the instant case, the directing of a verdict for the defendant was error.

The principal case shows, again, that our federal statutory scheme of compensation for injured railroad empoyees is inadequate.[25] Though the employer is deprived of his common law defenses, the employee "is not given a remedy, but only a lawsuit."[26] In an area in which industrial accidents are numerous and often severe, the injured employee must yet wait upon the determination of a jury to know if he will be made whole.

Even to those who think a railroad should not stand in a paternalistic relation to its employees, it must occur that the recovery structure of the Federal Employers Liability Act is entirely outmoded when contrasted with the workmen's compensation systems.[27]

UNAUTHORIZED PRACTICE OF LAW

TAX COUNSELING BY ACCOUNTANTS

Bercu, a certified public accountant, was consulted concerning a corporation's 1943 federal income tax return. A

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would never have occurred had the first of the standing cars been equipped with the couple-on-impact type coupler prescribed by the Safety Appliance Act. It was held that the injured employee was not within the class of persons meant to be protected by the Act's coupling provisions. St. Louis & S. F. R. R. v. Conarty, 238 U.S. 243 (1915). Two years later an employee who had been injured in a coupling accident brought his case before the Supreme Court. The defendant urged upon the Court its decision in the Conarty case. The latter case was somehow distinguished away, and a recovery was allowed. Louisville & N. R. R. v. Layton, 243 U.S. 617 (1917). By 1921 there had been a return to the Conarty learning in respect to coupling accidents. Lang v. New York C. R. R., 255 U.S. 455 (1921). In 1923, the Court had this to say with respect to the manner in which the coverage of the statute was to be interpreted: " . . . [the employee] can recover if the failure to comply with the requirements of the act is a . . . cause of the accident, . . . although [he is] not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." Davis v. Wolfe, 263 U.S. 239, 243 (1923).

25. See Mr. Justice Frankfurter, concurring in Tiller v. Atlantic Coast Line R. R., 318 U.S. 54,71,72,73 (1943).

26. Mr. Justice Jackson, concurring in Miles v. Illinois C. R. R., 315 U.S. 698, 707 (1942).

27. For a recommendation that railroad accidents be comprehended within some sort of workmen's compensation plan see Schoene and Watson, "Workmen's Compensation in Interstate Railways" 47 Harv.L.Rev. 389 (1934) passim. To the same effect is the language of Mr. Chief Justice Taft, speaking in 1929 before the American Law Institute. A relevant excerpt appears in 19 Am.Lab. Leg. Rev. 380 (1929).

disagreement between the accountant and the corporation's attorney concerning certain deductions grew out of the consultation. Bercu examined the Bureau of Internal Revenue rulings and submitted a written memordandum which proved to be correct. The New York County Lawyer's Association brought suit in the Supreme Court of New York County to punish for contempt[1] and to enjoin the alleged unlawful practice of law by Bercu. The injunction was denied because of the failure of the Lawyer's Association to conform with the statutory requirement that prior to such suits a written request must be made on the attorney general to commence the suit. The Court concluded that under the New York statute Bercu was not engaged in the unlawful practice of law.[2] *In re Bercu,* 69 N.Y.S. 2d 730 (1947).

How many tax consulting functions the accountant may perform without engaging in the practice of law is the subject of disagreement between the professions of law and accounting.[3] If all the activities of lawyers in practicing

1. The Supreme Court had jurisdiction to have Bercu adjudged in contempt of court for alleged unlawful practice of law outside of court, since out of court activities amounting to unlawful practice of law may be punished as and for a criminal contempt under the New York Judiciary Law, §750, subd. 7 (1939).
2. The court noted that in New York the legislature holds the power to define and regulate the practice of law. Note, 56 Yale L. J. 1438, 1441, n.12 (1947). That is not the majority rule. The position taken by most of the courts is that the practice of law is subject to regulation by both the judicial and legislative departments. Danforth v. Egan, 23 S. D. 43, 119 N.W. 1021 (1909); accord, In re Myrland, 45 Ariz. 484, 45 P.2d 953 (1935); Rhode Island Bar Ass'n. v. Auto. Service Ass'n., 55 R.I. 122, 179 Atl. 139 (1935); In re Opinon of the Justices, 279 Mass. 607, 180 N.E. 725 (1932); In re Caunon, 206 Wis. 374, 240 N.W. 441 (1932); In re Bruen, 102 Wash. 374, 172 Pac. 1152 (1918); In re Thatcher, 80 Ohio St. 492, 89 N.E. 39 (1909). In Indiana it has been considered a judicial function. Beamer v. Waddell, 221 Ind. 232, 45 N.E.2d 1020 (1943). The principal Indiana statute which attempts to deal with the problem merely makes it a misdemeanor to practice law without a license, but the ascertainment of what constitutes the unlawful practice of law is left to the courts. Ind. Stat. Ann. (Burns, 1933) §9-402. Similar statutes exist in other states. Ill. Rev. Stat. (1943) c.13, 91; Idaho Laws Ann. (1943), Title 3, §104; Ga. Code Ann. (1933) §9-402.
3. The attention the problem has received is illustrated by the efforts of both professions to reach a satisfactory solution. See Vernon, "American Bar Association to Sponsor Tax Courses for General Practitioners," 29 A.B.A.J. 516 (1943). May, "Accounting and the Accountant in the Administration of Income Taxation," 47 Col. L. Rev. 377 (1947). The State Bar Association of Texas has recently entered into agreements with accountants. 12 Unauth. Prac. News 3 (1946). Other groups have adopted similar agreements. "Resolution of the Georgia Society of Certified Public Accountants", 6 Unauth. Prac. News 20 (1940). "Resolution of

their profession are to be included within the "practice of law," then the number of unauthorized practitioners would be overwhelming.

In the principal case the rulings used by Bercu were made by the Income Tax Unit of the Treasury Department, and were reported in the Internal Revenue Bulletin with the qualification that they would "only show the trend of official opinion."[4] Through the use of these rulings Bercu advised his client that payment of a city sales tax which had accrued during past years and which was paid in full in 1943 could be deducted from the amount of 1943 income.

An examination of the few cases which have considered whether accountants who advise clients concerning tax matters thereby "practice law" indicates that some courts have placed importance upon the source of information employed by the accountants. An accountant may be practicing law when, in advising his client how to reduce his tax liability, he indicates a specified course of action which should be followed in order to conform to particular statutes.[5] And where to compute the amounts of claims for refund of occupation taxes an accountant interprets statutes, he may invade the lawyer's province.[6] Similarly, an accountant may perform legal functions when he construes tax statutes in order to determine whether an assessment upon the client's property was made in accordance with the statutes.[7] On the other hand an accountant who analyzes assessed property valuations

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the Virginia Society of Public Accountants," 75 J. Accountancy 154 (1938). The importance of the problem has increased coextensively with the growth of the accounting profession. Since 1909 the number of accountants has increased by 600% and the accounting profession has developed technical literature, created an educational system, a code of ethics, standards of accounting and auditing procedure, and strong professional societies. Carey, "Public Opimon of the Accounting Profession," 85 J. Accountancy 59 (1948).

4. Note, 56 Yale L. J. 1438, 1440, n.7 (1947).
5. Blair v. Motor Carriers Service Bureau, 40 Pa. Dist. and County Rep. 413 (Ct. Comm. Pleas, Phila. County 1939).
6. Chicago Bar Ass'n. v. United Taxpayers of America, 312 Ill. App. 243, 38 N.E.2d 349 (1941).
7. McConnell operated a taxpayers association and had contracts with many local taxpayers by the terms of which he was authorized to determine the legality of taxes assessed against their property. The court observed that there are few questions in law that are more difficult than the determination of what constitutes a legal tax. Crawford v. McConnell, 173 Okla. 520, 49 P.2d 551 (1933). In Mandelbaum v. Gilbert and Barker, 160 Misc. 656, 290 N.Y.S. 462 (1936), a similar result was reached where the accountant interpreted a tax law in attempting to secure tax payment refunds.

and the elements entering into them, merely to ascertain the method of computing such valuation without attempting to ascertain the legality of the assessments under a particular statute, does not practice law.[8] Nor is it the practice of law for an accountant to use his general business and accounting experience to advise the replacement of par value stock with no par value stock.[9]

It is suggested that these cases may be rationalized on the basis of the source of an accountant's information used in a particular transaction. However, the impossibility in many cases of ascertaining the original source of the information an accountant uses in performing certain functions illustrates the impracticability in any such distinction. Its only value lies in its use in ascertaining a line of demarcation between accounting and legal problems: a line which may be impossible to find.[10]

An examination of policy considerations is therefore required. In the principal case the corporate client itself was not a party to the proceedings nor had it been at all damaged. It is suggested, therefore, that perhaps the remedy could be confined to the aggrieved party and relieve the bar from the persistent lay criticism that it is attempting to

8. Tanenbaum v. Higgins, 190 App. Div. 861, 180 N.Y.S. 738 (1920).

9. The court held that the accountant applied such information as any good business man might obtain in the course of his experience and implied that it could not be derived from knowledge and construction of a particular statute or statutes. Elfenbein v. Luckenbach Terminals Inc., 111 N.J. 67, 166 Atl. 91 (1933); cf. Dunlap v. Lebus, 112 Ky. 237, 65 S.W. 441 (1901) where the court held that a bookkeeper, in assisting the state auditor in the collection of back estate taxes, was not practicing law illegally when he determined the extent and character of an estate. The Court said that that was such computation as any property holder might make.

10. Berle and Fisher, "Elements of the Law of Business Accounting," 32 Col. L. Rev. 573 (1932). A similar view is that the professions of law and accounting in the entire tax area are inseparable and that the educational programs of both professions should provide better mediums for mutual understanding. Wienshienk, "Accountants and the Law," 96 U. Pa. L. Rev. 48 (1947). Leidman, "Cooperation Between Attorneys and Accountants," 17 Tenn. L. Rev. 43 (1941), predicts that no one will find a definite line between the two professions in the tax field. See Note, 28 Iowa L. Rev. 116 (1942). One proposed soluition is that both a lawyer and an accountant should be employed when a case reaches the "Twilight Area" between law and accounting. Maxwell and Charles, "Joint Statement as to Tax Accounting and Law Practice," 32 A.B.A.J. 5 (1946). This view has also been adopted in a resolution of the New York State Conference of Lawyers and Certified Public Accountants. 12 Unauth. Prac. News 34 (1946). The financial burden on the public makes this suggestion impractical.

enforce a monopoly.[11] However, for the remedy to be effective a damaged client must have a reasonable chance for recovery in actions of deceit or malpractice. These actions render the accountant liable for erroneous advice when he does not conform to the standards of professional conduct of other reasonable accountants in his community. To carry this consideration one step further, under the suggested remedies for aggrieved clients, when the accountant would advance into legal problems to an extent which other reasonable accountants would not go, he would be liable if his advice proved to be erroneous. A premium would be thus placed on the ability and accuracy of the accountant. The ultimate limit to which he may go could be fixed by statute.[12] In the absence of statute, the immediate bounds of his advance could be fixed by the needs of the public and his own abilities which when over-estimated would prove costly to the accountant.

On the other hand are those policy considerations advanced by the bar in justification of its activity against the unauthorized practice of law.[13] This justification can be found in the large number of reported cases involving defective instruments which probably would not have arisen had an attorney been employed at the start.[14] Banks, trust companies, real estate agents, and others commonly trespass in the field of drafting legal instruments, and it is submitted that in the case of an instrument in which an error might not be discovered until succeeding generations, a single remedy

11. Note, 28 Iowa L. Rev. 116 (1942). That special rights and privileges are accorded a lawyer in a court of law is no reason why similar rights should be accorded to the lawyer by administrative agencies merely because those bodies are governed by law or because their decisions are subject to a limited right of appeal to the courts. May, "Accounting and the Accountant in the Administration of Income Taxation," 47 Col. L. Rev. 377 (1947). The original position of the American Bar Association that any practice in the field of federal income taxation should be restricted to lawyers was objected to as monopolistic by the American Institute of Accountants and has since been modified. 4 Unauth. Prac. News 98 (1938). See also Carey, "Public Opinion of the Accounting Profession," 85 J. Accountancy 59 (1948).

12. See n.2 supra.

13. "The profession of law is founded on the axiomatic truth that the public is best served, so far as legal services are concerned, by practitioners specially trained and qualified by character and learning to act as attorneys and counselors." Resh, "The Unauthorized Practice of Law," 1945 Wis. L. Rev. 160.

14. Resh, "The Unauthorized Practice of Law," 1945 Wis. L. Rev. 160.

existing only at the time of damage would be useless. The fact that real estate agents and other similar "lay practitioners" have their own national associations and codes of ethics has proved of little value in alleviating the effects of their unlawful practice.[15] Thus the endeavor of the bar to eliminate this illegal practice may be justified. But it is possible that in the field of tax problems, considerations of a different nature are involved. It has been suggested that the loss of a great deal of the tax practice to the accountants has been caused by the unwillingness of the attorneys to train for this specialized field of endeavor.[16]

The unlawful practice of law in the tax field is often a result of a misunderstanding between the lawyer and the accountant of each others' problems,[17] and while past negotiations between the professions of law and accounting have proved of little practical value,[18] it is submitted that in the solution of such a complex problem mutual understanding and negotiation may well be the most important forces.[19]

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15. Brand, "Unauthorized Practice Decisions," 474, 475 (1937).
16. The American Bar Association's Committee on Unauthorized Practice reached the conclusion that until larger numbers of lawyers throughout the United States were trained in tax work, clients would naturally entrust their tax problems to persons most familiar with this field, whether or not such persons were lawyers. Vernon, "American Bar Association to Sponsor Tax Courses for General Practitioners," 29 A.B.A.J. 516 (1943).
17. The layman has come to regard the lawyer as insufficiently trained in the specialized field; the lawyer regards the layman as insufficiently trained in anything related to law. Note, 28 Iowa L. Rev. 116 (1942).
18. The following is a portion of the agreement entered into between representatives of the Milwaukee Bar Association and the Milwaukee Chapter of the Wisconsin Society of Certified Public Accountants: "3. That certified public accountants should not prepare legal documents such as articles of incorporation, corporate bylaws, contracts, deeds, trust agreements, wills, and similar documents. . . . " 11 Unauth. Prac. News 43 (1945). That such agreements are of little or no practical value is obvious from the text. However, similar resolutions continue to be drawn. 12 Unauth. Prac. News 3, 34 (1946).
19. The instant case was reversed by the N.Y. Sup. Ct., App. Div., 1st Dept., reported in 16 U.S.L.Week 2499 (1948).