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NOTES

FEDERAL COURTS—THREE-JUDGE STATUTORY COURTS UNDER SEC. 266 OF THE JUDICIAL CODE—POWERS OF THE SINGLE JUDGE.—On April 6, 1942, Congress by enacting Chapter 210, Sec. 3, 56 Stat. 199, 28 U. S. C. A., Sec. 792, again dealt with the powers of single federal judges in cases falling within the provisions of Sec. 266 of the judicial code.¹ Sec. 266 requires the presence of three federal judges, one of whom must be a circuit judge, in equity suits where an interlocutory injunction is sought on constitutional grounds in the federal district courts to restrain state officials from enforcing a state statute or order of a state administrative tribunal.²

The powers of a single district judge in cases falling within the section have presented a troublesome question. Prior to the case of *Ex parte Poresky*,³ although it was well settled that a single judge could not dismiss such a case on the merits, there was no decision covering the matter of dismissal for lack of jurisdiction.⁴ In that case the Supreme Court declared that the single judge

¹Judicial Code, Sec. 266, as amended, 28 U. S. C. A., Sec. 380.

²See: Bowen, *When Are Three Federal Judges Required?* 16 MINNESOTA LAW REVIEW 1. See also 18 M. L. R. 729; 19 M. L. R. 92.

³*Ex parte Poresky* (1933) 290 U. S. 301, 54 S. Ct. 3, 78 L. Ed. 152, 18 M. L. R. 729.

⁴It had been suggested on principle that the single judge could not dismiss any more for lack of jurisdiction than on the merits; 16 M. L. R. 1, 23-24.

might dismiss for lack of jurisdiction. In a subsequent decision, *California Water Service Co. v. City of Redding*,⁵ the Supreme Court went a step further to hold that it was the "duty" of the single district judge to scrutinize the bill of complaint and to ascertain whether a substantial federal question is presented.

These declarations of the Supreme Court, however, would seem now to have been overruled by Congress in the Act of 1942, amending 28 U. S. C. A., Sec. 792. That section covers all situations where statutory three-judge courts are required and defines in detail the powers and limitations on single judges. Briefly summarized, the single judge is authorized to take specified action⁶ subject, however, to review by the statutory court when later convened. Other language in the section expressly forbids the single judge from doing other things, among which is, to dismiss the suit.

The limitation against dismissal is not qualified⁷ and literally prevents a single judge dismissing the suit regardless of the grounds, whether on the merits, or for want of a substantial federal question as defined and sustained by the Supreme Court, or for lack of good faith.

It may well be that in practice and by judicial construction the new law will be so shaped as to permit a single judge to dismiss three-judge cases in instances of clear fraud, oppression, or abuse of process. In view of the clear language of the statute, it appears unlikely that single judges will undertake to dismiss on jurisdictional grounds.

Alfred W. Bowen.

⁵(1938) 304 U. S. 252, 254, 58 S. Ct. 865, 866, 82 L. Ed. 1323.

⁶The full text of the section, 28 U. S. C. A., Sec. 792, follows: Three-judge district court actions for interlocutory injunction and final hearing; powers of single judge.

In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of sections 47, 380, or 380a of this title, or section 28 of Title 15 and section 44 of Title 49, as amended by section 1 of the Act of April 6, 1942, chapter 210, any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action. Provided, however, that any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion. April 6, 1942, c. 210, Sec. 3, 56 Stat. 199.

⁷See footnote 6, *supra*.