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Judicial Review of Administrative Action in West Virginia--A Study in Separation of Powers

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This article attempts to bring together and to analyze critically the West Virginia cases dealing with review by courts of action taken by administrative officials and tribunals. Although a wealth of legal literature on federal administrative law is rapidly developing, studies of some phases of state law in this field are still relatively rare. The need for research in state administrative law is indicated by the seemingly unscientific approach of many courts to some problems, by an apparently high degree of incoherence in the decisions, and by the striking inadequacy of the case finders.

This article proceeds upon the hypothesis that a more intensive study of the law of one jurisdiction is preferable to a less intensive examination of the general law, even though no assurance can be given that West Virginia is typical.

Between fifty and seventy-five state administrative agencies are now at work in West Virginia, and the legislature adds to their

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1 State courts often seem to be inadequately informed of their own previous decisions in this field. An extreme example is West Penn Power Co. v. Board of Review, 112 W. Va. 442, 164 S. E. 862 (1932), in which the supreme court took jurisdiction of a tax assessment problem "because of long practice", when the supreme court from 1896 until 1924 had consistently denied such jurisdiction.
2 Even such new works as the Fourth Decennial Digest, Corpus Juris Secundum, and American Jurisprudence have no headings on Administrative Law. Shepard’s Citator and the Annotated Code are the only case finders that are quite useful in finding West Virginia cases on this subject.
3 In an article written sixteen years ago on the review of the work of the State Corporation Commission of Virginia, Dean Dobie said of judicial review of administrative action: "Virginia’s experience should tend to be quite typical and altogether normal." Dobie, Judicial Review of Administrative Action in Virginia (1922) 8 VA. L. REV. 477, 483. Yet a comparison of the article with this one indicates that the Virginia cases have little in common with the West Virginia cases. On account of the peculiar provision in the Virginia Constitution concerning the State Corporation Commission, it may be that West Virginia is more likely to be typical than Virginia.
4 Some of them are: Public Service Commission, Workmen’s Compensation Commissioner and Appeal Board, Department of Mines, Unemployment Compensation Advisory Council and Board of Review, State Road Commission and Commissioner, Insurance Commissioner, Commissioner of Securities, Tax Commissioner, Department of Labor and Commissioner of Labor, State Health Department and Public Health Council, Water Commission, Department of Banking and Banking Commissioner, Liquor Control Commission, Board of Aeronautics, State Board of Education and Negro Board of Education, Conservation Commission and Director of Conservation, Department of Public Safety, Department of Public Assistance, Board of Control, Board of Public Works.
number at every session. No figures are available as to the volume of work of such agencies, but according to a recent article, “The number of claims and controversies decided by the administrative agencies and tribunals of the United States is many, many times greater than all of the Federal civil cases decided during a cor-

Commissioner of Weights and Measures, Bureau of Negro Welfare and Statistics, Forest and Parks Commission, Geological and Economic Survey Commission, Public Land Corporation, Board of the School Fund, State Armory Board, State Sinking Fund Corporation, Parole Board, Athletic Commission, Library Commission, Commission on Historic and Scenic Markers, Department of Purchasing, Adjutant General, Department of Archives and History, Director of Budget, State Board of Finance, Commission on Uniform State Laws, Commission on Interstate Cooperation, Judicial Council, Agricultural Advisory Board, Planning Board. Some which grant, refuse, suspend or revoke licenses to engage in occupations are: Board of Dental Examiners, Board of Pharmacy, Board of Embalmers and Funeral Directors, Board of Examiners for Nurses, Board of Optometry, Board of Certified Public Accountants, Veterinary Examining Board, Board of Architects, Board of Engineers, Board of Osteopathy, Chiropractic Board of Examiners, Committee of Barbers and Beauticians, Real Estate Commission, Racing Commission.

Some which perhaps should not be counted in an enumeration are: Carnifex Ferry Battle Ground Park Commission, Droop Mt. Battlefield Commission, Philippi Battlefield Commission, Picketts Fort St. Park Commission, Ft. Pleasant Battle Monument Commission.

Perhaps others listed above should not be counted. The functions of some, such as the Judicial Council, for example, are wholly advisory. However, it may be that some should count for more than one. The State Road Commission, for instance, has at least seventeen subdivisions, variously known as “Divisions”, “Bureaus”, and “Departments”, and the State Road Commissioner has some powers not possessed by the Commission.

Perhaps the seven so-called “executive officers” should be included: Governor, Secretary of State, State Superintendent of Free Schools, Auditor, Treasurer, Commissioner of Agriculture, Attorney General. The Governor, for example, may conduct a hearing and remove certain officers for cause. Is not the Governor an administrative tribunal when he so acts? If this power were conferred upon an independent board it would be an administrative tribunal. Nothing can hinge upon the question whether a tribunal is headed by a single official or is multiple-headed. The Workmen’s Compensation Commissioner is thus as much an administrative tribunal as would be a commission consisting of several officials.

There is considerable overlapping. For example, the same man is Auditor, Insurance Commissioner, and Commissioner of Securities.

An administrative “tribunal” has been defined as an agency which exercises either legislative or judicial powers, or both. See Stason, Reorganization of Administrative Tribunals (1938) 36 Mich. L. Rev. 533, 536. Some of the agencies listed above might readily be classified on this basis, but so many powers exercised are not susceptible of such classification that it is believed impossible accurately to classify these agencies according to judicial, legislative, executive and administrative functions.

In addition to state administrative agencies, innumerable county and municipal agencies exist. Indeed, the county courts and the circuit courts, in performing functions held to be nonjudicial, are among the most important of West Virginia administrative tribunals.

(Much of the material of this footnote was taken from a chart prepared by Professor Clifford E. Garwick of the Department of Political Science, West Virginia University.)
The work of West Virginia administrative agencies rivals in magnitude that of the West Virginia courts. The impact upon the traditional legal system of the many boards, commissions, bureaus and other administrative officials and tribunals is portrayed in the cases dealing with judicial review of administrative action. Such cases are not primarily concerned, as might be expected, with appraisals of the quality of the work of administrative agencies and with a consideration of the consequent need or lack of need for judicial review. Instead, the cases seem to involve for the most part, at least in their language, an abstraction known as the doctrine of separation of powers. It is sought to demonstrate in these pages that, although the soundness of this doctrine rightly interpreted is not questioned, it has been so interpreted in the West Virginia cases as to work positive harm in the formulation of the practice with respect to judicial review of administrative action. What is thought to be a perversion of the doctrine of separation of powers has culminated in a series of cases decided since 1931 which, it is believed, have quite unnecessarily held several important statutes unconstitutional and cast doubt upon the constitutionality of much existing legislation.

**Taxation**

If one may believe the language of judicial opinions in West Virginia tax cases, the judicial review of the action of tax officials revolves around seven labels. Probably all kinds of functions are performed in the administration of the tax laws — judicial, legislative, and executive, as well as ministerial, administrative, quasi judicial, and quasi legislative. Any particular function is theoretically susceptible of being characterized by one of these seven labels. And the choice of labels is vital, for it determines whether or not article V of the West Virginia constitution has been violated: "... nor shall any person exercise the powers of

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5 McGuire, *Reforms Needed in the Teaching of Administrative Law* (1938) 6 Geo. Wash. L. Rev. 171, 174-5. The article indicates that in 1936 not more than 16,658 civil cases were decided by all federal courts, and that during the same year 608,246 cases arose in one department alone of the federal government. In 1937 the Federal Trade Commission, whose cases are probably relatively both lengthy and difficult, "decided a total of 920 cases or 278 cases less than all of the federal civil cases decided by the circuit courts of appeal during the preceding fiscal year.

more than one [department of the government] at the same time . . . .”

The assumed necessity for determining whether a given function is, for example, judicial, nonjudicial, or quasi judicial frequently becomes little more than a game of word logic which may well be denominated, in Mr. Justice Cardozo’s phrase, a “tyranny of labels.” According to the opinions the primary basis for decision is not whether or not it is desirable that the same official or tribunal should have power, from the standpoint of practical expediency or convenience, to perform functions which are somewhat legislative in character and also to perform functions which are somewhat judicial in their nature. The theory that pervades judicial language is that questions of desirability and workability have been conclusively answered by Montesquieu and by those who drafted article V.

An examination of the cases which proceed on this theory leads irresistibly to the conclusion that such a basis for decision is wholly artificial and unworkable. Syllogistic constructions cannot be erected upon foundations of abstract concepts which are undefined and undefinable. And the word “judicial,” for example, is not susceptible of precise definition. The judicial shades into the legislative and the executive, and some powers fall into a borderland which is neither wholly one nor wholly another. It is not surprising, therefore, that attempts to fit all powers into one of three or seven rigid categories have resulted only in inconsistency and confusion.

Specific results are more instructive. In 1886 the action of the circuit court in changing the valuation of land for assessment purposes was held to be “plainly ministerial and not judicial.”

In 1893 it was held that such action of the circuit court was the exercise of “a legislative power, and in no sense judicial.”

The supreme court in 1894 granted a writ of mandamus to require a circuit court to determine a question of valuation, declaring that

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7 Article V provides: “The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature.”

8 In Snyder v. Massachusetts, 291 U. S. 97, 114, 54 S. Ct. 330, 335, 78 L. Ed. 674, 90 A. L. R. 575 (1934) Mr. Justice Cardozo said: “A fertile source of perversion in constitutional theory is the tyranny of labels.”

9 Pittsburgh, Cincinnati & St. Louis Ry. v. Board of Public Works, 28 W. Va. 264 (1886).

"the ascertainment of the values of property is strictly judicial." A separate concurring opinion rendered in 1896 constituted the beginning of a line of cases which consistently declared until 1929 that valuation of property is a legislative function but that the determination of questions of taxability is judicial. Since 1929 questions of valuation apparently are again judicial. In other words, the action of the circuit court in determining a question of valuation is nonjudicial, judicial, nonjudicial, and judicial, in that order. All this with only one express overruling!

The assertions of the foregoing paragraph call for a statement of the cases in greater detail.

The question in Pittsburgh, Cincinnati & St. Louis Ry. v. Board of Public Works was whether or not the supreme court of appeals had jurisdiction of a case in which the circuit court in the exercise of a power conferred by statute had reduced a tax assessment made in the first instance by the board of public works. It was necessary to determine whether the function of the circuit court was judicial or nonjudicial since "The writ of error must be not only from a court of record, but it must be from a judgment of such court rendered in a judicial proceeding..." and since "the Constitution of this State confines the jurisdiction of this Court exclusively to judicial matters". The court held that the acts of both the board and the circuit court were "plainly ministerial and not judicial". The supreme court therefore had no jurisdiction.

12 Judge Dent's concurring opinion in Charleston & Southside Bridge Co. v. County Court, 41 W. Va. 653, 673, 24 S. E. 1002 (1896). To the same effect is a concurring opinion by the same judge in State v. South Penn Oil Co., 42 W. Va. 80, 107, 24 S. E. 688 (1896).
13 Hannis Distilling Co. v. County Court, 69 W. Va. 426, 71 S. E. 576 (1911); Copp v. State, 69 W. Va. 439, 71 S. E. 580 (1911); State v. McDowell Lodge, 96 W. Va. 611, 123 S. E. 561 (1924). In the latter case the court declared that "this distinction runs through all of our cases on the subject".
14 At least, the supreme court has jurisdiction to decide valuation questions. The holdings to this effect are discussed at length below, beginning at p. 276.
15 In Pittsburgh, Cincinnati & St. Louis Ry. v. Board, 28 W. Va. 264 (1886) the court declared: "We frankly overrule the proposition contained in the second point of the syllabus in Low v. County Court, 27 W. Va. 785" (1886). The overruled syllabus declared merely that the supreme court had jurisdiction to determine a question of taxability. This proposition has since become firmly established West Virginia law. See, e. g., the three cases cited in note 13, supra. The overruling occurred before the court began to distinguish valuation questions from taxability questions for purposes of determining jurisdiction.
16 28 W. Va. 264 (1886).
In Mackin v. County Court\(^1\) an assessor’s valuation had been affirmed by the county court but reduced by the circuit court on appeal, and the supreme court declined jurisdiction on the ground that “that important function of government, the assessment of taxes . . . is a legislative power, and in no sense judicial”.

A taxpayer in Wheeling Bridge & Terminal Ry. v. Paul\(^2\) was dissatisfied with an assessment made by the board of public works and petitioned the circuit court without avail to exercise its statutory power to review the assessment. The circuit court’s ruling was placed on the ground that the power was nonjudicial. The supreme court, in granting a writ of mandamus to require the circuit court to act, declared: “The ascertainment of the values of property is strictly judicial. . . .”

In Charleston & Southside Bridge Co. v. County Court\(^3\) the county court had assessed property for taxation at fifty thousand dollars, and the circuit court on appeal had reduced the valuation to twenty-five thousand. On writ of error to the supreme court, the supreme court’s jurisdiction was first discussed. The court declared that under Pittsburgh, Cincinnati & St. Louis Ry. v. Board,\(^4\) the constitution limits the jurisdiction of the supreme court to matters which are “strictly judicial” and that therefore the question was whether the action of the circuit court was “administrative or executive” or judicial. The conclusion upon this question was that “We must then regard this judgment of the court in fixing the valuation of this bridge property upon the testimony introduced in the cause as a judicial act.” The court then proceeded to reverse the finding of the circuit court and to affirm the finding of the county court. The rationale of the case is the very antithesis of Pittsburgh, Cincinnati & St. Louis Ry. v. Board and of Mackin v. County Court.

In separate concurring opinions in the Charleston & Southside

\(^1\) 38 W. Va. 338, 18 S. E. 632 (1893). After the decision of the Pittsburgh Railway case, and before the decision of the Mackin case, the court took jurisdiction in a valuation case without discussing whether the question was legislative or judicial. Bank of Bramwell v. County Court, 36 W. Va. 341, 15 S. E. 78 (1892). The court declared that there was a “controversy” in a “civil case” involving more than $100, and that therefore “we are of opinion that the case is properly before us for consideration . . .”

\(^2\) 39 W. Va. 142, 19 S. E. 551 (1894).

\(^3\) 41 W. Va. 658, 24 S. E. 1002 (1896).

\(^4\) 28 W. Va. 264 (1886).
Bridge case and in the South Penn Oil Co. case Judge Dent set forth a distinction which was consistently recognized in several later cases: "... the circuit court, in hearing appeals in tax assessment cases, necessarily acts in a dual capacity, to wit: (1) As a mere assessor representative of the legislative branch of the state government, in the ascertainment of assessable valuations for the purposes of taxation; (2) as a court representative of the judicial branch of the state government in the determination of the constitutional and statutory right of taxation. In cases coming under the first division solely, this Court is without jurisdiction; but, as to cases coming under the second division, this Court has appellate jurisdiction, by means of writ of error."

The validity of this distinction, first drawn in 1896, was declared in two decisions of 1911 to be "often adverted to" and "generally conceded", and in a 1924 decision it was still more emphatically stated: "The taxability of property is jurisdictional and calls for judicial determination; whereas, the fixing of values for taxation is merely ministerial. This distinction runs through all of our cases on the subject." The apparent vitality of this distinction, which persisted without judicial contradiction from 1896 until 1924, seemingly had settled the law. It was somewhat surprising, therefore, when, in 1929, in Liberty Coal Co. v. Bassett, the supreme court assumed jurisdiction in a case which involved only a question of valuation. Not a word was said in the opinion of the legislative, ministerial or judicial nature of the question presented. The only mention of jurisdiction consisted in a quotation of the statute permitting an "appeal" to the supreme court where the value of the property is fifty thousand dollars or more. In the light of the previous state of the law, it might be reasonable to believe that the Liberty Coal case involved merely an oversight. But in four succeeding cases the court also assumed jurisdiction in cases involving only a question of valuation.

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21 Charleston & Southside Bridge Co. v. County Court, 41 W. Va. 658, 673, 24 S. E. 1002 (1896); State v. South Penn Oil Co., 42 W. Va. 80, 107, 24 S. E. 688 (1896).
22 Quoted from the South Penn Oil case, at p. 107.
jurisdiction to determine valuation questions, and in one of them, West Penn Power Co. v. Board, the court stated a reason for its assumption of jurisdiction. After a lengthy discussion of evidence as to the proper valuation of the property the court declared: "Matters of this sort are primarily administrative. By virtue of statute they are appealable here where the assessment is $50,000.00 or more. Code 1931, 11-3-25. Though doubting the right of the legislature thus to clothe this court with authority and duty of reviewing assessments we have submitted to it because of long practice." The reason, then, why the supreme court had jurisdiction in 1932 of a question which is "primarily administrative" is simply "long practice". But the "long practice" dated just two and one-half years — only since the decision of the Liberty Coal case. Even though "matters of this sort are primarily administrative", as the court recognized in this case, and even though, as the court had consistently held in earlier cases, "It is a plain proposition, that the Constitution of this State confines the jurisdiction of this Court exclusively to judicial matters", yet the "long practice" of two and one-half years justifies the violation of the constitution! Of course, that is hardly reasonable. It seems probable that the court acted under a misapprehension as to its earlier holdings. The explanation may lie in the fact that for the proposition concerning "long practice" the court cited the 1931 decision of Hodges v. Public Service Commission, for in that case, holding unconstitutional a statute regarded as conferring a legislative power upon a circuit court, the court said that its decision was "not to be taken as unsettling the practice of circuit courts. . . . to entertain appeals from boards of equalization and review on the valuation of property for taxation. This practice has been pursued in such a great number of cases and over so many years, that we are of opinion that it should not be disturbed now." In the Hodges case, the question concerned the jurisdiction of the circuit court, and the reference was to the powers in taxation which may be exercised by circuit courts. The jurisdiction of the supreme court was not discussed, and, as has been long recognized, there is a difference in the jurisdiction of the circuit court and that of the supreme court.

27 112 W. Va. 442, 446, 164 S. E. 862 (1932).
28 Quoted from Pittsburgh, Cincinnati & St. Louis Ry. v. Board, 28 W. Va. 264, 270 (1886).
29 110 W. Va. 649, 654, 159 S. E. 834 (1931).
in this respect." It is reasonable to believe that the citation of the Hodges case for the proposition about "long practice" in the West Penn case indicates that the court simply failed to distinguish between the jurisdiction of the circuit court and that of the supreme court. At all events, whatever may be the reason or absence of reason, the supreme court now reviews valuations in tax assessment cases.

In the most recent case on the general question, Crouch v. County Court, the scope of that review is defined. The supreme court reversed an assessment which had been affirmed by a county court sitting as a board of equalization and review and again approved by the circuit court on appeal from the county court. The court declared in the syllabus: "Where an assessment of real estate of an amount ($50,000 or more: Code, 11-3-25) reviewable by the supreme court of appeals appears to have been made without proper regard to requisite elements and to have been approved by the circuit court without substantial evidence to sustain the assessed valuation, the appellate court will reverse the circuit court's order of affirmation and will remand the case for further proceedings."

The foregoing cases relate to the functions of the supreme court and circuit courts. The seven labels are also applied to the county courts, the assessors, and the board of public works. Thus, the county courts, in determining the valuation of taxable property, act judicially, nonjudicially, and quasi judicially, depending upon whether the question is decided in 1884, 1893, or 1896. In Ex parte Low, a county court's action in reducing an assessment was held to be "judicial in its nature", so that a legislative enactment providing a method for determining valuation was "judicial legislation" and therefore unconstitutional. In Mackin v. County Court it was declared that "it is clear that the action of the County Court in such a matter [valuation] is not judicial". In

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30 E. g.: Mackin v. County Court, 38 W. Va. 338, 348, 18 S. E. 632 (1893) (with respect to assessments for taxation: "Now there is a difference between the Supreme Court of Appeals and Circuit Courts in respect to their capacity to have conferred upon them such jurisdiction.")


32 24 W. Va. 620 (1884).

33 The phrase "judicial legislation" ordinarily relates to legislation by the courts. The phrase was apparently used in this case to mean judicial action by the legislature.

34 38 W. Va. 338, 344, 18 S. E. 632 (1893).
State v. South Penn Oil Co., the court declared the action of the county court in determining valuation to be "quasi judicial". Apparently the the court thought the "quasi" had some meaning, for in the same opinion the court said that the same function performed by the circuit court was "judicial", without the "quasi".

It would be reasonable to suppose that whether an act is judicial or nonjudicial depends upon the character of the act, and not upon the nature of the official or tribunal performing the act. Thus, it is said in one case that "the fact, that a ministerial act is performed by a court, does not change the nature of the act and make it judicial." And in another case the court reasoned that since the county court's action in fixing valuation was not judicial, the performance of the same function by the circuit court could not be judicial, because "Surely the inherent nature of the act has not been so quickly changed by its transfer to the Circuit Court."

Such a proposition is almost too obvious to state, and yet the view is taken in some cases that the classification of acts under the separation of powers clause depends not only upon the character of the act but also upon the nature of the official or tribunal. One of the best examples is State ex rel. Hallanan v. Rocke. Previous cases had consistently held that the courts in determining questions of taxability act judicially, and at least two decisions had taken the view that the assessor also acts judicially in determining questions of taxability. Accordingly, there seemed to be some basis for the serious contention made in the Rocke case that the assessor, said to be an executive officer, could not constitutionally determine questions of taxability because that would be to exercise a judicial function in violation of the separation of powers clause. Of course, the court might well have rejected this contention by holding that it was predicated upon a misconception of the separation of powers clause, which, properly interpreted, does not pre-

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35 42 W. Va. 80, 24 S. E. 688 (1896).
38 91 W. Va. 423, 113 S. E. 647 (1922).
39 See notes 12, 23 and 24, supra. Four months before the decision of the Rocke case, it had been argued in Humphreys v. County Court, 90 W. Va. 315, 110 S. E. 701 (1922) that a circuit court could not properly review by certiorari a county court's decision on a question of taxability because the county court's action was nonjudicial. This contention was rejected on the ground that the county court had acted judicially.
vent an assessor from performing such judicial acts as are necessary to the determination of the taxability of property. Instead, the court held that the assessor does not act judicially in determining taxability. That the difference in the assessor's action and that of a court lies not in the character of the function performed but in the nature of the performer is even indicated in the court's opinion, for the following reasoning is advanced to show that the action was nonjudicial: "That an assessor is not a judicial officer, within the meaning of the Constitution is clear. He is not mentioned in Art. VIII, dealing with and defining the judicial department. The office is provided for in Art. IX, creating local executive and administrative officers...." In another case it is said that the circuit court acts judicially in deciding whether or not property is taxable, because the court is "a tribunal having power to determine questions of law and fact, either with or without a jury; and there were parties litigant who contested the case on the one side and on the other." The Rocke case overlooks the assessor's "power to determine questions of law and fact," and the fact that the parties to the case are the same parties to the same case when it reaches the circuit court. There is no difference in the character of the function, but it is judicial when the court performs it and non-judicial when the assessor performs it!

If the character of an act under the separation of powers clause depends in part upon the nature of the official or tribunal who does it, then it is pertinent to inquire whether the county court is a judicial, legislative or executive institution. Perhaps it is a unique institution of so anomalous a character that a new label should be invented for it, for even the West Virginia supreme court has specifically recognized that the county court violates the

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42 The circuit court does not merely "review" the finding of the county court or of the board of public works. The circuit court takes new evidence and makes a finding de novo, substituting its judgment for that of the county court or the board. See, e. g., W. Va. Code (Barnes, 1923) c. 29, § 129.

Compare the reasoning of the court in the Pittsburg Railway case, 28 W. Va. 264, 268 (1896): "It is true the judgment of the court must succeed that of the board and is in review of the latter, but that does not alter the nature of the act to be performed."

43 Article VIII, § 24, confers upon county courts, for instance, "jurisdiction in all matters of probate," and also prescribes that they shall "have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies."
principle of separation of powers: "... in moulding county courts, the Constitution has entirely disregarded the separation of governmental powers commanded in Article V, and has blended in such courts both administrative and judicial powers. ..."44

If we are committed to a tyranny of labels, if every power must have one of three or seven labels, then why not turn to the authority on labels — the dictionary? The court did so in at least one case.45 The question was whether or not the action of the circuit court in changing a valuation from fifty thousand to twenty-five thousand dollars was "executive" action. The court quoted Webster as follows: "In government, 'executive' is distinguished from 'legislative' and 'judicial'; 'executive' being applied to that which carries the laws into effect, or secures their due performance." The court then declared: "The judgment complained of did carry the statute into effect..." Apparently on the basis of this analysis the court concluded that the action was judicial! Since it is not known what is meant by "that which carries the laws into effect," one can hardly quarrel with the statement that the judgment did carry the statute into effect, and yet, since this reasoning led to the conclusion that the action was not executive, it may be that the court intended to say that the judgment did not carry the statute into effect. Indeed, it would be fair to say that a reading of the opinion suggests that one might go through some opinions on what is judicial and what is nonjudicial and insert or delete a "not" here and there with nothing lost!

The labels remain undefined. The criteria for applying them change from case to case. Each opinion, considered alone, has its convincing qualities, but an attempt to correlate the opinions, so far as the theory of separation of powers is concerned, reveals little more than a delirious jumble. This does not imply that the confusion is attributable to judicial shortcoming in determining what is judicial or nonjudicial. The truth is that the court has undertaken a task which is probably impossible to perform. The interpretation given to the separation of powers clause is so unreal that it must in the nature of things break down miserably when it comes to be applied to the practical workings of government. It

44 Poling v. County Court, 116 W. Va. 580, 584, 182 S. E. 778 (1935). It is curious that the supreme court has not found in the county court a hint of what the framers of the West Virginia Constitution may have meant by the separation of powers clause.

45 Charleston & Southside Bridge Co. v. County Court, 41 W. Va. 658, 664, 24 S. E. 1002 (1896).
is the essence of artificiality to say that every function performed
by tax officials and tribunals is wholly judicial, wholly legislative,
or wholly executive.

The chief difficulty has been that the court has purported to
decide cases on the basis of the theory of separation of powers but
in fact has not always done so. The theory in some cases has had
to yield to practical necessities — necessities which have not always
found their way into the opinions. Even if it were possible to
formulate a theoretically perfect system of separation of powers
that system would be wholly unworkable. If the court had con-
sistently recognized this fact, if it had limited its talk about separa-
tion of powers and had addressed itself to the true bases for de-
cision, much confusion might have been avoided.

The court might well have taken greater advantage of the
insight of Judges Dent and Brannon who seemed to be fully aware
of the artificiality of the theory of separation of powers. For
example, Judge Dent declared in the Charleston & Southside
Bridge case: "The ascertainment of values for assessment pur-
poses is a judicial function, strictly belonging to the legislative or
administrative branch of the state government..." To one steeped
in the theory of separation of powers this does not make sense, any
more than does a reference by the same judge in a case not in-
volving taxation to "legislative judicial functions". But Judge
Dent may have perceived a truth not always grasped by other

46 It is not meant to imply that all other judges were not aware of such
artificiality. See, for example, the language of Judge Holt in State v. South
Penn Oil Co., 42 W. Va. 80, 97, 24 S. E. 688 (1896).
47 Charleston & Southside Bridge Co. v. County Court, 41 W. Va. 658, 681, 24
S. E. 1002 (1896).
49 It could not have been lack of understanding that caused Judge Dent to
talk about "legislative judicial functions". The depth of his insight into
the nature of separation of powers is illustrated by his language in Wheeling
Bridge & Terminal Ry. v. Paull, 39 W. Va. 142, 144-45, 19 S. E. 551 (1894):
"The constitution, within itself...proceeds to make many laps of the
various departments, so as to make them mutually dependent upon and sup-
porting each other; thus welding them into an harmonious whole, or three
distinct departments in one...Were it practicable to keep these three depart-
ments wholly distinct, the increase of the necessary offices and officers would be
so great, and the expense thereof so burdensome, as to render the cost of the
administration of the government unbearable...So that, while we find that
the constitution, as much as possible keeps the heads of the three departments
comparatively distinct and independent of each other, yet as we move down the
scale these several powers become more complicated and interwoven with each
other, until we find the common council of every village exercising legislative,
executive and judicial functions, indiscriminately, by authority of the same
constitution which declares that these functions shall be kept distinct."
judges: that all powers are not necessarily wholly judicial, wholly legislative, or wholly executive. To hold that a function is judicial and belongs to the legislative branch of the government is to violate the theory of separation of powers, but so to hold may nevertheless be thoroughly realistic.

Judge Brannon openly rejected a strict theory of separation of powers in the Mackin case, holding that the circuit court could properly exercise a legislative power. Judge Brannon’s reasons consist in something other than labels and word logic. Referring to article VIII, § 12, he declared: "I think this clause authorizes the legislature to confer upon the Circuit Court the right to entertain this appeal. The presence of this very important court among the people in every county; its readiness, facility and competency in the hearing and trial of matters by witnesses, juries and otherwise; — the obvious necessity of a power in the legislature to render available and useful its functions in the administration of government by charging it with jurisdiction of additional matters, as time and expediency may suggest; — the whole cast, structure and purpose of this court, as seen in the constitution — tell us that we ought not to give a narrow construction to this clause. To do so would defeat the purpose of the convention, which framed the constitution, and cramp the usefulness of the Circuit Courts."

The opinions in the tax cases involving judicial review of administrative action have revolved around words: judicial, legislative, executive. What an improvement it would be to substitute Judge Brannon’s words: "facility ... necessity ... expediency ... usefulness ..." 51

51 Federal jurisdiction often depends upon whether a determination by a state tribunal is judicial or administrative. Under Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908), a doctrine of so-called comity has been established that state administrative remedies must be exhausted before a federal court will take jurisdiction. On the other hand, it is clear that if a state judicial remedy has been resorted to, the federal court must refuse to reopen the question decided, according to the doctrine of res judicata. Thus, if the action in the circuit court is only administrative in determining the valuation of property for tax purposes, the federal court will not take jurisdiction of the case until after the administrative remedy in the circuit court has been exhausted. But if the action in the circuit court is judicial, the decision of the circuit court bars any action in the federal court. One who has a case which it is desirable to bring before a federal court is thus confronted with a dilemma. He must decide, often at his peril, whether the action of the circuit court in reviewing a question of valuation, for instance, is administrative or judicial. If his guess is wrong, he may be barred from further remedy.

Several decisions of federal courts are of especial interest in this connection.
The leading West Virginia case on judicial review of action of the Public Service Commission is *United Fuel Gas Co. v. Public Service Commission.*\(^{52}\) The commission had ordered the company to cease discrimination between two classes of domestic consumers and to reduce rates to a specified maximum. The company petitioned the supreme court, in accordance with section 16 of the act,\(^{53}\) which provides: "Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present his or its petition in writing to the supreme court of appeals. . . . praying for the suspension of such final order. . . . The court shall decide the matter in controversy as may seem to be just and right."

Among the arguments of the company were several contentions that

The early decision of the United States Supreme Court in *Upshur County v. Rich*, 135 U. S. 467, 10 S. Ct. 651, 34 L. Ed. 196 (1890), held that a West Virginia county court acted only administratively and not judicially in fixing the valuation of property for taxation, and, partly because of this reason, the proceeding was not properly removable to the federal circuit court before action had been taken by the county court. Mr. Justice Bradley declared of the West Virginia county court: "It has no judicial powers except in matters of probate. In all other matters it is an administrative board, charged with the management of county affairs."

A somewhat more difficult question was presented by the recent case of *Baltimore & Ohio R. R. v. Board of Public Works*, 17 F. Supp. 170 (N. D. W. Va. 1936), decided by a three-judge federal court. The railroad brought a bill in the federal court to enjoin the assessment of taxes, alleging that the assessment was excessive and discriminatory, and asserting certain constitutional objections. The property had been assessed by the board of public works, but the railroad had not taken advantage of its statutory right of appeal to the circuit court, which, under the statute had the power to take new evidence and to "correct the valuation so made and ascertain and fix the true and actual value of such property according to the facts proved." In thus seeking relief in the federal court before taking the case to the circuit court of the state, the railroad may well have been relying upon *Norfolk & Western Ry. v. Board of Public Works*, 3 F. Supp. 791, 796 (S. D. W. Va. 1933), in which a three-judge federal court declared with respect to action of a West Virginia circuit court: "... the question of discrimination was raised in the suit before the circuit court of McDowell county, and the decision of that court on this question was a judicial action and not administrative, as was the act of that court in fixing the value for purposes of taxation."

In the Baltimore & Ohio case, however, one of several grounds on which the court decided against the railroad was that "the plaintiff has not exhausted its administrative remedies with respect to the valuation and assessment of its property for the purposes of taxation". The court relied upon *West Penn Power Co. v. Board of Review*, 112 W. Va. 442, 164 S. E. 862 (1932), in holding that the remedy before the circuit court was at least in part administrative. The court did not deny, however, that the circuit court also had power to act judicially, but, instead, declared: "The fact that a court possessed of administrative powers might pass upon judicial as well as administrative questions

\(^{52}\) 73 W. Va. 571, 80 S. E. 981 (1914).

\(^{53}\) W. VA. Rev. Code (1931) c. 24, art. 5, § 1.
The court first considered the question of its own jurisdiction. It cited numerous West Virginia decisions to support the proposition that “the appellate jurisdiction of this court is limited by the Constitution and statutes to judicial matters, in judicial proceedings, and . . . we have no power to review by writ of error or appeal the decisions of an inferior tribunal, officer or board, as to matters which are merely administrative, executive or legislative, and not strictly judicial in nature, except when such power may be expressly con-

in reviewing the assessment and making the correction is no reason for not requiring that relief be sought before such tribunal before resorting to a court of equity possessing judicial powers alone; for the administrative proceeding cannot be said to be exhausted so long as the administrative review provided by statute has not been invoked.”

This reasoning seems to be the precise antithesis of the reasoning in a 1934 decision of the United States Supreme Court. In City Bank Farmers’ Trust Co. v. Schnader, 291 U. S. 24, 54 S. Ct. 259, 78 L. Ed. 628 (1934), a taxpayer filed a bill in a federal district court to enjoin the imposition and collection of a Pennsylvania inheritance tax, alleging both that the property was not taxable and that the valuation was excessive. The statute gave to the Dauphin county court the power to review the decisions of the Department of Revenue, both as to taxability and as to valuation. The tax officials contended that the bill in the federal court was premature because the taxpayer had not yet exhausted his remedy by taking the statutory appeal to the court. Mr. Justice Roberts, in behalf of a unanimous court, rejected this contention on the ground that, “. . . . while the action of the appraiser in a case like the present is purely administrative, the function of the court upon appeal is judicial in character, if, when the case is brought into the court, the Commonwealth becomes plaintiff and the taxpayer defendant, and the action is tried as an ordinary action, resulting in a judgment, which is final and binding on the parties, subject only to appeal to a higher state court, as permitted by the Act. This renders the proceeding judicial, and gives it the character of a suit or action at law. . . . If the Dauphin County court were by the act of Assembly granted only the right to revise the valuation of the appraiser, and precluded from considering any other question, its proceedings would be purely administrative, and the contention that the appellant had failed to pursue to the end its administrative remedy would be sound. . . .”

It is of interest to observe that in the Baltimore & Ohio case, the West Virginia circuit court had not only “the right to revise the valuation” but also had power to consider taxability. Under the decision of the three-judge federal court in the Baltimore & Ohio case, if the state court may act both judicially and administratively, the federal court will not take jurisdiction until remedies in the state court have been exhausted. Under the decision of the United States Supreme Court in the Schnader case, if the state court may act both judicially and administratively, the federal court will take jurisdiction before remedies in the state court have been exhausted.

The petition alleged that the orders violated section 10 of article III and section 9 of article V of the West Virginia Constitution, and the due process and privileges and immunities clauses of the Fourteenth Amendment of the Federal Constitution.
ferred by the Constitution." The cases cited were interpretations of the separation of powers clause of article V of the West Virginia constitution. In rejecting a contention that the statute could properly allow an appeal under article VIII, section 3, providing that the supreme court shall have appellate jurisdiction "in cases involving . . . the constitutionality of a law" and "such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law", the court declared that the appellate jurisdiction is limited to judicial proceedings, and an appeal will not lie to the court from "some legislative, executive or administrative proceeding of the government." The appellate jurisdiction must relate to "some judicial proceedings begun in an inferior judicial tribunal." The court pointed out that it had "denied appellate jurisdiction to review the judgments or decrees of the circuit courts on appeal from the orders of the Board of Public Works, or other boards, involving simply executive or administrative matters, such as valuation of property for taxation" and observed that "never have we entertained jurisdiction from such decrees or orders of the circuit court unless the same have related to the taxability of the property." The action of the court in entertaining an appeal from rate-making orders would be "extra-judicial, and legislative or administrative the same as that of the Commission." And the making or regulation of rates "is legislative, not judicial." Therefore, the court had "no jurisdiction to review as upon appeal the order complained of."

The constitution provides, however, that the supreme court shall have "original jurisdiction in cases of habeas corpus, mandamus, and prohibition," and the court declared that the statute may be construed "as intended to confer original jurisdiction by process akin to mandamus or prohibition". The court thus held that it had jurisdiction to grant the relief prayed for, "But we cannot construe the statute as intended to give us the

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56 Nine cases are cited. Six had to do with the nature of the function of the circuit court in reviewing tax assessments, one with an election board, one with the circuit court's incorporation of cities, and one with the circuit court's function in settling a county boundary dispute. All nine are discussed elsewhere in this article.

56 It is of interest to observe that although this statement was true when made, in several cases since 1929 the Supreme Court has entertained jurisdiction in tax assessment cases involving only questions of valuation. See notes 25 and 26, supra.

57 Art. VIII, § 3.
power and authority to substitute our judgment for that of the Commission, in a matter purely legislative or administrative."

Because the United Fuel Gas case is much cited and quoted in subsequent cases, a detailed analysis of the opinion will be profitable.

The West Virginia constitution prescribes both the original and the appellate jurisdiction of the supreme court of appeals. In addition to the appellate jurisdiction prescribed, it provides for "such other appellate jurisdiction . . . as may be prescribed by law". No provision is made for original jurisdiction except that specifically conferred by the constitution. Yet the United Fuel Gas case holds that the legislature may enlarge the original jurisdiction of the court but may not enlarge its appellate jurisdiction! Why?

The only reason given is the separation of powers principle. Because of that principle "the appellate jurisdiction . . . is limited . . . to judicial matters, in judicial proceedings . . ." Therefore, the court says, there may be no appeal to the court from the Public Service Commission, because the commission, in fixing rates, acts legislatively, and the action of the court on appeal would be "extra-judicial, and legislative or administrative the same as that of the Commission." It is suggested, with all deference, that this step in the court's reasoning is plainly fallacious. It is not true that review by a court of legislative action of a commission is necessarily itself legislative. This was settled by the United States Supreme Court as early as 1894. The court may, for instance, consider the question whether or not under the constitution the rate fixed is confiscatory, without acting legislatively. The determination of such a question is the very essence of the judicial function. The court overlooks the clear difference between performing the same function the commission has performed and merely reviewing the legality or the constitutionality of the commission's order.

The court itself, in another part of the opinion, recognizes this, for it holds that the commission's action may be reviewed "by

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58 Ibid.
59 In Howell v. Pub. Serv. Comm., 78 W. Va. 664, 666, 90 S. E. 105 (1916), the court seemed again to express the thought that legislative action of an administrative tribunal does not call for judicial review: "When the legislature enacted the water power act it evidently regarded the granting of such permission, as is here complained of, as a purely legislative function, and, therefore, made no provision for reviewing the public service commission's decision on that matter by any of the courts."
Such review must be judicial, or the constitution, according to the language of the opinion, would not permit it. But if the review "by process akin to mandamus or prohibition" is judicial, why would not review by appeal or writ of error be judicial? It is the nature of the action taken by the court, and not the manner in which the case is brought to the court, that should determine whether the court's action is legislative or judicial. If the court issues its own order to take the place of the order issued by the commission, then, according to the decisions of the United States Supreme Court, the court's action would be legislative, whether the case is brought to the court by appeal or by writ of error or by "process akin to mandamus or prohibition". If the court merely determines the legality or constitutionality of the commission's order, and upholds it or sends the case back for further action by the commission, then the court's action is judicial, no matter how the case may have been brought before the court.

Another premise necessary to the court's reasoning is the court's assumption, on the authority of the Prentis case, that the action of the commission was entirely legislative. This premise may likewise be questioned. The Prentis case did hold that fixing rates for the future is legislative. But the United Fuel Gas case involved two orders of the commission, only one of which fixed

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60 In Howell v. Pub. Serv. Comm., 78 W. Va. 664, 90 S. E. 105 (1916), a later case involving a similar question, the court did not follow this technique. By statute enacted subsequent to the enactment of the Public Service Commission Act, the commission was given jurisdiction to grant permission to hydro-electric companies to erect dams. The new act contained no provision for judicial review, and the court held that the provision of the original act for review was "meant to relate only to matters over which the public service commission was then given jurisdiction". A petition to the court to review an order of the commission was accordingly dismissed. The court did not, as in the United Fuel Gas case, hold that it had jurisdiction "by process akin to mandamus or prohibition". There is a difference in the two cases in that one statute contained a provision for petitioning the supreme court and the other did not, but inasmuch as jurisdiction by mandamus or prohibition does not depend upon a special statutory grant of jurisdiction, this difference becomes unimportant. Perhaps it is the result of the two cases, taken together, that even though jurisdiction by mandamus or prohibition need not be specially conferred, yet jurisdiction "by process akin to mandamus or prohibition" does not exist unless it is specially conferred by statute. The decision in the Howell case was followed in Royal Glen Land & Lumber Co. v. Pub. Serv. Comm., 91 W. Va. 446, 113 S. E. 749 (1922).

61 See discussion infra, p. 304, et seq.
The commission made a finding "That the United Fuel Gas Company is violating the law by maintaining in the City of Huntington two rates for natural gas for domestic purposes..." Accordingly, it was "therefore ordered by the Public Service Commission that the United Fuel Gas Company do cease and desist from a continuation of this practice in discriminating between the two classes of domestic consumers." Is this action legislative or judicial? Is a decree of a court of equity restraining a defendant from continuing an unlawful practice legislative or judicial? There is here no creative action of the commission, no promulgation of a rate schedule for the future. The commission merely investigated, found that the company was "violating the law", and ordered the practice to cease. Before the advent of public service commissions, the courts prevented such discrimination by public service corporations. And, as Mr. Justice Holmes said in the Prentis case, the question whether proceedings are judicial or legislative "depends not upon the character of the body, but upon the character of the proceedings."

Whether rightly or wrongly, the court held in the United Fuel Gas case that it had no jurisdiction to entertain an appeal from the commission. But it went on seemingly to nullify the effect of this holding by further holding that it had jurisdiction of the case "by process akin to mandamus or prohibition". The pertinent inquiry, then, is: What practical difference is there between jurisdiction by appeal and jurisdiction "by process akin to mandamus or prohibition"?

Whether rightly or wrongly, the court held in the United Fuel Gas case that it had no jurisdiction to entertain an appeal from the commission. But it went on seemingly to nullify the effect of this holding by further holding that it had jurisdiction of the case "by process akin to mandamus or prohibition". The pertinent inquiry, then, is: What practical difference is there between jurisdiction by appeal and jurisdiction "by process akin to mandamus or prohibition"?

It is even questionable whether the action of the commission in issuing the rate-fixing order was entirely legislative. The commission found that the rate theretofore in effect was "excessive and exorbitant". It is undeniable that a court in determining whether or not a rate is "excessive and exorbitant" acts judicially. If the commission performs precisely the same function as the court, is not the commission's action of the same character as that of the court? It is very persuasively argued that it is, in Hardman, The Extent of the Finality of Commissions' Rate Regulations (1922) 28 W. Va. L. Q. 111. Dean Hardman in that article agrees with the dissent of Mr. Chief Justice Fuller in the Prentis case, in saying: "I cannot see why the reasonableness and justness of a rate may not be judicially inquired into and judicially determined at the time of the fixing of the rate, as well as afterwards." The conclusion of the majority of the court in the Prentis case that "the nature of the final act determines the nature of the previous inquiry" has been much criticized. Indeed, the West Virginia court in a later case, Weil v. Black, 76 W. Va. 685, 692, 86 S. E. 666 (1915), recognized that in determining reasonableness the Public Service Commission performs a "quasi judicial" function: "In so far as they are empowered to investigate rates and charges of public service corporations, and to determine their reasonableness or unreasonableness, they would seem to be performing a quasi judicial function..."
There is no substantial difference in the procedure. Indeed, the proceedings are so much alike that the court no longer takes the trouble to distinguish them in its own terminology. If the form prescribed by the *United Fuel Gas* case were followed, the proceeding would be a "petition" to the supreme court of appeals, and the court's disposition of the case would be "Order suspended" or "Order of suspension refused" or "Petition dismissed". It is probably not without significance that such terminology was followed for only a short time after the decision of the *United Fuel Gas* case. Thus, as early as 1923 the court changed its language, beginning an opinion with the statement, "This is an appeal... from an order of the Public Service Commission..." and entering the order "Findings of defendant reversed, and cause remanded". In nearly all of the more recent cases the proceeding is called an "appeal" and the order of the commission is either "affirmed" or "reversed" or "reversed and remanded".

In trying to ascertain the difference between jurisdiction by appeal and jurisdiction by "process akin to mandamus or prohibition", one must take special note of the words "process akin to". If these words were omitted, there would be a difference of vast consequence, for the traditional scope of mandamus and prohibition is indeed limited. Thus: "The writ is purely jurisdictional and will not lie to correct errors or be allowed to usurp the functions of a writ of error or certiorari, or the remedy by appeal."
Similarly: "Mandamus will not be awarded unless it appears that the officer has clearly and wilfully disregarded his duty, or that his action was extremely wrong or flagrantly improper and unjust, so that his decision can only be explained as the result of caprice, passion, partiality or corruption." In other words, mandamus and prohibition cannot be used to correct errors of judgment. Accordingly, if the jurisdiction of the court were limited by the scope of the writs of mandamus and prohibition, the jurisdiction would be much narrower than the jurisdiction which might be exercised on appeal. Although there is a difference between "mandamus and prohibition" and "process akin to mandamus and prohibition," how much difference the court does not indicate. But the court does say: "By the broad language used we may assume perhaps that the legislature intended to enlarge somewhat the scope of our original jurisdiction as upon mandamus or prohibition, by bringing under it matters not included within the scope of those writs at common law." It is the next declaration that is of the greatest import: "But we cannot construe the statute as intended to give us the power and authority to substitute our judgment for that of the Commission, in a matter purely legislative or administrative." The court's meaning is clear that the court has a jurisdiction the scope of which lies between the narrow power which may be exercised through the writs of mandamus and prohibition and the broad power to substitute judicial judgment for administrative judgment. But the vital inquiry is why the court does not have the power to substitute its judgment for that of the commission. Is it because of the reasoning in the early part of the court's opinion which applied the separation of powers clause in such a way as to lead to the conclusion that there was no jurisdiction by appeal but only by "process akin to mandamus or pro-

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70 Dillon v. Bare, 60 W. Va. 483, 56 S. E. 390 (1906). The doctrine is sometimes differently stated: "Where an inferior tribunal is authorized to use its discretion and proceeds to exercise such discretion, it can not be controlled by mandamus in judicially determining questions properly presented for its consideration and within its jurisdiction." Miller v. County Court, 34 W. Va. 285, 12 S. E. 702 (1890). For other cases see the W. Va. Ann. Code (Michie, 1937) c. 53, art. 1, § 1.

71 The only provision of the constitution defining the original jurisdiction of the supreme court is art. VIII, § 3, providing that "It shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition." It was held in the United Fuel Gas case that the appellate jurisdiction of the supreme court could not be expanded by the legislature. The court gives no explanation for its conclusion that the original jurisdiction may be broadened by legislative enactment.
hibition? or is it only because of the court's interpretation of the intent of the legislature in enacting the statute? The court seems to say that both reasons support the conclusion, that is, that the court does not have power to substitute its judgment for that of the commission because of two independent reasons: (1) under the separation of powers clause there may be no appeal from commission to court but the action of the commission may be reviewed only "by process akin to mandamus or prohibition", and, (2) it was not the intention of the legislature in enacting the statute that the court should substitute its judgment for the commission's judgment.

But what an extraordinary conclusion results from the United Fuel Gas case so interpreted! If the separation of powers clause prevents the court from substituting its judgment for that of the commission on fact questions, then the separation of powers clause of the West Virginia constitution, so interpreted, violates the Fourteenth Amendment of the Constitution of the United States, as interpreted by the Federal Supreme Court, and is therefore unconstitutional! For it was held in the well-known decision of Ohio Valley Water Co. v. Ben Avon Borough that if the owner in a rate case "claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." The case held that the power in the court to determine whether or not the commission's order was "reasonable and in conformity with law" and whether "there was competent evidence tending to sustain the commission's conclusion and no abuse of discretion" did not satisfy the requirement. There must be power in the court to substitute its judgment for that of the commission as to both law and facts.

If, then, the proper interpretation of the opinion in the United Fuel Gas case is that the separation of powers clause forbids the

72 This is apparently the interpretation given in Hardman, supra n. 62: "... it was held that, as a rate regulation involves legislative action, not judicial action, the court had no power to substitute its judgment for that of the commission in a matter purely legislative or administrative."

court from exercising an independent judgment as to both law and facts, the separation of powers clause, as interpreted, violates the Fourteenth Amendment. From the standpoint of the legislature, a perfect dilemma is presented.\(^{74}\) The power of substituting judicial judgment for administrative judgment must be either granted or withheld. If it is granted, the separation of powers clause of the West Virginia constitution is violated, under the United Fuel Gas case. If it is withheld, the Fourteenth Amendment of the Federal Constitution is violated. If something must yield, it must be the separation of powers clause of the state constitution, which, accordingly, is unconstitutional. Separation of powers, the cardinal principle upon which the federal and all the state governments are founded, a great American contribution to the science of government, violates the due process clause! Such an absurd result surely proves the unsoundness of either the United Fuel Gas case or the Ben Avon case, or both.

Of course, it is not clear that the court in the United Fuel Gas case meant to hold that the separation of powers clause stands in the way of independent judicial judgment. Perhaps, by analogy to the practice of interpreting an ambiguous statute so as to render it constitutional, we should interpret the court's opinion in such a way as to save the constitutionality of the separation of powers clause. But by doing so we sacrifice the constitutionality of the Public Service Commission Act, for it is undeniable that the United Fuel Gas case, either because of separation of powers or because of the court's construction of the act, or both, holds that judicial judgment may not be substituted for administrative judgment. The court convincingly substantiates its interpretation of the intent of the legislature: 'Such a construction [permitting the court to substitute its judgment] would practically emasculate the statute.

\(^{74}\) There is one possibility that the dilemma may not be perfect. Judicial review of the action of the Public Service Commission need not necessarily be in the supreme court of appeals, but might be placed in the circuit courts. Under the separation of powers clause, it would seem to be as bad to confer legislative power upon the circuit courts as upon the supreme court. And it has recently been held that legislative power may not be conferred upon a circuit court. \textit{E. g.:} Hodges v. Pub. Serv. Comm., 110 W. Va. 649, 159 S. E. 834 (1931). However, it has sometimes been held that there is a difference between the circuit courts and the supreme court in this regard. \textit{E. g.:} Mackin v. County Court, 38 W. Va. 338, 18 S. E. 632 (1893). If this view were taken, the legislature could escape from the dilemma by transferring to the circuit courts the jurisdiction to review orders of the commission. There is little likelihood, however, that since the decision of the Hodges case this view would be taken, for the Hodges opinion disapproves the Mackin case and similar holdings.
and rob it and the Commission of their proper authority and jurisdiction. The salaries which the statute attaches to the office of the Commissioners, and the nature of the subjects to be dealt with by them, all imply that only persons of the requisite qualifications should be appointed, and that after appointment they should by investigation and study become further qualified by learning and experience, indeed should become experts upon all subjects and business coming within their jurisdiction. Is it to be presumed then that the legislature intended to invest in this court jurisdiction on review by original or other process to substitute its judgment for that of the Commission? We cannot so hold."

Despite the wisdom of this rationalization, which in the opinion of many is undoubtedly confirmed by subsequent experience, the statute as thus interpreted violates the Fourteenth Amendment in any rate case in which confiscation is claimed.

It is clear, then, that although the reason for the holding is not free from doubt, the procedure required by the United Fuel Gas case violates the due process requirement of the Ben Avon case. But the Ben Avon case was decided six years after the United Fuel Gas case. If the latter case is followed in subsequent decisions, the whole West Virginia practice may be unconstitutional.

Since the decision of the United Fuel Gas case, the West Virginia court has handed down sixteen decisions of especial significance on the question of the weight which the court will give to the findings of fact of the Public Service Commission. If the language of the court in these sixteen cases is to be taken at its face value, it is apparent that the court does not substitute its judgment for that of the commission on fact questions. Three cases carry syllabi by the court as follows: "Findings of fact by the Public Service Commission based upon evidence to support them generally will not be reviewed by this court." In another case this statement is quoted with approval in the opinion. The

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75 This interpretation is in keeping with the terms of the statute. The provision that "the court shall decide the matter in controversy as may seem to be just and right" leaves open the question whether the court must substitute its judgment on fact questions for the judgment of the commission or whether the court should set aside findings of fact of the commission only if they are not supported by the evidence.


word “generally” seems to imply that exceptions are made to the rule thus stated. But such is not the case, for in four cases\textsuperscript{78} the court made a flat declaration in the syllabus without the word “generally”: “Findings of fact by the Public Service Commission based upon evidence to support them will not be reviewed by this court.” No reason is discernible from the facts of the cases for including the word “generally” in the statement of the rule in some cases and for omitting it in others. In four additional cases\textsuperscript{79} the practice of the court to refrain from making an independent inquiry into the facts is stated in various forms in the syllabi. In twelve of the sixteen cases, then, the language of the court is clear and unequivocal that the court will not substitute its judgment for that of the commission. It may be noteworthy that in three of the other four cases the commission’s orders were “set aside” or the cases “reversed and remanded”, and the fourth\textsuperscript{80} was affirmed by the West Virginia court but reversed by the United States Supreme Court. But even in the cases in which the West Virginia court reversed the commission, lip service was paid to the rule stated in the other cases. Thus: “... a fact, once found by the commission, will not be disturbed by this court, if there is sufficient evidence to support it.”\textsuperscript{81} “... we have persistently held that because the commission is ‘experienced in rates and familiar with the intricacies of rate making’ we will ordinarily not substitute our judgment for that of the commission on controverted evi-


\textsuperscript{79} Baltimore & Ohio R. R. v. Pub. Serv. Comm., 99 W. Va. 670, 130 S. E. 131 (1925) (“‘Findings of fact by the Public Service Commission will not be disturbed upon appeal to this Court, unless the Commission has acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support them.’”); Pittsburgh & W. Va. Gas Co. v. Pub. Serv. Comm., 101 W. Va. 63, 132 S. E. 497 (1926) (“... where there is a substantial conflict of evidence on any question of fact, the probative value accorded by the Commission to such evidence will not be disturbed.”); City of Huntington v. Pub. Serv. Comm., 101 W. Va. 378, 133 S. E. 144 (1926); Bluefield Telephone Co. v. Pub. Serv. Comm., 102 W. Va. 296, 135 S. E. 833 (1926) (“An order of the Public Service Commission will not be annulled by this court unless the order manifests unlawful, arbitrary or capricious exercise of power.”)


\textsuperscript{81} Natural Gas Co. v. Pub. Serv. Comm., 95 W. Va. 557, 561, 121 S. E. 716 (1924).
dence.

Although our judgment will not ordinarily be substituted for that of the commission, because of the latter's experience in rates, ... where it appears that its findings of fact are contrary to the evidence or without evidence, or there has been misapplication of legal principles, it becomes our bounden duty as a matter of law to set aside the same and remand the case for further consideration in conformity with law.

If, then, the practice is what the court seems to say it is, West Virginia apparently does not accord an opportunity for an independent judicial inquiry in Public Service Commission cases. If such a practice is followed in cases in which the owner claims confiscation the requirement of the due process clause of the Fourteenth Amendment as interpreted by the United States Supreme Court in the Ben Avon case is violated. But compliance or non-compliance with the Ben Avon doctrine does not necessarily depend upon the language which the court uses in its opinions in cases in which it reviews findings of the Public Service Commission. The question is whether or not the court does in fact make an independent inquiry. The difference between what a court does and what it professes to do in this regard was recognized by the United States Supreme Court in the St. Joseph case. The district court in its opinion in that case had expressed the view that it is not within the province of the judiciary to weigh the evidence and pass upon issues of fact. However, the Court held: "As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration. . . ."

It seems indisputable that in many cases the practice declared is followed. But not all of the cases come within the consti-

84 In the West Virginia workmen's compensation cases the difference between holding and dictum in this connection is much more pronounced than in the Public Service Commission cases. See infra, p. 313, et seq.
86 Wheeling v. Natural Gas Co., 115 W. Va. 149, 175 S. E. 339 (1934), may be an exception to the general practice. The case, however, involved no question of confiscation, inasmuch as the city, and not the company, appealed the case. After observing that the court was bound to set aside findings contrary to evidence or without evidence or reached on the basis of a misapplication of
tutional requirement, which is limited to cases in which "the owner claims confiscation", and eleven of our sixteen cases were not such cases. The remaining five call for more detailed analysis.

In Baltimore and Ohio R. R. v. Public Service Commission the commission had entered an order prescribing maximum rates, and the court declared that there was "but one question, whether under the evidence the rates are just and reasonable". The court declared flatly: "We cannot substitute our judgment for that of the Commission on the weight of evidence." The court also declared: "Nor will such findings be disturbed on appeal unless the Commission has acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support them." If the

legal principles, the court proceeded in a lengthy opinion to set aside at least ten specific findings of the commission, concluding with a verbal chastisement of the commission in the following words: "Concretely stated we would caution the commission to give greater heed to actual value and less to theories." Most of the findings on which the court reversed the commission probably involved questions of law and not questions of fact, although some of the findings illustrate the frequent difficulty of distinguishing questions of law from questions of fact. The commission was found to be in error in failing to give adequate consideration to the original cost of the property, in charging to operating expenses certain items which should have been capitalized, in failing to take account of age and obsolescence as well as physical depreciation, in failing to follow the prevailing practice of using the "rock pressure" method of ascertaining the depreciated condition of the gas well account, in including in the valuation leaseholds not presently in use or soon to be used, in adding an item for going concern value when the company had not sustained the burden of showing going concern value, in using exclusively the gas sales method of allocation of value among three states, in failing to consider salvage value of worn-out property. Each of these errors of the commission has to do with the method by which the commission arrived at its findings of fact, and it is at least arguable that each question is therefore probably properly considered a question of law and not of fact. The commission stated that its finding as to the reproduction cost of the property was based upon the lowest price levels for labor and materials available in the record. Because this statement was untrue, the court reversed the finding as to the reproduction cost. Such a correction of a mistake probably comes within the court's formula in this instance of setting aside a finding because it is "contrary to the evidence". On just one finding, it is more than arguable that the court did substitute its judgment for that of the commission. The commission found that the future life of the company was thirty years and included an item for amortisation accordingly. The court declared: "We cannot accord in the finding that the company will cease to function within a period of thirty years ... it would be unfair, at this time, to burden the consumers in this state with an additional annual charge ... based on a thirty year life expectancy." Even though on this point the court did seem to exercise an independent judgment on a question of fact, the fact that such action was taken in a case in which at least nine other findings were also reversed tends to weaken considerably the effect that this one isolated instance may have upon the general rule as declared and apparently applied in fourteen other cases.

phrase, "contrary to evidence" were taken out of its context, it would probably mean "contrary to the weight of the evidence", and if the finding were to be disturbed if contrary to the weight of the evidence, the court would be exercising an independent judgment — all that the Ben Avon case requires. However, this phrase may not properly be read apart from its context, and the sentence must mean that a finding will not be disturbed unless it is so clearly contrary to the weight of the evidence that the commission has acted arbitrarily and unjustly. This interpretation is borne out by the previous statement that the court will not substitute its judgment on the weight of the evidence, and also by the statement later in the opinion that, "The value of evidence in rate proceedings varies, and the weight to be given to it is peculiarly for the body experienced in regard to rates, and familiar with the intricacies of rate making." The order was therefore "affirmed", apparently without the court's exercising an independent judgment as to the facts. The holding therefore seems to be in violation of the Ben Avon requirement.

Doubt as to the meaning of the opinion in Pittsburgh & W. Va. Gas Co. v. Public Service Commission88 is somewhat greater. The company complained of an order of the commission refusing an increase in rates "on the ground that the rates now in effect are confiscatory". The main point of error relied upon was the failure of the commission to accept an estimate that the net earnings in 1925 would be $1,000,000 less than in 1924. After pointing out a discrepancy between a figure upon which the estimate was based and a figure taken from an audit of the books, the court observed: "The probative value of estimates is inconsequential when compared with actualities. The Commission had before it a comprehensive history of the utility, its financial operations, purchases, expenses, stock transactions, dividends and depreciations, fluctuations in production and sales, and the like, together with its developed and undeveloped gas territories, all of which could be considered by it in weighing the testimony of decreased sales and increased expenses for the year 1925." It is significant that the court said that these factors were before the commission and could be considered by it. There is no indication that these factors were considered by the court. The court seemed to deny that it considered such factors: "We cannot say that the Commission acted

without evidence; nor can we say that the estimates of decreased sales and increased expenses founded largely upon conjecture should outweigh the actual facts and figures considered by the Commission." The court then defined the scope of its inquiry: "The courts do not attempt to weigh conflicting evidence in rate cases; and will not interfere with the rates fixed, unless the Commission has acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support them." (That this practice rests upon separation of powers seems to be implied by the court's next statement: "It must be kept in mind that the fixing of rates is legislative in its character.") So far as appears from this part of the opinion, it seems rather clear that the court did not make an independent finding as to the probable reduction in earnings in 1925. However, after a discussion of other questions, the court declared in the latter part of the opinion: "Confiscation is the basis of the application for reversal of the order, and we have examined the evidence on which the finding of fact is based, to ascertain if there has been a misinterpretation of legal principles or a mistake as to the evidence, or no evidence on which to base the findings . . ." What is meant by "a mistake as to the evidence"? Certainly this question cannot be answered with definiteness. But the opinion should be interpreted to make it consistent with itself, and, since in the early part of the opinion the court declared without ambiguity or uncertainty that the court would not weigh conflicting evidence, it seems reasonable to assume that the court did not mean by the words, "a mistake as to the evidence", to indicate that the court did weigh the conflicting evidence on the question concerning the probable reduction in earnings in 1925. If this analysis is correct, the case constitutes another failure to follow the Ben Avon doctrine, and the company was therefore denied procedural due process of law.

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80 Italics supplied.
80 As pointed out in the preceding paragraph concerning the Baltimore & Ohio case, the words "contrary to evidence" as used in this context probably mean "so clearly contrary to the evidence as to be arbitrary and unjust". A mere difference of opinion between the commission and the court as to what was the weight of the evidence would hardly indicate that the commission had acted "arbitrarily and unjustly".
81 In Buchanan, The Ohio Valley Water Company Case and the Valuation of Railroads (1927) 40 Harv. L. Rev. 1033, 1076, the Pittsburgh & West Virginia Gas Co. case is interpreted as following the principle of the Ben Avon case.
In *Bluefield Telephone Co. v. Public Service Commission*, the company complained of an order of the commission "because of (1) the valuation fixed as the rate base, (2) the rate of depreciation allowed, and (3) the conclusion that the present revenue is an ample return of the Company's investment." After reviewing the evidence the court declared: "The solution of problems such as these is peculiarly within the province of the Commission. In this case the Commission has exercised its judgment in good faith. We find no reason to question the result." The action of the court apparently conformed with the court's statement in the syllabus: "An order of the Public Service Commission will not be annulled by this court unless the order manifests unlawful, arbitrary or capricious exercise of power." Again, so far as can be ascertained from the case, the *Ben Avon* requirement apparently was not met.

The holding in *Natural Gas Co. v. Public Service Commission* is not helpful and the language is confusing. The commission had refused an application for an increase in rates. After paying lip service to its rule against an independent judicial investigation, the court observed that the rate base "nowhere appears in this record; so it becomes necessary for us to review the evidence in order to determine whether the ultimate finding of the commission is correct. . . ." The court then proceeded to try to determine the rate base from the evidence in the record. As to one item, however, "the evidence as to the amount is too uncertain in this case for us to determine any particular sum." Most puzzling is the court's statement: "We are asked by the company to exercise our independent judgment upon the evidence and determine the rate base. This we would do if we had sufficient facts before us. We are not disposed . . . to shirk our duty . . ." Since the court could not ascertain the rate base, it concluded, "we think it proper to reverse the order and send it back for further investigation and inquiry." Although the court did attempt to exercise its independent judgment in finding the rate base, the decision is not inconsistent with cases holding that the court will not exercise an independent judgment in finding facts, because apparently the only reason for the attempted exercise of an independent judgment was the fact that the rate base used by the commission did not appear in the record. The court might well have remanded the case with-

92 108 W. Va. 296, 135 S. E. 833 (1926).
93 95 W. Va. 557, 121 S. E. 716 (1924).
out attempting to make an independent judicial inquiry, but the court's own attempt to find the rate base is not inconsistent with the practice in other cases to refuse to pass upon the weight of the evidence.

Although the West Virginia practice is seemingly in violation of the Fourteenth Amendment as interpreted by the United States Supreme Court, no West Virginia case has ever been reversed by that Court because of failure to afford opportunity for an independent judicial inquiry. In one case the Federal Supreme Court did comment upon the West Virginia practice, Bluefield Water Works & Improvement Co. v. Public Service Commission.\textsuperscript{94} The West Virginia court, in affirming the order of the commission, made no statement with respect to its practice of sustaining findings of fact based upon evidence to support them, for it happened that the primary question in the case was not one of fact but one of law as to the proper method to be followed in finding the valuation of property. The Supreme Court reversed the West Virginia court because the commission had considered the original cost and had not accorded "proper, if any, weight" to the estimated cost of reproduction new. The Court did, however, advert to the practice of the West Virginia court of sustaining findings based on evidence to support them. Mr. Justice Butler declared: "The State Supreme Court of Appeals holds that the valuing of property of a public utility corporation and prescribing rates are purely legislative acts not subject to judicial review except in so far as may be necessary to determine whether such rates are void on constitutional or other grounds; and that findings of fact by the commission based on evidence to support them will not be reviewed by the court." In support of this statement, three West Virginia cases were cited. Then, after pointing out the error of the West Virginia court in sustaining the commission’s improper method of valuation, Mr. Justice Butler observed: "Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts." For this, the \textit{Ben Avon} case was cited.

At least some significance must lie in the fact that the United States Supreme Court went so far afield in its opinion in order to caution the West Virginia court that opportunity must be

\textsuperscript{94} 89 W. Va. 736, 110 S. E. 205 (1921), \textit{rev’d} 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923).
given for an independent judicial inquiry in rate cases in which the owner claims confiscation. A discussion of this requirement was twice removed from the case before the court, for not only was the question of an independent judicial inquiry not raised in that case but the cases cited to show the West Virginia practice involved no constitutional question and hence even under the *Ben Avon* decision were not improperly decided.

If the language of the Supreme Court in the *Bluefield* case was meant as a warning to the West Virginia court, that court apparently did not heed the warning. Instead, it seems that it has valiantly clung to its view which was first expounded in the *United Fuel Gas* case, even though its decisions have been subject to reversal by the Supreme Court. Whether this seeming defiance should be called a despicable persistence in refusing to comply with requirements of due process of law, or whether it should be heralded as a worthy achievement of the West Virginia court in sustaining a reasonable and efficient system in spite of an unfortunate decision of the Supreme Court, is a question which has already called forth such an abundance of periodical literature that little new could be added at this late date. Suffice it to observe that few decisions of the United States Supreme Court have received more adverse comment than the *Ben Avon* case. In addition, three judges dissented from both the original decision and from the 1936 decision in which the doctrine was reaffirmed. It is well said by a 1938 commentator of the dissenting justices in these cases: "Because their reasoning seems more to accord with the temper of the times, it is they, rather than the majority, who are likely to gain adherents to their position." Indeed, with the

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96 In *Baltimore & Ohio R. R. v. United States*, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936) four justices joined in an expression of such views.

97 Landis, supra n. 95, at p. 529.
recent changes in the personnel of the Supreme Court, it seems not unlikely that the Ben Avon doctrine may soon be discarded.\footnote{United Gas Public Service Co. v. Texas, 58 S. Ct. 483 (1938), may be a step in the direction of overruling the Ben Avon case. It is there held that the question of the reasonableness of rates fixed by a commission may be submitted to a jury and that the requirement of an independent judicial inquiry is thus satisfied.}

The Public Service Commission Act neither grants nor denies the power of the Supreme Court to modify an order of the commission. The relevant clause provides: "Any party feeling aggrieved by the entry of a final order by the commission . . . may present a petition in writing to the supreme court of appeals . . . praying for the suspension of such final order . . . If the court . . . be of the opinion that a suspending order should issue, the court . . . may require bond . . . The court shall decide the matter in controversy as may seem to be just and right."\footnote{W. Va. Rev. Code (1931) c. 24, art. 5, § 1.}

It might reasonably be argued that since the petition to the court must pray "for the suspension of such final order" the only power of the court is to suspend or to refuse to suspend a final order. Similarly, the provision for bond in case of issuance of a suspending order, with no mention of a modifying order, might be interpreted as a denial of the power to modify. But the concluding sentence permitting the court to decide "as may seem to be just and right" is sufficiently broad to include the power to modify an order of the commission. In effect, then, the question is left for judicial decision.

The court has never specifically discussed the question whether or not it has power to modify an order of the Public Service Commission. In one case, however, the court did modify such an order.\footnote{City of Huntington v. Pub. Serv. Comm., 101 W. Va. 378, 133 S. E. 144 (1926). The order of the commission provided: "Hereafter, when a local service area, city or town, moves into another group by reason of the change in its number of stations, the telephone company may put into effect rates applicable to the Class Rate of said group by filing with the Commission a tariff, together with an affidavit setting forth the number of stations in such local service area, city or town." The order was modified by the court because: "The Commission certainly cannot by such order prevent the patrons in the future from protesting against, or estop itself from investigating, any proposed reclassification."} After indicating an opinion that the commission's order had gone too far in one respect, the court declared: "We are of opinion to modify the order of the Commission in this particular, and affirm it in all other respects." Accordingly, the order of the
commission was "Modified and affirmed." Although the absence of discussion of the court's power may indicate some degree of inadvertence on the part of the court, the case nevertheless must be deemed an authoritative interpretation of the act, for it is undeniable that the court did modify the order.\textsuperscript{101}

Important consequences may follow from this interpretation, for, according to the analysis made by the United States Supreme Court in a series of cases, if the court has the power to modify a legislative order, then the court in reviewing the order acts legislatively, whether the court affirms, reverses, or modifies the order. Thus, in the leading case of \textit{Prentis v. Atlantic Coast Line Co.},\textsuperscript{102} it was held that the Virginia supreme court of appeals in reviewing rates fixed by the corporation commission of that state acted legislatively, because the court had the power "to substitute such order as, in its opinion, the commission should have made". Even in the very early case of \textit{Reagan v. Farmers' Loan & Trust Co.},\textsuperscript{103} in which it was settled that it is a judicial function to set aside unreasonable or confiscatory rates fixed by a commission, the importance of the fact that the courts had no power to revise or change was recognized: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation." In \textit{Keller v. Potomac Elec. Co.},\textsuperscript{104} the pivotal language was: "Has it [the court] the power to make the order the Commission should have made? If it has, then the court is to exercise legislative power in that it will be laying down new rules, to change present conditions and to guide future action and is not confined to definition and protection of existing rights." Accordingly, it was held that the provision for

\textsuperscript{101} In City of Elkins v. Pub. Serv. Comm., 102 W. Va. 450, 135 S. E. 397 (1926), the court concluded its opinion by an intimation that it had power to modify: "We do not find sufficient cause in the action of the Commission . . . justifying setting aside or modification of the order complained of."

\textsuperscript{102} 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908).

\textsuperscript{103} 154 U. S. 362, 397, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894).

\textsuperscript{104} 261 U. S. 428, 440, 43 S. Ct. 445, 67 L. Ed. 731 (1923).
appeal to the Supreme Court from the courts of the District of Columbia, which had the power to modify, was unconstitutional. Similarly, in Porter v. Investors Syndicate it was held that since a court could "set aside, modify or confirm" an order of the Montana investment commissioner, the court acted, at least in part, legislatively.

Under such decisions of the Federal Supreme Court, a court having the power to modify legislative orders of a commission acts legislatively, whether it affirms, modifies, or reverses. In the absence of a West Virginia holding on the proposition, these decisions may well be accepted as authoritative. It follows, therefore, that since the West Virginia court did modify an order of the Public Service Commission in one case, and since a court having the power to modify a legislative order acts legislatively, the West Virginia court acts legislatively in reviewing orders of the Public Service Commission. The Public Service Commission Act as interpreted, then, confers a legislative power upon the supreme court of appeals. This reasoning proves that the Public Service Commission Act is unconstitutional in its entirety, under the Hodges case, which held unconstitutional the West Virginia Water Power Act because it conferred a legislative power upon a court.

Of course, no one expects the West Virginia Public Service Commission Act to be held unconstitutional on this basis. The point is that the result of the combination of the two doctrines, that a court which may modify acts legislatively, and that the separation of powers clause forbids a court from acting legislatively, serves to demonstrate the extreme artificiality of the two doctrines.

At least since 1926 the West Virginia court has had the power to modify orders of the commission, if the fact that the court did in that year modify such an order has any significance. Has any harm resulted? On a purely conceptualistic basis, the doctrine of

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106 Of course it is not necessarily true in the nature of things that the power to modify a legislative order is a legislative power. Logic seems to break down completely in the distinctions drawn between the judicial and the legislative. Thus, if the power to modify is legislative, because an order of modification "looks to the future," why is not the power to suspend a legislative order also legislative? An order of suspension "looks to the future," just as the repeal of a statute by a legislature "looks to the future." The difficulty is one which is intrinsic in any attempt to force powers which are made up of numberless ingredients in varying proportions to fit three rigid categories called judicial, legislative and executive.
separation of powers has been violated, for judicial and legislative powers are combined, and, according to the court in the Hodges case: "There is no liberty if the powers of judging be not separated from the legislative and executive powers." Would any reasonable person assert that the government of the state since 1926 has to the extent of the court's power to modify commission orders been tyrannical and that there has to that extent been "no liberty"? 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?

WORKMEN'S COMPENSATION

Of all the workmen's compensation cases decided by the West Virginia supreme court, at least one case in every five involves primarily a review of the findings of fact of the commissioner. Unlike the taxation and Public Service Commission cases, most workmen's compensation opinions do not involve discussions of separation of powers. Only in the initial establishment of the practice did the theory of separation of powers come into play; the great bulk of the cases make no mention of it. The fundamental question raised by the cases is the extent to which the court should review administrative findings of fact. The court might give no weight to the commissioner's findings, simply substituting its judgment for that of the commissioner, or it might regard administrative findings as final and limit judicial review strictly to questions of law, or it might follow some intermediate practice. Inquiries concerning what is and what should be the practice, and the reasons therefor, are important not only in the quest for maximum efficiency in the administration of workmen's compensation, but they are of immediate consequence to the practitioner, for helpful guides indicating what findings the court is likely to affirm or reverse might win cases that seem lost or save useless appeals. That the court's own statements of guiding principles do not accurately

108 Quoted with approval by the court from Alexander Hamilton.
109 The supreme court of appeals has decided about 225 workmen's compensation cases. Those which, in the opinion of the writer, involve primarily questions of fact total about 44. Of course, separating questions of fact from questions of law involves judgment, and opinions may differ in many cases.
110 See infra, p. 311, et seq.
reflect what the court does in affirming or reversing findings lends emphasis to the utility of attempting such inquiries.

It is now reasonably clear that constitutional obstacles do not stand in the way of complete administrative finality on fact questions in West Virginia workmen’s compensation cases. At one time in the development of this law, the constitutionality of such finality was very much in doubt. The decision of the Supreme Court of the United States in *Ohio Valley Water Co. v. Ben Avon Borough* held that where confiscation is claimed due process of law requires an independent judicial determination of the value of public utility property for rate-making purposes.\(^{111}\) The Illinois supreme court held in 1922 that this decision was applicable to the findings of fact of the Illinois Industrial Commission in a workmen’s compensation case\(^ {112}\) but the Illinois court in 1925 apparently changed its view and distinguished the *Ben Avon* case on the ground that fixing rates for the future is a legislative function and that the decision is therefore inapplicable to the performance of an essentially judicial function by an agency which administers the workmen’s compensation act.\(^ {113}\) Finally, in 1931, the New York Court of Appeals distinguished the *Ben Avon* case on like grounds and held constitutional a provision of the New York workmen’s compensation statute making the decisions of the Industrial Board “final as to all questions of fact”, and this holding was unanimously affirmed without opinion by the United States Supreme Court.\(^ {114}\) This decision, of course, destroyed what was left of the idea that the *Ben Avon* case stood in the way of administrative finality in workmen’s compensation cases. However, in 1932 came *Crowell v. Benson*,\(^ {115}\) holding that with respect to determinations of facts which are “fundamental” or “jurisdictional” in the administration of the Federal Longshoremen’s and Harbor Workers’ Compensation Act the findings by the deputy commissioner are not final.

\(^{111}\) 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920). The doctrine of the *Ben Avon* case was reaffirmed in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936). See list of commentaries on the *Ben Avon* case in note 95, supra.

\(^{112}\) Otis Elevator Co. v. Industrial Comm., 302 Ill. 90, 134 N. E. 19 (1922).

\(^{113}\) Nega v. Chicago Rys. Co., 317 Ill. 482, 148 N. E. 250 (1925). In *Dodd, Administration of Workmen’s Compensation* (1936) 372, it is said that the highest court of Oklahoma has upheld finality of fact determination, citing *Pine v. State Industrial Comm.*, 108 Okla. 185 (1925), but such an interpretation of the case seems questionable.


but that such issues of fact must be tried *de novo* before a court. The opinion indicates that questions as to whether or not the injury occurs on the navigable waters of the United States and whether or not the relation of master and servant exists are questions of "fundamental" or "jurisdictional" facts, and that the question whether or not the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another is not such a question of "fundamental" or "jurisdictional" fact. But the opinion in failing to make clear the criterion for so classifying questions of fact leaves in doubt what other questions of fact might be included within this classification. The opinion is also obscure as to the very basis of decision. If, as might be reasonably argued, it rests upon the due process clause, then it is applicable to the administration of state compensation acts. If, as is more probable but far from clear, it rests upon Article III of the Federal Constitution, extending the judicial power of the United States "to all Cases of Admiralty and Maritime jurisdiction", then it does not affect state compensation acts, except as it may constitute an analogy for the interpretation of similar provisions of state constitutions, and it is clear that no provision of the West Virginia constitution would be so interpreted. However, even though some doubt remains as to whether or not the administration of state compensation acts may in some cases fall within the scope of the holding in *Crowell v. Benson*, it happens that the West Virginia compensation act is elective instead of compulsory and the United States Supreme Court has held that an employer "who elects to accept the law may not complain that, in the plan for . . . compensation for injury sustained, there is no particular form of judicial review". It probably follows that an employee who seeks to accept the benefits of the act would similarly have no standing to assert the unconstitutionality of the act. Therefore, even if *Crowell v. Benson* does apply to state compensation acts it cannot be applied to the West Virginia elective act because no one is in a position to raise

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117 The only relevant provision is art. VIII, § 1: "The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace."

the question of constitutionality, and on this basis the conclusion is reasonably clear that no constitutional obstacle stands in the way of giving complete finality to administrative findings.

In many states the workmen's compensation statutes either provide that administrative findings of fact shall be final or provide for judicial review of questions of law only.\textsuperscript{119} A Maryland court has thus summed up the state of the legislation: "In nearly half of the state acts in this country and in federal acts, finality is given to the findings of the commission on facts."\textsuperscript{120} The West Virginia statute contains no such provision, the only indication in the statute as to the scope of judicial review being that "the supreme court on such review shall determine the matter and certify its decision to the board and the commissioner".\textsuperscript{121} The court has from the beginning taken the view that the "statute no doubt gives us right to review the findings of the Commissioner on evidence presented to him".\textsuperscript{122} The court accordingly has been wholly free to work out its own practice, unhampered by either statutory or constitutional limitation, apart from the separation of powers clause of the state constitution.

How, then, should the court determine its practice? What are the criteria?

The arguments against administrative finality are centered in the idea that there is security in the judicial process which an

\textsuperscript{119} In DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 371 et seq., it is indicated that the statutes of the following states make administrative determinations of fact final: California, Colorado, Idaho, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia, Wisconsin. In Georgia and Iowa such findings are final if there is "sufficient competent evidence".

That a statute provides for administrative finality does not always mean that the courts in practice accord administrative finality. Even if review is limited to questions of law, the court may still determine all jurisdictional questions, may review the evidence to ascertain whether or not the finding is based on sufficient evidence or is contrary to the clear preponderance of the evidence, may decide whether or not the finding was unreasonable, and may examine the entire record in order to determine a question of law where a question of fact is so dependent upon questions of law as to be "a mixed question of law and fact". For a collection of cases indicating that such questions are deemed questions of law, see opinion of Brandeis, J., in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).

That statutes giving finality to administrative determinations have not been altogether successful in preventing the courts from reviewing questions of fact, see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 380-81.


\textsuperscript{122} Poccardi v. Com'r, 79 W. Va. 684, 688, 91 S. E. 663 (1917).
administrative process cannot or does not afford. Judicial independence is deeply rooted in centuries of tradition, whereas "legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."123 At least where constitutional rights are involved, making administrative findings of fact conclusive "is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."124 It has been said that "administrative justice, at least in its crude beginnings, appears to have very much in it of the oriental; to have very much in it of a reversion to justice without law."125 Administrative agencies give rise to a hatred of "bureaucracy", to a fear of a "new despotism". Indeed, since there is even a constitutional requirement in some cases of an independent judicial finding of fact, should not such a judicial finding be made as a matter of policy where the constitutional limitation is not applicable?

On the other side of the question perhaps the most important consideration is the persuasive fact that it is desirable to take full advantage of the special qualifications and abilities of the administrative officials. The workmen's compensation commissioner126 is a specialist; the judges are like general practitioners. Because the commissioner devotes his full time to matters of compensation, his decisions "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions which may lie beneath consciousness without losing their worth."127 In addition, the commissioner has an advantage which the judges do not enjoy in that he confronts the witnesses instead of merely reading a printed record. In many cases in which the medical testimony is in conflict, the commissioner may personally examine the injured man to determine the percentage of disability, or whether the claimant is malingering, or whether the disability resulted from an injury or from other causes, and the results of such a personal

124 Ibid.
126 References to the workmen's compensation commissioner are, of course, intended to include assistants such as the trial examiners.
examination cannot be adequately reflected in a printed record. In addition, judicial review of facts tends to promote litigation, to delay settlements, and to increase expense to the claimants. Informality of procedure and a relaxation of the technical rules of evidence in hearings before the commissioner are desirable, and judicial review naturally tends to cause a commissioner to apply the same rules of evidence and procedure to which the reviewing court is accustomed, with the consequence of undue formality and the usual necessity that each party be represented by counsel even in the vast bulk of cases which never reach the court. Another effect of excessive judicial review may be to cause the commissioner to give primary attention to making the record instead of devoting his principal attention to the settlement and decision of controversies. As for the argument that there is greater security in the judicial than in the administrative process one reply is that the commissioner is exercising an essentially judicial function, and, as the New York Court of Appeals has said of the industrial board of that state, "has the dignity and the form of many of our courts, the only distinction being that of name." Finally, and of the greatest importance, administrative finality does not mean the withdrawal of all judicial protection, for under any view the court may always set aside findings if they are not based upon evidence, or if proper procedural requirements are not observed, or if a mistake of law is made, or if there is an abuse of discretion.

It seems almost too obvious to state that a problem so essentially practical cannot be properly solved either by legal niceties or by abstract thought. Above all, the answer is not to be found in Montesquieu! But if the reasons given in the opinions of the supreme court of appeals indicate the true motivating forces, the basis of the determination has been essentially Montesquieu's doctrine of the separation of powers. Indeed, if the opinions are to be believed, the basis has been a mistaken application of that doctrine.

In the first workmen's compensation case to come before the court, while the act was still being administered by the Public Service Commission, it was held that United Fuel Gas Co. v. Public

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129 See note 119, supra.

Service Commission, concerning the judicial review of rate-making by the commission, was controlling as to the judicial review of its workmen’s compensation findings. That case held that on account of the legislative character of rate-making, the appellate jurisdiction of the supreme court could not be invoked to review an order of the commission, because the jurisdiction of the court was “limited by the Constitution and statutes to judicial matters, in judicial proceedings.” Accordingly, it was held that only the original jurisdiction of the court “by process akin to mandamus or prohibition” could be invoked. And in a mandamus or prohibition proceeding it is not for the court to substitute its judgment for that of the commission. The obvious fallacy in this reasoning is that the United Fuel Gas case does not apply to workmen’s compensation because that case was predicated on the proposition that rate-making was legislative, whereas compensation hearings are judicial or quasi judicial. But this apparently was not recognized until some time later when a new explanation, also based in part upon a concept of separation of powers, was advanced: “The Compensation Commissioner is not a part of the judiciary of the state, and under the constitution appeals to this Court lie only from judicial decisions of inferior courts.” Because an appeal to the court from the commissioner is “akin to mandamus”, it follows, as the court said in the first syllabus in the first workmen’s compensation case raising the question of the extent to which the court should accord finality to administrative findings of fact, that “under its supervisory power over the Public Service Commission, this court takes cognizance of questions of law only.” This is

131 73 W. Va. 571, 80 S. E. 531 (1914). The case is discussed at length supra, p. 284, et seq.

132 Proffitt v. Com’, 108 W. Va. 438, 151 S. E. 307 (1930). In the following cases the court has reiterated that the supervisory power of the court is under its original jurisdiction by mandamus: Poccardi v. Pub. Serv. Comm., 75 W. Va. 542, 84 S. E. 242 (1914); Hall v. Com’, 109 W. Va. 239, 153 S. E. 510 (1930); Saunders v. Com’, 112 W. Va. 212, 164 S. E. 39 (1932); Peerless Coal & Coke Co. v. Com’, 113 W. Va. 6, 166 S. E. 529 (1932); Lively v. Com’, 113 W. Va. 242, 167 S. E. 583 (1933). It is interesting to observe that for the purpose of determining whether or not testimony before the commissioner is privileged so far as an action for libel is concerned, it is held that the commissioner acts in a “quasi judicial capacity” and there is privilege to the same extent as before a court. Higgins v. Williams Pocahontas Coal Co., 103 W. Va. 504, 138 S. E. 112 (1927).

an irresistible conclusion from the court’s premises. Both the rule and the reasons for the rule are thus definite and clear, if the court’s language is to be taken at its face value without further investigation. But even though the court reiterates the same rule in many syllabi, and even though the court itself has intimated and many West Virginia lawyers apparently believe that “the syllabus is the law”, it is obvious that the only profitable inquiry is what the court does and not what it says either in its syllabi or in its opinions, for the law in action does not always coincide with the law in books.

It is repeatedly declared that: “A finding of fact made by the State Compensation Commissioner will not, as a general rule, be set aside if supported by substantial evidence.” This is no doubt an accurate statement of what the court does, but only in the sense that more findings supported by substantial evidence are affirmed than reversed and hence that such findings will not be set aside “as a general rule”. The vital fact lies in the implication that findings supported by substantial evidence are sometimes set aside, for this implication is borne out by what the court does. A dozen or more cases carry syllabi substantially as follows: “A

134 For example, in State ex rel. Dodd v. Hill, 84 W. Va. 468, 100 S. E. 286 (1919) the court applied the following doctrine with respect to the writ of mandamus: “If, as we believe and hold, the matters stated are fairly considered within the scope of the authority conferred by the legislature, and the officer upon whom such authority devolved duly considered them, as he solemnly swears he did before deciding to withhold approval, the writ ought not to issue. For, while this court may by mandamus compel action in good faith by an officer clothed with discretionary power, we will not award the writ for such purpose unless it appears that he has clearly and willfully disregarded his duty, or that his action was flagrantly wrong working unjust results, or that his decision was due to caprice, passion, partiality or corruption.” Under such a view, of course, mandamus cannot be used even to secure a judicial review of the good faith determination of questions of law.

135 See, e. g.: State v. Peel Splint Coal Co., 36 W. Va. 502, 822 (1892) (“Under a provision of our constitution, this Court prepares the syllabus in each case reported, and that duty is not left to the reporter. It is to the syllabus, therefore, and not to the opinion, that we are accustomed to look for precedents binding upon this Court.”); Bank v. Burdette, 61 W. Va. 636, 637, 57 S. E. 53 (1907) (“Now our constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion.”) The United States Supreme Court declared in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 356 (1910): “The syllabus—which in West Virginia is the law of the case, whatever may be the reasoning employed in the opinion of the court—is as follows ...” That a syllabus, however, must be read in the light of the facts of the case, see, e. g.: Nees v. Julian Goldman Stores, 106 W. Va. 502, 506, 146 S. E. 61 (1928); Barron v. B. & O. R. R., 116 W. Va. 21, 23, 178 S. E. 277 (1935).

136 E. g.: Anderson v. Com’r, 113 W. Va. 742, 169 S. E. 386 (1933).
finding of fact made by the State Compensation Commissioner should be treated as a finding of a judge, or the verdict of a jury, and will not, as a general rule, be set aside if there is substantial evidence to support it.137 Were these syllabi to be accepted at their face value, the attitude expressed in the following passage would be the only proper one: "While we might have rendered a different conclusion from the evidence had we been called upon to do so, sitting in the first place, we cannot disturb the finding here."138 Such an attitude is undeniably taken in numerous cases, but the significant fact is that such language appears only in cases in which the commissioner's findings are affirmed. In the cases which reverse the commissioner's findings the usual explanation is merely that the findings are contrary to the "clear preponderance of the evidence", although in some cases no explanation exists except for a discussion of the evidence and a statement of the conclusion that the opposite finding should have been made. To ascertain the rule of action in such cases, no language, no abstraction, no generalization will suffice. A detailed review of the facts of particular cases is necessary.

More than half the cases may be summarily eliminated from the discussion at the outset. These are the cases in which the finding is affirmed.139 Little can be learned from them. The facts are stated and discussed, and the rule that the finding has the effect of the finding of a judge or the verdict of a jury is repeated and applied. The only noteworthy cases affirming findings are those in which the court "recommends" or "suggests" that the case be

137 E. g.: Dowdy v. Com'r, 112 W. Va. 428, 164 S. E. 495 (1932).
138 Id. at 432.
reopened for further evidence, the court’s recommendation being “merely gratuitous and . . . . [having] no legal significance.”

It is in the cases in which findings are reversed that the rule of action may be discerned. But even of these cases a large group may be eliminated as unfruitful. Many findings are reversed because it does not appear from the record whether or not there was sufficient evidence to support the finding, such cases being remanded for a further development of the evidence, sometimes with specific instructions as to what further inquiries ought to be made. Although such cases are interesting from the standpoint of determining what evidence may be held sufficient, it is the cases in which the court reverses without remanding for further findings that best indicate the extent of administrative finality.

Such decisions reversing findings of the commissioner may be conveniently classified into three groups: (1) those involving questions as to whether or not inferences of fact should be drawn from undisputed evidence; (2) those in which the finding is held contrary to the “clear preponderance of the evidence”; and (3) those in which no reason for the reversal is given other than the court’s disagreement with the finding.

(1) Inferences from Undisputed Facts. Poccardi v. Public Service Commission, the first West Virginia case involving a review of an administrative finding of fact, involved the question whether or not a hernia resulted from an accidental injury. The evidence was not in conflict. The commission had ruled that the claimant had not proved that the accidental injury had caused the hernia. The court declared that the “only question is the weight

140 In Postlethwait v. Com’r, 106 W. Va. 57, 144 S. E. 717 (1928), after affirming the commissioner’s order, the court added: “As the misfortune of the applicant is so serious, we are of opinion that his case should be reopened if he can materially develop it further, which privilege we are satisfied will be granted him by the Commissioner.” In Stone v. Comp. App. Bd., 106 W. Va. 572, 146 S. E. 372 (1929), the court declared, after affirming the order: “We would recommend that the Compensation Commissioner reopen the case, take further evidence, if any is available, and give further consideration to this matter. Of course, this suggestion is merely gratuitous, and has no legal significance.”


142 75 W. Va. 542, 84 S. E. 242 (1914).
to which inferences arising from the facts are entitled'', reviewed the evidence, and concluded that "the facts disclosed by the record establish the claim''. The rationale of the decision, not stated in the body of the opinion, is disclosed in the second syllabus: "In the absence of conflict in the evidence adduced to show a claimant's right to participation in the Workmen's Compensation Fund, the Commission is regarded, in this court, as a demurrant to the evidence, and, if the evidence would sustain a verdict of a jury in favor of the claimant, the claim is regarded as sufficiently proved.''

In other words, even though the commission's finding was adverse to the claimant, there must be a finding in favor of the claimant if the evidence would sustain a jury verdict in favor of the claimant. This is decidedly different from the West Virginia practice with respect to setting aside jury verdicts. The finding of a jury of laymen will stand unless it is contrary to the "the decided preponderance of the evidence". But where the finding of the supposedly expert commission is adverse to the claimant, it will be set aside if the evidence permits an inference to support the opposite finding.143

Two years later, in Poccardi v. Commissioner,144 the court apparently changed its mind. The commissioner had found as a fact that the claimants had not proved themselves dependents of the deceased. Although it was shown that the deceased had supported the claimants there was no evidence of remittance by the deceased to the claimants within one year prior to the death. The evidence was not in conflict, the only question being whether or not an inference should be drawn from past support that the claimants

143 The decisions which so hold seem to go even a step further than the scintilla-of-evidence rule which has been consistently rejected by the West Virginia court in jury cases since 1900. Under this rule a verdict may be directed in favor of one party only if no evidence whatever favors the other party, and if there is a scintilla of evidence in favor of the other party a verdict may not be directed. This rule was applied, for example, in Carrico v. W. Va. C. & P. Ry., 35 W. Va. 389, 14 S. E. 12 (1891). However, since the decision of Ketterman v. Dry Fork R. R., 48 W. Va. 606, 37 S. E. 683 (1900) the West Virginia court has refused to apply the scintilla rule. Under the modern practice a verdict may be directed in favor of one party if the evidence of the opposite party is insufficient to justify a verdict in his favor. According to Poccardi v. Pub. Serv. Comm., and the cases which follow it, the rule seems to be that where the evidence is undisputed a scintilla of evidence in the claimant's favor is sufficient to reverse a finding against the claimant. A scintilla of evidence in jury cases prevented a directed verdict in favor of the opposite party; in compensation cases, a scintilla of evidence sometimes prevented not merely what would correspond to a directed verdict, but it prevents an actual finding in favor of the opposite party. 144 79 W. Va. 684, 91 S. E. 663 (1917).
were dependent upon the deceased at the time of the death, a question parallel in all respects with the question in *Poccardi v. Public Service Commission*. Instead of reversing the finding, as in the earlier case, the court affirmed it. This would not be inconsistent with the previous case if the reason for the affirmance had been that the evidence was not sufficient to sustain a jury verdict in favor of the claimants. But no such insufficiency of the evidence was found. Instead, the court declared of the commissioner’s finding: “...we think his finding should be treated substantially as the findings of a judge, or the verdict of a jury, and should not be set aside if there is evidence which will support it.” The court’s language approximates an express denial of the rationale of the earlier case: “On this evidence the Commissioner might, perhaps, have found differently, but was he bound to do so, and can we properly say he erred in his conclusions?”

The third case, *Poccardi v. Ott*,145 seemingly reverted to the technique of the first case, without recognizing the inconsistency of the two earlier cases. The commissioner had found that the evidence did not sufficiently establish the claimant’s dependency upon the deceased. Uncontradicted evidence had been introduced to show that the deceased had supported the claimant during the year prior to his death. The court did not point out, as it might have done, that such evidence distinguished the case from *Poccardi v. Commissioner*, but, instead, the court declared: “Evidence that would sustain the verdict of a jury, if one were rendered upon the proof before the compensation commissioner upon the fact of dependency where that is the ground on which the claim is predicated, must be regarded as sufficient proof.” The commissioner was thus reversed because of evidence which would sustain a jury verdict finding the opposite from what the commissioner had found.

The court divided on a question whether or not an inference should be drawn from undisputed facts in *Caldwell v. Commissioner*.146 The claimant had received a gunshot wound in his leg twelve years before he injured the leg at his work. Shortly after the injury an abscess formed at the site of the old wound. One doctor testified that it was “merely possible” that the injury “set up the abscess”. Another doctor testified: “The present trouble may have been aggravated by the blow... but the trouble

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145 82 W. Va. 497, 96 S. E. 790 (1918).
146 106 W. Va. 14, 144 S. E. 568 (1928).
primarily is an old one." The commissioner denied compensation. The majority of the court reversed, declaring: "The reasonable inference from these undisputed facts is that the injury aggravated the gunshot wound, and caused him to lose time from his work, and therefore he is entitled to compensation.' The dissenting judge, after quoting from medical treatises, cited Poccardi v. Commissioner for the proposition that the commissioner's finding should be treated as the "finding of a judge and as the verdict of a jury" and declared: "We are thoroughly committed to the rule that such finding or verdict should not be reversed in this court, unless we can say that it is plainly wrong. I cannot see how a 'merely possible' inference can establish any conclusion plainly right or plainly wrong." It will be observed that the court divided on precisely the same ultimate question as that on which the early three cases were in disagreement.

One of the most striking consequences of judicial review of administrative findings in West Virginia compensation cases is reliance by judges upon their own research in medical treatises. The dissenting judge in the Caldwell case preferred to read medical books and form his own opinion rather than accept opinions of doctors: "In The Practice of Surgery, a standard treatise by Dr. Russell Howard, an abscess is defined as a local collection of pus in the body, which is caused by one of the pyogenic organisms. The organism may become embedded in the tissues in several ways, one of which is by means of a wound. . . . Dr. Howard says: 'Foreign bodies may remain for years in the tissues without causing the least inconvenience, but at any time infection by microorganisms may ensue and an abscess form.' . . . In connection with Dr. Howard's book I have also examined Johnson's Surgical Diagnosis and Gould and Fie's Cyclopaedia of Medicine and Surgery (both of which are accepted as standard works by the medical profession) and find no reference to a bruise as causing or as fomenting an abscess in the tissues of the body." In Poccardi v. Pub. Serv. Comm'n., 75 W. Va. 542, 549, 84 S. E. 242 (1915), the finding rested in part upon the question whether or not a hernia is always accompanied by pain. This question was settled by quoting from the Encyclopaedia Britannica. In Bailey v. Com'r, 109 W. Va. 324, 327, 154 S. E. 764 (1930), the court discredited expert testimony apparently on the basis of its own research on a strictly medical question. The opinion of the expert witness was rested in part upon the Wasserman test to determine the presence of syphilis. The court quoted from CROSSEN ON DIAGNOSIS to the effect that this test should not be regarded as conclusive.

Such excursions by judges into the realm of medicine are no doubt a natural consequence of the judicial review of findings of fact where medical questions are involved. Although a particular judge may be competent to decide for himself questions upon which medical experts are in disagreement, it is at least questionable whether or not a brand of justice which is dependent upon a layman's understanding of medical treatises will command high respect. The disposition of Conley v. Com'r, 107 W. Va. 546, 149 S. E. 666 (1929), in which the court remanded "to the Commissioner with the recommendation that he have the medical department examine the works of Dr. Henderson and Dr. Stressman as well as other authorities" seems definitely preferable.
Two recent cases involving inferences that deaths resulted from the employment further establish the practice of reversing a finding of the commissioner against the claimant if from undisputed evidence it is reasonable to draw an inference in favor of the claimant. In *Demastes v. Commissioner*\(^{148}\) the deceased had met an unwitnessed death while working alone in the woods. The court held that on account of blood found on his body and on account of his failure to mark brush on his way to the spring where his body was found, as it was his duty to do, the inference should have been drawn that his death was caused by an accident resulting from employment. In *Watkins v. Commissioner*\(^{149}\) the commissioner had denied compensation for the death of a deputy prohibition commissioner who had been fatally shot while he was performing his duties. No evidence was introduced to show the reason for the shooting. The court reversed the finding that it had not been proved that the death resulted from the employment because "this Court is committed to the rule of liberal construction in favor of the claimant in compensation cases" and because it was "reasonable to infer" from the circumstances that the death resulted from the employment.

*Goble v. Commissioner*\(^{150}\) probably goes even further. The court expressly stated that "there is no controversy of fact". The workman sustained an injury. Later he had arthritis. The company physician expressed an opinion that the arthritis "may have been produced or aggravated by the injury". The court further stated with respect to the arthritis that "no one, except the company physician, attempts to express opinions as to its cause or the effect of the injury in producing or aggravating it." No other material facts appeared. Solely on the basis of the "well settled principle of law" that "the claimant is entitled to all reasonable inferences in his favor from undisputed facts in support of his claim, as would be accorded to him upon a demurrer to his evidence", the court reversed the commissioner's denial of compensation.

(2) *Findings Contrary to "Clear Preponderance of the Evidence"*. Under the rule as frequently stated in the syllabi that the findings of the commissioner will be given as much weight as the verdict of a jury, the court in numerous cases has declared that

\(^{149}\) 114 W. Va. 507, 172 S. E. 715 (1934).
\(^{150}\) 111 W. Va. 404, 162 S. E. 314 (1932).
findings of the commissioner will be set aside only if contrary to the "clear preponderance of the evidence". Of course, this phrase is almost empty, so far as the literal meaning of the words is concerned. Its meaning can be determined only from the manner in which the court applies it to various fact situations. An examination of the cases reveals that the meaning of the phrase in compensation cases is different from its meaning in jury cases.

The following is probably as accurate an explanation of the practice with respect to jury verdicts as can be made in general terms: "The verdict must be plainly against the decided weight and preponderance of the evidence, before it will be set aside. . . . the call to set aside 'must be very loud and plain.' The verdict must be palpably unjust. A doubtful case, a slight weight and preponderance of evidence against the verdict, is not a sufficient cause for setting it aside." The holding in the case from which this passage was taken was that a verdict depending solely on conflicting oral evidence will not be set aside on the ground alone that the verdict is plainly against the decided weight of the evidence. Other jury cases indicate that the attitude of this case is representative.

The attitude is different in compensation cases. One of the clearest of such cases is Sedinger v. Commissioner. On the sole question of fact, whether or not blindness was caused by an injury, medical testimony was conflicting. In support of the commissioner's denial of compensation was the testimony of one eye specialist that "it would be impossible for me to say that it was due to the injury claimed. . . .", and the testimony of another specialist that "I cannot believe that the atrophy is due to his alleged injury. Syphilis is suspected." The theory of syphilis was discredited by the fact that blood tests were negative. Both the doctors who stated that the blindness was caused by the injury had made prior

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152 It is said in Estep v. Price, 93 W. Va. 81, 115 S. E. 361 (1923): "If there had been a verdict for plaintiff and a motion to set aside, the court would, in considering the motion, discard all of defendant's evidence in conflict with that of plaintiff's and then if such evidence together with all the justifiable inferences which the jury could reasonably draw therefrom, was sufficient to sustain the verdict, the motion to set aside would be refused." See, also, Buck v. Newberry, 55 W. Va. 681, 47 S. E. 889 (1904); Hetzel v. Kemper, 102 W. Va. 597, 155 S. E. 667 (1930); McGraw v. Aetna Ins. Co., 106 W. Va. 714, 146 S. E. 823 (1929), 108 W. Va. 308, 151 S. E. 183 (1959) (finding of lower court); LeGrand v. Hamrick, 116 W. Va. 572, 182 S. E. 577 (1935).
contradictory statements. In this state of the evidence the court reversed the commissioner’s finding on the ground that the finding was contrary to the clear preponderance of the evidence. The holding quite clearly indicates that the phrase “clear preponderance of the evidence” is nothing more than a convenient explanation for the result when the court substitutes its judgment for that of the commissioner, and that the phrase does not in compensation cases have the meaning attached to it in jury cases.

Similar cases involving conflicting evidence in which findings supported by substantial evidence were reversed as being contrary to the clear preponderance of the evidence are Hamlet v. Commissioner,\textsuperscript{154} Epperson v. Commissioner,\textsuperscript{155} and Wills v. Commissioner.\textsuperscript{156}

(3) Reversals Without Explanation Other Than Court’s Disagreement with Finding. In Bradley v. Commissioner\textsuperscript{157} the award of compensation hinged upon the question of fact whether or not the injury resulted from the use of short fuses in violation of a statutory provision. The only evidence for the claimant was his own testimony. Three items of circumstantial evidence introduced in behalf of the employer tended to show the use of short fuses. The weight of each such item of evidence was carefully discussed in the opinion of the court. For example, the mine electrician and the foreman gave uncontradicted testimony that they found pieces of short fuse at the place of the accident two or three hours after its occurrence. But despite the fact that the commissioner’s denial of compensation was based upon this and other similar evidence, the court set aside the finding. The explanation approximates a statement that the court was substituting its judgment for that of the commissioner: “In view of the time that had elapsed after the accident before the examination of the working place, the inconsistencies in the evidence of those claiming to have made the investigation, and other circumstances casting doubt upon the alleged discoveries, we are of opinion that the employer has not carried the burden of disproving the story of the claimant, and establishing the theory that the injury resulted from his use of short fuse.” In other words, the court apparently re-

\textsuperscript{154} 113 W. Va. 247, 167 S. E. 586 (1933).
\textsuperscript{155} 113 W. Va. 559, 169 S. E. 165 (1933).
\textsuperscript{156} 114 W. Va. 822, 174 S. E. 323 (1934).
\textsuperscript{157} 110 W. Va. 89, 157 S. E. 42 (1931).
versed the commissioner’s finding for no better reason than that the court disagreed with the finding.

Another such case is *Bailey v. Commissioner*,\(^{158}\) which was taken twice to the supreme court. The issue of fact was whether lameness was attributable to an injury or to syphilis. Medical testimony was in conflict. The court compared the reputations of the respective doctors, and considered the basis of the opinions of each. The opinion of a doctor who testified against the claimant was discredited because his opinion was based in part upon a fact stated in a hospital report which did not appear in the record. The opinion of the other doctor who testified against the claimant was discredited on account of its reliance upon the Wassermann test. The court, apparently upon the basis of its own research, quoted from a medical treatise to the effect that too much reliance should not be placed upon this test. Another reason for rejecting the opinion of this doctor was the absence of any information in the record as to the manner in which he learned of certain other facts upon which his opinion was apparently based in part. The court accordingly concluded: “For all of which, we are of opinion that the Commissioner gave a significance to the opinions of Drs. Cox and Kessel which the evidence does not warrant.” The case was returned to the commissioner for his further consideration with the suggestion that the evidence be further developed, particularly with respect to the hospital report and the other facts upon which the doctor’s opinion was based. The commissioner conducted a second hearing at which new evidence was introduced but failed to procure the evidence suggested by the court. The commissioner made an award based on a 60% disability rating. On the second appeal the court declared: “The commissioner in failing to test the opinions of Drs. Cox and Kessel, as suggested by this Court, and in entering a substantial award, is presumed, at least, to have abandoned the theory that the sole cause of the increased disability is syphilitic disease. It remains to determine (1) the percentage of disability, and (2) whether syphilitic disease exists as a contributing cause.” On the first of these questions the court referred to medical testimony of several years previously that the claimant was at that time entitled to “at least 40% disability”, to other medical testimony that “apparently he has shown

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a very considerable amount of disability”, and to the joint state-
ment of two other doctors that claimant “is 100% disabled from
doing manual labor”. The court, without further explanation of
any kind, then declared: “In view of all the evidence, we are
inclined . . . to fix his disability at 100 per centum; and it will
be so ordered.” The second question put by the court was dis-
posed of in a single cavalier sentence: “According to the expert
opinion for the claimant, which should be accepted, the injury,
which occurred October 26, 1923, is responsible for his present dis-
ability.” The court did not in any manner attempt to rationalize
its conclusions. It did not explain why the expert opinion for
the claimant should be accepted and why the expert opinion against
the claimant should be rejected. It did not say that the 60%
disability rating was contrary to the “clear preponderance” of
the evidence. It did not say that the finding was not based upon
sufficient evidence. Even the syllabus did not suggest a basis for
the decision but was limited to one incomplete sentence: “A case
in which the ruling of the compensation commissioner is reversed
on a finding of fact.” Unless there are other aspects of the case
which do not appear in the opinion of the court, the decision is
clearly one in which the court merely substituted its own opinion
as to the weight of the evidence for that of the commissioner. The
decision is squarely opposed to statements in other cases, such as:
“‘In reviewing the action of the compensation commissioner, this
Court takes cognizance of questions of law only . . . We do not
decide upon questions of controverted fact . . . .’” Such a state-
ment apparently yields when the court disagrees with the comis-
ioner’s findings.

In Scott v. Commissioner\(^\text{159}\) an award had been granted on the
basis of a finding of 83% disability, but the claimant contended
that he was totally disabled. Three doctors were of opinion that
he could perform some kinds of work other than that which he had
been doing, and the record disclosed that he could do light work
about his house and that he could drive a car for a short time.
Nevertheless, the court discussed the evidence and concluded: “We
are of the opinion that claimant is totally and permanently in-
jured within the meaning of the statute.” No explanation was
given except that the opinion of the court was different from that
of the commissioner.

\(^{159}\) 112 W. Va. 608, 166 S. E. 274 (1932).
The Workmen’s Compensation Appeal Board. In 1935 the act was amended to establish the Workmen’s Compensation Appeal Board of three members to whom a claimant or an employer may appeal from findings of the commissioner. A similar board, consisting of the governor, the commissioner of labor, and the commissioner of health, was created in 1925 but was abolished in 1929. It might seem reasonable to expect that the court would give greater effect to the findings of such a board than it has given to the findings of the commissioner. The cases do not indicate, however, that the court has done so.

Of the cases decided by the board which functioned from 1925 to 1929, only six appeals from findings of fact were taken to the court, of which five affirmed the findings of the board and one reversed and remanded the case to the commissioner for the taking of further evidence. In one of the cases affirming the findings of the board, the court made what it called a “merely gratuitous” suggestion that the commissioner reopen the case and take further evidence. No special significance can be attached to this unusual procedure, for the same had been done a year earlier in a case affirming a finding of the commissioner. Examination of the six cases reveals no indication that any case might have been disposed of differently if the appeal had been directly from the commissioner instead of from the board.

Findings of fact of the board established in 1935 have been reviewed in three cases, one of which involved an affirmance of the board’s finding, one a decision reversing and remanding for further consideration, and one a final decision of reversal.

Only the latter decision, Rasmus v. Appeal Board, is of special significance. The question of fact was whether or not a workman who had died of heat prostration was exposed by reason of his employment to special or peculiar danger not experienced by other

persons in the community. The commissioner’s award of compensation was reversed by the board. The court stated that the question before it was whether or not the finding of the board was “clearly wrong.” In deciding this question the court definitely considered the weight of the evidence. The temperature in the general locality was 89 degrees at 8 A.M. and 100 degrees at noon. The deceased worked in an open junkyard exposed to the sun “with metal beneath him, metal above his head, metal in part surrounding him and large quantities of metal piled upon the ground on two sides of him,” and he worked within three or four feet of an operating gasoline engine. In the light of these facts, the court declared: “We do not regard the proof to the effect that it was cooler in the cab of the crane than it was upon the ground surrounding the crane as being of any particular worth.” Two dissenting judges pointed out that the testimony that it was cooler in the cab than on the ground was clear and unequivocal and was not controverted and argued: “Even admitting that the claim is one upon which reasonable men may differ, then the Board should be upheld since it is essentially a fact-finding tribunal.”

The decision probably indicates that the court gives no more effect to the finding of fact of the appeal board than to the commissioner’s findings.

The Rasmus case is also of importance for its decision as to the effect to be given by the board to findings of the commissioner. The court held that the finding of the board “is not to be circumscribed nor trammeled by the finding of the Compensation Commissioner, but that it proceeds to make such disposition of the case on appeal as in its opinion the state of the proof taken before the Compensation Commissioner demands, being free to act in the premises uninfluenced by the finding of the Compensation Commissioner.” This holding was challenged and reaffirmed in Moore v. Commissioner. 170

Conclusions as to Judicial Review of Administrative Action in Workmen’s Compensation Cases. Although reasoning based upon separation of powers has led the court consistently to pay lip service to a rule that the findings of the workmen’s compensation commissioner will be given as much weight as the verdict of a jury or the findings of a judge, and although the court has reiterated in many cases that the commissioner’s findings will be

set aside only if contrary to the clear preponderance of the evidence, examination of the facts of cases in which the court has reversed the commissioner’s findings reveals that the court has frequently substituted its judgment for that of the commissioner on fact questions. It is readily demonstrable that statements such as the following should be heavily discounted: “In reviewing the action of the Compensation Commissioner, this Court takes cognizance of questions of law only. . . . We do not decide upon questions of controverted fact. . . .”\(^{171}\) Such a statement represents only an ideal. It embodies a conclusion drawn by logical processes from the doctrine of separation of powers, but it constitutes in practice no more than a convenient formula for explaining decisions affirming administrative findings. A chance remark in a recent opinion more accurately reflects the rule of action: “. . . where in our judgment the finding of the commissioner is contra to the preponderance of the evidence, his order will be reversed.”\(^{172}\)

The distinction drawn by the federal courts between “jurisdictional” or “constitutional” facts and other facts has never been made in West Virginia.

The court’s liberality toward claimants is perhaps best indicated by the now well-established practice, in cases in which the question is whether or not an inference should be drawn from undisputed facts, of reversing a finding adverse to the claimant if there is evidence which would support a finding in the claimant’s favor. Indeed, the court’s liberality toward claimants may be the best explanation of many reversals of the commissioner’s findings. It seems quite significant that in every case in which a finding has been reversed the court has held in favor of the claimant. And in some cases a sympathy for the claimant can easily be discerned in the court’s opinions.\(^{173}\) However, too much weight should not be given to the fact that an administrative finding against an employer has never been reversed, for not until 1929 did the employer have a right of appeal to the court,\(^ {174}\) and it happens that in no case has an employer’s appeal involved primarily a question of fact.

\(^{171}\) Martin v. Com’r, 107 W. Va. 583, 586, 149 S. E. 824 (1929).
\(^{172}\) Wills v. Com’r, 114 W. Va. 822, 824, 174 S. E. 323 (1934).
\(^{173}\) A good example is Bradley v. Com’r, 110 W. Va. 89, 157 S. E. 42 (1931), in which the court called the claimant “a blind, helpless man”, quoted from a letter of counsel that he was “in a pitiable condition”, and commended counsel for the gratuity of their services.
\(^{174}\) See W. VA. CODE (Barnes 1923) c. 15P, § 43; W. Va. Acts 1929, c. 71, § 43.
In workmen's compensation cases, as in other West Virginia cases, separation of powers has afforded no assistance in the solution of problems of judicial review. On the contrary, it may be that it has done positive harm, for the doctrine of separation of powers seems to be responsible for the court's unreal language that judicial judgment is not substituted for administrative judgment. Of course it is true that if, as is asserted, what the court usually calls an "appeal" is only a proceeding "akin to mandamus", and if, as is held in a legion of cases, judicial judgment will not be substituted for administrative judgment in a proceeding in mandamus, then it follows that great weight must be given to administrative findings irrespective of more practical factors. But such an approach is wholly artificial. No argument should be needed to convince that the weight to be given to administrative findings should be determined by an investigation into facts with respect to administration, the special competency of the commissioner and his examiners, the nature of the issues he is called upon to determine, the extent to which medical knowledge is needed, the importance of confronting the witnesses and of examining the injuries, the tendency or lack of tendency toward arbitrary administrative action, the relative susceptibility of the commissioner and of the judges to political or other ulterior influence, the practical effects of review upon the efficiency of the administrative process, the increased delay and expense caused by judicial review, and, since 1935, the effects upon the whole problem of the establishment of the appeal board.

Logic and the theory of separation of powers are not the tools needed for the solution of a problem so essentially practical.

INCORPORATION OF TOWNS

No group of West Virginia decisions on separation of powers is more instructive than the series of cases which deal with the incorporation of cities, towns and villages by the circuit courts. The constitution, art. VI, § 39, provides: "The Legislature shall not pass local or special laws . . . . incorporating cities, towns, or villages . . . ." Accordingly, a statute was early enacted prescribing conditions for the incorporation of cities, towns, and villages, and providing that upon satisfactory proof of compliance with the statutory conditions, the circuit court should direct the clerk to issue a certificate of incorporation. *In re Town of Union*
Mines was the first case in which the constitutionality of the statute was challenged. It was contended that the statute "confers on the Circuit Court legislative powers". The court, after quoting article V, observed: "It has been found to be wholly impracticable to make such separation perfect." Then, as to the nature of the power exercised by the circuit court, the court straddled: "In discharging these functions, the Circuit Court does not act under the judicial branch of the government and is not subject to its supervision, except by mandamus or prohibition in a proper case, but acts as a part of the legislative branch of government. . . . Hence its action in discharging these legislative judicial functions can not be reviewed by this Court by a writ of error or other ordinary appellate writ notwithstanding their judicial character. . . . The Circuit Court being engaged in the discharge of a legislative function in aid of the legislative department of the state government, the petitioners had no right to appear and contest the issuance of the certificate of incorporation in such manner as to be made parties litigant in a judicial sense, any more than before a committee of the legislature . . . . The matter of the incorporation of cities, towns and villages belongs distinctively to the legislative not to the judicial department." This language is not to be attributed to lack of understanding of separation of powers, but rather to such insight into the nature of separation of powers that the court recognized that the power exercised by the circuit court could not properly be characterized by only one label but that it combined the attributes of the legislative and the judicial, so that neither label alone would suffice. The power was accordingly "legislative judicial". The case may thus be regarded as a drop of realism in a sea of abstraction, for it is undeniable that no possible analysis can be made to prove that either the term "legislative" or the term "judicial" is a precise characterization of what the circuit court did. The plain fact is that such terms as "legislative" and "judicial" are round and square holes, and that the pegs which represent the functions performed are sometimes round, sometimes square, and usually of an extremely irregular shape. The court's unorthodox characterization of the power in this case as "legislative judicial" is an attempt to

175 W. Va. 179, 19 S. E. 398 (1894).
176 Italics supplied.
177 Judge Dent wrote the opinion. That Judge Dent well understood the doctrine of separation of powers is indicated by his language in other opinions. See note 49, supra.
make a new category, a hole that will more nearly fit an odd-shaped peg. The holding, as expressed in the syllabus, was that the statute, "in so far as it confers on the Circuit Court functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, is constitutional and valid." This syllabus, if later cases may be believed, established the law, even though the court declared in its opinion that "there is no case in a judicial sense, in which to raise the question of the constitutionality of this law.'

_Elder v. Incorporators of Central City_178 followed the _Union Mines_ case, in holding, in language, and in spirit, except for the last sentence of the opinion. The syllabus was the same as the syllabus of the earlier case, and the opinion declared that the function of the circuit court was "at least, an administrative or quasi judicial function, which the Circuit Court may be authorized to perform." However, the last sentence of the opinion declared: "But a majority of the court being of opinion that the matter is only administrative, and that this Court has no jurisdiction in a matter merely quasi judicial, the writ of error must be dismissed as improvidently awarded." This is significant for its use of the term "quasi judicial", since it was the first holding or declaration that the supreme court "has no jurisdiction in a matter merely quasi judicial".

_Bloxton v. McWhorter;_179 in denying a writ of prohibition against the circuit court's issuance of a certificate of incorporation, added little, except for its statement that the circuit court's jurisdiction was "partly legislative and partly judicial and administrative".

Before the next decision the statute was amended so as to provide that the circuit court could at its discretion direct the clerk to issue a certificate of incorporation. The added element of discretion in the circuit court presented a new question. In exercising discretion as to whether or not a certificate should be issued, did the circuit court act judicially or legislatively? In _Morris v. Taylor;_180 this question was answered: "The discretion vested in such courts . . . is administrative and judicial, not legislative." The court specifically held that the exercise of discretion by the

178 40 W. Va. 222, 21 S. E. 738 (1895).
179 46 W. Va. 32, 32 S. E. 1064 (1899).
180 70 W. Va. 618, 74 S. E. 872 (1912). This decision was followed in _Baker v. Workman_, 72 W. Va. 518, 78 S. E. 670 (1913).
circuit court did not violate article V. Judge Poffenbarger declared that discretion "does not necessarily signify legislative discretion. Discretion does not belong exclusively to the legislature . . . discretion . . . is neither a criterion nor a determining factor". The court bolstered its opinion with a quotation from Story that the true meaning of separation of powers is "that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments". If this test is used, the decision is easy: "Under this statute the court does not exercise the whole legislative power, respecting the incorporation of towns, and the delegation of authority, if any, is therefore, not inhibited by the constitution, if Story's theory is correct." The court then proceeded to consider a further objection that the circuit court had excluded a portion of the territory from the proposed corporation after the voters had voted to incorporate. It was declared that even if the allegation were true that a majority of the voters had protested against the issuance of the certificate after a portion of the territory had been excluded, "this is immaterial and does not invalidate the certificate". In other words, it was held that the circuit court had power to override the voters on the question of the inclusion or exclusion of territory. And the circuit court in determining what territory should be included acts administratively and judicially, and not legislatively. The decision to this effect is one of the West Virginia court's most liberal decisions on any separation of powers question. The court went the whole way in adopting Story's interpretation of the doctrine of separation of powers. It might well have gone even further and included in its opinion a discussion of reasons of expediency in favor of giving circuit courts discretion in the incorporation of cities, towns and villages, a discussion of the efficiency of the method chosen by the legislature, a discussion of the efficiency of possible alternative methods, a discussion of the reasons that underlie the doctrine of separation of powers and their applicability or inapplicability to the exercise of this particular power by the circuit court. It is suggested that the West Virginia supreme court, in its much stricter opinions of the past ten years, would not so readily strike down on the basis of a tyranny of labels legislative efforts to establish efficient methods of administering government, if it were to become imbued with the wisdom that pervades the 1911 opinion of Judge Poffenbarger in *Morris v. Taylor*. 
Thus far, it had been consistently held that the circuit court could properly perform its statutory function in the incorporation of cities, towns and villages, but it had not yet been held that the supreme court could exercise any power of review of the circuit court’s action. This step remained to be taken in West v. West Virginia Fair Ass’n,\(^1\) in which, on a writ of error from an order of the circuit court granting a certificate of incorporation, the supreme court determined whether or not the action of the circuit court was arbitrary or capricious. The court expressly recognized that no statutory provision was made for review by the supreme court. It did not, however, hold that a writ of error was appropriate, but declared: “If there has been an abuse of discretion, it may in a proper proceeding be reviewed and corrected. Whether the proper procedure has been followed, we will not stop to discuss; the case is here, and should be adjudicated without further costs.” The court accordingly proceeded to discuss the evidence and to conclude that the action of the circuit court was not capricious. The supreme court has thus taken upon itself the power of review of the incorporation of cities, towns and villages, and, if anything is to be learned from the workmen’s compensation cases, a power to determine whether or not action is arbitrary easily becomes a power to exercise the ultimate judgment.\(^2\)

**Certificates and Licenses**

Cases concerning the grant, refusal and revocation of certificates of convenience and licenses to do business and to practice professions present similar problems which may be considered together. No group of West Virginia cases on judicial review of administrative action is more confused; no group of such cases affords a more convincing demonstration of the artificiality of the doctrine of separation of powers as it has been interpreted.

Two 1927 decisions concerning issuance by the State Road Commission of certificates of convenience to operate bus lines are most instructive. In the Reynolds case\(^3\) the supreme court held the action of the commission in awarding certificates to certain applicants and denying certificates to others to be judicial and therefore denied writs of prohibition to restrain a circuit court from

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\(^1\) West v. West Virginia Fair Ass’n, 181 W. Va. 10, 125 S. E. 353 (1924).

\(^2\) In Houseman v. Town of Anawalt, 85 W. Va. 60, 100 S. E. 548 (1919), it was held that a circuit court in forfeiting the charter of a town acted judicially and that the supreme court therefore had jurisdiction on writ of error.

\(^3\) Reynolds Taxi Co. v. Hudson, 103 W. Va. 173, 136 S. E. 833 (1927).
reviewing the commission's action by certiorari. In the Quesenberry case\textsuperscript{184} it was held that the circuit court had no jurisdiction to review by certiorari the choice made by the commission among the applicants for the award of a certificate, on the ground that the action of the commission was nonjudicial. The reason for the opposite results of the two cases is stated in clear-cut fashion in the Quesenberry case: "Where the granting or refusing of the certificate affects a right of property, illustrated in the ferry cases cited, and in the Reynolds case cited, the action of the Commission is judicial in its nature; but where no such right is involved the action of the Commission is ministerial and administrative, and does not come within the realm of the judiciary." Here is a definite principle which is well worth examining.

Two questions are raised: (1) What is the nature of the property right which determines whether the action of the commission is judicial or nonjudicial? (2) Why does the presence or absence of such a property right make the action judicial or nonjudicial?

A property right was involved in the Reynolds case because the bus line for which the certificate was awarded would compete with "established public carriers". The four applicants were a subsidiary of the Monongahela West Penn Public Service Company (which owns and operates a system of electric railway lines), a subsidiary of the Baltimore & Ohio Railroad, an independent taxi company, and an independent bus company. The commission had granted certificates to the two independent companies and had denied certificates to the two subsidiary corporations, and on application of the two parent corporations and the two subsidiaries the circuit court had awarded writs of certiorari. The court denied prohibition against the circuit court because "there can be no doubt of the right of an established public carrier, which is furnishing necessary service, to protest the granting of a certificate of convenience to an applicant proposing to furnish competing service." Apparently it was the property right of the parent corporations, which were not applicants, and not that of the subsidiaries, the applicants, with which the court was concerned.

In the Quesenberry case the court found that no property right was involved for the reason that: "One who applies for a certificate or license has no property right involved. It is a privilege equally available to all persons. But after the permit has been

\textsuperscript{184} Quesenberry v. State Road Comm., 103 W. Va. 714, 138 S. E. 362 (1927).
issued to him and becomes final, he has obtained a valuable right which cannot be revoked except for cause, and which will be protected by the courts.' The distinction, then, is clear: one who is doing business has a property right in avoiding competition; one who is applying in the first instance for a certificate of convenience has no property right. But is it true that because Quesenberry was applying for a certificate he had no property right involved? The applications were made early in 1924. The certificate was granted to Quesenberry and refused to the Transportation Company June 10, 1925. The court specifically declared: "It appears that up to June 10, 1925, both applicants had operated over the route under their taxi licenses ..." Furthermore, it was not until April 26, 1926, that the commission entered a further order granting a certificate to the transportation company but not revoking Quesenberry's certificate, and the court said: "It is true that Quesenberry had begun to operate and had expended money and energy in perfecting his organization, relying upon the award of his certificate ..." This is passed over with the court's statement that the commission "was influenced by the fact that it had, by its premature action, caused Quesenberry to expend money and purchase equipment, and therefore concluded not to require him to stop." Such a statement does not explain the fact that both applicants were doing business before any certificate was granted, and that Quesenberry had made a considerable investment. The court does attempt to meet this difficulty with the explanation that when the certificate of June 10, 1925, was awarded it was understood that the commission would reopen the hearings on the applications and take further evidence. But this further fact means only that the award of the certificates was not finally decided until April 26, 1926, and at that time it appeared not only that both applicants had been doing business before June 10, 1925, but also that Quesenberry had since that time spent money and purchased equipment. Yet, in the face of a frank recognition of that fact, the court held that Quesenberry had no property right in the grant of a certificate, citing with approval the Reynolds case holding that established carriers had a property right in not having additional competition. The only conclusion to be drawn from the two cases, taken together, is that the right to continue to do business at all
is not a property right but that the right to continue to do business without competition is a property right.\textsuperscript{183}

The holdings are even more difficult to digest in their application of the separation of powers doctrine. When the State Road Commission conducts a hearing and decides whether or not one with a considerable investment shall be permitted to continue to operate \textit{at all} and enters an order accordingly, the commission acts legislatively, but when the commission conducts a hearing and decides whether or not an "established carrier" shall be permitted to continue to operate \textit{without competition} and enters an order accordingly, the commission acts judicially!

Even though the court's opinions may not be wholly convincing that a property right was involved in the \textit{Reynolds} case and not in the \textit{Quesenberry} case, let it be assumed that such were the facts of the two cases. Would it then follow that the commission acted judicially in the case involving the property right and nonjudicially in the case involving no property right? The character of the action of the commission in the two cases being precisely the same in all other respects, does the presence or absence of a property right change the character of its action? If comparisons be made with the functions of courts and legislatures, it may be observed that courts frequently pass upon questions which involve no property rights, as, for example, in cases involving freedom of speech, of the press and of religion, and much legislation affects property rights, as, for example, the enactment of a tax statute. If comparisons be made with functions of administrative tribunals, no support is found for the proposition that the presence of a property right determines whether or not action is judicial. The functions of assessing taxes\textsuperscript{186} and of fixing public service rates for the future\textsuperscript{187} involve property rights of the first order and yet are held nonjudicial. And it is specifically held\textsuperscript{188} that "a

\textsuperscript{183} The question before the commission in the Quesenberry case was not only whether or not a certificate should be granted to the transportation company, but was also whether or not Quesenberry's certificate should be revoked. It is assumed that if the revocation of a certificate is judicial, then the determination whether or not to revoke a certificate must be judicial even though the decision is not to revoke the certificate.

\textsuperscript{186} Assessments have not always been considered nonjudicial. See discussion \textit{supra}, p. 273, \textit{et seq.}


\textsuperscript{188} Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274 (1899).
public office is not property, within the meaning of the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers'”; yet it is held that removal from office is judicial. So far as West Virginia cases are concerned, the use of a property right as a criterion for determining whether or not action is judicial is unique in these State Road Commission cases and is inconsistent with many cases concerning other administrative tribunals or officials.

Even if one questions the conclusions of the court in the Reynolds and Quesenberry cases that a property right was involved in the former and not in the latter and that the presence or absence of a property right makes the action of the commission judicial or nonjudicial, one may still agree with an expression of the court that may be of greater consequence than any of the talk about separation of powers: "Their [State Road Commissioners'] judgment and discretion is likely to be better and sounder for all concerned than those who are not better informed though more learned in the law. We do not think that it was ever contemplated by the lawmakers that every one who made application for a certificate and failed, having no other right thereto than the fact that he made application in due form and was prepared to give acceptable service, could appeal to the courts to control the discretion of the Commission in that regard. It would cause delays and uncertainties to the detriment of the public needs, besides congesting the courts with complaints of disappointed office seekers of questionable merit." Such language puts the question of judicial review upon its true basis. The determination of the extent of judicial review should involve wholly practical considerations such as those referred to by the court, not abstract conceptions founded upon the theory of separation of powers. There is not, and perhaps cannot be, a satisfactory method for determining whether a function such as the granting of certificates of convenience and necessity should be called judicial or legislative, when the truth probably is that it partakes to some extent of the character of both. No assistance is found in solving a problem as

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to the extent to which courts should review administrative action by making the problems referable to the doctrine of separation of powers. That doctrine frequently, if not usually, is positively an obstacle to the proper decision of a difficult case. It caused considerable apparent confusion in the Reynolds and Quesenberry cases. If problems of judicial review of administrative action were to be studied on the basis of such practical considerations as those which the court took into account in the language quoted above, if arguments of counsel were directed to questions of efficiency and convenience, and if the court were to decide cases upon such a basis, without becoming concerned with ill-understood conceptualistic notions, the administration of government surely would be vastly improved.\textsuperscript{191}

\textit{Spurdone v. Shaw,}\textsuperscript{192} in holding that the revocation by the tax commissioner of a license to dispense nonintoxicating beer was judicial and therefore that a circuit court could be compelled by mandamus to entertain an appeal from the ruling of the tax commissioner,\textsuperscript{193} is consistent in result with the distinction drawn in the Reynolds and Quesenberry cases, but the reason given was not that the license was a property right but that "As the tax com-

\textsuperscript{191} The Reynolds and Quesenberry cases are not wholly consistent with earlier West Virginia cases involving similar licenses or rights. In Belington & Northern R. R. v. Town of Alston, 54 W. Va. 597, 46 S. E. 612 (1904), an injunction against the repeal by a town council of the railroad's right of way through the streets was dissolved. The court found that since the right of way was not a franchise a statute requiring notice for repeal of a franchise was not applicable, and no notice was required. The court specifically declared that the railroad could have the repeal "reviewed and reversed by proper judicial method of review". It cannot be ascertained from the opinion whether the court regarded the council's action as judicial or legislative. The court did state that "the defendant's council is clothed with limited legislative, judicial and executive or administrative functions . . ."

In Wheeling & Elm Grove R. R. v. Town of Trindolphia, 58 W. Va. 487, 52 S. E. 499 (1906), after a thorough discussion, the court held the revocation by a town council without a hearing of a railroad's right of way to use streets could properly be enjoined, as it was nonjudicial. The court indicated that the remedy would have been \textit{certiorari} if the action were judicial. The decision is discussed with approval in the Reynolds case.

Ellis v. State Road Comm., 100 W. Va. 531, 131 S. E. 7 (1925), in holding that \textit{certiorari} and not mandamus is the proper method for review of the action of the State Road Commission in revoking a taxicab permit and chauffeur's license, was a forerunner of the distinction drawn in the Reynolds and Quesenberry cases.

\textsuperscript{192} 114 W. Va. 191, 171 S. E. 411 (1933).

\textsuperscript{193} The writ of mandamus was denied in the case because the petitioner sought to compel the circuit court of Marion County to entertain her appeal, and the court found that only an appeal to the circuit court of Kanawha County was appropriate.
missioner is authorized to act only for specified causes, his deter-
mination involves the exercise of judicial or quasi judicial dis-
cretion, which may, therefore, be reviewed by the judiciary.’’

In two 1935 decisions involving the revocation of licenses the
court encountered more difficulty with separation of powers. In
the Hedrick case the question was the kind of notice which the
board of dental examiners must give a dentist before revoking his
license to practice. In deciding this question the court declared:
“The Board is not a judicial tribunal and the hearing before it is
not a lawsuit. Technical rules of procedure are inapplicable to its
proceedings.” In saying that the board is not a “judicial tri-
bunal” the court probably did not mean that the board is not a
tribunal which acted judicially, for even a board of education in
removing a supervisor of schools is held to be an “inferior tri-
bunal” as that term is used in article VIII of the constitution.
The court probably meant only that the board is not a court, and
hence that the procedure of a lawsuit need not be followed. In
the Eddy case however, the court based its decision upon a flat
statement that the revocation by the board of optometry of a
practitioner’s license is not judicial. The constitutionality of the
statute was challenged on the ground that it placed the power of
revocation of licenses, a judicial power, in a board consisting of
optometrists whose business interests were served by keeping down
competition in the profession. The court rejected this contention
by saying: “In this petitioner loses sight of the fact that revo-
cation of a license is no more a judicial function than that of
licensing; that both are a part of the regulatory measure.” The
distinction so finely drawn in the Reynolds and Quesenberry cases
was apparently forgotten, and even Spurdone v. Shaw, decided
only two years previously, was overlooked. The case constitutes
still another demonstration of the desirability of minimizing the
theory of separation of powers in the decision of cases concerning
judicial review of administrative action. The court might well

194 Board of Dental Examiners v. Hedrick, 116 W. Va. 222, 179 S. E. 809
(1935).
195 State ex rel. Board of Education v. Martin, 112 W. Va. 174, 163 S. E. 850
(1932).
196 Eddy v. West Virginia Board of Optometry, 116 W. Va. 698, 182 S. E.
870 (1932).
197 The court weakened somewhat its position to this effect by following
this language with a quotation from a treatise: “The maxim that no man shall
be judge in his own case ‘applies to judicial officers, but not to officers whose
duties partake of an administrative character, and are only quasi-judicial.’”
have decided the question whether members of the board could properly revoke the license of an optometrist without denominating the action either judicial or nonjudicial. The question was a practical one — whether or not the self-interest of the members of the board was such that it was unfair to permit them to pass upon the revocation of a license of another optometrist. The court is obviously more likely to reach a proper decision on such a question if the argument of counsel and the court's deliberation are directed to practical considerations than if the real problem is obscured by the conceptualism of separation of powers.

**Appointment and Removal of Officers**

Although the cases involving appointments are of relatively little interest, the West Virginia law with respect to removal of officers is one of the most fertile of grounds for an enlightening study of judicial review of administrative action and the doctrine of separation of powers.

Despite the provision of article VI, § 40 of the constitution, providing that "The Legislature shall not confer upon any court or judge the power of appointment to office, further than the same is herein provided for", the power may constitutionally be conferred upon the circuit courts to appoint jury commissioners and probation officers, but not a prosecuting attorney. The constitutionality of the power to appoint jury commissioners is justified on the ground that they are officers of the court and not officers of the state, and the word "office" as used in the constitutional provision includes only the latter. Such an interpretation was apparently assumed in the cases involving the appointment of probation officers, for the contention of unconstitutionality was "based upon the theory of inhibition against encroachment by any one of the three departments of the state government upon the powers of the others". The court rejected this contention: "All authority, however, recognizes the impossibility or impracticability of wholly avoiding every form of encroachment by each department upon the province of the others . . . No one department can fully and completely fulfill or discharge the duties allotted to it without at least in part exercising some function belonging to one

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198 State v. Mounts, 36 W. Va. 179, 14 S. E. 407 (1892).
199 Hall v. County Court, 82 W. Va. 564, 96 S. E. 906 (1918); Locke v. County Court, 111 W. Va. 156, 161 S. E. 6 (1931).
or both of the others. . . .’’ The court did not stop to consider whether the making of an appointment is judicial or nonjudicial; it merely declared the impracticability of applying strictly the doctrine of separation of powers and therefore found that the court may properly be authorized to make the appointment. It is to be regretted that the court has not always approached separation of powers questions with such an attitude.

The questions raised in the removal cases are of practical importance because of the probability that an existing statute will be held unconstitutional if the doctrine of separation of powers is strictly interpreted and applied. The statute\textsuperscript{201} provides for removal by the governor of certain elective state officers if they are disqualified from holding the office, or ‘‘for official misconduct, malfeasance in office, incompetence, neglect of duty, or gross immorality’’. Under the statute the governor may remove such an officer only upon the basis of evidence submitted at a hearing before the governor. The statute further provides: ‘‘Any such officer against whom charges may have been brought as aforesaid, feeling aggrieved by his removal from office by the governor, may present his petition in writing to the supreme court of appeals. . . . After argument by counsel, the court shall decide the matter in controversy, both as to the law and evidence, as may seem to it to be just and right, and may affirm the order of removal, or may permanently suspend, set aside and vacate such removal and restore such officer to his office. . . .’’

If the separation of powers doctrine is strictly applied, the power of removal cannot be both executive and judicial. If it is judicial, may the governor exercise it? If it is executive, may there be an ‘‘appeal’’\textsuperscript{202} from the governor’s decision to the supreme court of appeals? The dilemma is \textit{prima facie} perfect.

\textsuperscript{201} W. VA. REV. CODE (1931) c. 6, art. 6, §§ 5, 6.

It is provided by c. 6, art. 6, § 4 that any officer appointed by the governor may be removed by the governor ‘‘at his will and pleasure’’. This statute goes much further than the constitutional provision, article VII, § 10, which provides that the governor may remove such an appointive officer ‘‘in case of incompetency, neglect of duty, gross immorality, or malfeasance in office’’.

C. 6, art. 6, § 7 provides for removal of certain county officers by the circuit court.

\textsuperscript{202} If the power of removal were held to be executive, so that the governor could properly exercise it even under a strict interpretation of the doctrine of separation of powers, there would be grave question whether the statutory review by the supreme court of appeals would be constitutional. It was held in United Fuel Gas Co. v. Pub. Serv. Comm., 73 W. Va. 571, 80 S. E. 931 (1914), that there could be no appeal from legislative action of the Public
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On the question whether the power of removal for cause is judicial or executive, cases in other jurisdictions hold both ways, and the question on its merits might reasonably be decided either way. The West Virginia cases, however, have held consistently and definitely that the power is judicial. In one case the court held unconstitutional a statute conferring upon the county court power to remove a justice of the peace, on the ground that the removal of an officer is a judicial function and that under article VIII, § 24 of the constitution the legislature may confer upon county courts only nonjudicial powers. In a later case a statute conferring upon the circuit court power to remove county commissioners was held constitutional. And in two recent cases it has been held that the removal by a board of education of a supervisor of schools and the removal of a teacher by the state superintendent of free schools are judicial acts and hence reviewable by the circuit court upon certiorari. In the second of these cases

Service Commission to the supreme court. It would no doubt be held that for similar reasons there can be no appeal from executive action of the governor to the supreme court. The United Fuel Gas case held, however, that the court could review the action of the commission “by process akin to mandamus or prohibition” within the original jurisdiction of the supreme court. A similar technique cannot so easily be applied to the court’s review of the removal of an officer by the governor, for the statute, in providing that the court shall decide “as may seem to it to be just and right”, calls for an independent finding by the court, and an independent judicial finding is far beyond the scope of mandamus or prohibition, or even anything “akin to mandamus or prohibition”. Furthermore, the statute expressly calls the review an “appeal”: “The supreme court shall consider and decide the appeal upon the original papers and documents . . .” The revisers’ note to this statute twice refers to the review as an “appeal”, and the following section of the Code, referring back to this section, calls it an “appeal”.

203 See, for example, cases cited in Arkle v. Board of Com’s, 41 W. Va. 471, 23 S. E. 804 (1895).

204 Arkle v. Board of Com’s, 41 W. Va. 471, 23 S. E. 804 (1895).

205 “Such courts [county courts] may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law.”

The court has not consistently held that this clause is a limitation upon the powers that may be conferred upon the county courts. For example, in Poling v. County Court, 116 W. Va. 580, 182 S. E. 778 (1935), it was held that the county court could constitutionally be empowered to appoint a prosecuting attorney because: “Since, in moulding county courts, the constitution has entirely disregarded the separation of governmental powers commanded in article V, and has blended in such courts both administrative and judicial powers, there would be no inherent impropriety in having county courts fill a vacancy in the office of prosecuting attorney—a purely administrative act.”

206 McDonald v. Guthrie, 43 W. Va. 595, 27 S. E. 844 (1897).

the supreme court of appeals affirmed the action of the circuit court upon a writ of error.

The West Virginia law being rather definitely established that the removal of an officer is judicial, may the legislature confer the power of removal upon the governor? If not, the statute is unconstitutional. Of course, if the court is to follow the inflexible attitude taken in the Hodges case, in which the water power act of 1929 was held unconstitutional in its entirety merely because an appeal was allowed to a circuit court from legislative action of the Public Service Commission, the statute in question, in permitting the governor to exercise a function held to be judicial would be easily stricken down as unconstitutional. Even though the court has followed the Hodges case in several more recent decisions, the decision is so unnecessarily extreme in its interpretation of the separation of powers clause that it is unsafe to assume that the attitude there taken will be adhered to in future decisions.

Indeed, an examination of the various constitutional provisions concerning removal of officers yields convincing evidence that it could not have been the intent of the framers of the West Virginia constitution that the separation of powers clause should be interpreted as laying down such an inflexible rule.

Article IV, § 6 provides: "All officers elected or appointed under this Constitution, may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty, or gross immorality, in such manner as may be prescribed by general laws . . ." It was in pursuance of this authority that the legislature conferred the power of removal of certain elective state officers upon the governor, for the constitution did not otherwise provide for the removal of these officers. However, there are four other provisions of the constitution with respect to removal of officers, and one general provision for impeachment.

Article VII, § 10 provides: "The Governor shall have power to remove any officer whom he may appoint in case of incompeten-

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209 Baker v. County Court, 112 W. Va. 406, 164 S. E. 515 (1932); Danielley v. City of Princeton, 113 W. Va. 252, 167 S. E. 620 (1933); Staud v. Sill, 114 W. Va. 208, 171 S. E. 423 (1933); Buckeye Savings & Loan Ass'n v. Smith, 114 W. Va. 284, 171 S. E. 650 (1933). These cases are discussed below, p. 361, et seq.
Since the Federal Constitution does not prohibit a state from violating the doctrine of separation of powers by its Constitution,\textsuperscript{210} this provision means either that the removal of such appointive officers for cause is an executive function or that the governor may exercise a noneexecutive function. There is no other alternative, except to repudiate the whole theory of separation of powers.

Article IV, § 9 provides: "Any officer of the State may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments . . ." This provision means either that removal by impeachment is legislative, or that the house and senate of the legislature may exercise a nonlegislative power. And the same is necessarily true of article VIII, § 17, which permits removal of judges for specified causes "by a concurrent vote of both houses of the Legislature", and of article VI, § 25, which permits each house of the legislature to expel one of its own members.

Article IX, § 4 provides that certain county officers "shall be subject to indictment for malfeasance, misfeasance, or neglect of official duty and upon conviction thereof, their office shall become vacant." In effect, this section confers upon the circuit courts the power to remove certain county officers. It must therefore be true that either the removal of such officers is judicial or the circuit courts are authorized by the constitution to perform a nonjudicial function.

To find the intent of the framers of the constitution, that instrument should be read as a whole.\textsuperscript{211} If all the provisions for removal of officers are read together, since there is probably no inherent difference in the character of the function of removing an appointive state officer, a judge, and a county officer, it would seem that the conclusion should be, not that the removal of these officers is, respectively, executive, legislative, and judicial, but that it is the intent of the framers of the constitution that the separation

\textsuperscript{210} Dreyer v. Illinois, 187 U. S. 71, 88, 23 S. Ct. 28, 47 L. Ed. 79 (1902).

\textsuperscript{211} E. g.: State v. Harden, 62 W. Va. 313, 58 S. E. 715 (1907) (syllabus 3): "In ascertaining the intention of the people in adopting a constitution all parts of the constitution must be considered, every article, section, clause, phrase and word allowed some effect, and all parts, clauses, phrases and words harmonized, if possible."
of powers clause is not intended to be literally interpreted in its application to the removal of officers.

The removal provisions of the constitution thus reveal a truth of broad significance with respect to the doctrine of separation of powers. Madison and Story did not understand that doctrine to require such a strict interpretation as that made by the West Virginia court in cases such as the Hodges case. The removal provisions seem to indicate that the framers of the constitution did not so understand it.

Elections

The constitution, article IV, § 11, provides: "The Legislature shall prescribe the manner . . . of determining contested elections." For various offices different methods of contesting elections have been prescribed by statute. The county court is judge of the election of its own members and of all county and district officers. Each house of the legislature determines contests of the election of its own members. A contest of the election of a governor is determined by a joint session of both houses of the legislature, and a contest of the election of certain other state officers and judges is decided by a "special court" consisting of three persons, selected by the contestant, the contestee, and the governor.

The cases indicate that in determining election contests the joint assembly of the legislature acts quasi judicially, that the county court acts quasi judicially, and that the "special court" is "legislative in character." The mere statement of these results is sufficient to show that the court has not been strict in its application of the doctrine of separation of powers in the election cases. Most striking is the decision that the joint assembly of the legislature acts "in a quasi judicial capacity" in determining a contest of the election for governor. It cannot be denied that such action by the joint

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213 Id., c. 3, art. 9, § 9.
214 Id., c. 3, art. 9, § 12.
215 Id., c. 3, art. 9, § 13.
216 Goff v. Wilson, 32 W. Va. 393, 9 S. E. 26 (1889).
219 Goff v. Wilson, 32 W. Va. 393, 9 S. E. 26 (1889).
assembly is a clear violation of the literal words of article V:

"... nor shall any person exercise the powers of more than one department of the government] at the same time...."

The function of the county court in deciding an election contest is said to be "mainly ministerial", but it is nevertheless "quasi judicial, so far as it is their [the commissioners'] duty to determine, whether the papers laid before them by the clerk and purporting to be returns, are in fact such genuine, intelligible, and substantially authenticated returns as are required by law." Consistently with this analysis it is held\(^{220}\) that a circuit court has jurisdiction by \textit{certiorari} to review the action of the county court in determining an election contest, and, if the value of the office is more than $100,\(^{222}\) the supreme court of appeals has jurisdiction by writ of error.

It might be thought that if the function of both the joint session of the legislature and the county court in deciding election contests is quasi judicial, the performance of an identical function by the special statutory court would be of the same character. Apparently, however, it is true here as in some of the tax cases\(^{223}\) that the character of an act depends not only upon what is done but also upon the nature of the official or tribunal performing it. At all events, in \textit{McWhorter v. Dorr}\(^{224}\) the court specifically rejected a contention that such a special court is an inferior judicial tribunal within the meaning of article VIII, § 1 of the constitution and that a writ of prohibition against its exceeding its jurisdiction would therefore lie. Stress was laid upon the fact that "The pay and mileage of the members of the tribunal are the same as the pay and mileage of members of the Legislature." Another contributing factor was that "The fact that no appeal or review is provided for cannot be attributed to an oversight or inadvertence by the Legislature." It was accordingly held that the statute had created "a special tribunal, legislative in its character, to hear and determine contests as to the election of the officers named, wholly separate from the judicial power of the State and not reviewable by it — a special tribunal at once exclusive and conclusive." No way to reconcile the decision with such cases as \textit{State ex rel. Board}

\(^{221}\) Dryden v. Swinburne, 15 W. Va. 234 (1879).
\(^{222}\) This is difficult to reconcile with the holding in Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274 (1899), that "A public office is not property . . . ."\(^{223}\) See discussion supra, p. 279, \textit{et seq.}\(^{224}\) 57 W. Va. 608, 50 S. E. 838 (1905).
of Education v. Martin,\(^2\) holding that a board of education is an "inferior tribunal", is apparent.

An amendment of 1916\(^2\) added to the statute the following provision: "Either party to such contest feeling aggrieved by the final decision of such special court may present his petition in writing to the supreme court of appeals... praying for the suspension, setting aside, or vacation of such final decision." Of course, the tribunal being legislative under McWhorter v. Dorr, there can be no appeal to the supreme court of appeals, according to the holding of United Fuel Gas Co. v. Public Service Commission.\(^2\) The amendment is therefore unconstitutional unless it can be construed as an enlargement of the original jurisdiction of the supreme court "by process akin to mandamus or prohibition".

Anderson v. Bowen\(^2\) is of interest for the frankness with which the court indicated that an argument based upon separation of powers would not be taken seriously: "Power in the legislature to authorize the board of election supervisors, created by the act, to perform duties and functions that are generally regarded as being quasi-judicial, is clear and undoubted. If judicial power cannot be conferred upon such a body, legislative and administrative power respecting elections and election contests, can be delegated to it, by virtue of sec. 11, Art. IV of the Constitution, and, if necessary to uphold the act, it would have to be interpreted as conferring legislative power." One wishes that the court had consistently taken such an attitude in other decisions.

In Baer v. Gore\(^2\) an election contest was decided by a county court, appealed to the circuit court, and taken by writ of error to the supreme court. As the statute conferred no right of review, the challenge of the jurisdiction of the supreme court might reasonably have been upheld, as several earlier cases\(^2\) denied such jurisdiction in the supreme court unless specifically conferred. This contention, however, was brusquely rejected. The

\(^{225}\) 112 W. Va. 174, 163 S. E. 850 (1932).


\(^{227}\) 73 W. Va. 571, 80 S. E. 931 (1914). See discussion supra, p. 284, et seq.

\(^{228}\) 78 W. Va. 559, 89 S. E. 677 (1916).

\(^{229}\) 79 W. Va. 50, 90 S. E. 530 (1916).

court also did violence to the hitherto rather well established view that the constitutional power of the circuit court to perform administrative or legislative functions is somewhat broader than the corresponding constitutional power of the supreme court. Counsel's argument that the supreme court was without jurisdiction because the action was nonjudicial was rejected in the following manner: "If sound, the proposition urged against the right denied or restricted applies with the same degree of consistency to the right conferred by the primary act on the circuit courts." The court did not mention at least five previous cases holding that the supreme court could not review nonjudicial acts performed by the circuit courts within their constitutional power.

Establishment of Ferries

Article VIII, § 24 of the constitution gives to county courts authority over the establishment of ferries "under such regulations as may be prescribed by law". Article VIII, § 12 provides: "The circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition and certiorari." Article VIII, § 3 gives the supreme court "appellate jurisdiction in civil cases . . . concerning a mill, road, way, ferry or landing ...." Statutes provide for an "appeal" from the county court to the circuit court in cases of the establishment and regulation of ferries and for the award by the supreme court of "an appeal from, or a writ of error or super-

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232 In Poteet v. County Com'rs, 30 W. Va. 58, 3 S. E. 97 (1887), it was held that the action of the county court in ascertaining and declaring the result of a vote on the relocation of a county-seat is judicial and hence reviewable by the circuit court on certiorari. Accord: Welch v. County Court, 29 W. Va. 63, 1 S. E. 337 (1886); Brown v. Randolph County Court, 45 W. Va. 827, 32 S. E. 165 (1899); State ex rel. Marcum v. County Court, 90 W. Va. 105, 110 S. E. 482 (1922). In Hickenboatom v. County Court, 95 W. Va. 253, 120 S. E. 767 (1923), in which it was held that the commissioners of a county court in canvassing the returns of a vote in a road bond election act nonjudicially, the court declared: "This court bases its conclusion in the Poteet case and the Brown case largely on the ground of necessity, in order to afford some remedy against fraud and illegality in county-seat relocation elections." This is one of few instances in which the court has specifically recognized that necessity may color its views on a question of separation of powers.

233 W. VA. REV. CODE (1931) c. 58, art. 3, § 1; c. 58, art. 5, § 1.
sedeas to, a judgment’’ of the circuit court in cases concerning ferries.

The principal question usually presented to the county court in determining whether to grant or refuse an application for the establishment of a ferry is the question whether or not there is a sufficient “public need” for the new ferry. Although it might, perhaps, be reasonably thought that the question whether or not the public need is sufficient is legislative and not judicial, the supreme court has consistently assumed both its own jurisdiction and that of the circuit court to substitute judicial judgment for the judgment of the county court on the question whether an application for the establishment of a new ferry should be granted or rejected. Thus, in the leading case, the question was said to be “whether the general public interest would be promoted in the particular case by the establishment of two ferries so close to each other over the same stream”, but the court did not discuss the question of its jurisdiction. In a later case the court adverted to the fact that the establishment of a ferry is within the police jurisdiction of the county court and that therefore it might be thought that the discretion of that court is not reviewable. This idea was rejected, however, with the simple statement: “But the legislature took a different view in giving an appeal in a ferry case.” Later ferry cases have not discussed jurisdiction, but in each case the court has made an independent judicial inquiry into the sufficiency of the public need for a new ferry.

Of course, whether the determination of public need is legislative or judicial, the result the court has reached may probably be justified upon the basis of the various constitutional provisions referred to above. And since in each of the ferry cases the establishment of the new ferry was resisted by the owner of an existing ferry, a property interest was involved in each case upon the basis of which the action could be called judicial, if the distinction drawn by the court in cases concerning the issuance by the State Road Commission of certificates of public convenience and necessity were to be applied.237

236 Polley v. Gilleland, 72 W. Va. 301, 78 S. E. 96 (1913); Egerton v. Flesher, 76 W. Va. 519, 86 S. E. 34 (1915); Greene v. Lane, 100 W. Va. 399, 130 S. E. 522 (1925).
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COUNTY BOUNDARY DISPUTES

A statute provided for the settlement of county boundary disputes by the appointment by the circuit court of commissioners to establish the true line. In Summers County v. Monroe County, a circuit court dismissed the petition of a county for the appointment of commissioners, and the county obtained a writ of error to the supreme court, which held that "under that statute a circuit court does but perform a purely ministerial, not a judicial, function, nor one of discretion", and hence that the supreme court was without jurisdiction. The principal significance of the case lies in its recognition that the circuit court could properly perform a nonjudicial function, in contrast with several decisions since 1931 holding statutes unconstitutional on account of provisions for the exercise of nonjudicial functions by circuit courts.

SALE OF LAND FOR TAXES

In pursuance of a statutory provision a circuit court issued orders directing and confirming the sale for the benefit of the school fund of land upon which taxes were delinquent, and an appeal was taken to the supreme court in McClure v. Maitland. It was held that the proceeding in the circuit court, being ex parte, was neither a suit nor a controversy and therefore that the action of the circuit court was nonjudicial. The appeal was accordingly dismissed for want of jurisdiction. In its assumption that the action of the circuit court was valid, the case is in striking contrast with the 1933 decision of Staud v. Sill, in which a statute was held unconstitutional in its entirety because it permitted a circuit court to confirm a sale of land under a trust deed.


The court apparently thought it necessary to declare: "It is the character of the act, not the tribunal doing it, which gives cast to that act." That this is not always so, see discussion above, p. 279, et seq.

Many cases have recognized that circuit courts may properly perform nonjudicial functions. See notes 264, 265, 266, 267, and 268, infra. Yet, since 1931 four statutes have been held unconstitutional because they conferred nonjudicial powers upon circuit courts. See discussion infra, p. 352, et seq.


24 W. Va. 561 (1884).

Sutherland v. Miller\(^2\) held unconstitutional a statute\(^3\) empowering a circuit judge in an ex parte proceeding to determine whether "the interests of public justice require . . . a judicial inquiry" into the question whether certain candidates for office have engaged in corrupt and illegal practices contrary to the provisions of the statute. A writ of prohibition was awarded against a circuit judge to restrain him from further proceeding in inquiring into the campaign expenditures of a successful candidate for the office of United States senator. The decision was based upon (1) violation of article V, (2) unlawful delegation of legislative power, the exercise of which was "made to depend upon the mere will or caprice of the grantee of the power", and (3) violation of a provision of the Federal Constitution vesting exclusive power in the senate to judge of the election, returns and qualifications of its own members. The court supported its decision as to separation of powers as follows: "The privilege of a successful candidate in an election to fill the office of United States senator is made to depend in a large measure, in the first instance, upon the ex parte opinion of a single judge, one selected by a candidate defeated in the same election for the same office . . ." The decision on this point does not constitute, as some other decisions\(^2\) seem to do, a blind application on a strictly logical basis of the conceptualism of separation of powers. Adequate reasons of expediency may exist for denying to the legislature the power to require a circuit judge to perform the function in question, and it was upon the basis of such reasons that the case was decided.\(^2\)

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\(^2\) 79 W. Va. 796, 91 S. E. 993 (1917).
\(^3\) W. Va. Acts 1915, c. 27, § 15.
\(^2\) See discussion of "The Hodges Case and Its Aftermath", infra, p. 352, et seq.
\(^2\) The court, of course, should not decide, either on the basis of reasons of expediency or on any other basis, the question of legislative policy as to whether or not it is desirable to confer upon the circuit court the power to determine whether or not a judicial inquiry should be made into campaign expenditures. The only question for the court is the constitutionality of a statute conferring such power upon the circuit court. But in the absence of clear historical guidance or binding precedents, the court must interpret a broad constitutional provision such as the separation of powers clause by deciding the desirability that the legislature should have power to enact the statute. And in this case, the question for the court, i. e., the desirability of having the power in the legislature to confer upon the circuit court the power to determine whether or not a judicial inquiry should be made into campaign expenditures is, practically though not theoretically, the same as the question for the legislature, i. e., the desirability of conferring upon the circuit court
A statute provides that the attorney general of the state must either approve or disapprove the validity of bond issues of municipalities, counties and school districts. Any person in interest or any taxpayer of the political division issuing the bonds "may present his or its petition to the supreme court of appeals... praying that the action of the attorney general in approving or disapproving such bond issue, as aforesaid, be reversed or modified. ... The case shall be proceeded with as in cases of original jurisdiction. The court shall decide the matters in controversy and enter such order thereon as to it may seem to be just."

Inasmuch as the attorney general is one of the seven executive officers of the state who make up the "executive department" under article VII, § 1 of the constitution, the question arises whether or not the approval or disapproval of a bond issue is an executive or a judicial act, for if it is judicial the court might hold that the separation of powers clause is violated by the exercise of the power by an executive officer, and if the act of the attorney general is executive, the question arises whether or not the court may properly review it and decide "as to it may seem to be just."

In State ex rel. Allen v. England the constitutionality of the statute was sustained. The court's opinion was directed only to the question of the jurisdiction of the court; the question whether or not the attorney general could properly exercise judicial power apparently was not raised. It is not clear whether the court regarded the act of the attorney general as executive. After asking itself the question, "But do his duties involve purely judicial action or discretion?" the court declared: "The purpose [of the legislature] was to make his duties supervisory and ministerial, although calling for his opinion and judgment on the law. His duties in this respect are not different from almost any other ministerial or executive officer." Does this mean that the duties of the attorney general were not judicial or merely that they were not "purely judicial'? Whether the court's treatment of this question is attributable to vagueness of expression or whether it is attributable to an unusually realistic insight into the nature of the power to determine whether or not a judicial inquiry should be made into campaign expenditures.


250 86 W. Va. 508, 103 S. E. 400 (1920).
question cannot be ascertained from the opinion. But it is not unreasonable to interpret this part of the opinion as meaning that the attorney general, in approving or disapproving a bond issue, performs an act which is neither wholly executive nor wholly judicial. For example, in so far as there are no parties and no hearing the act is nonjudicial, and in so far as the decision rests upon the application of principles of law to given facts, the act is judicial. It is somewhat judicial and somewhat nonjudicial; to regard it as wholly one or the other would be inaccurate. Powers of this kind cannot be fitted into rigid categories with precision. Powers may fall partly into one category and partly into another, and this is true in the case of the attorney general's approval or disapproval of a bond issue. If this is what the court meant in its opinion in the *England* case, then it is to be regretted that the thought is not stated with greater clarity, for the court in later cases could have benefited immensely by following such a sound precedent.

After inquiring into the character of the attorney general's act, the court proceeded to hold that in the exercise of its original jurisdiction it could properly review the act. The basis of this conclusion was: "We have numerous cases where the acts of ministerial and executive officers, though involving judgment on the law, have been controlled..." And the court then examined the merits of the case, apparently substituting its judgment for the attorney general's on the question whether the bond issue should be approved or disapproved. Here again, the court in its opinion did not squarely face the issue. The early part of the opinion must be interpreted as meaning either that the act of the attorney general is not judicial or that it is not "purely judicial". Since the court did substitute its judgment for that of the attorney general and had power to substitute its order for the attorney general's, it would seem that the action of the court must have been of the same character as the action of the attorney general and hence either nonjudicial or not "purely judicial". A strict interpretation of the separation of powers clause would call for the conclusion that the court could not properly exercise such a function. It seems unfortunate that the court did not recognize this line of reasoning and specifically reject it. It might well have...

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251 See, for example, the language of the first syllabus in United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571, 80 S. E. 931 (1914), to the effect that the supreme court's jurisdiction "is limited to matters purely judicial".
pointed out what would be the consequence of a strict interpretation of separation of powers, and then have said with Madison and Story that the separation of powers clause is not to be thus strictly interpreted.

Although the court's language in the England case is not as clear as might be wished, the holding of the case, to the effect that the separation of powers clause does not prohibit the legislature, if it sees fit, from authorizing an executive officer to do an act which may be reversed, affirmed, or modified by the supreme court of appeals, in accordance with the independent judgment of the court, should be regarded as a precedent for a liberal view of the doctrine of separation of powers. Much unnecessary difficulty would have been avoided in later cases if the court had consistently followed the attitude taken in this decision.

**The Hodges Case and Its Aftermath**

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 the Public Service Commission cases, the practice has been to accord a high degree of finality to findings of fact of the commission, despite a decision of the United States Supreme Court ostensibly founded upon separation of powers which requires in many cases an independent judicial inquiry, and the court has exercised the power to modify legislative orders of the commission although it is well established elsewhere that a court possessing solely judicial powers may not modify legislative orders. In the workmen's compensation cases the separation of powers theory leads to the opposite result from that which usually obtains in practice. In a few cases concerning other administrative agencies, the theory of separation of powers has loomed rather large in the results of cases, but for the most part such use as was made of that theory before 1931 did not lead to results unjustifiable under wholly pragmatic tests.

In 1931, however, in *Hodges v. Public Service Commission*,253

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and in several subsequent cases decided upon the authority of the Hodges case, the doctrine of separation of powers has brought about consequences which from the standpoint of efficiency in government may well be considered unfortunate. The Hodges case held the water power act of 1929 unconstitutional in its entirety because a provision for appeal from the Public Service Commission to a circuit court was regarded as conferring legislative duties upon the circuit court in violation of the separation of powers clause. As this decision and the cases which follow it are so far-reaching in their consequences, a detailed examination of the opinion seems appropriate.

The water power act was a comprehensive statute filling thirty pages of the Acts of 1929. It was declared in § 1: "In order to conserve and utilize the energy of the power streams it is hereby declared to be the policy of the state to encourage water power development. It shall be the aim to secure for a given stream or watershed the greatest proper and practicable utilization of the power of such stream or watershed." Various powers were accordingly conferred upon the Public Service Commission, including the authority to grant licenses for the construction of dams. The act declared that the commission should "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." By § 13 it was provided that any party aggrieved by any decision of the commission granting or refusing a license "may appeal ... to the circuit court of Kanawha county with trial de novo in said circuit court. ..." The circuit court was to use the record before the commission in connection with any additional evidence offered by any party. Provision was made for "appeal" to the supreme court of appeals.

The commission granted a license to the West Virginia Power & Transmission Company to construct a series of dams on the Cheat

255 The court gave as an incidental reason for holding the act unconstitutional the fact that it conferred legislative powers upon the governor, who was required to sit with the commission in granting or refusing a license. This aspect of the case is ignored in the ensuing discussion.
River and its watershed. "Citizens of West Virginia" resisted the application before the commission and appealed to the circuit court, which reversed the commission and remanded the proceeding, and the applicant secured an appeal to the supreme court.

After stating the facts, finding that constitutional questions were properly raised, making observations about the presumption of constitutionality, and quoting article V, the court began its discussion of separation of powers. The first paragraph on this subject was devoted to the historical background of article V, with references to Blackstone, Montesquieu, Paley, Story, Hamilton, Willoughby, Bryce, Cooley, and Ordonaux. The court concluded, in words quoted from another court, that "All writers on constitu-

256 One of the most subtle aspects of the Hodges case is the manner in which the court avoided the application of the firmly established principle that a constitutional question may not be raised by one who has no personal or property interest in the subject matter of the action. The only parties who were challenging the constitutionality of the water power act were "citizens of West Virginia", who could show neither personal right nor property right in the determination of the question presented. The court expressly recognized this: "The applicant challenges the right of the protestants to raise constitutional questions on the ground that they have no personal or proprietary interest in the subject matter. Lack of such interest would ordinarily sustain this challenge." But the court found a method whereby such citizens whose rights are not involved may raise constitutional questions. This method consisted in a simple declaration that "we have no jurisdiction to entertain this appeal unless it be conferred by the act", and a statement that "since our jurisdiction herein depends entirely upon the validity of the act, it is our duty to scrutinize the act before considering the merits of this proceeding, lest that consideration should be vain." Accordingly, the court proceeded to consider the substantive question of constitutionality and concluded that the act was unconstitutional "in its entirety". The case thus recognized that no parties had standing to raise the constitutional question and at the same time held the statute unconstitutional. So far as appears from the opinion of the court it would seem that since the protestants had no standing to raise constitutional questions, and since no one but the protestants sought to raise such questions, it would follow that no such questions may be raised in this proceeding for any purpose and that the further question of jurisdiction which depends upon constitutionality is immaterial.

However, it appears in the petition of the applicant (but not in the opinion of the court) that not only constitutional questions but also other questions were raised. The court therefore had to determine whether or not it had jurisdiction to decide the nonconstitutional questions which presumably were properly raised. Whether or not any party challenges the jurisdiction of the court, it must not act without jurisdiction, and since the court assumed that its jurisdiction depended upon the act, it had no jurisdiction if the entire act was unconstitutional. Therefore, the court had no choice but to determine the constitutional question.

The soundness of the court's assumption that "we have no jurisdiction to entertain this appeal unless it be conferred by the act" may be challenged on the authority of Baer v. Gore, 79 W. Va. 50, 55, 90 S. E. 530 (1916), in which the court held: "Nor can the right of review on writ of error reasonably be denied on the ground that the legislature did not expressly authorize it."
tional law are agreed that the functions of the three departments should be kept as distinct and separate as possible."

It is questionable whether an examination of the authorities referred to by the court confirms the court's conclusion. It is true that all the authorities cited paid their tribute to the theory of separation of powers. But the vital fact is that the court did not give effect to the qualifications which most of these writers placed upon their acceptance of that theory. For example, Story on the Constitution (5th ed.) C. VII, was cited. The court might have quoted from this chapter (but did not) as follows: "But when we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist. It was obviously the view taken of the subject by Montesquieu and Blackstone in their commentaries... The slightest examination of the British constitution will at once convince us that the legislative, executive, and judiciary departments are by no means totally distinct and separate from each other. Since the water power act did not vest in the circuit court the "whole power" of the legislative department, it seems that Story, and, according to Story, Montesquieu, Blackstone, and the authors of the Federalist would not interpret the theory of separation of powers as forbidding the circuit court from reviewing the action of the commission as provided by the water power act. Among the more modern writers, the court cited Willoughby but apparently ignored the following statements of that author: "Thus it is not a correct statement of the principle

257 To say that the court did not give effect to the qualifications is not to say that the court was wholly unaware of them. In a later paragraph the court did say that courts have not drawn abstract analytical lines of separation and that courts recognize necessary areas of interaction. But these observations of the court only led to its curious concluding statement of the paragraph: "It would therefore seem that the plain language of article V calls not for construction, but only for obedience." (Italics supplied.)

of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. . . . Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive, or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.\textsuperscript{2259}

The next paragraph of the court's opinion observed that "this historical background is reflected perfectly in the constitution of West Virginia", pointing out that articles VI, VII, and VIII deal respectively with the legislative, executive, and judicial powers. Such observations are true as far as they go, but why should they not go further? The court might have taken cognizance of the many well-known instances in which the constitution did not adhere rigidly to the theory of separation of powers, such as, for example, the legislature's judicial power of impeachment, the governor's legislative power of veto,\textsuperscript{260} and the removal power (whatever its character), which is given in some cases to the governor, in some to the legislature, and in others to the courts.\textsuperscript{261}

The court itself has declared in a later case:\textsuperscript{262} "In moulding county courts, the constitution has entirely disregarded the separation of governmental powers commanded in article V, and has blended in such courts both administrative and judicial powers."

In the Hodges opinion, however, the court mentioned only those parts of the constitution which supported its conclusions.

The court next proceeded to the consideration of counsel's argument that the power to review the commission's order may constitutionally be conferred upon the circuit court under article VIII, § 12, of the constitution, which provides that the circuit courts shall have "such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law", and that by reason of this clause the court had upheld enactments imposing on circuit courts jurisdiction in such legis-

\begin{itemize}
\item \textsuperscript{2259} WILLOUGHBY ON THE CONSTITUTION (1910) § 743.
\item \textsuperscript{260} Madison regarded the power to "put a negative on every law" as legislative. \textit{Federalist}, No. XLVII. And it is probably generally so regarded. The West Virginia court, however, in State v. Mounts, 36 W. Va. 179, 16 S. E. 407 (1892), reasoned from the separation of powers clause of article V to the conclusion that the veto power was "deliberative, but not legislative". An act which was to go into effect ninety days after its passage was accordingly held to have become law ninety days after the action of the legislature and not ninety days after the approval of the governor.
\item \textsuperscript{261} See the discussion of the removal power, \textit{supra}, p. 341, \textit{et seq.}
\item \textsuperscript{262} Poling v. County Court, 116 W. Va. 580, 584, 182 S. E. 778 (1935).
\end{itemize}
lative matters as valuation of property for taxation and the incorporation of towns.\footnote{203} (Counsel failed to direct the court's attention to other cases upholding the exercise by circuit courts or the supreme court of functions which may be regarded as non-judicial, such as cases involving establishment of ferries, sale of school lands, settlement of boundary disputes, approval of bond issues, and appointment of officers.\footnote{208}) The court rejected the argument by discrediting but not overruling the cases dealing with tax assessments and incorporation of towns. One of the principal reasons given was: "The phrase 'other jurisdiction' in section 12 is general. The inhibition in article V against the exercise of dual authority is specific." It seems regrettable that the court did not explain this reason, for in the absence of explanation one might think that article V, dealing with all agencies of all departments of the government, is relatively general, and that section 12, dealing with only one particular part of the judicial department of the government, is relatively specific.

The court discredited a previous holding\footnote{209} that a circuit court could properly direct the clerk to issue certificates of incorporation for cities, towns or villages, upon proof of compliance with certain statutory conditions. The court declared that the case "overlooks both the positive inhibition in article V and the entire constitutional design to separate the powers of government, as set forth in articles V, VI, VII and VIII." It is interesting to note in this connection that the court in the earlier case quoted and discussed article V and declared that "It has been found to be wholly impracticable to make such separation perfect." The earlier case, however, was saved from overruling by the following language: "This construction of section 12 is not to be taken as unsettling the practice of circuit courts to incorporate towns and to entertain appeals from boards of equalization and review on the valu-

\begin{itemize}
\item \footnote{203} The tax cases are discussed, \textit{supra}, p. 272, \textit{et seq.}, and the cases involving incorporation of towns are discussed, \textit{supra}, p. 327, \textit{et seq.}
\item \footnote{204} Williamson v. Hays, 25 W. Va. 609 (1885); Ferry Co. v. Russell, 52 W. Va. 356, 43 S. E. 107 (1908); Polley v. Gilheand, 72 W. V. 301, 78 S. E. 96 (1913); Egerton v. Flesher, 76 W. Va. 519, 86 S. E. 34 (1915); Greene v. Lane, 100 W. Va. 399, 130 S. E. 522 (1925).
\item \footnote{205} McClure v. Maitland, 24 W. Va. 561 (1884).
\item \footnote{206} Summers County v. Monroe County, 43 W. Va. 297, 27 S. E. 307 (1897).
\item \footnote{207} State \textit{ex rel.} Allen v. England, 86 W. Va. 508, 108 S. E. 400 (1920).
\item \footnote{208} State v. Mounts, 36 W. Va. 179, 14 S. E. 407 (1892); Hall v. County Court, 82 W. Va. 564, 96 S. E. 966 (1918); Locke v. County Court, 111 W. Va. 156, 161 S. E. 6 (1931).
\item \footnote{209} \textit{In re} Town of Union Mines, 39 W. Va. 179, 19 S. E. 398 (1894).
\end{itemize}
ation of property for taxation. This practice has been pursued in such a great number of cases and over so many years, that we are of opinion that it should not be disturbed now." In this curious statement the court implicitly recognized that the statute in the *Hodges* case is indistinguishable from the statutes upheld in previous cases, and expressly recognized that the practice of upholding such statutes is established by a great number of cases extending over many years. It might reasonably be thought that the presumption of constitutionality coupled with such a well established practice of upholding similar statutes which the court is unable to distinguish would be sufficient to sustain the statute in the *Hodges* case. Of course, the court did feebly attempt to distinguish the assessment and city incorporation cases by saying of the procedure in those cases: "However, this procedure applies to local matters only; and we feel no obligation because of submission thereto, to approve the further delegation of legislative functions to the judiciary, particularly in a proceeding of statewide interest, such as this." For its conclusion that the court will permit what it deems to be a violation of the constitution in local matters but not in matters of "statewide interest", the court gave no reason other than custom. Ordinarily, in the absence of such a judicial pronouncement, one might suppose that the geographical extent of the interest aroused in a function performed by a circuit court has no bearing upon the constitutional authority to perform that function.70

The crux of the holding lies in the conclusion that the clause of article VIII, § 12, conferring upon the circuit courts "such other jurisdiction . . . as is or may be prescribed by law", is limited to "jurisdiction essentially juridical", and in the adoption of the view that the function to be performed by the circuit court under

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70 There is a difference between a statement that the geographical extent of the interest aroused in a function performed by a circuit court has no bearing upon the constitutional authority to perform that function, and a statement that the separation of powers clause applies equally to state officials and tribunals and to local officials and tribunals. The writer is of the opinion that the latter statement is not true, but that, on the contrary, there is merit in the observation of Judge Dent in *Wheeling Bridge & T. Ry. v. Pauli*, 39 W. Va. 142, 145, 19 S. E. 551 (1894): "... While we find that the constitution, as much as possible keeps the heads of the three departments comparatively distinct and independent of each other, yet as we move down the scale these several powers become more complicated and interwoven with each other, until we find the common council of every village exercising legislative, executive and judicial functions, indiscriminately, by authority of the same constitution which declares that these functions shall be kept distinct."
the water power act is legislative. There is no doubt merit in the court's interpretation of the words "other jurisdiction" to mean judicial and not legislative jurisdiction, for the framers of the constitution may not have intended that the legislature should under this clause confer strictly legislative powers upon the circuit court. It is not so difficult to agree with an early West Virginia holding that the legislature could not constitutionally confer upon a circuit court the power to repeal a municipal ordinance.\footnote{Shepherd v. Wheeling, 30 W. Va. 479, 4 S. E. 635 (1887).} But is the function of the circuit court under the water power act comparable to the enactment or repeal of an ordinance or a statute?

The essence of the court's opinion on the character of the function of the circuit court is that the power of the commission, in the words of the act, "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" involves a determination of policy which is said to be "clearly legislative in character", and the "legislature intended the circuit court to try and determine these legislative matters de novo, without regard to the findings of the commission." The court quoted from other courts to the effect that "The question of what the public convenience requires is a political, not a legal one", and that "Whether a drainage ditch proposed to be constructed . . . will be conducive to the public health, convenience or welfare, or whether the route thereof is practicable, are questions of governmental or administrative policy, and are not of judicial cognizance, and jurisdiction over them by appeal or otherwise cannot be conferred upon the courts by statute."

Did the water power act require the circuit court to make such a determination of policy that its action was "clearly legislative in character"? The policy of the state was declared by § 1 of the act: "In order to conserve and utilize the energy of the power streams it is hereby declared to be the policy of the state to encourage water power development. It shall be the aim to secure for a given stream or watershed the greatest proper and practicable utilization of the power of such stream or watershed." The principal function of the circuit court in the Hodges case was to conduct a hearing to determine whether or not this declared policy would be furthered by the grant of the license to the West Virginia Power & Transmission Company to construct a series of dams on the Cheat.
River and its watershed. The court was not to determine the fundamental policy of the state; that policy had been declared by the legislature. The court was only to apply that policy to a given set of facts, and to reach a decision upon the basis of evidence introduced by parties on both sides. There was a controversy between the applicant for the license and the citizens who resisted the application. The function performed by the court was strikingly similar to its function in ordinary litigation. There is a difference between the legislature's determination of the policy of the state in § 1 of the act, and the court's application of that declared policy to the particular facts. True, the legislature had determined policy in only a general way, and the court determined a more specific policy in order to adjudicate the particular controversy. But deciding what policy should be applied to particular facts has always been the very essence of the judicial function. Surely it cannot be denied that the great body of the common law is based largely upon judicially determined policy. Both courts and legislatures determine the policy of governments, the legislatures declaring it in statutes to be applied to all cases arising in the future, the courts deciding it retroactively with respect to particular controversies. The circuit court in the Hodges case did only what courts have done from time immemorial. Yet, because of this, the water power act was held unconstitutional in its entirety!

Even if the function of the circuit court under the water power act were not wholly within the scope of what courts traditionally have done, still the act should not be held unconstitutional, for it is believed that the separation of powers clause, properly interpreted, does not forbid a court to exercise a power somewhat judicial and somewhat legislative, if the legislature sees fit to confer such a power upon the court. All powers are not wholly judicial, wholly legislative, or wholly executive. Some powers fall into a borderland, defying classification. Indeed, some powers may partake of the characteristics of all three departments of the government and cannot with precision be said to belong to one any more than to another. And if there is to be efficiency in govern-

272 An illustrative West Virginia decision is Monongahela West Penn Public Service Co. v. State Road Comm., 104 W. Va. 183, 139 S. E. 744 (1927), in which the court quoted at some length from opinions of other courts to show that it was the policy of the state to protect the property interests of existing carriers as against the interests of those who seek to compete.
ment the separation of powers principle cannot be inflexibly applied to such borderland or unclassifiable powers. The legislature in enacting the water power act found it desirable that the circuit court should review the action of the commission in granting a license. It would be reasonable to hold that unless the power of review is wholly nonjudicial the legislative purpose will not be thwarted by the theory of separation of powers.

In the record in the Hodges case is much testimony to the effect that the legislative policy of the water power act was unsound. It is possible that the court, finding itself in sympathy with such views, conceived that its duty was a broad one of statesmanship, to protect the state against unwise legislation, and that the court sacrificed the means, the separation of powers clause, to the end, ridding the state of an undesirable statute. The more the opinion is read, the more plausible becomes the explanation that the court was influenced by such extra-legal factors. But the difficulty with this explanation is that the court in four succeeding cases, apparently not involving such questionable legislation, has based its decisions upon the authority of the Hodges case. In fact, the court in a later case refers to the opinion in the Hodges case as a "learned and logical opinion. . . . (showing much research) . . ."); quotes from it for nearly two full pages, and then calls it a "sound exposition of the constitutional limit on the legislative power to encumber the judiciary with duties and powers which should be exercised by the other coordinate branches of the government."

Danielley v. City of Princeton held the state water commission act of 1929 unconstitutional in its entirety because the provision for review by the circuit court of an order of the commission was deemed a violation of the separation of powers clause. The offending provision was: "Such circuit court of the county shall have jurisdiction, by certiorari, to review any order of said commission upon the application of any person or intervener

273 E. g., pages 690-707.
275 Baker v. County Court, 113 W. Va. 252, 167 S. E. 620 (1933). The case is noted in (1933) 39 W. VA. L. Q. 336.
aggrieved by such order. Upon the hearing, such circuit court... shall determine all questions arising on the law and evidence and render such judgment or make such order upon the whole matter, as law and equity may require." The commission had found that the sewage of the city polluted the stream and, in pursuance of power granted by the act, ordered that the city install one of two specified systems of sewage disposal. The city had the case removed to the circuit court by certiorari, and the overruling of the city's demurrers was certified to the supreme court. The court held: "A hearing before the Commission involves the determination (1) of whether the act complained of is a statutory pollution, and if so (2) of the proper sewage treatment or system of filtration to reduce the pollution. The first determination is quasi-judicial; the second is executive or administrative... A review of the system... adopted by the Commission... would require the court itself to exercise discretion, i.e., executive power." Therefore, largely on the authority of the Hodges case, the whole act was stricken down.

The comment upon the Hodges case is applicable to the Danielley case. But the Danielley case adds one very puzzling question about the West Virginia doctrine of separation of powers. Why is the exercise of discretion as to the proper method of sewage disposal executive? Surely it would be within the legislative power to prescribe what method of sewage disposal should be used in certain classes of cases. And, in accordance with the view hereinabove set forth, it might well be held that the decision of controversies concerning the proper method to be followed in particular cases is judicial.

Baker v. County Court held unconstitutional a statute authorizing the county court to fix compensation of certain officers, including deputy sheriffs, and providing "that any taxpayer feeling aggrieved at the allowance made by the county court to the sheriff, and any sheriff feeling that the business of his office cannot be conducted properly by the maximum allowance by the county court for office expenditures, or the number of deputies and their salaries, shall be allowed the right of appeal to the circuit court of such county for the purpose of determining the equity of such maximum allowance." The court declared that whether the duty

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278 Id., § 7.
of fixing salaries was "legislative or ministerial" was unimportant, as it was nonjudicial. With this part of the opinion it is not so difficult to agree as it is with the court's statement that the statute gave to the circuit court "the power of substituting its judgment for that of the county court." The court did not discuss this interpretation of the statute but merely announced its conclusion. Does the mere word "appeal" in the statute call for the substitution of the circuit court's judgment? Or is it the words, "for the purpose of determining the equity of such maximum allowance", that call for such a result? Since the constitutionality of the statute is at stake, any uncertainty in its meaning should be resolved in favor of that interpretation which will render it valid.

In the United Fuel Gas case, it was held that an "appeal" from the Public Service Commission to the court would be unconstitutional, but that: "[The act] in only one place refers to the proceeding in this court as an appeal. The petition and proceedings prescribed are as well, if not better, adapted to a petition or proceeding upon mandamus or prohibition, and as we can not assume, for constitutional reasons, that the legislature intended to confer appellate jurisdiction, we find warrant and authority for construing the statute as intended to confer original jurisdiction by process akin to mandamus or prohibition." Why should not the statute in the Baker case be similarly interpreted? The function of the circuit court would then be limited to the determination of the reasonableness of the action of the county court, a judicial function, and, whatever the character of the county court's action, the statute would be constitutional. As pointed out hereinafter, the court's failure so to interpret the statute raises serious doubts as to the validity of much existing legislation.

Staud v. Sill held unconstitutional in its entirety a statute enacted in 1933 which required confirmation by the circuit court

281 In Williamson v. Hays, 25 W. Va. 609, 614 (1885); the court declared of a somewhat similar statutory provision: "The mode of reviewing these cases is called in this statute an appeal; but this is obviously a mere blunder..." One wonders why in the principal case the court did not invoke the principle that an ambiguous statute should be so construed as to render it constitutional.


283 114 W. Va. 208, 171 S. E. 423 (1933). The decision is followed in Buckeye Savings & Loan Ass'n v. Smith, 114 W. Va. 284, 171 S. E. 650 (1933). Both cases also held that the act could not constitutionally be applied retroactively.

284 W. Va. Acts 1933 (Reg. Sess.) c. 34.
of sales of property under trust deeds. The basis of the holding was the doctrine enunciated in the Hodges case that a circuit court may not be required to exercise a nonjudicial function. The statute provided that the trustee in selling property under a trust deed should make a written report of the sale to the circuit court together with a petition for confirmation of the sale, and that "in case the court or judge shall be satisfied that the said sale was in all respects regular and that the sale price reported is reasonably adequate under all the circumstances, he shall confirm such sale; otherwise the court or judge shall have discretion to direct a resale . . . and in determining all questions in respect to adequacy of price, the court or judge may consider the appraisement of the property, and as well affidavits filed pro and con and all evidence taken upon the inquiry." The court apparently did not hold that the determination of the adequacy of the price was a nonjudicial function. The basis of the decision was rather: "It will be noted that there are no parties to the petition of the trustee . . . It makes no difference whether the creditor, the debtor or anyone else feels or is aggrieved . . . No issue is made up . . . There is no cause of action nor ground of equitable relief required to be alleged and there is nothing in the proceeding that would enable anyone at a later time to plead elsewhere that any rights had been adjudicated by it."

These reasons, the only ones given, seem to add up to little more than a statement that the court's function under the statute is not concerned with litigation. The court seems to say that in order that the circuit court's action may be judicial there must be parties, someone aggrieved, an issue, and a cause of action or a ground of equitable relief. Such may be the ingredients of an ordinary lawsuit, but are these elements necessary for judicial action? Courts have traditionally supervised the acts of fiduciaries and protected the interests of incompetent persons, whether there is litigation or not. Whether or not mortgage debtors in some situations require protection comparable to that afforded incompetents,
and whether or not trustees under deeds of trust are to be treated as some other fiduciaries are treated are questions of legislative policy which the legislature should be free to decide as it sees fit. Many functions long performed by courts are not concerned with litigation, such as, for example, duties connected with decedent's estates, bankruptcies, trusts, receiverships, guardianships. The reasons the court gives in *Staud v. Sill* apply equally to most such functions. Surely the court did not intend to hold all such functions outside the scope of proper judicial power.

An existing guardianship statute affords a good example: "... when it shall be made to appear to the satisfaction of a circuit court on a bill in chancery, or by petition in a summary way, filed for the purpose by the guardian, that the proper maintenance and education, or other interests of an infant, require that the proceeds of his real estate, beyond the annual income thereof, should be applied to the use of such infant, it shall be lawful for the circuit court to order the sale of, or to authorize a loan upon, his real estate, or such part thereof as may be necessary for the purpose, and, from time to time, make such decrees and orders as may be proper to secure the due application of the proceeds of such sale or loan. ..." All of the reasons given in *Staud v. Sill* for holding the action of the circuit court nonjudicial are equally applicable to this guardianship statute. There are no parties, no aggrieved person, no issue, no cause of action, no ground of equitable relief. Does the court mean by its decision in *Staud v. Sill* that statutes such as the guardianship statute are unconstitutional?

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286 In Daniels v. Rogers, 111 W. Va. 587, 163 S. E. 416 (1932), a statute, W. Va. Rev. Code (1931) c. 44, art. 1, § 1, empowering a circuit court to compel an administratrix to file an inventory with a commissioner of accounts was held not to violate article V.


288 Another good example of a similar statute is W. Va. Rev. Code (1931) c. 44, art. 6, §§ 3-4, permitting fiduciaries to apply to the circuit court for "authority or direction" with respect to the investment of funds. Do the provisions that notice shall be served on the beneficiaries of the trust funds and that the beneficiaries "shall be made defendants" distinguish the statute from that involved in *Staud v. Sill*? If the language of the court in that case is taken literally, the two statutes are distinguishable, but the court's statement that "there are no parties" is hardly accurate. There may or may not be parties in addition to the trustee under the deed of trust, depending upon whether or not anyone sees fit to resist the application. If, in a trustee's application for authority to invest, the beneficiaries do not choose to oppose the application, then for all practical purposes the trustee is the only party.

See also W. Va. Rev. Code (1931) c. 61, art. 7, § 2.
EXISTING LEGISLATION OF DOUBTFUL CONSTITUTIONALITY

Doubts with respect to the constitutionality of the public service commission act,289 of a statute providing for removal of certain elective officers by the governor,290 of a guardianship statute,291 and of a statute concerning investments by fiduciaries,292 have already been discussed. If the Hodges case and the cases which follow it are to be applied with logical consistency to other statutes, much other existing legislation may be unconstitutional.

The board of embalmers and funeral directors may grant, refuse, revoke and suspend licenses to engage in the business of embalming or funeral directing.293 The right of "appeal" is given from the board's decision to the circuit court. It is provided that on the appeal to the circuit court, "Such court shall thereupon hear and determine such case as in other cases of appeal." This apparently means that the court may substitute its judgment for that of the board. According to the 1935 decision in the Eddy case,294 "revocation of a license is no more a judicial function than that of licensing; . . . both are a part of the regulatory measure." If the Hodges case is followed, and if the Eddy case is followed, the entire act setting up the board of embalmers and funeral directors is unconstitutional!

Provision is made by statute295 for the sterilization of inmates of certain institutions who are "insane, idiotic, imbecile, feebleminded or epileptic". Several factors are to be taken into account by the public health council in determining whether or not an inmate should be sterilized, including "the welfare . . . of society". An appeal lies from the decision of the council to the circuit court, which may "affirm, revise or reverse in whole or in part . . . and enter such order as it deems just and right . . . ." According to the Hodges case, weighing advantages "from the standpoint of the state as a whole and the people thereof" is legislative. If the Hodges case is followed, and if the determination of what is for "the welfare . . . of society" is also legislative, then since under the statute the circuit court may substitute its judgment for that

289 See pp. 293, 305, supra.
290 See p. 339, supra.
291 See p. 365, supra.
292 See note 288, supra.
293 W. VA. REV. CODE (1931) C. 30, art. 6, § 7.
295 W. VA. REV. CODE (1931) c. 16, art. 10, §§ 1-2.
of the council, the entire act providing for sterilization of mental defectives is unconstitutional!

The public health council is given power to amend regulations under the public health laws, a violation of which constitutes a misdemeanor. The power is rather clearly legislative. "Any person aggrieved by any order of the public health council . . . may . . . appeal to the circuit court . . ." In the Baker case it was held that the words, "shall be allowed the right of appeal to the circuit court of such county for the purpose of determining the equity of such maximum allowance", gave the circuit court power to substitute its judgment for that of the county court. If it is the word "appeal" that accounts for this result, and if the Baker case is followed, the entire act setting up the public health council is unconstitutional!

The department of mines may enter an order "restraining further mining operations in proximity to any well, except under such conditions as the department may impose". 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." According to the Danielley case, determining what method of sewage disposal should be used is "executive". If the determination of what conditions to impose upon further mining in proximity to a well is like deciding upon a method of sewage disposal, and if the Danielley case is followed, 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!

The commissioner of securities has power to limit the price at which securities may be sold, and may prescribe the amount of commission to be allowed on sales of securities. Such price-fixing the West Virginia court regards as legislative. The circuit court has power to review orders of the commissioner. It is provided that "The finding of the commissioner as to the facts, if supported by evidence, shall be conclusive." However, it is also

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203 Id., c. 16, art. 1, § 3.
204 Id., c. 16, art. 1, § 13.
205 Id., c. 16, art. 4, § 12. See also id., c. 22, art. 2, § 18; c. 22, art. 4, §§ 3-4.
206 Id., c. 22, art. 4, § 12.
207 Id., c. 32, art. 1, § 8.
209 W. VA. REV. CODE (1931) c. 32, art. 1, § 19.
provided that the court may enter a "judgment or decree, affirming, modifying or setting aside, in whole or in part, any order of the commissioner..." The West Virginia court apparently has never determined the effect of a provision conferring upon a reviewing court the power to modify, but the United States Supreme Court has consistently held that the action of a court having the power to modify is of the same character as the action of the tribunal whose order is reviewed.303 If, therefore, the West Virginia court follows the well established rule of the United States Supreme Court, and if the strict attitude of the Hodges, Baker, Danielley and Staud cases is followed, the entire Blue Sky Law, or a large portion of it, depending upon separability, is unconstitutional!

Chapter 30 of the Code deals with professions and occupations, including physicians, dentists, pharmacists, nurses, optometrists, certified public accountants, veterinarians, chiropodists, architects, engineers, osteopaths, midwives, and chiropractors.304 In article 1 is a general provision that a person whose license is refused, suspended or revoked by a board may petition the circuit court, which "may enter an order affirming, revising, or reversing the decision of the board if it appears that the decision was clearly wrong." If, as was held in 1935 in the Eddy case,305 the revocation of a license is legislative, if, as the United States Supreme Court has consistently held,306 the power to modify or revise makes the action of the court of the same character as the action of the board, and if the West Virginia court persists in its attitude taken in the Hodges case and others like it, then the entire chapter 30 is unconstitutional!

303 Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908); Keller v. Potomac Elec. Co., 261 U. S. 428, 440, 43 S. Ct. 445, 67 L. Ed. 731 (1923); Porter v. Investors Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226 (1932). These cases do not involve statutes making administrative findings conclusive if supported by the evidence. But it would seem that such a provision is immaterial, as long as the court has the power to modify. The only effect of the conclusiveness of the findings if supported by the evidence is that the court's power to modify will be exercised only in cases in which the evidence does not support the findings. No case has been found which passes upon this unusual combination of a provision for conclusiveness with a provision for judicial power to modify. Of course, the court might hold that this feature of the statute distinguishes the cases above cited.

304 The general provision for review, contained in W. Va. Rev. Code (1931) c. 30, art. 1, § 9, specifically excepts attorneys at law, and the article on embalmers and funeral directors has its own provision for review.


306 See note 303, supra.
Why multiply examples? The Code is filled with statutes creating administrative tribunals, and provision is usually made for some kind of judicial review. Enough has been said to show that the validity of much existing legislation is at least questionable if the court is to apply with logical consistency its holdings in the Hodges case and those which follow it. The purpose of this demonstration, of course, is not to prove existing legislation unconstitutional but to indicate the far-reaching effect of decisions such as that in the Hodges case. Should all of this legislation be stricken down without reasons more persuasive than those set forth in the opinions of the Hodges, Baker, Danielley and Staud cases?

CONCLUSION

Problems concerning the extent to which courts should review action of administrative officials and tribunals are intensely practical. They cannot be solved by abstract speculation about the theory of separation of powers. The solutions should depend upon factors such as the competency and fairness of the particular official or tribunal, the relative need for legal training or for specialized training in some other field in order that the issues may be properly decided, the importance of the rights involved considered in connection with whatever additional security may be afforded by the relatively cumbersome judicial process as compared with the more facile but sometimes arbitrary administrative process,\textsuperscript{307} the public confidence in and respect for the particular agency, the importance in certain classes of cases of confronting witnesses instead of reading a printed record, the presence or absence of opportunity for review by an appellate administrative body, the increased delay and expense resulting from appeals, the additional burden which review imposes upon courts, the importance of informality of procedure before administrative tribunals and the extent to which a full review by a court accustomed to strict legal procedure tends to cause undue formality at an administrative hearing, the facts that "Responsibility is the great developer of men"\textsuperscript{308} and that one whose findings are to be reviewed

\textsuperscript{307} Mr. Justice Brandeis, who has often favored administrative finality where others have opposed it, declared in behalf of a unanimous court in Ng Fung Ho v. White, 269 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922): "The difference in security of judicial over administrative action has been adverted to by this court."

\textsuperscript{308} In dissenting in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 933 (1936), Mr. Justice Brandeis declared: "In deciding whether the Constitution prevents Congress from giving finality
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may tend to direct his primary efforts to preparing the record instead of to the proper settlement and decision of cases, the relative susceptibility of the particular tribunal and of courts to political or other ulterior influence.

In a few cases the West Virginia court has referred to some such factors in its opinions. In other cases such factors have remained inarticulate but nevertheless may have been influential or decisive. But judicial opinions dealing with review of administrative action usually have been devoted principally to the theory of separation of powers, often suggesting what has been called a "tyranny of labels". Thus, according to the opinions, the review of tax assessments revolves around seven undefined and undefinable labels. The role of separation of powers in public utility cases may be of serious consequence, for many West Virginia decisions in this field seem to deny the degree of judicial review required by the Federal Constitution as interpreted by a 1920 decision of the United States Supreme Court. The consistent West Virginia practice in public utility cases is apparently in violation of the Federal Constitution, and if, as seems to be true, although the West Virginia court's language is not entirely clear, this practice is required by an interpretation of article V, then the separation of powers clause of the state constitution as interpreted by the West Virginia court is unconstitutional under the Federal Constitution. In the review of workmen's compensation cases, the court consistently pays lip service to the finality which it apparently deems the separation of powers to require, but, for reasons not stated in the opinions, the court in practice often does not accord such finality. In the review of action of miscellaneous agencies, judicial opinions usually talk the language of a strict doctrine of separation of powers, although the results of many cases seem to indicate a much more liberal interpretation.

Broadly speaking, the theory of separation of powers has usually pervaded West Virginia judicial opinions, but, until 1931, most of the results of cases have probably been in a general way

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to findings as to value or income where confiscation is alleged the Court must consider the effect of our decisions not only upon the function of rate regulation, but also upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?"
consistent with results that might have been reached by a more pragmatic approach. Since 1931, however, several important statutes have been held unconstitutional in their entirety because they violated an unusually strict interpretation of separation of powers; indeed, the holdings have been so extreme that doubt has been cast upon the constitutionality of much existing legislation.

The thesis of this article is that the theory of separation of powers as it has usually been interpreted in the opinions of the West Virginia court, and especially as interpreted in several cases since 1931, has been positively harmful in attempting to solve problems with respect to which courts should review administrative action. The soundness of Montesquieu's theory, limited as Madison and Story limited it, is not questioned: "His [Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department of the government is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." But the West Virginia court has too often interpreted literally or very strictly the words of article V: "... nor shall any person exercise the powers of more than one [department of the government] at the same time. . . ." A literal interpretation of this clause, and even a strict interpretation, must be rejected as unsound and unworkable. The reasons are quite overwhelming:

1. The answers to 20th century questions about West Virginia tax officials, the public service commission, the workmen's compensation commissioner, and other agencies, 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.

2. A strict interpretation of the separation of powers clause is historically unsound.310

3. The founders of the West Virginia constitution, in drafting other provisions, were not themselves guided by a strict interpretation of separation of powers. For example, the constitution confers legislative powers upon the governor, judicial powers

309 Quoted from Madison, Federalist, No. XLVII (1788).
upon the legislature, both judicial and nonjudicial powers upon the county courts, and the removal power (whatever its character) is conferred upon courts, governor, and legislature.

4. The theory of separation of powers as interpreted by the West Virginia court is dependent upon the impossible task of applying with precision terms which have no precise meaning. Such terms as "judicial", "legislative" and "executive" are not susceptible of definition.11

5. Even though the application of such terms to particular functions might be possible without definition, the West Virginia court has been unable to apply these terms consistently. For example, the assessment of property for taxation has been regarded as nonjudicial, judicial, nonjudicial, and judicial, in that order. The same function performed by a county court has been called judicial, nonjudicial and quasi judicial. The court has denominated one function "legislative judicial". In several cases, whether a function is judicial or nonjudicial seems to depend not upon the character of the function but upon the nature of the tribunal.

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311 Mr. Justice Holmes, dissenting in Springer v. Philippine Islands, 277 U. S. 189, 211, 48 S. Ct. 480, 72 L. Ed. 845 (1928): "It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."

CARDozo, THE GROWTH OF THE LAW (1924) 132: "I have been surprised to see how many partisans the notion of a separation of powers rigid and perpetual — the judges the interpreters, the legislature the creator — is able even in our day to muster at the bar."

LASKI, AUTHORITY IN THE MODERN STATE (1919) 71: "It [separation of powers] is in fact a paper merit for the simple reason that in practice it is largely unworkable . . . The truth is that the business of government does not admit any exact division into categories."

Interstate Commerce Commissioner Eastman, The Place of the Independent Commission (1928) 12 CONST. REV. 95, 97: "The cataloging of the duties of an independent commission by tags representing the three traditional subdivisions of the Government is little more than an interesting mental exercise."

Indeed, there is nothing in the nature of things to require a tripartite division of governmental powers. The constitutions of two states, Indiana and Oregon, provide four kinds of powers, including the "administrative" with the traditional three. One school of thought has advocated a two-fold division. The author of a text has classified governmental powers into five categories. In a sense, the West Virginia court recognizes seven, adding to the traditional three the quasi judicial, the quasi legislative, the administrative and the ministerial.

It is recognized that there are those who take a different view. For example, in Green, The Separation of Governmental Powers (1920) 2 LAM. L. BULL. 373, legislation and adjudication are defined, and the conclusion is advanced that, "... the cases show it [separation of powers] to be active, effective and capable of consistent application."
The grant of a certificate of convenience to operate a bus line is either judicial or legislative, depending upon the presence or absence of a property right; the revocation of a beer license is judicial; the revocation of an optometrist’s license to practice “is no more a judicial function than that of licensing”. These inconsistencies (and many others) spring not from judicial shortcoming in applying labels, but from the impossibility of properly deciding cases on the basis of a “tyranny of labels”.

6. Many functions are not wholly judicial, wholly legislative, or wholly executive. The failure of a strict interpretation to recognize this fact is the source of much confusion. The court has tried to make pegs of very irregular shapes fit round or square holes.

7. Separation of powers is apparently responsible for the court’s unreal language in workmen’s compensation cases to the effect that the commissioner’s findings will not be set aside unless contrary to the clear preponderance of the evidence. And examination of what the court has done, as distinguished from what it has said, reveals that the court has frequently substituted its judgment for that of the commissioner in reversing findings of fact.

8. Judicial opinions which talk the language of separation of powers, even when the court reaches a result consistent with a wholly pragmatic analysis, tend to obscure the nature of the problem. Argument of counsel should not be directed to speculations about an abstraction but to an inquiry into concrete facts with respect to convenience and efficiency in government.

9. Some administrators may be political appointees without special training, incompetent, unintelligent, ignorant not only of the specialized field in which they work but also of elementary principles of law and justice. The court’s holdings in the Hodges, Baker, Danielley, and Staud cases seem to raise 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. In the creation of new administrative agencies, a wise legislative policy may sometimes require a rather complete judicial review. 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 court’s strict interpretation of separation of powers in cases such as the Hodges case prevents the legislature from carrying out such an obviously sensible program.
10. If the court continues to interpret the separation of powers clause as it was interpreted in the Hodges and succeeding cases, much existing legislation will needlessly be held unconstitutional.

11. Every municipal charter which confers upon a municipal council executive, legislative and judicial powers violates a literal interpretation of article V.

12. "Effective regulation demands implementation with all three of the governmental powers in question. The task of the commission is unitary in nature, and to accomplish the task properly it must have all the needed tools. We must choose between effective regulation on the one hand and, on the other, a rigid adherence to the doctrine of separation of powers."

13. Able West Virginia judges in the past have rejected a strict interpretation of the doctrine of separation of powers in favor of a more pragmatic interpretation. Such judges include Brannon, Dent, Holt, Poffenbarger. The flavor of Judge Brannon's discussion, for example, is suggested by such words as "faeility", "necessity", "expediency", "usefulness".

14. To interpret article V so as to place greater emphasis upon essentially practical considerations would not require a radical departure but only a choice among inconsistent precedents. The extreme holdings since 1931 may harmonize with much of the language of earlier cases, but many holdings before 1931 interpret separation of powers liberally. Thus, the court has held that circuit courts may exercise nonjudicial functions in assessing

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313 An attitude similar to that of these West Virginia judges has often been taken by the United States Supreme Court. It is described in Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers (1924) 37 Harv. L. Rev. 1010, 1014-16: "From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction . . . Even more significant than the decisions themselves are the considerations which induced them, and the insistence on an abstract doctrine of separation of powers which they rejected. 'The necessities of the case,' 'to stop the wheels of government,' 'practical exposition,' are the variations in the motif of the decisions. The dominant note is respect for the action of that branch of the government upon which is cast the primary responsibility for adjusting public affairs.'

Powell, Separation of Powers (1912) 27 Pol. Sci. Q. 215, 238: "The doctrine of the separation of governmental powers . . . as a complete denial of the capacity of one department of the government to exercise a kind of power assumed to belong peculiarly to one of the others, does not obtain in our public law beyond the confines of the printed page."
property for taxation, in incorporating towns, in establishing ferries, in selling school lands, in settling county boundary disputes, in approving bond issues, and in appointing officers. The supreme court of appeals itself now reviews tax assessments, at the same time declaring the function to be "administrative." And the supreme court, though not required by statute to do so, has, in modifying a legislative order of the public service commission, exercised what is probably a legislative function. The supreme court has apparently undertaken to substitute its judgment for that of an executive officer, the attorney general, in determining whether or not a municipal bond issue should be approved. The court has specifically recognized that the public service commission exercises "quasi judicial", "legislative", "ministerial" and "executive" functions.1

Other instances of a sanctioned violation of a strict doctrine of separation of powers are discussed in the foregoing pages.

15. Due process and other provisions of the bill of rights constitute adequate safeguards against arbitrary action; the theory of separation of powers is not a satisfactory tool to use for this purpose.

This study has not attempted an answer to the question: To what extent should courts review administrative action? Its province is limited to pointing out some practical considerations that should be taken into account, and to an attempted demonstration that separation of powers as often interpreted constitutes an obstruction to the solution of the problem. The proper extent of judicial review will no doubt vary from one agency to another, and will change with respect to a particular agency as circumstances change. If a legislative committee has made adequate investigation into the work of a given agency, it may be appropriate to provide by statute the extent of judicial review. Perhaps the legislative policy in many cases should be so to draft the statute as to leave open the question of the extent of judicial review.315

The courts will then be free to determine the question as special facts may require. If the obstruction of separation of powers were removed by a more liberal judicial interpretation, the briefs and arguments of counsel and the deliberations of the courts could

be directed to wholly practical considerations such as those herein outlined, and the question would be determined by a relatively scientific method instead of by futile speculations about an abstraction.

More than a century ago Mr. Justice Story discerned the pitfall with respect to separation of powers which has caused the West Virginia court so much difficulty: "... a perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government ...." Mr. Justice Story perceived a truth not always recognized by the West Virginia court: "But the true and only test must, after all, be experience, which corrects at once the errors of theory and fortifies and illustrates the eternal judgments of nature."