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ADMINISTRATIVE LAW - JOHNSON ACT - JURISDICTION OF FEDERAL COURTS TO GRANT INJUNCTIONS AGAINST ENFORCEMENT OF RATE ORDERS OF STATE COMMISSIONS

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COMMENTS

ADMINISTRATIVE LAW — JOHNSON ACT — JURISDICTION OF FEDERAL COURTS TO GRANT INJUNCTIONS AGAINST ENFORCEMENT OF RATE ORDERS OF STATE COMMISSIONS — Two years have elapsed since the passage of the Johnson Act[1] restricting the jurisdiction of federal district courts to enjoin rate-making orders of state utility commissions; and the time is now ripe to survey the case law which has grown up under the act and to evaluate its results. It will be recalled that this statute came as the culmination of a long history of agitation to prevent federal court interference with what many believed to be a function which local state courts were better fitted to review.[2] The interference aimed at had resulted from the amendment to the Judiciary Act in 1875,[3] which for the first time gave to the

[1] Judicial Code, § 24(1), 48 Stat. L. 775, 28 U. S. C., § 41(1) (as amended, 1934).

[2] The best discussion of the legal situation in this field prior to the act is Lilienthal, "The Federal Courts and State Regulation of Public Utilities," 43 HARV. L. REV. 379 (1930). See also comments in 44 YALE L. J. 119 (1934) and 20 IOWA L. REV. 128 (1934).

[3] Judicial Code, § 24(1), 18 Stat. L. 470, 28 U. S. C., § 41(1).

federal courts jurisdiction in cases arising under the Constitution. In a few years' time, resort to the federal courts became the ordinary mode of seeking relief on the part of utilities which felt rate orders and other orders promulgated by state commissions to be confiscatory. Among the criticisms levelled at such procedure were (1) that federal trials consumed too much time, during which economic conditions frequently changed; (2) that such litigation was unduly expensive, since the court could not utilize the record of the hearing before the state commission but had to take evidence de novo;[4] (3) that the burden upon federal courts was too heavy; (4) that the problems involved in rate regulation were largely local and would be better understood by state judges; and (5) that federal judges were too inclined to favor the vested interests. Steps which had been taken prior to the Johnson Act to correct the alleged evils[5] were felt to be inadequate, and accordingly Congress passed the Johnson Act, which, with certain exceptions, took away the jurisdiction of the district courts to grant injunctions restraining state utilities commissions from enforcing their rate orders where there has been a "reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state."[6]

[4] The ordinary state practice is to limit the reviewing court to the evidence presented to the commission. Lilienthal, "The Federal Courts and State Regulation of Public Utilities," 43 HARV. L. REV. 379, note 2, 412 ff. (1930). It was charged in the Congressional debates on the bill that the undue cost of federal trials gave the utilities a club over state rate-making board, which at times was utilized by their suing for relief in state courts and shortly before judgment dismissing the action to begin anew in the federal court.

[5] These included the Mann-Elkins Act of 1910, which required a three-judge district court to sit in suits for injunctions against allegedly confiscatory rates, and an amendment a year later which provided that where a state court granted an injunction pendente lite in suits brought to enforce rate orders, the federal courts were deprived of jurisdiction. Judicial Code, § 266, 36 Stat. L. 557, 1162, 28 U. S. C., § 380.

[6] Judicial Code, § 24(1), 48 Stat. L. 775, 28 U. S. C., § 41(1). The complete terminology of the act is as follows:

> "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

The act was not designed to deprive the United States Supreme Court of appellate jurisdiction over decisions of state courts reviewing rates, but merely to restrict the jurisdiction of the trial courts.

In the two years since its enactment, six decisions have been handed down by lower federal courts involving their jurisdiction under the statute, one of which was affirmed by the United States Supreme Court in a per curiam opinion. Although many points of interpretation remain uncertain, awaiting further appellate decisions, some of the more important problems have been considerably clarified. The following discussion will consider in order, in the light of the decisions, (1) the constitutionality of the act, (2) the interpretation of its most critical provisions, and (3) the question of how far it has fulfilled the objectives of its framers.

1.

Although the Supreme Court has not directly passed on the constitutionality of the statute, the act has successfully hurdled constitutional barriers in the lower courts, and there seems to be little doubt but that it will ultimately be sustained. The failure of the utilities to raise constitutional objections in the four most recent cases involving the act indicates that its validity is being conceded. In an early case,[7] its validity was attacked on the theory that it is the duty of Congress to vest the whole judicial power in the inferior federal courts, and once having done so it cannot retract its grant. Despite the famous dictum of Justice Story to that effect in *Martin v. Hunter's Lessee*,[8] the court rejected the contention, relying chiefly on the authority of *Kline v. Burke Construction Co.*[9] A second objection upon which it was feared the act might run aground—namely, that the act in singling out rate orders in utility cases from other administrative orders is guilty of unreasonable classification violating the Fifth Amendment—has not yet been made; but it is probable that it will make little headway if presented.

2.

More substantial difficulties arise in connection with the interpretation of the act itself. How far it succeeds in its purpose to cut down

[7] Mississippi Power & Light Co. v. City of Jackson, (D. C. Miss. 1935) 9 F. Supp. 564.

[8] 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97 (1816).

[9] 260 U. S. 226, 43 S. Ct. 79 (1922). The Court said at page 234: "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . ."

The practice of Congress since the adoption of the Constitution, in not granting jurisdiction to the lower courts to hear cases arising under the Constitution until 1875 and in retracting it thereafter in certain classes of cases, was also pointed to in support of the construction taken.

the jurisdiction of the district courts in utility cases depends largely on the construction given to the third characteristic required of a commission order for the act to operate, namely that the order be made after "reasonable notice and hearing" and with an opportunity for a "plain, speedy, and efficient remedy" in the state courts. This question has been the focal point for most of the argument in the cases. The tendency of the decisions has been to make the answer coincide exactly with the requirements for due process of law in administrative tribunal procedure and review, as worked out by the Supreme Court.

Thus, in determining what constitutes a reasonable hearing, the court in *Mississippi Power & Light Co. v. City of Jackson*[10] adopted the criterion of whether due process had been observed, and quoted the Supreme Court to the effect that this means, "A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important. . . ."[11]

In *Mississippi Power Co. v. City of Aberdeen*,[12] the problem was raised as to whether it is sufficient that a fair hearing actually have been given, although the statute under which the commission acted failed to provide for such hearings or give the board the power to summon witnesses and compel testimony. The court held this to be a violation of due process and not a "reasonable hearing" under the Johnson Act, asserting that the statute itself must require a hearing. "Extra official or casual notice of a hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law the Constitution requires. . . ."[13]

Another question litigated in connection with the requirement of reasonable notice and hearing involves the impartiality of the tribunal. In both the case of *Georgia Continental Telephone Co. v. Georgia Public Service Commission*[14] and that of *Montana Power Co. v. Public Service Commission of Montana*,[15] the commissioners comprising the rate-making body had made sweeping pre-appointment promises to

[10] (D. C. Miss. 1935) 9 F. Supp. 564.

[11] (D. C. Miss. 1935) 9 F. Supp. 564 at 569.

[12] (D. C. Miss. 1935) 11 F. Supp. 951.

[13] (D. C. Miss. 1935) 11 F. Supp. 951 at 953. It is difficult to see why, assuming that a fair hearing was actually given, the federal court should have jurisdiction in the face of the Johnson Act merely because it was not provided by law. Perhaps, the chances of a fair hearing in such case are so slight that the court will not care to go into the evidence to see if it was given. But suppose the statute gives the board necessary powers to conduct a hearing and yet leaves it discretionary with the board to decide if it will hold one. It would seem, then, that if a fair hearing is actually conducted the federal court should be deprived of jurisdiction; but the dicta in the principal case seem to require that the statute make a hearing mandatory.

[14] (D. C. Ga. 1934) 8 F. Supp. 434.

[15] (D. C. Mont. 1935) 12 F. Supp. 946.

secure reductions, in the Georgia case going to the point of promising to consider facts outside the record in doing so. The utilities claimed that this prejudice on the part of the boards deprived them of reasonable hearings, and that injunctions should therefore issue. Both courts, however, denied relief, saying that, although denial of hearing or a consideration of outside evidence would constitute a violation of due process and not afford a reasonable hearing under the Johnson Act, the hearings in litigation could not be considered unfair in the absence of actual evidence to that effect, since public officers are presumed to do their duty.[16]

It is evident from the foregoing that the district courts, in deciding whether a reasonable hearing has been accorded the utility under the Johnson Act, have established as the criterion whether the hearing has violated in any way the standards of due process in procedure before administrative boards.[17] When we turn to the construction of the requirement of the availability of a "plain, speedy, and efficient remedy" in the state courts, we find the same tendency manifested. Such was the case in *Cary v. Corporation Commission of Oklahoma.*[18] In that case the question was presented as to whether or not a legislative review of the commission order in and by the state courts is sufficient under the act to defeat federal jurisdiction. By the term "legislative review" is meant the exercise of a reviewing power sufficient to consider the merits of the rate order as distinguished from legal errors therein, and to modify the order if deemed desirable.[19] The Oklahoma constitution provided review in the state supreme court, with power in the court to modify rates it adjudged confiscatory; but it was not clear whether there was any purely judicial review pro-

[16] In the Georgia case it was contended also that the commissioners had a financial interest in acting unfavorably to the utilities, since it was likely that the governor would remove them if they did not do so. The court held, however, that this interest was too remote, and, even if not, that the hearing was reasonable since a financially interested commissioner can properly sit if there is no one who can legally take his place.

[17] There are a variety of other problems concerning what constitutes due process in administrative hearings in addition to the two discussed above, which it would be unwise to consider in detail here in view of the lack of decisions particularly applying to the Johnson Act. See comment, 80 UNIV. PA. L. REV. 878 (1932); DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 106-108 (1927).

[18] (D. C. Okla. 1935) 9 F. Supp. 709, affd. 296 U. S. 452, 56 S. Ct. 300 (1935).

[19] In Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 S. Ct. 67 (1908), the Court held that an injunction against an administrative order could be had in the federal courts until the legislative process was complete, and that a review when the court had revisory powers was a legislative review for this purpose. The test for determining whether an appeal was legislative or judicial or whether the final act of the appellate body is forward or backward looking was laid down.

vided as well. The court held that since the review afforded was legislative in nature, it was insufficient to satisfy the constitution for two reasons: (1) because no ultimate appeal to the United States Supreme Court can be had from the decision of a state court acting legislatively,[20] and (2) because judicial review is necessary to due process.[21] Since there was doubt as to the opportunity for judicial

[20] For this reasoning to be sound, two propositions must be true: (1) the United States Supreme Court must be unable to hear appeals from decisions of the highest state court acting legislatively, and (2) the Constitution must confer the right to such ultimate appeal in all cases involving constitutional questions. As authority for the first proposition, the court cited Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627 (1933), where the Court in a dictum referred to the rule it had established that it cannot review decisions of legislative federal courts in cases where the latter have been given power to revise a decision of a commission considered unjust. However, those cases would seem to present a different situation from that involved in the principal case. There the lower court was exercising true legislative power, reviewing the discretion of the commission, whereas under the Oklahoma constitution the Supreme Court was limited to reversing unconstitutional rates. In two cases, the United States Supreme Court has actually decided, without discussion of the problem, that it could hear appeals from state court decisions affirming the commission order (where the state court had power to modify). Grubb v. Public Utilities Comm. of Ohio, 281 U. S. 470, 50 S. Ct. 374 (1930); Oklahoma Natural Gas Co. v. State of Oklahoma, 258 U. S. 234, 42 S. Ct. 287 (1922). This suggests the possibility that such review is judicial if the order is affirmed and legislative if modified; but the district court in the Cary case directly repudiated such a distinction. Even if the distinction were taken, however, the original difficulties would still be presented where the state court does modify the order: can review in the United States Supreme Court be had, and if not, is the Constitution satisfied?

Perhaps the solution to the problem will be found to lie in the overruling of the doctrine of the Prentis case, which has already been eaten into considerably. It would seem that a review where the court can modify an order only if, and to the extent that, it violates the Constitution might well be considered a judicial review, just as the setting aside by a court of a jury's verdict because of excessive damages and ordering a remittitur is the exercise of a judicial function. Even assuming that the test of legislation established by Justice Holmes in that case of whether the action looks toward the future is a sound one, the modification of a rate order because of its violation of due process can easily be considered a determination of existing, and not future, legal relationships.

On the second point, the Court cited no authority to show that the Federal Constitution confers the right of ultimate appeal to the Supreme Court in cases involving constitutional questions. The Court merely said that a "substantial right" was taken away by the state constitution. It seems questionable whether such right exists, although it is perhaps desirable that it should in order to have a unified system of deciding federal constitutional problems. Even if not required by the constitution, it might be said that the construction of the Johnson Act should go beyond the Constitution at this point, including it as part of an "efficient remedy." See 30 ILL. L. REV. 215 (1935).

[21] The court cited only Southern Railway v. Virginia, 290 U. S. 190, 54 S. Ct. 148 (1933), but the case hardly supports the position taken, since there

review in the state courts, the federal court held it had jurisdiction and proceeded to issue an injunction. The *Cary* case is important not only because of its holding that judicial review must be accessible in the state courts to defeat federal jurisdiction, but also because it indicates that state remedies may not be "plain, speedy, and efficient" if they violate other clauses of the Constitution than due process. Finally, the important principle is established with the sanction of the Supreme Court that mere doubt as to the availability of a constitutional state remedy will give the federal court jurisdiction.

Equally important is the question whether state review must permit the issuance of a stay of enforcement of the rate order pendente lite to defeat federal jurisdiction. This problem was involved in the *Montana Power Company* case[22] where the state statute provided that no injunction against enforcement of rate orders could be granted until final decree. The district court held that, although this provision clearly violated the due process clause,[23] there was a sufficient remedy in the state court, since the latter in a proper proceeding must declare that section unconstitutional and give interlocutory relief despite the statute. There is a striking contrast between this result and that in the *Cary* case: both rely upon due process, but in the *Cary* case the clause is used to sustain federal jurisdiction, while here it is employed to deny it. Can the two cases be distinguished? It can perhaps be said that it would have been impossible in the *Cary* case to adopt the conclusion reached here, because the legislative review in the former did not in itself transgress due process—the violation consisted rather in the failure of the state to provide an opportunity for judicial review.[24] Consequently, the court there could not say that the pro-

not only was no court review provided but there was likewise no provision for notice or hearing before the administrative tribunal, and the court emphasized both factors in its decision. The Supreme Court in affirming the decision in the Cary case has gone beyond the previous authority on the question of whether due process is satisfied by a legislative review, though there was some intimation in prior decisions that the stand here taken would be adopted. See Merrill, "Does 'Legislative Review' by Courts in Appeals from Public Utility Commissions Constitute Due Process of Law?" 1 IND. L. J. 247 (1926). It would seem an unfortunate result of the Prentis case and of conceptual distinctions between legislative and judicial review if a review before a court which otherwise possesses all the essentials of a good judicial review is to be considered a violation of due process merely because the court is given power to revise rates it judges confiscatory.

[22] (D. C. Mont. 1935) 12 F. Supp. 946.

[23] Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196, 44 S. Ct. 553 (1924); Oklahoma Nat. Gas Co. v. Russell, 261 U. S. 290, 43 S. Ct. 353 (1923); Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617 (1932) (dictum).

[24] Legislative review has been recognized as valid where it is not the only review available. Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 S. Ct. 67 (1908); Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617 (1932).

vision permitting modification of the rates must be declared void by the state court, leaving a good judicial review remaining. Whether this distinction will be taken or the *Montana Power Company* case repudiated must be decided by future cases. If its reasoning is upheld, however, the number of cases which can get into the federal courts is drastically cut down.

A third important problem as to the sufficiency of the state remedy is presented where the state statute provides that the findings of fact of the rate-making body will be binding upon the reviewing court, in violation of due process.[25] This situation was discussed in *Munoz v. Porto Rico Ry. Light & Power Co.*[26] The court held that such a statute could not be considered "efficient," though it might be "plain and speedy," and that the federal court therefore had jurisdiction.[27] It is difficult to see why the court here could not have said equally as well as in the *Montana Power Company* case that there was an efficient remedy because the state reviewing court was bound to disregard the stipulation in the statute and go ahead to exercise its own judgment on the facts; but this possibility evidently did not occur to the court.

We can conclude, therefore, that in subsequent cases which arise under the act the answer to the question of whether reasonable notice and hearing has been given and a plain, speedy, and efficient remedy made available will depend primarily upon whether the requirements of due process have been observed. A possible exception to be remembered is the reasoning of the *Montana Power Company* case that the remedy may be rendered sufficient by the fact that the state court is bound to disregard the unconstitutional provision. Is the criterion of construction of the provisions thus adopted sound? The act itself says nothing about due process; yet a remedy can hardly be called efficient if there is substantial doubt as to whether due process will be observed in carrying it out. On the other hand, in view of the extent to which the clause has been carried in supervising administrative procedure and protecting the right of utilities to review, it would seem unwise to go beyond its requirements in the interpretation of the Johnson Act.

[25] An independent judgment on the facts is required of the reviewing court. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527 (1920); St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720 (1936). Such statutes are relatively rare today. Comment, 44 YALE L. J. 119 (1934).

[26] (C. C. A. 1st, 1936) 83 F. (2d) 262. The court also decided that the Johnson Act does not apply in the territories, and that even if it did the action here was based on violation of a federal statute and not the Constitution and so did not come within its language. The discussion of the problem in question may, therefore, be considered mere dictum or it may be considered an alternative ground of decision.

[27] This is the only decision which has intimated any distinction between the meaning of the terms, "plain, speedy, and efficient."

In addition to the interpretation of the clause already discussed, dispute has arisen concerning several less critical provisions of the act which it is unnecessary to consider at length here. The courts have not yet had to construe the requirement that the order must "not interfere with interstate commerce." In one case,[28] a point was raised regarding the basis of jurisdiction for the federal suit, it being contended that the clause requiring jurisdiction to be "based solely upon the ground of diversity of citizenship or the repugnance of such order to the Constitution of the United States" makes it possible to get into the federal courts where both grounds are relied on. The court properly condemned the reasoning as specious, asserting that when a suit is brought on both grounds they stand or fall separately and not jointly.[29]

3.

While at first blush it might seem that restrictive interpretation has narrowed the act to the point of nullification and made the third characteristic required of an order a wide-open loophole, a statistical count of the cases indicates otherwise. Disregarding the *Munoz* case, where it was held that the Johnson Act did not apply at all, of the seven[30] suits for injunctions in the district courts, jurisdiction was denied in five and taken in only two. There is no way to tell how many suits which would otherwise have been brought were not commenced because of the existence of the statute. Moreover, if the state will provide by statute a hearing and review satisfying the requirements of due process, it is evident that it can defeat federal jurisdiction completely. (This may, of course, involve some hardship, because under the decision in the *Cary* case it may not provide as the only method of review one in which the court has power to modify constitutional rates.) Finally, the reasoning of the *Montana Power Company* case results in a denial of jurisdiction in many cases where due process has not been provided by the state statutes. Much depends on whether this reasoning will be followed by upper courts. If not, the scope of federal jurisdiction is greatly enlarged, for which the proper antidote to be administered by those who secured the passage

[28] Mississippi Power & Light Co. v. City of Jackson, (D. C. Miss. 1935) 9 F. Supp. 564.

[29] In the same case, the question was raised as to the effect of the subsequently-enacted federal declaratory judgment statute. Judicial Code, § 274d, 48 Stat. L. 955, 49 Stat. L. 1027, 28 U. S. C. (Supp. 1935), § 400. The court said a declaratory judgment could not be given, because that act only gives jurisdiction to grant such judgment in cases already within the jurisdiction of federal courts. See 30 ILL. L. REV. 215 at 225-226 (1935) for a discussion of this question.

[30] The Montana Power Company decision applied to three different suits.

of the act would seem to be to secure the deletion of the last clause. Yet that clause would seem to serve a useful purpose by operating as a lever to induce the states to provide a constitutional procedure in rate regulation.

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