# *Recent Case Notes*

CENSUS—POWER OF THE DIRECTOR OF CENSUS TO PUBLISH THE POPULATION OF CITIES.—An interesting attempt to force the Director of Census to lend his aid to the cause of competitive city advertising is to be found in a recent case in the District of Columbia Court of Appeals. In 1929 the Georgia Legislature created the "municipality" of Atlanta, comprising an area of approximately 184 square miles, of which the former city of Atlanta was one borough. Although a semblance of central government was established, the autonomy of the various boroughs was left practically uncurtailed. In a preliminary bulletin the Director of the Federal Census published the population of Atlanta as 270,367, with a footnote describing the Act of the Legislature and giving the total population of the municipality as 360,692. The relators, including newspaper, hotel, and furniture corporations, sought a writ of mandamus to compel the director to publish the population of Atlanta as 360,692 in future bulletins. It was held that, although the exercise by the legislature of its exclusive power and discretion to create municipalities is not to be questioned by the Director of Census, mandamus would not lie for reason that the latter had neither power nor authority to publish the population of cities. *United States ex. rel. Atlanta v. Steuart, Director of Census*, U. S. Daily, Oct. 28, 1930, at 2696 (Ct. of App. D. C. 1930).

It is well settled that mandamus will not issue to compel an officer to carry out an act which he has no power or duty to perform.[1] But the application of the rule to the instant case is doubtful. The Federal Constitution empowers Congress to provide for the decennial enumeration of the people of the United States[2] and by the Census Act of 1902 the Director of Census "is authorized and directed to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law,"[3] and to collect and publish "social statistics of cities."[4] Although there have apparently been no decisions interpreting the phrase "social statistics of cities," the authority and duty of the Director to publish preliminary bulletins has been judicially construed to include the publication of statistics concerning such political units as cities.[5] And state legislatures, in providing for the status of various political units, have relied on the duty of the Director to publish such statistics.[6] Likewise various courts have taken judicial notice of such statistics as being prepared under provision of law.[7] Furthermore a

[1] Ex parte Cutting, 94 U. S. 14 (1876); 2 BAILEY, HABEAS CORPUS (1913) 781.

[2] Art. 1, § 2.

[3] 32 STAT. 53 (1902); 13 U. S. C. § 4 (1926).

[4] 32 STAT. 52 (1902); 13 U. S. C. § 111 (1926).

[5] Childers v. Duvall, 69 Ark. 336, 340, 63 S. W. 802, 803 (1901) (interpreting section of Act of 1899 which was incorporated in the Act of 1902); Holcomb v. Spikes, 232 S. W. 891, 894 (Tex. Civ. App. 1921).

[6] State ex rel. Kilfiker v. Seaton, 191 Iowa 81, 181 N. W. 796 (1921); Commonwealth ex rel Woodring v. Walter, 274 Pa. 553, 118 Atl. 510 (1922).

[7] Brown v. Reeves, 129 Miss. 755, 92 So. 825 (1922); Stratton v. Oregon City, 35 Ore. 409, 60 Pac. 905 (1900). But *cf.* 5 WIGMORE, EVIDENCE (1923) § 2577, n.4 (refers to 3 *ibid*, § 1671, where it is pointed out that the courts usually confuse judicial notice with admission of evidence).

liberal construction of the Census Act has been considered desirable by a federal court for the reason that it is necessary to know something beyond the fact that the population of each state reaches a certain limit.[8] Thus it would seem that the decision of the instant court that the Director was neither authorized nor required to publish the population of cities is difficult to justify. Yet the case achieves a desirable result in denying judicial assistance to civic jealousy and negativing the possibility of states vying with one another in creating weird types of municipalities in order to place their cities a few notches higher on the Census List. But it is thought that the same result could have been reached without disturbing the status quo of the Census Director by dismissing the case on the ground that mandamus issues only in cases of necessity to prevent injustice or great injury.[9] Furthermore, although the power of a state to define the limits of a municipality for purposes of local government may be supreme,[10] the court might well have decided that in the compilation of statistics the Director of Census is invested with the discretion of defining the limits of a municipality for the purpose of insuring some reasonable comparability of the population of different cities.

CORPORATIONS—PROPRIETY OF DEDUCTION OF CHARITABLE BEQUESTS ON INCOME TAX RETURNS.—Three recent cases raise the timely question of the propriety of deduction by a corporation of the amount of its charitable contributions from its gross income in making income tax returns. In the first the petitioner, a manufacturing company employing one half of the city's wage earning population, contributed 36% of the total of a civic improvement fund. An order of the Board of Tax Appeals disallowing a claim for a refund of the income tax paid by the petitioner on that contribution was reversed, the court holding that such a contribution was deductible from gross income as an "ordinary and necessary expense incurred in carrying on trade or business" within the meaning of Section 234 (a) (1) of the Revenue Act of 1918.[1] *American Rolling Mill Co. v. Commissioner of Internal Revenue*, 41 F. (2d) 314 (C. C. A. 6th, 1930). In the second of the cases the petitioner, a manufacturing company, made two donations of $50,000 each to a trust fund established by it to aid its employees in time of emergency and illness, the trustees being given authority to use the funds for any charitable or educational purpose which in their judgment would benefit the petitioner's employees. An order of the Comsioner of Internal Revenue disallowing a claim under Section 234 (a) (1) of the Revenue Act for a deduction of the contribution was reversed, even though the trustees were authorized to spend the income of the trust for objects which would not be deductible if made directly by the corporation. *Forbes Lithographe Manufacturing Co. v. White, Collector of Internal*

[8] See United States v. Moriarity, 106 Fed. 886, 891 (C. C. S. D. N. Y. 1901).

[9] State, relation of McClellan v. Graves, 19 Md. 351 (1862) (opening of street refused); State ex rel. Attorney General v. The Kansas City, St. Joseph & Council Bluffs R. R., 77 Mo. 143 (1882) (undoubted legal right for trains to run refused in judicial discretion); HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896) § 9. But *cf.* BAILEY, *op. cit. supra* note 1, at § 201.

[10] Sharpleigh v. San Angelo, 167 U. S. 646, 17 Sup. Ct. 957 (1897); Kirkpatrick v. State, ex rel. McKee, 5 Kan. 673 (1868); 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 66; 1 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 182.

[1] 40 STAT. 1077 (1918).

*Revenue*, 42 F. (2d) 287 (D. Mass. 1930). In the third of these decisions, the petitioning corporation, in order to preserve the "good will" of its customers, and at their solicitation, made various contributions to local funds and organizations. The Board of Tax Appeals held that such contributions were deductible from the petitioner's taxable income as necessary expenditures. *Killian Co. v. Commissioner of Internal Revenue*, 20 B. T. A. C. C. H. Vol. III (1930) § 7537, C. C. H. Vol. II (1930) § 5697.

Where the employees of a corporation represent a large proportion of those likely to be benefited by the corporation's donations to churches, hospitals and other organizations, such donations are deductible as necessary expenditures.[2] Likewise if corporate contributions are made to benefit projects which may usually be expected to stimulate the business of the donor and bear a sufficiently direct relation to that business, they are also deductible.[3] In the instant cases the foregoing requirements were viewed with considerable liberality.[4] Balancing the outlay against the benefits

[2] Superior Pocahontas Coal Co. v. Com., 7 B. T. A. 380 (1927) (75% to 90% of congregation of donee church were employees of donor); Appeal of Poinsett Mills, 1 B. T. A. 6 (1924). *Cf.* E. M. Holt Plaid Mills Inc. v. Com., 9 B. T. A. 1360 (1927) (not deductible where petitioner's employees represented only 25% of congregation of donee church); Boucher-Cortright Coal v. Com., 7 B. T. A. 1 (1927). But *cf.* Corning Glass Works v. Lucas, 37 F. (2d) 798 (Ct. of App. D. C. 1929) (hospital contribution deductible although employees only 15% of town's population).

[3] Appeal of Anniston City Land Co., 2 B. T. A. 526 (1925) (real estate company contributed to fund for purchase of land for army camp); Merchants Transfer & Storage Co. v. Com., 17 B. T. A. 290 (1929) (contribution by baggage transfer company to Shriner's convention fund). But *cf.* Majors Co. v. Com., 5 B. T. A. 260 (1926) (contribution by bookstore serving donee university not deductible because "not made in connection with the operation of taxpayer's trade"); Appeal of Thomas Shoe Co., 1 B. T. A. 124 (1924) (donation by wholesale shoe company to purchase land for naval ordnance plant non-deductible). The relationship between the contribution and the donor's business is not of necessity considered to be direct simply because a benefit is derived. See Appeal of Bell-Rogers & Zemurray Co., 4 B. T. A. 687 (1926) (contribution by wholesale fruit company to purchase land for army camp held not deductible even though business was increased fourfold); Anniston Auto Co. v. Com., 4 B. T. A. 689 (1926).

[4] In the Forbes case the company contributed to the neighborhood Y. M. C. A. *Cf.* Appeal of Corso Paper Co., 3 B. T. A. 28 (1925) (contribution to build a hospital, the city having no modern hospital at all, not deductible). In the American Rolling Mills case contributions were made to the Boy Scouts, Girl Scouts, Public Library, Girls Club, Community Building and American Legion. *Cf.* E. M. Holt Plaid Mills Inc. v. Com., *supra* note 2 (donations to Boy Scouts and Red Cross not deductible); Fire Companies Building Corporation v. Com., 18 B. T. A. 1258 (1930) (even though employees of petitioner were always sent to donee hospital, petitioner's contribution, without which hospital could not carry on, was held not deductible); Appeal of David Baird & Sons, 2 B. T. A. 901 (1925) (contributions to highway fund to repair roads used by donor's employees not deductible). In the Killian case contributions were made to Coe College, to funds to bring conventions to Cedar Rapids, to church, social, literary and musical organizations. *Cf.* Stephens Fuel Co. v. Com., 13 B. T. A. 666 (1928) (contributions to various organizations at request of customers to retain good will disallowed); Majors Co. v. Com., *supra* note 3.

reasonably to be expected, the courts were satisfied that the business interests of the donors would be advanced and that sufficed. The only reason for limiting a corporation's freedom from taxation on its donations more strictly than that of an individual is to effectuate a restraint upon such corporations as might give away the corporate funds to the detriment of stockholders.[5] Accordingly, if a donation does not violate the rights of the stockholders by exceeding the powers of the corporation to use its funds for purposes outside the usual course of business, it should be held deductible. The cases indicate that in the absence of express charter limitations a corporation possesses the power to use its funds for semi-eleemosynary purposes if a benefit is reasonably to be expected from such use.[6] It seems clear that the liberal results reached in the instant cases are consistent with the purposes of the law in question and in line with the allowance to corporations of broad incidental powers.

EVIDENCE—EXCEPTIONS TO THE HEARSAY RULE IN PROVING DISPUTED BOUNDARY.—In an action against the town to quiet title to a certain strip of beach the defense offered the testimony of one Henry Sherwood in support of its contention that the disputed premises were public lands. The witness was asked, "Have you ever talked with any other aged men, now dead, or have you heard any other aged men make any statements concerning the general reputation as to the particular beach that I have just described to you?" He replied that when disputes had arisen as to public rights in various pieces of property in the neighborhood his father and grandfather used to say, "Well, there are two places where we will never be barred out; one is Cedar Point and the other is Compo Mill Beach." Laurence Donahue, also a witness for the defense, testified that one Aaron Sherwood, previously deceased, who had lived near the disputed property all his life had pointed out to him the boundary claimed by the defendant and told him that that was the boundary line. On appeal it was held, *inter alia*, that the court did not err in admitting the testimony of the witness Henry Sherwood, as both question and answer properly reflected the principle upon which reputation evidence is admissible. Donahue's testimony was likewise held admissible on the ground that the difficulty of proving private boundaries furnishes the indispensable and urgent necessity for the admission of declarations of the deceased in respect to them. *Borden v. Town of Westport*, 151 Atl. 512 (Conn. 1930).

In the United States the reported statements of deceased persons are admissible as evidence of reputation in both public and private boundary disputes.[1] The declaration must purport to be a statement of the com-

[5] See Corning Glass Works v. Lucas, *supra* note 2, at 800.

[6] Richelieu Hotel Co. v. International Encampment Co., 140 Ill. 248, 29 N. E. 1044 (1892) (contribution by a hotel company to aid in establishing nearby encampment); Huntington Brewing Co. v. MacGrew, 64 Ind. App. 273, 112 N. E. 534 (1916) (contribution by brewing company to organization engaged in promoting the growth of commerce and industry in city); Temple St. Cable Reg. Co. v. Hellman, 103 Cal. 634, 37 Pac. 530 (1894) (traction company gave note to induce establishment of baseball park near lines); Steinway v. Steinway, 17 Misc. 43, 40 N. Y. Supp. 718 (Sup. Ct., 1896) (funds given for churches, library, streets and sewers by a corporation); People ex rel. Metropolitan Life Ins. Co. v. Hotchkiss, 136 App. Div. 150, 120 N. Y. S. 649 (3d Dep't 1909) (maintenance by insurance company of hospital for care of employees).

[1] For a general discussion of reputation evidence, see 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1582ff.

munity reputation of which the speaker is merely the mouthpiece;[2] and statements which are merely individual assertion are rejected.[3] Although the declarations reported in the testimony of Henry Sherwood are labelled evidence of reputation by the court, actually they seem no more than assertions of fact. The question then arises whether these declarations are admissible, as was the statement reported by the witness Donahue, under another exception to the hearsay rule whereby, in many American jurisdictions, certain individual assertions of the deceased may be received in evidence in private boundary disputes.[4] The admission of the declarations under this exception, however, is doubtful, since in such cases courts require that the declarant shall have had peculiar means of knowledge of the matter in controversy and no motive to misrepresent.[5] So, the reported declaration of one who surveyed the land,[6] a chain carrier in the survey,[7] and one who owned adjoining land,[8] have been admitted. The Massachusetts rule goes so far as to require that the declarant must have been an owner of the property and on the land engaged in pointing out the boundary when the statement was made, although most jurisdictions exclude an owner's statement as self-serving.[9] No case ruling directly upon the question of knowledge appears to have gone as far as the present one admitting the reported declaration of a declarant who lived "very near" the disputed property. Illustrative in both its holdings of a modern tendency to break down the dividing lines of the orthodox exceptions to the hearsay rule,[10] the principal case may even represent an approach to the position advocated by Wigmore that all declarations of deceased persons be admitted in evidence.[11]

INTERNAL REVENUE—JURISDICTION OF CIRCUIT COURTS OF APPEALS TO REVIEW SPECIAL ASSESSMENT RULINGS OF THE BOARD OF TAX APPEALS AND THE COMMISSIONER OF INTERNAL REVENUE.—The petitioner claimed that it was entitled to a special assessment under Sections 327 and 328 of the Revenue Act of 1918 [40 STAT. 1057, 1093] which empowered the Commissioner of Internal Revenue to impose a tax bearing the same ratio to the net income of the taxpayer as the average tax of representative corporations bears to their net incomes when "unable to determine the invested capital" and upon a finding that unless so assessed the tax would work "an exceptional hardship." The Commissioner's denial of such a claim by the peti-

[2] Regina v. Bliss, 7 A. & E. 550 (1837). See Moseley v. Davies, 11 Price 162, 180 (1822).

[3] Attorney General v. Horner, [1913] 2 Ch. 140 (a map by a private individual does not of itself purport to be a statement of reputation); Brocklebank v. Thompson, [1903] 2 Ch. 344 (written statement of plaintiff's predecessor in title); Regina v. Bliss, *supra* note 2 (oral statement of deceased). But *cf.* Wooster v. Butler, 13 Conn. 309 (1839); Deacle v. Hancock, 13 Price 226 (1824). See Den ex dem. Tasser v. Herring, 14 N. C. 340, 342 (1832).

[4] See WIGMORE, *op. cit. supra* note 1, at § 1562ff.

[5] Turgeon v. Woodward, 83 Conn. 537, 78 Atl. 577 (1910); *cf.* Matthews v. Thatcher, 33 Tex. Civ. App. 133, 76 S. W. 61 (1903); Hadley v. Howe, 46 Vt. 142 (1873).

[6] Sullivan v. Blount, 165 N. C. 7, 80 S. E. 892 (1914).

[7] *Ibid.* See Harriman v. Brown, 8 Leigh 697, 713 (Va. 1837).

[8] Turgeon v. Woodward, *supra* note 5.

[9] See WIGMORE, *op. cit. supra* note 1, at § 1567.

[10] McCormick, *The Borderland of Hearsay* (1930) 39 YALE L. J. 489.

[11] 1 WIGMORE, *op. cit. supra* note 1, at § 8a. The same view is held by McCormick, *op. cit, supra* note 10, at 504.

tioner was sustained by the Board of Tax Appeals, and on appeal to the Circuit Court of Appeals the jurisdiction of that court was challenged by the Commissioner. The court held, *inter alia*, that the Revenue Act of 1926 [44 STAT. 109, 110 (1926), 26 U. S. C. § 1224 (1928)] had conferred upon it jurisdiction to review any decision of the Board. *Ryan Car Co. v. Commissioner of Internal Revenue*, U. S. Daily, Nov. 3, 1930, at 2697 (C. C. A. 7th).

Where there is an asserted deficiency upon which an application for a special assessment is based,[1] the Commissioner's action in allowing or denying[2] such application is subject to judicial[3] review by the Board of Tax Appeals.[4] By the Revenue Act of 1926 power "to affirm . . . modify or reverse the decision of the Board" is vested in the Circuit Courts of Appeals.[5] Thus there is a logical basis for the court's contention in the instant case that it had jurisdiction to review a decision of the Board sustaining the Commissioner's denial of the petitioner's right to a special assessment. But in *Williamsport Wire Rope Co. v. United States*[6] the Supreme Court held that in a suit for a refund[7] based upon a claim of special assessment the Court of Claims had no jurisdiction to review the Commissioners' decision for the reason that such a decision was an act of administrative discretion which, in the absence of fraud or other illegality, could not be challenged in the courts. While that action was instituted prior to the passage of the Act of 1926,[8] the finality of the Commissioner's discretionary decision has been uniformly upheld in original suits for refund[9] and, in two circuits,[10] on appeal from the Board. And the reasoning which

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[1] A deficiency finding is a condition precedent to a review by the Board. 43 STAT. 297 (1924), 26 U. S. C. § 1048 (1928); Appeal of New York Trust Co., 3 B. T. A. 583 (1926); Hudson-Dugger Co. v. Com., 7 B. T A. 357 (1927). A proposed statute has been drafted by the American Bar Association which would give the Board jurisdiction to review the Commissioner's denial of special assessment irrespective of whether a deficiency is involved. (1930) 8 N. I. T. M. 337, 378. A bill to the same effect has been introduced in Congress. Sen. Bill No. 4268; H. R. 12237.

[2] If the tax is assessed under Sections 327 and 328, the amount computed by the Commissioner is evidently also subject to review. See principal case.

[3] See Kahn, *The Status of the United States Board of Tax Appeals as a Judicial Body* (1929) 7 N. I. T. M. 135.

[4] Blair v. Oesterlein Machine Co., 275 U. S. 220, 48 Sup. Ct. 87 (1927).

[5] *Cf.* Old Colony Trust Co. v. Com., 279 U. S. 716, 49 Sup. Ct. 499 (1929). See *The Judicial Status of the Board of Tax Appeals* (1929) 7 N. I. T. M. 175.

[6] 277 U. S. 551, 48 Sup. Ct. 587 (1928).

[7] The Board of Tax Appeals is without jurisdiction to pass upon a mere claim for refund. 45 STAT. 852 (1928), 26 U. S. C. § 2272 (1928); Everett Knitting Works, 1 B. T. A. 5 (1924); BICKFORD, COURT PROCEDURE IN FEDERAL TAX CASES (1928) 11. A statute which would give the Board jurisdiction was approved by the American Bar Association at its 53rd annual meeting in August, 1930.

[8] No reference to this Act was made in the instant case.

[9] Live Stock National Bank v. United States, 36 F. (2d) 334 (C. C. A. 8th, 1929), *certiorari* denied, 281 U. S. 760, 50 Sup. Ct. 459; Ennis Coal Co. v. United States, 37 F. (2d) 574 (C. C. A. 4th, 1930); Brown's "Shamrock" Linens v. Bowers, 41 F. (2d) 862 (S. D. N. Y. 1930); Chicago Frog & Switch Co. v. United States, 7 Ct. Cl. 662 (1929).

[10] Cramer & King Co. v. Com., 41 (2d) 24 (C. C. A. 3d, 1930); Duquesne

induced the Supreme Court in the *Williamsport* case to conclude that the Court of Claims was without jurisdiction to review the decision of the Commissioner would seem to apply to the instant case to limit the scope of appellate inquiries. For the Board, like the Commissioner, is exercising a discretionary [11] authority and acts not as a court but as an administrative agency.[12] From a practical point of view, it is specially qualified by experience and knowledge to pass upon the technical and complex problems necessarily incident to a just determination of special assessment rights. By the intervention of such an intermediate agency, to confer the power of scrutinizing judicially actions otherwise unreviewable in the courts is to create an unwarranted distinction between original and appellate proceedings.[13] Moreover, since the Circuit Court of Appeals is limited in its review to the correction of errors of law [14] and since the reasons influencing the decision of the Board and the Commissioner [15] under the indefinite determinatives prescribed by the Act of 1918 preclude an adequate examination by a court lacking the specialized skill of the Board of Tax Appeals, the decision in the instant case seems particularly unwise.[16]

PRACTICE OF LAW—DOCUMENTS DRAWN BY TRUST COMPANIES.—The Board of Bar Commissioners of Idaho instituted proceedings for an order requiring the defendant trust company and its president to show cause why the company should not be cited for contempt of court in practising and holding itself out as qualified to practice law. The trust company had issued pamphlets advertising itself as a "specialist in drawing trust agreements, declarations of trust and wills," and calendars declaring that it made a "speciality of drawing contracts, deeds and mortgages." The Idaho statutes made the practice of law or representation of legal qualifications without a license an offense punishable by fine, imprisonment or both. It was held that the defendant trust company, in representating itself as qualified to perform the above acts, was practising law in violation of the statutory requirements. *In re Idaho Trust Co.*, 288 Pac. 157 (Idaho 1930).

While it has been consistently held that a corporation cannot practice

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Steel Foundry Co. v. Com., 41 F. (2d) 995 (C. C. A. 3d, 1930) (order denying *certiorari* vacated and rehearing granted. Nov. 24, 1930); Apollo Steel Co. v. Com., 41 F. (2d) 986 (C. C. A. 3d, 1930); Standard Rice Co. v. Com., 41 F. (2d) 481 (C. C. A. 5th, 1930). Only in the last case was consideration given the Act of 1926. *Cf.* Oak Worsted Mills Co. v. United States, 38 F. (2d) 699 (Ct. Cl. 1930), *certiorari* granted, 281 U. S. 717, 50 Sup. Ct. 465.

[11] Standard Rice Co. v. Com., *supra* note 10.

[12] 44 STAT. 105 (1926), 26 U. S. C. § 1211 (1928); Old Colony Trust Co. v. Com., *supra* note 5, at 725, 49 Sup. Ct. at 502.

[13] *Cf.* Standard Rice Co. v. Com., *supra* note 10; James, *Special Assessment Cases in the Courts and in the Board* (1930) 8 N. I. T. M. 287.

[14] Avery v. Com., 22 F. (2d) 6 (C. C. A. 5th, 1927); Bishoff v. Com., 27 F. (2d) 91 (C. C. A. 3d, 1928); Powers Mfg. Co. v. Com., 34 F. (2d) 255 (C. A. A. 8th, 1929); Anchor Co. Inc. v. Com., 42 F. (2d) 99 (C. C. A. 4th, 1930).

[15] Williamsport Wire Rope Co. v. United States, *supra* note 6, at 556, 48 Sup. Ct. at 589. See MONTGOMERY, FEDERAL TAX PRACTICE (1929) 301.

[16] *Cf.* Standard Rice Co. v. Com., *supra* note 10; Magill, *Finality of Determinations of the Commissioner of Internal Revenue* (1930) 30 COL. L. REV. 147.

law,[1] an adequate definition of the "practice of law" has not been advanced.[2] The concept certainly includes more than appearance before a court of record,[3] or the conduct of litigation.[4] According to the definition framed by the United States Supreme Court the practice of law embraces all activity relating to "legal formalities." [5] But the decisions enumerating legal formalities present a "wilderness of single instances." [6] Thus, while negotiations with a magistrate for the release of a prisoner have been held to constitute the practice of law,[7] proceedings taken before a state legislature to secure a pardon have been otherwise interpreted.[8] And a company which had drawn up a bill of sale was acquitted by the New York Court of Appeals,[9] although at the same term that court ruled that the drawing of bills of sale was practicing law.[10] The question as to what constitutes the practice of law has been a constantly recurring one as the profits [11] to be secured by acting as trustee have led more and more modern trust companies to engage in activities commonly performed by lawyers.[12] Moreover the advertisements employed by many trust companies are apt to mislead laymen even if they do not strictly make representations of legal ability.[13] A legalistic solution of the problem, however, has proven ineffectual except in extreme cases.[14] Consequently, trust officers and lawyers have attempted to separate their respective functions in mutual conferences.[15] Committees in state bar associations have also directed their at-

[1] Matter of Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910); Matter of City of New York, 144 App. Div. 107, 128 N. Y. Supp. 999 (1st Dep't 1911).

[2] See E. J. McCULLEN, REPORT TO THE ST. LOUIS BAR ASS'N (Feb. 4, 1929).

[3] Commonwealth v. Barton, 20 Pa. Super. 447 (1902).

[4] In re Duncan, 83 S. C. 186, 65 S. E. 210 (1909).

[5] Savings Bank v. Ward, 100 U. S. 195, 199 (1879).

[6] Jackson, *Functions of The Trust Company in the Field of Law* (1929) 52 N. Y. BAR ASS'N REP. 142; THORNTON, ATTORNEYS AT LAW (1914) § 69.

[7] In re Duncan, *supra* note 4.

[8] Bird v. Breedlove, 24 Ga. 623 (1858); *cf.* State v. Bryan, 98 N. C. 644, 4 S. E. 522 (1887).

[9] People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919). The case turns, perhaps, on the construction of the word "practice" since the defendant company was accused of infrequent acts. That the word "practice" includes more than a single effort, see McCargo v. State, 1 So. 161 (Miss. 1887).

[10] People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919).

[11] See *Committee Report on the Scope and Practice of Law* (1930) 53 N. Y. BAR ASS'N REP. 432; Griswold, *Trust Service and "Practice of Law"* (1929) 48 TRUST COMPANIES 753.

[12] Note (1920) 68 U. of PA. L. REV. 356.

[13] YEAR BOOK, N. Y. COUNTY LAWYER'S ASS'N (1924) 167.

[14] Thus the investment of funds is a legitimate bank or trust function, Commonwealth v. Barton, *supra* note 3, while the drafting of wills and papers of incorporation falls within the lawyer's province, Eley v. Miller, 7 Md. App. 529, 34 N. E. 836 (1893). It would seem, also, that if the document is standardized or the act consists only of filling in blanks a layman might perform the service and therefore a company also. See instant case at 158; Note (1918) 31 HARV. L. REV. 886.

[15] Stark, *When Trust Officers and Lawyers Agree* (1928) 47 TRUST COMPANIES 283.

tention to the problem.[16] In view of the past success of mutual conferences and the willingness of the parties to pursue this program in the future, the conference method appears to be the most satisfactory one for separating the legal and business aspects of the trust transaction,[17] and the instant decision, while of considerable present interest, appears merely to add one more "instance" to the "wilderness of single instances."

PROCEDURE—BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE IN "HIT-AND-RUN" ACCIDENTS.—The plaintiff's decedent, traversing a crosswalk, was struck and killed by a car negligently driven by the defendant, who immediately drove away from the scene of the accident. There were no eye-witnesses and the defendant failed to testify. In an action for damages for wrongful death, the defendant's motion for a nonsuit was granted for lack of direct evidence of due care on the part of the decedent. On appeal, the Connecticut Supreme Court of Errors, although deploring the absence of a "statutory provision . . . to enforce the obviously just requirement that the burden of proof in this particular class of cases be put in effect upon the defendant," went on record as bound to follow the established Connecticut rule as to the burden of proof, and hence forced to affirm the lower court decision (Chief Justice Wheeler dissenting). *Kotler v. Lalley*, 151 Atl. 433 (Conn. 1930).

The incidence of the burden of proof is generally deemed to be a matter of procedural law.[1] Rules of procedural law, when found to work injustice, have frequently been reversed,[2] and the consequent departure from precedent has not been considered an interference with any constitutional right.[3] More particularly, several courts have felt free to reverse, of their own motion, rules governing the burden of proof on the issue of contributory negligence.[4] Furthermore, although authority exists to the effect that the

[16] The Committee on the Unlawful Practice of the Law, of the N. Y. County Lawyer's Association, and the Committee on Illegal Practice of Law by Laymen, of the Missouri Bar Association, are examples.

[17] *Cf. The Practice of Law by Banking Institutions* (1930) 47 BANKING L. J. 819; *Trite Observations on Relationship between Trust Companies and the Legal Profession* (1929) 48 TRUST COMPANIES 235. But *cf.* Dawson, *Frankenstein, Inc.* (Mar. 1930) 19 AM. MERCURY 274.

[1] *Cf.* Southern Indiana R.R. v. Peyton, 157 Ind. 690, 61 N. E. 722 (1901) (retroactive statutes changing burden of proof held constitutional); Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109 (1915) (same); Duggan v. Bay State Ry., 230 Mass. 370, 119 N. E. 757 (1918); Schrader v. New York, C., & St. L. R.R., 172 N. E. 272 (N. Y. 1930); 2 WHARTON, CONFLICT OF LAWS (3d ed. 1905) 1107. See McKean, *The Rule of Precedents* (1928) 76 U. of PA. L. REV. 481, 487; Note (1915) 29 HARV. L. REV. 95.

[2] Perry v. Haritos, 100 Conn. 476, 124 Atl. 44 (1924) (admissibility of evidence); Commonwealth v. Lehigh Valley R.R., 165 Pa. 162, 30 Atl. 836 (1895) (default judgments against corporations for misdemeanor); Rosen v. United States, 245 U. S. 467, 38 Sup. Ct. 148 (1918) (competency of witness); Whitaker v. Lane, 128 Va. 317, 104 S. E. 252 (1920) (evidence of conditional delivery of sealed instrument).

[3] Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619, 34 Sup. Ct. 941 (1914); Kenfield-Leach Co. v. Industrial Publications, 320 Ill. 449, 151 N. E. 239 (1926). *Cf.* Second Employers Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 (1912); Arizona Copper Co. v. Hammer, 250 U. S. 400, 39 Sup. Ct. 553 (1919).

[4] Adams v. Bunker Hill Mining Co., 12 Idaho 637, 89 Pac. 624 (1907); Buechner v. City of New Orleans, 112 La. 599, 36 So. 603 (1904); Hoyt v.

burden of proof is to be regarded as a substantive matter,[5] substantive rights may properly be altered by the overruling of prior decisions.[6] The rule here followed has been widely repudiated elsewhere by legislation[7] or decision.[8] Even a recognition that the procedural handicap, imposed on the plaintiff by the burden of proof of due care, may be both just and politic in the ordinary negligence action does not warrant a judicial extension of the rule to cover the distinctive factual situation presented by the "hit-and-run" accident. The Connecticut court itself has accepted unexplained departure from the scene of an accident, in violation of statutory duty,[9] as evidence of a "consciousness of guilt."[10] And consciousness of guilt or, correspondingly, of liability might well be said to indicate a lack of defenses and thus to amount, in the instant case, to an implied admission that the decedent had not been guilty of any negligence materially affecting the defendant's liability. The instant decision, while allegedly based on the reluctance of the court to alter an existing law, in effect extends to the hit-and-run killer the advantage of a rule heretofore applied only in ordinary negligence actions and in favor of less reprehensible parties. Judicial legislation of this sort is difficult to support, and obviously cannot be justified by the veiled reference in the opinion to the general impropriety of judicial legislation.

SURETYSHIP AND GUARANTY—DEBTOR'S FRAUDULENT CONVEYANCES AS LIMITING RIGHTS OF SURETY.—The plaintiff, payee of an unsecured promissory note endorsed by him before maturity to a third party with a guarantee of payment, brought a bill in equity against the defendant to set aside as fraudulent certain conveyances made by the maker to the defendant. The plaintiff alleged that the note was past due, that he was being pressed for

City of Hudson, 41 Wis. 105 (1876); *cf.* City of Vicksburg v. Hennessy, 54 Miss. 391 (1877); Mississippi Central R.R. v. Hardy, 88 Miss. 732, 41 So. 505 (1906).

[5] The rule of burden of proof enforced by the federal courts is held so far a substantive matter as to be applicable in a case tried before a federal court in a jurisdiction enforcing a different rule. Central Vermont Ry. v. White, 238 U. S. 507, 35 Sup. Ct. 865 (1915); *cf.* Lee v. Central of Georgia Ry., 252 U. S. 109, 40 Sup. Ct. 254 (1920).

[6] Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921) (doctrine of imputed negligence abandoned); Citizens Life Assurance Co. v. Brown, [1904] A. C. 423 (rule as to malicious intent in a corporation reversed); Ashland Finance Co. v. Dudley, 98 W. Va. 255, 127 S. E. 33 (1925) (rule as to priority of liens reversed); Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N. E. 300 (1919) (rule as to effect of release of one of joint tortfeasors reversed); Klein v. Maravelas, 219 N. Y. 383, 114 N. E. 809 (1916) (prior holding as to constitutionality of statute overruled).

[7] N. Y. CIVIL PRACTICE ACT § 265; N. H. PUB. LAWS (1926) c. 328 § 13; MASS. GEN. LAWS (1921) c. 231, § 85; ME. REV. STAT. (1916) c. 87, § 48; IND. ANN. STAT. (Burns, 1926) § 380.

[8] Baltimore & Potomac R.R. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137 (1903); Aubin v. Duluth Street Ry., 169 Minn. 342, 211 N. W. 580 (1926); Casey v. Chicago Railway Co., 269 Ill. 386, 109 N. E. 984 (1915); Wilkins v. Bradford, 247 Mich. 157, 225 N. W. 609 (1929); SHEARMAN AND REDFIELD, NEGLIGENCE (6th ed. 1913) §§ 107, 108; THOMPSON, NEGLIGENCE (Supp. 1907, 1914) § 366.

[9] CONN. GEN. STAT. (1930) § 1584(a).

[10] State v. Ford, 109 Conn. 490, 496, 146 Atl. 828, 829 (1929); *cf.* instant case at 434.

payment, and that unless it were paid by the maker, he would have to pay it. A lower court judgment for the plaintiff was reversed on appeal on the ground that the bill was not one of exoneration to force payment by the debtor or his estate, but was an action to set aside a fraudulent conveyance and that this latter action was available in Idaho only to judgment creditors. *Saunders v. Saunders,* 291 Pac. 1069 (Idaho 1930).

That a surety, guarantor, indorser or accommodation maker of commercial paper need not pay the debt of his principal in order to be discharged from liability is settled law.[1] On maturity of the debt two courses are open to such a party. He may, in jurisdictions recognizing the doctrine of *Pain v. Packard,*[2] compel the creditor to sue the debtor, a failure to sue within a reasonable time discharging the surety.[3] Or, he may bring in equity a bill of exoneration to force the debtor to pay.[4] The instant case involved the availability of this latter remedy when the debtor had conveyed away his assets and thereby insulated himself against attachments. Many statutes require that a petitioner filing a bill to set aside allegedly fraudulent conveyances must be a judgment creditor,[5] while others require only that he be a simple contract creditor.[6] But a surety who has not paid his principal's debt is not regarded as a creditor within either type of statute,[7] although a few special statutes permit a contingently liable surety to file such a bill.[8] The construction of the term "creditor" adopted by the instant court forces a surety to pay the debt before bringing action against a dishonest debtor. Thus a debtor may, by his fraudulent acts, limit the rights of a hard-pressed surety. Though such a holding as that in the principal case may be justifiable in legal theory, certain it is that the surety is denied protection when he needs it most.

TAXATION—CONSTITUTIONAL LAW—INCOME FROM PATENTS AND COPYRIGHTS AS THE MEASURE OF A CORPORATE FRANCHISE TAX.—The federal instrumentality doctrine[1] has recently received consideration and diverse application in two cases involving the power of a state to include in its calculation of the amount of a corporation franchise tax, income derived through royalties from patents and copyrights. In the first case, the Tennessee Supreme Court held that the income of a corporation consisting of

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[1] 2 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 1011; 1 BRANDT, SURETYSHIP AND GUARANTY (3d ed. 1905) §§ 245, 246.

[2] 13 Johns. 174 (N. Y. 1816).

[3] See Comment (1928) 37 YALE L. J. 971 and cases discussed therein.

[4] Thorne v. St. Paul's M. E. Church, 86 Ala. 138, 5 So. 508 (1889); Holcombe v. Fetter, 70 N. J. Eq. 300, 67 Atl. 1078 (1905); Pavarini & Wyne Inc. v. Title Guaranty & Surety Co., 36 App. D. C. 348 (1911); Sassaman v. Root, 37 Idaho 588, 218 Pac. 374 (1923). See also 1 STORY, *op. cit. supra* note 1, at § 571; Note (1910) 9 MICH. L. REV. 237.

[5] Ellis v. Southwestern Land Co., 108 Wis. 313, 84 N. W. 417 (1900); Perkins v. Bundy, 42 Idaho 560, 247 Pac. 751 (1926).

[6] Greene v. Starnes, 48 Tenn. 582 (1870); Smith v. Pitts, 167 Ala. 461, 52 So. 402 (1910); Thuringer v. Trafton, 58 Colo. 250, 144 Pac. 866 (1914); Price v. Engle, 77 Ind. App. 439, 133 N. E. 755 (1922).

[7] Barnes v. Sammons, 128 Ind. 596, 27 N. E. 747 (1891); Severs v. Dodson, 53 N. J. Eq. 633, 34 Atl. 7 (1895); Ellis v. Southwestern Land Co., *supra* note 5; Smith v. Pitts, *supra* note 6. *Contra:* Stump v. Rogers, 1 Ohio 533 (1823).

[8] Greene v. Starnes, *supra* note 6; Walters v. Akers, 31 Ky. Law Rep. 259, 101 S. W. 1179 (1907).

[1] See 2 COOLEY, TAXATION (4th ed. 1924) § 606.

royalties on patent rights was unconstitutionally included in the computation of a state corporate franchise tax. The court regarded the assessment as on income rather than as an excise levied for the privilege of doing business, and consequently, on the authority of *Long v. Rockwood*,[2] affirmed the decree of the chancellor awarding the complainant a recovery for the aggregate of the taxes paid by it. *Quicksafe Manufacturing Co. v. Graham*, 29 S. W. (2d) 253 (Tenn. 1930). Opposed to this decision, is that of the Federal District Court for the Southern District of New York in a very similar case, where a corporation sought to enjoin the Attorney-General of New York from collecting a franchise tax measured by its net income which was derived solely from copyright royalties on motion picture films. The bill was dismissed on the ground that the tax was not levied on income, but was an excise tax, and that the income of the corporation, although derived solely from copyrights, entered into the measure of the tax merely as a casual incident thereof. *Educational Films Corporation of America v. Ward*, 41 F. (2d) 395 (S. D. N. Y. 1930).

The power which both Tennessee and New York here sought to exercise is analogous to that under which states have heretofore computed excise taxes on the basis of income derived from federal securities.[3] The validity of such a method of assessment under the federal instrumentality doctrine was questioned, however, in *Macallen Co. v. Massachusetts*,[4] where it was held that income from such securities could not be used as the measure of a corporate franchise tax. The District Court in the *Educational Films* case distinguished the *Macallen* case on the ground that there the resulting charge against federal securities was not a mere casual incident of the tax but a deliberate attempt of the legislature to reach such securities.[5] Nevertheless, whatever the legislative intent may be, it seems clear that the inclusion of income from non-taxable securities in the measure of a corporate franchise tax actually renders the securities somewhat less valuable to the corporation. It has been suggested, however, that, even conceding this, such indirect taxation places no appreciable burden upon the borrowing power of the United States.[6] The Tennessee court recognized the transparency of the "excise" device, but in doing so lost sight of the major consideration that the applicability of the federal instrumentality doctrine should properly depend upon whether a failure to apply it would result in any detriment to the government.[7] The District Court, on the other hand, by

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[2] 277 U. S. 142, 48 Sup. Ct. 463 (1928) (state income tax on royalties derived from patents held unconstitutional, as being a tax on a federal instrumentality). *Cf.* (1927) 26 MICH. L. REV. 120. But *cf.* (1928) 28 COL. L. REV. 1100.

[3] Society for Savings v. Coite, 6 Wall. 594 (U. S. 1867); Hamilton Co. v. Massachusetts, 6 Wall. 632 (U. S. 1867). See Flint v. Stone Tracy Co., 220 U. S. 107, 163, 31 Sup. Ct. 342, 354 (1910).

[4] 279 U. S. 620, 49 Sup. Ct. 432 (1929). See Note (1930) 43 HARV. L. REV. 280.

[5] As first passed, the statute in the Macallen case expressly exempted income from United States securities. MASS. GEN. LAWS (1921) c. 63, § 30, par. 5, as amended by Mass. Acts 1925, c. 265, § 1. A further amendment shortly thereafter omitting this exemption, the Supreme Court regarded it as the manifestation of an intention to tax such securities. Mass. Acts 1925, c. 343, § 1A. *Cf.* Miller v. Milwaukee, 272 U. S. 713, 715, 47 Sup. Ct. 280 (1927). See (1930) 44 HARV. L. REV. 136.

[6] See Powell, *Indirect Encroachment on Federal Authority by the Taxing Power of the States* (1919) 32 HARV. L. REV. 902, 926.

[7] See 2 COOLEY, *op. cit. supra* note 1, at 606.

its inability to see the tax before it other than as an excise, reached a much more reasonable decision, but likewise failed to note that the inclusion of the income of a corporation within the terms of a state excise tax can hardly be viewed as a discouragement of invention and authorship within the contemplation of the Constitution.[8]

WORKMEN'S COMPENSATION—WORK IN BROADCASTING STATION AS INTERSTATE EMPLOYMENT.—An employee of a radio broadcasting company was engaged in the installation of an ice machine for the proper cooling of radio tubes. While attempting to move the switchboard, an integral part of the transmitting apparatus, he was electrocuted. An order of the lower court denying an application for compensation under the State Workmen's Compensation Act [WASH. COMP. STAT. (Remington, 1922) §§ 7673 *et seq.*] was affirmed on appeal, the court ruling that the employee had been performing work so closely related to interstate commerce as to be a part of it. *Van Dusen v. Department of Labor and Industries*, 290 Pac. 80 (Wash. 1930).

In the absence of federal legislation, the states ordinarily retain jurisdiction over industrial accidents in interstate commerce.[1] The Washington Workmen's Compensation Act, however, specifically excludes from its purview those employees "for whom a rule of liability or method of compensation is now existing under or may be established by the Congress of the United States."[2] Consequently employees of that state engaged in both interstate and intrastate,[3] or wholly in interstate service, other than rail transportation,[4] are subjected to all the ancient common law defenses peculiar to actions to recover for accidents occurring while at work.[5] Thus the question whether the special employment at the time of an injuiry was of an

[8] UNITED STATES CONSTITUTION, art. 1, § 8. It might be argued, that if the computation of a corporate franchise tax on the basis of income from copyrights or patents would diminish corporate profits to the extent that a corporation would pay an author or inventor less for the use of his works, the pecuniary incentive of the latter to produce would be lessened, and the purpose of this clause of the constitution defeated. But such a possibility seems too remote to be reasonable. See (1930) 40 YALE L. J. 136; (1930) 30 COL. L. REV. 1070.

[1] Valley Steamship Co. v. Wattawa, 244 U. S. 202, 37 Sup. Ct. 523 (1917); Western Union Telegraph Co. v. Byrd, 155 Tenn. 455, 294 S. W. 1099 (1927). See Wagner v. Chicago & Alton Ry., 265 Ill. 245, 251, 106 N. E. 809, 812 (1914); DAVIS, AERONAUTICAL LAW (1930) 320.

[2] WASH. COMP. STAT. (Remington, 1922) § 7695. For similar provisions see KAN. REV. STAT. ANN. (1923) c. 44, § 506; MICH. COMP. LAWS (Cahill, 1915) § 5491; N. Y. CONS. LAWS (Cahill, 1930) c. 66, § 113; W. VA. CODE ANN. (Barnes, 1923) c. 15P, § 52.

[3] The Michigan, New York, and West Virginia statutes, *supra* note 2, provide for mutual election by employer and employee to comply with the state compensation act in cases of employment partly interstate and partly intrastate.

[4] Only "common carriers by rail" are affected by the Federal Employers' Liability Act. 35 STAT. 65 (1908), 36 STAT. 291 (1910), 45 U. S. C. §§ 51-59 (1926).

[5] State v. Postal Telegraph-Cable Co., 101 Wash. 630, 172 Pac. 902, *aff'd*, 104 Wash. 693, 176 Pac. 346 (1918); Adams v. Kentucky & West Virginia Power Co., 102 W. Va. 66, 135 S. E. 662 (1926). See Suttle v. Hope Natural Gas Co., 82 W. Va. 729, 735, 97 S. E. 429, 432 (1918). But see Stoll v. Pacific Coast S. S. Co., 205 Fed. 169 (S. D. Wash. 1913).

interstate or intrastate nature, always a question of degree,[6] here becomes particularly significant. If the railroad cases, which draw a distinction between state and interstate activity on the basis of whether the work involved construction or repair,[7] are regarded as controlling, then the occupation in the instant case may logically be held to fall within the field of interstate commerce.[8] It may be questioned, however, whether the railroad cases, involving the movement of tangible objects between states, are decisive of the wholly different situation presented by radio broadcasting, wherein neither equipment nor service extend beyond state lines. The necessity for federal control demanded the expansion of the concept of interstate commerce to include broadcasting for purposes of regulation,[9] but that an industry, admittedly *sui generis*, is interstate for one purpose would not seem to compel its classification as interstate for all purposes.[10] In assuming to the contrary, the court in the instant case has, unnecessarily, it is thought, precluded the application of the Compensation Act to a field over which, in view of the probable infrequency of radio accidents, the federal government will not likely see fit to legislate.

ZONING—CONSTITUTIONALITY OF ZONING ORDINANCE RAISED IN CERTIORARI PROCEEDINGS.—Under the provisions of the zoning ordinance of the city of Chicago, the petitioners appealed to the board of zoning appeals from a decision of the building commissioner granting the appellants a permit to erect a sixty-story office building. The board of appeals affirmed the commissioner's decision, and the petitioner then sued out a writ of *certiorari* to the circuit court, following the procedure provided by the ordinance. The trial court, in revoking the permit, upheld the petitioner's contention that the amendment to the zoning ordinance, under the authority of which the appellants had originally applied for the permit, was unconstitutional. On appeal, the appellants asserted that under a writ of *certiorari* the petitioner could not raise, nor had the court the power to pass upon, the constitutionality of the ordinance. The Supreme Court of Illinois held (Dun-

[6] See Industrial Accident Comm. v. Davis, 259 U. S. 182, 187, 42 Sup. Ct. 489, 491 (1922).

[7] Compare the following analogous cases. Held interstate: Southern Pacific Co. v. Industrial Accident Comm., 178 Cal. 20, 171 Pac. 1071 (1918) (repairing conduit from power plant to trolley wire); Ross v. Sheldon, 176 Iowa 618, 154 N. W. 499 (1915) ("replacing" hand signals by automatic system); Thompson v. Cincinnati N. O. & T. P. Ry., 165 Ky. 256, 176 S. W. 1006 ( work on repair shop extension); Vollmers v. New York Central R.R., 180 App. Div. 60, 167 N. Y. Supp. 426 (3d Dep't 1917) (repairing plumbing in interstate depot). Held intrastate: Wright v. Interurban Ry., 189 Iowa 1315, 179 N. W. 877 (1920) (dismantling and reconstructing substation); Seaver v. Payne, 198 App. Div. 423, 190 N. Y. Supp. 724 (3d Dep't 1921) ("replacing" turntable).

[8] For the various tests devised by the courts see Pedersen v. Delaware, L. & W. R.R., 229 U. S. 146, 33 Sup. Ct. 648 (1913); Lamphere v. Oregon R.R. & Navigation Co., 196 Fed. 336 (C C. A 9th, 1912); Southern Pacific Co. v. Industrial Accident Comm., *supra* note 7; Note (1927) 22 ILL. L. REV. 209. But see Note (1930) 1 AIR L. REV. 491.

[9] See United States v. American Bond & Mortgage Co., 31 F. (2d) 448 (E. D. Ill. 1929); Comment (1929) 39 YALE L. J. 245; (1929) 14 MINN. L. REV. 176.

[10] *Cf.* Western Union Telegraph Co. v. Byrd, *supra* note 1 (telegraph, though a common carrier for regulatory purposes, held not "common carrier" according to meaning of Compensation Act).

can, J., dissenting) that the issue of constitutionality was properly before the court in *certiorari* proceedings. *Michigan-Lake Building Corp. v. Hamilton*, 172 N. E. 710 (Ill. 1930).

Most zoning ordinances provide that any person aggrieved by the decision of a local zoning board may petition a court of record to review the decision of the board on a writ of *certiorari*.[1] Upon the hearing the court may take evidence and may reverse, affirm or modify, wholly or in part, the decision brought up for review.[2] Attempted determination of the proper scope of the judicial review so provided has given rise to much confusion. At common law the writ of *certiorari* was used only to review the decisions of inferior courts and administrative bodies on jurisdictional questions,[3] and the reviewing court, confined to the record, was not permitted to take evidence or reopen questions of fact.[4] Hence it is clear that the writ of *certiorari* authorized by zoning ordinances is a special statutory writ and the proceedings in respect to it should therefore be controlled by the creating statute.[5] Some courts, in construing such statutes, have denied themselves the power to pass upon the question of constitutionality under the specially prescribed *certiorari* proceeding, contending that the issue can only be raised in some other manner, such as by a suit for a mandamus, an injunction, or a declaratory judgment.[6] One court, in so holding, declared that since review by *certiorari* is predicated upon the constitutionality of the ordinance, a petitioner cannot be permitted to take advantage of that method of review in order to attack the validity of the ordinance.[7] This interpretation bears out the intention of the framers of the Standard Zoning Act that too frequent raising of the constitutionality issue be precluded by provision for a special means of relief in cases of hardship.[8]

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[1] *Cf.* STANDARD STATE ZONING ENABLING ACT (Dep't of Comm. 1926) 11, which is followed in whole or in part by practically every state that has enacted a zoning statute. See BAKER, LEGAL ASPECTS OF ZONING (1927) 39, 43.

[2] STANDARD STATE ZONING ENABLING ACT (Dep't of Comm. 1926) 13.

[3] *Cf.* N. Y. Central R.R. v. Middlesex County, 220 Mass. 569, 108 N. E. 506 (1915); In re Washington Party Nominations, 237 Pa. 567, 85 Atl. 873 (1912).

[4] Cass v. Duncan, 260 Ill. 228, 103 N. E. 280 (1913); State v. Sundquist, 137 Wis. 292, 118 N. W. 836 (1908).

[5] *Cf.* In re Forbes, 316 Ill. 141, 146 N. E. 448 (1925).

[6] In New York the courts have uniformly held that mandamus is the proper proceeding to test the validity of a zoning ordinance. Matter of Dillon v. O'Shaughnessy, 222 App. Div. 772, 226 N. Y. Supp. 37 (2d Dep't 1927); Matter of Melita v. Nolan, 126 Misc. 345, 213 N. Y. Supp. 674 (Sup. Ct. 1926); Hecht-Dann v. Burden, 124 Misc. 632, 208 N. Y. Supp. 299 (Sup. Ct. 1924). Similarly in New Jersey. Falco v. Kaltenbach, 3 N. J. Misc. 333, 128 Atl. 394 (1925); Rohrs v. Zabriskie, 102 N. J. L. 473, 133 Atl. 65 (1926). *Cf.* State v. Jacoby, 168 La. 752, 123 So. 314 (1929) (injunction); Taylor v. Haverford Township, 299 Pa. 402, 149 Atl. 639 (1930) (declaratory judgment); (1930) 39 YALE L. J. 1220.

[7] Taylor v. Haverford Township, *supra* note 6 at 408, 149 Atl. at 641. *Cf.* Pera v. Village of Shorewood, 176 Wis. 261, 186 N. W. 623 (1922) (petitioner filing claim for compensation pursuant to eminent domain zoning statute not allowed to attack validity of statute on appeal); Appeal of Holley, 110 Conn. 80, 147 Atl. 300 (1929) (applicant for permit to erect gas station not permitted on appeal to raise constitutionality of statute providing method of appeal).

[8] BASSETT, BOARD OF APPEALS IN ZONING (1921) 6.

On the other hand, in Illinois [9] and a few other states,[10] the zoning statutes have been so interpreted that courts are permitted to pass upon constitutionality under the special *certiorari* proceeding. These courts construe the statute as widening the field of review to include not only questions of jurisdiction but also questions of fact, thereby creating a liberality of review which is a departure from that allowed to administrative boards in common law proceedings on *certiorari*.[11] The result under this line of decisions is in accord with the general policy of allowing fewer artificial limitations on the scope of judicial review.[12] Divergence in interpretation of the same statutory provision can here be attributed to the statutory use of the term *certiorari* to designate the special procedure for reviewing zoning cases, for the door is thereby opened to irrelevant analogies. Under this conflict of statutory construction, the instant case emphasizes the necessity of a choice between what is conceived to be the policy behind the zoning statute and the broader interests of simplified procedure.

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[9] Minkus Pond, 326 Ill. 467, 158 N. E. 121 (1927); Brown v. Board of Appeals, 327 Ill. 644, 159 N. E. 225 (1927).

[10] Ayers v. Building Commissioner, 242 Mass. 30, 136 N. E. 338 (1922); Anderson v. Jester, 206 Iowa 452, 321 N. W. 354 (1928); Sundlun v. Zoning Board of Review, 50 R. I. 108, 145 Atl. 451 (1929).

[11] See Hughes v. Board of Appeals, 325 Ill. 109, 113, 156 N. E. 350, 351 (1927); Park Ridge Fuel Co. v. City of Park Ridge, 335 Ill. 509, 515, 167 N. E. 119, 122 (1929).

[12] See Dodd, *Problems of Appellate Courts* (1929) HANDBOOK OF AMERICAN ASSOCIATION OF LAW SCHOOLS 72, 84; Sunderland, *ibid.*, 88, 90; Sunderland, *Problem of Appellate Review* (1926) 5 TEX. L. REV. 126, 138.