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PUBLIC UTILITIES-INJUNCTION RESTRAINING ENFORCEMENT OF RATE ORDER OF STATE COMMISSION-JURISDICTION OF FEDERAL COURT UNDER JOHNSON ACT

PUBLIC UTILITIES—INJUNCTION RESTRAINING ENFORCEMENT OF RATE ORDER OF STATE COMMISSION—JURISDICTION OF FEDERAL COURT UNDER JOHNSON ACT—Plaintiffs sued in a federal district court for an injunction restraining enforcement of an order of the Corporation Commission of Oklahoma reducing gas rates. The plaintiffs alleged that the new rates were confiscatory and in violation of due process of law under the Fourteenth Amendment. It appeared that there was much uncertainty in the decisions of the Supreme Court of Oklahoma as to whether the appeal to that court from the orders of the Corporation Commission were legislative or judicial. *Held*, that in view of the uncertainty of an opportunity for judicial review of the orders of the Commission, there was not "a plain, speedy, and efficient remedy" in the state court within the meaning of the Johnson Act,[1] and that therefore the injunction would be

[1] The complete text of this act is: "Notwithstanding the foregoing provisions of this paragraph, 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,

granted. *Corporation Commission of Oklahoma v. Cary*, 296 U. S. 452, S. Ct. 300 (1935).

The federal injunction restraining state administrative action, particularly in the field of public utility rate regulation, has had a stormy career.[2] Relying upon the principle of comity, the Supreme Court in 1908 took the position that a federal injunction would not be granted restraining the order of a state public utility commission where the state had provided for a system of appeals legislative in nature and it appeared that the utility had not exhausted that remedy.[3] This position was later qualified by the corollary that the injunction would be refused only if a supersedeas or stay of the commission's order were allowed by the reviewing body of the state, since in the absence of a stay there might be confiscation by virtue of the reduced rates.[4] On the other hand, it was held that if the commission refused a petition for increase of rates the federal injunction would not necessarily issue merely because there was a refusal to stay the commission's order, but only when there was a refusal of supersedeas accompanied by an unreasonable delay in hearing the appeal.[5] The federal injunction was not, however, so limited where the appeal provided by the state statute was of a judicial nature. Resting upon the principle that the utility had its constitutional right to a choice of forms, it was held that in such case the utility need not exhaust its remedies in the state courts before seeking federal relief.[6] This interference of federal courts with state administrative action has been a constant source of resentment on the part of the states. It has resulted in a series of statutory limitations on the power of federal courts in the rate cases,[7] the latest of which, popularly known as the Johnson Act,[8] was involved in the instant case,

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." 48 Stat. L. 775, 28 U. S. C., §41(1) (1934).

[2] The history of the federal injunction and of the steps leading up to the Johnson Act are fully discussed in 20 IOWA L. REV. 128 (1934) and 44 YALE L. J. 119 (1934).

[3] Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67 (1908). The theory of this case was that it was presumed that the state reviewing body would act within constitutional bounds, and that the utility might get all the relief it sought in the state court.

[4] Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 S. Ct. 353 (1923); Pacific Tel & Tel. Co. v. Kuykendall, 265 U. S. 196, 44 S. Ct. 553 (1924).

[5] Cumberland Tel. & Tel. Co. v. Railroad and Public Utilities Comm., (D. C. Tenn. 1921) 287 F. 406.

[6] Prentis v. Atlantic Coast Line Co., 211 U. S. 210 at 228, 29 S. Ct. 67 (1908); Bacon v. Rutland R. R., 232 U. S. 134, 34 S. Ct. 283 (1914). On the subject of the federal injunction against state rate orders generally, see 1 UNIV. CHI. L. REV. 777 (1934).

[7] For a history and discussion of this legislation, see 20 IOWA L. REV. 128 (1934) and 44 YALE L. J. 119 (1934).

[8] 48 Stat. L. 775, 28 U. S. C., § 41(1) (1934). The constitutionality of this act has been upheld. Mississippi Power & Light Co. v. City of Jackson, (D. C. Miss. 1935) 9 F. Supp. 564.

the first Supreme Court decision in interpretation of that act. The inference to be drawn from this case is that the distinction between legislative and judicial appeals as a test as to whether or not the federal injunction shall issue has been turned around by the Johnson Act, or, at least, by the court's interpretation of it. Although it was formerly held that the federal injunction could be granted where the state appeal was judicial,[9] this remedy is apparently no longer available, since the opinion of the district court,[10] which is affirmed by the Supreme Court, is to the effect that, if the appeal is judicial, then the injunction cannot issue. On the other hand, the legislative appeal, with which the Supreme Court has formerly declared it will not interfere,[11] is regarded by the court as not satisfying the requirement of due process.[12] Therefore, the court says, since it is uncertain whether the plaintiff will get a judicial appeal, which is necessary for due process, or a legislative appeal, which does not satisfy the requirement of due process, it cannot be said that the plaintiff has a "plain" remedy.[13] The court takes the position that, since the Supreme Court could not hear an appeal from a "legislative" order of the state supreme court, the utility would be without a remedy in case of an adverse ruling by the state court.[14] The court has apparently overlooked Mr. Justice Holmes' opinion to the effect that, since the state appeal is legislative, the order of the reviewing body, not being judicial, is not res judicata, and could be attacked collaterally by an injunction issuing at that point.[15] Since the utility cannot be damaged pending the legislative appeal, it would seem that its remedy is as "plain, speedy, and efficient" as if the appeal were judicial, for in either case the utility would be able to get ultimate relief in a federal court. At the same time there is the possibility that the utility would get relief in the state court, thus making ultimate resort to the federal court unnecessary.[16] It is submitted that the court, in holding that the doubt as to the

[9] Bacon v. Rutland R. R., 232 U. S. 134, 34 S. Ct. 283 (1914).

[10] Cary v. Corp. Comm., (D. C. Okla. 1935) 9 F. Supp. 709. This district court opinion was commented upon before the case reached the Supreme Court in 35 COL. L. REV. 943 (1935). For a discussion of the Johnson Act and some of the cases under it, including the instant case in the district court, see Cullen, "Legislative Restriction of Federal Jurisdiction over Local Rate Regulation," 20 ST. LOUIS L. REV. 308 (1935); 30 ILL. L. REV. 215 (1935). The opinion of the Supreme Court in the instant cast is so brief that it is necessary to refer to the district court opinion in order to see fully the reasoning involved.

[11] Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67 (1908).

[12] Cary v. Corp. Comm., (D. C. Okla. 1935) 9 F. Supp. 709 at 711.

[13] Ibid., and see statement in the principal case on appeal, (U. S. 1935) 56 S. Ct. 300 at 301.

[14] Cary v. Corp. Comm., (D. C. Okla. 1935) 9 F. Supp. 709 at 711.

[15] "If the rate should be affirmed by the supreme court of appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of *res judicata*." Prentis v. Atlantic Coast Line Co., 211 U. S. 210 at 230, 29 S. Ct. 67 (1908).

[16] Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67 (1908).

nature of the state appeal denied a "plain" remedy, is proceeding upon a too literal interpretation of the word "plain." [17]

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[17] Pending the appeal of the instant case to the United States Supreme Court, the Supreme Court of Oklahoma held that the appeal from the orders of the Corporation Commission provided by its statute was judicial. Oklahoma Cotton Ginners' Assn. v. State, (Okla. 1935) 51 P. (2d) 327. The United States Supreme Court refused to consider this decision in the instant case, on the ground that the jurisdiction of the district court had already attached before the Oklahoma decision was rendered. Corp. Comm. v. Cary, (U. S. 1935) 56 S. Ct. 300 at 302.