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THE HODGES CASE AND BEYOND

A Reply to Professor Davis

ROBERT T. DONLEY*

"Labels are bromides and there is no point in quarreling about them."

In the June, 1938, issue of this Quarterly, Professor Kenneth C. Davis published a "study in separation of powers," in the course of which he contended that the case of Hodges v. Public Service Commission was erroneously decided; that subsequent cases based upon it are unsound; and predicted the early death of certain existing statutes if the court persisted in its errors. It will be the burden of this paper to weigh the soundness of those contentions.

As that one of counsel for Hodges, et al., who formulated the constitutional arguments upon which the case ultimately turned, wrote that portion of the brief dealing with them, and argued the points before the supreme court, the writer feels that he has an unique interest in these questions and shall, therefore, hereinafter claim the privilege of sometimes dropping into the first person singular instead of clinging to the stilted psuedo-formality of the words "the writer". I hereby deny any pride of paternity but do claim the right of legitimacy for the offspring. I would not undertake to make this reply were it not for the fact that, in my opinion, Mr. Davis has made both negative and positive errors in that: (a)

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** LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING (1938) 29.


2 110 W. Va. 649, 159 S. E. 834 (1931).
he has not fully stated the arguments in support of the case, and of those based upon it; (b) nor has he, in every instance, correctly interpreted statutes which it is claimed will be held unconstitutional.

In order to examine the Hodges case let us first look to the provisions of the water power act of 1929,\(^3\) which was held unconstitutional. We shall have to go back even further and look at the subject matter with which that act dealt: water power. It had been consistently recognized by the water power acts of 1913\(^4\) and 1915\(^5\) that the water power resources were the property of the state. In two cases,\(^6\) the supreme court had likewise supported that view, and so far as can be learned it has never been opposed. These resources were recognized as being tremendously valuable assets of the state, because of their social and economic potentialities: the building up of the communities of the state by new industries which would be attracted by cheap, readily available electric current. As such the "title" (if I may be permitted to use a "label" to express a concept) to these resources was held by the state and the sole power of disposal was vested in the legislature. The situation was the same as it would have been had the state owned valuable mineral resources such as coal, oil or gas. The state did not see fit to adopt the policy of developing and operating this water power on its own behalf. It was thought that private enterprise could and would do the job more efficiently. Accordingly the licensing scheme was adopted.

Of course, the ultimate policy of the state did not spring Minerva-like to full maturity. In the act of 1913 it is evident that the legislature regarded the issuance of licenses to hydroelectric companies more in the nature of a special privilege accorded to private enterprise than as a grant of the state's resources. The primary concerns of the act were to insure the technical sufficiency of the proposed project from an engineering standpoint and the protection of life and property. In 1913, hydroelectric dams were regarded as dangerous structures. Perhaps the horrors of the Johnstown flood lingered in memory. The act of 1915 revealed progress in legislative thinking. In addition to being satisfied as to the tech-

\(^4\) W. Va. Acts 1913, c. 11.
nical sufficiency of the project, the commission was to investigate its effect upon the economic value and importance of agricultural lands, forests, coal, oil, gas, mineral deposits and other natural resources. The commission was to have due regard for public sentiment in the district affected. Still, however, the emphasis was upon the economic value of property in the immediate vicinity of the project, and development was regarded primarily as a matter of local concern.

Fourteen years later, when the 1929 act was passed the legislature (or others responsible for its enactment) had come to the full realization that water power was a resource which, even though the site be actually located in only one county, should be controlled and utilized for the benefit of the state as a whole. The act provided that while it was the policy of the state "to encourage water power development", nevertheless the commission was enjoined "to weigh, from the standpoint of the state as a whole and the people thereof, the advantages and disadvantages arising therefrom before acting upon any application for a license; and no license shall be granted until the commission shall have determined that the advantages substantially exceed the disadvantages."

To illustrate, let us put a hypothetical case. Suppose that there is no water power act in existence. The situation, then, is this: the state owns valuable resources and the legislature is the sole branch of the government having the power of disposal by license or otherwise. It could, by special legislative enactment, dispose of this resource or any part of it. Neither the executive nor the judicial branches would have any voice in the matter. But the legislature apparently concludes that it possesses neither the time nor the technical knowledge to deal adequately with the subject. No one contends that it may not constitutionally delegate this power of disposal to an administrative agency, an "arm" of the legislature, an agency created not by the constitution but by the legislature itself. If the legislature had done so, and stopped there, no constitutional objection would be found. The findings of fact and decisions as to policy could have been finally and unappealably delegated to the water power commission. In the absence of a showing of abuse of discretion or lack of sufficient evidence, no review by a judicial tribunal of any sort would be constitutionally necessary for no legal "rights" would be involved and none could be destroyed or injured. No hydroelectric company would have
any "right" to a license. No citizen or body of citizens would have any "right" to have the license refused.

But the legislature did not stop there. In the act of 1929, it attempted to place upon the circuit court of Kanawha county the burden of deciding a pure question of legislative policy: did the advantages substantially exceed the disadvantages "from the standpoint of the state as a whole and the people thereof"? At the time of the application in the Hodges case the incumbent judge was the honorable and amiable Arthur P. Hudson, an exceptionally able and experienced judge. It may be asked (if Mr. Davis insists upon realism in preference to theory) whether Judge Hudson was an expert in any of the matters which he had to decide. What did he know of the technical sufficiency of the plans, of the advantages and disadvantages involved from the standpoint of the state as a whole and its people? The proper function of a judge, is, in the language of Chief Justice Taft, 7 "confined to definition and protection of existing rights". Yet the 1929 act required this judge (with no special training or experience in such matters) to determine questions of expediency and legislative policy in a matter in which no "rights" whatever were involved. Moreover, he was to determine them not upon the record made before the commission, but upon a trial de novo held in his own court. He was to consider whatever additional evidence might there be adduced. Of necessity, he was to form, and in the Hodges case did form, an independent judgment upon this matter of state concern which involved the disposition of a resource covering 1415 square miles of watershed.

What, then, became of the commission—the legislative "arm" which was to perform for the legislature the function which it could not itself ably perform? It became a body of figureheads. The office of the commission became a convenient place for the taking of evidence which had no conclusive weight whatsoever. Its judgment upon matters of policy was at most "persuasive". The applicant might make a weak case before the commission and the license be denied. Then, while "the public" is lulled into a state of apathy, an appeal would be taken and a strong case made before the court, which would grant the license before the public could be stirred to opposition.

These are not objections going to the "wisdom" of the act.

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The question is: could the legislature constitutionally have delegated this power in the first instance directly to the circuit court of Kanawha county, without the interposition of the water power commission? For, as previously shown, that is the real effect of the provisions for a trial de novo. To test the validity of the principle by its possible applications: suppose that the state owned in fee simple a large body of valuable coal land in McDowell county. The legislature declares a policy of development by leases upon a royalty basis. It then enacts a statute providing that the circuit court of Ohio county shall, on behalf of the state, enter into leases with private operators if it is satisfied that the advantages substantially exceed the disadvantages from the standpoint of the state as a whole and the people thereof. If this arrangement be constitutional then it is difficult to imagine any legislative function which could not be irresponsibly passed on to the already overburdened judiciary. Yet this is precisely what was attempted by indirection under the water power act of 1929 when one looks at the substance, rather than the form, of the statute.

I shall not here repeat the formal legalistic arguments in support of the Hodges case. They are set forth amply in Judge Hatcher’s opinion and the reader will be assumed to have read the case. Let us rather proceed to consider the objections advanced by Mr. Davis.

At the outset of his discussion, Mr. Davis says that “Before 1931, the role of separation of powers in the West Virginia cases was of much greater consequence in the writing of opinions than in the decision of cases. In the tax cases the talk seems to revolve around seven labels, but most of the holdings are in harmony with results that would be reached by a more pragmatic approach.” In other words, the “seven labels”, like the seven dwarfs in Snow White, whistled while they worked. This leads Mr. Davis to his only “pragmatic” objection to the Hodges case and those based upon it, namely, that “the doctrine of separation of powers has brought about consequences which from the standpoint of efficiency in government may well be considered unfortunate.”

No proof is offered in support of this conclusion, nor is there any definition of what constitutes “efficiency in government”. On the contrary, the Hodges case would seem to make for efficiency if by that word is meant (a) speed in administration; (b) finality of

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8 Davis, supra n. 1, at 352.
9 Id. at 353.
decision; and (c) the superior judgment of qualified experts. For, in order to attain these ends the legislature need only set up the water power commission, accord finality to its findings of fact and conclusions of policy, and omit the provision for appeal to the circuit court. If it is efficiency that is desired, nothing could be more inefficient than a system which provided for (1) a hearing before a body of three experts upon one mass of evidence, followed by (2) another hearing before one nonexpert upon another mass of evidence, followed by (3) a third hearing (appeal to the supreme court) before five nonexperts, upon the latter mass of evidence. Yet, because this incongruous system was stricken down by the Hodges case, Mr. Davis complains that from the standpoint of efficiency in government the decisions "may well be considered unfortunate." Of theoretical objections to the decision, Mr. Davis enumerates seven:

(1) The court did not give effect to the qualifications which most writers placed upon the acceptance of the theory of separation of powers.\textsuperscript{10}

The "true meaning," according to Mr. Davis, is that "the whole power of one of these departments [of government] should not be exercised by the same hands which possess the whole power of either of the other departments."\textsuperscript{11} This is quoted from Story, who cites The Federalist, Blackstone and Montesquieu. One is slightly puzzled to find Mr. Davis relying upon such authors, especially Montesquieu twice removed, when one has previously read remarks such as these:

"... If it is expedient from the standpoint of convenience and efficiency in government that a court should have power in its discretion to modify a legislative order of a commission, should a jurisprudence of conceptions founded upon the writings of an eighteenth century French philosopher be allowed to stand in the way?"\textsuperscript{12}

Presumably no criticism can be directed at Montesquieu's works by reason of the fact that he was a Frenchman, nor because he happened to live in a century more graceful than ours. Again:

"It seems almost too obvious to state that a problem so essentially practical cannot be properly solved either by legal

\textsuperscript{10} Id. at 355.
\textsuperscript{11} Ibid., quoting STORY ON THE CONSTITUTION (5th ed. 1891), c. VII.
\textsuperscript{12} Id. at 306.
niceties or by abstract thought. Above all, the answer is not to be found in Montesquieu!"\(^{13}\)

I should be quite willing to leave it at that. But if the answer is not to be found in Montesquieu (although Story says that it is) neither shall wisdom die with Blackstone and Madison. However, if we meet the argument on its own ground — the "whole power" — the Hodges case is sound in the modern application of that principle.

It is true that Madison, in No. 47 of *The Federalist*, argued that the "whole power" interpretation should be taken literally. He was, however, placing his own construction upon Montesquieu's words:

"'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' or 'if the power of judging be not separated from the legislative and executive.'"

And, as Madison further points out, Montesquieu was commenting upon the British Constitution which was to him "what Homer has been to the didactic writers on epic poetry."

A literal application of Madison's "whole power" interpretation of Montesquieu would result in the practical destruction of the doctrine of separation of powers. For, the doctrine would not be violated unless the *entire aggregate* of powers of one branch of the government were vested in another branch.

It is interesting to note, too, that Madison was primarily concerned with the *encroachment* by one branch of the government upon another branch. In No. 48 of *The Federalist* he remarks that "the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." He inquires into the adequacy of "these parchment barriers against the encroaching spirit of power."

He did not, apparently, contemplate the spirit of *relinquishment* of legislative power, as exemplified in the water power act. It would seem, however, that the fundamental objectives of the doctrine of separation of powers may be as effectively subverted by abdication as by encroachment. The judicial branch must as firmly guard against the increase of its own powers as it must resist legislative attempts at their reduction.

It thus seems to me that if the phrase "whole power" means

\(^{13}\) *Id.* at 311.
anything for us today, it means that whole power as applied to a certain subject matter. The whole power of disposing of the water power resources was relinquished by the legislature and transferred to the circuit court of Kanawha county by the act of 1929. It was not a mere "review" of the action of the commission in order to determine whether it had acted in accordance with the law and the evidence and within the bounds of legitimate discretion. It was expressly a trial de novo.

The real objection must be upon some other ground. Thus, we read:

"The answers to 20th century questions . . . must be found in modern experience, and not in the abstract writings of an 18th century French philosopher who speculated about other problems and other conditions in another place at another time."14

I interpret this to mean, in bolder language, that the strict doctrine of separation of powers is outmoded. It once had validity but it no longer has. Admitting that it is in the constitution, how then shall we get rid of it — how shall we get it out of the constitution? By formal amendment? No one suggests that. The only other way is by judicial emasculation: a gelding is more tractable than a stallion and may run a better race. After all, it is the race and not the horse that is important — in the twentieth century. The test is not whether the constitution has been violated but whether it is convenient to ignore the violation. Chief Justice John Marshall (who, I take it, is outmoded too) once asked to what purpose limitations are imposed and committed to writing if they may at any time be exceeded by those intended to be restrained.15

I confess that the cult of modernity repels me, perhaps because it is essentially hypocritical. It says one thing and does another. The constitution does not mean today what it meant yesterday, nor the day before. It shifts and changes under the skillful

14 Id. at 371.

". . . At least in the English-speaking world we must have a balance between stability and change, between the general security and the individual life, between society and the individual, between regimented co-operation and free individual initiative and activity, between nation and state, between state and neighborhood, between legislative and executive and judiciary. . . .

"It is a mistake to think of balance as an obsolete idea of the eighteenth century." Pound, Some Implications of Recent Legislation (1939) 45 W. Va. L. Q. 205, 207.

15 Marbury v. Madison, 1 Cranch 137, 5 L. Ed. 137 (U. S. 1803).
manipulation of the skin-of-a-living-thought school of jurisprudence. There are, to me, interests other than that of expediency to be safeguarded. One of them is stability of the law. Another is predictability. A third is the assurance that even the judges are governed by the law; tritely, that this is a "government of laws and not of men"; that they decide cases upon principles as they conscientiously understand them and not according to what may seem at the moment expedient, and presented with a voice-of-Jacob-hand-of-Esau claim to birthright, disingenuously rationalized into a principle which, once postulated, is easily defended. In a word, respect for law depends in large measure upon confidence—faith, if you like (viewing the law as a kind of theology)—in the motives of the judges. It is preferable that a principle of law be honestly misinterpreted or misapplied without regard to the result reached, than that an expedient result be had through a dishonest bending of the principle to justify it. That, in brief, is my objection to the statement that answers to twentieth century questions must be found in modern experience: it is a counsel of conscious intellectual hypocrisy. All this is now old, unoriginal, platitudinous and somewhat of a bore. So, too, is all other orthodox theology. Perhaps there is a middle ground—"Somewhere between worship of the past and exaltation of the present, the path of safety will be found."  

(2) Previous cases had upheld the performance of nonjudicial functions by circuit courts.  

There is no doubt about the correctness of this statement. The supreme court admitted it. If, however, those cases were incorrectly decided (as the court indicates), and if, as is conceded, the matters therein dealt with were of only local concern, the question becomes this: should the court persist in its previous errors and extend them to new and different subject matter? The extent of the application of a principle is one of degree. Even if one

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"Another idea which had held a chief place in the polity of English-speaking peoples was that one will was not to be subjected arbitrarily to the will of another... This was the idea behind our bills of rights and behind the doctrine our legal historians have been calling 'the supremacy of the law'; a doctrine once thought to be the birthright of the American but now sneered at frequently by young lawyers newly appointed to give counsel to administrative bureaus and imbued with the idea of the supremacy of the bureau." Pound, supra n. 14, at 208.  
18 Davis, supra n. 1, at 356,
concedes that the previous cases were correctly decided, the question still remains as to how far and in what circumstances and as applied to what subject matter, their principles should be extended. This, as is everywhere admitted, is the very essence of the judicial function, and it is only a matter of individual opinion as to whether a particular decision involving a question of degree is either wrong or right. Mr. Davis is, of course, entitled to his own opinion. But it is just that, and nothing more. As a demonstration of eternal verities as to which there can be but one conviction, the argument wholly fails.

(3) The court implicitly recognized that the statute in the Hodges case is indistinguishable from the statutes upheld in previous cases.19

This statement is not borne out by a fair analysis of Judge Hatcher’s opinion. The distinctions between the water power act and the statutes dealing with incorporation of towns and with appeals from the valuations fixed by boards of equalization and review are so plain as to be unmistakable. First, the water power act set up a system for the disposal of a natural resource owned by the state. Second, the decision of the circuit court was to be based upon the advantages and disadvantages of that disposal from the standpoint of the state as a whole and the people thereof. This is not merely a question of “the geographical extent of the interest aroused in a function.”20 It is not geography, i.e., the physical extent of the interest, that is important, but rather the economic and social effect upon the entire commonwealth—a matter completely different, both in character and degree, from the questions of whether a town should be incorporated or whether the tax valuations in any one county are correct. This, and no less, is what the court meant by the words “statewide interest”.

(4) The water power act did not require the circuit court to make a determination of policy.21

The foundation of this argument is that the legislature had already determined the state’s policy to be “to encourage water power development.” The fallacy in this point seems obvious and, not to labor it unduly, I simply state that the declaration of a broad, general policy does not overcome the declaration of a narrower, more specific policy. It was as much the policy of the legislature

19 Id. at 358.
20 Ibid.
21 Id. at 359.
not to encourage development unless the evidence affirmatively showed that the advantages substantially outweighed the disadvantages in each specific case, as it was its policy to encourage development generally. In truth, the latter was subordinate to the former, for if a proper showing could not be made then the application for license must be denied however much it might otherwise fulfill the general requirement of development. The determination of this specific and paramount policy was, as previously shown, committed (indirectly in form, but directly in substance and effect) to the circuit court. To say, as Mr. Davis does, that the principal function of that court was "to determine whether or not this declared policy would be furthered" and that the court "was only to apply that policy to a given set of facts", is merely playing with words. If the substance of a power is embodied in the function of "applying" it, then for all purposes (except quibbling) the application is the power itself. 22

(5) The function performed by the circuit court was strikingly similar to its function in ordinary litigation. 23

I confess myself unable to understand this point. Hitherto, I had supposed that in "ordinary litigation" the function of a circuit court was to adjudicate "rights" and enforce correlative "duties" between parties. Perhaps this is only a slavish attachment to "labels". There is usually process or notice of some kind; pleadings are filed; a determination of facts is made; a judgment is rendered, to be enforced by appropriate sanctions. All this may be only the machinery that turns the wheels of justice, and therefore unimportant in determining the abstract nature of a function. Is it the function of circuit courts "in ordinary litigation" to grant to private enterprise a natural resource belonging to the state? Do circuit courts ordinarily determine the specific applications of the policy of the state in disposing of its natural resources? My experience and observation have been that they do not, and in the absence of something more persuasive than Mr. Davis' assertion that they do, I shall hold to that opinion.

(6) The separation of powers clause, properly interpreted, does not forbid a court to exercise a power somewhat judicial and

22 Compare the rule that a life estate coupled with a power of disposal amounted to a fee simple, prior to W. VA. REV. CODE (1931) c. 36, art. 1, § 16, and Notes (1930) 36 W. VA. L. Q. 288, and (1931) 37 W. VA. L. Q. 422.
23 Davis, supra n. 1, at 360.
somewhat legislative, if the legislature sees fit to confer such a power
upon the court.\textsuperscript{24}

This proposition as stated begs the question. It must first be
determined whether or not the legislature may constitutionally con-
fer power as it sees fit. What it was meant to assert, one assumes,
is that the separation of powers clause should be so interpreted as
to authorize the legislature to confer upon a court powers some-
what legislative and somewhat judicial. Why? Because, says Mr.
Davis, "if there is to be efficiency in government the separation of
powers principle cannot be inflexibly applied to such borderland
or unclassifiable powers." I have already commented upon the
unsoundness of the "efficiency" argument as applied to the water
power act. But on principle I disagree with the theory in its
broader applications. The argument of efficiency is the argument
of convenience or necessity: a court should have such-and-such
powers because it is expedient for it to have them. We have it
from Chief Justice Hughes that:

"'While emergency does not create power, emergency may
furnish the occasion for the exercise of power.'\textsuperscript{25}

That sentence has a beautiful ring but the more often one
reads it the more he is impressed by its Edward Learian quality.
It is a neat example of the judicial method of having your cake
and eating it too. As a result, we have standing side by side the
federal constitutional provision that no state shall pass a law im-
pairing the obligation of a contract, and the Minnesota act doing so.
It is obvious, of course, that in addition to having a ring, it is one
—a perfect circle—and, as Mr. Justice Sutherland pointed out
in his dissenting opinion:

"'... I can only interpret what is said on that subject as
meaning that while an emergency does not diminish a re-
striction upon power it furnishes an occasion for diminishing
it; and this, as it seems to me, is merely to say the same thing
by the use of another set of words, with the effect of affirming
that which has just been denied.'\textsuperscript{26}

Chief Justice Hughes' words were mere lip-service: the high
priest repeating the ritual which he did not follow in practice.
In borderline cases decision becomes little more than a battle of

\textsuperscript{24}Ibid.
\textsuperscript{25}Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 426, 54 S. Ct. 231,
78 L. Ed. 413 (1934).
\textsuperscript{26}Id. at 472.
words and one gets cynically accustomed to the unconscious hypocrisy with which they are employed. However, other cases, in which should be included the Hodges case, are not of this character. If not purely legislative, certainly the functions which the circuit court was to perform under the water power act were preponderantly legislative to such a degree as to call for application of the words of the written constitution—written as it is—not as we might write it if we had in mind only, or primarily, the question of efficiency.

(7) The plausible explanation of the Hodges case is that the court was influenced by extra-legal factors.27

This is hardly an argument at all and Mr. Davis does not seriously contend that it is. But if it were, he should be the last to object to that method of deciding a case, since he has emphasized so strongly the argument of expediency and efficiency—purely "extra-legal" considerations. It is conceded that the method exists, although courts deny it. The denial is both expected and then ridiculed by the professors of law. It is all good, clean fun and the game would be spoiled if we changed the rules.

The first part of this paper has been devoted to an attempt to refute Professor Davis' argument upon the traditional ground of formal logic which takes the shape of a syllogism. Upon this ground, there is no doubt of the validity of the conclusion reached, purely as logic, in the Hodges case. The syllogism runs in this wise:

Major premise: The constitution forbids the courts to exercise legislative powers.

Minor premise: The power to determine whether, in any specific case, resources of the state should be disposed of is a legislative power.

Conclusion: Therefore, this power cannot be exercised by the courts.

The syllogism is declared unsound by attacking the validity of both premises. It is said, first, that the constitution does not mean what it says, both because complete separation of powers is only the expression of an ideal, impossible of perfect attainment in practice, and because it has been interpreted otherwise in other cases. The answer is that because an ideal cannot be fully achieved is no reason for not achieving it as completely as possible; and that previous interpretations were unsound and the question may be

27 Davis, supra n. 1, at 361.
determined without reference to them. Secondly, the minor premise is said to be untrue because the application of the general policy of the state to a specific state of facts is really a judicial function. The answer to this has already been indicated with sufficient clarity.

The point of cleavage is now plain, and may be stated as follows: admitting that the separation of powers clause is open to interpretation by reason of the fact that complete separation cannot be attained in practice, how should it be interpreted? Two answers to this question have been made:

_The Court:_ Strictly, so that the ideal expressed by the clause may be attained as nearly as possible consonant with the practical considerations involved.

_Mr. Davis:_ Liberally, because practical considerations are of more importance than ideals. Anyway, the ideal is an eighteenth century one and ought not to be a twentieth century one.

Thus, what appeared on both sides to be cold logic are now seen in their true light as value-concepts. There is not much point in arguing with one about his values. Nor can it be said that by any _objective_ standard there has been "correct" thinking on one side only.

"Legal thinking is never a simple syllogistic deduction, but is to some extent a determination of social ends. It accordingly runs afoul of all the logical difficulties of such determination..."  

It is therefore submitted that so much of Mr. Davis' argument as depends upon logic—and I include here the appeals to precedent, history, the "intention of the framers", commentators, and the like—utterly fails to convince. We are, therefore, reduced to a consideration of his "value-concepts". Even if one concedes that in some cases practical considerations must prevail over adherence to ideals, there remains to be determined what those cases are. I cannot agree that there is any overbalancing practical reason for insisting that findings of fact and the exercise of discretion by an administrative body _must_ be reviewed by the courts—where there is no showing of lack of evidence or abuse of discretion—in order to have "efficiency". Indeed, the contrary would seem more reasonable: commit such matters to experts, eliminate the delay and expense of rehearing and reconsideration.

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28 _Burtt, Principles and Problems of Right Thinking_ (1928) 490.
by nonexperts. Thus, the argument in so far as it depends upon expediency alone, also fails to convince. It is submitted, therefore, that the Hodges case is sound, both as to the logical structure of the opinion and as to its practical results. I shall next proceed to discuss the cases which have followed it, bearing in mind that whatever may be the conclusion as to their soundness or unsoundness, the correctness of the Hodges case is in no wise affected thereby.

**Cases Based Upon the Hodges Case**

(1) *Danielley v. City of Princeton.*

Mr. Davis asks: Why is the exercise of discretion as to the proper method of sewage disposal executive? I confess (with becoming modesty) that I do not know; I am quite as puzzled as he. Nevertheless, I submit that the case was correctly decided. Mr. Davis does not mention (and apparently considers as unimportant) the fact that the statute empowered the circuit court to consider additional evidence introduced before it. Is the effect, then, the same as if there had been an express provision for trial de novo, which necessarily would require the court to render an independent judgment upon both the facts and the law?

What is the effect of a provision in such statutes that the circuit court shall either (a) have power to consider additional evidence or (b) conduct a trial de novo? It may be conceded that, purely as logic, the power to consider additional evidence does not necessarily mean that a trial de novo is intended. Nor does a trial de novo necessarily mean that the court is to act as a commission and substitute its judgment for the latter’s. It is possible to argue that the legislature intended that the findings of the commission should be (1) prima facie correct, or (2) entitled to the same weight as the additional evidence, or (3) given no weight whatsoever.

When, however, as a practical matter, the circuit judge decides the case, it is impossible to analyze his mental processes and to determine what factors and what evidence were uppermost in his mind. It is likely that if the commission is an able and experienced one the judge will be inclined to affirm its findings. On the other hand, if the commission is incompetent, no legislative mandate can, by the use of magic words such as “prima facie,” prevent the judge from formulating an independent judgment.

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29 113 W. Va. 252, 167 S. E. 620 (1933); Note (1933) 39 W. Va. L. Q. 336.
30 W. Va., Acts 1929, c. 14; W. VA, REV. CODE (1931) c. 16, art. 11.
These and other imponderables will, in varying degrees, enter into the decision of each case.

It is my contention here—and it may well be erroneous—that whenever a statute either empowers the court to hear additional evidence or to conduct a trial *de novo*, that the legislature intended that court to formulate a new and independent judgment upon the merits of the whole case and, if necessary, to substitute its judgment for that of the commission. In brief, to perform the same function that the commission performs—to act as a Commission.

Furthermore, if that be correct, then the court is acting non-judicially and therefore unconstitutionally, regardless of whether it has only the power to reverse or to affirm or whether it has the more extensive power to "modify" or to "make the order the commission should have made."

*Keller v. Potomac Electric Power Company*[^31] is one of the leading cases enunciating the doctrine that if a court has power to make the order the commission should have made then it is exercising legislative power. But it seems to me that this is not the true test. If the form of the order, or whether it is entered by the court or by the commission, be made the criterion then it is a highly artificial one. There is no substantial difference—except in form—between the court's entering the order which the commission should have entered, and the court's reversal of the commission's order with directions to enter a new order. In either case, it is in reality the court that is solving the administrative problem. The true test should be not who enters the order, but what is the nature of the function exercised. Thus, in commenting upon the *Keller* case, a later case[^32] said:

"'There [in the *Keller* case] this court held that the function assigned to the courts of the District in the statutory proceeding was not judicial in the sense of the Constitution, but was legislative and advisory, because it was that of instructing and aiding the commission in the exertion of power which was essentially legislative.'"

On the other hand, it has been held that although the court was empowered to consider new evidence, nevertheless,

"The legislature never intended that the court should put itself in the place of the commission, try the matter anew as an administrative body, substituting its findings for those of the commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of non-judicial powers. 33

It was admitted that "This presents a situation somewhat anomalous in that the court may receive evidence in order to determine whether findings of fact are sustainable. . ." 34

It would seem that the only way by which to avoid this anomaly is a flat holding that the legislature meant what its language reasonably imports and that such statutes are unconstitutional.

Cases of this type holding that an independent judicial re-examination cannot constitutionally be made by the courts are seemingly in conflict with the celebrated *Ben Avon* case, discussed at length by Mr. Davis. While the present status of the *Ben Avon* case may be doubtful, there is authority for contending that its principles apply only where it is claimed that confiscation of property will result. 35

To return to the *Danielley* case: the foregoing observations have been made in order to explain the emphasis which I have placed—and in discussing subsequent cases will again place—upon the effect of provisions in our statutes for the taking of additional evidence before the circuit court. As I understand Mr. Davis' views, he attaches no importance to such provisions but looks rather to the test supposedly laid down in the *Keller* and other cases: does the court have the power to make the order the commission should have made.

In the *Danielley* case the entire statute was properly thrown out, since to uphold part of it would have been to upset the whole legislative scheme. In addition, there was no "saving clause."

(2) *Baker v. County Court.* 36 The criticism of this case seems to be sound. There was nothing in the statute 37 which either expressly or by necessary implication required the circuit court to

33 *State v. Great Northern Ry.*, 130 Minn. 57, 153 N. W. 247 (1915).
34 *Id.* at 60.
35 See *Modeste v. Connecticut Co.*, 97 Conn. 453, 117 Atl. 494 (1922), denying the constitutionality of an appeal to the courts from an order of the public utilities commission refusing application for a license to operate a jitney over certain routes.
“substitute its judgment for that of the county court”. The statute should have been construed, if possible, in such manner as to uphold it. There was no provision for the taking of additional evidence. The circuit court was to “determine the equity” of the county court’s allowances to the sheriff. These words are used quite ambiguously for the reason that “equity” is not defined, nor is it specified how or upon what evidence the question is to be determined. If the circuit court could properly consider only the evidence adduced before the county court then it could “determine the equity” (without substituting its judgment for that of the county court) by finding that the county court’s judgment was not inequitable, i.e., was supported by substantial evidence and not arbitrary, even though the circuit judge, had he been deciding the matter in the first instance, would have reached a different conclusion. Familiar analogies are apparent: the weight given to a jury’s verdict upon conflicting evidence; or to the findings of a commissioner in chancery; or to the decision of a circuit court in granting a new trial. In other words, the supreme court might well have construed the statute to mean that upon the appeal the circuit court was confined to the case supposed in the opinion:

“... It may be conceded that if the county court should fix an amount which would be unreasonable, plainly capricious and arbitrary, there would be a clear abuse of discretionary power, and the courts would have jurisdiction to give relief....”

It should be noted, however, that the entire statute was not held unconstitutional. Only the appeal provision was invalidated.

(3) Staud v. Sill.\textsuperscript{38} What are the elements necessary for judicial action? Mr. Davis indicates that a court may act judicially although there is an absence of parties, someone aggrieved, an issue, and a cause of action or a ground of equitable relief. I submit that this is an unsound criticism. The circuit court did not perform a judicial function for the reason that its decree confirming the trustee’s sale did not have the finality and binding effect which is accorded to other decrees or judgments—in a word, it was not a decree at all because nobody was bound by it. The point is not that the function performed is nonjudicial in nature—concede that it is judicial—but rather that functions otherwise judicial in nature are not invested with that character unless they be per-

\textsuperscript{38} 114 W. Va. 208, 171 S. E. 428 (1933).
formed in a certain manner and with some significance. It is fundamental that due process of law requires notice and an opportunity to be heard before any binding effect can be given to a decree or judgment. Under the procedure set up by the statute, the trustee could file his petition without making parties, or giving notice to, either the grantor or the beneficiary of the deed of trust. The decree would not even protect the trustee in a subsequent suit by either the grantor or the beneficiary, seeking to charge him with liability for breach of any duty imposed by law upon him as a fiduciary under the trust. If nobody is bound by the decree then it does not represent judicial action in any but the Pickwickian sense.

This fact distinguishes the case from the others cited by Mr. Davis. His choice of the "guardianship statute" as an example is especially unfortunate. Of it he says: "There are no parties, no aggrieved person, no issue, no cause of action, no ground of equitable relief." But, if one reads to the end of the statute he will find that the proceedings thereunder for the sale of, or loan upon, an infant's real estate must conform to Chapter 37, Article 1 of the Code. This section does provide for parties. An issue is made upon the allegations of the petition or bill of the guardian by the filing of an answer of a guardian ad litem for the infant, and of the infant himself, if over fourteen years of age. Process or notice is served. The court hears evidence upon the issue thus made up. The decree has finality, for the guardian under his bond, the purchaser of the property, or the creditor taking the same as security, all are protected as against subsequent attack by the infant.

EXISTING LEGISLATION OF DOUBTFUL CONSTITUTIONALITY

(1) Code, 30-6-7. This statute provides that the circuit court shall, on appeal from the decision of the board, "hear and determine such case as in other cases of appeal". There is no provision for the introduction of new evidence in the circuit court, nor is it expressly made a trial de novo. Construing the statute in such manner as to uphold it, the supreme court might well hold here also

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39 In Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541 (1926), speaking of the jurisdiction of constitutional courts it was said: "... their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties. . . ."

that upon such appeal the circuit court is not empowered to render an independent judgment, but is limited to deciding whether or not the action of the board was arbitrary or without evidence to support it. The obstacle to such a holding is, of course, *Baker v. County Court.* If the court adheres to that decision, Mr. Davis’ conclusion seems sound, except that, if the *Baker* case is followed, the entire statute would not be invalid, but only the appeal provision.

(2) **Code, 16-10-12.** Mr. Davis’ conclusion seems correct with reference to this statute, especially because there is an express provision for the taking of new evidence before the circuit court.

(3) **Code, 16-1-13.** Here one finds what is submitted to be a vital omission from Mr. Davis’ quotation of the statute. In his article he quotes only part of it, thus:

"Any person aggrieved by any order of the public health council ... may ... appeal to the circuit court. . . ."

The statute adds, following the last words above quoted:

"of the county wherein his property rights or personal liberties have been affected."

Thus, in order for there to exist a circuit court to which an appeal may be taken, there must be an aggrieved party whose property rights or personal liberties have been injuriously affected. Plainly, this requirement is not merely jurisdictional, i.e., for the mere purpose of determining the venue of the appeal, but is also substantive. Unless there is a party who has suffered such injury, no appealable issue is presented. And, if presented, the function of the court on the appeal is limited to the definition and protection of existing rights of person or property — the essence of judicial function. There is thus no warrant for asserting that on such an appeal the circuit court would be performing legislative functions. In fact, Mr. Davis does not make that assertion. But unless it is implied, then there is no point whatever in his contention, for he bases it upon the *Baker* case, which is authority for the proposition that the circuit court cannot perform legislative functions.

(4) **Code, 22-4-13.** Here one finds a misreading of the statute. Mr. Davis says:

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“Provision is made for appeal to the circuit court, which 'shall promptly decide the matter in controversy as may seem to it to be just and right.'"

A reading of the statute shows that the above quoted language refers not to the circuit court, but to the supreme court of appeals. The statute does not so provide as to appeals to the circuit court nor is it specified whether additional evidence may there be ad-duced. There is no provision for trial de novo.

As previously indicated (but for the Baker case) the supreme court might well hold here also that the statute should be construed in such manner as to uphold it, and that the circuit court is em-powered only to determine whether or not the action of the depart-ment of mines was arbitrary or without evidence to support it.

Moreover, it would seem that section 12 contains its own pro-vision for appeal. There is no provision for the introduction of additional evidence in the circuit court. Section 11, setting forth the procedure whereby a coal operator may obtain permission to drill within two hundred feet of a well, does, however, contain an express provision for appeal, the procedure upon which shall con-form to that set forth in section 4. The latter section provides for the introduction of additional evidence before the circuit court. It is therefore arguable that this section requires an independent judgment by the court and is, accordingly, invalid under the Hodges case. But Mr. Davis' conclusion that "all legislation in chapter 22 of the Code with respect to far-reaching functions of the department of mines, or, at least, a large portion of such legislation, depending upon separability, is unconstitutional!" is itself too far-reaching. Under familiar principles, depending, of course, upon separability, only parts of article 4 appear to be invalid—not the remainder of chapter 22.

(5) Code, 32-1-19. The point here turns entirely upon the construction of, or meaning attached to, the word "modify". It is impossible to imagine all future situations which might arise in connection with the administration of this statute. It is, however, conceivable that cases might arise in which only part of the facts found by the commissioner of securities are supported by evidence. If such facts were irrelevant to the issues, or if relevant were not so material as to be decisive thereof, the court might "modify" the order of the commissioner in so far as it purported to find such facts, and then affirm as to the remainder of the order. It would
seem farfetched to declare that the court would thereby perform a legislative function. It is arguable that the supreme court could and should interpret the word “modify” as having this limited sense, i.e., as meaning the power to strike from an order improper or impertinent matter, but not to alter the mandate itself. I freely admit that such an interpretation does violence to grammar, since the power is to modify “in whole or in part.” Conceding that such power to “modify in whole” cannot constitutionally be granted, surely it is a separable part of the act, and the remainder thereof granting the power to affirm or to set aside the commissioner’s order, should be upheld. If so, the point is of little practical importance.

(6) Code, 30-1-9 Here, again, is found an omission of what is submitted to be a vital part of the statute. It is provided that in determining the case, the circuit court shall do so “upon the record of the proceedings before the board.” There is no provision for new evidence or for trial de novo. The statute, like others previously discussed, might well be upheld (but for the Baker case) by limiting the function of the circuit court to determining whether the action of the board was arbitrary or without evidence to support it.

The Summing Up

To begin with, is it true that the Hodges case and those following it have rendered the theory of separation of powers “positively harmful”? That depends, of course, upon what one means by those words: harmful to whom or to what; to legal theory or to the welfare of the people of West Virginia?

There is no attempt to demonstrate that the latter is true. Here, if we would go beyond the court’s opinions — which the rules of the game do not permit — we might find that, for example, the decision in the Hodges case was distinctly beneficial to the state and its people. It would be unfair for me to comment upon that question. Besides, I am prejudiced. I do not know what were the practical effects of the Danielley, Baker and Staud cases, but presumably they were not too bad. The same observation may be made as to the fate of the questioned statutes, for it would be a simple matter to re-enact them without their invalid features. As was said by Cardozo, J., in Matter of Doyle: 48

48 The point is doubtful. See Mr. Davis’ comment in footnote 303, at p. 368.
49 257 N. Y. 244, 268, 177 N. E. 489, 498 (1931).
"... A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."

But, says Mr. Davis, there has been raised "a constitutional barrier in every case to a complete judicial review of nonjudicial action, no matter how great the practical need for such review may be."

To this there are two answers: first, there is no evidence of such practical need; second, there is no necessity for a "complete" judicial review. If the legislature will, in creating administrative boards, make sufficient provisions for their functioning it may wisely make their decisions upon facts and their exercise of discretion final, leaving to the courts only to decide whether actions have been arbitrary or without substantial evidential basis — something a great deal less than "complete" review. For, if an administrative body makes honest mistakes in its rulings, but has reasonable evidence to support it, how do we improve anything by letting a judge overrule it? He also may be mistaken as to nonjudicial questions, and if we must choose between guessers, three are more likely to be right than one. If it is gambling we want then we should follow the gambler’s rule and play the averages.

If the practical effects are no more serious than I have suggested, what is all this talk about? Legal theory — that is all. Here we approach "brooks too broad for leaping", but a few observations may be made without unduly prolonging this paper. Perhaps one can attach too much importance to theories. Thus, Oswald Spengler, in The Decline of the West pays his respects to

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44 "... An independent judicial review of discretion is an administrative function vested in a court." Freund, *The Right to a Judicial Review in Rate Controversies* (1921) 27 W. Va. L. Q. 207, 212. Where constitutional issues are not involved, "it would be presumptuous on the part of the courts to review the determinations of commissions to the extent of exercising an 'independent judgment as to both law and facts,' i.e., in effect, of substituting the opinion of the courts for that of the commissions, unless, of course, there was a legislative or constitutional authorization for such an extensive review." Hardman, *The Extent of the Finality of Commissions’ Rate Regulations* (1922) 28 W. Va. L. Q. 111, 113.

45 The assumption here made is, of course, that the administrative officials are really experts. This may not be true in many instances. "... The administrative official or agent is not appointed because he is an expert. He is an expert because he has been appointed to be one." Pound, *supra* n. 14, at 211.
'all those ethico-politico-social reform-projects which demonstrate, unanswerably, how things ought to be, and how to set about making them so — theories that without exception rest upon the hypothesis that all men are as rich in ideas and as poor in motives as the author is (or thinks he is). Such theories, even when they have taken the field armed with the full authority of a religion or the prestige of a famous name, have not in one single instance effected the slightest alteration in life. They have merely caused us to think otherwise than before about life. . . . All world-improvers, priests, and philosophers are unanimous in holding that life is a fit object for the nicest meditation, but the life of the world goes its own way and cares not in the least what is said about it.'

To one concerned only with results, theory should be of little importance. The unexpressed premise of Mr. Davis' argument is that sound legal theory either produces or rationalizes desirable practical results: if the Supreme Court could get its theory of the separation of powers straightened out, then it would automatically grind out decisions meeting acceptable pragmatic tests.

I wonder. A liberal interpretation might well lead to unacceptable results. We cannot have the pendulum of judicial decision swinging in too wide an arc without in large measure destroying the interests of stability, predictability and confidence that I have previously mentioned. We cannot secure them by following Mr. Davis' suggestion that:

"... As administrators become trained to their tasks, prove their competency and fairness, and command the respect of those whose rights they affect, the extent of judicial review may well be diminished."

The frailties of the human body and nature, the uncertainty of political fortunes, and other like factors render it improbable that most administrative bodies would have that continuity of personnel which is essential to the application of the foregoing scheme.

Then there is the lover of pure theory, who wishes the law to be logical, beautifully symmetrical and consistent. He does not care about results. He does not demand that Art have a utilitarian

47 That neither the bar nor the legislature considers the Hodges case and those subsequently decided upon its authority as undesirable, is indicated by the fact that the proposed judiciary amendment does not vest the circuit courts with any greater legislative or administrative powers than they now have under the constitution. See Carlin, The Judiciary Amendment (1939) 45 W. VA. L. Q. 220, 231-232.
justification for existence. Apparently, Mr. Davis is not a worshipper at this shrine.

Then, too, there are amusing little ironies in this whole discussion. Mr. Davis, while leaving the impression that, in some instances at least, administrative boards are more efficient than circuit courts, nevertheless objects when the supreme court prevents the latter from completely reviewing the action of the former. On the other hand, the protestants in the Hodges case had no such faith in commissions and insisted upon a finding by the circuit court. Then, they asked — and received — a decision striking down the jurisdiction of the very court to which they had appealed for protection and which had afforded it to them by reversing the findings of the commission on the merits of the case. If what I have contended for here — finality of the commission’s findings when supported by substantial evidence — had been written into the act of 1929, the most valuable water power site in the state would have been irrevocably lost to private enterprise. Thus, having so little consistency in my own tests of pragmatism, perhaps I can justify the questioning of Mr. Davis’. But the final irony, of course, is that practically nobody — least of all the supreme court — will be influenced by what either of us has written. Mr. Davis will not, I fear, persuade the court to change its views. He has, however, made it probable that some lawyer will take advantage of his research in order to have existing legislation held unconstitutional. Thus, as Felix Kennaston observed, in The Cream of the Jest, the alchemist seeking the formula for eternal life discovered — gunpowder. Afterwards, he was interested less in the breakage, than in the horrible noise this accident had occasioned.