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FEDERAL PRACTICE - DECISION OF QUESTIONS PRELIMINARY TO THE CONVENING OF A THREE-JUDGE COURT

FEDERAL PRACTICE — DECISION OF QUESTIONS PRELIMINARY TO THE CONVENING OF A THREE-JUDGE COURT — Before the district judge can convene a three-judge court,[1] two preliminary questions must be decided. First, is the case within the jurisdiction of the federal courts? Second, is the case one to which the three-judge statute applies?

It may be necessary, in deciding either or both of these questions, to determine whether the claim of unconstitutionality, which is made against the statute or order challenged, is substantial.[2] When federal jurisdiction is claimed on the basis of a federal question, the federal question presented must be substantial, both on its face and in view of past decisions.[3] And it has been frequently said that a substantial claim

[1] "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. . . . The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court. . . . " U. S. C. tit. 28, sec. 380 (1926).

For a good discussion of the statute, see Hutcheson, "A Case for Three Judges," 47 HARV. L. REV. 795 (1934).

[2] See the full text of the opinion in Chapman v. Boynton, (D. C. Kan. 1933) 4 F. Supp. 43.

[3] Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 53 Sup. Ct. 549, 77 L. ed. 1062 (1933).

of unconstitutionality is one of the conditions precedent to the applicability of the three-judge statute.[4] When jurisdiction exists because of diversity of citizenship, there is no occasion to consider whether there is a substantial claim of unconstitutionality for purposes of the first question.[5] But this must be considered when inquiry is made as to the presence in the case of those elements which call into play the three-judge statute.[6] When diversity of citizenship is not present in the case and jurisdiction is claimed on the basis of a federal question, the substantiality of the claim of unconstitutionality arises in the consideration of both of the above questions. Of course a decision on this point for purposes of the first question automatically disposes of the second question in that regard.

The constitutionality of the state statute or order attacked is always the ultimate question in a case properly within the three-judge statute.[7] And the three-judge court alone has power to decide the case on the merits.[8] Therefore, it might reasonably be argued that the single judge should not be permitted to consider, in any respect, the constitutionality of the statute or order attacked.[9] But as illustrated above, the single judge must necessarily have power to consider the constitutionality of such statute or order to such extent as will enable him to determine whether the claim of unconstitutionality is substantial, if he is to decide the two preliminary questions.

A literal reading of the statute would indicate that the single judge is to be a mere "rubber stamp" [10] without power to decide any of the

[4] Chapman v. Boynton, (D. C. Kan. 1933) 4 F. Supp. 43; Cannonball Transp'n Co. v. American Stages, (D. C. S. D. Ohio 1931) 53 F. (2d) 1050; United Drug Co. v. Graves, (D. C. M. D. Ala. 1929) 34 F. (2d) 808; Ex parte Buder, 271 U. S. 461, 46 Sup. Ct. 557, 70 L. ed. 1036 (1926); Stratton v. St. Louis S. W. Ry., 282 U. S. 10, 51 Sup. Ct. 8, 75 L. ed. 135 (1930).

[5] United Drug Co. v. Graves, (D. C. M. D. Ala. 1929) 34 F. (2d) 808.

[6] United Drug Co. v. Graves (D. C. M. D. Ala. 1929) 34 F. (2d) 808.

[7] See the statute, n. 1, supra.

[8] Ex parte Metropolitan Water Co., 220 U. S. 539, 31 Sup. Ct. 600, 55 L. ed. 575 (1911); Ex parte Northern Pacific Ry., 280 U. S. 142, 50 Sup. Ct. 70, 74 L. ed. 233 (1929); Stratton v. St. Louis S. W. Ry., 282 U. S. 10, 51 Sup. Ct. 8, 75 L. ed. 135 (1930).

[9] See Bowen, "When Are Three Federal Judges Required?," 16 MINN. L. REV. 1 (1931).

"The shadowy line of demarcation between jurisdiction and the merits is apparent from the use of the jurisdictional test of a 'substantial federal question,' and undoubtedly there will be difficulty in defining just what is jurisdictional so as to permit action by the single judge and what pertains to the merits as to require the presence of two other judges." 28 ILL. L. REV. 839 at 844 (1934).

[10] See the very spirited opinion by Judge Bourquin in Great Falls Gas Co. v. Pub. Serv. Comm., (D. C. Mont. 1930) 39 F. (2d) 176.

questions in the case.[11] But in the recent case of *Ex parte Poresky*[12] the Supreme Court decided that the question of jurisdiction is a matter for the single judge.[13] This decision is certainly correct since a court can take no effective action whatever with respect to a case over which it has no jurisdiction.

The question regarding the applicability of the three-judge statute should likewise be decided by the single judge. This result has frequently been reached in regard to conditions precedent to applicability of the statute other than the substantiality of the claim of unconstitutionality.[14] But it has been said that the question of whether the claim

[11] "Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. . . ." U. S. C. tit. 28, sec. 380; n. 1, supra.

[12] 290 U. S. 30, 54 Sup. Ct. 3, 78 L. ed. 49 (1933), note in 28 ILL. L. REV. 839 (1934).

[13] This decision reveals the true import of an earlier case. In Madden Bros. v. Railroad & Warehouse Commission, (D. C. Minn. 1930) 43 F. (2d) 236, the single judge dismissed the bill for want of jurisdiction where federal jurisdiction was claimed on the basis of a federal question. Mandamus was granted by the Supreme Court, Ex parte Madden Bros., Inc., 283 U. S. 794, 51 Sup. Ct. 484, 75 L. ed. 1419 (1931), but the memorandum opinion there reported did not indicate whether the Supreme Court felt that the district judge merely erred or that he had exceeded his authority.

Bowen, in his article, "When Are Three Federal Judges Required?," 16 MINN. L. REV. 1, 23 *et seq.* (1931), expressed the view that the single judge should not decide the question of jurisdiction.

[14] There are several conditions precedent to the applicability of the three-judge statute. The statute applies only to actions: "(1) In which an application for interlocutory injunction is made and pressed, (2) to restrain the enforcement, operation, or execution of a state statute (including the orders of an administrative board or commission acting under and pursuant to the statutes of such state), (3) by restraining the action of some state officer in the enforcement or execution of such statute or order, and (4) where such relief is sought upon a substantial claim of unconstitutionality of the statute or order there involved." Cannonball Transp. Co. v. American Stages, (D. C. S. D. Ohio 1931) 53 F. (2d) 1050 at 1051. For cases in which the single judge was allowed to decide as to the presence in the case of these elements, see:

As to the 1st point above: Moore v. Fidelity & Deposit Co., 272 U. S. 317, 47 Sup. Ct. 105, 71 L. ed. 273 (1926).

As to the 2d point above: Ex parte Collins, 277 U. S. 565, 48 Sup. Ct. 585, 72 L. ed. 990 (1928), and cases therein cited.

As to the 3d point above: Ex parte Williams, 277 U. S. 267, 48 Sup. Ct. 523, 72 L. ed. 877 (1928).

As to the 4th point above: The single judge has been allowed to decide that there was *no question* of constitutionality in the case. Ex parte Buder, 271 U. S. 461, 46 Sup. Ct. 557, 70 L. ed. 1036 (1926); Ex parte Hobbs, 280 U. S. 168, 50 Sup. Ct. 83, 74 L. ed. 353 (1929). There are also cases in which the single judge has assumed the power to decide whether the claim of unconstitutionality was substantial. Independent Gin & Warehouse Co. v. Dunwoody, (D. C. M. D. Ala. 1928) 30 F. (2d) 306; United Drug Co. v. Graves, (D. C. M. D. Ala. 1929) 34 F. (2d) 808; Chapman v. Boynton, (D. C. Kan. 1933) 4 F. Supp. 43 (dictum). But apparently the Supreme Court has not ruled on the propriety of such action.

of unconstitutionality is substantial cannot be considered by the single judge except as to the question of jurisdiction.[15] This statement is based on the result reached in *Ex parte Poresky*[16] and the well-established rule that the single judge cannot dispose of the case on the merits. This latter rule is established by the following cases: *Ex parte Metropolitan Water Co.*,[17] *Ex parte Northern Pacific Ry.*,[18] and *Stratton v. St. Louis S. W. Ry.*[19] But to allow the single judge to decide whether the claim of unconstitutionality is substantial is obviously far different from allowing him to decide the constitutionality of the statute or order attacked and thus dispose of the case on its merits. Chief Justice Hughes, in the *Stratton* case, while denying the single judge the power to decide the constitutionality of the statute attacked, expressly said that a substantial claim of unconstitutionality is a prerequisite to the applicability of the three-judge provision. Chief Justice White, in *Ex parte Metropolitan Water Co.*, said, "the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious." But "meritorious" and "substantial" are obviously quite different. As for *Ex parte Northern Pacific Ry.*, it has been said:

> "The federal District Judge to whom that case was presented issued a temporary restraining order[20] pending a final determination by a three-judge court upon the merits as to whether or not an interlocutory injunction should be issued. Having granted a temporary restraining order, he had already committed himself to the fact that there was a substantial federal question involved, and, of course, was without jurisdiction to hear either the motion to dissolve the temporary restraining order or the motion to dismiss the bill on its merits." [21]

In other words, since the federal question in that case was the constitutionality of the state order, the single judge had already determined that the claim of unconstitutionality was substantial and so had decided

[15] 47 HARV. L. REV. 707 (1934).
[16] 290 U. S. 30, 54 Sup. Ct. 3, 78 L. ed. 49 (1933).
[17] 220 U. S. 539, 31 Sup. Ct. 600, 55 L. ed. 575 (1911).
[18] 280 U. S. 142, 50 Sup. Ct. 70, 74 L. ed. 233 (1929).
[19] 282 U. S. 10, 51 Sup. Ct. 8, 75 L. ed. 135 (1930).
[20] "Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid." U. S. C. tit. 28, sec. 380 (1926). See also n. 1, supra.
[21] Judge Hopkins in Chapman v. Boynton, (D. C. Kan. 1933) 4 F. Supp. 43 at 47.

that the case was one within the jurisdiction of the federal courts and also that it was a proper case for a three-judge court. Thus, to allow the single judge to decide the preliminary questions of jurisdiction and applicability is not inconsistent with the above rule which forbids him to dispose of the bill on its merits.

Sound policy and the Congressional purpose in enacting the three-judge statute make decision of these preliminary questions by the single judge highly desirable. By enacting said provision, Congress sought to insure adequate hearing and deliberation before interference with state statutes and thus to eliminate some of the conflict inherent in our federal system.[22] To allow the single judge to cut off an attack on a statute at its commencement is perfectly consistent with that purpose. Obviously, calling a three-judge court involves expense and inconvenience.[23] It is therefore desirable that an attempt be made to eliminate those cases which the three judges will merely turn aside because they are not within the jurisdiction of the federal courts or because they are not within the three-judge statute.[24]

J. I. L.

[22] Cumberland Tel. & Tel. Co. v. Pub. Serv. Comm., 260 U. S. 212, 43 Sup. Ct. 75, 67 L. ed. 217 (1922); Hutcheson, "A Case For Three Judges," 47 HARV L. REV. 795 (1934); 38 YALE L. J. 955 (1929).

[23] Ex parte Collins, 277 U. S. 565, 48 Sup. Ct. 585, 72 L. ed. 990 (1928). See 29 MICH. L. REV. 935 (1931) where it is argued that because of the purpose of the statute and the burden and inconvenience involved in calling a three-judge court, the Supreme Court should have interpreted section 266 of the Judicial Code (n. 1, supra) so as to make a three-judge court necessary only to *grant* an injunction.

[24] See for example: Cumberland Tel. & Tel. Co. v. City of Memphis, (D. C. W. D. Tenn. 1912) 198 Fed. 955; Connor v. Board of Com'rs of Logan County, Ohio, (D. C. S. D. Ohio 1926) 12 F. (2d) 789; Henrietta Mills Co. v. Rutherford County, (D. C. W. D. N. C. 1928) 26 F. (2d) 799; Cannonball Transp'n Co. v. American Stages, (D. C. S. D. Ohio 1931) 53 F. (2d) 1050.