

purchaser bank, although it may have acted in good faith at the time of purchase, could not be a holder in due course because it had been given notice prior to purchase.

The Supreme Court of the United States, referring to the Illinois Appeals case, said:⁸ "The State Supreme Court denied an application for certiorari without more. The argument is that this amounted to approval of the construction placed upon the statute by the Appeals Court. The point is not well taken." Although the Supreme Court of the United States may not have been bound by the *Northwestern National Bank Case* as was thus explained, it is to be regretted that the latter case was not followed as stating the better doctrine.

J. C. L. '36

FEDERAL JURISDICTION—JOHNSON ACT.—The Federal District Court for the Western District of Oklahoma had taken jurisdiction of a suit by Cary, a trustee of the Consolidated Gas Company, seeking an interlocutory injunction against the enforcement of reduced rates ordered by the Oklahoma Corporation Commission, and that court, sitting with three judges, had granted the injunction prayed for.¹ On appeal, the Supreme Court of the United States *per curiam* affirmed the decision. *Held* that the District Court did not abuse its discretion; that, in view of the uncertainty produced by "diametrically opposed" decisions of the state courts² as to the availability of judicial review to one contesting an order of the Corporation Commission in the state courts, and in view of certain provisions of the Oklahoma constitution,³ there was no "plain, speedy, and efficient" state remedy as contemplated by the Johnson Act⁴ and hence the District Court was not deprived of its jurisdiction.⁵

The Johnson Act, passed by Congress on May 14, 1934, after prolonged debate,⁶ was designed to eliminate unnecessary interference by the Federal

⁸ *Graham v. White-Pillips Co.*, *supra*, l. c. 30.

¹ *Cary v. Corporation Commission of Oklahoma et al.* (1935) 9 F. Supp. 709.

² *Swain v. Oklahoma Ry. Co.* (1934) 168 Okl. 133, 32 P. (2nd) 51; *Pioneer Telephone and Telegraph Co. v. State* (1914) 40 Okl. 417, 138 P. (2nd) 1033.

³ Article 9, Sections 20, 22, 23, Oklahoma Constitution.

⁴ 48 Stat. 775, 28 U. S. C. 41 (1). "An act to amend Section 24 of the Judicial Code." (Senate Bill No. 752.) It provides: no District Court shall have jurisdiction to restrain the enforcement of an order of an administrative board or commission of a State, "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."

⁵ *Corporation Commission of Oklahoma et al. v. Cary* (Dec. 23, 1935) 56 S. Ct. 300.

⁶ (a) In the Senate, 78 Cong. Rec. (Part 2) 1915-1920, 2014-2024, 2238-2243; (b) In the House, 78 Cong. Rec. (Part 8) 8322-8351, 8415-8433. (c)

Courts with State regulation of utilities⁷ and to assure to the States, best acquainted with the economic needs of their inhabitants, control in the first instance of the public utilities operating within their boundaries.⁸ Other purposes were to reduce the growing congestion in the Federal Courts by withdrawing this class of cases from their jurisdiction;⁹ to take away from the utilities the "unfair advantage" with which they were blessed by reason of their freedom to choose as between Federal and state judicial systems when they desired to contest the order of a state regulatory commission;¹⁰ and to do away with the greater expense characteristic of proceedings in the Federal Courts.¹¹

It was not contemplated by those who drew up the act that the utility should be deprived of ultimate appeal to the Federal Courts through review by the Supreme Court, but merely that the lower stages of the judicial process should be pursued through the state judicial system rather than the lower Federal Courts.¹² It has been held by the Supreme Court that due process requires that the issue of confiscation be left open to judicial review upon both the law and the facts¹³ and the same court has declined to review a legislative, as distinguished from a judicial, decision of a court.¹⁴ Since legislative review by state courts is sometimes the only review of public service commission orders which the state laws accord,¹⁵ doubt as to the interpretation which would be accorded to the requirement of the Johnson Act that there must be in the courts of the state "a plain, speedy, and efficient remedy . . . at law or in equity" arose before a decision of the Supreme Court was handed down.¹⁶ Must the remedy be judicial or will a legislative review suffice?

The lower Federal Courts have refrained from ruling on this question in other recent cases,¹⁷ since they have been able to find in the State sys-

In the Senate Judiciary Committee, Report No. 125, 73rd Congress, 1st Session.

⁷ *Supra*, note 6 (a), 1916, 1917; 6 (c) pp. 3, 7, 8.

⁸ *Supra*, note 6 (a); 6 (c) p. 9.

⁹ *Supra*, note 6 (a); 6 (c) pp. 16-22; Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Cornell L. Q.*, 499.

¹⁰ *Supra*, note 6; 6 (c) pp. 12-15, citing *Black and White Taxi Co. v. Brown and Yellow Taxi Co.* (1928) 276 U. S. 518.

¹¹ *Supra*, note 6 (c) p. 11.

¹² *Supra*, note 6 (a) pp. 1915, 1916, 1918, 1919.

¹³ *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287, 40 S. Ct. 527.

¹⁴ *Federal Radio Commission v. General Electric Co.* (1930) 281 U. S. 464, 50 S. Ct. 389.

¹⁵ *Supra*, note 3; see also *Virginia Constitution of 1902*, Section 156; *Virginia Code*, Section 4066.

¹⁶ Cullen, *Legislative Restriction of Federal Jurisdiction over Local Rate Regulation*, 20 *St. L. Law Review* 308; 44 *Yale Law Journal* 119; 20 *Iowa Law Review* 128.

¹⁷ *In Mississippi Power and Light Co. v. City of Jackson* (1935) 9 *Fed. Supp.* 564, the jurisdiction of the Federal District Court was denied where the State Chancery Court had independent jurisdiction to prevent by injunc-

tems the means by which the utility could obtain at least theoretical judicial review. But in the instant case the Supreme Court, in affirming the District Court's decision, plainly interprets the condition that the state remedy be "plain, speedy, and efficient . . . at law or in equity" as meaning that the remedy must be judicial and not purely legislative. Under the Oklahoma Constitution¹⁸ and the decisions of the Oklahoma Supreme Court¹⁹ that court in reviewing the rate-setting orders of the Corporation Commission acts in a legislative capacity. Furthermore, it is doubtful whether the Oklahoma lower courts can enjoin an order of the Corporation Commission which is alleged to be confiscatory.²⁰ Such "uncertainty" and "the consequent lack of the effective judicial remedy which was contemplated by the Act of May 14, 1934," warrant the District Court in taking jurisdiction. In so ruling the Supreme Court follows up the inference in *Prentiss v. Atlantic Coast Line*²¹ that after the plaintiff has pursued his legislative remedy to finality he may then have the issue of confiscation tried in a court of his own choosing.

What measure of judicial review will satisfy the "plain, speedy, and efficient" clause the Supreme Court does not decide. But, whatever the merits of exclusively legislative review may be,²² the Supreme Court has not abandoned its requirement for more than just that. Those states which provide no more²³ must to some extent revise their judicial systems if they would reserve to themselves, unimpeded by the lower Federal Courts, the regulation of public utilities. Those states which provide more²⁴ will need

tion the enforcement of municipal ordinances deemed void because confiscatory of property.

In *Montana Power Co. v. Public Service Commission of Montana*, U. S. Law Week, December 24, 1935, p. 333 (Federal District Court for Montana), jurisdiction was denied to the District Court under the presumption that an existing state statute, if it prevented, as its words would imply, a utility from obtaining temporary relief from an alleged confiscatory rate order, would be held unconstitutional under *Porter v. Investors Syndicate* (1932) 286 U. S. 461, 52 S. Ct. 617.

¹⁸ *Supra*, note 3.

¹⁹ *Atchison, Topeka, and Santa Fe Ry. v. State* (1909) 23 Okl. 510, 101 P. 262; *Atchison, Topeka, and Santa Fe Ry. v. Miller* (1911) 28 Okl. 109, 114 P. 1104; *Pioneer Telephone & Telegraph Co. v. City of Bartlesville* (1913) 40 Okl. 583, 139 P. 694; *City of Poteau v. American Indian Gas and Oil Co.* (1932) 159 Okl. 240, 18 P. (2nd) 523.

²⁰ *Supra*, note 2.

²¹ (1908) 211 U. S. 210.

²² Merrill, Does "Legislative Review" by the Court in Appeals from Public Utility Commissions Constitute Due Process of Law?, 1 *Indiana Law Review* 247.

²³ *Supra*, notes 3, 15, 19.

²⁴ Some states allow judicial review on appeal and injunctive relief in varying degrees. Revised Statutes of Missouri, 1929, Sections 5234-5237; Compiled Laws of Michigan, 1929, Sections 11042-11043; Code of Alabama, 1923, Sections 9679, 9691, 9699-9701.

Some states provide appeals by statute, limiting the evidence to be reviewed by the courts. Compiled Laws of Colorado, 1921, Sections 2960-2964; Digest of Statutes of Arkansas, Crawford and Moses, 1921, Sections 1698-1699.

less, if any, change. In the instant case the Supreme Court has looked at the judicial process of one of that class of states which provides through its courts the minimum in the way of judicial review for the utility contesting a regulatory commission's order. A recent decision of the Oklahoma Supreme Court, apparently conscious of the need for some change in policy, restricts the field of suits which fall within the constitutionally-prescribed legislative reviewing powers of the State Supreme Court.²⁵

J. H. W., JR. '37.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—RES IPSA LOQUITUR—EVIDENCE.—Plaintiff, employed by defendant as train auditor, was injured in a wreck of defendant's train in which the engine and five or six forward coaches left the track. Plaintiff had no control over the management of the train, knew nothing of the condition of the track or equipment, and was engaged only in the duty of collecting fares. In an action by plaintiff under the Federal Employers' Liability Act, it was held that plaintiff was entitled to go to the jury under the *res ipsa loquitur* rule. *Williams v. St. L. & S. F. Ry. Co.* (Mo. 1935) 85 S. W. (2d) 624.

This case is of interest in that, first, it holds the *res ipsa loquitur* rule applicable under the Federal Employers' Liability Act, an act which affects the liability of carriers by railroad engaged in interstate commerce to their employees in case of injury or death to the latter.¹ There are earlier cases which hold that the *res ipsa loquitur* rule cannot be invoked where the master-servant relation exists.² But it has been suggested that these cases are based upon a misinterpretation of two previous cases.³ The defendant in the case under discussion relied upon these two cases, among others, to support its contention that the *res ipsa loquitur* rule was inapplicable in cases arising between master and servant. The court, in disposing of this contention, states that these cases are merely authority for the proposition that the fact of an accident raises no presumption of negligence, a principle which is well established.⁴ The only reasons offered for withholding the rule in a suit by employee against employer are that the accident may be attributed to the negligence of a fellow servant, or to the contributory negligence of the plaintiff.⁵ These defenses have been abolished by the Act,⁶ and therefore the reasons for not applying the rule lose their force. What-

²⁵ *Oklahoma Cotton Ginners Assn. v. State* (1935) 51 P. (2nd) 327 (Okl.).

¹ 45 USCA sec. 51 et seq.

² *Chicago & N. W. Ry. Co. v. O'Brien*, C. C. A. 8, 1904, 132 Fed. 593; *Northern Pacific Ry. Co. v. Dixon*, C. C. A. 8, 1905, 139 Fed. 737; *Shandrew v. Chicago, St. P. M. & O. Ry. Co.*, C. C. A. 8, 1905, 142 Fed. 320.

³ 5 *Tulane Law Review* 321. The cases misinterpreted were *Patton v. Ry. Co.* (1901) 179 U. S. 658; *Looney v. Metropolitan Ry. C.* (1906) 200 U. S. 480.

⁴ Harper on *Torts*, p. 182.

⁵ *Ridge v. Norfolk Southern Ry. Co.* (1914) 167 N. C. 510, 83 S. E. 762.

⁶ 45 USCA secs. 51, 53, 54.