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## Constitutional Law--Separation of Powers--Water Power Act

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## STUDENT NOTES

CONSTITUTIONAL LAW — SEPARATION OF POWERS — WATER POWER ACT. — The West Virginia Water Power Act of 1929<sup>1</sup> was drafted paternalistically to encourage a tardy development “in order to conserve and utilize the energy of the power streams”.<sup>2</sup> It exacted only a small annual charge from the licensee rather than a royalty on gross revenue derived from the sale of power.<sup>3</sup> It made the license practically perpetual.<sup>4</sup> The membership of the Public Service Commission, together with the Governor, formed a body to investigate the effects of any proposed development, and to grant a license only when the advantages substantially exceeded the disadvantages from the viewpoint of the State as a whole and the people thereof.<sup>5</sup> Any party of record could appeal as a matter of right from any final decision of the commission to the circuit court of Kanawha County with a trial *de novo* on the original record before the commission and upon any additional evidence offered and, thereafter, appeal to the Supreme Court of Appeals in the usual manner.<sup>6</sup> Assuming to protect the public interest, several citizens actively opposed an application for a license for the so-called Cheat River project and challenged the validity of the act upon constitutional grounds.<sup>7</sup> *Held*, that the legislature cannot commit to the executive or judiciary primarily legislative powers, that the entire act is invalid as an illegal delegation of such powers to the Governor and to the circuit court, and that the application for the license be dismissed. *Hodges v. Public Service Commission*.<sup>8</sup>

We are not concerned here with the wisdom of the particular economic theory which the legislature adopted, but rather with the administrative features of the act. The court recognized the

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<sup>1</sup> Acts of 1929, c. 58; W. VA. REV. CODE (1931) c. 31, art. 9; Simonton, *The West Virginia Water Power Act* (1930) 37 W. VA. L. Q. 1.

<sup>2</sup> W. VA. REV. CODE (1931) c. 31, art. 9, § 1.

<sup>3</sup> W. VA. REV. CODE (1931) c. 31, art. 9, § 6.

<sup>4</sup> W. VA. REV. CODE (1931) c. 31, art. 9, § 4; Simonton, *op. cit. supra* n. 1, at 9-10, 29-31.

<sup>5</sup> W. VA. REV. CODE (1931) c. 31, art. 9, §§ 1-3.

<sup>6</sup> W. VA. REV. CODE (1931) c. 31, art. 9, § 13; Simonton, *op. cit. supra* n. 1, at 54-55.

<sup>7</sup> The Circuit Court of Kanawha County adjudged the act constitutional, but reversed the Commission's order granting the license, and remanded the proceedings. The power company appealed, and the citizens cross-assigned error in the decision as to the constitutionality of the act.

<sup>8</sup> 159 S. E. 834 (W. Va. 1931).

familiar presumption in favor of the validity of legislation.<sup>9</sup> That it reached a contrary result is not surprising, however, in view of the court's historical approach. Treating the separation of powers doctrine legalistically will inevitably produce inconsistencies. As to an earlier water power act providing for no appeal from the decision of the commission, it was decided that no right of appeal existed to the exercise of the legislative function of granting franchises.<sup>10</sup> Apparently such delegation of *legislative* power to the commission is valid in spite of a decision that members of the commission are *executive* officers.<sup>11</sup> Numerous cases hold that rate-making is legislative, that only final orders of the commission will be reviewed under the statutory right of appeal, and that findings of the commission will only be disturbed when it has acted arbitrarily either contrary to the evidence or without supporting evidence.<sup>12</sup> But later the court extended its jurisdiction to *experimental* orders as well.<sup>13</sup> An act providing Supreme Court control over the action of the attorney-general in approving a bond issue was upheld because it was considered purely administrative not involving discretion, but one judge believed that this gave the court power to compel an executive officer to perform an act in a manner *contrary to his judgment*.<sup>14</sup> An act conferring power on circuit courts to revoke a city ordinance on petition of ten tax-payers is an invalid delegation of legislative power,<sup>15</sup> but acts empowering such courts to issue certificates of incorporation to cities, towns and villages,<sup>16</sup> or to

<sup>9</sup> *Supra* n. 8, at 835.

<sup>10</sup> Royal Glen Lumber Co. v. P. S. C., 91 W. Va. 446, 113 S. E. 749 (1922); Howell v. P. S. C., 78 W. Va. 664, 90 S. E. 105 (1916).

<sup>11</sup> Weil v. Black, 76 W. Va. 685, 86 S. E. 666 (1915).

<sup>12</sup> Harrisville v. P. S. C., 103 W. Va. 526, 138 S. E. 99 (1927); United Fuel Gas Co. v. P. S. C., 103 W. Va. 306, 138 S. E. 388 (1927); Huntington v. P. S. C., 101 W. Va. 378, 133 S. E. 144 (1926); Pittsburgh, etc., Gas Co. v. P. S. C., 101 W. Va. 63, 132 S. E. 497 (1926); B. & O. Ry. Co. v. P. S. C., 99 W. Va. 670, 130 S. E. 131 (1925); B. & O. Ry. Co. v. P. S. C., 90 W. Va. 1, 110 S. E. 475 (1922); Huntington v. P. S. C., 89 W. Va. 703, 110 S. E. 192 (1921); Kelly Axe Mfg. Co. v. United Fuel Gas Co., 87 W. Va. 368, 105 S. E. 152 (1920); Charleston v. P. S. C., 86 W. Va. 526, 103 S. E. 673 (1920); Mill Creek Coal Co. v. P. S. C., 84 W. Va. 662, 100 S. E. 557 (1919); N. & W. Ry. Co. v. P. S. C., 82 W. Va. 408, 96 S. E. 62 (1918); B. & O. Ry. Co. v. P. S. C., 81 W. Va. 457, 94 S. E. 545 (1917); Bluefield v. Bluefield Water Co., 81 W. Va. 201, 94 S. E. 121 (1917); State v. B. & O. Ry. Co., 76 W. Va. 399, 85 S. E. 714 (1915); United Fuel Gas Co. v. P. S. C., 73 W. Va. 571, 80 S. E. 931 (1914).

<sup>13</sup> Charleston v. P. S. C., 83 W. Va. 718, 99 S. E. 63 (1919). But *cf.* Bluefield v. Bluefield Water Co., *supra* n. 12, refusing to review an experimental order.

<sup>14</sup> State v. England, 86 W. Va. 508, 516, 103 S. E. 400, 404 (1920).

<sup>15</sup> Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635 (1887).

<sup>16</sup> Elder v. Incorporators of Central City, 40 W. Va. 222, 21 S. E. 738 (1895); *In re* Town of Union Mines, 39 W. Va. 179, 19 S. E. 398 (1894).

review tax assessments of the Board of Public Works" are valid since the constitution confers on circuit courts, as an arm of the legislature,<sup>18</sup> such "supervisory jurisdiction as may be prescribed by law".<sup>19</sup> The court in the Water Power case on a reconsideration determined that "supervisory jurisdiction" as limited by the article on separation of powers<sup>20</sup> meant a "juridical jurisdiction" and that circuit courts could not aid, therefore, in administering the water power act which involved a matter of *state-wide interest*. It recognized as an established practice but did not approve a limited breakdown of the doctrine as to such *local matters* as incorporating cities and reviewing assessments.<sup>21</sup>

The provision making the Governor a member of the commission might have been upheld.<sup>22</sup> If we distinguish between the delegation of the power to make law and the delegation of the authority to execute a law, the powers delegated to the commission may be said to be purely administrative and not legislative. The legislature assumed the responsibility of making the primary declaration of policy as to water power development.<sup>23</sup> It outlined the conditions under which licenses should be awarded, and set out guide-posts for the determination of facts upon which the act would operate to accomplish the intent of the legislature.<sup>24</sup> Proceedings before the commission are certainly not legislative in the sense of establishing law to be applied to future cases, but

<sup>17</sup> *Wheeling Bridge Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551 (1894); *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. 632 (1893).

<sup>18</sup> *In re Town of Union Mines*, *supra* n. 16, at 182.

<sup>19</sup> W. Va. Const., art. 8, § 12.

<sup>20</sup> W. Va. Const., art 5, § 1.

<sup>21</sup> *Hodges v. P. S. C.*, *supra* n. 8, at 836, where the court further said: "Recognizing the force of that inhibition (i. e. constitutional separation of powers) . . . it 'necessarily follows' if an act, 'in any degree, requires the circuit court to exercise legislative powers, it is to that extent void'. We are mindful that courts have not drawn 'abstract analytical lines of separation' (37 HARV. L. REV. 1014) between the departments, and that there is some overlapping of judicial and administrative duties." But, the court concluded that "the plain language of article 5 calls, not for construction, but only for obedience," since encroachments are only proper when incidental to the performance of legitimate judicial functions. Is the West Virginia Constitution any more sacred in this respect than the Federal Constitution? In *Springer v. Philippine Islands*, 277 U. S. 189, 211, 48 S. Ct. 480, 485 (1928), Mr. Justice Holmes said: "It does not seem to need argument to show that however we may disguise it by veiling words, we do not, and can not 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."

<sup>22</sup> The writer acknowledges that much of the argumentative material here is drawn from brief of counsel in the Water Power Case.

<sup>23</sup> W. VA. REV. CODE (1931) c. 31, art. 9, § 1.

<sup>24</sup> W. VA. REV. CODE (1931) c. 31, art. 9, §§ 3, 6.

seem to be "quasi-judicial"<sup>25</sup> in determining the rights of the individual applicant. On the same reasoning the United States Supreme Court has held that conferring power to alter tariff rates on the President with the advice of the Tariff Commission is not void as an improper delegation of legislative power.<sup>26</sup>

Accepting the court's view that the delegation of power is legislative, the provisions for review by the circuit court, as in the cases involving Workmen's Compensation<sup>27</sup> and rate regulation,<sup>28</sup> might have been construed to confer only original jurisdiction to review the commission's orders as to purely judicial matters. The United States Supreme Court has gone even further in rate cases in permitting review of findings of fact as well as law.<sup>29</sup> The crux of the problem is in the even more radical authorization of the circuit court to receive *new evidence* as well as the original record before the commission, since plausibly this makes the court the real administrator of the act. How far, if at all, the decision rested on this factor is difficult to determine. It has been suggested as a possible construction to uphold the act that the circuit court be bound to give great weight to the commission's findings of fact, especially when the new evidence is cumulative.<sup>30</sup> *Quaere*: should the innovation as to new evidence be sufficient alone to invalidate an act?<sup>31</sup>

<sup>25</sup> The term "quasi-judicial" has been used by our own court, *State v. B. & O. Ry. Co.*, 76 W. Va. 399, 407, 85 S. E. 714, 718 (1915).

<sup>26</sup> *Hampton v. U. S.*, 276 U. S. 394, 48 S. Ct. 348 (1928). Similarly as to the delegation to the Secretary of the Treasury of certain administrative powers to enforce the income tax act, *Brushaber v. Union P. Ry. Co.*, 240 U. S. 1, 36 S. Ct. 236 (1916). For a full discussion of the problem as to federal executive officials see Welch, *The Flexible Provisions of the Tariff Act* (1926) 13 Va. L. Rev. 206.

<sup>27</sup> *DeConstantin v. P. S. C.*, 75 W. Va. 32, 83 S. E. 88 (1914).

<sup>28</sup> *Supra* n. 12.

<sup>29</sup> *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527 (1920) (construing a statute authorizing a commission to fix charges of public service corporations to be powerless to withhold from the courts the authority to determine the question of confiscation according to their own independent judgment). But *cf.* *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445 (1923) (invalidating a congressional enactment insofar as it attempted to confer jurisdiction on the United States Supreme Court to exercise legislative power on review, but upholding the same as to the courts of the District of Columbia under their peculiar jurisdiction. The water power act seems to be within this decision, however, since the appeal from the circuit court's decision to the Supreme Court of Appeals was to be upon the record in the circuit court in the usual manner).

<sup>30</sup> This suggestion is from brief of counsel.

<sup>31</sup> The objection to the reception of new evidence by the circuit court is that the court in effect must exercise legislative power, but the United States Supreme Court in the Keller case, *supra* n. 29, apparently saw no objection to the exercise of legislative power by state courts saying "Congress may clothe courts of the district (of Columbia), not only with the jurisdiction and

The court, receding from the position to which past decisions might logically impel it, draws an arbitrary line in applying the separation of powers doctrine strictly to a matter of state-wide interest. It cites in bold relief a United States Supreme Court decision of 1880 extolling this doctrine.<sup>52</sup> Time has disproved earlier fears. Aside from the growth of commissions, the instances have been comparatively few in which the legislature has sought to burden greatly other branches of government. The proper function of this doctrine is not to establish a system of checks and balances.<sup>53</sup> More recent decisions treat it as a testing instrument of the reasonableness of the legislature's administrative scheme under the differing circumstances of cases and times.<sup>54</sup> If the water power act is unconstitutional, it is because the administrative features are unreasonable and not because of an invalid delegation of power. The legislature has declared its policy as to water power development, and its wisdom in such matters should not be judicially questioned. If the power to regulate exists, the fact that the legislature has created additional safeguards by executive supervision and judicial review, should not invalidate the act because of Montesquian conceptions of the division of power.

—BERNARD SCLOVE.

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CORPORATIONS — DISABILITY OF CORPORATION TO ACT AS AFFECTING FIDUCIARY DUTY OF DIRECTOR TO STOCKHOLDER. — The Columbia Oil Company (hereafter called the Columbia) is a corporation whose principal office is at Sistersville, West Virginia. It was successful and had properties in a number of states. A decision was made (which was probably well known to all stockholders) to enter the Wyoming field, and the Big Horn Oil & Gas

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powers of Federal courts in the several states, but with such authority as a State may confer on her courts".

<sup>52</sup> *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377 (1880). But Laski, *Authority in the Modern State* (1919) 70, 71, writes: "The one obvious method by which the past sought refuge from the dangers of authority has proved in fact elusive (referring to this doctrine). It is in fact a paper merit for the simple reason that in practice it is largely unworkable. The business of government does not admit any exact division into categories".

<sup>53</sup> See Green, *The Separation of Governmental Powers* (1920) 2 ILL. L. BULL. 373-416.

<sup>54</sup> "In determining what it (one branch of government) may do in seeking assistance from other branches, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination," per Taft, C. J., *Hampton and Co. v. U. S.*, 276 U. S. 394, 406, 48 S. Ct. 348, 351 (1928).