

# YALE LAW JOURNAL

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Published monthly during the Academic Year by the Yale Law Journal Co., Inc.,  
Edited by Students and members of the Faculty of the Yale Law School.

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SUBSCRIPTION PRICE, \$4.50 A YEAR SINGLE COPIES, 80 CENTS  
Canadian subscription price is \$5.00 a year; foreign, \$5.25 a year.

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## THE THREE JUDGE RULE

The maintenance of balance between the state and federal power is one of the continuing problems created by our dual system of government. The Constitution of the United States provides that the Constitution and the laws made in pursuance

thereof shall be the supreme law of the land. Congress has provided procedural methods by which this supremacy shall be maintained. Section 237<sup>1</sup> of the federal Judicial Code provides for review by federal authorities of state judicial action, and under Section 24<sup>2</sup> federal courts have jurisdiction to restrain state encroachment on private federal rights. Prior to 1910, single judges in a federal district or circuit court, on ex parte hearings and affidavits, had held the enormous power of holding void acts of state legislatures and commissions, often for considerable periods, on the ground that they were unconstitutional. This situation was made less objectionable by the Act of June 18, 1910,<sup>3</sup> which required the concurrence of at least two of three judges who must be called in to sit in a suit for an interlocutory injunction to restrain the action of any officer of a state under a statute alleged to be unconstitutional. A temporary restraining order could be issued by a single judge, but was to remain in force only until the hearing and determination of the application for an interlocutory injunction. A direct appeal to the Supreme Court from an order granting or denying the interlocutory injunction was provided for. These provisions were incorporated into the Judicial Code as Section 266 in 1911.<sup>4</sup>

In 1913<sup>5</sup> the jurisdiction of the "three judge court" was extended to include the orders of state boards or commissions. The Supreme Court construed this to include attacks on such orders although the constitutionality of the statute under which the commission acted was not attacked.<sup>6</sup> But the jurisdiction of the federal court was limited by the provision that, if the alleged unconstitutional action of the state officers or board were stayed in a suit brought in a state court before the application in the federal court had been finally heard, the proceedings in the latter should be stayed until final determination of the suit in the state court. But the action in the state court, it was said, must be such that the same issues can be framed and the same questions considered as are raised in the federal court and the stay secured must protect the particular plaintiff seeking the aid of

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<sup>1</sup> 28 U. S. C. § 344 (1926).

<sup>2</sup> 28 U. S. C. § 41 (1926).

<sup>3</sup> The Mann-Elkins Act, Act of June 18, 1910, c. 309, § 17, 36 STAT. 539, 557 (1910). "This was a compromise between the wish on the part of the House to deprive the federal courts entirely of this jurisdiction, and the insistence of the Senate to the contrary." Pogue, *State Determination of State Law and the Judicial Code* (1928) 41 HARV. L. REV. 623.

<sup>4</sup> Act of March 3, 1911, c. 231, 36 STAT. 1162 (1911).

<sup>5</sup> Act of March 4, 1913, c. 160, 37 STAT. 1013 (1913).

<sup>6</sup> *Oklahoma Gas Co. v. Russell*, 261 U. S. 290, 43 Sup. Ct. 353 (1923); *Southern Ry. v. Query*, 21 F. (2d) 333 (E. D. S. C. 1927); *Louisville & N. R. R. v. Railroad Commission*, 208 Fed. 35 (M. D. Ala. 1913). *Contra*: *Michigan State Telephone Co. v. Odell*, 283 Fed. 139 (E. D. Mich. 1922).

the federal court.<sup>7</sup> And if a temporary restraining order had already been issued by the federal court when the stay in the state court was secured, the federal court retained its jurisdiction.<sup>8</sup> The stay might be vacated if the suit was not being prosecuted with "diligence and good faith."<sup>9</sup>

In 1925 the section was again amended to extend the requirement of three judges to the final hearing, from which also a direct appeal to the Supreme Court is allowed.<sup>10</sup> But this has been narrowly restricted to cases where a hearing for a preliminary injunction has also been had.<sup>11</sup> Thus the plaintiff is given an election, depending on whether he chooses to press for a preliminary injunction, of getting a three judge court and a direct appeal to the Supreme Court, or a single judge and an appeal to the Circuit Court of Appeals.

Section 266 does not purport to define exclusively the elements

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<sup>7</sup> Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 41 Sup. Ct. 272 (1921); Northwestern Bell Telephone Co. v. Hilton, 274 Fed. 384 (D. Minn. 1921).

<sup>8</sup> Union Light, Heat & Power Co. v. Railroad Commission, 17 F. (2d) 143 (E. D. Ky. 1926).

<sup>9</sup> Judicial Code § 266, 28 U. S. C. § 380 (1926).

<sup>10</sup> See Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925* (1925) 35 YALE L. J. 1, 10.

Prior to this act, the final hearing in the suit was had before a single judge. From his decree a direct appeal to the Supreme Court could be founded only upon the provisions of Section 238 [28 U. S. C. § 345 (1926)] as originally enacted. This permitted a direct appeal to the Supreme Court as the only method of review if the jurisdiction of the district court rested solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution. But where the jurisdiction of the district court was invoked upon other federal grounds as well as the one attacking the constitutionality of the state statute, an appeal might be taken to the Circuit Court of Appeals, with ultimate review in the Supreme Court if the case was of the class within its jurisdiction. See *Crescent Mfg. Co. v. Wilson*, 242 Fed. 462, 464 (C. C. A. 2d, 1917). But Section 238 was so far changed by the Act of 1925 that now there is no right of direct appeal on constitutional grounds unless the case arises under Section 266. Direct appeals are therefore now allowed from final decrees only where the hearing for an interlocutory injunction is required to be before three judges, where such hearing has been had, and a final decree by three judges issued.

<sup>11</sup> *Smith v. Wilson*, 273 U. S. 388, 47 Sup. Ct. 385 (1927). The Court here refused to decide whether it would be error if three judges had sat. But in *Chicago, R. I. & P. R. R. v. United States*, 6 F. (2d) 888 (N. D. Tex. 1925), *aff'd*, 274 U. S. 29, 47 Sup. Ct. 486 (1927), it was held proper for three judges to sit on final hearing where they were called in to listen to a bill for a restraining order, and then the parties agreed that the hearing should be considered as a hearing on the merits.

See Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1, 24; see also *Film Transport Co. v. Michigan P. U. Commission*, 17 F. (2d) 857 (E. D. Mich. 1927); *Hi-Ball Transit Co. v. Railroad Commission*, 27 F. (2d) 425 (N. D. Tex. 1928).

necessary for relief thereunder. In general, three requisites must be present.<sup>12</sup>

First, there must be a case cognizable in a federal court of equity. The unconstitutionality of a state law is not of itself ground for relief in the federal courts. There must be a threat of "irreparable injury" or the absence of an "adequate remedy at law," which, however, the courts have experienced little difficulty in "finding."<sup>13</sup> The existence of a legal remedy in a state court does not preclude federal equity jurisdiction.<sup>14</sup> And the federal courts have been reluctant to hold that a legal remedy available in a state court can be enforced in a federal court so as to preclude federal equitable jurisdiction.<sup>15</sup> The requirement that state administrative remedies be exhausted as a prerequisite to federal equitable aid<sup>16</sup> seems to have been relaxed.<sup>17</sup> And the pendency of an appeal in the state court from the commis-

<sup>12</sup> The original jurisdiction of the district courts is now defined by Section 24 of the Judicial Code.

An interesting analogy to the "three judge court" grew out of the Commerce Court which was originally vested with jurisdiction to pass upon judgments of the Interstate Commerce Commission. This court was short lived and was abolished by the Act of October 22, 1913, 38 STAT. 208, 219 (1913). This act vested jurisdiction in the district court, and provided: "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered into by the Interstate Commerce Commission shall be issued or granted by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as District Judge, unless the application for the same shall be presented to a Circuit or District Judge, and shall be heard and determined by three judges . . . unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges." 38 STAT. 220 (1913). Cf. *Home Furniture Co. v. United States*, 2 F. (2d) 765 (W. D. Tex. 1924). Thus it seems that whether relief be sought under a state rate which conflicts with an order of the Interstate Commerce Commission or whether an order of the commission itself is questioned, an interlocutory injunction in the federal courts may be issued only by a specially constituted district court of three judges.

<sup>13</sup> See *Terrace v. Thompson*, 263 U. S. 197, 214, 44 Sup. Ct. 15, 17 (1923); *Herkness v. Irion*, 11 F. (2d) 386 (E. D. La. 1926); see Comment (1927) 36 YALE L. J. 845, 850.

<sup>14</sup> *Bacon v. Rutland R. R.*, 232 U. S. 134, 34 Sup. Ct. 283 (1914); *Chicago, B. & O. Ry. v. Osborne*, 265 U. S. 14, 44 Sup. Ct. 431 (1924); *Pacific Tel. & Tel. Co. v. Cushman*, 292 Fed. 930 (C. C. A. 9th, 1923), *cert. denied*, 263 U. S. 729, 44 Sup. Ct. 181 (1924); *Van Wert Gaslight Co. v. P. U. Commission*, 299 Fed. 670 (S. D. Ohio, 1924).

<sup>15</sup> *Southern Ry. v. Query*, *supra* note 6; (1928) 37 YALE L. J. 378; *Risty v. Chicago Ry.*, 270 U. S. 378, 46 Sup. Ct. 236 (1926); *Western Union Tel. Co. v. Tax Commission*, 21 F. (2d) 355 (S. D. Ohio, 1927).

<sup>16</sup> *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67 (1908); *Trenton & Mercer County Traction Corp. v. Trenton*, 227 Fed. 502 (D. N. J. 1915), *aff'd*, 229 Fed. 140 (C. C. A. 3d, 1916).

<sup>17</sup> *Banton v. Belt Line Ry.*, 268 U. S. 413, 45 Sup. Ct. 534 (1925); *Smith*

sion's order will not debar federal aid.<sup>18</sup> But after a state court has adjudged the matter on appeal, the federal courts will not take original jurisdiction of the issue.<sup>19</sup> A suit brought before the effective date of the statute has been held not premature, on the ground that the injury might become irreparable if no relief is possible before the effective date.<sup>20</sup> In fact, the writ of injunction has been stretched far beyond its original scope in order that the constitutional questions might be presented for determination by way of what in effect is a declaratory judgment.<sup>21</sup>

Second, the matter in controversy must exceed, "exclusive of interests and costs, the sum or value of \$3,000."<sup>22</sup> This amount does not depend solely upon initial cost, but may include future maintenance. If the capitalization necessary to meet the maintenance exceeds the required amount, this element is satisfied. It is sufficient if the bill discloses that the enforcement of the statute or order sought to be enjoined will have the effect of materially increasing the plaintiff's expenditures, as well as causing him injury in other respects.<sup>23</sup> But the existence of the jurisdictional amount is generally assumed without discussion in cases under Section 266. This is true although the amount of damages that is threatened is entirely speculative.

Third, the constitutionality of some state statute or order of a state administrative commission must be called into question. The word "statute," as used in this section, has been strictly construed to mean a statute or law directly passed by the legislature

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v. Illinois Bell Tel. Co., 270 U. S. 587, 46 Sup. Ct. 408 (1926); cf. Western Union Tel. Co. v. Tax Commission, *supra* note 15.

The fact that orders of the state commission merely prescribed temporary rates to be effective until final determination does not prevent equitable relief where such orders are final while in effect. *Prendergast v. Tel. Co.*, 262 U. S. 43, 43 Sup. Ct. 466 (1923).

<sup>18</sup> *Oklahoma Gas Co. v. Russell*, *supra* note 6.

<sup>19</sup> *Detroit & Mackinac Ry. v. Michigan Railroad Commission*, 235 U. S. 402, 35 Sup. Ct. 126 (1914). Otherwise if the state appellate court has legislative powers. *Prentiss v. Atlantic Coast Line*, *supra* note 16.

<sup>20</sup> *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925); cf. *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926).

<sup>21</sup> See Comment (1927) 36 YALE L. J. 845, 850.

The existence of a constitutional question does not permit a stockholder to maintain a bill under Section 266 without complying with Equity Rule 27, where the right of action to restrain the enforcement of the statute as an unconstitutional deprivation of the liberty and property of the corporation by the state statute was a right existing in the corporation itself. The stockholder must show that he has exhausted the means within his reach to obtain action by the corporation in conformity with his wishes. *Wathen v. Jackson Oil Co.*, 235 U. S. 635, 35 Sup. Ct. 225 (1915).

<sup>22</sup> Section 24 of the Judicial Code, par. 1, 28 U. S. C. § 41 (1) (1926).

<sup>23</sup> *Western & A. R. R. v. Railroad Commission*, 261 U. S. 264, 43 Sup. Ct. 252 (1923) (initial expense of spur track only \$1260); *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257 (1924).

of the state, and hence does not apply to municipal ordinances.<sup>24</sup> It is the threatened action of some "state" official or board that is involved, and hence municipal boards,<sup>25</sup> county commissioners,<sup>26</sup> and local district commissioners<sup>27</sup> are not included, though they may act pursuant to a state statute. But if the commission, though incorporated, has authority to act for the state and throughout it, its members have been held "state officers" within this section.<sup>28</sup> The making of assessments<sup>29</sup> or publication of rates<sup>30</sup> are not "orders" whose operation may be restrained under Section 266. This section also does not apply where officers of a state pretend to act under a statute which is alleged to have gone out of force,<sup>31</sup> or where the acts of the officials are alleged to be outside of and beyond the powers conferred on them by a statute the constitutionality of which is not attacked.<sup>32</sup> The term "unconstitutionality" refers only to the federal Constitution.<sup>33</sup> But once the jurisdiction of the federal court is

<sup>24</sup> *Ex parte Collins*, 277 U. S. 565, 48 Sup. Ct. 585 (1928); *Cumberland Tel. & Tel. Co. v. City of Memphis*, 198 Fed. 955 (W. D. Tenn. 1912); *Sperry & Hutchinson v. City of Tacoma*, 190 Fed. 682 (C. C. Wash. 1911); *Birmingham Waterworks Co. v. City of Birmingham*, 211 Fed. 497 (N. D. Ala. 1913), *aff'd*, 213 Fed. 450 (C. C. A. 5th, 1914); *Land Development Co. v. City of New Orleans*, 13 F. (2d) 898 (1926), *rev'd* on other grounds, 17 F. (2d) 1016 (1927).

A city ordinance, however, has been held a statute within Section 237 (a). *King Manufacturing Co. v. City Council of Augusta*, 277 U. S. 100, 48 Sup. Ct. 489 (1928); Comment (1929) 38 YALE L. J. 359.

<sup>25</sup> *Petition of Public Nat. Bank of N. Y.*, 49 Sup. Ct. 43 (U. S. 1928); *City of Dallas v. Dallas Tel. Co.*, 272 Fed. 410 (C. C. A. 5th, 1921).

<sup>26</sup> *Connor v. Board of Com'rs of Logan County*, 12 F. (2d) 789 (S. D. Ohio, 1926); *Henrietta Mills Co. v. Rutherford County*, 26 F. (2d) 799 (W. D. N. C. 1928).

<sup>27</sup> *Rorick v. Board of Com'rs of Everglades Drainage Dist.*, 27 F. (2d) 377 (N. D. Fla. 1928); *cf. Silvey v. Com'rs of Montgomery County*, 273 Fed. 202 (S. D. Ohio, 1921).

<sup>28</sup> *Suncrest Lumber Co. v. N. C. Park Commission*, decided November 27, 1928 by the Circuit Court of Appeals for the Fifth Circuit.

<sup>29</sup> *Ex parte Williams*, 277 U. S. 267, 48 Sup. Ct. 523 (1928).

<sup>30</sup> *Southern Bell Tel. & Tel. Co. v. Railroad Commission*, 280 Fed. 901 (E. D. S. C. 1922).

<sup>31</sup> *In re Buder*, 271 U. S. 461, 46 Sup. Ct. 557 (1926).

<sup>32</sup> *Council of Defense v. International Magazine Co.*, 267 Fed. 390 (C. C. A. 8th, 1920); see *Grigsby v. Harris*, 27 F. (2d) 945, 946 (S. D. Tex. 1928); *Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials* (1927) 40 HARV. L. REV. 969.

<sup>33</sup> *Cook v. Burnquist*, 242 Fed. 321 (D. Minn. 1917).

Almost invariably the constitutional issue is pleaded under the Fourteenth Amendment. Other provisions of the Constitution are often included, sometimes inappropriately. The great bulk of all decisions under Section 266 is devoted to dissertations of constitutional meaning after acceptance of the issues. The issues seem to have included everything from vasectomy [*Berry v. Davis*, 242 U. S. 468, 37 Sup. Ct. 208 (1917)] to prohibitions on placing "shoddy in comfortables." A great majority of the cases have arisen under rate and license statutes and orders of public service boards.

invoked under Section 266, it may consider all questions in the case, local as well as federal.<sup>34</sup>

Where the orders of a commission carry with them a provision for penalties for disobedience, federal jurisdiction is invoked on the ground that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of statutes or orders. Liability to a penalty before the validity of such command has been determined, which would put the party affected in a position where he himself must, at his own risk, pass upon the question of uncertain legality, may amount to a violation of the Fourteenth Amendment.<sup>35</sup> But if the penalty provisions alone are relied on to invoke federal jurisdiction, a suit brought under Section 266 will be dismissed where the statutory penalties are clearly separable from a reasonable order of the commission.<sup>36</sup> And where so separable, and no attempt has been made to enforce the penalties, the federal court will not pass upon their validity.<sup>37</sup>

As Section 266 provides only for injunctive relief, obviously the suit must be commenced by a bill of complaint, properly entitled, filed with a justice of the Supreme Court, or a circuit or district judge. The jurisdictional elements must appear upon the face of the bill.<sup>38</sup> If they do, the single judge is bound to call two other judges to hear the application. But five days' notice must be given to the governor and the attorney general of the state and the other defendants before the hearing. The

<sup>34</sup> *Louisville & N. R. R. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48 (1913); *Van Dyke v. Geary*, 244 U. S. 39, 37 Sup. Ct. 483 (1917); *Wofford Oil Co. v. Smith*, 263 Fed. 396 (M. D. Ala. 1920).

If the case can be disposed of without considering whether the acts violated the federal Constitution, the court may do so. See *Connecting Gas Co. v. Imes*, 11 F. (2d) 191 (S. D. Ohio, 1926). But the Supreme Court has refused to decide the constitutionality of a statute under the state constitution where the state court has had no opportunity to pass upon the question, and the case could be disposed of on federal grounds. *Michigan Commission v. Duke*, 266 U. S. 570, 45 Sup. Ct. 191 (1925).

<sup>35</sup> *Kern Trading & Oil Co. v. Associated Pipe Line Co.*, 217 Fed. 273 (N. D. Cal. 1914). The power of the state to prescribe penalties heavy enough to compel obedience to administrative orders is not questioned; its exercise is not the basis of the federal court's jurisdiction. See *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 662, 35 Sup. Ct. 214, 218 (1915). In many states interested parties may avoid acting at their peril by bringing an action for a declaratory judgment. *Erwin Billiard Parlor Co. v. Buckner*, 300 S. W. 565 (Tenn. 1927).

<sup>36</sup> *Phoenix Railway v. Geary*, 239 U. S. 277, 36 Sup. Ct. 45 (1915); *Grand Trunk Ry. v. Michigan Railroad Commission*, 193 Fed. 1009 (E. D. Mich. 1912), *aff'd*, 231 U. S. 457, 34 Sup. Ct. 152 (1923).

<sup>37</sup> *Phoenix Railway v. Geary*, *supra* note 36.

<sup>38</sup> If the bill fails to show the proper jurisdictional elements, the judge need not call in two other judges. *Chandler v. Neff*, 298 Fed. 515 (W. D. Tex. 1924); *cf. Home Furniture Co. v. United States*, 2 F. (2d) 765 (W. D. Tex. 1924).

section provides that the hearing upon the application shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. If the judge refuses to call two others, no appeal therefrom can be taken, but the Supreme Court will issue mandamus.<sup>39</sup> It has no discretion to grant or refuse the writ dependent upon its conception as to whether the state statute is or is not constitutional.<sup>40</sup> But if the three judge court takes jurisdiction and issues a decree, the Supreme Court may review the entire case.<sup>41</sup>

Where, pending the appeal from the district court, the state statute or order is modified, the Supreme Court is not deprived of power to review the cause. However, it seems inclined to give weight to the action and consider its operation in disposing of the case.<sup>42</sup> The death of the officer sought to be enjoined does not abate the action, which may be continued against his successor.<sup>43</sup>

<sup>39</sup> *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911); *Ex parte Williams*, *supra* note 29; *Grigsby v. Harris*, *supra* note 32.

<sup>40</sup> *Ex parte Metropolitan Water Co.*, *supra* note 39. Where the three judge court denies the application on the ground that it is without jurisdiction, the Supreme Court will remand the cause for consideration on its merits if it finds that the lower court did have jurisdiction. *Oklahoma Gas Co. v. Russell*, *supra* note 6.

<sup>41</sup> *Louisville & N. R. R. v. Garrett*; *Van Dyke v. Geary*, both *supra* note 34.

<sup>42</sup> *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 40 Sup. Ct. 338 (1920); *Texas Co. v. Brown*, *supra* note 34. So where the objectionable statute was repealed pending determination of the case, the Supreme Court refused to pass upon the validity of the injunction granted by the three judge court, as all possibility or threat of the operation had disappeared. *Berry v. Davis*, *supra* note 33.

The Supreme Court is reluctant, on appeal, to reverse the decision of the three judge court under Section 266 "upon what is solely a question of fact and an exercise of sound judicial discretion as to the just balance of convenience in granting or withholding a temporary suspension of the operation of a state law. . . ." *Chicago G. W. Ry. v. Kendall*, 266 U. S. 94, 45 Sup. Ct. 55 (1924). It will not consider rulings assailed and assigned as error in the record, but not in the argument. *Southeastern Express Co. v. Robertson*, 264 U. S. 541, 44 Sup. Ct. 424 (1924).

Where an appeal from an order refusing an interlocutory injunction is followed by an appeal from a final decree dismissing the bill, on the same ground, the first appeal is dismissed and relief granted under the second. *Pacific Tel. Co. v. Kuykendall*, 265 U. S. 196, 44 Sup. Ct. 553 (1924).

<sup>43</sup> This is provided for in the Act of Feb. 13, 1925, 43 STAT. 941 (1925).

Prior to this the rule was long established in the federal courts that suits of this nature were against the officer individually on his personal obligation and not against the office. Hence, upon the death of a defendant, the action abated and might not be continued against the successor in office. As to federal officers, the Act of Feb. 8, 1899, 30 STAT. 822, c. 121 (1899) provided that successors of officers of the United States might be substituted for them in suits against the latter in their official capacity. But the old rule applied to state officers. *Pullman Co. v. Croom*, 231 U. S. 571, 34 Sup. Ct. 182 (1913). The only exception existed in cases of

A single judge has no power to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory injunction applied for.<sup>44</sup> He cannot continue a temporary restraining order after the three judges have refused an interlocutory injunction.<sup>45</sup> The three judge court, however, may grant such continuance pending appeal.<sup>46</sup> The Supreme Court also has this power, but it will generally refer the matter to the three judges who passed upon the application for a preliminary injunction.<sup>47</sup>

These, in general, are the results obtained under the operation of the "three judge rule." The concurrence of at least two of three judges in issuing an injunction was required for the purpose of decreasing the ease with which state activity had formerly been restrained.<sup>48</sup> The rule has probably served its purpose in the sparsely settled districts where federal judges are few and widely separated; but in the busy eastern centers, where the meeting of three judges can be easily effected, there seems to have been no increase in the difficulty of obtaining injunctions. Federal interference has not been decreased by the clause providing for a stay of proceedings in the federal courts if the enforcement of a statute or commission order has been stayed in an action in a state court. This is partly due to the strict interpretation placed upon this section;<sup>49</sup> but more

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boards of quasi-judicial character having a continued existence. *Marshall v. Dye*, 231 U. S. 250, 34 Sup. Ct. 92 (1913).

<sup>44</sup> But the three judge court may delegate to the local judge the issue of the injunction on performance of the conditions specified in its decree. *Monroe Gaslight & Fuel Co. v. Michigan P. U. Commission*, 292 Fed. 139 (E. D. Mich. 1923); *Illinois Cent. R. R. v. Railroad Commission*, 1 F. (2d) 805 (E. D. Ky. 1923). And it may authorize him to issue a similar injunction to any other intervener or plaintiff whose case is not essentially distinguishable from that of the plaintiff in the suit in which the injunction has been granted, without a further hearing before the three judges. *J. & A. Freiberg Co. v. Dawson*, 274 Fed. 420 (W. D. Ky. 1920), *aff'd*, 255 U. S. 288, 41 Sup. Ct. 272 (1921).

<sup>45</sup> Equity Rule 74, which authorizes a justice or judge who took part in a decision of an equity suit granting or dissolving an injunction to make an order suspending, modifying, or restoring the injunction pending the appeal upon proper terms, does not apply to a single judge under Section 266. *Cumberland Tel. & Tel. Co. v. La. P. S. Commission*, 260 U. S. 212, 43 Sup. Ct. 75 (1922).

<sup>46</sup> *Phoenix Ry. v. Geary*, *supra* note 36; *Virginia Ry. v. United States*, 272 U. S. 658, 47 Sup. Ct. 222 (1926). The issue of the stay requires the assent of the three judges given after the application is made, evidenced by their signatures or an announcement in open court with three judges sitting, followed by a formal order tested as they direct.

<sup>47</sup> *Cumberland Tel. & Tel. Co. v. La. P. S. Commission*, *supra* note 45.

<sup>48</sup> See *Chicago etc. Ry. v. Oglesby*, 198 Fed. 153, 156 (W. D. Mo. 1912). The passage of Section 266 was probably influenced to a great extent by the decision in *Larabee v. Dolley*, 175 Fed. 376 (D. Kan. 1909).

<sup>49</sup> See notes 7 and 8 *supra*; *Gen. Outdoor Advertising Co. v. Williams*, 12 F. (2d) 773 (C. C. A. 1st, 1926).

important is the lack of machinery by which the stays in state actions could be secured before resort to the federal courts has proved successful.<sup>50</sup> Furthermore, one may avoid the provisions of Section 266 entirely by failing to press for a preliminary injunction and requesting a hearing on the merits by one judge.<sup>51</sup> This can be remedied by an amendment to the section extending the requirement of three judges to hearings on the merits where no interlocutory injunction has been requested, and providing for direct obligatory appeal therefrom.

The preference which the federal courts have enjoyed with respect to actions to restrain state activity is due largely to the greater likelihood of getting injunctions in the federal courts. The state courts have shown a strong tendency to construe statutes and orders of commissions in favor of their validity, and injunctive relief has been seldom secured.<sup>52</sup> In addition, the

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<sup>50</sup> Pogue, *op. cit. supra* note 3, suggests the passage of state statutes to provide adequate machinery for securing stays in state courts. Assuming that this legislation could be secured, the accomplishment of its purpose is doubtful, as the complainant might still secure a temporary restraining order or an interlocutory injunction before the state courts could issue a stay in an appropriate action.

<sup>51</sup> The situation as it exists at present is peculiarly anomalous. If a person seeks an interlocutory injunction, a three judge court is necessary and direct obligatory appeal to the Supreme Court is provided for. The same is true where a final hearing is held after the hearing for an interlocutory injunction has been had. But if a final hearing on the merits is desired at the outset, a situation where the requirement of three judges and direct appeal would seem most desirable, a single judge can dispose of the case, and an appeal lies only to the Circuit Court of Appeals, with *certiorari* to the Supreme Court.

It is interesting to note that the limitations of Section 266 might also be avoided if the federal courts entertained suits for declaratory judgments. This was pointed out by Professor Borchard to a subcommittee of the Senate Judiciary Committee in a hearing on the proposed Federal Declaratory Judgment Act. But the committee seemed to think this to be no objection. HEARINGS ON H. R. 5623, DECLARATORY JUDGMENTS (1929) 38-39. However, the act has not been passed. And the Supreme Court has ruled that the declaratory judgment procedure cannot be invoked in the federal courts under the Conformity Act in those states which authorize their courts to render declaratory judgments. *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 47 Sup. Ct. 282 (1927); Comment (1927) 36 YALE L. J. 845, 847.

<sup>52</sup> Cf. *New York & Penn. Co. v. New York Cent. R. R.*, 281 Pa. 257, 126 Atl. 382 (1924). Often the state courts are allowed to examine only the regularity of the proceedings in the commission's action. *Chicago, M. & St. P. Ry. v. P. U. Commission*, 41 Idaho 181, 238 Pac. 970 (1925). Some statutes provide that the administrative remedies provided by the commission must first be exhausted before appeal to the courts can be made. *Capital Water Co. v. P. U. Commission*, 41 Idaho 19, 237 Pac. 423 (1925). Such a provision makes it easy for a hostile commission to delay proceedings indefinitely. Cf. *Smith v. Ill. Bell Tel. Co.*, 270 U. S. 587, 46 Sup. Ct. 408 (1926). In Maine, failure to except from the orders of the com-

narrowing of the scope of direct obligatory appeal to the Supreme Court under Section 237 has led suitors to use every available means to start their cases along the less tortuous route that leads up from the decision of the district court in petitions for injunctions. One way out of the difficulty is to abolish the jurisdiction of the federal courts to grant injunctions to restrain state activity.<sup>53</sup> This extreme view is supported by the argument that review by *certiorari* by the United States Supreme Court of the decisions of the highest state courts affords ample protection to constitutional rights. But this is questionable in view of the lengthy procedure that would be necessary before the Supreme Court could pass upon the validity of state action, and of the serious damage that might be done in the interim in cases where such action is declared unconstitutional. On the other hand the present situation of ready interference with local matters is equally undesirable. It is doubtful whether legislation can secure the "happy medium." A realization by the federal courts themselves that local matters are best left to the states to determine, and their refusal to take jurisdiction except in cases of strict "equitable necessity" and where the constitutional question is a genuine and important issue will do much to effect the result aimed at by Section 266. There is some indication that such an attitude may be adopted.<sup>54</sup>

#### THE SHAREHOLDER'S "INDIVIDUAL" SUIT

That the shareholder in a corporation is injured by a tortious reduction of capital assets is obvious. It is equally apparent that considerations of administrative convenience make it impossible to allow each shareholder a separate right of suit. The acts are therefore termed "corporate" wrongs and the courts require that the corporation sue. To avoid injustice, however, where the corporation refuses to sue, a shareholder is allowed to bring a representative suit in behalf of himself and all other shareholders.<sup>1</sup> But, as a condition precedent, he must show an

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mission is conclusive evidence of a waiver of the right. *Devercaux v. P. U. Commission*, 125 Me. 520, 134 Atl. 545 (1926).

<sup>53</sup> Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499.

<sup>54</sup> See *United States v. Hoboken*, 29 F. (2d) 932, 936 (D. N. J. 1928).

<sup>1</sup> A glance at any set of general reports will show a striking number of such suits. Cf. Glenn, *The Stockholder's Suit—Corporate and Individual Grievances* (1924) 33 YALE L. J. 580; see *Jones v. Johnson*, 10 W. P. D. Bush 649, 660-1 (Ky. 1874). It is clear that this, far from being a disregard of the corporate entity theory, is a tacit recognition of it. The shareholder enforces only a "derivative and representative" right. Glenn, *op. cit. supra*. "[The shareholder is] treated, for the time being, and for the purposes of the litigation, as the trustee and real representative of the corporation, instead of its offending directorate, and majority stock-

attempt, or the uselessness of an attempt, to induce the corporation, through its directorate, or through the shareholders in meeting, to seek reparation.<sup>2</sup> Judgment or decree in such a suit is *res adjudicata* to all actions which may be instituted by a shareholder or by the corporation to redress the same rights, thus serving the policy against multiplicity of suits.<sup>3</sup>

Three cases have recently arisen which raise the further problem of a suit by a shareholder in his individual capacity. In each of the cases the court refused to apply the limitations of a shareholder's representative suit to bar individual claims.

In *Matter of Auditore*,<sup>4</sup> the defendant, the survivor of two brothers, each of whom owned an equal share in a corporation, was appointed administrator of the decedent's estate with a surety company on his bond. The defendant, as director of the corporation, diverted all of its assets in a period preceding and following his appointment. The plaintiff, co-administratrix, recovered judgment in a shareholder's representative suit. Execution was returned unsatisfied. Upon the settlement of accounts by the plaintiff, the court held the defendant and the surety responsible to the extent of one half of the defalcations for dereliction of duty, as administrator, in protecting the estate's interest in the corporation. The theory of the case was that, since the defendant, as administrator, owed a "separate duty" to the estate to keep it intact, he could be sued in that capacity. Two judges dissented.<sup>5</sup>

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holders." *Consumers' Ice and Coal Co. v. Security Bank and Trust Co.*, 170 Ark. 530, 548, 280 S. W. 677, 683 (1926).

The equitable complaint may state facts which would call for relief at law if the corporation sued. *Moran v. Vreeland*, 81 Misc. 664, 143 N. Y. Supp. 522 (Sup. Ct. 1913).

The courts are liberal in construing complaints in shareholders' suits so as to sustain the action. *Cf. Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163 (1916) (prayer for damages for tort); *MacLeod v. Miller*, 201 N. Y. Supp. 108 (Sup. Ct. 1923). But *cf. Samuel v. Holladay*, 21 Fed. Cas. 306 (C. C. Kan. 1869). Of course where the corporation could not recover, the suit fails. *Anderson v. Avey*, 272 Fed. 664 (C. C. A. 9th, 1921).

<sup>2</sup> *Hawes v. Oakland*, 104 U. S. 450 (1881); *Wenzel v. Brewing Company*, 48 S. C. 80, 26 S. E. 1 (1896); *cf. Sohland v. Baker*, 141 Atl. 277 (Del. 1927); *Schoening v. Schwenck*, 112 Iowa 733, 84 N. W. 916 (1901).

<sup>3</sup> *Cf. 6 THOMPSON, CORPORATIONS* (3d ed. 1927) § 4584; *Dorrah v. Pemiscot Bank*, 213 Mo. App. 541, 256 S. W. 560 (1923) (action denied where eight suits by shareholders were pending). But *cf. Samuel v. Holladay*, *supra* note 1, at 312 (shareholder's representative suit denied because of multiplicity of suits).

<sup>4</sup> 249 N. Y. 335, 164 N. E. 242 (1928).

<sup>5</sup> The Appellate Division had remitted the proceeding to the Surrogate's Court for a determination of creditors' rights. *Matter of Auditore*, 223 App. Div. 654, 229 N. Y. Supp. 414 (2d Dep't 1928). The Court of Appeals also ordered an investigation of the damage.

Judge Lehman's dissent, *supra* note 4, at 348, 164 N. E. at 245, denied the existence of a "separate duty." He said further: "... I fail to see

In *Vierling v. Baxter*<sup>6</sup> a unanimous court allowed an individual shareholder recovery in an action at law for conspiracy whereby he was induced by fraudulent promises and representations to assign control of a corporation to the defendants who converted all the corporate property to the X Corporation. The elements of damage were depriving the plaintiff of his control and diversion of the corporate assets.

In a third case, *Equitable Trust Co. v. Columbia Nat'l Bank*,<sup>7</sup> the officers of the A Corporation who owned all but twenty-five shares in the corporation and who were also officers of the defendant Bank, transferred their shares to the Bank, which took over all of the assets of the A Corporation in payment of an alleged indebtedness. The plaintiff, holder of the twenty-five shares, sued the Bank for damages for conversion of the corporate assets and was allowed recovery of the amount paid in on the shares on the theory that the Bank had notice of and became party to the legal fraud in "freezing out" the plaintiff by taking all the assets of the A Corporation. Two justices dissented.

As a general rule, for wrongs of the nature that appear in these cases, the individual has no right of action; he may not recover the consequent depreciation in the value of his shares.<sup>8</sup> It is said that such injury is merely indirect and the damage is a matter of reflex action;<sup>9</sup> recovery by the corporation heals the shareholder's wounds. This is a logical attribute of the shareholder's suit, as revealed in the leading case of *Smith v.*

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any sound ground for transmitting the injury done to the corporation into an injury to the stockholder in order to create a new liability against the surety on the administrator's bond."

<sup>6</sup> 141 Atl. 728 (Pa. 1928). See *infra* notes 19, 20.

<sup>7</sup> 142 S. E. 811 (S. C. 1928). See *infra* note 21.

<sup>8</sup> *Hodge v. Meyer*, 252 Fed. 479 (C. C. A. 2d, 1918) (wrongful interference with contracts made on behalf of corporation); *Wells v. Dane*, 101 Me. 67, 63 Atl. 324 (1905) (wrongful issuance of shares); *Rafferty v. Donnelly*, 197 Pa. 423, 47 Atl. 202 (1900) (recovery of salaries paid); *Dorrah v. Pemiscot Bank*, *supra* note 3 (directors' negligence); *Greaves v. Gouge*, 52 How. Pr. 58 (N. Y. 1876) (conversion of corporate assets by officers); *Gardiner v. Pollard*, 10 Bosworth's Rep. 674 (N. Y. Super. Ct. 1863) (same); *Tomlinson v. Bricklayers' Union*, 87 Ind. 303 (1882) (same); *Hirsh v. Jones*, 56 Fed. 137 (C. C. Tex. 1893) (wilful waste by officers); *Evans v. Brandon*, 53 Tex. 56 (1880) (imprudent loans by bank directors); *Latimer v. Richmond R. R.*, 39 S. C. 44, 17 S. E. 258 (1892); *Niles v. N. Y. R. R.*, 176 N. Y. 119, 68 N. E. 142 (1903) (majority wrecking corporation); *Beeber v. Wilson*, 285 Pa. 312, 131 Atl. 854 (1926) (for distribution of extraordinary fund); see 6 FLETCHER, CYCLOPEDIA CORPORATIONS (1919) § 4052; Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 COL. L. REV. 128, 129.

<sup>9</sup> See Glenn, *op. cit. supra* note 1, at 584. The "direct and proximate consequence of a wrong done to the securities should be rectified by an appropriate suit on the part of the corporation." See *Hodge v. Meyer*, *supra* note 8, at 483.

*Hurd*,<sup>10</sup> wherein the Massachusetts court, regarding the matter as one of first impression, denied an individual action on the theory that the injury was "corporate."

In this same case, however, dictum appears to the effect that a "separate and peculiar interest" of the shareholder would be protected.<sup>11</sup> Where such interest is entirely independent of that of the corporation, the individual's capacity to sue would seem clear. Thus it has been held that representations by directors inducing a sale of shares at too low a price are actionable by individual shareholders.<sup>12</sup> And it has been intimated<sup>13</sup> that a like result would be reached where spurious shares were issued, or an unlawful tax assessed on the shares, or where a share certificate was mutilated.

The difficulty arises where the act alleged to be a violation of the shareholder's individual right is concededly actionable by the corporation. The instant cases fall within this category. The *Auditore* case employs the "separate duty" concept which is said to have been first articulated in *General Rubber Co. v. Benedict*.<sup>14</sup> There the defendant, a director of the plaintiff corporation which was the majority shareholder of the X Corporation, failed to notify the plaintiff that funds of the X Corporation were being misappropriated to the use of an enterprise in which he had an interest. The defendant was held for a

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<sup>10</sup> 12 Metc. 371 (Mass. 1847). The court reasoned that "the fact that similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in view of all such suffering parties and their legal advisers and guides, there was no principle on which such an action can be maintained." *Ibid.* 383. The action was on the case against the directors for mismanagement whereby the bank failed.

<sup>11</sup> *Ibid.* 386. The interest here referred to was that represented by the certificate. Trover or trespass for the conversion of the certificate, trespass on the case for refusing to make a proper transfer, and assumpsit for a dividend declared were stated to be maintainable by the individual shareholder.

<sup>12</sup> *Porter v. Healey*, 244 Pa. 427, 91 Atl. 428 (1914). The plaintiffs were allowed to recover a bonus paid to directors who, by their statements that they were being paid just what the other shareholders were getting, induced the plaintiff to sell their shares. Here there was no cause of action in the corporation. See *Niles v. N. Y. R. R.*, *supra* note 8, at 123, 68 N. E. at 144.

<sup>13</sup> See *Greaves v. Gouge*, *supra* note 8, at 60; *Wells v. Dane*, *supra* note 8, at 71, 63 Atl. at 325; *Seitz v. Michel*, 148 Minn. 80, 88, 181 N. W. 102, 105 (1921).

Another wide group of cases where a representative suit is not necessary includes suits involving maintenance of preferential security positions. Such actions are brought against the corporation, not in its behalf. See 4 COOK, CORPORATIONS (8th ed. 1923) 3184-3186.

<sup>14</sup> 215 N. Y. 18, 109 N. E. 96 (1915) (4-2 decision affirming 3-2 decision in the Appellate Division); see (1929) 42 HARV. L. REV. 705; *Noto* (1915) 28 HARV. L. REV. 409; L. R. A. 1915F 617.

violation of his duty as director.<sup>15</sup> The case has been criticized as an unnecessary departure from the rule of *Smith v. Hurd*.<sup>16</sup> It has nevertheless been followed.<sup>17</sup> A valid objection may be made to this solution of the difficulty: that the "separate duty" is too much the variable.<sup>18</sup>

The *Vierling* case suggests no new approach. Like the *Audiotore* case, it recognizes the corporate cause of action but upholds the right to sue for wrongs which affect the individual. Undue emphasis is put on the fact that there has been a conspiracy to injure the plaintiff.<sup>19</sup> The confusion as to the elements of damage should be noted.<sup>20</sup>

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<sup>15</sup> *Ritchie v. McMullen*, 79 Fed. 522 (C. C. A. 6th, 1897) has been quite generally cited in support of the proposition advanced in the *Benedict* case. There the plaintiff shareholder pledged his shares with the defendant directors. To "freeze him out" the directors combined and wilfully reduced the value of his shares so that they could buy in at a public sale. The defendants were held directly liable to the plaintiff.

In an earlier New York case where the defendant directors, by committing waste, induced the plaintiff to sell out in belief that no dividends would be paid, the defendants were held for their "fraud." *Von Au v. Magenheimer*, 126 App. Div. 257, 110 N. Y. Supp. 629 (2d Dep't 1908), *aff'd* without opinion, 196 N. Y. 510, 89 N. E. 1114 (1909). In his opinion, 126 App. Div. at 267, 110 N. Y. Supp. at 636, Miller, J. states:

"In view of the conditions under which business is now conducted, it will be very unfortunate if it shall be held that the duty of corporate managers in respect of their conduct of the corporate affairs is solely to the corporate entity, and that, however great a designed injury to an individual stockholder may be, he can only get redress through the corporation."

It may be conceded that in these two cases it would be very "unfortunate"—in view of the fact that the shareholders had already been "frozen out" and could not bring representative actions. These cases, however, do not present situations where the corporate and individual wrongs are identical.

<sup>16</sup> See Note (1915) 28 HARV. L. REV. 409, 411. The case has also been termed an extension of the "rule, which holds the agent only as to matters arising within the scope of his agency." See (1915) 25 YALE L. J. 154.

<sup>17</sup> *Keating v. Hammerstein*, 125 Misc. 334, 209 N. Y. Supp. 769 (Sup. Ct. 1921); *cf. Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229 (1915) (distinguishing the *Benedict* case). But *cf. Von Boskerck v. Aronson*, 197 N. Y. Supp. 809 (Sup. Ct. 1923) (individual shareholder's demand for damages for breach of director's promise to conduct properly corporate affairs denied; *Benedict* case not cited); (1923) 23 COL. L. REV. 498.

<sup>18</sup> Under a logical application of the concept any "separate" right-duty relationship would sustain a cause of action. For example, where directors are termed "fiduciaries," logically, as many individual cestuis could sue as would care to. The unlimited extent of such an application is evident.

<sup>19</sup> The court expressly assumes conspiracy to allow recovery on at least some of the plaintiff's claims. But see *Lukach v. Blair*, 103 Misc. 20, 21, 178 N. Y. Supp. 8, 10 (Sup. Ct. 1919): "By adopting the expedient of alleging that the corporate acts performed by the defendants were performed pursuant to a conspiracy, plaintiff cannot overturn the established principles of law relating to derivative actions."

<sup>20</sup> The plaintiff is, under any theory, entitled to his personal damages

The result in the *Equitable Trust* case, as indicated in the minority opinion, seems to follow from a misunderstanding of the theory of the shareholder's representative suit. The court, after expounding the rule that the corporation must enforce corporate rights but that, on refusal, the shareholder may do so in a representative capacity, proceeds to allow the individual suit. The much italicized dissenting opinion reiterates the orthodox rule and points out the evils of the course of the majority.<sup>21</sup>

From the various legal principles expounded in the cases only one proposition emerges as a definite approach to this problem of remedy for grievances which are at the same time "corporate" and "individual." That is the "separate duty" concept as found in the New York cases. But it is open to several objections, among which are its indefiniteness,<sup>22</sup> the difficulty of computing damages,<sup>23</sup> the policy against multiplicity of suits<sup>24</sup> and the uncertainty of protection of creditors' rights.<sup>25</sup>

Viewed on their facts the instant cases may be approved on the ground that in each case the plaintiff is the only person

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accruing out of his being induced to surrender control. His rights with respect to this do not collide with corporate interests.

<sup>21</sup> Upon investigation it was found that not one of the authorities cited sanctioned the individual suit. They all referred to shareholders' representative actions. This was indicated in the dissenting opinion of Cochran, J., who also points out the error of allowing a cause of action for "conversion of real estate," and the possibility of a huge number of suits if the rule of the case be logically applied. *Equitable Trust Co. v. Columbia Nat'l Bank*, *supra* note 7, at 825-826.

As to the talk of the court about "de facto dissolution" the authorities are not clear as to what happens on dissolution. *Cf. Brock v. Poor*, *supra* note 17 (no individual suit while corporation exists); (1924) 8 MINN. L. REV. 348 (stating that a representative suit is in many cases necessary even where the corporation is legally dissolved). But *cf. dissent of Seabury, J. in Brock v. Poor*, *supra* note 17, at 415-16, 111 N. E. at 239 (arguing that defendants were estopped to set up the corporate entity which they had kept alive contrary to their agreement); *Brown v. Deposit Nat'l Bank*, 125 Misc. 247, 211 N. Y. Supp. 366 (Sup. Ct. 1925) (trustee in bankruptcy of shareholder may sue for portion of fund in hands of defendants as trustee for dissolution of the corporation); see Glenn, *op. cit. supra* note 1, at 593-596.

<sup>22</sup> *Supra* note 18.

<sup>23</sup> For instance, if several of the individuals harmed recovered damages while others did not and a representative suit was later brought, there would be great difficulty in computing the damages. The same difficulty would be encountered in determining the damages accruing to a single individual. However, this factor has not deterred those courts which incline favorably to the "individual" suit. *Cf. Gardiner v. Pollard*, *supra* note 8, at 690; *Higgins v. Applebaum*, 186 App. Div. 682, 686-87, 174 N. Y. Supp. 807, 810 (1st Dep't 1919).

<sup>24</sup> *Supra* note 3; see *Eldred v. Ripley*, 97 Ill. App. 503, 507-508 (1901).

<sup>25</sup> See *Brown v. Deposit Nat'l Bank*, *supra* note 21, at 250, 211 N. Y. Supp. at 369.

interested in enforcing the cause of action against the wrongdoers.<sup>26</sup> In such situations a representative suit may well be deemed unnecessary since the administrative necessity which is the basis of the rule requiring a single action in the corporate right is satisfied.<sup>27</sup> However, the rationalization in terms of "separate duty" is obviously broader than the situation requires. It is open to the danger of application to cases not falling within the category of the instant fact situations.<sup>28</sup>

THE POWER OF AN APPELLATE COURT TO DISPOSE OF A CASE  
WITHOUT REMANDING

Among the various devices which have been developed to relieve the courts of the congestion which is so great a problem to-day, is that of giving to an appellate court the power finally to dispose of a case without remanding it to a lower court. At common-law, in general, an appellate court could only affirm or reverse a case coming to it.<sup>1</sup> It has often happened, however, that an appellate court finds that the trial court should have directed a verdict, one way or the other. In such a case, remanding the case to the trial court for a new trial, and a directed verdict, seems an unnecessary multiplication of judicial acts. To avoid this unnecessary remanding, some states have, by statute, authorized appellate courts, when a directed verdict was erroneously refused below, to enter such a directed verdict, and to render judgment on it, unless, of course, there is some other phase of the case which necessitates a retrial.<sup>2</sup>

Such a provision came before the United States Supreme

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<sup>26</sup> In the *Auditors* case, the plaintiff and defendant represented all the share interests; in the *Vierling* case, as in the *Equitable Trust* case, the plaintiff appears to be the only shareholder not in privity with the wrongdoers.

<sup>27</sup> Since the difficulty of computing damages and the necessity of protecting creditors' rights, under such facts, are the only practical objections to an individual recovery, and since the judicial machinery is sufficient in itself to meet such obstacles, the individual relief should be given.

<sup>28</sup> *Cf.* (1924) 8 MINN. L. REV. 348, 349, pointing out that such a "short-cut to justice" has its dangers: "once the right is established, it is not easy to confine it to particular facts."

It has been suggested that the "individual" plaintiff aver in his complaint the non-responsibility of the defendant to the corporation and if issue is joined on the question of responsibility that the personal action be stayed until a trial of the corporate right. See Note (1915) 28 HARV. L. REV. 409, 411, n. 12. This is open to the objection that it does not take care of the "hard case" where the responsibility to the corporation is apparent.

<sup>1</sup> See Sunderland, *The Scope of Judicial Review* (1929) 27 MICH. L. REV. 416 for a historical description and suggested explanation for the development of appellate practice in common-law courts.

<sup>2</sup> MASS. GEN. LAWS (1921) c. 231, §§ 122, 123; MINN. STAT. (Mason 1927) § 9495; PA. STAT. (1920) § 17292; and see statutes cited *infra* notes 6, 8.

Court in *New York Life Ins. Co. v. Slocum*.<sup>3</sup> In the district court, in an action on an insurance policy, the defendant's request for a verdict directed in his favor had been refused, and there had been a trial to a jury, with a verdict for the plaintiff. The Circuit Court of Appeals found that the verdict should have been directed for the defendant, and following the state statute under the Conformity Act, directed the verdict, and entered judgment for the defendant upon it. The Supreme Court reversed this holding on the grounds that, since the issue had once gone to the jury, an appellate court could not enter a final judgment contrary to the finding of the jury without violating the jury trial safeguard of the Seventh Amendment.<sup>4</sup> It would seem that if the court finds that the issue should never have been left to the jury, the safeguard is not violated by a final judgment in an appellate court merely because the issue was erroneously given to a jury. And on these grounds, the state courts have upheld such provisions, refusing to follow the *Slocum* case.<sup>5</sup>

Such provisions, however, are of but limited application, and of themselves only a minor remedy. Of greater scope, and of greater effect as a remedy for the unnecessary complications of appellate practice, are those provisions in many states which provide in general language that an appellate court may, whenever possible, render final judgment on the case.<sup>6</sup> This provision, when coupled with the usual powers of an appellate court both in law and in equity cases, gives not only the powers of the type of statute first mentioned, but also allows final determination in any case in which the appellate court thinks that sending the case back would amount to having purely formal proceedings taken.<sup>7</sup>

Beyond this, there are many statutes which provide that where the findings of fact of the trial court are assigned as error, the appellate court may make new findings and render

<sup>3</sup> 228 U. S. 364, 33 Sup. Ct. 523 (1912).

<sup>4</sup> For a keen criticism of this view see Schofield, *New Trials and the Seventh Amendment* (1913) 8 ILL. L. REV. 287, 381, 465.

<sup>5</sup> *Bothwell v. Boston Elevated Co.*, 215 Mass. 467, 102 N. E. 665 (1913); *Kernan v. St. Paul City Ry.*, 64 Minn. 312, 67 N. W. 71 (1896).

<sup>6</sup> ARIZ. REV. STAT. (1913) § 1268; FLA. COMP. LAWS (1927) § 4637; ILL. REV. STAT. (Cahill, 1927) c. 110, §§ 110-111; IOWA CODE (1927) §§ 12871, 14010; KAN. REV. STAT. ANN. (1923) c. 60, § 3317; MASS. GEN. LAWS (1921) c. 231, §§ 124, 125; MO. REV. STAT. (1919) § 1514; MONT. REV. CODE (1921) § 8805; N. Y. C. P. A. (1921) § 584; N. C. CODE (1927) § 1412; TENN. CODE (Shannon, 1918) § 4902; TEX. COMPLETE STAT. (1928) §§ 1771, 1856, 1857; WASH. COMP. STAT. (Remington, 1922) § 1737; WYO. COMP. STAT. (1920) § 6387.

<sup>7</sup> For example, where a verdict should have been directed below, but no request was made for such direction, the appellate court may enter final judgment nevertheless. *Miller v. Union Indemnity Co.*, 209 App. Div. 455, 204 N. Y. Supp. 730 (4th Dep't 1924).

final judgment on them.<sup>8</sup> Even if it is not provided expressly in the statute that cases tried to a jury shall not be included within its scope, it is universally held that if the findings of fact were made below by a jury, the constitutional jury safeguard prohibits the appellate court from substituting its own findings on appeal.<sup>9</sup>

While the wording of these statutes is quite uniform, with minor variations of course, the liberality with which they have been interpreted, and the scope which has been allowed to appellate courts under them varies. It would seem of value to undertake an examination of the North Dakota provision, which has been quite narrowly construed, of the Alabama provision, which has been more liberally applied, and of the English provision, which is the broadest in scope and usefulness.

The North Dakota provision<sup>10</sup> reads:

"... a party desiring to appeal from a judgment ... (in an action tried by the court 'but without a jury') ... shall cause a statement of the case to be settled ... (as provided elsewhere by statute) ... and shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court. Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. The supreme court shall try anew the question of fact specified in the statement or in the entire case, if the appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, ... order a new trial of the action ... provided that the provisions of this section shall not apply to actions properly triable with a jury."

The limitation on the applicability of this statute imposed by the proviso that it shall not apply to "actions properly triable with a jury" does not seem quite clear. It is obvious that the

<sup>8</sup> ALA. CODE (1928) §§ 6149, 9502; CAL. CODES AND GEN. LAWS (Supp. 1927) § 956a; IND. STAT. (Burns, 1926) § 723; MONT. REV. CODE (1921) § 8805 (as to equity suits); NEB. COMP. STAT. (1922) §§ 9150, 9151 (equity); N. D. COMP. LAWS (Supp. 1926) § 7846; ORE. CONST. Art. VII, § 3c; Rules of the English Supreme Court, Order 53, r. 4, ANNUAL PRACTICE (1928) 1186 *et seq.*; YEARLY PRACTICE (1928) 1160 *et seq.*

<sup>9</sup> A good discussion of this point is found in *Mirich v. Forschner Co.*, 312 Ill. 343, 143 N. E. 846 (1924) interpreting ILL. REV. STAT. (Cahill, 1927) c. 110, § 110. For other cases see *First Nat'l Bank v. Crawford*, 78 Neb. 665, 111 N. W. 587 (1907); *Wigfield v. Akridge*, 207 Ala. 560, 93 So. 612 (1922).

<sup>10</sup> N. D. COMP. LAWS (Supp. 1926) § 7846.

provision applies to equity cases where no jury is called in. However, when a jury is called in an equity case, even though in a purely advisory capacity, the provision for trial *de novo* is held to be inapplicable.<sup>11</sup> The generalization might be drawn from this that the proviso merely operated to exclude cases where, in the trial court, a jury was in fact employed. However, it is held that where, in the trial court, a jury which might have been claimed has been waived, the retrial provision is also inapplicable.<sup>12</sup> In fact, the provision apparently does not enlarge the scope of appellate review at all, in law cases, with regard to the review of facts. In cases where a jury has been waived below, the appellate court will review the findings of fact from the trial court, but uniformly the appellate court has said that the findings will not be overturned unless it is clearly against the weight of the evidence,<sup>13</sup> which seems hardly more than the usual powers of an appellate court. No case was found in which the facts as found by the trial court were overturned. The operation of the statute, therefore, seems to be to limit as much as to enlarge the scope of appellate action. It cuts out equity cases where a jury was used, and in other equity cases allows discretionary<sup>14</sup> final determination without remanding where special findings of fact<sup>15</sup> are specified on appeal. It has further been held to apply only to appeals from final judgments, which are before the appellate court for review.<sup>16</sup> The purpose of such a statute is obviously to eliminate as far as possible, without infringing upon the jury safeguard, an appellate court's sending a case back to another trial when the whole matter could be settled in the appellate court. It seems unfortunate, therefore, that this section was not held to apply to any case not in fact tried to a jury.<sup>17</sup> It is possible that a different interpretation would have been reached were the pressure of work on the courts greater than it is in North Dakota.

<sup>11</sup> *People's Bank v. Lee*, 55 N. D. 42, 212 N. W. 439 (1927).

<sup>12</sup> *Novak v. Lovin*, 33 N. D. 424, 157 N. W. 297 (1916); *State Bank v. Maier*, 34 N. D. 259, 158 N. W. 346 (1916); *Lloyd Mortgage Co. v. Davis*, 51 N. D. 336, 199 N. W. 869 (1924); *Quinn Works v. Boyd*, 52 N. D. 273, 202 N. W. 852 (1924); *Baird v. Abraham*, 55 N. D. 348, 213 N. W. 733 (1927).

<sup>13</sup> See cases cited *supra* note 12. In retrial of equity cases there is a presumption of correctness in the trial court, although less strong. *Cf. Williston v. Ludowese*, 53 N. D. 797, 208 N. W. 82 (1926).

<sup>14</sup> *Wilke v. Merchants Bank*, 55 N. D. 603, 215 N. W. 77 (1927). See *infra* note 24.

<sup>15</sup> *Lunde v. Irish*, 50 N. D. 312, 195 N. W. 825 (1923).

<sup>16</sup> *Dale v. Duffy*, 44 N. D. 33, 176 N. W. 97 (1919); *Marquette Ins. Co. v. McCutcheon*, 54 N. D. 596, 211 N. W. 433 (1926).

<sup>17</sup> *Cf. IND. STAT.* (Burns, 1926) § 723 where the exclusion of cases "triable to a jury" from the operation of the statute is held to make the provision applicable to equity suits only. *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109 (1905); *Mills v. Thomas*, 194 Ind. 648, 144 N. E. 412 (1924).

Alabama has had on its books since 1907<sup>18</sup> a provision giving the appellate court power finally to dispose of the case. In tracing its development in that state, however, it is necessary to look into the provisions relating to waiving jury trial, for the provision applies where a jury has been waived. It was first provided that when a jury was waived, and no special finding of fact was made by the trial court, the general finding of the trial court should have the same authority as a jury verdict.<sup>19</sup> This provision was retained in the code of 1907, which first introduced a provision for a review of the findings on appeal, and the rendition of a judgment thereon. For this reason, the provision for final judgment on appeal was allowed to apply only to "equity" cases, and to cases where a special finding of fact had been made, on the application of one of the parties, and where a jury had been waived.<sup>20</sup> However, by 1915, the requirement of a special finding below had been dropped, and it is not found in the latest code.<sup>21</sup> Therefore in any case in which there was in fact no jury below, the appellate court may review the findings of the lower court, and may make another finding, and enter judgment upon it.<sup>22</sup> This has been done even in a criminal case.<sup>23</sup> But this rendition of judgment is discretionary, and the

<sup>18</sup> ALA. CODE (1907) §§ 5359-61. The present provisions (ALA. CODE (1928) §§ 6149, 9502) read: "§ 6149. The appellate court may, upon the reversal of any judgment or decree, remand the same for further proceedings, or render such judgment or decree as the court below should have rendered, when the record enables it to do so." "§ 9502. In the trial of any cause without a jury in addition to the questions which may be under the existing laws presented to the supreme court for review, either party to the cause may, by bill of exceptions, also present for review the conclusions and judgments of the court on the evidence that the supreme court shall review the same without any presumption in favor of the court below on the evidence, and if there be error, shall render such judgment in the cause as the court below should have rendered, or reverse and remand the same for further proceedings in said court as the supreme court may deem right. The finding of the court on the facts shall be subject to review without an exception thereto."

<sup>19</sup> ALA. CODE (1896) § 3319.

<sup>20</sup> *First Bank v. Mayfield Mills*, 146 Ala. 610, 40 So. 954 (1906) (no special finding made); *Allen v. Scruggs*, 190 Ala. 654, 67 So. 301 (1914) *semble*; *cf. Betancourt v. Eberlin*, 71 Ala. 461 (1882) (finding of judge when jury waived equal to jury verdict).

A trial below on agreed facts was equivalent to a special finding. *Bassett v. Powell*, 178 Ala. 340, 60 So. 88 (1912).

<sup>21</sup> See *supra* note 18.

<sup>22</sup> *Pinckard v. Cassels*, 195 Ala. 353, 70 So. 153 (1915) (evidence reviewed, finding below reversed—jury had been waived); *Cochran v. Leonard*, 204 Ala. 163, 85 So. 693 (1920); *Montgomery Light Co. v. Woods*, 194 Ala. 329, 70 So. 119 (1915); *Farmers' Bank & Trust Co. v. Shut & Keihn*, 192 Ala. 53, 68 So. 363 (1915); *Twin Tree Lumber Co. v. Ensign*, 193 Ala. 113, 69 So. 525 (1915); see *Jones v. Hines*, 205 Ala. 145, 146, 87 So. 531 (1920).

<sup>23</sup> *Corcoran v. State*, 18 Ala. App. 202, 89 So. 835 (1921).

appellate court still may remand the case, if it so desires.<sup>24</sup> The court will only review, however, what is included in the bill of exceptions.<sup>25</sup> Thus it will be seen that under a broad provision a liberal interpretation will enable the appellate court in many cases coming to it<sup>26</sup> to settle a case finally while it is passing upon the correctness of the trial below.

California recently, in 1927, passed the most far-reaching American provision for appellate disposition of a case. The statute<sup>27</sup> was passed following an amendment to the Constitution,<sup>28</sup> ratified in 1926, making it possible. The statute, in brief, provides that in all cases "where a jury is not a matter of right, or where jury has been waived" the appellate court may make findings of fact contrary to, or in addition to, those made by the trial court, and may take new evidence of events any time before decision, and may make final judgment. The statute expressly declares that it is to be construed liberally to avoid retrials. The statute has already been used frequently,<sup>29</sup> but in view of its obvious modelling on the English Rules of Court the development in England may be of greater interest than a study of the very recent California provision.

The English provision reads: <sup>30</sup>

"The Court of Appeal shall have . . . the full discretionary power to receive further evidence on questions of fact, such evidence to be taken either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeal from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (except as above) shall be admitted on

<sup>24</sup> Ex parte Kemp, 203 Ala. 467, 83 So. 485 (1919); Munson S. S. Line v. Horace Turner Co., 202 Ala. 574, 81 So. 76 (1919). For discussion of discretionary nature of such provisions see J. J. G., *Fact Finding Power of Appellate Courts of California* (1928) 16 CALIF. L. REV. 500, 504 *et seq.*

<sup>25</sup> Consolidated Motor Co. v. Malik, 207 Ala. 120, 92 So. 262 (1922); Bridgman v. Doss, 9 Ala. App. 615, 64 So. 173 (1913) (bill must show finding below).

<sup>26</sup> In Alabama, jury is waived unless specially asked for within a certain time. ALA. CODE (1928) §§ 8593-95, 8597. Similar provisions designed to make jury waiving more common are found in some other states. CONN. GEN. STAT. (1918) § 5752; N. Y. C. P. A. (1921) § 426.

<sup>27</sup> CAL. CODES AND GEN. LAW (Supp. 1927) § 956a.

<sup>28</sup> CAL. CONST. Art. VI, § 4¾.

<sup>29</sup> For collections of recent California cases applying this section see J. J. G., *Fact Finding Power of Appellate Courts of California*, *supra* note 24, at 509 *et seq.*; (1928) 1 So. CALIF. L. REV. 387; CAL. JUR. SUPP. (1928) 187 *et seq.*

<sup>30</sup> Order 58, r. 4, ANNUAL PRACTICE (1928) 1186 *et seq.*; YEARLY PRACTICE (1928) 1160 *et seq.*

special grounds only, and not without special leave of court. The Court of Appeal shall have power to draw inferences of fact, and to give any judgment or make any order which ought to have been made . . ."

The Rule further provides for admitting evidence on partial appeals, or in favor of the appellee as well as the appellant.

One feature, which is to be noted in comparison with the American provision, is the absence of any reservation as to jury cases. Of course, there is no constitutional guaranty of jury trial in England in the sense that there is in America; however, the practice under the Order seems to be that when there has been a jury verdict below, the appellate court hesitates to make findings of fact counter to the jury's finding. The English provision can best be discussed by treating the question of the admission of new evidence in connection with the power to give final judgment. The rule is said to be that if evidence could have been, but was not, submitted below to the jury, it will not be admitted on appeal.<sup>31</sup> Where, however, the appellate court, allowing for the presumption of correctness always accorded the trial court,<sup>32</sup> thinks that there could be only one reasonable finding of fact, the court will make its own finding, and give final judgment.<sup>33</sup> Where there was no jury below, the court is more ready to draw its own inferences of fact.<sup>34</sup>

As to the admission of new evidence on appeal, the practice of the court seems to be cautious, although new evidence is often admitted.<sup>35</sup> The provisions for admitting new evidence without special leave are strictly construed.<sup>36</sup> As has been suggested, especially where there has been a jury, the court will not admit new evidence which, with diligence, could have been presented below.<sup>37</sup> When new evidence is to be admitted, notice of its production must be given the opponent party.<sup>38</sup> It is possible, though not usual, to have witnesses subpoenaed to give evidence on appeal.<sup>39</sup> The procedure under the Rules of Court is open in

<sup>31</sup> *Nash v. Rochford Rural Council*, [1917] 1 K. B. 384; *cf. MacDougall v. Knight*, 14 App. Cas. 194 (1889).

<sup>32</sup> *Coghlan v. Cumberland*, [1898] 1 Ch. D. 704; *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q. B. 38.

<sup>33</sup> *Winterbotham & Co. v. Sibthorp*, [1918] 1 K. B. 625; *Banbury v. Bank of Montreal*, [1918] A. C. 626.

<sup>34</sup> *Coghlan v. Cumberland*, *supra* note 32.

<sup>35</sup> *In re Chennell*, 8 Ch. D. 492 (1878) (any evidence not heard below is eligible, but court should be cautious); *Bigsby v. Dickinson*, 4 Ch. D. 24 (1876) (evidence received).

<sup>36</sup> *In re Compton*, 27 Ch. D. 392 (1884).

<sup>37</sup> See cases cited *supra* note 31.

<sup>38</sup> *Hastie v. Hastie*, 1 Ch. D. 562 (1876); *Justice v. Mersey Steel & Iron Co.*, 24 W. R. 199 (1875); *INDEMAUR, MANUAL OF PRACTICE* (10th ed. 1919) 349.

<sup>39</sup> *In re Coal Economizing Co.*, 24 W. R. 36 (1875); *Regina v. Rourke*, 56 J. P. 292 (1891).

criminal cases by reason of a provision in the criminal code which opens to criminal cases all practices used in civil cases.<sup>40</sup>

The North Dakota statute noted above also provides:<sup>41</sup>

"On appeal in the supreme court in any action tried by the court without a jury, if it appears that material evidence was excluded, the supreme court may issue a mandate to the lower court to take such evidence, and proceedings will be stayed while it is returned."

No cases were found, however, in North Dakota in which this procedure was employed. Provisions for the taking of new evidence in appellate courts are found in the statutes of a few other states.<sup>42</sup>

A broad provision like that recently adopted in California seems to be the most useful. In view of the congestion in so many courts of this country, any means that will enable the courts to clear their dockets of cases with a minimum of judicial procedure is to be advocated. In "equity" cases, since the appellate court so frequently reviews the facts anyway, the power to make a final determination will cut out a duplication of proceedings in many cases. Since it must be recognized that it would not be wise to make a complete retrial of every case in the appellate court the usual procedure, this can be avoided by making the review of facts, and the remanding to a trial court, a matter in the discretion of the appellate court. The same considerations would seem to apply in the cases where jury has been waived in the trial court. We may trust appellate courts not to usurp the functions of the trial court.

The provision for the admission of new evidence on appeal also seems desirable. In those states where it has been allowed, and in England, the practice seems to be that such evidence is not very often resorted to, and if the provision is applied so as to avoid allowing a disappointed litigant to bolster up his case on appeal, it may be of great value in those cases where the only grounds for remanding are that facts have come to light since trial which put a new complexion on the case.

#### CONVICTION OF ONE DEGREE OF AN OFFENSE AS ACQUITTAL OF ALL HIGHER DEGREES

One of the questions that has arisen in connection with the constitutional provision<sup>1</sup> that no person shall be placed in jeop-

<sup>40</sup> *Rex v. Robinson*, [1917] 2 K. B. 108.

<sup>41</sup> *Supra* note 10.

<sup>42</sup> CAL. CODES AND GEN. LAWS (Supp. 1927) § 956a; KAN. REV. STAT. ANN. (1923) c. 60, § 3316; MASS. GEN. LAWS (1921) c. 231, § 125; MICH. COMP. LAWS (1915) § 12034; N. J. COMP. STAT. (Cum. Supp. 1925) §§ 163-304; N. C. CODE (1927) § 1414; R. I. GEN. LAWS (1923) § 4963 (expressly limited to equity); see (1927) 36 YALE L. J. 570.

<sup>1</sup> U. S. CONST. AMEND. V.

ardly twice for the same offense is whether, when a conviction is reversed and a new trial granted,<sup>2</sup> the defendant can raise the plea of former jeopardy as to all offenses of a higher degree than that of which he was formerly convicted. For example, suppose A to be on trial for murder. Upon a conviction of manslaughter, he appeals and the case is sent back for a new trial. May he, at the second trial, contend that the manslaughter verdict operated as an acquittal of murder? If so what will be the effect (a) of trying the defendant anew upon the original indictment; (b) of introducing evidence at the second trial which would tend to establish the commission of the higher offense; (c) of convicting the defendant of murder on the second trial?

In the recent case of *Carbonell v. People of Porto Rico*,<sup>3</sup> the defendant was indicted for murder and convicted of manslaughter. On appeal, the judgment was reversed and the cause remanded. At a second trial on the original indictment, the defendant pleaded the former conviction as an acquittal of all offenses higher than manslaughter, and hence as a bar to further prosecution for murder. The plea was overruled and the defendant was again convicted of manslaughter. On writ of error, the defendant alleged, *inter alia*, double jeopardy. The court, relying on the rule of *United States v. Trono*,<sup>4</sup> affirmed the conviction.

The defendant's contention in the *Carbonell* case would have been supported in some states, notably in California. A court there has gone so far as to grant a writ of prohibition to prevent a second trial on the original indictment, even though the court had ruled that a conviction could be had for no higher offenses than on the first trial.<sup>5</sup>

Where the doctrine prevailing is that a conviction of a smaller offense operates as an acquittal of all higher offenses, the effect of admitting evidence on the second trial which would support a conviction for a higher offense presents an interesting question. The only cases which have been found on this point arose in Florida and their results are apparently in conflict. In *West v.*

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<sup>2</sup> Of course, the plea of double jeopardy is not available as a defense to all further prosecution on a new trial, where such new trial has been procured by the defendant's motion or appeal. *State v. Slack*, 6 Ala. 676 (1844); *Johnson v. State*, 29 Ark. 31 (1874); *People v. Clinton*, 78 Cal. App. 451, 248 Pac. 929 (1926).

<sup>3</sup> 27 F. (2d) 253 (C. C. A. 1st, 1928).

<sup>4</sup> 199 U. S. 521, 26 Sup. Ct. 121 (1905). In this case, the defendant had been convicted of an assault after being tried on an indictment for murder. On appeal of the defendant to the Supreme Court of the Philippine Islands, the court reversed the conviction of assault and the defendant was then convicted of murder in the second degree. This action was affirmed by the Supreme Court of the United States.

<sup>5</sup> *Huntington v. Superior Court*, 5 Cal. App. 288, 90 Pac. 141 (1907).

*State*,<sup>6</sup> where the defendant was convicted on the first trial of manslaughter, the admission in a later trial of evidence tending to show premeditation was held to be reversible error. In the second case,<sup>7</sup> after a conviction for assault with intent to commit murder in the second degree, the fact that some of the evidence admitted on the second trial might have been interpreted as showing premeditated intent was held not to be error. In both cases the trial was expressly confined to the grade of the offense of which the defendant was formerly convicted, but the discrepancy in result may possibly be explained by the fact that in the latter case the potential penalty for each of the two grades of the offense was the same.<sup>8</sup> The court points out this fact, and goes on to say:<sup>9</sup>

" . . . and on a subsequent trial that is expressly confined to an assault with intent to commit murder in the second degree, an intent to commit the felony must be shown to accompany the assault, and in proving the intent, it may not be error to admit evidence of the circumstances incident to the assault that may tend to show a premeditated design to kill as well as an intent to kill by perpetrating an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to kill any individual."

The court was no doubt cognizant of the practical difficulties of proving any sort of "intent," and its decision to dispense with hair-splitting seems desirable, particularly under the facts of this case.

Cases which actually result at the second trial in convictions for a higher degree of the offense are rare. In some states, there is considerable dicta to the effect that such a verdict would not be allowed.<sup>10</sup> An Arkansas case has expressly so held, basing its decision upon an interpretation of the state constitution and code.<sup>11</sup> A Virginia court has reached the same result,<sup>12</sup> arguing

<sup>6</sup> 55 Fla. 200, 46 So. 93 (1908).

<sup>7</sup> *Thomas v. State*, 85 Fla. 113, 95 So. 752 (1923).

<sup>8</sup> FLA. REV. GEN. STAT. (1920) § 5063 provides that an assault to commit a crime punishable by death or life imprisonment is punishable by imprisonment for not more than 20 years. See also *ibid.* § 5035 making murder in the first degree punishable by death and murder in the second degree punishable by life imprisonment.

<sup>9</sup> See *Thomas v. State*, *supra* note 7, at 117, 95 So. at 754.

<sup>10</sup> See *Thornton v. State*, 18 Ala. App. 225, 227, 90 So. 66, 68 (1921); *State v. Bridges*, 149 La. 844, 846, 90 So. 217 (1921); *Brown v. State*, 99 Tex. Cr. 19, 22, 267 S. W. 493, 494 (1925).

<sup>11</sup> *Johnson v. State*, *supra* note 2. The Bill of Rights provided that "no person having been once acquitted by a jury for the same offense shall be again put in jeopardy. . . ." In view of this, a code provision that a new trial placed the parties in the same position as if no trial had been had was held inoperative as to offenses of which he had been acquitted.

<sup>12</sup> *Stuart v. Commonwealth*, 28 Gratt. 950 (Va. 1877). See opinion of

that had the defendant been indicted on one count for murder and on another for manslaughter, an express acquittal on the murder count would effectively bar any subsequent conviction therefor. The court considered that the result should be the same where a conviction for a smaller offense operates as an implied acquittal of higher offenses. Apparently, in spite of subsequent waverings, this is still the state of the law in Virginia.<sup>13</sup>

Such a view is faultless in its academic logic, but it is sharply challenged by practical aspects of the problem,<sup>14</sup> and it may be wholly upset by discarding the premise that a conviction of one offense is for all purposes an acquittal of any higher offense. *Trono v. United States*<sup>15</sup> squarely holds that where the defendant appeals he may on a new trial be convicted of a higher offense than on the first trial because the appeal is a "waiver" of the right to plead former jeopardy. A recent Mississippi case<sup>16</sup> explains a similar holding by construing a provision of a state statute, that "there must be an actual acquittal or conviction on the merits to bar another prosecution," as not to include "constructive" acquittals as such a bar. Undoubtedly courts which hold that a new trial places all the issues before the jury anew<sup>17</sup>

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Staples, J. at 962: "When the jury say the defendant is guilty of manslaughter, they affirm and in effect find by irresistible implication [that] he is not guilty of murder. What difference can it make . . . whether there be two counts or one count, or whether there be two express findings or one express and the other implied by law?"

<sup>13</sup> For a summary of the subsequent history of this problem in Virginia cf. *Benton v. Commonwealth*, 91 Va. 782, 21 S. E. 495 (1895). After the case of *Stuart v. Commonwealth*, *supra* note 12, the General Assembly in the Acts of 1877-1878 provided that, where a verdict was set aside on the defendant's motion, he should stand at the new trial as if the verdict had not been found. While this was in force, *Briggs v. Commonwealth*, 82 Va. 554 (1886) came up, raising the question of whether a conviction of murder in the second degree was an acquittal of murder in the first degree. The court refused so to instruct the jury in view of the statute, and, on appeal, the statute was sustained as constitutional. The Legislature, however, in the revision of 1887 provided that if the verdict be set aside and a new trial granted, the accused shall not be tried for any higher offense than that of which he was convicted at the last trial.

<sup>14</sup> See *infra* note 23.

<sup>15</sup> *Supra* note 4. Peckham, J. says at 533, 26 Sup. Ct. at 124: "... As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment. . . . No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal, he thereby waives . . . his right to avail himself of the acquittal of the greater offense in the judgment he has himself procured to be reversed."

<sup>16</sup> *Jones v. State*, 144 Miss. 52, 109 So. 265 (1926), writ of error denied, 273 U. S. 639, 47 Sup. Ct. 96 (1926).

<sup>17</sup> This view is sometimes taken, as in the *Trono* case, *supra* note 4, on the ground of waiver by the defendant. *Brantley v. State*, 132 Ga. 573, 64 S. E. 676 (1909), *aff'd*, 217 U. S. 284, 30 Sup. Ct. 514 (1910); *Watson v. State*, 224 Pac. 368 (Okla. 1924). Other courts like *Jones v. State*, *supra*

would allow a conviction on the second trial for a higher degree of the offense than was had on the first trial.

So long as the ingenuity of lawyers retains its pristine vigor, no claim can be made for the infallibility of any rule. Defendants convicted of murder in the second degree have been known to object to a failure on the new trial to try them for first degree murder.<sup>18</sup> It would seem, however, that the opportunities for ingenious objections were somewhat greater under the California rule,<sup>19</sup> than under that of *Trono v. United States*.<sup>20</sup> For example, when a conviction of manslaughter was reversed on appeal as being against the evidence, the defendant claimed on the new trial that a reversal precluded any further conviction for manslaughter and that the former verdict barred a conviction for murder.<sup>21</sup> Similarly, a defendant convicted on the first trial of murder in the second degree claimed on reversal that an intervening statute abolishing the different degrees of murder should operate to discharge him wholly; since the former verdict acquitted him of first degree murder.<sup>22</sup>

Some argument for the adoption of the *Trono* rule can be found if only in a desire to discourage such defenses as much as possible. An even more cogent argument for its adoption is presented in a Nevada case.<sup>23</sup> The language of the court is some-

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note 16, adopt it because of a constitutional or statutory provision which is construed as authorizing it. *Veatch v. State*, 60 Ind. 291 (1878); *People v. Palmer*, 109 N. Y. 413, 17 N. E. 213 (1888); *Gibson v. Somers*, 31 Nev. 531, 103 Pac. 1073 (1909); *Young v. People*, 54 Colo. 293, 130 Pac. 1011 (1913); *Newton v. Commonwealth*, 179 Ky. 496, 247 S. W. 707 (1923).

<sup>18</sup> Cf. *Vaughan v. State*, 18 Ala. App. 511, 93 So. 256 (1922); *Ex parte Williams*, 213 Ala. 121, 104 So. 282 (1925).

<sup>19</sup> *Supra* note 5.

<sup>20</sup> *Supra* note 4.

<sup>21</sup> *People v. Huntington*, 8 Cal. App. 612, 97 Pac. 760 (1908); cf. *State v. Ash*, 68 Wash. 194, 122 Pac. 995 (1912). Note that in both cases the convictions were affirmed. *State v. Ash* relies on the rule of *Trono v. United States*, and although *People v. Huntington* indicates that even under the California rule such quibbling *may* be overruled, it is submitted that there is less certainty that it *will* be than under the majority rule.

<sup>22</sup> *Beaupre v. State*, 206 S. W. 517 (Tex. 1918) (conviction affirmed).

<sup>23</sup> See *Gibson v. Somers*, *supra* note 17, at 533, 103 Pac. at 1074: "There are many cases where a cold-blooded murderer, through the eloquence of his attorney or sympathy for his relatives or those dependent upon him, or where a majority of the jury, believing the defendant guilty of murder in the first degree, in order to appease some member of the jury or for other reasons, rather than to allow the accused to escape some punishment or prevent a mistrial or total miscarriage of justice, agree to bring in a verdict of a lower degree of homicide, when as a matter of right and justice, the defendant, if he got his just deserts, should be hanged by the neck until he be dead. The People of the State, representing the victim of the accused, on a new trial, if they can prove a clear and conclusive case of murder in the first degree ought to be entitled to exact the full penalty of the law with equally as good a right as the defendant has to receive only

what theatrical, but even though hardships may result in particular cases, it is sound in pointing out that the interests of society are as much to be protected as those of the defendant, that a verdict for a smaller offense may mean many things other than innocence of higher offenses, and that it is better to allow the state the opportunity to show this on a new trial, if it can.

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the punishment provided by law for the lesser degree of crime and to hold otherwise, we believe, would be a travesty of justice."