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Restore Certiorari to Review State-Wide Administrative Bodies in California

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FORWARD-LOOKING legislation of the last quadrennium in California, which has organized certain of the professions and semi-professional callings and has conferred upon them powers of self-government exercised through their governing boards, has met with an extraordinary set-back through recent decisions of our supreme court. Other state-wide administrative agencies such as the Board of Equalization, the Employment Commission, the Commissioner of Corporations, the Fish and Game Commission and the Director of Agriculture are affected. No precedent for the decisions in question can be found in any other state of this country. This paper is written as part of an aroused professional opinion¹ asking reconsideration of the new doctrine enunciated in these decisions. Attention will be directed chiefly to the first, namely, *Standard Oil Co. v. State Board of Equalization*, in 1936.²

By that decision the court overturned the law of this state, settled for many years, that certiorari might issue to review the quasi-judicial determinations of state-wide administrative bodies, and held that even express legislative provision for certiorari to them is unconstitutional. Having thus destroyed the traditional means of review, the court proceeded in 1939 to substitute its own invention, a writ of mandamus, not to compel the administrative body to perform some non-discretionary act enjoined by law (the common-law use of mandamus)³ but rather to try over again "*de novo*" in the superior courts

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¹ GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* (1940) 819, n.; McGovney, *Administrative Decisions and Court Review Thereof, in California* (1941) 29 CALIF. L. REV. 110; Note (1937) 25 *ibid.* at 694; (1939) 27 *ibid.* at 738; (1940) 13 So. CALIF. L. REV. 500.

² (1936) 6 Cal. (2d) 557, 59 P. (2d) 119.

³ For this elementary proposition one need cite only the court's discussion of man-

the very matters which the legislature confided to the administrative agency.⁴ The net result of these two cases is that the writ of certiorari has been more narrowly restricted than at common law, or in the other states of this country,⁵ whereas mandamus has been expanded into a veritable *lis mirabilis* unknown before on land or sea. The court, while denying the legislature the right to give certiorari a scope beyond what the court now conceives to have been its common-law use, arrogates to itself the right to extend mandamus in contravention of the common-law nature and use of that writ—a fact expressly admitted in the latest decision.⁶ This from a court which has always maintained that these two writs and others provided for in the constitution must be accorded simply their scope as at common law in 1879.⁷

The present complaint is not about some merely abstract or theoretical error; the evil wrought by the court's new doctrine is practical and serious. Trial *de novo* on mandamus—and this apparently means a jury trial where the court sees fit⁸—in the case of such administrative matters as are committed to our state-wide agencies, undermines and makes a laughing-stock of the work of such agencies.⁹ It inevitably sacrifices the element of discretion, experience,

damus in its latest opinion in *Bodinson Mfg. Co. v. California Employment Comm.* (Feb. 7, 1941) 17 A. C. 335, 2 Cal. Dec. 278. See also *I. C. C. v. United States* (1933) 289 U. S. 385, 393-394; *Pacheco v. Beck* (1877) 52 Cal. 3, 10; 2 SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES (2d ed. 1901) § 1467; *Cousens, Legal Doubt or Determination as a Ground for Refusing Mandamus* (1936) 24 GEO. L. J. 268, 272; *Notes* (1920) 33 HARV. L. REV. 462; (1940) 25 IOWA L. REV. 638. The view of *Drumme v. State Bd. of Funeral Directors & Embalmers* (1939) 13 Cal. (2d) 75, 87 P. (2d) 848, that mandamus issues whenever no other remedy appears available is contra to better authority. See *Kimball v. Union Water Co.* (1872) 44 Cal. 173, 175; *Jacobs v. Board of Supervisors* (1893) 100 Cal. 121, 129, 34 Pac. 630, 632; *Hilmer v. Superior Court* (1934) 220 Cal. 71, 73, 29 P. (2d) 175, 176; *Greene v. Superior Court* (1933) 133 Cal. App. 35, 38, 23 P. (2d) 785, 786.

⁴ *Drumme v. State Bd. of Funeral Directors & Embalmers*, *supra* note 3. See also *Laisne v. California State Board of Optometry* (1940) 101 Cal. App. Dec. 337, 101 P. (2d) 787, *rel'g den.*, (1940) 101 Cal. App. Dec. 589, 102 P. (2d) 538, Sup. Ct. *hearing granted*, June 17, 1940.

⁵ Authorities are cited where this matter is taken up in detail later. See *infra* note 69.

⁶ *Bodinson Mfg. Co. v. California Employment Comm.*, *supra* note 3, at 343, 2 Cal. Dec. at 283.

⁷ For several cases see *Note* (1937) 25 CALIF. L. REV. 694.

⁸ CAL. CODE CIV. PROC. § 1090.

⁹ The *Drumme* case, *supra* note 3, is itself a good example. From his own admissions it is reasonably clear [as the Board found, and see excellent opinion by Spence, J., for the district court of appeal (1938) 93 Cal. App. Dec. 1, 77 P. (2d) 912] that *Drumme* was using his position as deputy coroner to divert business to the private under-

and expertness which is the distinctive feature of the administrative process.¹⁰ The new doctrine creates an absurd distinction between purely local bodies not affected by the *Standard Oil* decision and still subject, therefore, to review only on "jurisdictional" errors of law in the record,¹¹ and on the other hand, the more stable and important state-wide boards whose quasi-judicial decisions are now subject to complete retrial. It has led to an equally indefensible distinction between discretionary decisions against granting a license, where no *de novo* review is permitted, and the revocation of a license for cause, where *de novo* review is held constitutionally necessary.¹² It has compelled the court to give a wholly artificial meaning to the provisions of the Agricultural Prorate Act and the Milk Stabilization Act for "review" of orders thereunder.¹³ It tends to load the calendars of the courts with matters which the legislature never intended should be there.¹⁴ Finally, it substitutes delay, expense and uncertainty for the normal characteristics of administrative adjudication.¹⁵

taker by whom he was employed—the very evil against which the act was directed. Yet the superior court is sustained in ordering the Board to reinstate Drummey, though no error in the Board's proceeding is found.

¹⁰ See e.g., *Federal Trade Comm. v. Keppel & Bro. Inc.* (1933) 291 U. S. 304; and *LANDIS, THE ADMINISTRATIVE PROCESS* (1938) 45-46, 142-155. See *Federal Comm. v. Pottsville Broadcasting Co.* (1940) 309 U. S. 134, 146: "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

¹¹ *Nider v. City Comm.* (1939) 36 Cal. App. (2d) 14, 97 P. (2d) 293; see also *Rubin v. Board of Directors of the City of Pasadena* (1939) 100 Cal. App. Dec. 23, 97 P. (2d) 485, Sup. Ct. *hearing granted*, Feb. 15, 1940. Fortunately, the term "jurisdictional" is given a far broader scope than in respect to review of lower courts, and frequently means almost any error of law deemed serious by the reviewing court. For the cases, see *Notes* (1937) 25 CALIF. L. REV. 694, 704-707; (1934) 19 IOWA L. REV. 609, 612-614.

On the theory of the *Standard Oil* case, *supra* note 2, the supreme court can justify certiorari to local administrative bodies only by calling them "inferior courts" within article VI, section 1. This makes them subject to various provisions of law which have never been thought applicable to them, e.g., their members would be subject to disqualification for bias or prejudice under the Code of Civil Procedure, section 170 [no such basis of disqualification was held to exist in *Federal Construction Co. v. Curd* (1918) 179 Cal. 489, 177 Pac. 469] and their members would be subject to suspension and removal by the supreme court after conviction of crime involving moral turpitude under article VI, section 10a.

¹² *McDonough v. Goodcell* (1939) 13 Cal. (2d) 741, 91 P. (2d) 1035.

¹³ See *Ray v. Parker* (1940) 15 Cal. (2d) 275, 290-291, 101 P. (2d) 665, 673.

¹⁴ Many of the acts authorizing administrative revocation of licenses do not mention judicial review at all.

¹⁵ The supreme court is sadly in arrears. As of December 31, 1939, it had 523 uncalendared cases, some of which were filed as far back as 1936. See Edmonds, *The Cause of Delay in the Supreme Court of California* (1940) 13 So. CALIF. L. REV. 281. It is now deciding some cases where mandamus was issued from the superior courts to adminis-

The ill fortune which has thus at last befallen the disciplinary work of the business and professional licensing boards, such as the Board of Medical Examiners, of Dental Examiners, of Pharmacy, of Accountancy, and perhaps a dozen others, is even worse than the blow which was dealt the Board of Governors of the State Bar, with no better constitutional justification, when that body attempted to exercise the powers of self-government authorized by the State Bar Act of 1927.¹⁶ Review of the Board of Governors, even though it extends to reconsidering the weight of the evidence,¹⁷ is at any rate limited to the record made before the Board,¹⁸ and is in the supreme court, not before a superior court judge and jury, with the fatiguing prospects of appeal still ahead. At the very time when the Supreme Court of the United States is insisting upon scrupulous respect for the finality attaching to administrative determinations of fact,¹⁹ our California Supreme Court has not only authorized the use of mandamus to retry such issues but has purported to deduce from the Federal Constitution a requirement that the trial court exercise "an independent judgment on the facts."²⁰ However, a note of almost comic uncertainty is interjected by the following from a decision just handed down: "It would, of course, be highly improper for this court to substitute its opinion for that of an administrative agency on matters which were properly entrusted to the agency to decide. In the present case, however, accepting the facts exactly as found by the Commission, it is clear that there was no statutory authority for the

trative boards with respect to revocation orders of 1938. See *e.g.*, *Laisne v. California State Board of Optometry*, *supra* note 4.

¹⁶ "... what was conceived to be an act vesting full power and control over the admission and discipline of members of the bar has been practically nullified, in those respects at least, by decisions of this court." Justices Curtis, Richards and Langdon dissenting in *Herron v. State Bar* (1931) 212 Cal. 196, 211, 298 Pac. 474. See Turrentine, *May the Bar Set Its Own House in Order?* (1935) 34 MICH. L. REV. 200.

¹⁷ See *Fish v. State Bar* (1931) 214 Cal. 215, 225, 4 P. (2d) 937, 941.

¹⁸ See *In re Shattuck* (1929) 208 Cal. 6, 9, 279 Pac. 998, 999.

¹⁹ *Helvering v. Rankin* (1935) 295 U. S. 123, 131; *Federal Trade Comm. v. Standard Education Soc.* (1937) 302 U. S. 112; *N. L. R. B. v. Waterman S. S. Corp.* (1940) 309 U. S. 206; *N. L. R. B. v. Bradford Dyeing Ass'n* (1940) 310 U. S. 318; *Railroad Comm. v. Rowan & Nichols Oil Co.* (1940) 310 U. S. 573.

²⁰ See *Drumme v. State Bd. of Funeral Directors*, *supra* note 3, at 85, 87 P. (2d) at 854. It was, of course, frivolous to argue, as the court did, that a "constitutional right" was involved in this case so as to bring it within the doctrine of *St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38. See *Reetz v. Michigan* (1903) 188 U. S. 505, 507; *Chicago Life Ins. Co. v. Cherry* (1917) 244 U. S. 25, 30; *Shields v. Utah Idaho R. Co.* (1938) 305 U. S. 177, 180; *McGoveney*, *op. cit. supra* note 1, at 128-130; *Note* (1941) 39 MICH. L. REV. 438.

award. . . ."²¹ In the light of this remark in 1941, what are we to think of the pointed though gratuitous suggestion offered by the court to the legislature in 1937 that a *de novo* trial of administrative cases be provided by statute.²² The attitude of the voters towards any such over-riding of administrative action may be gathered from the defeat of Proposition 6 at the last election, the officially printed argument against this proposition being that it was a scheme to undermine our administrative system and create work for lawyers.

Mine is only the latest of several protests against the new doctrine. Mr. Rode in this *Review*²³ wrote learnedly upon the *Standard Oil* case soon after its decision. Professor Gellhorn, Director of the U. S. Attorney General's distinguished "Committee on Administrative Procedure," has criticized the *Standard Oil* case and drawn attention to the problems it creates.²⁴ Very recently Professor McGoveney has gone into the entire question in a brilliant definitive article.²⁵ Two points, I believe, deserve further attention: first, the serious misunderstanding of previous California authorities revealed in the *Standard Oil* decision; and secondly, the judicial method which resulted in that decision.

THE CALIFORNIA AUTHORITIES

In the *Standard Oil* case the opinion of Chief Justice Waste says: "While some uncertainty, and perhaps confusion, exists in the decisions upon this subject, the better reasoned cases are in accord with our conclusion herein."²⁶ From this statement and the subsequent citation of authority, one might infer that the court was merely bot-toming itself upon fairly well-settled doctrine and overruling casual aberrations. The actual picture is very different. Beginning with *People ex rel. Bellmer v. State Board of Education*²⁷ in 1875 and coming down to *Matson Navigation Co. v. State Board of Equalization*²⁸ in 1935, I find some twelve cases wherein the supreme court

²¹ Bodinson Mfg. Co. v. California Employment Comm., *supra* note 3, at 345, 2 Cal. Dec. at 285.

²² See Whitten v. California State Board (1937) 8 Cal. (2d) 444, 446, 65 P. (2d) 1296.

²³ Note (1937) 25 CALIF. L. REV. 694.

²⁴ See GELLHORN, *loc. cit. supra* note 1.

²⁵ McGoveney, *loc. cit. supra* note 1. See also (1939) 27 CALIF. L. REV. 738; (1940) 13 So. CALIF. L. REV. 500.

²⁶ *Supra* note 2, at 559, 59 P. (2d) 119.

²⁷ (1875) 49 Cal. 684.

²⁸ (1935) 3 Cal. (2d) 1, 43 P. (2d) 805, *aff'd*, (1936) 297 U. S. 441.

issued or by inference approved the issuance of certiorari to a state-wide administrative agency.²⁹ This leaves out of account the Industrial Accident Commission and the Railroad Commission which, because of special constitutional authorization, are not affected by the *Standard Oil* decision. It also does not take account of the very numerous cases beginning as far back as 1860 wherein the supreme court has approved the issuance of certiorari to county and municipal boards and commissions, in none of which is there any hint that in respect to certiorari the local boards stand on a different basis from the state-wide boards.³⁰ Likewise no attempt has been made to compile the very numerous district court of appeal cases—at least nineteen between 1922 and 1936³¹—in which these courts issued certiorari to review state-wide boards, and in many of which the supreme court denied a hearing.

In a considerable number of the supreme court cases referred to above, wherein certiorari to state-wide agencies was approved, the issue was directly adjudicated. Opinions rendered in 1920,³² 1921,³³ 1927³⁴ and 1928³⁵ contain language to the effect that the propriety of the use of certiorari for this purpose can no longer be considered an open question, that the law is well settled on the point. It is extraordinary to say the least that as late as 1928 the supreme court should unanimously be declaring the law settled if as stated by the Chief Justice in the *Standard Oil* case, the "better reasoned cases"

²⁹ *S. F. & N. P. R. R. v. State Board of Equalization* (1882) 60 Cal. 12; *Hewitt v. State Board of Medical Examiners* (1906) 148 Cal. 590, 84 Pac. 39; *Suckow v. Alderson* (1920) 182 Cal. 247, 187 Pac. 965; *Brecheen v. Riley* (1921) 187 Cal. 121, 200 Pac. 1042; *Doble Steam Motors Corp. v. Daugherty* (1924) 195 Cal. 158, 165, 232 Pac. 140, 143; *State Bd. of Chiropractic Exam. v. Superior Ct.* (1927) 201 Cal. 108, 255 Pac. 749; *Homan v. Board of Dental Examiners* (1927) 202 Cal. 593, 262 Pac. 324; *Renwick v. Phillips* (1928) 204 Cal. 349, 268 Pac. 368; *Dyment v. Board of Medical Examiners* (1922) 57 Cal. App. 260, Sup. Ct. *hearing den.*, at 266, 207 Pac. 409; *Osborne v. Baughman* (1927) 85 Cal. App. 224, 225, 259 Pac. 70, 71.

³⁰ *E.g.*, *Whitney v. Board of Delegates of the S. F. Fire Dep't* (1860) 14 Cal. 479; *Robinson v. Board of Supervisors of Sacramento* (1860) 16 Cal. 208; *Farmers, etc. Bank v. Board of Equalization* (1893) 97 Cal. 318, 32 Pac. 312; *Stumpf v. Board of Supervisors* (1901) 131 Cal. 264, 63 Pac. 663; *Legault v. Board of Trustees* (1911) 161 Cal. 197, 118 Pac. 706; *Miller & Lux v. Board of Supervisors* (1922) 189 Cal. 254, 208 Pac. 304; *Garvin v. Chambers* (1924) 195 Cal. 212, 232 Pac. 696.

³¹ For a collection of at least this many district court of appeal cases, see Note (1937) 25 CALIF. L. REV. 694.

³² *Suckow v. Alderson*, *supra* note 29, at 250, 187 Pac. at 966.

³³ *Brecheen v. Riley*, *supra* note 29, at 125, 200 Pac. at 1044.

³⁴ *State Bd. of Chiropractic Exam. v. Superior Ct.*, *supra* note 29, at 110, 255 Pac. at 750.

³⁵ *Renwick v. Phillips*, *supra* note 29, at 351, 268 Pac. at 369.

were to the contrary. Actually there is no decision of the supreme court prior to the *Standard Oil* case to the contrary. The cases relied upon in the opinion of the Chief Justice and in his reiteration of the *Standard Oil* doctrine in the subsequent *Drummey* case³⁶ are two arising out of the Water Commission Act of 1913.³⁷ In these, and a third case of the same sort,³⁸ the court denied certiorari to review action of the State Water Commission or its successor, the Department of Public Works, in granting a permit to take unappropriated waters or in making a certificate as to completion of beneficial application of appropriated water. In the earlier case, *Tulare Water Co. v. State Water Commission*,³⁹ the denial of the writ was rested by the majority of the court solely on the ground that the Water Commission Act provided for a summary procedure without a formal hearing and that in issuing a permit the Commission could not and did not adjudicate any rights whatever. Its action, therefore, lacked judicial or quasi-judicial character, both procedurally and substantively, and so was not subject to review on certiorari, but might be attacked by mandamus if abuse of discretion appeared. This, of course, is wholly consistent with prior authorities.⁴⁰ There is a dictum that if a hearing had been required and power to determine the right to appropriate water had been conferred, the review by certiorari "would only go to the regularity of the proceeding and not to the merits of the ruling."⁴¹ This dictum, and the ground on which the denial of certiorari is rested, show that the case, in place of being a "decision" to sustain the *Standard Oil* case is quite in the opposite direction. One justice, Shaw, concurred in a separate opinion, and it is upon this separate opinion that Chief Justice Waste mainly relies—a reliance,

³⁶ *Supra* note 3, at 81, 87 P. (2d) at 852.

³⁷ *Tulare Water Co. v. State Water Comm.* (1921) 187 Cal. 533, 202 Pac. 874; *Dep't of Public Works v. Superior Court* (1925) 197 Cal. 215, 239 Pac. 1076.

³⁸ *Mojave River Irr. Dist. v. Superior Court* (1927) 202 Cal. 717, 262 Pac. 724. The case adds nothing to the two preceding water cases. The opinion of Justice Richards makes the same point as in the second water case that judicial power cannot be given to the administrative, and therefore certiorari does not lie; but Richards admits that "certain other decisions of this court" (*ibid.* at 722, 262 Pac. at 726) are against him, and does not try to distinguish them but relies solely on the two earlier water cases. He seems to have forgotten his own cordial approval of two leading cases the other way in *Doble Steam Motors Corp. v. Daugherty*, *supra* note 29.

³⁹ *Supra* note 37.

⁴⁰ The California cases are well discussed in Note (1937) 25 CALIF. L. REV. 694, 695-700. See also Goodnow, *The Writ of Certiorari* (1891) 6 POL. SCI. Q. 493, 514; Note (1933) 19 IOWA L. REV. 137, 141-142; (1934) *ibid.* at 609, 609-612.

⁴¹ *Supra* note 37, at 537, 202 Pac. at 876.

I submit, resulting from a misunderstanding of the point which Shaw was trying to make. Shaw concerns himself with the statement of the majority that the Water Commission Act does not give the Commission power "to judicially determine the fact as to unappropriated water, or to adjudicate conflicting claims that might exist there-to . . ." ⁴² Shaw fortifies this construction of the Act by observing that an attempt to give an administrative body the right to adjudicate titles in the stream would be an unconstitutional encroachment upon the judicial power. No one other than a court can determine "the rights and titles of individuals to private real property. . . ." ⁴³ he says. Now this is, of course, sound construction of the constitutional term "the judicial power". Some matters such as trying title to real estate between private parties are so traditionally the subject of court determination that they cannot be turned over to an administrative agency. ⁴⁴ California, contrary to the rule in some other states, ⁴⁵ holds the same thing to be true with respect to the award of money damages under a workmen's compensation act of the California type, except, of course, that our act is saved by explicit constitutional authorization. ⁴⁶ In the last sentence of his opinion Shaw says that an attempt by the Water Commission to adjudicate titles in the stream would be absolutely void and "... *certiorari* would not lie to review its action in that regard." ⁴⁷ This too is sound. If the Commission were not a court, its purported adjudication of title would be void on its face and a court would not attempt to review it on *certiorari*. ⁴⁸

Nowhere in this separate opinion does Shaw deny the power of the court to review quasi-judicial decisions of state agencies on *certiorari*. The best proof that Shaw never meant to be understood as denying such a power is, first, that less than three months before the *Tulare* case Shaw had concurred in *Brecheen v. Riley*. ⁴⁹ Here those provisions of the Real Estate Act of 1919 which gave the Real Estate Commissioner power, after notice and hearing, to revoke licenses

⁴² *Ibid.*

⁴³ *Ibid.* at 542, 202 Pac. at 878.

⁴⁴ See the famous statement of Curtis, J., in *Murray's Lessee v. Hoboken Land & Improvement Co.* (1855) 59 U. S. (18 How.) 272, 284, last par.; and *cf.* *State v. Guilbert* (1897) 56 Ohio St. 575, 47 N. E. 551.

⁴⁵ *E.g.*, *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 133 N. E. 209.

⁴⁶ *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 156 Pac. 491.

⁴⁷ *Tulare Water Co. v. State Water Comm.*, *supra* note 37, at 543, 202 Pac. at 879.

⁴⁸ *State ex rel. Anderson v. Timme* (1888) 70 Wis. 627, 36 N. W. 325; *State ex rel. Schaefer v. Schroff* (1904) 123 Wis. 98, 100 N. W. 1030.

⁴⁹ *Supra* note 29.

of realtors for "dishonest dealing" and provided for review of such revocations by certiorari were challenged as unconstitutional, on the ground that they amounted to a conferring of judicial power upon the Commissioner in violation of article VI, section 1, which gives "the judicial power of the State" to designated courts. The court upheld the Act, drawing the usual distinction between "the judicial power" in article VI, section 1, and the use of the term "judicial functions" in section 1068 of the Code of Civil Procedure in connection with the provision for certiorari. The Commissioner was held to be acting quasi-judicially, and performing a "judicial function" in revoking a license; but action of this sort was held not within the concept of "the judicial power" so as to be confined solely to the courts. This distinction, well settled in other states,⁵⁰ goes back at least to 1860 in California.⁵¹

Equally striking proof that Shaw in the *Tulare* case did not intend to announce a rule which would confine certiorari to the review of court decisions is that within two years of the *Tulare* case Shaw himself had written for a unanimous court in *Suckow v. Alderson*,⁵² holding that the power to revoke licenses given to the Board of Medical Examiners was not judicial in the sense of offending article VI, section 1, and that certiorari lay to review such revocation. He says: "It is also settled that where a board has exercised *quasi-judicial* power of the nature of that here in question, its decisions are subject to revision by way of *certiorari*."⁵³ Is it conceivable that in his separate opinion in the *Tulare* case Shaw intended to overrule his own recent holdings without so much as mentioning them or the doctrine which they announced? This is apparently what Chief Justice Waste would have us believe, and he cites the *Tulare* case in which, as already stated, the majority opinion goes wholly on the summary, non-determinative nature of the permit-issuing process, as a "clear-cut holding" contra to the issuance of certiorari to review the quasi-judicial action of state licensing boards.⁵⁴

⁵⁰ See authorities *infra* note 69.

⁵¹ See *Robinson v. Board of Supervisors of Sacramento*, *supra* note 30, at 209. Although this case, so far as it held a salary-fixing ordinance to be reviewable as "judicial" is no longer law [*Spring Val. W. v. Bryant* (1877) 52 Cal. 132], the distinction for which it is cited in the text is not affected.

⁵² *Supra* note 29.

⁵³ *Ibid.* at 250, 187 Pac. at 966.

⁵⁴ See *Drummev v. State Bd. of Funeral Directors*, *supra* note 3, at 81, 87 P. (2d) at 852.

The second case upon which the *Standard Oil* decision relies and which it quotes at length is *Department of Public Works v. Superior Court*,⁵⁵ involving the propriety of certiorari to review the issuance of a certain certificate under the Water Commission Act. In denying the writ the court gave as one reason exactly the same good and sufficient ground urged by the majority in the *Tulare* water case, namely, that the procedure for a certificate, like the procedure for a permit in the *Tulare* case, was not attended by notice or hearing and did not involve "procedure looking to the adjudication of the rights of anyone,"⁵⁶ and was therefore not within the established conception of quasi-judicial action reviewable on certiorari. The opinion (by the court) goes on, however, to talk about the invalidity of any legislative attempt to confer judicial power on the certifying agency, the Department of Public Works, and says that since the agency cannot exercise judicial functions, this essential element for the issuance of certiorari is lacking. The court here falls into the same confusion between the constitutional concept of "the judicial power" and the code requirement of a "judicial function" for review by certiorari which had been cleared up in the *Brecheen* and other cases mentioned above. These cases, however, are not cited by the court. It must be conceded that this part of the court's opinion is a precedent for the same sort of language and confusion of thought appearing in the *Standard Oil* case, and like the latter, it also represents a misreading of Shaw's separate opinion in the *Tulare* case. The court is apparently not aware of the line of authorities contrary to the second ground of its decision. The decision itself can be rested on the valid reasoning first given by the court.

Down to the time of the *Standard Oil* case the supreme court had no idea that the two water cases above discussed had altered the law with respect to review of state-wide bodies by certiorari—as witness a holding, two years after the second water case that certiorari will issue to review the revocation of a license by the State Board of Chiropractic Examiners, wherein the court said: "... it has been repeatedly held that boards, such as the petitioner board, empowered to revoke licenses previously granted, may have their decisions subjected to revision by way of *certiorari*"⁵⁷—this from a court five

⁵⁵ *Supra* note 37.

⁵⁶ *Ibid.* at 221, 239 Pac. at 1079.

⁵⁷ *State Bd. of Chiropractic Exam. v. Superior Ct.*, *supra* note 29, at 109, 255 Pac. at 750.

justices of which were sitting when the second water case was handed down. Witness also certiorari issued by the supreme court to the State Board of Equalization in a case of first-rate importance, *Matson Navigation Co. v. State Board of Equalization*,⁵⁸ within fifteen months before the *Standard Oil* decision. Although as stated in the *Standard Oil* case the jurisdiction to issue certiorari in the *Matson* case was not questioned by the parties, the court's opinion in the *Matson* case devotes a substantial opening paragraph to pointing out that jurisdiction rests upon a provision in the Bank and Corporation Franchise Tax Act of 1933 providing for certiorari to the Board, and that this was the first case arising under that provision.⁵⁹ Evidently no one on the court sniffed any taint of unconstitutionality in the provision thus pointedly adverted to, yet four members of that court were on the bench when the second water case was decided.

The foregoing summary of authorities has been given not to argue the constitutional question on its merits—Professor McGovney has done that very ably—but in an attempt to clear away any supposed barrier to an overruling of the *Standard Oil* case. The latter, beyond question, is a judicial aberration.

JUDICIAL TECHNIQUE IN THE STANDARD OIL DECISION

There is perhaps no better illustration in the books of the fact that faulty judicial method may produce error than the *Standard Oil* case. The court's technique deserves attention in any estimate of the weight of the case as a precedent. The case involved a constitutional question of far-reaching importance in this state. Indeed, if the court had carried its reasoning to its logical conclusion, the entire statewide administrative system apart from the Industrial Accident Commission and the Railroad Commission would have been found to be unconstitutional.⁶⁰ To hold the express legislative provision for certiorari to the Board of Equalization invalid meant overturning long-settled doctrine. Yet the court ventured upon this undertaking without so much as having had the question argued even on brief, and in the face of an express statement by the Attorney General, counsel for the respondent, in his supplementary brief that the provision for review by certiorari was valid and did not violate article VI, section 1,

⁵⁸ *Supra* note 28.

⁵⁹ Necessarily, the issuance of the writ in the *Matson* case is an assertion of jurisdiction so to do. See *Chicago Life Ins. Co. v. Cherry*, *supra* note 20, at 29.

⁶⁰ See Note (1937) 25 CALIF. L. REV. 694, 703.

or article III, section 1, of the California Constitution. After the decision to the contrary the court denied a petition for rehearing filed by the Attorney General in which he urged that the sweeping holding was in defiance of established precedent and would nullify the work of the state administrative agencies, and asked the court to permit the question to be briefed.

Lest this mode of decision be sought to be defended by reference to *Erie Railroad Co. v. Tompkins*⁶¹ in which the Supreme Court of the United States without argument by counsel on the point, overruled a ninety-six-year-old precedent, *Swift v. Tyson*,⁶² it should be recalled that *Swift v. Tyson* had been attacked by distinguished members⁶³ of the Supreme Court itself and had been debated and criticized in professional literature for many years,⁶⁴ and as the Court in the *Tompkins* case said, its "mischievous results . . . had become apparent."⁶⁵ The opposite in all respects is true of the precedents overruled in the *Standard Oil* case. The opinion in the latter is itself the best evidence that the court needed assistance of counsel.

The second respect in which the technique of the *Standard Oil* decision is seriously defective involves a moment's consideration of the question presented. That question was: has the legislature in providing for review by certiorari of the action of the Board of Equalization in determining tax liability under the Retail Sales Act attempted to extend the writ beyond its common-law use, it being settled that the power to issue the writs named in article VI, section 4, means those writs as they were known at the adoption of the constitution. To decide this question one obviously must inquire what has been the use of certiorari at common law. Nevertheless the court's opinion makes not even a gesture in that direction. Apparently it did not occur to the court that other states must have faced the same problem and that light as to the common-law scope of certiorari might be found also in the practice in England. By the time of the *Drumme*y case three years later, the court had in fact discovered that it had invented a restriction on certiorari not known in the United States generally, for the court there says: "In most jurisdictions it is held that such administrative boards exercise at least quasi-judi-

⁶¹ (1938) 304 U. S. 64.

⁶² (1842) 41 U. S. (16 Pet.) 1.

⁶³ See e.g., Holmes, Brandeis and Stone, dissenting in *B. & W. Taxi. Co. v. B. & Y. Taxi. Co.* (1928) 276 U. S. 518, 532.

⁶⁴ See the Court's citations, *supra* note 61, at 73.

⁶⁵ *Ibid.* at 74.

cial functions and that certiorari is the proper remedy."⁶⁶ Following this significant admission the court argues that the use of certiorari elsewhere can have no relevancy in California because of our constitutional provision for the separation of powers. It cites no authority and, of course, none could be cited for this attempt to distinguish the law of the other states. It is elementary constitutional dogma throughout the United States that "the judicial power" cannot be placed elsewhere than in the courts,⁶⁷ short of express constitutional authority, and this is held both where there is an explicit provision in the state constitution for the separation of powers and where that principle is deduced by implication.⁶⁸ The precise question posed by the *Standard Oil* case, namely, how can certiorari which lies to review action of a judicial sort issue to administrative bodies if the state constitution forbids giving those bodies "the judicial power", has been answered repeatedly in other states⁶⁹ in the same way it was

⁶⁶ *Supra* note 3, at 83, 87 P. (2d) at 852-853.

⁶⁷ The rule, and a large collection of cases, will be found in 16 C. J. S. 520-521.

⁶⁸ Forty state constitutions have separation of powers clauses. The other eight states (Delaware, Kansas, Ohio, Pennsylvania, New York, North Dakota, Washington and Wisconsin) adhere to the same principle by interpretation of less specific constitutional provisions. See DODD, *STATE GOVERNMENT* (2d ed. 1928) 58; INDEX DIGEST OF STATE CONSTITUTIONS (Columbia Univ. 1915) 526. That a delegation of "the judicial power" to an administrative agency would be bad even in the eight states having no specific provision for separation of powers, see *Kansas: In re Dumford* (1898) 7 Kan. App. 89, 53 Pac. 92. *North Dakota: State ex rel. Miller v. Taylor* (1913) 27 N. D. 77, 145 N. W. 425; *State ex rel. Hughes v. Milhollan* (1923) 50 N. D. 184, 195 N. W. 292. *Ohio: State v. Otter* (1922) 106 Ohio St. 415, 140 N. E. 399. *Wisconsin: Klein v. Barry* (1923) 182 Wis. 255, 196 N. W. 457.

⁶⁹ *Illinois: Winter v. Barrett* (1933) 352 Ill. 441, 186 N. E. 113. See also *Com'rs of Drainage Dist. v. Griffin* (1890) 134 Ill. 330, 25 N. E. 995; *Bartunek v. Lastovken* (1932) 350 Ill. 380, 183 N. E. 333. *Kansas: State v. Mohler* (1916) 98 Kan. 465, 158 Pac. 408. *Michigan: In re Fredericks* (1938) 285 Mich. 262, 280 N. W. 464; and see *Fitch v. Board of Auditors* (1903) 133 Mich. 178, 94 N. W. 952; *Hartz v. Wayne Circuit Judge* (1910) 164 Mich. 231, 129 N. W. 25. *Minnesota: State v. Common Council* (1893) 53 Minn. 238, 55 N. W. 118. *Utah: People v. Hasbrouck* (1895) 11 Utah 291, 39 Pac. 918; *Gilbert v. Board of P. & F. Com'rs* (1895) 11 Utah 378, 40 Pac. 264. *Wisconsin: State ex rel. Moreland v. Whitford* (1882) 54 Wis. 150, 11 N. W. 424; *Borgnis v. Falk Co.*, *supra* note 45. For the general rule that certiorari issues to review the quasi-judicial action of administrative bodies, see also *Florida Motor Lines, Inc. v. R. R. Com'rs* (1930) 100 Fla. 538, 129 So. 876; *Marcus v. Board of Street Com'rs* (1925) 252 Mass. 331, 147 N. E. 866; *Railroad Co. v. Adams* (1904) 85 Miss. 772, 38 So. 348; *People v. Board of Health* (Sup. Ct. 1891) 58 Hun. 595, 12 N. Y. Supp. 561; *People ex rel. C. P. etc. R. R. v. Willcox* (1909) 194 N. Y. 383, 87 N. E. 517; *Davidson v. Whitehill* (1914) 87 Vt. 499, 89 Atl. 1081; *Wilson v. Seattle* (1891) 2 Wash. 543, 27 Pac. 474; *Angelus v. Sullivan* (C. C. A. 2d, 1917) 246 Fed. 54; *Northern Pac. Ry. v. Interstate Com. Comm.* (App. D. C. 1927) 23 F. (2d) 221; *Goodnow, op. cit. supra* note 40, at 512; *Pillsbury, Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 583.

answered in California down to *Standard Oil Co. v. Board of Equalization*. No other state of the Union, so far as I can discover, has been baffled by the merely verbal dilemma. In the light of the history of the writ, it has been held that the use of the term "judicial" in connection with certiorari connotes the determination of rights after notice and hearing, whether such determination is by courts in which "the judicial power" of the state is lodged or by administrative agencies. If by the latter, such action is usually called "quasi-judicial", as not partaking in all respects of the finality and effect of court decision.

Had the court's technique in deciding a question as to the common-law use of certiorari led the court to look at the common law of England, ancient and modern, it would have found no support for the *Standard Oil* case. On the contrary, from the early days of the common law perhaps the most important use of the writ was to bring before the King's Bench the record of "special tribunals" not acting in accordance with the common law, that is, tribunals which today we would call administrative—the governing body of a profession,⁷⁰ the justices of the peace where under special act of Parliament they levy a tax for a local improvement⁷¹ (it being recollected that prior to modern times the justices of the peace were the most important administrative officers in England)⁷²—in order that the court might see "that they keep themselves within their jurisdiction."⁷³ The history of the writ in England as well as the story of its earlier use in this country has been authoritatively told by Professor Goodnow⁷⁴ and there is no need to repeat it here. One may recur, however, to the statement of Mr. Justice Brandeis, where in referring to the review of quasi-judicial decisions of administrative tribunals by certiorari, both at common law and under the practice of our states generally, he says, "Certiorari is the historical writ for determining whether the action of an inferior tribunal has been taken within its jurisdiction . . ."⁷⁵ The use of certiorari in England to review quasi-judicial administrative action continues to this day.⁷⁶ The most famous of all English cases on administrative law arose in 1915 on a

⁷⁰ *Groenvelt v. Burwell* (1698) 1 Salk. 263, 1 Raym. Ld. 213.

⁷¹ *Rex v. Inhabitants in Glamorganshire* (1700) 1 Raym. Ld. 580.

⁷² Goodnow, *op. cit. supra* note 40, at 498.

⁷³ *Rex v. Inhabitants in Glamorganshire*, *supra* note 71, at 580.

⁷⁴ Goodnow, *loc. cit. supra* note 40.

⁷⁵ Dissenting (on another point) in *Crowell v. Benson* (1932) 285 U. S. 22, 75.

⁷⁶ 9 HALSBURY, LAWS OF ENGLAND (2d ed. 1931) 855-858.

certiorari from the King's Bench Division to examine whether an administrative board of nation-wide jurisdiction had acted, procedurally, in accordance with the true meaning of an act of Parliament.⁷⁷

CONCLUSION

Standard Oil Co. v. Board of Equalization is contra to the hitherto established rule of this state which permitted the use of the writ of certiorari to review state administrative bodies. It is supported only by a part of the reasoning of two Water Act cases,⁷⁸ reasoning which was not necessary to the decision in the case, and which had often been repudiated prior thereto and was not applied subsequently until the *Standard Oil* case. The latter decides a question of common law contrary to the common law of England and of the rest of the United States. The practical results of the decision are bad. It can be overruled without disturbing any prior cases. No rights of property have vested under it. It should be overruled at the first opportunity.

⁷⁷ Local Gov't Board v. Arlidge [1915] A. C. 120.

⁷⁸ The reference here is to the two later water cases, Dep't of Public Works v. Superior Court, *supra* note 37, and Mojave River Irr. Dist. v. Superior Court, *supra* note 38. The first water case, Tulare Water Co. v. State Water Comm., *supra* note 37, upon which the two later cases rely, and which they misunderstand, is not authority for the *Standard Oil* case either in its holding or any part of its reasoning.