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Certiorari to Review Decisions of the Board of Standards and Appeals

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for a conspiracy to charge a person falsely with an offense, and procure his arrest therefor, is good, although the indictment alleges that the conspiracy was executed.[14] Section 37 of the Federal Criminal Code makes conspiracy a felony, and as crimes of equal degree do not merge, the question of merger does not arise in that jurisdiction.

The court points out, in the instant case, that to uphold the doctrine of merger would be to give the defendant, and not the prosecuting attorney, the right to determine the crime with which he must be charged. It is often possible to convict for the lesser crime when it would be impossible to convict for the greater. The court remarked:[15]

> "The same act may involve different offenses, felonies and misdemeanors. Robbery includes larceny, and if one breaks and enters a dwelling with intent to steal and does so, there is committed both burglary and larceny. It would be unfortunate if the state could not prosecute for any one of the crimes committed, without regard to the question of whether a lesser crime had merged in the greater."

This appears to deal the death-blow to the doctrine of merger in this state, and every student of the law will agree that it is a step in the right direction.

DANIEL O'SULLIVAN.

CERTIORARI TO REVIEW DECISIONS OF THE BOARD OF STANDARDS AND APPEALS.

By section 1283 of the Civil Practice Act, the writ of *certiorari* is abolished except for the purpose of reviewing tax assessments. The statute[1] provides that in all cases, except the latter, a petitioner must proceed by order and not by writ. The courts have declared that section 1283, *et seq.*, of the Act apply with equal force to *certiorari* proceedings to review decisions of the Board of Standards and Appeals.[2]

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[14] Johnson v. State, 26 N. J. L. 313 (1857).
[15] *Supra* note 1 at 91, 177 N. E. at 319.

[1] N. Y. C. P. A. §1283, Am'd by L. 1922, c. 355: "Nothing in this section shall be construed as abolishing the writ of certiorari under the tax law, or under any other general or special statute, to review assessments for purposes of taxation which are placed on the local tax rolls."

[2] Matter of Multiplex Garages, Inc. v. Walsh, 213 App. Div. 155, 210 N. Y. Supp. 178 (1st Dept. 1925), *rev'd*, on another ground, 241 N. Y. 527, 150 N. E. 540 (1925); Matter of McGarry v. Walsh, 213 App. Div. 289, 210 N. Y. Supp. 286 (2d Dept. 1925).

In the recent case of *People ex rel. St. Albans-Springfield Corporation* v. *Connell*,[3] however, the Court of Appeals has held that section 719a of the Greater New York Charter [4] has modified the rules of *certiorari* in so far as they apply to the review of decisions of the Board of Standards and Appeals. Although in form the method is still by order of *certiorari*, in effect it is similar to the manner of reviewing tax assessments.[5]

The facts were as follows: Pursuant to the Building Zone Resolutions adopted by the Board of Estimate and Apportionment, the relator's [6] property was placed in a business district. Unable to profitably dispose of the property either for residential or business purposes, he applied to the Board of Standards and Appeals to permit the erection upon the corner lot of a gasoline station. This was in accordance with section 21 of the Amended Building Zone Resolutions of the City of New York which permits the Board of Standards and Appeals to vary any provision of the zoning requirements where practical difficulties or unnecessary hardships intervene.

The application before the Board was denied, however, whereupon the relator obtained an order of *certiorari* to review the decision pursuant to section 719a of the charter.[7] The Special Term made an order referring the matter to a referee to take proof of all the practical difficulties in the way of carrying out the strict letter of the Zoning Resolutions. The referee found the evidence to be overwhelmingly in favor of the relator. The property in question was almost valueless as an ordinary business property. Stores nearby were vacant and the banks refused to loan money on the property in this neighborhood. The referee further found that the only profitable use to which the property could be put was a gasoline station. The Special Term confirmed the referee's report, and directed the Board of Standards and Appeals to permit the relator to erect upon his property the gasoline station as requested. The Board appealed from this order claiming: (1) The Board of Standards and Appeals did not abuse its discretion in denying the relator's application; and (2) on the application for *certiorari* the Special

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[3] 257 N. Y. 73, 177 N. E. 313 (1931).

[4] Subd. 4, §719a, Greater New York Charter (Laws of 1901, c. 466, Am'd Laws of 1917, c. 601). "If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."

[5] *Supra* note 3.

[6] In this note the respondent is referred to as the relator, since the case bears the legend People *ex rel.* St. Albans, etc. In Multiplex Garages, Inc. v. Walsh, referred to in note 2, *supra*, the Appellate Division said that such a proceeding should be entitled "In the Matter of the Application of" the petitioner.

[7] *Supra* note 4.

Term was without power to direct the referee to take evidence *de novo*.

The Court of Appeals affirmed and modified the judgment of the Special Term. It said that the evidence was so overwhelmingly in favor of the relator's contention that the refusal of the Board to grant the relief requested amounted to a positive abuse of discretion. Moreover, said the court, under subdivision 4 of section 719a of the New York Charter, the Special Term had the power to direct the referee to take evidence *de novo*.

On the question of zoning, the above holding falls in line with a long series of cases where the courts have refused to set aside the decision of the members of the Board of Standards and Appeals unless their findings were obviously unsupported by the evidence adduced before them.[8] Thus, in *Falvo* v. *Kerner*,[9] the court said that the mere fact that more profit may be derived from certain property in a district zoned as residential if a gasoline station is erected upon the property, instead of using it for residential purposes, is not a sufficient basis for the claim of the property owner that to refuse his application for the erection of a station thereon is an unnecessary hardship on him. In *Wetner* v. *Walsh*,[10] the court declared the existence of a presumption in favor of the correctness of the determination arrived at by the Board of Appeals, and in *Revorg Realty Co.* v. *Walsh*,[11] the court said that inasmuch as there was no convincing proof that it was impossible to use the property for any other purpose than a gasoline station, the respondent had not shown practical difficulties or unnecessary hardships to exempt it from the general rule.

On the question of introducing new evidence at a *certiorari* proceeding, however, the *St. Albans* case is seemingly in conflict with the dicta in a previously decided case which was affirmed by the Court of Appeals without opinion. The case adverted to is en-

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[8] Falvo v. Kerner, 222 App. Div. 289, 225 N. Y. Supp. (4th Dept. 1927); Matter of Goldenberg v. Walsh, 215 App. Div. 396, 213 N. Y. Supp. 578 (1st Dept. 1926), *rev'd*, 242 N. Y. 576, 152 N. E. 434 (1926); People *ex rel.* Facey v. Leo, 230 N. Y. 602, 130 N. E. 910 (1921); People *ex rel.* Sheldon v. Board of Appeals, 234 N. Y. 484, 138 N. E. 416 (1923); People *ex rel.* Smith v. Walsh, 211 App. Div. 205, 207 N. Y. Supp. 324 (2d Dept. 1925), *aff'd*, 240 N. Y. 606, 148 N. E. 724 (1925); Matter of Sagamore Road Corp. v. Lee, 224 App. Div. 744, 230 N. Y. Supp. 58 (2d Dept. 1928); *aff'd*, 250 N. Y. 532, 166 N. E. 313 (1928); Matter of Revorg Realty Co. v. Walsh, 225 App. Div. 774, 232 N. Y. Supp. 141 (2d Dept. 1928), *aff'd*, 251 N. Y. 516, 168 N. E. 410 (1929); Matter of Wilkins v. Walsh, 225 App. Div. 774 (2d Dept. 1928), *aff'd*, 251 N. Y. 518, 168 N. E. 411 (1929); Matter of Beardsley Realty Co. v. Walsh, 225 App. Div. 815 (2d Dept. 1929), *aff'd*, 252 N. Y. 571, 170 N. E. 147 (1929).

[9] *Supra* note 8.

[10] 212 App. Div. 635, 209 N. Y. Supp. 454 (1st Dept. 1925), *aff'd*, 240 N. Y. 689, 148 N. E. 760 (1925).

[11] *Supra* note 8.

titled *People ex rel. Helvetia Realty Co.* v. *Leo.*[12] In that case, the Appellate Division said that on *certiorari* to review the determination of the Board of Standards and Appeals, the court cannot hear the matter *de novo,* its jurisdiction being limited to matters affecting the board's jurisdiction under section 719a, subdivision 4 of the Charter. The question to be decided, said the court, was only whether the Board abused its discretion in relation to the evidence before it. This decision induced a learned commentator to say:

> "That the court is not at liberty to consider facts *de hors* the return and that the facts set forth therein must be accepted as true seems to be the accepted doctrine in New York and elsewhere." [13]

In the *St. Albans* case, however, the Court of Appeals said that its affirmance of the *Helvetia*[14] case without opinion was without express approval of the statement barring new evidence on the hearing.[15] The court distinguishes the *Helvetia* case, declaring that the power of review given to the courts was not directly involved as it might have been if the application for a variance had been denied and the owner's rights thereby restricted. In the *Helvetia* case, the Board of Standards and Appeals had permitted a variance which was approved by the Special Term and on appeal.

Thus, under the interpretation of section 719a, subdivision 4, of the Greater New York Charter in the *St. Albans* case, the rule in New York now is that on a hearing for *certiorari* to review a determination of the Board of Standards and Appeals, the court is given express power to review the determination of the Board of Appeals and to reverse or to affirm wholly or partly, or to modify the decision brought up for review, and may take additional evidence on the hearing.[16]

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[12] 195 App. Div. 887, 185 N. Y. Supp. 949 (1st Dept. 1921), *aff'd,* 231 N. Y. 619, 132 N. E. 912 (1921).

[13] Weisman, *Zoning Administration in New York City* (1928) 2 ST. JOHN'S L. REV. 105, at 166.

[14] *Supra* note 12.

[15] *Cf.* contrary dicta in Werner v. Walsh, *supra* note 10.

[16] *Cf.* this procedure with that of the writ of *certiorari* to review tax assessments. People *ex rel.* Manhattan Railway Co. v. Barker, 152 N. Y. 417, 46 N. E. 875 (1897). In this case the Court said (p. 431): "The petition is regarded as the complaint, the return as the answer, and, in deciding the issues joined thereby, the court may call witnesses to its aid and their testimony becomes a part of the proceedings upon which the determination of the court is to be made. That determination is a revaluation and it may be a different valuation of the property assessed."

Parson, discussing the writ of *certiorari* under the tax law says: "In the tax law the certiorari proceedings might well be an action, as it is a proceeding to review *de novo* and not a review as is contemplated in the code proceeding." PARSON, PRACTICE MANUAL (Standard ed. 1931) 380.

In accordance with this rule, the order of the court below, which authorized the erection of a gasoline station, was affirmed as modified by a direction that when the circumstances become so changed by the development of the city that the property is reasonably susceptible of being applied to business uses, then, upon the application of the authorities or anyone interested, the gasoline station must be removed.

Discussing the constitutionality of zoning laws, the court said:

> "Law is applied to facts, and as the facts change in the process of time the law adapts itself accordingly. That which may be unconstitutional today may be legal years hence * * *." [17]

This language, noble though it be, was mere dicta since the constitutionality [18] of zoning restrictions was not in issue in this case. Whether it is evidence of a growing tendency for the formulation of a realist jurisprudence [19] remains to be seen. Meanwhile, pity the fact that such words are only dicta instead of forming a part of a decision upholding the constitutionality of some great social enactment.

ALBERT SCHLEFER.

THE DEVELOPMENT OF THE RULE OF DAMAGES FOR FRIGHT IN NEW YORK.

The question as to whether damages are recoverable for fright and for nervous shock has been the subject of legal controversy since 1888 when the Court in *Victorian Railways Commrs.* v. *Coultas* [1] decided that there could be no recovery for damages resulting from fright. Before many years had passed the doctrine of that case was practically overruled,[2] and in 1925 the case of *Hambrook* v. *Stokes Bros. Ltd.*[3] liberally extended the doctrine of recovery of damages for fright as it then existed in England.

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[17] *Supra* note 3 at 82, 177 N. E. at 315.

[18] For a discussion of the constitutionality of zoning laws, see Weisman, *Zoning Administration in New York City, supra* note 13.

[19] Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697.

[1] 13 App. Cas. 222 (1888).

[2] Dilieu v. White, 2 K. B. 669 (1901).

[3] 1 K. B. 141 (1925). The plaintiff was allowed to recover for the death of his wife brought about by reason of the severe shock she suffered in witnessing the defendant's motor lorry negligently strike her daughter. It was said plaintiff could recover, although his wife had not been shocked by a fear of injury to herself, provided shock resulted from what she saw or realized, rather than that which someone told her.