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## Review Of Powers Of Single Judge Under Three-Judge Acts

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## CASE COMMENTS

REVIEW OF POWERS OF SINGLE JUDGE UNDER  
THREE-JUDGE ACTS

United States statutes provide that an interlocutory or permanent injunction restraining the enforcement of any state statute<sup>1</sup> or act of Congress<sup>2</sup> on the ground of repugnance to the Constitution of the United States shall not be granted unless the application therefor is heard and determined by a district court of three judges.<sup>3</sup> The composition of and the procedure whereby the three-judge court is to be convened is provided for in 28 U.S.C. § 2284.<sup>4</sup>

A plaintiff makes application to a single district judge for an in-

<sup>1</sup>"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 36 Stat. 1162 (1911), as amended, 28 U.S.C. § 2281 (1952).

<sup>2</sup>"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 50 Stat. 752 (1937), as amended, 28 U.S.C. § 2282 (1952).

It will be noted that sections 2281 and 2282 provide that the "injunction . . . shall not be granted unless" the application is heard by a three-judge court. In the first case arising under the three-judge acts the district judge construed this language literally and held that while the statute deprived him of the power to grant an injunction, it did not deprive him of the power to deny the injunction. A writ of mandamus was granted by the Supreme Court which held that the district judge was totally without jurisdiction to hear the case on the merits. *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911).

<sup>3</sup>There are two other situations in which three-judge courts may be required:

(1) "[A]ctions for injunctions against the enforcement of the Interstate Commerce Commission's orders, or other administrative orders as to which the laws applicable to the Commission are also made applicable to other administrative agencies . . ." 1 Barron and Holtzoff, *Federal Practice and Procedure* 110-12 (rules ed. 1950).

(2) "[A]ctions brought by the United States under the anti-trust laws in which the Attorney General files a certificate that in his opinion the case is of general public importance." *Id.* at 112.

Although many of the principles brought out herein are applicable to all three-judge courts, this comment is directed specifically to those actions embraced within 28 U.S.C. §§ 2281 and 2282.

<sup>4</sup>36 Stat. 199 (1942), as amended, 28 U.S.C. § 2284 (1952).

junction restraining the enforcement of an act of Congress and asks that a three-judge court be assembled. The judge determines that the district court does not have jurisdiction to hear the application and dismisses the action without taking the necessary steps to assemble a court of three judges. Has the district judge exceeded his authority? That is to say, when an application is made for an injunction which Congress has provided must be heard and determined by a court of three judges, does the single district judge to whom the application is presented have the power to dismiss the action for lack of jurisdiction? And, aside from the question of power to determine jurisdiction, what is the proper method of review of the single judge's dismissal for lack of jurisdiction?

These perplexing questions, as well as a somewhat novel interpretation of section 2284 were presented in *Eastern States Petroleum Corp. v. Rogers*.<sup>5</sup> The movant, a petroleum corporation, filed a civil action in the District Court for the District of Columbia seeking an injunction restraining the enforcement of a federal taxing statute<sup>6</sup> on the ground that, as applied to it, the statute was unconstitutional. The single district judge, being of the opinion that exclusive jurisdiction of this case was in the Customs Court, the Court of Customs and Patent Appeals, and the Supreme Court, dismissed the action. Thereupon, the movant filed a motion with Chief Judge Prettyman, as Chief Judge of the Circuit, requesting leave to file an application for an order designating two judges to complete a court of three judges in order that the single judge's action might be reviewed.

The procedure employed by the movant to seek review is unusual in that heretofore, when a single district judge dismissed actions of this type, the plaintiffs sought review either by a petition to the Supreme Court for a writ of mandamus compelling the district judge to convene a three-judge court<sup>7</sup> or by appeal to the court of appeals.<sup>8</sup> Here movant is asking that a three-judge court be convened so that the *court of three judges* can review the action of the district judge. The reason for seeking this method of review is implicit in the con-

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<sup>5</sup>265 F.2d 593 (D.C.Cir. 1959).

<sup>6</sup>The taxing statute involved is one imposing an import tax on petroleum. Nowhere in his opinion does Chief Judge Prettyman give a citation to the statute, nor does he indicate that counsel informed him as to precisely which taxing statute is involved.

<sup>7</sup>See, e.g., *Ex parte Poresky*, 290 U.S. 30 (1933); *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911).

<sup>8</sup>See, e.g., *White v. Gates*, 253 F.2d 868 (D.C. Cir. 1958); *Jacobs v. Tawes*, 250 F.2d 611 (4th Cir. 1957); *Wicks v. Southern Pac. Co.*, 231 F.2d 130 (9th Cir. 1956).

struction that the movant places on section 2284, the text of which is set forth in the margin.<sup>9</sup> According to the movant:

1. Section 2284(5) provides flatly that no single judge shall dismiss the action. This means that he cannot dismiss the action.

2. Section 2284(5) also provides that the actions of a single judge are reviewable by the three-judge court. Therefore, if the single judge to whom application is made erroneously dismisses it, his action in doing so is reviewable *only by the three-judge court*.

3. Section 2284(1) provides that the district judge to whom application is made must *immediately* notify the chief judge of the circuit who must designate two other judges to complete a three-judge court. This means that the district judge and chief judge must do these things as purely ministerial acts. Thus if the district judge dismisses the action, the proper procedure is to have the chief judge appoint two other judges to complete the three-judge court which will then review the action of the district judge.

Chief Judge Prettyman considered this interpretation of the statute and rejected it, holding that a single district judge does have the power to dismiss, for lack of jurisdiction, an action which otherwise would have to be heard and determined by a court of three judges. And section 2284, which the petitioner contended flatly forbids a single judge to dismiss the action for any reason, is, according to Judge Prettyman, applicable only after a three-judge court is assembled. It is implicit in Judge Prettyman's reasoning that a three-judge court need not be convened unless there is jurisdiction in the district court and that the single district judge has the power to make this pre-

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<sup>9</sup>28 U.S.C. § 2284 (1952) provides:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

\* \* \*

"(5) Anyone of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing."

liminary determination. In refusing petitioner's motion, Judge Prettyman *in effect* held this procedure employed by the movant to seek review of the district judge's action to be improper, and he indicated that the proper method would be either a petition to the Supreme Court for a writ of mandamus or an appeal to the court of appeals.<sup>10</sup>

At certain places in the opinion it is difficult to follow Judge Prettyman's reasoning. However, the above analysis of the movant's contention and the court's holding is believed to be substantially correct. The opinion points up the fact that uncertainty still exists as to the procedure to be followed in giving effect to the three-judge acts. The purpose of this comment is to eliminate some of the existing confusion by establishing the following two propositions:

1. That the single district judge to whom an application is made for an injunction has the power, and it is his duty, to make the preliminary determination of whether any of the three-judge acts are applicable.

2. That the proper method of seeking review of the district judge's preliminary determination is by appeal to the court of appeals.

#### I. POWER OF THE DISTRICT JUDGE TO DETERMINE THE APPLICABILITY OF THE THREE-JUDGE ACTS

The first of the three-judge acts was approved March 3, 1911.<sup>11</sup> Thereafter, the cases construing the statute developed certain well-defined principles concerning the powers of the district judge. However, in the Act of April 6, 1942, Congress was thought to have curbed drastically the powers of the single judge. This statute makes it necessary to discuss this portion of the comment under two headings: A. Power of the district judge prior to 1942; and B. Power of the district judge after 1942.

##### *A. Power of the District Judge Prior to 1942.*

It is well established that a federal judge, to whom a bill of complaint is presented which is required to be heard by a three-judge court, has no power, acting alone, either to grant an interlocutory or

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<sup>10</sup>Judge Prettyman did not expressly rule that the procedure employed by movant was improper. However, that conclusion is implicit in his reasoning. See note 45 *infra*.

<sup>11</sup>36 Stat. 1162 (1911).

permanent injunction or to dismiss the action upon the merits.<sup>12</sup> However, the three-judge court is not a permanently established and continuing court within the framework of the federal judiciary. Three judges must be assembled each time a situation contemplated by one of the three-judge acts is presented. Necessarily, someone must set in motion the machinery to convene a three-judge court. That person is the district judge to whom the application is presented. It is submitted that the duty to set the machinery in motion necessarily includes the duty and power to make the initial determination of whether the action is one requiring disposition by a court of three judges.

In *Ex parte Poresky*<sup>13</sup> petitioner sought an interlocutory and permanent injunction restraining the enforcement of a Massachusetts compulsory liability insurance statute on the ground that it violated the fourteenth amendment to the United States Constitution and prayed that a three-judge court be convened to hear and determine his application. Jurisdiction of the district court was founded on the federal, *i.e.*, constitutional question—there was no diversity of citizenship.<sup>14</sup> The district judge determined that the federal question was plainly unsubstantial when viewed in light of prior Supreme Court decisions and dismissed the action for lack of jurisdiction. The petitioner then filed a motion with the Supreme Court for leave to file a petition for a writ of mandamus requiring the district judge to convene a three-judge court for the purpose of hearing petitioner's application for injunction.<sup>15</sup> In denying petitioner's motion, the Supreme Court clearly held that the district judge had the power to dismiss for lack of jurisdiction, stating that "while it is appropriate that a single District Judge to whom application is made for an interlocutory injunction . . . should carefully scrutinize the bill of complaint

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<sup>12</sup>*Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930); *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911).

<sup>13</sup>290 U.S. 30 (1933), 47 Harv. L. Rev. 707.

<sup>14</sup>The two most common bases of jurisdiction in the federal courts are diversity of citizenship, 28 U.S.C. § 1332 (1952), and the existence of a substantial federal question, 28 U.S.C. § 1331 (1952).

<sup>15</sup>At the time that *Poresky* was decided, § 266 of the Judicial Code, 36 Stat. 1162 (1911), governed the procedure to be followed in three-judge cases. It provided that "whenever such application [for injunction] . . . is presented . . . to a judge, he shall immediately call to his assistance to hear and determine the application two other judges . . ." This procedure was changed by Congress in 1948, 62 Stat. 968 (1948), 28 U.S.C. § 2284 (1952), so that now, when an application is filed with the district judge, he does not call two judges to his assistance, but rather he notifies the chief judge of the circuit who in turn designates two other judges to sit with the district judge in hearing the application. See note 9 *supra*.

to ascertain whether a substantial question is presented, to the end that the complainant should not be denied opportunity to be heard in the prescribed manner upon a question that is fairly open to debate, the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance *and no other ground of jurisdiction appears.*"<sup>16</sup> The Court then considered the substantiality of the constitutional question and, agreeing with the district judge that it lacked substance, denied petitioner leave to file for a writ of mandamus.

Writers had supposed that actions such as that involved in *Poresky* could not be dismissed by a single judge.<sup>17</sup> After *Poresky* was decided, it was thought that the power of the single judge to dismiss an action of the type requiring three judges would be limited solely to those situations in which the court lacked statutory jurisdiction.<sup>18</sup> However, *Poresky* proved to be but a stepping stone toward an even greater expansion of the power of the single judge.

In *Ex parte Buder*,<sup>19</sup> which was decided before *Poresky* and in which the precise question was not involved, the Court had said that "a substantial claim of unconstitutionality is necessary for the application of Section 266."<sup>20</sup> Then in *California Water Serv. Co. v. City of Redding*<sup>21</sup> the Court said:

"We have held that Section 266 of the Judicial Code does not apply unless there is a substantial claim of the unconstitutionality of a state statute or administrative order. . . . It is therefore the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable."<sup>22</sup>

As authority for this proposition the Court cited *Ex parte Buder*<sup>23</sup>

<sup>16</sup>290 U.S. at 32. (Emphasis added.)

<sup>17</sup>Bowen, When Are Three Federal Judges Required, 16 Minn. L. Rev. 1, 23 (1931).

<sup>18</sup>47 Harv. L. Rev. 707 (1934). The term "statutory jurisdiction," as used here, refers to the jurisdiction conferred on the federal courts by 28 U.S.C. § 1331 (evidence of a substantial federal question) and 28 U.S.C. § 1332 (diversity of citizenship) and the other special jurisdictional statutes.

<sup>19</sup>271 U.S. 461 (1926).

<sup>20</sup>Id. at 467. The "§ 266" referred to by the court is § 266 of the Judicial Code, 36 Stat. 1162 (1911), which was codified and re-enacted by Congress in 1948, 62 Stat. 968 (1948), and which is now 28 U.S.C. § 2281 (1952).

<sup>21</sup>304 U.S. 252 (1938).

<sup>22</sup>Id. at 254.

<sup>23</sup>271 U.S. 461 (1926).

and *Ex parte Poresky*.<sup>24</sup> It is of importance to note, however, that the Court's language did not limit the single judge's authority to dismiss to situations in which "the [constitutional] question lacks the necessary substance and no other ground of jurisdiction appears" as it did in *Poresky*.<sup>25</sup> The clear implication is that when the constitutional question is unsubstantial, the district judge has the power to dismiss the bill of complaint *although the court may have jurisdiction on some other ground*.<sup>26</sup>

Aside from these three decisions, which are considered landmark cases defining the power of the single judge in a three-judge court situation, there have been numerous cases reaffirming and extending the power of the single judge. In *J. B. Schermerhorn, Inc. v. Holloman*<sup>27</sup> the plaintiff sought an injunction to restrain county officers of Carter County, Oklahoma, from imposing and collecting a local personal property tax on the ground that to do so would violate the Constitution of the United States.<sup>28</sup> Jurisdiction of the district court was based on diversity of citizenship and the existence of a federal question. Plaintiff sought a special court of three judges. However, the trial court declined to convene such a court because it was of the opinion that an action to restrain *county* officers from enforcing a *local* tax was not one requiring a court of three judges. The trial court then dismissed the action because plaintiff had not exhausted his state administrative remedies. On appeal, the Court of Appeals for the Tenth Circuit affirmed the decision of the district judge, declaring that "a trial judge is authorized to determine in the first instance whether a case is one requiring disposition by a special court convened in ac-

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<sup>24</sup>290 U.S. 30 (1933).

<sup>25</sup>*Id.* at 32. (Emphasis added.)

<sup>26</sup>See *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, vacating 25 F. Supp. 771 (D.D.C. 1938). Here plaintiff sought an injunction restraining the enforcement of an act of Congress on the ground of its unconstitutionality. Since the validity of an act of Congress was involved, a three-judge court was convened. The court of three judges dismissed the complaint on the merits. From this dismissal, the plaintiff appealed directly to the Supreme Court. The Supreme Court held that the constitutional question was unsubstantial and that therefore the three-judge court had acted without jurisdiction. Since the three-judge court had acted without jurisdiction, the Supreme Court was without jurisdiction to hear a direct appeal from it. Therefore the court vacated the decree of the three-judge court and remanded the case to the single judge to be disposed of independently of the three-judge act.

<sup>27</sup>74 F.2d 265 (10th Cir. 1934), cert. denied, 294 U.S. 721 (1935).

<sup>28</sup>The plaintiff alleged that the situs of the property sought to be taxed by Carter County, Oklahoma, had always been in Minnesota and had been taxed there. It was contended that if Carter County taxed this property, the plaintiff would be subjected to double taxation in contravention of the United States Constitution.

cordance with the statute, and he is not required to call two additional judges to his assistance unless the case is of that nature."<sup>29</sup> The court further held that an action to enjoin county officers from imposing and collecting a local tax is not one requiring a three-judge court.

Other cases have held that when a bill of complaint otherwise cognizable only by a three-judge court is presented to a single district judge, a three-judge court need not be assembled when the district judge determines that an indispensable party has not been joined,<sup>30</sup> or that the court lacks equitable jurisdiction,<sup>31</sup> or that the relief asked for cannot be granted.<sup>32</sup>

It appears safe to say that before 1942 the district judge clearly had the power, and it was his duty, to scrutinize closely applications for injunctions which *apparently* called for disposition by a court of three judges and to ascertain whether in fact any of the three-judge acts were applicable. The acts might have been inapplicable for a number of reasons, the most prominent ones being:

- (1) Lack of statutory jurisdiction.
- (2) Lack of equitable jurisdiction.
- (3) Unsubstantiality of the constitutional question.
- (4) Action not within the purview of the statutes.<sup>33</sup>

#### *B. Power of the District Judge After 1942.*

In 1942 Congress passed a statute<sup>34</sup> defining the powers of a single district judge in cases requiring disposition by a court of three judges, the pertinent portion of which is as follows:

<sup>29</sup>74 F.2d at 266.

<sup>30</sup>*Osage Tribe of Indians v. Ickes*, 45 F. Supp. 179 (D.D.C. 1942), *aff'd per curiam*, 133 F.2d 47, *cert. denied*, 319 U.S. 750 (1943).

<sup>31</sup>*Farr v. O'Keefe*, 27 F. Supp. 216 (S.D. Miss. 1939); *Independent Gin & Warehouse Co. v. Dunwoody*, 30 F.2d 306 (M.D. Ala. 1928).

<sup>32</sup>*Pullen v. Patton*, 19 F. Supp. 340 (N.D. Tex. 1937).

<sup>33</sup>The situations embraced within this classification are similar to the one in *J. B. Schermerhorn, Inc. v. Hollomon*, 74 F.2d 265 (10th Cir. 1934). There plaintiff sought to enjoin a county officer from enforcing a local tax, and the three-judge act expressly applied only to applications for injunctions to restrain state officers from enforcing state statutes. See note 1 *supra*.

It should be noted that this listing and classification of reasons why the three-judge acts may be inapplicable is not intended to be exhaustive. More reasons may be found which do not fit conveniently into any of the categories listed. However, those set forth are believed to be the ones most often encountered.

<sup>34</sup>56 Stat. 199 (1942). In 1948 the statutes providing for three-judge courts were codified and re-enacted. 62 Stat. 968 (1948). The applicable portion of the 1942 enactment appears in substantially the same form as 28 U.S.C. § 2284(5) (1952).

"In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for [an] interlocutory injunction . . . any one of such three judges may perform all functions, conduct all proceedings . . . provided such single judge *shall not . . . dismiss the action, or enter a summary or final judgment on all or any part of the action . . .*"<sup>35</sup>

Writers were of the opinion that the statute was intended to and did, in fact, overrule such cases as *Poresky*, thus stripping the single judge of his power to determine the applicability of the three-judge statutes.<sup>36</sup> In most of the cases arising after the passage of the statute the court's attention was not directed to it, and consequently the cases were decided as they would have been prior to 1942.<sup>37</sup> However, in *Jacobs v. Tawes*<sup>38</sup> the question of what effect the statute had upon the power of the district judge was squarely put in issue. There the plaintiff sought an injunction restraining the Comptroller of the Treasury of the State of Maryland from collecting Maryland sales and use taxes on the ground that as applied to him they were unconstitutional. The district judge dismissed the complaint on the ground that the requisite jurisdictional amount was not involved. The plaintiff appealed to the Court of Appeals contending that section 2284(5) prevented the district judge from dismissing the action although it was patently clear that the district court lacked jurisdiction. The Court of Appeals, in a lucid opinion by Chief Judge Parker, affirmed the decision of the district judge, saying that:

"The rule laid down in *Ex parte Poresky*, supra, has not been changed by anything contained in 28 U.S.C. section 2284. That section was enacted to codify and clarify the practice with respect to the composition of and procedure before courts of three judges. Subsection 5 of the section was manifestly intended to regulate procedure *after* the court of three judges had been constituted, not to abrogate the salutary rule that the judge before whom the action was brought may dismiss it if the complaint does not state a case within the jurisdiction of the District Court."<sup>39</sup>

<sup>35</sup>56 Stat. 199 (1942). (Emphasis added.)

<sup>36</sup>*Berueffy*, *The Three Judge Federal Court*, 15 *Rocky Mt. L. Rev.* 64, 73 (1942); 62 *Harv. L. Rev.* 1398 (1949); 28 *Minn. L. Rev.* 131 (1943).

<sup>37</sup>See, e.g., *Linehan v. Waterfront Comm'n*, 116 *F. Supp.* 401 (S.D.N.Y. 1953); *Priceman v. Dewey*, 81 *F. Supp.* 557 (E.D.N.Y. 1949), 62 *Harv. L. Rev.* 1398 (1949); *New Jersey Chiropractic Ass'n v. State Bd.*, 79 *F. Supp.* 327 (D.N.J. 1948).

<sup>38</sup>250 *F.2d* 611 (4th Cir. 1957).

<sup>39</sup>*Id.* at 614. (Emphasis added.)

In *Eastern States Petroleum Corp. v. Rogers*, Chief Judge Prettyman, faced with precisely the same question that was involved in *Jacobs v. Tawes*, recognized that decision as persuasive authority and resolved the question in the same manner. He reasoned that since the first sentence of section 2284(5) reads "any one of the three judges of the court," the whole subsection necessarily presupposes the existence of a three-judge court and that, therefore, subsection five would be applicable only if and after a three-judge court is convened. Since the subsection in no way affected the power of the single judge before the three-judge court is convened, Judge Prettyman ruled that the district judge had the power to determine jurisdiction just as he did before the statute was enacted.

It is submitted that the construction placed on section 2284(5) by Chief Judges Parker and Prettyman is correct and that the accuracy of these decisions is demonstrated by the fact that this precise point has not often been raised since passage of the statute.<sup>40</sup> It would appear that the 1942 statute did not diminish in the slightest degree the power of the single judge to determine the applicability of the three-judge acts and that such power is just as extensive as it was prior to 1942.<sup>41</sup>

## II. PROPER METHOD OF SEEKING REVIEW OF DISTRICT JUDGE'S DETERMINATION OF APPLICABILITY OF THE THREE-JUDGE ACTS

Certain things are clear concerning review procedure in three-judge court actions. First, when the three-judge court is properly assembled and decides the question presented, appeal will lie directly to the Supreme Court.<sup>42</sup> Secondly, a Court of Appeals has no jurisdiction to decide appeals from decisions of three-judge courts properly

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<sup>40</sup>The principal case and *Jacobs v. Tawes*, 250 F.2d 611 (4th Cir. 1957), are the only instances encountered by the writer in which the point was raised.

<sup>41</sup>For cases sustaining the power of the single judge to determine the applicability of the three-judge acts see, e.g., *White v. Gates*, 253 F.2d 868 (D.C. Cir. 1958) (constitutional question not substantial); *Booker v. Tennessee Bd. of Educ.*, 240 F.2d 689 (6th Cir. 1957), cert. denied, 353 U.S. 965 (1957) (constitutional question not substantial); *Wicks v. Southern Pac. Co.*, 231 F.2d 130 (9th Cir. 1956) (constitutional question not substantial); *Haines v. Castle*, 226 F.2d 591 (7th Cir. 1955) (constitutional question not substantial); *Van Buskirk v. Wilkinson*, 216 F.2d 735 (9th Cir. 1954) (failure to allege jurisdictional amount); *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946); *Patterson v. Hardin*, 145 F. Supp. 299 (S.D. Ind. 1956); *Linehan v. Waterfront Comm'n*, 116 F. Supp. 401 (S.D.N.Y. 1953); *Priceman v. Dewey*, 81 F. Supp. 557 (E.D.N.Y. 1949) (no equitable jurisdiction); *Carras v. Monaghan*, 65 F. Supp. 658 (W.D. Pa. 1946). But see *Webb v. State Univ. of N.Y.*, 120 F. Supp. 554 (N.D.N.Y. 1954).

<sup>42</sup>62 Stat. 928 (1948), 28 U.S.C. § 1253 (1952).

assembled.<sup>43</sup> Thirdly, when the single district judge undertakes to grant an interlocutory injunction or to enter a final decree, either dismissing the bill upon the merits or granting a permanent injunction, the only method of review is to petition the Supreme Court for a writ of mandamus compelling the trial judge to convene a three-judge court.<sup>44</sup> However, it is not so clear what the correct review procedure is when the district judge first determines that the bill does not present an action required to be heard and determined by a three-judge court and then disposes of the case without causing a court of three judges to be convened.

It should be remembered that the sole purpose of the motion before Judge Prettyman in the principal case was to obtain review of the district judge's dismissal of movant's complaint because of lack of jurisdiction. The alternatives presented, said Judge Prettyman, were three:

(1) Petition the Supreme Court for a writ of mandamus compelling the district judge to take the necessary action to convene a three-judge court.

(2) Appeal to the court of appeals for the circuit to review the decision of the trial judge.

(3) The procedure employed in the instant case. That is, to file a motion with the chief judge of the circuit to convene a court of three judges forthwith, or to mandamus the district judge to take necessary steps to convene a three-judge court to the end that a court of three judges should review the single judge's action.

As pointed out earlier, Judge Prettyman *in effect* ruled that number three is actually incorrect.<sup>45</sup> That left numbers one and two,

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<sup>43</sup>28 U.S.C. § 1291 (1952).

<sup>44</sup>Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930).

<sup>45</sup>Judge Prettyman said that "if the statutes of 1942 and 1948 have not changed review procedure, the only proper method of review is by writ of mandamus from the Supreme Court. If these statutes have changed the method of review, it appears that an appeal will be to our Court of Appeals. Once I reach the conclusion that this movant has one of these alternative procedures open to it, then in so far as I am concerned, I shall not exercise the power of mandamus, even if I have it." Eastern State Petroleum Corp. v. Rogers, 27 U.S.L. Week 2398, 2399 (D.C. Cir. Feb. 5, 1959).

However, Judge Prettyman did specifically rule that a three-judge court need not be convened if the district court did not have jurisdiction and that the single judge had the power to determine the question of jurisdiction. He further held section 2284(5), upon which movant based his theory as to review procedure, to be applicable only after a three-judge court is assembled. It is submitted that this reasoning leads to the inescapable conclusion that the procedure employed by movant is in fact erroneous.

and although he did not decide which of these would be proper, he indicated that he *thought* that a petition to the Supreme Court for a writ of mandamus would be the only available remedy.<sup>46</sup>

It is submitted that the remedy of appeal to the court of appeals is also available, and it is the more logical procedure to be followed. As authority for the proposition that the only available remedy from dismissal by the district judge is by way of petition to the Supreme Court for a writ of mandamus, Judge Prettyman cited *Stratton v. St. Louis S.W. Ry.*<sup>47</sup> But that case is clearly distinguishable. In *Stratton* the Supreme Court held that when a district judge is presented with a complaint which is cognizable only by a court of three judges and when he, alone, decides the case *on the merits*, either granting or denying the relief asked for, the only available remedy is by way of mandamus from the Supreme Court. However, a different situation is presented when, as in the instant case, the district judge makes a preliminary determination that the action is one not requiring disposition by a court of three judges and then proceeds to dispose of the action on the merits or otherwise. The rule of the *Stratton* case applies only when the court either inadvertently<sup>48</sup> or deliberately<sup>49</sup> attempts to decide the *merits* of an action *which is required to be heard by a court of three judges*. Obviously, when a single judge de-

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<sup>46</sup>See quoted material in note 45 supra.

<sup>47</sup>282 U.S. 10 (1930).

<sup>48</sup>In the *Stratton* case it appears that it never occurred to the district court, to the court of appeals or to any of the parties that the action required a court of three judges. Therefore, the district judge did not make a preliminary determination as to the applicability of the three-judge acts and thus inadvertently decided the merits of an action which only a three-judge court had the power to hear.

<sup>49</sup>In *Wicks v. Southern Pac. Co.* the plaintiff sought an injunction on the ground of the unconstitutionality of certain acts of Congress and applied for a court of three judges. The district judge refused to convene a three-judge court because the constitutional question was plainly unsubstantial. The plaintiffs appealed the judge's decision to the Court of Appeals for the Ninth Circuit and then, in oral argument before that court, challenged the jurisdiction of the court to hear and determine the appeal from the district judge's action. The plaintiffs, basing their contention on the *Stratton* case, urged that the only method of obtaining review of the district judge's refusal to convene a three-judge court was by petition to the Supreme Court for a writ of mandamus. The court of appeals held that the trial judge did have the power to dismiss the action for lack of a substantial constitutional question, and that the court did have jurisdiction to entertain and dispose of an appeal from the district judge's dismissal of the case. The court further held that it is only when the district judge determines the three-judge act to be applicable and then deliberately disposes of the case on the merits that he acts without jurisdiction and that then the only remedy is by way of mandamus from the Supreme Court. 231 F.2d 130 (9th Cir. 1956), cert. and motion for leave to file petition for writ of mandamus denied, 351 U.S. 946 (1956), affirming 121 F. Supp. 454 (S.D. Cal. 1954).

termines the applicability of the three-judge acts, as it is his duty to do, he is not acting on the *merits* of the case. If, after determining that the action is not one required by Congress to be heard by a three-judge court, he then disposes of the case on the merits, or otherwise, he has not decided a case *which is required to be heard by a court of three judges*. Therefore, the *Stratton* case is clearly inapplicable in this situation.

The more logical procedure, and the one less burdensome on the Supreme Court, would be to await the final disposition of the case by the district judge and then appeal to the court of appeals putting in issue the district judge's decision as to the applicability of the three-judge acts, and also, if desirable, his decision as to the final disposition of the case. The writer is not unmindful of cases such as *Poresky*<sup>50</sup> in which the district court dismissed the application for lack of jurisdiction and the plaintiff petitioned the Supreme Court for a writ of mandamus. However, it is significant that all of the recent cases<sup>51</sup> on this point discovered by the writer support the procedure outlined above, including *Jacobs v. Tawes*,<sup>52</sup> in which Chief Judge Parker wrote:

"[I]t would certainly be absurd to require that, in a case of which the court manifestly lacks jurisdiction, the District Judge must notify the Chief Judge of the Circuit to call in two additional judges, the Chief Judge must call them in and all the cumbersome machinery of a court of three judges must be set in motion merely to dismiss the case. If the single District Judge in dismissing the case for lack of jurisdiction commits error, the error can be corrected by appeal to the Court of Appeals without burdening the Supreme Court with a direct appeal."<sup>53</sup>

### III. CONCLUSION

Although the power of a district judge, who is presented with a complaint of the type which can be heard only by a three-judge court, has never been defined by Congress, and although writers have sought to limit that power, it can be said that the district judge does have

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<sup>50</sup>290 U.S. 30 (1933).

<sup>51</sup>See, e.g., *White v. Gates*, 253 F.2d 868 (D.C. Cir. 1958); *Booker v. Tennessee Bd. of Educ.*, 240 F.2d 689 (6th Cir. 1957), cert. denied, 353 U.S. 965 (1957); *Jacobs v. Tawes*, 250 F.2d 611 (4th Cir. 1957); *Wicks v. Southern Pac. Co.*, 231 F.2d 130 (9th Cir. 1956); *Haines v. Castle*, 226 F.2d 591 (7th Cir. 1955); *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946); *J. D. Schermerhorn, Inc. v. Holloman*, 74 F.2d 265 (10th Cir. 1934).

<sup>52</sup>250 F.2d 611 (4th Cir. 1957).

<sup>53</sup>*Id.* at 615.