

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-

thority of the State Commission which directed the change of grade was conferred by the state statute of July 9, 1919, P.L. 814. The state court held that the damage in question was merely consequential, that the allowance of recovery therefor was a matter of legislative grace and not of right, and that the statute as invoked by appellant was invalid as it did not conform to the requirements of the state constitution. 311 Pa. 436; 166 Atl. 895. No federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without more. Appellant insists that questions under the Fourteenth Amendment were thus raised at the first opportunity. The petition for rehearing does not appear in the record. Nor does the record contain the pleadings, the evidence, or any findings by the state court upon the questions of fact involved. Appellant relies upon statements in the opinion of the state court but these fail to support appellant's contentions.

The appeal is dismissed for the want of a properly presented substantial federal question. *Whitney v. California*, 274 U.S. 357, 360, 362, 363; *Dewey v. Des Moines*, 173 U.S. 193, 199, 200; *Transportation Co. v. Chicago*, 99 U.S. 635, 641-643; *Wabash R. Co. v. Defiance*, 167 U.S. 88, 101.

Dismissed.

LARSEN *v.* NORTHLAND TRANSPORTATION CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 614. Argued March 14, 1934.—Decided April 2, 1934.

1. When sued for damages in a state court, a shipowner is not obliged to submit to that court his claim for limitation of liability even when there is only one owner and one claim against him. P. 23.
2. The right to limit liability is not waived by failing to set it up in a state court. *Id.*