

Counsel for Parties.

292 U.S.

Wall. 590, 620; *The Francis Wright*, 105 U.S. 381, 384-386; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 292; *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536, 537.

Dismissed.

GULLY, STATE TAX COLLECTOR, ET AL. v. INTER-
STATE NATURAL GAS CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 651. Argued March 15, 1934.—Decided April 2, 1934.

1. A contract of tax exemption is not impaired by a later statute authorizing assessments of back taxes on taxable property and not specifying the property in question. P. 18.
2. A mere assessment for taxation is not a statute or an order of an administrative board or commission within the meaning of § 266, Judicial Code. P. 18.
3. A decree rendered by a District Court erroneously constituted of three judges in a case not covered by § 266, Jud. Code, is not reviewable on the merits by direct appeal to this Court; but such appeal having been taken, this Court has jurisdiction to enforce the limitations of that section; and, the time for appeal to the Circuit Court of Appeals having expired, this Court will reverse the decree and remand to the District Court for further proceedings to be taken independently of § 266. P. 19.
- 4 F.Supp. 697, reversed.

APPEAL by the State Tax Collector and State Tax Commission of Mississippi from a final decree of the District Court, constituted of three judges. The decree made permanent a preliminary injunction enjoining the appellants from making assessments of taxes.

Mr. Edward W. Smith, with whom *Mr. Greek L. Rice*, Attorney General of Mississippi, and *Mr. J. A. Lauderdale*, Assistant Attorney General, were on the brief, for the Tax Collector, appellant.

Mr. Weaver E. Gore filed a brief on behalf of the Tax Commission of Mississippi, appellant.

Messrs. David Clay Bramlette and Garner W. Green, with whom *Messrs. William A. Dougherty, Marcellus Green, Walter P. Armstrong, and Thomas A. McEachern* were on the brief, for appellee.

PER CURIAM.

Appellee brought this suit in the District Court of the United States for the Southern District of Mississippi seeking to enjoin state officers from proceedings to assess its property for the years 1927 to 1931, inclusive, upon the ground that the proposed assessments would impair the obligation of a contract by which the Company had secured an exemption from taxation. Chapter 138, Laws of Mississippi of 1922, and Chapter 172, Laws of 1926. The challenged proceedings were taken pursuant to a statute which authorized assessments in cases where it was ascertained that in past years property had escaped taxation. See Chapter 214, Laws of 1928; Chapter 291, Laws of 1932; Mississippi Code of 1930, §§ 3226 and 6992; Code Supp., 1933, §§ 3204, 3208. It appeared that on April 14, 1933, at the instance of the State Tax Collector, the State Tax Commission had made assessments of appellee's property for prior years, subject, however, to objections to be made and filed with the Commission on or before May 23, 1933. Appellee, instead of availing itself of that opportunity, filed its bill in this suit on May 16, 1933.

The District Judge, on an application for an interlocutory injunction, considering § 266 of the Judicial Code to be applicable, called to his assistance two other judges; and the District Court, as thus composed, granted an injunction restraining defendants from approving and enforcing the proposed assessments. Motions to dismiss

the bill for want of equity were denied. An agreed statement of facts was filed and on final hearing the District Court of three judges made the injunction permanent. The court stated in its findings that it had been agreed that the assessment order would certainly be made final.

No substantial question was presented as to the validity of the statute authorizing assessments of property which had escaped taxation. The statute did not specify the property of appellee and it authorized assessments only of property that was taxable.

A mere assessment is not a statute or an order of an administrative board or commission within the meaning of § 266 of the Judicial Code. *Ex parte Williams*, 277 U.S. 267, 272. The decision in *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, is not to the contrary. Hence, there was no occasion for constituting a court of three judges. As the case was not one within § 266, the merits cannot be brought to this Court by a direct appeal. Compare *Smith v. Wilson*, 273 U.S. 388, 389, 391; *Healy v. Ratta*, 289 U.S. 701. But, although the merits cannot be reviewed here in such a case, this Court by virtue of its appellate jurisdiction in cases of decrees purporting to be entered pursuant to § 266, necessarily has jurisdiction to determine whether the court below has acted within the authority conferred by that section and to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes. The case is analogous to those in which this Court, finding that the court below has acted without jurisdiction, exercises its appellate jurisdiction to correct the improper action. *Assessors v. Osborne*, 9 Wall. 567, 575; *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 387-389; *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 73, 74; *Shawnee Sewerage Co. v. Stearns*, 220 U.S. 462, 471, 472; *Piedmont & Northern Ry. Co. v. United States*, 280 U.S. 469, 477, 478; *Stratton v. St. Louis S. W. Ry. Co.*, 282 U.S. 10, 18.

In this instance, relief cannot be afforded by treating the decree of the District Court as appealable to the Circuit Court of Appeals, notwithstanding the participation of three judges (cf. *Healy v. Ratta*, 67 F. (2d) 554, 556), as the time for appeal to that Court has expired. In these circumstances, without passing upon the merits, the appropriate action is to reverse the decree below and to remand the cause to the District Court for further proceedings to be taken independently of § 266 of the Judicial Code.

Reversed.

McGARRITY, ADMINISTRATOR, v. DELAWARE
RIVER BRIDGE COMMISSION ET AL.

APPEAL FROM THE COURT OF COMMON PLEAS, NO. 1,
PHILADELPHIA COUNTY, PENNSYLVANIA.

No. 635. Argued March 13, 1934.—Decided April 2, 1934.

Appeal dismissed for want of a substantial federal question properly presented to the state court, in a suit for damage caused by a change of street grade to a lessee of abutting property.

The appeal was from a judgment of the Supreme Court of Pennsylvania, 311 Pa. 436, affirming a judgment of the Court of Common Pleas, to which latter court the record had been remitted when the appeal to this Court was taken.

Mr. John Robert Jones for appellant.

Mr. Harold D. Saylor, Deputy Attorney General of Pennsylvania, with whom *Mr. Wm. A. Schnader*, Attorney General, was on the brief, for appellees.

PER CURIAM.

This action was brought to recover damages alleged to have been caused by a change in the grade of a street which prevented access to appellant's leasehold. The au-