to finance their operations. Any limitation upon available revenue which is tied to the 1965 level must necessarily hamstring efforts to provide the level of services demanded in the 1970's.<sup>180</sup> Acknowledging this fact, the legislature provided the previously discussed exceptions to the otherwise frozen tax limits. But the effectiveness of those provisions for increasing revenue must be questioned.

### A. *Flexibility*

Local governments must plan their expenditures over some period of time, the period often varying with different items in the same budget.<sup>181</sup> With any of the taxing authorities most expenditures for the year may be accurately predicted and provision made for them. However, short term emergency conditions may arise calling for the expenditure of unforeseen funds. Likewise, a budget year may see the completion of some phase of a long term construction project which, due to inflation, presents more bills than anticipated.

All of these factors may occur in any taxing authority thus producing a need for varying amounts of revenue. While the property tax itself may not be an exceptional means of meeting the demands for different amounts of revenue it is the main source of income for the three types of taxing districts under discussion.<sup>182</sup> When the property tax growth is limited to the exceptions provided in the rollback amendments any flexibility which may have been present is sorely restricted. To illustrate: assume a taxing district has come to the start of its fiscal year with an ongoing project that has just returned bills which will demand revenue in excess of the past budget. How may revenue be expanded to meet this temporary need? If the increase is less than 10% of the previous year's revenue *and* if the need arose in 1966 or 1967, then the authority could have increased revenue following

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<sup>180</sup> Even if individual demand has remained constant the population increase will produce a need for more revenue.

<sup>181</sup> For example, salaries will require a pre-determined outlay which is totally included within the time span of a yearly budget. A building project, on the other hand, may continue over many budgets, requiring changing amounts of revenue.

<sup>182</sup> See 44 LRC, *supra* note 37, at 1.

public hearings. However, such increases are no longer open to any of the taxing units.<sup>183</sup> Another possibility lies with the net assessment growth which has occurred in property taxable by the unit.<sup>184</sup> But, at no time was there any means of correlating this increase with the needed revenue. Any similarity between the two would be mere coincidence and, if the taxing unit were a city, this means of gathering additional revenue might not even be available.<sup>185</sup> The only other means of increasing revenue is by public vote, either for permission to sell bonds or to levy an extra tax. Both voting techniques have short-comings, not the least of which is the difficulty in getting voter approval.<sup>186</sup> Beyond this hurdle there are other problems: bonds may not be readily marketable; interest rates may be prohibitive; time requirements for meeting the demand for revenue may be such that no time is available for holding a special election; perhaps the cost of holding an election will exceed the amount of revenue needed; and, if the taxing unit is a city apparently the "direct election" of a levy is prohibited.<sup>187</sup> From this it can be seen that as a means of providing flexibility in the gathering of revenue, the rollback amendments leave much to be desired.

### B. *Predictability*

Closely related to the need for flexibility in the budgeting of revenue is the need for predictability. Any of the taxing units will require some additional expansion over a long period of time. To finance such growth a steady, predictable source of added income is needed.<sup>188</sup> Obviously this predictability cannot be pro-

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<sup>183</sup> If the taxing authority were a school district some increase may have become available beginning with the 1970-71 school year. The 1970 regular session of the legislature amended KRS § 160.470 so as to allow those school districts which were not taking at the maximum rate in 1965 to increase their present levy to produce an amount equal to the revenue that would have been produced by the maximum levy in 1965. This sum is not to include those exceptions allowed under the rollback amendments such as net assessment growth and voted levies. Similar changes were made in KRS § 160.477 (voted school building fund) and KRS § 157.440 (local tax effort requirement). Ky. Acts, ch. 118 (1970).

<sup>184</sup> Prior to 1971 this exception did not deal with increases other than improvements and new property. See note 133 *supra* and accompanying text.

<sup>185</sup> See notes 174-75 *supra* and accompanying text.

<sup>186</sup> See notes 192, 207-08 *infra* and accompanying text.

<sup>187</sup> See note 178 *supra* and accompanying text.

<sup>188</sup> Admittedly the rollback provisions provide an extremely predictable amount of revenue but little provision is made for added growth. Such growth simply must take place if only for the simple reason that there are more people within a taxing unit.



vided by the ten percent permissive increases nor by the net assessment growth. As indicated above, such increases are no longer available or their occurrence bears no relationship to the need. As with flexibility, the voting exceptions provide the only means of predictable revenue increases.<sup>189</sup> However, the same problems of desirability and availability apply in consideration of predictability. But perhaps voted levies provide the most equitable means of producing a predictable increase of revenue over a long period of time.<sup>190</sup>

### C. *Achieving Results*

A third consideration in providing means of increasing revenue is the difficulty of achieving the desired results. When they were available the ten percent permissive increases were readily accessible to the taxing officials, but they are now impossible to apply. In contrast, degrees of difficulty cannot even be considered in discussing net assessment growth since such increases lie beyond the direct control of the levying agents.<sup>191</sup> As indicated earlier, perhaps the greatest drawback to the voted levies is the difficulty in getting voter approval. This difficulty was, to some extent, probably anticipated by the legislators who passed the rollback amendment indeed forcing local officials to go to the voters was one purpose of the changes.<sup>192</sup> While reluctance to vote increased taxes on the part of the taxpayer is understandable, the wisdom of tying all controllable increases to direct voter approval is questionable. Certainly the elitist attitudes of some are to be rejected,<sup>193</sup> likewise note must be taken of the tremendous gulf between the demands of the public and their willingness to pay for these services. It is natural to avoid any additional outlay in taxes paid when the object of this revenue lies sometime in the future or is some inscrutable but necessary governmental service.

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<sup>189</sup> Obviously such revenue is predictable only after the levy has been voted.

<sup>190</sup> Property tax levies are classically regressive in their impact and the majority of voters may fall into the group hardest hit by a levy.

<sup>191</sup> About the only available control is through their ability to promote economic growth.

<sup>192</sup> See *Miller v. Nunnelley*, — S.W.2d — (Ky. 1971).

<sup>193</sup> For one of the best examples of this type of thinking see *Courier-Journal & Times* (Louisville), June 20, 1971, § F, at 2, col. 3.

Be that as it may, the fact remains that revenue is limited, essentially, to the 1965 level. The exceptions provided contain only limited relief. The 10% permissive increases were flexible, predictable, and relatively easy to achieve but are now no longer available. The net assessment growth occurs regardless of action by local officers, it is unpredictable to the extent that plans can be made only on the revenue added by the immediately *preceeding* assessment period and in addition it seems to be unavailable to the cities. The voted levies are not extremely flexible but they do provide a predictable source of revenue once the levies have been authorized. The problem with these exceptions lies in the difficulty in achieving voter acceptance.

## VI. THE INADEQUACY OF THE ROLLBACK LAW AS PERMANENT LEGISLATION

Public fear coupled with political pressure resulted in the hastily drawn "rollback" law. As is characteristic of legislation enacted in haste to meet an immediate need, structural shortcomings later became evident. To justify the faults it may, perhaps, be said that the legislature did not intend the rollback amendments to be permanent. When the provisions themselves are examined this response seems accurate. For example the ten percent permissive increases were only valid for a two year period which was to end the same year as the occurrence of a regularly scheduled legislative session.<sup>194</sup> If a ten percent increase was permissible for each of the first two years why should they not be available in later years? Surely there was no thought that the demand for revenue would decrease. The only conclusion is that *some* change was anticipated within those two years.<sup>195</sup> Likewise, commentators both before<sup>196</sup> and subsequent to enactment of<sup>197</sup> the amendments have indicated a belief that the changes were

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<sup>194</sup> See, e.g., KRS § 160.470 (Baldwin's 1969).

<sup>195</sup> Such conclusion is strengthened by the treatment accorded the public utility taxing districts. In the original 1965 amendments, the effect would have been to shift a greater percentage of the property tax burden *from* the utilities *to* the individual. This was prevented by an amendment which specifically imposed rates upon the utilities so as to retain the pre-*Russman* status quo. However, these restrictions were to last only two years and then the only limitations were to be the constitutional rate limits. Ky. Acts, ch. 41 (1966). For a more complete examination of the public utilities' treatment see 44 LRC, *supra* note 37, at 11.

<sup>196</sup> See note 114 *supra*.

<sup>197</sup> See 44 LRC 9-12,

only temporary. In light of the tumultuous state of affairs at the time of the special session little permanent planning could have been done; there seems no possible conclusion other than that the changes were not to be permanent.

Assuming for the moment that the rollback amendments were intended to stand as permanent law, the legislation leaves much to be desired. For example, the provisions which deal with the schools are complete and thorough but as the county and city taxing authorities are dealt with the provisions become more brief and provisions are omitted. The most flagrant example is the handling of the cities. Only one change was made<sup>198</sup> and it left the cities without specific authority to levy a tax for voted indebtedness, although similar provisions had been included in the school and county amendments. Likewise, there was no provision for utilization of net assessment growth; nor was there any allowance for public vote on direct levies. These structural omissions will require judicial construction if the cities are to receive any of these benefits, and there is *no legislative indication* as to whether it was intended that they receive such benefits. In addition, other constitutional shortcomings have produced amendments from time to time.<sup>199</sup> All of which illustrates the need for new legislation, even assuming that the limitations on revenue were intended to be permanent.

Whether or not the rollback law was intended to be a permanent answer to *Russman*, the fact remains that there are deficiencies in the legislation. The fact also remains that there has been little legislative action to correct the situation. One possible answer to the problem might be envisioned in judicial interpretation, but courts are often unwilling to "rewrite" deficient laws. Challenges to the amendments on constitutional grounds have already been mounted and these attacks were repelled by the Court of Appeals.<sup>200</sup> While some questions may be raised as to the accuracy of these decisions and although other constitutional attacks can be conceived,<sup>201</sup> the important aspect in terms of relief for revenue starved taxing districts is that no such relief is

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<sup>198</sup> There was another change but it was the creation of a new statute to handle a joint city-school tax. See KRS § 132.200(2)-(3) (Baldwin's 1969).

<sup>199</sup> See notes 133, 183 *supra*.

<sup>200</sup> See notes 140, 155, 166, 171 *supra*.

<sup>201</sup> See, e.g., notes 178-79 *supra* and accompanying text.

likely from the Court.<sup>202</sup> It is submitted that the Court has chosen to place the burden of discovering some means of meeting the demands of local governments squarely upon the legislature (and who is to say that is not where it belongs).

Left without judicial or legislative intervention, the rollback amendments seriously hamper revenue production for the various local taxing authorities. The ten percent permissive increase in revenue is no longer available and the net assessment growth is inflexible and not very predictable. Often the only hope lies in direct voter appeal. But many of the governmental processes of today are inexplicable even to men learned in the field; they become impossible when made the direct object of an election.<sup>203</sup> It should be no surprise that when faced with a choice of a tax for some purpose which he does not understand and no tax, a voter will choose not to levy the tax. This need not be an argument for paternalistic government, but some balance is needed between officials, who dictate decisions, and public elections on issues not fully understood by the electorate. One of the purposes of representative government and the use of elected officials is an attempt to strike some balance between these extremes. Election of local tax officials allows the public to register disapproval of taxing policies while permitting the day-to-day business of government to continue. When the rollback amendment came into effect this balance was destroyed by the requirement for public vote on almost every increase in tax revenue.<sup>204</sup> The announced reason for this imbalance was a fear of local officials; *i.e.*, that the public had lost control of their local officials and the imbalance had already swung too far in favor of those officials.<sup>205</sup> If that were the case then remedial legislation dealing with the selection of officials rather than perpetual limitations of revenue would seem the appropriate action.

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<sup>202</sup> Perhaps it is simply too soon to expect action from the Court in view of the time lapse between *Louisville Railway and Russman*.

<sup>203</sup> The Kentucky Commissioner of Revenue recently announced a "breathing spell" in attempts by the Department of Revenue to equalize assessment levels across the state. Mr. Lockett acknowledged that this lull, and previous ones, coincide with the occurrence of general elections. In explanation he indicated that equalization was a technical subject which was inappropriate as an election issue.

<sup>204</sup> If elected officials are so irresponsible as to require such control the question arises as to why the legislature has not subjected its decision-making power to *immediate review* by the public.

<sup>205</sup> See notes 107-13 *supra* and accompanying text.

## VII. CONCLUSION

Throughout the preceding pages the history of fair cash value assessment has been traced through its judicial wanderings to the final affirmation in *Russman*. Likewise the response to that decision has been chronicled and analyzed in an attempt to determine the appropriateness of the response. It is the purpose of this paper to show, in a limited way, the inadequacies of the legislative response in the rollback amendments and to underline the need for some type of legislative action.<sup>206</sup> It is not the purpose of this note to indicate what changes should be made, that is a subject unto itself. There are many alternatives: return to the statutory language before the amendments; require public approval by vote on each budget each year; establishment of a minimum property requirement which must be surpassed before any individual could be taxed; and, perhaps the most equitable, abolition of the property tax altogether. This is surely not an exhaustive list, but whatever course may be chosen, it is mandatory that some action be taken.

*William L. Stevens*

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<sup>206</sup> Because of its widespread occurrence no attempt has been made to chronicle the need for more revenue.