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of a vehicle without a warrant, the laws differ greatly in the two jurisdictions,[12] one having the "absolute personal knowledge" requirement, while in the other only "probable cause" is required.

Of course, the purpose of the rule excluding illegally obtained evidence which North Carolina has adopted[13] is to protect persons from unreasonable searches and seizures.[14] But there is an equal public interest in the enforcement of the criminal law. The statutory requirement of "absolute personal knowledge," together with the "exclusionary rule" embodied in the amendment to G. S. 15-27, seems to make adequate enforcement of the liquor laws impossible. Should the "exclusionary rule" be continued, a substitution of the "probable cause" federal test of legal search for the present requirement of "absolute personal knowledge" might better serve all interests concerned.[15]

JACK WATTS WORSHAM.

Federal Jurisdiction—Three-Judge Court—Meaning of "State Statute"

Congress has made provisions in certain types of situations where an overriding public importance is involved for a special three-judge district court to supplant the ordinary single-judge court.[1] Such situations include equity actions by the United States under the Sherman Anti-Trust Act and the Interstate Commerce Act, actions to restrain the enforcement of any order of the Interstate Commerce Commission and actions to restrain the enforcement of an act of Congress on the grounds of its repugnance to the Constitution. An additional situation is where an interlocutory or permanent injunction is sought in Federal district

[12] Except search incident to arrest, or with consent.

[13] N. C. GEN. STAT. §15-27 (1943) made incompetent any evidence obtained by a search that was illegal because the warrant was defective under the statute. It was held in State v. McGee, 214 N. C. 184, 196 S. E. 616 (1938) that it did not exclude evidence obtained by an illegal search where no warrant at all was used. The 1951 amendment to the statute corrects this anomalous situation.

[14] The rule was first suggested by the United States Supreme Court in Boyd v. United States, 116 U. S. 616 (1885). But it remained for Weeks v. United States, 232 U. S. 383 (1914) to clearly establish the rule and its reason. Wigmore severely criticizes the rule. 8 WIGMORE, EVIDENCE §§2183-2184 (3d ed. 1940). See Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 ILL. L. REV. 303 (1925); Waite, *Evidence—Police Regulations by Rule of Evidence*, 42 MICH. L. REV. 697 (1944). But see Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 MINN. L. REV. 1 (1928). The rule is not in effect in thirty-one states, England, Canada, Scotland, and Australia. Wolf v. Colorado, 338 U. S. 25, 38, 39 (1949).

[15] No cases have been found which indicate what standard North Carolina requires for making a lawful search without a warrant for contraband other than intoxicating liquor. It is believed that the standard of absolute personal knowledge would be applied. See MACHEN, THE LAW OF SEARCH AND SEIZURE 61 (1950).

[1] MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 125 (1949).

court against the enforcement, operation or execution of a state statute or an order of an administrative board or commission by restraining a state officer in the enforcement or execution of the statute or order, on the ground that such statute or order is invalid under the Federal Constitution. In such case, section 2281 of the Judicial Code[2] requires that it be heard by a district court composed of three judges, one of whom must be a circuit judge.

Section 2281 is a strict procedural device and was not intended to extend federal jurisdiction.[3] The purposes behind the enactment of the statute indicate that it was intended as a limitation on the power of federal district courts to interfere with the enforcement of state laws.[4] A substantial claim of unconstitutionality must be made,[5] and in the absence of such a claim, diversity of citizenship plus the jurisdictional amount will not confer jurisdiction on the three-judge court.[6] Since this is a proceeding in equity, the federal court must have a cause of action in equity before it.[7] A single district judge may deter-

[2] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under such State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 62 STAT. 968, 28 U. S. C. §2281 (1948). The original statute creating the three-judge court was enacted in 1910 as part of the Mann-Elkins Act, 36 STAT. 539, 557 (1910); incorporated into the Judicial Code as §266 in 1911, 36 STAT. 1162 (1911); was extended to include orders of state administrative boards and commissions in 1913, 37 STAT. 1013 (1913); and in 1925 the section was amended to extend the jurisdiction of the three judges to the final hearing for the injunction, 43 STAT. 936 (1925).

[3] "The history of §266 [28 U. S. C. §2281], the narrowness of its original scope, the piece-meal explicit amendments which were made to it, the close construction given the section in obedience to Congressional policy, combine to reveal §266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." Phillips v. United States, 312 U. S. 246, 250 (1941). See Chandler v. Neff, 298 Fed. 515 (W. D. Tex. 1924); Pogue, *State Determination of State Law*, 41 HARV. L. REV. 623 (1927); Comment, *The Three Judge Rule*, 38 YALE L. J. 955 (1928).

[4] "It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. . . . Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge. . . ." Phillips v. United States, 312 U. S. 246, 250 (1941).

[5] California Water Service Co. v. City of Redding, 304 U. S. 252 (1938); Stratton v. St. Louis Southwestern R.R., 282 U. S. 10 (1930); *In re* Buder, 271 U. S. 461 (1926); Butler v. Simpson, 184 F. 2d 526 (4th Cir. 1950); Wylie v. State Board of Equalization of California, 21 F. Supp. 604 (S. D. Cal. 1937); United States Building & Loan Ass'n v. McClelland, 6 F. Supp. 299 (D. Colo. 1934); Cannonball Transportation Co. v. American Stages, Inc., 52 F. 2d 1050 (S. D. Ohio 1931); United Drug Co. v. Graves, 34 F. 2d 808 (M. D. Ala. 1929).

[6] Wylie v. State Board of Equalization of California, 21 F. Supp. 604 (S. D. Cal. 1937).

[7] "But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have

mine the question of jurisdiction of the statutory court, but he has no authority to dismiss on the merits if the case is one within that jurisdiction, and this determination is made on the basis of the allegations in the complaint.[8] Where the case calls for a three-judge court, the parties may not waive it since it is a jurisdictional requirement,[9] and a single judge can only issue a restraining order that is good until the hearing for the interlocutory or permanent injunction.[10] Where there is a proper case before the statutory court, it may determine all questions, local as well as federal.[11] Even if a three-judge court hears a case not within its jurisdiction, the decision has the character of a decision by a single judge and is not void, but an appeal will only lie to the court of appeals,[12] and where a three-judge court should have been convened but was not, the United States Supreme Court on application will issue a writ of mandamus to the district judge, directing him to call two other judges for the statutory court.[13]

The statutory court is also available where a state officer is sought to be restrained in the enforcement of any order made by an administrative board or commission pursuant to a state statute on the ground that the order is unconstitutional.[14] In such a case, it is only necessary to attack the order as unconstitutional, and the statute creating the board or commission need not be attacked.[15] As a limitation on the

a cause of action in equity. . . . Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and imminent." American Fed. of Labor v. Watson, 327 U. S. 582, 593 (1946); Chandler v. Neff, 298 Fed. 515 (W. D. Tex. 1924). The federal courts will not restrain state officers in the enforcement of criminal statutes, regardless of their unconstitutionality, except in extraordinary circumstances where the danger of irreparable loss is both great and immediate. The accused should first rely on his defense in the state courts, and then appeal the constitutionality to federal courts. Speilman Motor Sales v. Dodge, 295 U. S. 89 (1935); Fenner v. Boykin, 271 U. S. 240 (1926); Terrace v. Thompson, 263 U. S. 197 (1923); Trent v. Hunt, 39 F. Supp. 373 (S. D. Ind. 1941); Watchtower Bible & Tract Society v. City of Bristol, 24 F. Supp. 57 (D. Conn. 1938).

[8] *Ex parte* Poresky, 290 U. S. 30 (1933); New Jersey Chiropractic Ass'n v. State Board of Medical Examiners of New Jersey, 79 F. Supp. 327 (D. N. J. 1948). At least one case has held the district court need not grant jurisdiction if there is an "insuperable impediment" to the relief desired. Pullen v. Patton, 19 F. Supp. 340 (N. D. Tex. 1937).

[9] Riss & Co. v. Hoch, 99 F. 2d 553 (10th Cir. 1938).

[10] Stratton v. St. Louis Southwestern R.R., 282 U. S. 10 (1930); *Ex parte* Metropolitan Water Co. of West Virginia, 220 U. S. 539 (1911).

[11] Louisville & N. R.R. v. Garrett, 231 U. S. 298 (1913); Fisher v. Brucker, 41 F. 2d 774 (E. D. Mich. 1930).

[12] Public Service Commission of Missouri v. Brashear Freight Lines, 312 U. S. 621 (1941); O'Malley v. United States, 128 F. 2d 676 (8th Cir. 1942).

[13] Stratton v. St. Louis Southwestern R.R., 282 U. S. 10 (1930).

[14] See note 2 *supra*. A single individual, such as the state prohibition commissioner, may constitute a state administrative board or commission within the meaning of the act. McCormick & Co. v. Brown, 52 F. 2d 934 (4th Cir. 1931). A notice by the state industrial board to attend a workmen's compensation hearing, may be an "order" within the meaning of section 2281. Albee Godfrey Whale Creek Co. v. Perkins, 6 F. Supp. 409 (S. D. N. Y. 1933).

[15] Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 (1923); Southern R.R. v. Query, 21 F. 2d 333 (E. D. S. C. 1927).

right to attack the order and in accord with equitable principles, the state provisions for review of the order must be followed and exhausted prior to coming into federal court.[16]

An additional prerequisite to obtaining a three-judge court is that the action must seek to restrain a "state officer."[17] This does not include municipal or county officers,[18] even though the local officer may be enforcing a state law.[19] There is an exception to this rule: In case the local officer, although locally elected and having authority only in one political subdivision, acts in the interest of the state, he is to be regarded as a state officer as to the performance of those functions in which the state has an interest.[20] This is particularly true of prosecuting attorneys who are charged with the enforcement of state law.[21] Where it appears that the primary relief demanded is other than the restraint of state officers, the statutory court has no jurisdiction.[22] It must also appear that the state officer is actually attempting to enforce the state statute and not merely carrying out functions incidental to the enforcement of the statute.[23]

[16] Alabama Public Service Commission v. Southern R.R., 341 U. S. 341 (1951); Driscoll v. Edison Light & Power Co., 307 U. S. 104 (1939). The Johnson Act, 28 U. S. C. §1342 (1948), has application in this area: "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where: (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and, (2) The order does not interfere with interstate commerce; and, (3) The order has been made after reasonable notice and hearing; and, (4) A plain, speedy and efficient remedy may be had in the courts of such State."

[17] See note 2 *supra.*

[18] *Ex parte* Collins, 277 U. S. 565 (1928); Beal v. Holcombe, 193 F. 2d 384 (5th Cir. 1951); Pleasant v. Missouri-Kansas-Texas R.R., 66 F. 2d 842 (10th Cir. 1933); Henrietta Mills Co. v. Rutherford County, 26 F. 2d 799 (W. D. N. C. 1928).

[19] City of Cleveland v. United States, 323 U. S. 329 (1945); Petition of Public National Bank of New York, 278 U. S. 101 (1928).

[20] "Where a statute embodies a policy of state-wide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the state and not simply in the interest of the locality where he serves. This is especially true in the case of a prosecuting officer who acts for the entire state, as a part of its machinery of enforcement, in proceedings against violators of the state statute. . . . In that enforcement, he is acting in a true sense as an officer of the state. Appellant sought to restrain his action in that respect and hence we think that the case . . . was properly heard by three judges." Spielman Motor Sales v. Dodge, 295 U. S. 89 (1935).

[21] *Ibid.*

[22] Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386 (1934).

[23] Wilentz v. Sovereign Camp, W.O.W., 306 U. S. 573 (1939). Where statute set up maximum rates to be charged for telephone and telegraph service, with a provision that anyone overcharged could collect a penalty, and that the Railroad Commission was to publish a list of rates, a bill to restrain such publication is not a bill to restrain the statute, since the Railroad Commission is not attempting to enforce the statute. Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina, 280 Fed. 901 (E. D. S. C. 1922).

Although section 2281 is applicable to both state statutes and orders of administrative boards and commissions, perhaps the most difficult question concerning this section is: What is a "state statute" within the purview of this act? By judicial decision, "state statute" does not include a municipal ordinance,[24] a city charter,[25] a departmental regulation[26] or a statute passed by a state legislature but which has only local application.[27] Neither does it include a law passed by local authorities pursuant to a state enabling act,[28] but it does encompass provisions of a state constitution.[29] The allegation of unconstitutionality, based not on the statute, but on the construction placed on the statute by the highest state court is insufficient to obain a three-judge court.[30] The conflict asserted must be one between the statute and the Federal Constitution,[31] and the fact that the statute is in conflict with federal legislation which by virtue of the Supremacy Clause has pre-

[24] John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 100 (1928); City of Baton Rouge v. Baton Rouge Waterworks Co., 30 F. 2d 895 (5th Cir. 1929); City of Dallas v. Dallas Telephone Co., 272 Fed. 410 (5th Cir. 1921); City of Des Moines v. Des Moines Gas Co., 264 Fed. 506 (8th Cir. 1920); Sperry & Hutchinson Co. v. City of Tacoma, 190 Fed. 682 (C. C. W. D. Wash. 1911); Ward Baking Co. v. City of Fernandina, 29 F. 2d 789 (S. D. Fla. 1928); Calhoun v. City of Seattle, 215 Fed. 226 (W. D. Wash. 1914); Birmingham Waterworks v. City of Birmingham, 211 Fed. 497 (N. D. Ala. 1913). Neither does §2281 apply to a county ordinance. Borges v. Loftis, 87 F. 2d 734 (9th Cir. 1937); Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (S. D. Cal. 1946).

[25] Uihlein v. City of St. Paul, 32 F. 2d 748 (8th Cir. 1929).

[26] Sweeny v. State Board of Public Assistance, 36 F. Supp. 171 (M. D. Pa. 1940). As to the assessment, levy or collection of state taxes, the Tax Injunction Act of 1937, 28 U. S. C. §1341 (1948), provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." A three-judge court may be obtained where the taxing statute itself is attacked as unconstitutional. Query v. United States, 316 U. S. 486 (1942).

[27] Rorick v. Board of Commissioners of Everglades Drainage District, 307 U. S. 208 (1939) (statute had only local application in one drainage district); Public National Bank of New York v. Keating, 29 F. 2d 621 (S. D. N. Y. 1928) (state taxing statute, but the state interest was very small compared to that of the city for whose chief benefit the tax was collected). Section 2281 has been held not to apply to statutes passed by the legislatures of Hawaii, Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368 (1949); or Puerto Rico, Benedicto v. West India & Panama Telegraph Co., 256 Fed. 417 (1st Cir. 1919).

[28] *Ex parte* Collins, 277 U. S. 565 (1928); Teeval v. City of New York, 88 F. Supp. 652 (S. D. N. Y. 1950).

[29] "It would . . . be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. The policy underlying §266 [28 U. S. C. §2281] admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. There is no suggestion in the history of §266 that Congress was willing to give the federal courts a freer hand when state constitutional provisions were involved. In our view the word 'statute' in §266 is a compendious summary of various enactments, by whatever method they may be adopted, to which a state gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions." Amer. Fed. of Labor v. Watson, 327 U. S. 582 (1946).

[30] Steinbach v. Metzger, 63 F. 2d 74 (3rd Cir. 1933).

[31] *Ex parte* Williams, 277 U. S. 267 (1928); United Drug Co. v. Graves, 34 F. 2d 808 (M. D. Ala. 1929).

empted the field, is not an allegation of unconstitutionality within the meaning of section 2281.[32] Neither is this requirement satisfied by an assertion that the state officer is acting outside the scope of his statutory authority.[33]

Phillips v. United States[34] attempted to clarify the meaning of "state statute" within the purview of section 2281 by the following language:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' "[35]

In this case, the defendant, governor of Oklahoma, sought to justify his actions on the basis of state statutes and constitutional provisions which gave him the power to declare martial law in order to enforce the laws of the state, but the court held that this was not enough to warrant the convening of a three-judge court, for the existence of the power to declare martial law as a general proposition was not claimed to be unconstitutional, only the particular acts in this one instance were assailed as constitutionally invalid. Cases prior to the *Phillips* case had held that the fact that the state officer claimed to be acting under statutory authority was enough to require a three-judge court,[36] but those cases now seem to be overruled by implication. Subsequent decisions seem to indicate that where a substantial charge is made that a state statute is unconstitutional as applied to the plaintiff, a three-judge court has jurisdiction,[37] and the fact that the statute may be perfectly valid

[32] Case v. Bowles, 327 U. S. 62 (1946); *In re* Bransford, 310 U. S. 354 (1940); *In re* Buder, 271 U. S. 461 (1926); Board of Trade v. Illinois Commerce Commission, 156 F. 2d 33 (7th Cir. 1046); Farmers' Gin Co. v. Hayes, 54 F. Supp. 47 (W. D. Okla. 1943); D. A. Beard Trucking Line Co. v. Smith, 12 F. Supp. 964 (S. D. Tex. 1935); Hume v. Mahon, 1 F. Supp. 142 (E. D. Ky. 1932).

[33] Council of Defense of State of New Mexico v. International Magazine Co., 267 F. 390 (8th Cir. 1920). At least one case has held that where the governor and other state officials were merely acting under "color" of the state statute, a single district judge had the right and duty to enjoin their unconstitutional actions taken pursuant to such statute. Joyner v. Browning, 30 F. Supp. 512 (W. D. Tenn. 1939).

[34] 312 U. S. 246 (1941).

[35] *Id.* at 252.

[36] "It is apparent that the complainant is seeking to enjoin the defendants, as officers of the State of Indiana, from doing the things which they believe to be their duty under the Constitution and laws of the State of Indiana." Cox v. McNutt, 12 F. Supp. 355, 356 (S. D. Ind. 1935). "Since it appears that the plaintiffs seek to enjoin the defendants, who are officers of the state, from doing what they claim they are authorized and required to do by the Constitution and laws of the state, the causes are properly to be determined by a statutory court. . . ." Powers Mercantile Co. v. Olson, 7 F. Supp. 865, 866 (D. Minn. 1934).

[37] "Here a substantial charge has been made that a state statute as applied

as applied to other situations within its purview does not seem to dislodge the jurisdiciton of the three-judge court.[38] The distinction seems to be made between an attack on a statute as applied, as being unconstitutional (where a three-judge court is available), and an attack merely on the end-result of the statute's application as being unconstitutional (where a three-judge court is not available).[39]

This distinction seems to have been confirmed in at least two recent instances where a three-judge court was sought. In *Briggs v. Elliott*[40] a statutory court was granted to plaintiffs, Negro school children in South Carolina. The court stated:

> "This is a suit for a declaratory judgment and injunctive relief in which it is alleged that the schools and educational facilities provided for Negro children in School District No. 22 in Clarendon County, South Carolina, are inferior to those provided for white children in that district and that this amounts to a denial of the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Federal Constitution, *and further that the segregation of Negro and white children in the public schools, required by Article 11, section 7 of the Constitution of South Carolina and section 5377 of the Code of Laws of that state, is of itself violative of the equal protection clause of the Fourteenth Amendment.*"[41] [Italics added.]

In the *Briggs* case, the constitutional provisions and state statute were directly attacked as unconstitutional, and the federal courts have previously held that section 2281 does not apply unless the statute is *directly involved.*[42] *Gray v. Board of Trustees of University of Tennessee*[43] was an action seeking to enjoin the defendants from denying plaintiffs admission to graduate school and college of law as students because

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to the complainants violates the Constitution. Under such circumstances we have held that relief in the form of an injunction can be afforded only by a three-judge court. . . ." Query v. United States, 316 U. S. 486, 490 (1942).

[38] In Query v. United States, 316 U. S. 486 (1942), the statute involved was a state license tax for the privilege of retailing certain articles. Obviously, this tax would be valid in some situations, but not where the tax was imposed upon U. S. Army Post Exchanges as was attempted to be done in the *Query* case.

[39] "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case, the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction." *Ex parte* Bransford, 310 U. S. 354, 361 (1940).

[40] 98 F. Supp. 529 (E. D. S. C. 1951), *remanded for other reasons*, 72 S. Ct. 327 (1952).

[41] *Id.* at 530.

[42] Grigsby v. Harris, 27 F. 2d 945 (S. D. Tex. 1928).

[43] 100 F. Supp. 113 (E. D. Tenn. 1951), *dismissed on appeal*, 72 S. Ct. 432 (1952).

they were members of the Negro race. The Constitution and Statutes of the state required segregation between the races in educational institutions. In answer to a request for a three-judge court, the court stated:

> "We are of the opinion that the case is not one for decision by a three-judge court. Title 28 U. S. Code, §2281, requires the action of a three-judge court only when an injunction is issued restraining the action of any officer of the State upon the ground of the unconstitutionality of such statute. *We are of the opinion that the case presents a question of alleged discrimination on the part of the defendants against the plaintiffs under the equal protection clause of the 14th Amendment rather than the unconstitutionality of the statutory law of Tennessee requiring segregation in education. As such, it is one for decision by the District Judge instead of by a three-judge court.*"[44] [Italics added.]

Here the court *construed* the complaint not to attack the statute as unconstitutional, but merely to allege discrimination on the part of the defendants, and the relief demanded could be granted without holding the segregation law invalid.[45] It is readily seen that whether the three-judge court has jurisdiction is largely in the control of the plaintiff in drawing his complaint,[46] for if the complaint makes a substantial charge of unconstitutionality of a state statute, then the statutory court is forthcoming.[47] But the defendant may not raise the constitutional issue by answer in order to obtain the three-judge court.[48]

It is by no means clear whether the *Briggs* and *Gray* cases represent the view that the Supreme Court will ultimately take on this particular question, for in neither case did that court decide this question on appeal.[49] These cases do represent an extension of the Supreme Court's views taken in the *Phillips* case, and serve to indicate the complexity of the problem involved.

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[44] *Id.* at 114.

[45] In such a situation, the plaintiff would be primarily alleging that the separate schools resulted in discrimination against him because of his race and color, and not that the segregation law *per se* was unconstitutional. Here the court could grant the relief demanded by forcing the state officers to make the separate schools equal.

[46] Hobbs v. Pollock, 280 U. S. 168 (1929).

[47] Stratton v. St. Louis Southwestern R.R., 282 U. S. 10 (1930). The U. S. Supreme Court held that it was insufficient reason for failure of district judge to immediately call two other judges to his aid that the question was likely to become moot. *Ex parte* Atlantic Coast R.R., 279 U. S. 822 (1928).

[48] Hobbs v. Pollock, 280 U. S. 168 (1929).

[49] The *Briggs* case was remanded by the U. S. Supreme Court, 72 S. Ct. 327 (1952), to allow the district court to consider the report made by the State of South Carolina on the progress made in carrying out the mandate of the district court to make the schools equal. The *Gray* case was dismissed on appeal, 72 S. Ct. 432 (1952), because the plaintiff had been admitted to the University of Tennessee.