

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1948

The Constitutionality of Certain Indirect Approaches to Raising the Assessment Level

Elvis J. Stahr Jr.

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Stahr, Elvis J. Jr., "The Constitutionality of Certain Indirect Approaches to Raising the Assessment Level" (1948). *Articles by Maurer Faculty*. Paper 2309.

<http://www.repository.law.indiana.edu/facpub/2309>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

The Constitutionality of Certain Indirect Approaches to Raising the Assessment Level

By ELVIS J. STAHR, Jr.

EDITOR'S NOTE: Mr. Stahr is Dean of the University of Kentucky College of Law and a member of the Kentucky and New York bars. He holds A.B., B.A. in Jur., B.C.L., and N.A. degrees.

It seems plain common sense that among the most effective methods the legislature might employ to effect the raising of assessments toward the goal of fair cash value would be the enactment of statutes giving practical incentives to property owners and to local assessment officers to start raising the level of assessments at the grass roots. The constitutionality of several types of such incentives will be considered briefly in this article, which is a summary of longer memoranda of law.

I

May the legislature prohibit the writing of *property insurance* in amount greater than the *assessed value of the property to be insured*? It is believed that it could constitutionally do so, for several reasons.

(a) *Public policy.* Equitable assessment of property for tax purposes, which does not now exist in Kentucky, but which would indisputably be in the public interest, can only be achieved by adopting the same standard throughout the state. The standard prescribed by section 172 of the Kentucky Constitution is fair cash

value. A statute whose object was to aid in achieving that standard would seem to have overriding considerations of public policy in its favor.

(b) *Constitutional mandate.* It is the duty of all branches of the state government to give effect to the state Constitution. A statute which sought to implement an express mandate (section 172) of that Constitution, even by indirection, would be entitled to the most favorable possible consideration by the courts.

(c) *Power of legislature to limit corporate powers.* The powers of domestic corporate insurers are limited to those set forth in their charters, and those of foreign corporate insurers to those permitted by the laws of the state where they seek to do business. In Kentucky, the powers of the latter may not exceed those of the former (Constitution 202; *Allin v. American Indemnity Co.*, 246 Ky. 396). The powers of both may be restricted or revoked by the legislature at any time. Constitution 37 provides that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment." See *Orient Ins. Co. v. Dags*, 172 U. S. 557.

Hence it would seem that limits on the amount of insurance which companies may lawfully write on any one piece of property may be set by the legislature, in the exercise of its power to amend or revoke corporate powers and privileges. The only specific constitutional restriction is that it must act through a general law (Constitution 59 [17]).

A puzzling question as to the state's power to regulate foreign insurance corporations has existed since the decision, in *U. S. v. South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), that insurance business is interstate commerce when carried on across state lines. A careful study of the McCarran Act (15 U. S. C. 1011-1015), together with subsequent Supreme Court cases involving the point, leads to the conclusion that, so long as Congress refrains from regulating interstate insurance business, the states will retain their previous power to do so, in all respects involved in the instant problem. See 164 A. L. R. 500 and 34 A. B. A. J. 539.

(d) *Police power of legislature to regulate insurance.* The Constitution of Kentucky does not mention insurance, hence contains no specific limitation on the power of the legislature to regulate it. Insurance is a business affected with a public interest and therefore may be regulated in the exercise of the police power. "Corporations engaged in the business, both domestic and foreign, must conform their business and contracts to the provisions of the statutes in the states where they do business. . . . This power . . . to regulate the business of insurance is very broad." See 1 Couch on Ins., sec. 244, and cases there cited.

Virtually every aspect of the business has been subjected to regulation by statutes of the various states, and their constitutionality has been upheld. See 36 A. L. R. 1512 and 72 A. L. R. 1173. A statute may limit the extent

of risk in any one policy (32 C. J., p. 983, 44 C. J. S., p. 522; *Glens Falls Ins. Co. v. Hawkins*, 126 S. W. 1114). The amount of new business an insurance company may do may be limited by statute (*Bush v. New York Life Ins. Co.*, 119 N. Y. Supp. 796). Limitation of risks has been said to be constitutional in opinions of the Supreme Court (*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389; *National Ins. Co. v. Wanberg*, 260 U. S. 71). The right of the state to guard against overinsurance has also been recognized (1 Couch on Ins., sec. 74b; see *Hartford Live Stock Ins. Co. v. Gibson*, 256 Ky. 338).

It might be argued that the legislature, in enacting the type of statute under consideration, had violated section 1 (5) of the Kentucky Constitution, which provides that all men have the inherent and inalienable right "of acquiring and protecting property." But does this mean the state is compelled to permit a citizen to "protect" more taxable property than he is willing to pay taxes upon? It must be remembered, too, that, in regulating insurance, the legislature may abridge the liberty of contract of both insurer and policyholder. *Hartford Live Stock Ins. Co. v. Gibson*, *supra* ("Contract rights are not absolute but must yield to the public good"); *Hartford Accident Co. v. Nelson County*, 291 U. S. 352 ("The business of insurance is one peculiarly subject to supervision and control . . . Liberty of contract is not an absolute concept. It is relative to many conditions of time and place and circumstance. The constitution has not ordained that the forms of business shall be cast in imperishable moulds"—per Cardozo, J.); *Kenton, etc., v. Goodpaster*, 304 Ky. 233 ("Because of the public interest an insurance company and its policyholders do not have the inviolate rights which characterize private contracts.")

Two excellent pronouncements on the limits of the police power in regu-

lating insurance are the opinion of the Supreme Court in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, and the opinion of Commissioner Stanley of the Court of Appeals in *Kenton, etc., v. Goodpaster, supra*. Both should be carefully studied, though space does not permit lengthy quotation from them here.

(e) *The power to regulate insurance may be exercised in indirect aid of another power.* This proposition has already been sustained in Kentucky. Everyone is familiar with the common type of statute prohibiting a murderer from collecting the proceeds of his victim's insurance, but I refer more particularly to such statutes as *KRS 281.450-470*, requiring certain insurance policies on taxicabs and city busses to conform to certain standards, and providing that insurance companies shall not be relieved of liability on such policies until the expiration of a fixed period after notification to the state of intention to cancel, *regardless of any contract between the parties*. These statutes were held constitutional and applied in *Maryland Casualty Co. v. Baker*, 304 Ky. 296, wherein Judge Dawson wrote:

" . . . These statutes were enacted by the legislature in the exercise of its police power for the safety and protection of the public in its transportation dealings with common carriers or operators of motor vehicles for hire upon the highways of the Commonwealth. . . . The policies involved here were executed in order that the taxicab owner might retain his permit and continue the operation of his business, and the policies and the statutes must be read and construed together. . . . As a general rule statutory requirements are to be considered in construing contracts of insurance, and mandatory statutory provisions must be read into the policies [citing

cases]; . . . and where restrictive provisions of a liability policy conflict with statutory requirements, the statute must control." (Emphasis added.)

Equally or more significant is the case of *Gross v. Commonwealth*, 256 Ky. 19, which dealt with the constitutionality of *KRS 281.080*. The Court wrote in part: "The appellant attacks the constitutionality of this quoted provision . . . for the reason, he contends, that . . . the Legislature . . . is without power to delegate the wide, unbridled authority which it possesses to legislate to a subordinate commission, which is here attempted, he asserts, in this act in delegating to the tax commission the undefined and unlimited authority to fix the amount of the insurance to be carried by taxi owners 'in such penal sums or maximum amounts as said Commission may deem necessary,' etc. . . . However, we do not agree that . . . the statute here attacked is to be held invalid. . . . [The statute] clearly represents an exercise by the Legislature of the state's police power to regulate and govern the transportation for hire of persons and property by motor vehicles on the state's public highways, for the protection of the interests and welfare of its thus traveling citizens. The means adopted by the Legislature for their protection in the exercise of this police power, so long as they have an ascertainable relevancy to the object sought, are within the scope of that power." (Emphasis added.)

The important point is that the Court clearly recognized that the legislature could fix the amount of insurance to be carried, and the main issue was merely whether it could delegate that power. The Court held it could. The regulation of insurance was held a valid, constitutional means of aiding the police power to promote safety on the highways. No ascertainable reason exists why regulation of

insurance could not be a valid means of aiding the taxing power as well, or of aiding in implementing the express constitutional mandate regarding assessments. As a matter of fact, the taxing power has frequently been declared by the courts to be a supreme attribute of sovereignty, as is the police power.

(f) *If doubt exists as to the constitutionality of a statute*, it will be resolved in favor of validity. This is a maxim too well known to require documentation here.

(g) *A statute limiting the amount of risk* would be no more "unreasonable" a regulation than existing valued policy statutes or statutes regulating amount of premium, amount of proceeds payable, amount of reserves, amount of dividends, kinds of investments, or amount of deposits, or prohibiting discrimination in rates, rebates, and so on. Yet all these things have, over and over, been held constitutional. The statute under consideration would be in the public interest and reasonably calculated to assist in attaining the public goal of fair value assessments for tax purposes. That is sufficient in the circumstances.

Incidentally, the scope of any such statute would presumably be limited to insurance on real property improvements.

II

A less stringent incentive than that just considered might be provision for the creation of a legal or administrative presumption that, where property is insured, the "fair cash value" is not less than the value for which it is insured. The presumption is reasonable in fact, and no serious constitutional question would seem to arise if the statute were properly framed and if the presumption were made rebuttable.

III

Another effective method for indirect stimulation of local assessments might be to distribute state financial aid for local schools derived from the so-called school equalization fund on some basis which would reflect directly the extent to which the local units are helping themselves by meeting certain minimum requirements as to assessment. For instance, it might prove effective to distribute this aid on the basis of the extent to which the local unit is approaching assessment at 100 per cent of market value. A formula for determining the amount of aid in proportion to the improvement in assessment could be worked out by comparing the amount of revenue produced locally at the existing ratio to full value with the amount which would be raised by a 100 per cent valuation. There would seem to be no constitutional obstacle to the use of this or any other method inasmuch as the only pertinent provision, section 186, as amended in 1940, provides:

" . . . the General Assembly shall by general law prescribe the manner of the distribution and use of the public school fund for public school purposes. Provided that each school district in the Commonwealth shall receive on a census pupil basis its proportionate part of at least ninety per cent of any fund accruing to the school fund. *The remainder of any fund accruing to the school fund may be distributed upon other than a census pupil basis.*" (Emphasis added.)

Further, at the present time KRS 157.053 requires the Kentucky Tax Commission to certify to the State Board of Education that any board of education applying for aid from the equalization fund has a ratio of assessed valuation of property to fair cash value equal to the average ratio throughout the state. This statute, enacted in 1942, has not been challenged

and there is no reason to believe that the formula provided therein or any other would make similar legislation unconstitutional. Any doubt, that the purpose of the 1940 amendment to section 186 creating the equalization fund and permitting it to be distributed on other than a census pupil basis was to leave the legislature unrestricted in the matter is dispelled by the opinion in *Talbott v. Kentucky State Board of Education*, 244 Ky. 826, which hastened the adoption of the amendment by deploring in no uncertain terms any constitutional restrictions on distribution of state aid to schools.

IV

Under present practice, railroad property and public service corporation franchises are valued by the Department of Revenue at "fair cash value." This valuation is then reduced to a figure—now 80 per cent—which is supposedly the average of assessment ratios for all counties. The reduced valuation is then allocated by standard rule and certified to the local taxing districts which assess taxes on that valuation regardless of whether the local assessor is assessing other property in the district at a 40 per cent or 100 per cent ratio. As a result counties with low ratios actually take tax money away from hard-pressed counties with high ratios.

It would seem fairer to equalize after allocation. In addition to being fairer, equalization after allocation would provide some incentive for counties with low assessment ratios to bring them up to the state average. Could the Department of Revenue value such property at full cash value, allocate it to the counties and then require the local taxing authorities to equalize this property at the local rate before assessing the tax against it? Could the Department at the same time assess for state taxes on the same basis or on full value as reduced under the present formula? These

problems are not simple, but it is submitted that the proposals may be found to satisfy the Constitution.

At one time there was no equalization of railroad property with locally assessed property, and the Court of Appeals held that the resulting denial of equality did not prevent the 100 per cent assessment of railroad property (*Louisville Ry. v. Commonwealth*, 105 Ky. 710). The Supreme Court of the United States, however, sustained an injunction a few years later in *L. & N. R. Co. v. Greene*, 244 U. S. 499, on the ground that the systematic assessment of railroad property at 75 per cent by the state while local property was assessed at 52 per cent was discriminatory. Ever since that time there has existed an uneasy truce under which the Department in its valuation takes the average assessment ratio sufficiently into account to prevent the utilities from objecting. It is submitted that the rule of the *Greene Case* would be equally well satisfied by requiring the utility to resort to the county equalization board for equalization. If the Department itself puts such an equalization into effect in advance of certification there would seem to be no objection insofar as local taxes are concerned.

If the *state* property tax were also assessed on the basis of the total of the equalized allocations, it might raise some question of uniformity (see *Mobile R. Co. v. State Tax Comm.*, 374 Ill. 75, and J. W. Martin, *Research Report to the Virginia Public Service Tax Study Committee*, p. 85), although that question would appear to be little, if any, more serious than uniformity questions which might be raised with respect to the present procedure. If the state tax continued to be levied on the basis now used (average of county ratios), there would seem to be no new constitutional objection arising from the fact that a different system was used for equalizing local taxes.