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James W. Martin
University of Kentucky

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SOCIAL IMPLICATIONS OF SOME RECENT KENTUCKY PROPERTY TAX CASES*

By JAMES W. MARTIN**

In general the cases selected as a basis for discussion fall into the practical categories of (a) those having to do with the scope of the Kentucky property tax and (b) those concerning assessments.[1] To make it easy for one who has not currently studied tax cases to follow the comment on their consequences, I shall undertake a layman's analysis of the setting of and decision in each case or group of cases.

One caution is essential to an interpretation of the practical significance of recent tax cases. An attorney—and especially a judge—is perforce concerned primarily with justice for litigants. The general tax student like myself is much more solicitious as to the bearing of any particular case on taxpayers who are *not* litigants. The reason is that there are more non-litigants than parties to law suits, and that much more money is involved. Moreover, the practical operations of the tax program are matters which intimately concern all taxpayers and our tax administration; whereas, by the very nature of our legal processes, the courts ordinarily settle only subject matter specifically presented in a controversy; and court decisions must, therefore, deal with segments rather than with the entirety of individual tax problems.

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* This paper is the substance of an address delivered before the Kentucky Bar Association's conference in Ashland, Kentucky, in October, 1940.

** Director, Bureau of Business Research, University of Kentucky, formerly Kentucky Commissioner of Revenue.

[1] Significant legal developments affecting enforcement of tax collections are excluded. Most legal issues have been studied recently by Earl Wilson, *Sale of Land for Taxes in Kentucky*, 28 Ky. L. J. 105 (1940).

I. APPLICATION OF THE KENTUCKY PROPERTY TAX

The High Splint Coal Case[2]

In recent political campaigns, a definite view that the people of Kentucky desire repeal of the state real property tax has developed. Some political leaders privately admit that one of the reasons the proposal has been emphasized lies in the fact that many voters think repeal of the state property tax would mean elimination of the tax bill paid annually to the sheriff; thus, perhaps the issue has been given more emphasis than is involved in the difference between a five-cents-a-hundred tax and no state levy. In any event both political parties in the 1935 campaign favored repeal of the state real property tax.

In keeping with his commitment, Governor A. B. Chandler recommended to the 1935 General Assembly elimination of the state levy.[3] In addition to repeal of the state real estate tax[4] two other provisions in the bill caused difficulty. The first sought to take away the authority of the state tax department to equalize assessments of real property.[5] On technical grounds this change was subject to grave objection,[6] but no one in the General Assembly seems to have offered adverse arguments. The second provision, the one that gave rise to litigation, required that the Kentucky tax commission asssess mineral property.[7] Although it appears that no objection to this centralization of responsibility was raised, it proved, when enacted, to be difficult of interpretation because the verbiage lacked precision.[8] In consequence the tax department called a conference of interested taxpayers—especially owners of oil, gas, and coal properties—and sought advice concerning suitable regulations for distinguishing that property subject to state assessment from that subject to local assessment. It was understood that the action of the department would be made the subject matter of a declaratory judgment suit,

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[2] Martin et al. v. High Splint Coal Company, 268 Ky. 11, 103 S. W. (2d) 711 (1937).

[3] 1 Kentucky House Journal, Jan. 7, 1936, p. 15, 22.

[4] Acts of the General Assembly, 1936, chap. 99, sec. 1.

[5] *Ibid.*, sec. 2.

[6] National Association of Assessing Officers' Committee on Assessment Organization and Personnel, Equalization Agencies (1940), especially pp. 33 ff.

[7] Acts, *op. cit, supra,* note 4.

[8] The provision at the end of sec. 3 read: "The State Tax Commission shall have exclusive power in the assessment of all minerals."

so that property owners might know whether their holdings were required to be listed with the state department or with the county tax commissioner, and what duties this statute required of the tax commission.

Pursuant to the regulations attempting an interpretation of the statute, counsel for three corporations and one individual, whose holdings introduced practically all the variable situations believed to be usual, filed a suit. The Court of Appeals on March 26, 1937, handed down a forcible opinion written by Judge Thomas[9] in which a fundamental constitutional tax question was decided. Instead of dealing with the comparatively unimportant question of whether or not the regulation correctly interpreted the statute, the Court dealt solely with whether or not chapter ninety-eight of the *Acts of the Regular Session, 1936* was constitutional. The Court sustained the opinion of the trial judge that the entire chapter was unconstitutional and void. In the decision two important questions were involved: (a) whether or not the bill sought to provide unconstitutional exemption, and (b) whether or not, in the event it did so, the 1934 legislation sought to be repealed would continue to prevail. With the latter question we are not now concerned, mainly because no unique issue seems to have been involved. It is important, however, that the Court held section 170 of the Constitution to require that the *state government* tax all classes of property. In effect, this decision appears to mean that the prohibition against any exemption applies specifically to state taxation and not merely to some taxing jurisdiction; that is to say, the Constitution does not merely require that some jurisdiction impose a tax. To the Kentucky bar this decision, once the general interpretation adhered to by the Court is agreed upon, may seem inevitable. To the student of comparative tax policies such is not the case, since many state constitutions do not as emphatically segregate fiscal provisions as does the Kentucky document. One phase of the Kentucky Constitution concerns state government; another phase, largely separate, local government.

Perhaps the first practical implication of this case lies in the finding that no class of property in Kentucky can be exempt from *state taxation.* This is important in a number of practical directions, and concrete illustrations may be cited.

[9] Martin v. High Splint Coal Company, *supra,* note 2.

Shortly after the High Splint Coal Company case was decided, it became necessary for the department of revenue to deal with general language in a statute providing for rural electrification cooperatives and requiring that each such enterprise pay $10.00 in lieu of other taxes.[10] The specific issue was whether this exemption provision comprehended property taxes. The department, in the light of the High Splint Coal Company case, proceeded on the assumption that the General Assembly, knowing the Constitution and realizing it required all property not expressly exempted therein to be taxed, simply did not mention property taxation. It was therefore held as a matter of course that rural electrification cooperatives were subject to property taxation. In the light of the Court's opinion in the High Splint Coal Company case, no particular issue appears to be involved in this decision; but the ruling involved another point which the Court may find it necessary to interpret, namely whether or not the general provision as to exemption applied to local property taxes, despite the fact that nothing in the statute expressly so indicated. Relying on the language of Judge Thomas in the High Splint Coal Company case, the department of revenue took the position that an exemption provision should be interpreted strictly against the person claiming it and necessarily held that the cooperatives were subject to both state and local taxation.[11] If the Court's opinion has been read aright, the High

[10] The language of the relevant section (Acts of the General Assembly, Fourth Extra Session, 1936, chap. 6, sec 27, Baldwin's Kentucky Statute Service, Oct., 1939, sec. 883j-28) is as follows. "Corporations formed hereunder shall be exempt from all franchise taxes, profit taxes, gross and net taxes, sales taxes, occupation taxes, privilege taxes, income taxes, any and all taxes on electric current consumed and from all excise taxes whatsoever, any statute or statutes now existing or hereafter passed to the contrary notwithstanding. In lieu of any and all other taxes, state, county, municipal and/or local corporations formed under this act being non-profit cooperative organizations shall pay annually to the treasurer of the Commonwealth of Kentucky an annual tax of $10.00."

[11] The language of the first part of the section, from which mention of any ad valorem property tax, state or local, is conspicuous by its absence, appears to strengthen materially the case against exemption. As a general proposition, a specific enumeration—especially as in this case, one which lacks a general catch-all provision—is interpreted to be an all-inclusive listing. For example, in the section quoted in the preceding note, the list of taxes from which exemption is provided can on this principle be deemed to include all such taxes; and levies on property imposed ad valorem, either state or local, are not expressly or impliedly included. Of course, the property tax cannot be contemplated as among "any other taxes, state, county, municipal and/or local . . ." since a flat $10.00 tax obviously *cannot*

Splint Coal Company case provides the state tax department a basis of procedure for both of these important issues.

Most students of property taxation, and notably Professor Jens P. Jensen,[12] have recommended major adjustments in its base.[13] Jensen proposes, as do many of his colleagues, that representative intangible property should not be subject to taxation. This class would include, for example, a mortgage on real estate. Jensen's view, conceivably, might also be interpreted, but with less reason, to propose exemption of stock in a corporation whose property is situated in the state.[14] Professor Jensen, moreover, like most other critical students of tax policy, proposes elimination of certain classes of tangible personal property from the tax base.[15] Under the doctrine of the High Splint Coal Company case, the express provisions of the Constitution preclude such reforms in the operation of our ad valorem tax.

It may be pointed out in compensation for this seeming objection that the Constitution also renders less practical a type of property tax "jockeying" for partisan political purposes which might otherwise be expected and which indeed seems to have been involved in the statute that gave rise to the construction.[16] Many other "urgent necessities" for exemption of specific classes of property may have been forestalled by reason of the Constitution's anti-exemption provision as interpreted. Since the legislature may set state property tax rates, however, this case does not eliminate, but merely impedes, partisan maneuvers which could be effected more freely but for the Constitution as interpreted in Judge Thomas' opinion.

One practical implication of this decision involves both economic and legal theory. The immediate result of the High Splint Coal Company case is to leave in doubt whether the state General Assembly can constitutionally free from property tax

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constitutionally be substituted for an ad valorem levy. Const., sec. 174.

[12] *The General Property Tax, the Mainstay of the Local Fiscal Autonomy*, 183 Annals of the American Academy of Political and Social Science, 124 ff. (Jan., 1936).

[13] *Ibid.*, p. 128.

[14] Note that, on petition for rehearing, such an exemption was sustained in Commonwealth v. Walsh's Trustee, 133 Ky. 103, 117 S. W. 398 (1909).

[15] Jensen, *supra*, note 12.

[16] Acts of the General Assembly, 1936, Regular Session, Chap. 98, codified as section 4019-1 to 4019-4 of Baldwin's 1936 Revision of Carroll's Kentucky Statutes, 1936 ed.

the shares of stock in a corporation which pays tax on 75 per cent of more of its property in Kentucky.[17] The original decision with respect to the validity of the 75-per-cent provision was grounded primarily on the doctrine that the shares of stock in a corporation were a "phase" of the property in the tangible assets of the corporation. If this view of the situation can be maintained, then much of what has been said above is economically unsound, because farm mortgages are a more thoroughly representative variety of property—more nearly, from an economic viewpoint, only a "phase"—than are shares of stock in corporations and so, for that matter, are corporate mortgage bonds and numerous other classes of intangible personal property[18] ordinarily classified by economists as representative intangibles and by lawyers simply as intangible personal property. In other words, the economic consequences of *Martin* v. *The High Splint Coal Company* are diametrically opposed in principle to the economic consequences of *Commonwealth* v. *Walsh's Trustees.*[19]

The Sutcliffe Case[20]

A second problem touching the application of the Kentucky property tax to an important class of estates is dealt with in the recent Sutcliffe case, and it is therefore well that the situation giving rise to the case be reviewed. If, under a will or a deed of trust, a trustee holds intangible property for the benefit of a local resident, the problem of situs for taxation is not seriously raised. As our national financial organization has grown increasingly complicated, it has become more and more usual for trusts for the benefit of persons in all states to be established in financial centers, such as New York, Chicago, and Boston. This practice has resulted in a variety of legal problems one of the most serious of which concerned the situs of the intangibles for property tax purposes. Certainly in the case of irrevocable trusts such, for example, as those established by will, the trustor can by no stretch of the imagination be deemed responsible for listing and paying taxes. But the situation is not so clear as

[17] As provided in section 4088, Carroll's Kentucky Statutes and sustained in Commonwealth v. Walsh's Trustee, *loc. cit.*

[18] S. E. Leland, The Classified Property Tax, 110 ff.

[19] *Supra*, note 12.

[20] Commonwealth of Kentucky ex rel., Martin v. Elbert Gary Sutcliffe, 283 Ky. 274, 140 S. W. (2d) 1028 (1940).

between the trustee, on the one hand, and the beneficiary, on the other. For many years those states which tax intangible property as such have in some instances provided by statute that the trustee as legal owner of the property should be taxable, and other states have provided with similar persistence that the beneficiary as the equitable owner should be required to list the property and pay taxes. An example of the first policy is found in Illinois;[21] and of the second, in Kentucky.[22]

For many years it appeared that no tax on beneficiaries has been contested in court. As a practical matter this absence of litigation seems to have arisen in some measure from the view that it was cheaper to pay taxes than to contest a doubtful point; but it has resulted largely from the fact that, if property were subject to tax on one basis, administrative officers have been reluctant to enforce other levies on a second basis. The situation has been ameliorated also by the fact that for some time neither New York nor Massachusetts have imposed ad valorem taxes on intangibles. The first important case involving the issue as to whether the beneficiary was liable for property taxes on such intangible property appears to have arisen only a dozen years ago in the case of *Safe Deposit and Trust Company of Baltimore* v. *Commonwealth of Virginia*,[23] although a number of cases involving the situs of such property for death taxes had been previously decided. The Safe Deposit case determined definitely that the corpus of trust property held by the trustee in Baltimore was not subject to a Virginia tax against a beneficiary domiciled in that state. In a concurring opinion Mr. Justice Stone made the point that the decision did not settle the issue as to whether Virginia might have imposed a tax on the resident's beneficial interest as distinguished from the corpus.

This reserved question appears not to have been raised in the highest court of any state or in a federal court until the issue came before the Kentucky Court of Appeals in the case of *Commonwealth of Kentucky* v. *Elbert Gary Sutcliffe*.[24] In this case the Court of Appeals held that the beneficial interest of Sutcliffe in a trust created under the will of his grandfather, Elbert H. Gary, New York Trust Company trustee, was subject

[21] Illinois Revised Stat. 1937, chap. 120, secs. 6, 19.

[22] In addition to the Sutcliffe case, see statutory provisions and cases cited therein.

[23] 50 Sup. Ct. 59, 280 U. S. 83, 74 L. Ed. 180 (1929).

[24] *Supra*, note 20.

to tax in Kentucky where Sutcliffe has resided since 1932. The Sutcliffe case involved an extreme example in that the terms of the trust instrument made it impossible for the beneficiary to assign his interest or any part of it and left him without the slightest control over the trust. The only right Sutcliffe enjoyed was the right to the net income.

It is of interest that, two or three days following the Kentucky Court of Appeals decision, the Supreme Court of Pennsylvania independently handed down the Stewart opinion[25] dealing with a comparable situation. The Pennsylvania view is somewhat more elaborately explained, but the result and apparently the theory on which the result is based are exactly the same as in the Kentucky case.

As a practical matter, the major significance of the Sutcliffe and Stewart cases is that, no matter how extreme the arrangement, the courts seem to take a position which precludes contracting away through the mechanism of a trust any element of tax liability that the parties might otherwise incur.[26] In view of the fact that New York does not impose any tax on such trust property, the situation would have become very inviting had the Court held otherwise. It is conceivable that the Court might have held in this case that Sutcliffe was not liable for taxation in Kentucky but that any beneficiary of a New York trust which had been created for the purpose of avoiding Kentucky taxes would be liable. Aside from being an administrative monstrosity, such a definition of the law would have been inconsistent from an economic point of view since the beneficiary in the case of each of the two trusts would have been in a precisely similar situation—one of them subject to tax, the other not. Thus, from the point of view of preventing other Kentuckians from having to assume the taxes of such beneficiaries through increased levies on themselves, from the point of view of sound administration, and from the point of view of equalization of tax load, the Sutcliffe decision, sustained and bolstered by the opinion of the Supreme Court of Pennsylvania in the Stewart case, must be accepted as an unmixed blessing.

Although implicit in what has already been said, it may perhaps be pointed out that in some instances including that of

[25] Commonwealth v. Stewart, 338 Pa. 9, 12 Atl. (2d) 444 (1940).
[26] Of course this has been the law all along, but some eminent counselors believed the trust route offered a means of escape.

Mr. Sutcliffe the trust arrangement was not effected for the purpose of avoiding taxes. Thus, the direct result in this case is simply to preclude an incidental rather than a designed avoidance of the property tax. In general, therefore, the consequence of the decision is to cut off both deliberate and accidental elision of tax liability.

Franchise Tax Cases

Two recent cases decided by the United States Circuit Court of Appeals make clear specific applications of the Kentucky franchise tax act. The Consolidation Coal Company case[27] requires the application of this tax law to a corporation engaged primarily in the coal mining and selling business but operating an electric current producing and distributing enterprise mainly as a convenience for its own employees. The only generally significant issue determined by this litigation is that the electric business is subject to tax notwithstanding that it is not carried on as a means of earning profits but rather as a means of facilitating an industrial concern's other activities. Practically, the case seems to settle that all coal concerns generally must report to the state department of revenue and pay franchise tax the same as other electric companies in respect of property used in producing and distributing current, even though they do so merely to promote coal mining.

The second franchise tax case[28] involved application of the same statute to a pipe-line company which did not hold itself out as transporting oil for the public—which, in other words, was not a common carrier. The statute, however, required that the "pipe-line company" be subjected to the tax, and it also subjected to the tax any corporation having privileges not enjoyed by natural persons. A pipe-line company has the right of eminent domain, although the Producers' Pipe-line Company had not exercised that right. The consequence of the court's decision that this company is liable for franchise taxes will be to set at rest any doubt that gas and oil transporters by pipeline will be required to report and pay the tax without regard to whether or not they function as common carriers.

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[27] Consolidation Coal Company v. Martin, 113 F. (2d) 813 (1940).
[28] Martin v. Producers' Pipe Line Co., 113 F. (2d) 817 (1940).

The Madden Case[29]

The Madden case concerns the Kentucky classification of property for taxation. It will be recalled that prior to 1917 Kentucky adhered to the uniform-rate general property tax plan. In that year the Commonwealth enacted a comprehensive classification of property in connection with which, among other things, it was provided that choses in action and other intangible property should generally be subject to a rate of 40 cents on each $100 valuation and should not be taxed locally.[30] At the same time it was provided that deposits in state banks organized under the laws of Kentucky and in national banks in the Commonwealth should be taxed 10 cents on each $100 valuation. Numerous other provisions were incorporated in the statute, and most of them have been adjudicated.[31]

This case involved among other things the taxation of certain bank deposits in New York owned at the time of his death by Mr. Madden, resident of Fayette County, Kentucky. The issue was originally tried in the Fayette County Court when the Commonwealth sought to list and tax property restrospectively. It was tried de novo in the Fayette Circuit Court, appealed to the Court of Appeals, sent back to the Circuit Court, and again brought before the Court of Appeals on a point already decided.[32] The case was subsequently appealed to the Supreme Court of the United States on the contention that the interpretation placed upon the statute by the Kentucky Court, that is, that "bank deposits" in New York City should be taxed at 50 cents on the $100 even though bank deposits in Kentucky were subject to tax of 10 cents, denied the estate due process and equal protection of the laws and was in conflict with the privileges and immunities clause of the Fourteenth Amendment. The Commonwealth insisted that the statute provided a reasonable classification because of the extraordinary convenience afforded in the administration of the Kentucky bank

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[29] John E. Madden, Jr., Executor of the Estate of J. E. Madden v. The Commonwealth of Kentucky, 60 Sup. Ct. 406, 309 U. S. 83, 84 L. Ed. 590 (1940).

[30] This provision was later changed to require a tax of 50 cents on each $100.

[31] See the cases cited in Carroll's Kentucky Statutes, 1936 edition, and supplements thereto, especially at section 4019a-10.

[32] Commonwealth v. Madden's Executor, 265 Ky. 684, 97 S. W. (2d) 561 (1936), and 277 Ky. 343, 126 S. W. (2d) 463 (1939).

deposits tax which was lacking in the administration of the general intangible property tax, particularly on bank deposits in institutions outside Kentucky. The Supreme Court sustained the position of the state and also dealt with the allegation that the statute as interpreted abridged the citizens' privileges and immunities in that it taxed bank deposits outside of the Commonwealth owned by residents at a higher rate than those within Kentucky. Incident to holding that the privileges and immunities with which the Fourteenth Amendment is concerned are those of federal citizenship as such and not those of state citizenship, the Court reviewed and overruled the case of *Colgate* v. *Harvey*.[33]

The general effect of this decision is to sustain this residual phase of the Kentucky statute which had not previously been subject to judicial review. Thus, approval of the Commonwealth's policy reflected in a tax five times as high for out-of-state bank deposits as for Kentucky bank deposits, dignifies administrative considerations to an extent that has seldom been evidenced in the decisions of our courts. The basis for this classification is the feasibility of assessing and collecting at its initial source all tax due and the consequent greater fairness of the ten-cent tax than of a higher rate, since the former could not be made applicable to all bank deposits.

A second result of great practical importance is added evidence that the Court of Appeals of Kentucky and the Supreme Court of the United States[34] are disposed to entrust the legislature with responsibility for determining tax policy. So far as Kentucky residents are concerned, it may be reasonably concluded that the general classification statute has been sustained on all important points so far as they relate to the right of the legislature to classify.[35]

II. ASSESSMENT CASES

In examining certain recent decisions concerning valuation for tax purposes, cases arising from property tax administra-

[33] 56 Sup. Ct. 252, 296 U. S. 404, 80 L. Ed. 299, 102 A. L. R. 54 (1939).

[34] Note still more emphatic evidence as to the latter in Wisconsin et al. v. J. C. Penny Co., decided Dec. 16, 1940, 61 Sup. Ct. 246, 85 L. Ed. 222.

[35] There has been no adjudication of a recent statute providing that debit accounts of brokerage houses be classified to be taxed at a lower rate than are other accounts receivable.

tion and others from inheritance taxation are to be considered because, as recently pointed out by the Court of Appeals,[36] the same constitutional principles of valuation are applicable. In general, it is important to keep in mind that the Kentucky statutes authorize judicial review of the facts as well as the law in each taxation case that is, the courts may, if they so elect, review the valuation.

One case is found in the appeal by Dumesnil.[37] In this instance two issues were involved: first, whether or not the application of the inheritance tax to specified insurance policies was valid and, second, whether or not the department erred in valuing certain securities. It is only the second issue that requires consideration. The record disclosed testimony for the taxpayer by a competent expert that he believed the stock primarily in question was worth not more than $90 a share. Three witnesses for the Commonwealth testified, two of them valuation witnesses and the other the inheritance tax supervisor. Both the former had valued the stock at $150 a share and the department, on the basis of that testimony, of evidence that the corporation, the stock of which was involved, had accepted for corporate taxation, a higher valuation, and of a showing that the corporation, in addition to fixed property, had net liquid assets actually worth about $125 a share, found a value of $125 a share. When the Court of Appeals reviewed the finding of the department of revenue, which had been sustained by the trial court, the Court expressed doubt about the valuation but took the position that the action of the Kentucky tax commission "the tribunal on whom is imposed by law the duty of fixing a valuation for tax purposes," should not be set aside in the absence of a clear-cut showing that it had erred and the taxpayer, so it was held, had failed to make such a demonstration.

Even more recently a like result has been reached under somewhat similar circumstances.[38] This case involved the assessment by the same department of distilled spirits in bonded warehouses and sought to have the assessment set aside on the ground that the department had been guilty of constructive fraud. Stored spirits were assessed at $18 a barrel rather than at a

[36] Dumesnil v. Reeves, 283 Ky. 563, 142 S. W. (2d) 132 (1940).

[37] *Loc. cit.*

[38] City of Louisville v. Kentucky Tax Commission, 284 Ky. 490, 144 S. W. 1034 (2d) (1940).

graduated and much higher valuation. The flat-rate assessment had been predicated largely on ease of administration; but it was not made until the department had computed valuations on the basis of a grading plan formerly in use in Kentucky (though not commonly employed in other states). The $18 figure was an approximation of the average which would have been reached on the basis of a graduation of value according to the age of the whiskey. The flat-rate assessment plan had been dropped the previous year on the ground that taxpayers had declined unanimously to consent. In the valuation under attack, however, all the taxpayers had agreed after careful computation that the difference in any particular taxpayer's bill would be insignficant as a result of the changed plan of valuation. For the first year the plan operated, however, it did result in an incidental reduction in the proportion of alcoholic beverages apportioned to Jefferson County and the city of Louisville; and it was on that ground primarily that these taxing districts objected to the valuation. Again the Court of Appeals ruled that it would decline to substitute its own judgment for that of the Kentucky tax commission which is vested by law with administrative responsibility for making the assessment.

The general import of these and related decisions for assessment administration is obvious. In the first place it may be expected that the Kentucky tax commission, knowing that it is held responsible by the courts for accurate appraisals, will continue to exercise great care in arriving at a fair valuation. Since the commission is continuously engaged in the appraisal of property and since it has competent legal, statistical, accounting, and appraisal technicians conveniently at hand, there is little doubt but that the commission's findings, even in doubtful cases, will be more nearly sound from an economic viewpoint than will those arrived at by an appellate court on the basis of a record.

The viewpoint adopted by the Court should eliminate a large proportion of tax litigation which would otherwise occur. Thus, the Commonwealth, as such, enjoys a saving in that it need not bring its judicial machinery into operation to deal with an essentially administrative task. In addition, the individual and corporate taxpayers of the state may secure their rights with greater economy and efficiency and without the undue delays and consequent interruptions of business which grow out of extensive litigation.

So far as the extent of judicial review in Kentucky is concerned, recent decisions, climaxed by the two just cited, have placed the state very nearly in line with the best policy authority. This result has stemmed primarily from the wisdom of the Court of Appeals rather than from statutory restrictions such as authorities on tax policy commend.[39] Perhaps it may be of interest to foot-note this observation by referring briefly to the latest expression by competent authority on this subject.

Some three years ago the president of the National Association of Assessing Officers[40] appointed a committee on Assessment Organization and Personnel composed of four outstanding local assessors and one state assesor with the charge that these five men study the subject fully and report recommendations to the Association's national convention. At the end of three years study, the committee unanimously reported to the Baltimore conference on September 11, 1940; and the report, so far as it concerned judicial review, was adopted without dissent. Among other recommendations are the following, which seem to demonstrate a close conformity—so far as Kentucky legislation permits—between the viewpoint made possible by recent decisions of the Court of Appeals and this nation-wide authority.[41]

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[39] National Association of Assessing Officers' Committee on Assessment Organization and Personnel, Judicial Review Agencies, (1939) 18ff. (and the Association's report on Assessment Organization and Personnel (1940), sec. IX); Kentucky Efficiency Commission, Revenue and Taxation (1923), 97-98; Ohio Tax and Revenue Commission, Preliminary Report of General Findings and Recommendations (1938), 7; M. S. Culp. *Administrative Remedies in the Assessment and Enforcement of State Taxes,* 17 North Carolina Law Review, 130 (1939); National Industrial Conference Board, State and Local Taxation of Property (1930), 65; National Association of Assessing Officers, Assessment Principles (1939), 100.

[40] Himself (John A. Zangerle) an outstanding practical assessor as well as a writer on property appraisal whose name is synonymous with preeminence.

[41] The committee makes acknowledgment in the preface to its report on Judicial Review Agencies (1939) to: "The following authorities in aministrative and tax law: Professors R. C. Brown, Indiana University (chairman of the American Bar Association Committee); Maurice S. Culp, Emory University; Amos H. Eblen, University of Kentucky; Ralph F. Fuchs, Washington University; Spencer D. Parrott, Syracuse University; and Henry Rattschaeffer, University of Minnesota."

"Where there is a competent administrative review agency on the state level, its determination of questions of fact should be final if supported by substantial evidence . . .

"Exhaustion of administrative remedies should . . . be required as a condition precedent to judicial review of question of law involving valuation of property.

"The judicial concept of constructive fraud should be restricted by statute to a showing of discrimination and should not extend to a mere showing of overvaluation."

The committee comments on the recommendations as follows:

"It is believed that the courts themselves would welcome the adoption of these recommendations. Many of them have displayed marked reluctance to enter the valuation field and have given effect to factual findings of the administrative review boards whenever they could do so in good conscience. Our proposals would relieve the judiciary of an onerous duty, terminate a certain amount of inexpert tinkering with assessed valuations, and contribute to a general strengthening of the administrative review process by concentrating responsibility and focusing attention upon the administrative agency."[42]

This reference to recent assessment cases would not be complete without some consideration of the McCracken County cases.[43] In essence the court held in these that, since the course of judicial review was specified by statute to lie from the board of supervisors to the quarterly court, the findings of the latter, being a judicial process, were final if not appealed within the time prescribed by law. Therefore, it was determined, an equalization order raising assessments in the county generally was inapplicable to such property as had been valued by order of the quarterly court. The law, the court found, did not treat the order of the county judge as a finding of valuation *in relation to the appraisals of other property* but as an *absolute* finding of 100 per cent of market value.

One consequence of this definition of the law is well illustrated in the McCracken County situation. The collection of data regarding valuations in the county showed the average to be about 73 per cent of market value.[44] If the county judge *actually* fixed values at 100 per cent of market value, then the practical result in the absence of a subsequent adjustment by

[42] National Association of Assessing Officers, Assessment Organization and Personnel (1940), sec. IX.

[43] McCracken Fiscal Court v. McFadden, Reynolds v. Miller, 275 Ky. 819, 122 S. W. (2d) 761 (1938).

[44] Kentucky Department of Revenue, Assessment of Real Property in Kentucky Counties (1939), 50. These data were not available at the time the equalisation order was entered, but other evidence indicated gross undervaluation.

the department of revenue would have been a valuation figure for the property of those who appealed about 37 per cent higher than the average assessed value of other property. If, on the other hand, the quarterly court *actually* fixed the valuations on these particular parcels at about the average level, that is about 73 per cent, then the consequence of the law is to give the person who appealed a *final* valuation which would have to be increased 15 per cent to bring it to a parity with the effective assessment on other property.

A second practical consequence of the decision stems from a type of abuse resorted to by certain property owners in a minority of the counties where county judges can be imposed on. Some property owners in counties having a quarterly court inadequate to the occasion have made a sort of racket out of appeals to the court. It is true, this practice depends for success on the weakness or collusion of the county attorney. Hereafter, however, the incentive for such a practice will be even greater in those counties which insist annually on an equalization order from Frankfort. Admittedly, the number of counties in which such a practice is possible is limited.

As a third consequence, the situation seems to require legislative correction. If one may accept the finding of the National Association of Assessing Officers,[45] the correction should be sought by providing that review orders of the local board of supervisors be subject to administration review by the department of revenue along with equalization proceedings—and not subject to action by the county judge. The findings of the department would in the absence of other legislation, of course, be subject to judicial review as are all valuations by state tax officials. It is worthy of note that the department of revenue, on its own motion, may now review findings of the county boards of supervisors regarding individual properties if there is no appeal to a court.[46]

[45] Assessment Organization and Personnel (1940), sec. VIII.
[46] Carroll's Kentucky Statutes, 1936 ed., sec. 4114i-16. Cf. Perry County v. Kentucky River Coal Corporation, 274 Ky. 235, 118 S. W. (2d) 550 (1938).