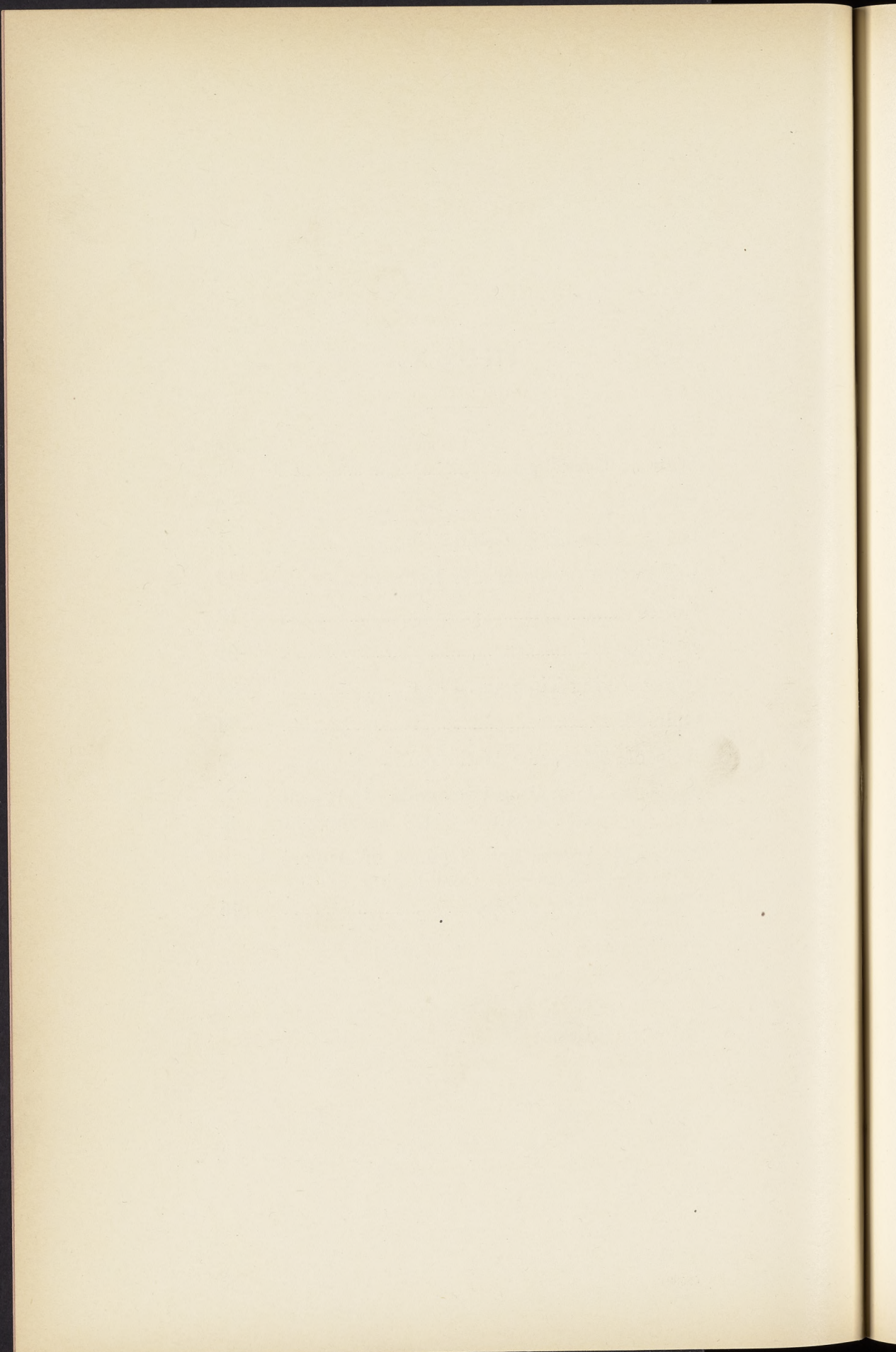


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Writ of Certiorari.

NEW JERSEY, ss.:

(L. S.) The State of New Jersey to the State Highway Commission of the State of New Jersey, and Walter K. Crater, County Clerk of the County of Somerset, GREETING:

10

We being willing for certain reasons to be certified of certain condemnation proceedings pending in the New Jersey Supreme Court entitled in the matter of the petition of The State Highway Commission of the State of New Jersey, for the condemnation of lands of Joseph S. Frelinghuysen, located in the County of Somerset, State of New Jersey, and a certain order made in the matter of the said proceedings and dated December 27, 1929, do command you that you send under your seal to the Justices of our Supreme Court of Judicature, at Trenton, on the 21st day of January, instant, as well the order made on December 17, 1929, among other things appointing commissioners in condemnation, as well as the petition on which the said order was made, with all things touching or concerning the same, as fully and entirely as they remain in your Court before you, by whatsoever names the parties may be called therein, together with this our writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

20

30

Witness, WILLIAM S. GUMMERE, Chief Justice of our said Court at Trenton, the 10th day of January, Nineteen Hundred and Thirty.

FRED BLOODGOOD,
Clerk.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

40

Writ of Certiorari

ALLOCATUR.

I allow the within writ. Let it be sealed.
January 10, 1930.

C. W. PARKER,
J. S. C.

10

ENDORSED.

New Jersey Supreme Court.

Joseph S. Frelinghuysen, Prosecutor, *vs.* The
State Highway Commission of the State of New
Jersey, Defendant.

20 Writ of Certiorari. Returnable January ,
1930.

McDermott, Enright & Carpenter, Attorneys
for Prosecutor, 75 Montgomery Street, Jersey
City, N. J.

30

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Reasons.

(3) The State Highway Commission does not have any power or authority to take land from a citizen, not for the purpose of constructing a highway thereon, but for the mere purpose of leaving it unoccupied.

10 (4) Because the State Highway Commission does not have any power or authority to take by condemnation any property for the purpose of affording users of highways an unobstructed view over parcels of land sought to be condemned by said Commission.

20 (5) Because the action of the State Highway Commission in attempting to take by condemnation the two parcels of land mentioned in paragraph 3 of the agreed state of facts and return, and the action of the Court in appointing commissioners for the purpose, is repugnant to Article I, Section 16, of the Constitution of the State of New Jersey, which provides:

“Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made.”

30 (6) Because the action of the State Highway Commission, in attempting to take by condemnation the parcels of land described in paragraph 3 of the agreed state of facts and return, is not authorized by Chapter 319 of the Laws of 1927, entitled, “An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof (Revision of 1927)”, and in particular by Section 111, paragraph E of said Act.

40

Reasons.

(7) Because Chapter 319 of the Laws of 1927, entitled, "An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof (Revision of 1927)", is repugnant to the Constitution of the State of New Jersey, in that if the right is given to the State Highway Commission by anything contained in said Act to condemn lands of a citizen for the purpose of **affording users of highways** an unobstructed view over the parcels intended to be taken, and for the purpose of preventing the citizen and owner thereof from using the same, said statute is repugnant to the provisions of Article III, Section VII, paragraph 4, of the State Constitution in that the said object is not expressed in the title of the said statute. 10
20

(8) The attempted condemnation of said parcels of land of the prosecutor, not for the improvement, betterment, reconstruction, resurfacing, maintenance, repair or regulation of a state highway, but for the purpose of preventing the prosecutor in the future from using the said parcels of land in any way he may see fit, is repugnant to Article I, Section One, of the Constitution of the State of New Jersey, in that it deprives the prosecutor of enjoying and possessing and protecting his property. 30

(9) Chapter 319 of the Laws of 1927 is unconstitutional and void as repugnant to the Fourteenth Amendment, Section One, of the Constitution of the United States, in that it abridges the privileges and immunities of the prosecutor, and in that it deprives him of his property without due process of law, and denies to him the equal protection of the laws. 40

Reasons.

10 (10) The order of the Hon. Charles W. Parker and the proceedings in condemnation aforesaid are illegal and null and void because Chapter 319 of the Laws of 1927 and the provisions of the State Constitution permit condemnation only for public use, and the purpose of the State Highway Commission in attempting to condemn the parcels of land described in paragraph 3 of the agreed state of facts and return is to prevent the use of said parcels by the prosecutor and so as to leave the same vacant and unoccupied by any roadway or structure.

20 (11) The said attempted condemnation of the said two parcels of land described in paragraph 3 of the agreed state of facts and return for the purpose of affording users of the public highway the protection of an unobstructed view over the parcels in question, is not authorized by the Constitution of the State of New Jersey or any statute of the State of New Jersey.

30 (12) Because the State Highway Commission seeks to acquire in said condemnation proceedings a fee simple estate in the lands and premises of the prosecutor described in the said petition, whereas the only right which the State Highway Commission is entitled to acquire in the lands and premises of the prosecutor under the laws of the State of New Jersey is an easement in lands required for the constructing, building, improving, widening, straightening and regrading of said highway.

40 (13) The proposed action of the State Highway Commission, being an attempt to secure a fee simple estate in the lands and premises of the prosecutor, part of which are intended for high-

Reasons.

way use and part not intended for highway use, would if the State Highway Commission acquires a fee simple estate put it in the power of the State Highway Commission under the provisions of Chapter 145 of the Laws of 1921 thereafter to make sale of the prosecutor's lands, to the great damage and detriment of the prosecutor, and in violation of his rights as owner of said lands and premises. 10

For all of which reasons the prosecutor prays that the order and proceedings aforesaid may be decreed to be null and void.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Prosecutor.

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Order Appointing Commissioners.

Condemnation proceedings before the Honorable Charles W. Parker, Justice of the Supreme Court, Somerset County.

10

IN THE MATTER

of

The Petition of the STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY for the condemnation of lands of JOSEPH S. FRELINGHUYSEN.

Order Appointing
Commissioners.

20

Whereas the State Highway Commission of the State of New Jersey under and by virtue of "An Act to establish a State Highway Department and to define its powers and duties, and vesting therein all the powers and duties now devolving by law on the Commissioner of Public Roads, and the existing State Highway Commission and Highway Commission", approved March 13, 1917, and the several supplements thereto and amendments thereof, and under the authority of "An Act to establish a State Highway System and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair, and regulation of the use thereof", approved March 30, 1927, and the several supplements thereto and amendments thereof, have made application to me in writing, by petition duly filed in the Clerk's Office of Somerset County, to appoint three disinterested freeholders, residents of the said County of Somerset, commissioners to appraise

30

40

Order Appointing Commissioners.

the said lands and premises and to assess the damages which the owners of the land set forth in said petition, and hereinafter particularly described have sustained or shall sustain by reason of the taking of said land for public use by the State of New Jersey, and to do whatever else the said commissioners so to be appointed are by law authorized or required to do; which said lands are more particularly described as follows: 10

All that certain lot, tract or parcel of land and premises situate, lying and being in the Township of Bridgewater, in the County of Somerset, and State of New Jersey, and more particularly described as follows:

Parcel #1.

As indicated on a certain plan filed in the office of the Clerk of Somerset County, showing particularly the location of the center line and right of way lines of the State Highway leading from Raritan to Chimney Rock, as adopted by the State Highway Commission, which plan is entitled "New Jersey State Highway Department, General Property Key Map, Route-29 Section 7, Raritan to Chimney Rock, showing existing right of way and parcels to be acquired in the Township of Bridgewater and in the Boro of Somerville, Somerset County, Scale: 1"=200', April, 1929"; and also as shown on a plan attached to the petition filed in this cause, marked "Exhibit A", entitled "New Jersey State Highway Department, Route 29 Section 7, Raritan to Chimney Rock Joseph S. Frelinghuysen Parcel 1, George E. Priefold Parcel 2, Boro of Somerville Parcel 3A-3B, John F. Reger Parcel 4, Andrew A. MacDonald Parcel 5, Township of Bridgewater Boro Somerville, Somerset County, Scale: 1"=200' April 9, 1929". 20 30 40

Order Appointing Commissioners.

BEGINNING at a corner of lands of Joseph S. Frelinghuysen on the east and lands now or formerly of William Southwick on the west in the existing northeasterly right of way line of West End Avenue (State Highway Route 28 Rev. 1927) and running thence (1) along the dividing line between lands of Joseph S. Frelinghuysen on the east and lands now or formerly of William Southwick on the west in a general northerly direction a distance of about nine (9) feet to a point in a line distant forty (40) feet normally from the center line of said West End Avenue (State Highway Route 28 Rev. 1927); thence (2) parallel to and distant forty (40) feet normally from the center line of West End Avenue aforesaid, South

20 fifty-four degrees, thirty-five minutes, East, a distance of about twenty-one (21) feet to a point of curvature marked "P. C. 530 R Station—3+32.02" on said plans; thence (3) along the proposed northerly right of way line of State Highway Route 29 Section 7, from Raritan to Chimney Rock in a general easterly direction on an arc of a curve to the left with a radius of five hundred thirty (530) feet a distance of about five hundred ninety-three (593) feet to a point in the dividing line between lands of the said Joseph S. Frelinghuysen on the west and lands now or formerly of

30 George E. Priefold on the east; thence (4) along said dividing line in a southerly direction (said dividing line being the second course described in a deed from Katherine Frelinghuysen to Joseph S. Frelinghuysen, dated November 7, 1898 and recorded in a deed Book V-8, Page 101 in the Office of the Clerk of Somerset County), a distance of about three hundred seventy-one (371) feet to a monument in the aforesaid northeasterly

40 right of way line of West End Avenue; thence (5)

- *Order Appointing Commissioners.*

along said existing northeasterly right of way line of West End Avenue. North fifty-four degrees, thirty-five minutes, West, a distance of about seven hundred four (704) feet to the point and place of Beginning; CONTAINING one acre and seventy-six one-hundredths (1.76) of an acre, be the same more or less. 10

TOGETHER WITH all right, title and interest of Joseph S. Frelinghuysen in and to West End Avenue adjacent to the above described premises.

TOGETHER WITH such slope rights as may be required for the grading of the entire right of way width of said State Highway Route 29 Section 7, said slope rights to extend to a line distant not more than twenty (20) feet northwesterly from the aforesaid proposed northerly right of way line, as more specifically shown on the aforesaid plan, attached to the petition filed in this cause, marked "Exhibit A". AND WHEREAS, by my order made the sixteenth day of November, A. D. 1929, I appointed Tuesday the seventeenth day of December, A. D. 1929, at the hour of ten o'clock (Eastern Standard Time) in the forenoon of said day, at the Court House in the Borough of Somerville, County of Somerset and State of New Jersey, as the time and place to hear said petition. AND WHEREAS, it appears to my satisfaction by the affidavit of Amos G. Snedaker, that due notice of this application for the appointment of commissioners and of the time and place of hearing the same has been served upon Joseph S. Frelinghuysen and Emily B. Frelinghuysen, his wife; Township of Bridgewater, a municipal corporation of New Jersey, by delivering the same to the Clerk of the said Township, and the State Highway Commission appearing by their counsel, 20
30
40

Order Appointing Commissioners.

Honorable William A. Stevens, Attorney General, upon the return of said order at the time and place named therein and assigned, and having heard and considered the matter and being satisfied that the said commissioners should be appointed and no cause shown to the contrary, except that counsel for the owner objected to inclusion of a triangular plot between the roadways as not needed for purposes of such roads and beyond the power of said Commission to take; and said objection being hereby overruled, with leave to review said rule by certiorari or other proper procedure,

I, Charles W. Parker, one of the Justices of the Supreme Court of the State of New Jersey, by virtue of the power and authority vested in me by law, do hereby on this seventeenth day of December, A. D. 1929, appoint Daniel H. Beekman, Grover F. Kipsey and Stewart A. Kenney, three disinterested freeholders of the County of Somerset and State of New Jersey, commissioners to examine and appraise the said lands of Joseph S. Frelinghuysen, as set forth in said petition, necessary and required to be taken by the State of New Jersey for public use for the construction of State Highway Route No. 29, as provided in said act, entitled "An Act to establish a State Highway System and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof (Revision of 1927)", approved March 30, 1927, its supplements and amendments, as in said petition set forth, and to assess the damages to be sustained by the person or persons interested in the taking or condemning of said lands or property for public use by the State of New Jersey for the purposes set forth in said

Order Appointing Commissioners.

petition and to proceed therein in all respects as is directed by an Act, entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900), approved March 20, 1900, its supplements and amendments.

And I do direct said commissioners to cause to be given to the State Highway Commission and Joseph S. Frelinghuysen and Emily B. Frelinghuysen, his wife; Township of Bridgewater, a municipal corporation of New Jersey, by delivering the same to the Clerk of the said Township, six days' notice in writing of the time and place when and where they will meet and proceed to execute their duties under this appointment which said notice, for the State Highway Commission, may be served upon J. L. Bauer, State Highway Engineer, personally, or by leaving the same at the office of the said State Highway Engineer at Trenton, or upon the counsel of the said State Highway Commission, the Attorney General of the State of New Jersey; and upon Joseph S. Frelinghuysen and Emily B. Frelinghuysen, his wife, either personally or by leaving the same at their place of residence within this State, if known, with some person over the age of fourteen years; Upon Township of Bridgewater, a municipal corporation of New Jersey, by delivering the same to the Clerk of the said Township.

AND IT IS FURTHER ORDERED that the said commissioners shall file their report with the Clerk of the County of Somerset on or before the first day of March, A. D. 1930.

CHARLES W. PARKER,
Justice of the Supreme Court. 40

Stipulation of Facts and Return.

NEW JERSEY SUPREME COURT.

10

JOSEPH S. FRELINGHUYSEN,
Prosecutor,

vs.

THE STATE HIGHWAY COMMISSION
OF THE STATE OF NEW JERSEY,
Defendant.

On Certiorari.
Stipulation of
Facts and Return.

20

IT IS HEREBY STIPULATED between the attorneys of the prosecutor and the defendant that the following facts are involved in this cause and shall constitute a return of The State Highway Commission to the writ of certiorari in above entitled cause:

30

(1) Annexed hereto is a true copy of the condemnation proceedings before Hon. Charles W. Parker, Justice of the New Jersey Supreme Court, consisting of a petition, notice, affidavit of Jacob L. Bauer, blueprint or diagram of Route 29, Section 7, attached to the petition and marked Exhibit "A", and order appointing Commissioners.

40

(2) Attached hereto and marked Exhibit "B" is a blueprint made by engineers of the State Highway Commission showing outlined in red the property of the prosecutor sought to be condemned by The State Highway Commission. It is agreed that the prosecutor was the owner in fee of the said lands and premises at the time of the filing of the petition in condemnation.

Stipulation of Facts and Return.

(3) Two parcels of land (for convenience referred to as triangular parcels) are not intended to be used by The State Highway Commission either for the building of a road thereon or for supports for the road or roads. Said irregular parcels of land attempted to be condemned are generally described as follows: 10

PARCEL ONE: BEGINNING at the most southerly point of the lands enclosed in red on Exhibit "A" attached to the said petition, and running thence (1) northerly along the easterly line of the lands marked in red on the said plan approximately two hundred and twenty-five (225) feet; thence (2) southwesterly and along the side or line of Route 29 approximately one hundred and twenty-five (125) feet; thence (3) in a southeasterly direction and at right angles to Course No. 2, twelve and one-half ($12\frac{1}{2}$) feet; thence (4) in a southwesterly direction approximately twenty-five (25) feet, from thence curving in a southeasterly direction in a curve on a radius of forty (40) feet to the southwesterly side or line of West End Avenue; thence (5) in a southeasterly direction along the northerly side or line of West End Avenue approximately one hundred (100) feet to the point or place of beginning. 20 30

PARCEL TWO: BEGINNING at a point in the easterly side or line of the parcel of lands and premises enclosed in red on the blueprint Exhibit "A" attached to the petition in this case, distant approximately sixty-two and one-half ($62\frac{1}{2}$) feet from the most northeasterly point in the parcel sought to be condemned, and running from said point (1) in a southwesterly direction along the westerly side of Route 29, one hundred sixty-two 40

Stipulation of Facts and Return.

and one-half ($162\frac{1}{2}$) feet to a point; thence (2) in a northwesterly direction at right angles to the first course twelve and one-half ($12\frac{1}{2}$) feet; thence (3) in a southwesterly direction approximately thirty-seven and one-half ($37\frac{1}{2}$) feet and from thence on a radius of forty (40) feet curving in a westerly direction to the northerly side or line of West End Avenue, and from thence in a northwesterly direction along the northerly side or line of West End Avenue approximately one hundred and sixty-two and one-half ($162\frac{1}{2}$) feet to a point where the southerly side of the proposed right-of-way line curving to the west intersects the northerly side or line of West End Avenue; thence (4) in a northeasterly direction along the southerly side of the proposed right-of-way line of Route 29, approximately three hundred and sixty-two and one-half ($362\frac{1}{2}$) feet to the point or place of beginning.

Said two triangular portions are blocked in on Exhibit "B" in dark red or brown crayon.

(4) The State Highway Commission does not intend to lay a roadway upon either of said parcels of land (parcels one and two) at the present time; but, nevertheless, claims the right to condemn the same for any of the following three purposes:

(a) To afford to the public using said intersecting highways the protection of an unobstructed view over the parcels in question.

(b) To use said parcels now and at any future time in the construction, improvement and betterment of Route 29, Section 7, according to the determination of said Highway Commission expressed in the following resolution adopted April 9th, 1929:

Stipulation of Facts and Return.

“RESOLVED that the State Highway Commission does hereby approve plans and specifications for the construction of Route 29, Section 7, Raritan to Chimney Rock, and determines to acquire by purchase or condemnation, in the name of the State of New Jersey, for public use in the construction of said highway, all lands and premises required for such purpose as indicated on General Property Key Map for the above mentioned section * * *.” 10

(c) To properly carry on the work of said Commission as defined by the statute (P. L. 1927, Chap. 319, at page 732) relating thereto.

Said parcels of land of themselves do not constitute an obstruction to clear vision; but the Commission claims the right to condemn so as to prevent the prosecutor in the future from so using the parcels, or either of them, as to create such obstruction. The present plans of the State Highway Commission contemplate leaving said two parcels unoccupied by any roadway or structure. 20

(5) The State Highway Commission claims it will acquire a fee simple estate through said proceedings in the lands condemned; prosecutor claims it is entitled in condemnation to no more than an easement. 30

(6) The location shown on Exhibit “B” is at this time fairly open country, there being a row of residences along the northerly side of West End Avenue east of Parcel One above described, forming the extreme limits of the residential section of Somerville at this point, the nearest dwellings to the west being those of William Southwick on the north side of the road, and the resi- 40

Stipulation of Facts and Return.

dence of the prosecutor on the south side of the road, opposite the Southwick residence.

We agree that the above is a fair statement of the facts, and shall be considered as the return to the writ of certiorari issued in the above entitled cause.

10

Dated: January 20, 1930.

WILLIAM A. STEVENS,
Attorney General of New Jersey,

By WALTER H. BACON, Jr.,
Counsel to State Highway Commission.

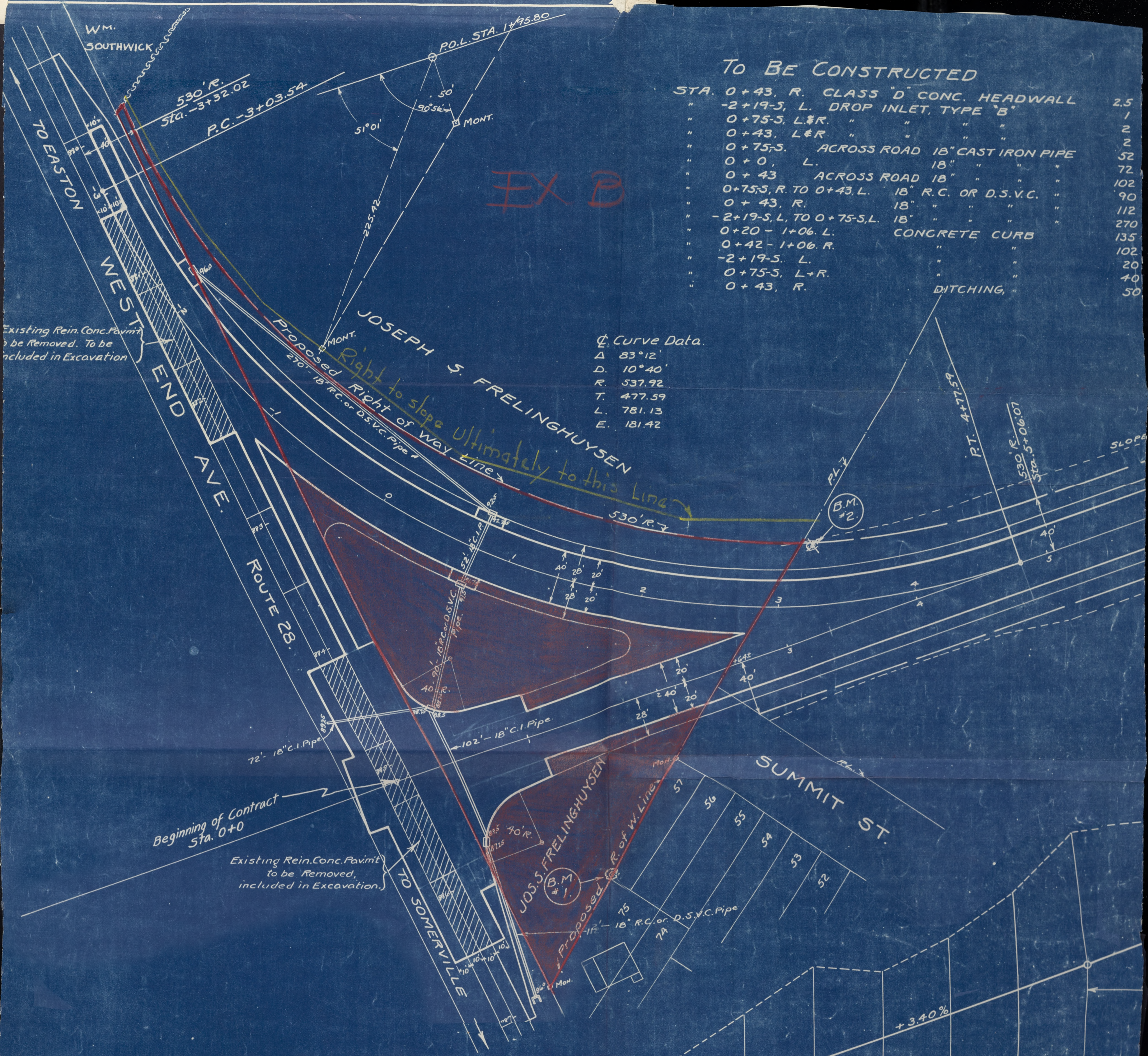
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GEORGE T. VICKERS,
Attorney for Defendant.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Prosecutor.

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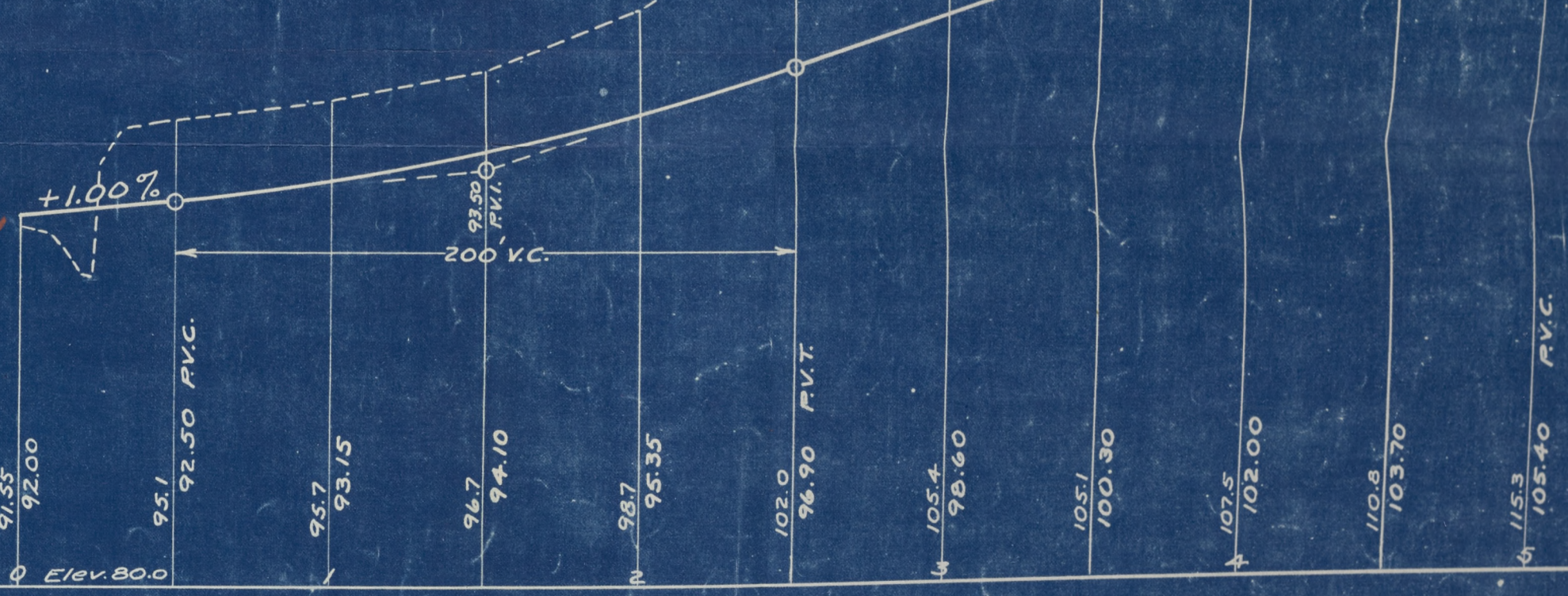


To BE CONSTRUCTED

STA. 0+43, R.	CLASS "D" CONC. HEADWALL	2.5
-2+19-5, L.	DROP INLET, TYPE "B"	1
0+75-5, L.&R.	" " " "	2
0+43, L.&R.	" " " "	2
0+75-5.	ACROSS ROAD 18" CAST IRON PIPE	52
0+0, L.	18" " " "	72
0+43	ACROSS ROAD 18" " " "	102
0+75-5, R. TO 0+43, L.	18" R.C. OR D.S.V.C.	90
0+43, R.	18" " " "	112
-2+19-5, L. TO 0+75-5, L.	18" " " "	270
0+20 - 1+06, L.	CONCRETE CURB	135
0+42 - 1+06, R.	" " " "	102
-2+19-5, L.	" " " "	20
0+75-5, L.&R.	" " " "	40
0+43, R.	DITCHING	50

Curve Data.
 Δ 83°12'
 D. 10°40'
 R. 537.92
 T. 477.59
 L. 781.13
 E. 181.42

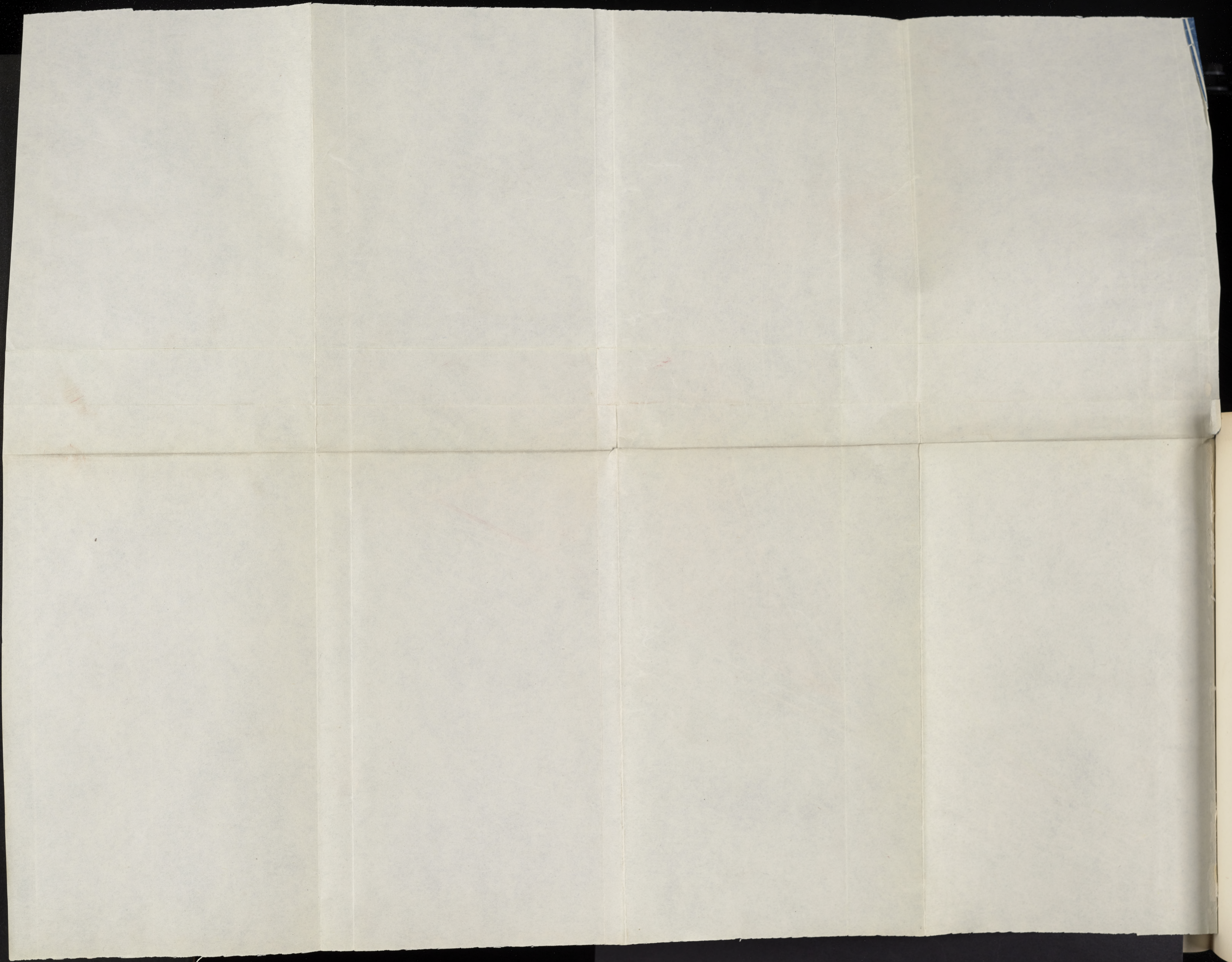
Route 29 Section 7
 PARCEL N° 1
 Area = 1.76 Acs Scale = 1" = 50'



BENCH MARKS

B.M. #1.	Sta. 1+22	R.R. Spike in 24" Tree,	113' R.	Elev. 95.80
B.M. #2.	Sta. 3+40	R.R. Spike in Twin Oak,	64' L.	Elev. 108.98

EXHIBIT "B"



Notice.

CONDEMNATION PROCEEDINGS

Before the

Honorable CHARLES W. PARKER, Justice of the
Supreme Court, Somerset County.

10

IN THE MATTER

of

The petition of THE STATE HIGH-
WAY COMMISSION OF THE STATE
OF NEW JERSEY for the condem-
nation of lands of JOSEPH FRE-
LINGHUYSEN.

Notice.

20

To:

JOSEPH S. FRELINGHUYSEN and EMILY B.
FRELINGHUYSEN, his wife; Township of
Bridgewater, a municipal corporation of
New Jersey, by delivering the same to
the Clerk of the said Township, and to
whom it may concern:

30

Please take notice that application has been
made by the State Highway Commission of the
State of New Jersey to the Honorable Charles W.
Parker, one of the Justices of the Supreme Court
of the State of New Jersey, upon its petition,
which petition has been duly filed in the office of
the Clerk of Somerset County, and a true copy of
which is hereto annexed, for the appointment of
three disinterested freeholders, residents of the

40

Notice.

10 County of Somerset, as Commissioners, to appraise and fix the compensation to be paid for a certain tract of land situate, lying and being in the Township of Bridgewater in the County of Somerset and State of New Jersey, and assess the damages, if any, caused by reason of the taking thereof, which lands are more particularly described in said petition, and of which lands and premises Joseph S. Frelinghuysen is the owner of record, and to make such decision and award as to such commissioners, so to be appointed, shall seem just and proper, and to do whatever else said commissioners are by law authorized and required to do in the premises.

20 Take further notice that an order was made by said Justice on the sixteenth day of November, A. D. 1929, a true copy of which order is hereto annexed, fixing Tuesday, the seventeenth day of December, A. D. 1929, at the hour of ten o'clock (Eastern Standard Time) in the forenoon of said day, at the Court House, in Somerville, in the County of Somerset and State of New Jersey, as the time and place when said petition will be heard, at which time you should appear if you desire to be heard.

30 WILLIAM A. STEVENS,
Attorney General of New Jersey.

WALTER H. BACON, Jr.,
Counsel to State Highway Commission
Attorneys of Petitioner.

Dated November 19, 1929.

Petition.

CONDEMNATION PROCEEDINGS

Before the

Honorable CHARLES W. PARKER, Justice of the
Supreme Court, Somerset County.

10

 IN THE MATTER
of

The petition of the STATE HIGH-
WAY COMMISSION OF THE STATE
OF NEW JERSEY for the condem-
nation of lands of JOSEPH S.
FRELINGHUYSEN.

} Petition.

} 20

To:

HIS HONOR, CHARLES W. PARKER, one of the
Justices of the Supreme Court of New
Jersey:—

The petition of the STATE HIGHWAY COMMISSION,
acting for and in the name and behalf of the STATE
OF NEW JERSEY, respectfully shows unto Your 30
Honor that your petitioner was created and exists
by virtue of an act of the Legislature of the State
of New Jersey entitled, "An Act to establish a
State Highway Department and to define its pow-
ers and duties and vesting therein all the powers
and duties now devolved by law upon the Com-
missioner of Public Roads and the existing State
Highway Commission and Highway Commission,"
approved March 13, 1917; and the several acts
supplementary thereto and amendatory thereof, 40
wherein it is provided that:—

Petition.

1. A State Highway Department is hereby established and the same shall be governed by a board to be known as the State Highway Commission, which shall consist of four members, no more than two of whom shall belong to the same political party. They shall be residents of the State.

10 8. The State Highway Department shall succeed to and exercise all the power and perform all the duties now exercised or performed by or conferred and charged upon the State Commissioner of Public Roads, or the State Highway Commission or Highway Commission, by virtue of any existing law or laws, and shall have full control and direction of all projects or work on State Highways.

20 That in and by an act of the Legislature of the State of New Jersey entitled, "An Act to establish a State Highway System and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof (Revision of 1927)", approved March 30, 1927, it is provided as follows:

III. In addition to, and not in limitation of, its general powers, the State Highway Commission shall have power:—

30 (a) To determine and adopt rules, regulations and specifications and to enter into contract covering all matters and things incident to the acquisition, improvement, betterment, construction, reconstruction, maintenance and repair of State Highways.

(e) To widen, straighten and regrade any State highway, and to acquire any lands or rights therein by gift, devise, purchase, or by
40 condemnation, according to the procedure as

Petition.

contained in an act entitled, "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900), approved March twentieth, one thousand nine hundred, and vacate any State Highway or any part thereof. 10
 The State Highway Commission shall have the right and power to enter upon and take property in advance of making compensation therefor in any case where it cannot acquire land or other property by agreement with the owner, whether by reason of disagreement or absence of the owner, or his inability to convey valid title, or by reason of any other cause. In any such case, upon the said Highway Commission exercising this right and entering upon and taking lands in advance of making compensation therefor, it shall present a petition and proceedings shall be had to fix the compensation to be paid to the owner, as provided in the said act entitled, "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (Revision of 1900), approved March twentieth, one thousand nine hundred. To do and perform whatever may be necessary or desirable to effectuate the object and purposes of this act. To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission and the Highway Commission. These powers are to be liberally construed. That said last above mentioned act further provides as follows:— 20 30

1. A State Highway System is hereby established to consist of the following routes:— 40

Petition.

Route No. 29. Newark, Lambertville, Trenton; beginning on Route No. 25 in the vicinity of its crossing with Peddie Ditch, thence crossing the Pennsylvania Railroad and Frelinghuysen Avenue to Hillside, passing in the vicinity of the junction of Elizabeth Avenue and the Lehigh Valley Railroad, thence through the township of Union, Springfield, Mountainside, and passing in the vicinity of North Plainfield and Bound Brook, Ringoss, Lambertville, Washington's Crossing and Trenton.

109. In the improvement, betterment, repair and maintenance of highway, forming a part of the State Highway System, the said commission shall possess and exercise, in addition to those conferred by this act, all those rights and powers, not incompatible with its functions nor prohibited by law, which are now exercised by overseers of roads and boards of chosen freeholders in road construction, repair and maintenance; provided, wherever any State highway shall run through a city having a population of seventy-five thousand or more, over streets or roads formerly under the jurisdiction of said city, such city shall retain in all such streets or roads all its former jurisdiction and rights as to the construction and regulation of the use of all water, sewer, gas and other subsoil conduits and structures.

And your petitioner in furtherance of the purposes for which it was created has determined to construct, widen, straighten and regrade State Highway Route No. 29, as in the aforesaid act set forth, and to that end has caused to be prepared and has adopted plans and specifications for such work, and for the purposes aforesaid has determined to acquire in the name of the State of New Jersey, as per resolution adopted by said State

Petition.

Highway Commission at a meeting of said Commission held on the twenty-third day of July, A. D. 1929.

All that certain lot, tract or parcel of land and premises, situate, lying and being in the Township of Bridgewater, in the County of Somerset and State of New Jersey, and more particularly described as follows:— 10

PARCEL #1.

As indicated on a certain plan filed in the office of the Clerk of Somerset County, showing particularly the location of the center line and right of way lines of the State Highway leading from Raritan to Chimney Rock, as adopted by the State Highway Commission, which plan is entitled, "New Jersey State Highway Department, General Property Key Map, Route 29, Section 7, Raritan to Chimney Rock, showing existing right of way and parcels to be acquired in the Township of Bridgewater and in the Boro of Somerville, Somerset County, scale: 1" = 200', April 1929"; and also as shown on a plan attached hereto, made a part hereof, marked "Exhibit A" entitled, "New Jersey State Highway Department, Route 29, Section 7, Raritan to Chimney Rock, Joseph S. Frelinghuysen Parcel 1, George E. Friefold Parcel 2, Boro of Somerville Parcel 3A-3B, John F. Reger Parcel 4, Andrew A. MacDonald Parcel 5, Township of Bridgewater Boro Somerville, Somerset County, scale: 1" = 200', April 9, 1929." 20 30

BEGINNING at a corner of lands of Joseph S. Frelinghuysen on the east and lands now or formerly of William Southwick on the west in the existing northeasterly right of way line of West End Avenue (State Highway Route 28 Rev. 1927) 40

Petition.

and running thence (1) along the dividing line between lands of Joseph S. Frelinghuysen on the east and lands now or formerly of William Southwick on the west in a general northerly direction a distance of about nine (9) feet to a point in a line distant forty (40) feet normally from the center line of said West End Avenue (State Highway Route 28 Nov. 1927) thence (2) parallel to and distant forty (40) feet normally from the center line of West End Avenue aforesaid, South fifty-four degrees, thirty-five minutes, East, a distance of about twenty-one (21) feet to a point of curvature marked "P. C. 530 R Station—3+32.02" on said plans thence (3) along the proposed northerly right of way line of State Highway Route 29 Section 7, from Raritan to Chimney Rock in a general easterly direction on an arc of a curve to the left with a radius of five hundred thirty (530) feet a distance of about five hundred ninety-three (593) feet to a point in the dividing line between lands of the said Joseph S. Frelinghuysen on the west and lands now or formerly of George E. Priefold on the east thence (4) along said dividing line in a southerly direction (said dividing line being the second course described in a deed from Katherine Frelinghuysen to Joseph S. Frelinghuysen, dated November 7, 1898 and recorded in deed Book V-8, Page 101 in the Office of the Clerk of Somerset County), a distance of about three hundred seventy-one (371) feet to a monument in the aforesaid northeasterly right of way line of West End Avenue thence (5) along said existing northeasterly right of way line of West End Avenue, North fifty-four degrees, thirty-five minutes, West, a distance of about seven hundred four (704) feet to the point and place of Beginning; CONTAINING ONE

Petition.

acre and seventy-six one-hundredths (1.76) of an acre, be the same more or less.

TOGETHER WITH all right, title and interest of Joseph S. Frelinghuysen in and to West End Avenue adjacent to the above described premises.

TOGETHER WITH such slope rights as may be required for the grading of the entire right of way width of said State Highway Route 29 Section 7, said slope rights to extend to a line distant not more than twenty (20) feet northwesterly from the aforesaid proposed northerly right of way line, as more specifically shown on the aforesaid plan, attached hereto, made a part hereof, marked "Exhibit A".

Your petitioner further shows that the owner of record of said lands and premises is Joseph S. Frelinghuysen, residing in the Town of Raritan, Somerset County and State of New Jersey; that no other person or corporation appears of record to have any interest in the said lands and premises except Emily B. Frelinghuysen, wife of the said Joseph S. Frelinghuysen, who has or may claim to have an inchoate right of dower therein; the Township of Bridgewater, a municipal corporation of New Jersey, which by reason of certain taxes and assessments, duly levied and assessed, has or may claim to have an interest therein.

That your petitioner has been unable to acquire the said lands and premises for the aforesaid purposes because of the fact that it has been unable to agree with the owner thereof as to the amount of the compensation to be paid by your petitioner for the taking of said lands and premises; that your petitioner has made to said owner a bona fide offer in writing to pay a just and reasonable

Petition.

sum of money as such compensation, which said offer said owner has failed to accept.

10 WHEREFORE your petitioner prays that Your Honor may appoint three commissioners, disinterested freeholders, residents of the said County of Somerset, to examine and appraise the said lands and premises and to fix the compensation to be paid therefor, and to fix a time and place for the hearing of this petition, and further that Your Honor may direct the manner in which the notice required by the statute to be given to the owner and persons interested may, in the present case, be given.

And your petitioner will ever pray, etc.

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WILLIAM A. STEVENS,
Attorney General of New Jersey.

WALTER H. BACON, Jr.,
Counsel to State Highway Commission.

Attorneys of Petitioner.

Dated: November 6, 1929.

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Petition.

STATE OF NEW JERSEY }
 COUNTY OF MERCER } ss.:

JACOB L. BAUER, of full age, being duly sworn according to law, on his oath says that he is State Highway Engineer of the State of New Jersey 10
 duly appointed by the State Highway Commission, the petitioner in the foregoing matter; that he has read the foregoing petition, that the matters therein referred to are within his knowledge and information and that he verily believes the statements therein contained are true; that the map hereto annexed and marked "Exhibit A" shows the premises described in the foregoing petition and was prepared under the direction of deponent; that it is necessary to acquire the said 20
 premises for the constructing, straightening, widening and regrading of the State Highway Route No. 29, named in section one of an act of the Legislature of the State of New Jersey, entitled "An Act to establish a State Highway System and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof (Revision of 1927)", approved March 30, 1927, its supplements and amendments; that the owner of record of said lands and premises is Joseph S. 30
 Frelinghuysen, and that the said State Highway Commission has failed to acquire the said lands and premises by agreement with the owner, for the reasons as set forth in the foregoing petition.

JACOB L. BAUER.

Sworn and subscribed before me this }
 6th day of November, A. D. 1929. }

GRACE A. MOORE,
 Notary Public of New Jersey.

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Order Fixing Time and Place.

Condemnation proceedings before the Honorable Charles W. Parker, Justice of the Supreme Court, Somerset County.

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IN THE MATTER

of

The Petition of the STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY for the condemnation of lands of JOSEPH S. FRELINGHUYSEN.

Order Fixing
Time and Place.

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The petition of the State Highway Commission setting forth the authority of the said Commission in the name of the State of New Jersey to acquire by condemnation certain lands and premises lying in the Township of Bridgewater in the County of Somerset and State of New Jersey, and the determination of the said Commission to acquire said lands and premises for the use of the State of New Jersey in the construction, widening, straightening and regrading of State Highway Route No. 29, as provided in Chapter 319, P. L. 1927; that Joseph S. Frelinghuysen is the owner of record of the lands and premises described in said petition and that the said Commission is unable to acquire the said lands and premises by agreement with said owner, and praying for the appointment of three commissioners, disinterested freeholders, residents of the said County of Somerset to examine and appraise said lands and premises and to fix the

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Order Fixing Time and Place.

compensation to be paid therefor and damages, if any, caused by reason of the taking thereof; having been presented to me, Charles W. Parker, one of the Justices of the Supreme Court of the State of New Jersey, and I having considered the same,

It is, on this sixteenth day of November, A. D. 1929, ORDERED that Tuesday, the seventeenth day of December, A. D. 1929, at the hour of ten o'clock (Eastern Standard Time) in the forenoon of said day, be assigned and fixed as the time, and the Court House in Somerville, in the County of Somerset, and State of New Jersey, as the place, for the hearing of said petition before me, and that notice thereof be given to the owner of said lands and premises and the persons interested therein, as set forth in said petition, which notice, together with a copy of said petition and of this order, neither of which need be certified, shall be served upon the parties in interest at least six days before the date hereinabove fixed for the hearing of said petition, in the manner following:

Upon Joseph S. Frelinghuysen and Emily B. Frelinghuysen, his wife, either personally or by leaving the same at their place of residence within this State, if known, with some person over the age of fourteen years; and if the residence in this State of any of the said parties in interest, is unknown, or if any of the said parties in interest reside outside of this State, said notice shall be given by publishing the same, embodying a description of said lands and premises, in the

, a newspaper published in the County of , and State of New Jersey, for not less than one week, and by mailing a copy of said notice to the said parties in interest whose addresses can be ascertained;

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Order Fixing Time and Place.

10 Upon Township of Bridgewater, a municipal corporation of New Jersey, by delivering the same to the Clerk of the said Township, by serving said notice upon the registered agent or one of the officers of said corporation within this State or by leaving the same at the principal office of said corporation within this State with the person in charge of said office;

And it is FURTHER ORDERED that the said petition and this order be filed in the office of the Clerk of the County of Somerset.

CHARLES W. PARKER,
Justice of the Supreme Court.

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Opinion.

10 It is admitted that the land involved is not to be used by the State Highway Commission as part of the highway for public travel, but is acquired for the purpose of eliminating obstacles to the view of travelers on the intersecting highways, the object being the public safety, particularly in the use of the automobile as a present means of transportation.

20 Three reasons are urged by the prosecutor for setting aside the order: (1) That the commission is without power under the eminent domain law to take lands for such purpose; (2) that the title of the act is not sufficiently broad to confer a power of condemnations; and (3) that the State cannot constitutionally take, as in this case is demanded, all of the right, title and interest of the prosecutor.

30 The first two of these contentions we think are without merit. The State of New Jersey has undertaken to establish within its borders a comprehensive scheme of highways adapted and necessary to the full use and enjoyment of modern means of transportation, and to this end in 1917, in Chapter 14 of the Laws of that year, it directed the State Highway Commission to "as soon as practicable lay out" certain designated routes. It authorized the commission to lay out, open and improve new roads as well as to utilize and improve existing roads; also to lay out routes in continuation of, connecting with or in addition to the routes specified.

40 In 1927, Chapter 319 was passed (P. L. 712). In this act various routes were defined and the State Highway Commission was given substantially the same powers as were conferred by the earlier act. In section 111, subdivision E of this act (p. 752),

Opinion.

the Commission is authorized "to do and perform whatever may be necessary or desirable to effectuate the object and purpose of this act", and the statute directs that the powers conferred are to be liberally construed.

In addition to the broad powers conferred by the act, section 118 (p. 732), provides for the acquisition of land by lease, gift, purchase, demise or condemnation for any purpose connected with highways, including the removal of obstructions to traffic and to the view and all other things and services necessary or convenient for the performance of the duty imposed by the act, and that in condemnation the proceedings shall be in accordance with the eminent domain act of 1900. 10

We live in an age of development in which the advances of science and invention have placed under our control forces of nature which were little dreamed of, much less availed of, by our fathers; most pronounced are those realized in our mode of transportation. The endeavor to keep pace with these developments involves obvious departures from the construction and character of highways that were suitable for the earlier forms of travel. Before the advent of the self-moving vehicle on the road the element of view at public crossroads was not in public conception deemed of moment. For the safety of the traveling public the speed of the automobile has made a reasonable view of approaching travel as essential as the safe construction of the highway itself. To this end new and existing roads are straightened, curves are banked, at intersections objects obstructing the view are removed. All of these things are clearly within the legislative scheme of providing safe highways for its own 20 30 40

Opinion.

citizens and others from without, and, as we think, as clearly indicated in the powers conferred.

10 With the second question, namely, the title of the act, we have little difficulty. It is entitled "An Act to establish a State Highway system and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof", and to this end in the body of the act sundry routes are established and the State Highway Commission is given the necessary powers to perform the duties called for by the body of the act.

20 It is said that under this the power to condemn cannot be exercised; that the object is not expressed in the title. That the establishment of a State highway system requires the acquisition of land upon which such system should operate no one will question. The mode of acquisition is but a detail in the legislative scheme. It is not an object, but a means incident to the accomplishment of the object. The title in substantially the same form has existed now for thirteen years and under it condemnation proceedings numerous in number and involving great value have been carried through to completion without attack from any source. We have no hesitation in saying that the title of the act of 1927 is not violative of the constitutional provision in Article 4, section 7, paragraph 4, which provides that "every law shall embrace but one object and that shall be expressed in the title".

30 We come now to the third and last point which, though of minor importance, perhaps, to the owner, is of vital importance as bearing upon the fundamental powers conferred upon the legislature by the constitution of the State. The petition

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Opinion.

for the appointment of commissioners sets forth that the State Highway Commission has determined to acquire in the name of the State as per a resolution adopted by the Commission the land in question, "together with all right, title and interest of Joseph S. Frelinghuysen, in and to West End Avenue, adjacent to the above described premises", and it is asserted in the brief of counsel for the commission that it is the purpose to take the entire fee of Frelinghuysen in the land to be condemned. 10

The right of the individual to be secure in his person and his property has been guaranteed by the constitution of the State and the Constitution of the United States. In 1832 it was declared by the Chancellor of this State in the case of *Scudder vs. Trenton & Delaware Falls Co.*, 1 Eq. 726, that "private property shall not be taken for private use. The legislature has no right to take the property of one man and give it to another even upon compensation being made", and since that time neither the constitution of 1844 nor the present constitution confer such power. That the power is thus limited is apparent from the recent decision of the Court of Errors and Appeals in *Landell vs. State*, 101 N. J. L. 297, in which the *Scudder* case is cited. In 20 C. J. 546, it is said that "independently of express authority given by the constitution private property can be taken only for a public use, and the Legislature cannot authorize a taking for strictly private use even upon making compensation. The necessity that the use shall be public excludes the idea that property may be taken under semblance of public use and ultimately conveyed and appropriated to a private use", citing numerous authorities. 20 30 40

Opinion.

Such we conceive to be the law of our own State. The present constitution provides in Article 1, section 16, that "private property shall not be taken for public uses without just compensation". This is a recognition of a legislative power to take private property for a public use, but is far from giving authority to take such property for other than public uses. When the State takes the property of its citizens for highway purposes, it acquires an easement only, and it would seem that it is empowered to take only so much of the title as is essential to the public use authorized. *New Jersey Zinc & Iron Co. vs. Morris Canal & Banking Co.*, 44 N. J. Eq. 404. To take all the right, title and interest of an owner obviously may go beyond such necessity and be a contradiction in terms of the right to acquire an easement only. Public uses are constantly changing and particularly with regard to the lands acquired by our highways; the courses and directions of the highways are frequently altered and upon the abandonment of such lands for such use, unless the State holds a greater title by the voluntary act of the owner, the easement ceases and the State has no further interest.

To sustain the contention of the Commission in this case would open the door to wide and dangerous invasions of private property. A power thus conferred would permit the acquisition of private property for a public use, with its ultimate destination intended to be devoted to a private use, and foreign to the cause for which it was condemned.

Our view is that this power does not exist, nor do we think the legislation, fairly construed, an attempt to exercise such power. Section 11, Act

Opinion.

of 1927 (p. 724), provides that the Commission may lay out, open and improve new roads over "acquired rights of way" and there is nothing further in the act of 1927 indicating a broader purpose. While it is true that Chapter 96 of the laws of 1926 provides that the Commission shall have power whenever lands shall "come into its possession or control", or it shall take any such lands or real estate for the uses of a State highway and the lands shall no longer be required for such use, that the Commission may sell the same, yet this must be limited to such lands as to which it has acquired a fee by deed, gift, grant or other lawful transfer from the owner. It was not intended to apply to "rights of way" acquired by condemnation. It could scarcely be contended that the power thus conferred was intended to apply to all lands coming into the Commission's "possession or control" for this would include lands taken possession of temporarily, to leased lands and those occupied as a temporary possession by the consent of the owner, as well as lands acquired by condemnation for the most temporary needs in highway construction.

The result we reach is that so much of the order as empowers the Commission to take all the right, title and interest of the relator in the lands in question is invalid and as thus modified the order will be affirmed.

Rule of Affirmance With Modifications.

NEW JERSEY SUPREME COURT.

10	JOSEPH S. FRELINGHUYSEN, Prosecutor,	}	On Certiorari: Rule of Affirmance With Modifications.
20	<i>vs.</i> THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Defendant.		

20 The Court having inspected the record and proceedings before Hon. Charles W. Parker, one of the Justices of the New Jersey Supreme Court, and in particular the order of said Justice dated December 17, 1929, among other things appointing commissioners in condemnation, and it appearing that the State Highway Commission in its petition for the appointment of commissioners in condemnation claims the right to take and condemn all the right, title and interest of the prosecutor in the lands and premises mentioned in the said petition, and that the order aforesaid directed that the commissioners be appointed to assess the damages which the prosecutor should sustain by reason of the taking of said lands for public use by the State of New Jersey in the manner described in the said petition, and the Court determining that the State cannot constitutionally take, as contended by the State Highway Commission, all the right, title and interest of the prosecutor in said lands and premises, but an easement only for highway purposes;

Rule of Affirmance With Modifications.

IT IS ORDERED that the petition of the State Highway Commission be amended so as to pray for condemnation of an easement for highway purposes in the lands of the prosecutor.

IT IS FURTHER ORDERED that so much of the order of the Hon. Charles W. Parker, one of the Justices of the New Jersey Supreme Court, dated December 17, 1929, as empowers the Commission to take all the right, title and interest of the prosecutor in the lands in question, be and the same is invalid and is null and void, but that the order in all other respects be and the same is hereby affirmed.

Let this rule be entered in the minutes.

Rule entered this 5th day of January, 1931, on motion of

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Prosecutor.

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**Notice of Appeal and Grounds of Appeal of
Joseph S. Frelinghuysen, Respondent.**

NEW JERSEY SUPREME COURT.

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JOSEPH S. FRELINGHUYSEN,
Prosecutor,

vs.

THE STATE HIGHWAY COMMISSION
OF THE STATE OF NEW JERSEY,
Respondent.

On Certiorari:
Notice of Appeal
and Grounds
of Appeal.

To:

Hon. WILLIAM A. STEVENS, Attorney General.

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GEORGE T. VICKERS, Esq., and WILLIAM H.
BACON, Jr., Esq., Attorneys for State
Highway Commission of the State of
New Jersey.

30

TAKE NOTICE that Joseph S. Frelinghuysen, the
prosecutor in the above-entitled cause, does here-
by appeal to the New Jersey Court of Errors and
Appeals, in the last Resort in all Causes, from the
judgment of the New Jersey Supreme Court enter-
ed in the above-entitled cause the fifth day of
January, 1931, affirming with modifications the
order of the Hon. Charles W. Parker, one of the
Justices of the New Jersey Supreme Court, dated
December 17, 1929, appointing commissioners in
condemnation to appraise the lands of the prose-
cutor as set forth in the petition filed by the re-
spondent with the said Justice.

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FURTHER TAKE NOTICE that the following are
the grounds of appeal which will be urged and

*Notice of Appeal and Grounds of Appeal of
Joseph S. Frelinghuysen, Respondent.*

relied upon by the prosecutor-appellant as reasons for reversal of the said judgment of the Supreme Court:

(1) Because no power or authority is given the State Highway Commission by any statute to condemn the two parcels of land described in paragraph 3 of the stipulation of facts and return, the same being intended to be left vacant and unoccupied by the State Highway Commission. 10

(2) Because the State Highway Commission does not have power or authority to take any land from a citizen for the purpose of preventing such citizen in the future from using the same in any lawful manner.

(3) The State Highway Commission does not have any power or authority to take land from a citizen, not for the purpose of constructing a highway thereon, but for the mere purpose of leaving it unoccupied. 20

(4) Because the State Highway Commission does not have any power or authority to take by condemnation any property for the purpose of affording users of highways an unobstructed view over parcels of land sought to be condemned by said Commission. 30

(5) Because the action of the State Highway Commission in attempting to take by condemnation the two parcels of land mentioned in paragraph 3 of the agreed state of facts and return, and the action of the Court in appointing commissioners for the purpose, is repugnant to Article I, Section 16 of the Constitution of the State of New Jersey, which provides:

*Notice of Appeal and Grounds of Appeal of
Joseph S. Frelinghuysen, Respondent.*

“Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made.”

10 (6) Because the action of the State Highway
Commission in attempting to take by condemna-
tion the parcels of land described in paragraph 3
of the agreed state of facts and return, is not
authorized by Chapter 319 of the Laws of 1927,
entitled “An Act to establish a State Highway
System, and to provide for the improvement, bet-
terment, reconstruction, resurfacing, maintenance,
repair and regulation of the use thereof (Revi-
sion of 1927)”, and in particular by Section 111,
20 paragraph E of said Act.

(7) Because Chapter 319 of the Laws of 1927,
entitled “An Act to establish a State Highway
System, and to provide for the improvement, bet-
terment, reconstruction, resurfacing, mainte-
nance, repair and regulation of the use thereof
(Revision of 1927)”, is repugnant to the Consti-
tution of the State of New Jersey, in that if the
right is given to the State Highway Commission
by anything contained in said Act to condemn
30 lands of a citizen for the purpose of affording
users of highways an unobstructed view over the
parcels intended to be taken, and for the purpose
of preventing the citizen and owner thereof from
using the same, said statute is repugnant to the
provisions of Article III, Section VII, paragraph
4 of the State Constitution in that the said object
is not expressed in the title of the said statute.

40 (8) The attempted condemnation of said par-
cels of land of the prosecutor, not for the improve-
ment, betterment, reconstruction, resurfacing,

*Notice of Appeal and Grounds of Appeal of
Joseph S. Frelinghuysen, Respondent.*

maintenance, repair or regulation of a state highway, but for the purpose of preventing the prosecutor in the future from using the said parcels of land in any way he may see fit, is repugnant to Article I, Section One of the Constitution of the State of New Jersey, in that it deprives the prosecutor of enjoying and possessing and protecting his property. 10

(9) The order of the Hon. Charles W. Parker and the proceedings in condemnation aforesaid are illegal and null and void because Chapter 319 of the Laws of 1927 and the provisions of the State Constitution permit condemnation only for public use, and the purpose of the State Highway Commission in attempting to condemn the parcels of land described in paragraph 3 of the agreed state of facts and return is to prevent the use of said parcels by the prosecutor and so as to leave the same vacant and unoccupied by any roadway or structure. 20

(10) The said attempted condemnation of the said two parcels of land described in paragraph 3 of the agreed state of facts and return for the purpose of affording users of the public highway the protection of an unobstructed view over the parcels in question, is not authorized by the Constitution of the State of New Jersey or any statute of the State of New Jersey. 30

For all of which reasons the prosecutor-appellant prays that the judgment of the Supreme Court may be reversed and the said order of the said Justice may be set aside and for nothing holden.

Respectfully yours,

McDERMOTT, ENRIGHT & CARPENTER, 40
Attorneys for Prosecutor.

**Notice of Appeal and Grounds of Appeal of
State Highway Commission of the
State of New Jersey.**

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

JOSEPH S. FRELINGHUYSEN,
Prosecutor-Appellee,

vs.

THE STATE HIGHWAY COMMISSION
OF THE STATE OF NEW JERSEY,
Respondent-Appellant.

On Certiorari.
On Appeal from
Supreme Court.
Notice of Appeal
and Grounds
of Appeal.

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To:

McDERMOTT, ENRIGHT & CARPENTER, Esqs.,
Attorneys for Prosecutor-Appellee,
75 Montgomery Street,
Jersey City, N. J.

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TAKE NOTICE that the State Highway Commission of the State of New Jersey, the respondent-appellant in the above entitled cause, does hereby appeal to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the judgment of the New Jersey Supreme Court entered in the above entitled cause on the 5th day of January, 1931, affirming with modifications the order dated December 17th, 1929, made by the Hon. Charles W. Parker, one of the Justices of the New Jersey Supreme Court, and appointing commissioners in condemnation to appraise the lands of the prosecutor, as set forth in the petition filed by the said Highway Commission.

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*Notice of Appeal and Grounds of Appeal of
State Highway Commission of the
State of New Jersey.*

FURTHER TAKE NOTICE that the following are the grounds of appeal which will be urged and relied upon by the respondent-appellant as reasons for reversal of the said judgment of the Supreme Court:

1. Because the Supreme Court erred in giving judgment ordering the petition of the State Highway Commission to be amended so as to pray for condemnation of an easement for highway purposes in the lands of the prosecutor.

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2. Because the Supreme Court erred in holding that the State Highway Commission has no power to sell lands acquired by condemnation when such lands shall no longer be required for the uses of the highway.

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3. Because the Supreme Court erred in holding that the power of the Commission to sell lands which shall "come into its possession or control" or taken for the uses of a State highway, and no longer required for such use, is limited to such lands as to which it has acquired a fee by deed, gift, grant or other lawful transfer from the owner.

4. Because the Supreme Court erred in holding that Chapter 96, P. L. 1926 in its provision giving the Commission power to sell certain lands, was not intended to apply to "rights of way" acquired by condemnation.

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5. Because the Supreme Court erred in directing a modification of the order appointing commissioners to eliminate "so much of the order as empowers the Commission to take all the right,

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*Notice of Appeal and Grounds of Appeal of
State Highway Commission of the
State of New Jersey.*

title and interest of the relator in the lands in question”.

10 6. Because the Supreme Court erred in holding invalid the claim of the Commission to acquire by condemnation all of the right, title and interest of the relator in the lands in question.

For all of which reasons the respondent-appellant prays that the judgment of the Supreme Court may be reversed and the rule of affirmance set aside and for nothing holden.

Respectfully yours,

20 WILLIAM A. STEVENS,
Attorney General.

By GEORGE T. VICKERS,
Assistant Attorney General,
and

WALTER H. BACON, JR.
Attorneys for Respondent-Appellant.

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Additional Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH S. FRELINGHUYSEN, Prosecutor-Appellant, <i>vs.</i> THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, Defendant-Appellee.	}	On Certiorari: On Appeal From Supreme Court:	20
		Additional Grounds of Appeal.	

The prosecutor-appellant in the above entitled cause does hereby assign the following additional reasons why the judgment of the New Jersey Supreme Court entered in the above entitled cause the 5th day of January, 1931, affirming with modifications an order of Hon. Charles W. Parker, one of the Justices of the Supreme Court, dated December 17, 1929, should be reversed and set aside:

(1) Because the New Jersey Supreme Court by its judgment of January 5, 1931, affirmed with modifications the order of Hon. Charles W. Parker, a Justice of the Supreme Court, dated December 17, 1929.

(2) Because the New Jersey Supreme Court in its judgment aforesaid did not set aside the order of the said Justice of the Supreme Court dated December 17, 1929, in so far as it appointed commissioners to condemn the two parcels of land described in paragraph 3 of the stipulation of facts.

McDERMOTT, ENRIGHT & CARPENTER,
 Attorneys for Prosecutor-Appellant.

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~~#183 - February Term 1931 -~~

New Jersey Court of Errors and Appeals

JOSEPH S. FRELINGHUYSEN,
Prosecutor-Appellant,

vs.

THE STATE HIGHWAY COMMISSION OF
THE STATE OF NEW JERSEY,
Respondent-Appellee.

JOSEPH S. FRELINGHUYSEN,
Prosecutor-Appellee,

vs.

THE STATE HIGHWAY COMMISSION OF
THE STATE OF NEW JERSEY,
Respondent-Appellant.

On Certiorari.
On Appeal from
Supreme Court.

**BRIEF OF McDERMOTT, ENRIGHT &
CARPENTER, FOR PROSECUTOR.**

Each of the above named parties has appealed from the judgment of the Supreme Court entered January 5, 1931.

Senator Frelinghuysen appeals because the Supreme Court by its judgment determined that the Highway Commission has the power by condemnation to take more property than is needed for the purpose of constructing a highway, to wit, that it has the right to condemn lands near highway intersections for the purpose of affording an unobstructed view.

The State Highway Commission appeals from so much of the order of the Supreme Court as determines that in condemnation proceedings the State Highway Commission does not acquire a fee simple estate, but only an easement for highway purposes.

These questions were raised by a writ of certiorari allowed by Mr. Justice Parker to review his own order appointing commissioners in condemnation proceedings instituted by the State Highway Commission against Senator Frelinghuysen.

Two parcels of land are involved. They are located in a westerly direction from Somerville on the road to Bernardsville and just outside the limits of Somerville. New Highway Route 29 runs through lands of the prosecutor. At the point where Route 29 intersects Route 28 (West End Avenue) the Commission seeks to take a triangular portion of prosecutor's lands approximately 371 feet on one side, 704 feet along West End Avenue, the third side being a curved line on a radius of 530 feet between the two sides first mentioned. Within this larger triangle are two parcels, for convenience described as triangles, which are colored in red crayon on the map, Exhibit "B", attached to the State of Case. These triangular tracts are described as parcels one and two (Stipulation of Facts and Return, p. 15). At the time of the filing of the petition in condemnation the lands sought to be condemned were vacant and of themselves did not constitute an obstruction to view.

The State Highway Commission does not intend to lay a roadway upon either of said parcels of land; but, nevertheless, claims the right to condemn the same for the purpose of affording the public using the intersecting highways the protection of an unobstructed view.

“Said parcels of land of themselves do not constitute an obstruction to clear vision; but the Commission claims the right to condemn so as to prevent the prosecutor in the future from so using the parcels, or either of them, as to create such obstruction. The present plans of the State Highway Commission contemplate leaving said two parcels unoccupied by any roadway or structure” (Stipulation of Facts and Return, par. 4, pp. 16 and 17).

The Supreme Court, in an opinion written by Mr. Justice Lloyd, held that so much of the order of the Supreme Court Justice as empowered the Highway Commission to take all the right, title and interest of the prosecutor in the lands in question, was invalid.

The Supreme Court also held that the State Highway Commission had power to take by condemnation not only lands necessary for the building of roads, but also sufficient lands to prevent the owner from building at intersections, in order to afford persons using the highway an uninterrupted view at highway intersections.

The prosecutor-appellant believes the Court below was correct in holding that the State Highway Commission in condemnation proceedings acquires only an easement in lands condemned.

The prosecutor-appellant, however, contends that the Court below erred in holding that the State Highway Commission has power to take by condemnation lands not required for road purposes, but taken solely to have them left vacant in order to afford motorists unobstructed views over an intersection of highways.

POINT I.

The State Highway Commission does not have power or authority to take property, not for public use, but to prevent its use by the owner.

Article I, Section 16 of the State Constitution provides:

“Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made.”

The State Highway Commission was created by Chapter 15 of the Laws of 1917, part of which Act was impliedly repealed by Chapter 319 of the Laws of 1927 (P. L. 1927, p. 732).

The Commission claims that its power to take the prosecutor's lands is derived from Chapter 319 of the Laws of 1927, entitled, “An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof (Revision of 1927)”, (P. L. 1927, p. 712).

Route 29 is provided by this Act (P. L. 1927, p. 715, section 22).

Section 105 provides that:

“In all cases the width of the pavement shall be at least eighteen feet and the total width of the roadway shall be at least thirty feet, except at bridges, culverts, or grade crossings, where the width of the roadway shall be of such width or widths as the State Highway Commission may deem necessary and determine. All sharp turns and angles and railroad grade crossings shall be eliminated wherever practicable” (p. 721).

Section 109 provides:

“In the improvement, betterment, repair and maintenance of highway, forming a part of the State Highway System, the said commission shall possess and exercise, in addition to those conferred by this act, all those rights and powers, not incompatible with its functions nor prohibited by law, which are now exercised by overseers of roads and boards of chosen freeholders in road construction, repair and maintenance” (p. 724).

Section 111, page 725, provides:

“In addition to, and not in limitation of, its general powers, the State Highway Commission shall have power—

(e) To widen, straighten and regrade any State highway and to acquire any lands or rights therein by gift, devise, purchase, or by condemnation, according to the procedure as contained in an act entitled, ‘An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use’ (Revision of 1900), approved March twentieth, one thousand nine hundred, and vacate any State highway or any part thereof. The State Highway Commission shall have the right and power to enter upon and take property in advance of making compensation therefor in any case where it cannot acquire land or other property by agreement with the owner, whether by reason of disagreement as to the price, or the legal incapacity or absence of the owner, or his inability to convey valid title, or by reason of any other cause. In any such case, upon the said Highway Commission exercising this right and entering upon and taking land in advance of making compensation therefor, it shall present a petition, and proceedings shall be had to fix the compensation to be paid to the owner, as provided in the said act entitled, ‘An Act to regulate the ascertainment and payment of compensation for property

condemned or taken for public use' (Revision of 1900), approved March twentieth, one thousand nine hundred. To do and perform whatever may be necessary or desirable to effectuate the object and purposes of this act. To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission and the Highway Commission. These powers are to be liberally construed."

Section 118 of the statute provides that:

"Wherever in this act the following words are used, they shall be held to have the meanings hereinafter given:

Improvement: The original work on a road or right-of-way which converts the same into a road which shall, with reasonable repairs thereto, at all seasons of the year, be firm, smooth and convenient for travel. Improvement shall consist of location, grading, surface, and subsurface drainage provisions, including curbs, gutters, and catch basins, foundations, shoulders and slopes, wearing surface, bridges, culverts, retaining walls, intersections, private entrances, guard rails, shade trees, illumination, guideposts and signs, ornamentation and monumenting. All of these component factors need not be included in an original improvement" (pp 730-731).

Work: The acquisition of land for any purpose connected with highways for adjoining sidewalks by lease, gift, purchase, demise, or condemnation, for temporary or permanent use; the laying out, opening, construction, improvement, repair and maintenance of highways, removing obstructions and encroachments from adjoining sidewalks; the building, repair and operation of bridges; the building of culverts, walls, and drainage; the planting of trees, the protection of slopes, the placing and repair of road signs and monuments, the opening, maintenance and

restoration of detours, the elimination of grade crossings, the lighting of highways, *the removal of obstructions of traffic and to the view, surveying and preparation of drawings and papers, the counting of traffic, the letting of contract, purchase of equipment, materials and supplies*, hiring of labor, and all other things and services necessary or convenient for the performance of duty imposed by this act" (p. 732).

Article I, Section 1 of the State Constitution provides:

"All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing and protecting property*, and of pursuing and obtaining safety and happiness."

It is true that the right of eminent domain is the right of the government to appropriate private property to public use in case of necessity (*Hale vs. Lawrence*, 21 N. J. L., p. 714).

Kent, in Vol. 2, p 339, of his *Commentaries*, says:

" 'The right of eminent domain, or inherent power, gives to the legislature the control of private property *for public use, and public uses only*;' and on page 340, 'but if they should take it for a purpose not of a public nature, as, if the legislature should take the property of A and give it to B, or if they should vacate a grant of property or of a franchise, under the *pretext* of some public use or service, such cases would be gross abuses of their discretion, and fraudulent attacks on private right, and the law would be clearly unconstitutional and void.' "

See *Coster vs. Tide Water Company*, 18 N. J. Ep. 54, where Chancellor Zabriskie said that:

“Whether the use for which property is taken is a public use, is a question of law, to be settled by the judicial power. Where the use is a public use, the legislature are the sole judges of the necessity or expediency of exercising the power of eminent domain in the particular case.”

While the Legislature has the undoubted right to provide for the taking of private property for public use, upon providing for just compensation, we submit that it has no power to take private property *not* for public use, with or without compensation.

In this case the prosecutor does not at all contest the right of the State to take so much of his property as is required for road purposes; he does object to the State taking the two triangular portions of his property under the plan of the State Highway Commission to leave them unoccupied by any roadway or structure. Such taking is not for public use at all. It is literally a taking of property to make sure of its *disuse*.

As Chancellor Kent says, the right of eminent domain gives to the legislature the control of property *for public use, and public uses only*.

It would be a great stretching of the powers of the State Highway Commission to permit them to take property of a citizen by condemnation solely to prevent the owner from making any use of it that he may desire.

The basis of the right of condemnation is that the right of the State to take property for the use of the public, upon paying compensation, is superior to the right of the individual.

This right of condemnation is one of the great exceptions to the Bill of Rights, Article I, Section 1, of the State Constitution. There is no question but what at the time our Constitution was adopted there was no thought in the minds of

its framers that anyone would ever attempt to condemn the lands of a citizen for any such purpose as has been attempted here.

We submit that the Constitution protects against such attempted use of the power of condemnation by the Legislature. If the State Highway Commission desires to acquire lands at street intersections for any other purpose than that of *public use*, then it should purchase such lands and not seek by an unjustifiable extension of the powers of eminent domain to acquire them by force.

We submit that the limit of right to condemnation as circumscribed by the Constitution is to condemn for public use.

If greater rights are desired they may be purchased. They cannot properly be acquired in any other way.

Mr. Justice Lloyd in his opinion below overlooks the limitations in the Constitution on the right to condemn, and he would permit the extension of the right by statute, because of the advances of science and invention, and the fact that the speed of the automobile has made a reasonable view of approaching travel as essential as the construction of the highway itself. The opinion of the Court below, however, overlooks the fact that the right to condemn is limited to property required "for public use", and we submit that the Legislature cannot extend this right beyond the limits of the Constitution, no matter how desirable it may be, without an amendment to the Constitution.

It will probably be contended by the State Highway Commission that if the two triangular parcels are taken and left wholly unoccupied by any structure, persons approaching the intersection of the highways in modern motor vehicles at high speed will not have to slow up in order to look

to the right and left to avoid collision with other vehicles. This may be true, but experience shows that accidents are almost as frequent at intersections where a broad view is given as at intersections where the view is constricted. The reason for this is that where there is not a broad view the average driver uses more care. Where there is a broad view at an intersection drivers approaching at high speed seem to expect the other fellow to yield the right-of-way, and frequently they meet, with one party or both not using due care.

Assuming, but not agreeing, that the argument of the Highway Commission is sound that a clear view will assist in avoiding accidents, the right of the State Highway Commission to condemn for the purpose of affording motorists a clear view at intersections should be given by the Legislature in clear and unambiguous language. Up to this time, the Legislature has not done more, we submit, than to give the right to condemn such lands as are necessary for the purpose of constructing State highways.

The idea of taking additional land to provide motorists with a clear view at intersections is new in our advance toward perfection.

When this matter comes before the Legislature it may very well be that the Legislature will greatly restrict the right of the State Highway Commission to condemn for the purpose of view. At present no power seems to be given in the legislation affecting the State Highway Commission to condemn for the purposes of affording a view, and if the Commission has the right to condemn parcels at corners for this purpose it, of course, has the right to condemn whole fields or hills and valleys. If the Commission has the right claimed it can condemn every billboard site along the State highways, and every corner building on

every corner in the State, so long as one of the corners is upon a State highway.

If our construction of the statute is correct and the Commission has not been given by express language the power to condemn for purposes of view, then the power ought not to be given by the Courts by construction. The Highway Commission contends that in the definition of "work" the words "the elimination of grade crossings, the lighting of highways, the removal of obstructions of traffic and to the view, surveying and preparation of drawings", &c. (P. L. 1927, p. 732) grant to the Commission power to condemn for the purpose of affording a view. Such power is not given in Section 111 of the Act of 1927, and it requires a grave stretching of the imagination to construe Section 111 and the power therein granted to include the power contended for under the definition of "work".

We do not dispute the right of the State Highway Commission to purchase property at intersections to afford views as its judgment may dictate. We insist, however, that the Commission does not have the right to take property for the purposes of view by the extraordinary right of eminent domain.

POINT II.

Chapter 319, P. L. 1927, is unconstitutional, its object not being expressed in its title. The Commission therefore is without power to condemn; and certainly cannot condemn for purposes of view.

"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one

object, and that shall be expressed in the title" (Constitution, Article III, Section VII, par. 4).

The title of Chapter 319, P. L. 1927, which is the only authority the State Highway in its petition claims for condemning lands for a view is entitled: "An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof" (Revision of 1927).

It would seem that this case is controlled by the decision of Mr. Justice Garrison in this Court in *Griffith vs. Trenton*, 76 N. J. L., 23, the syllabus of which states:

"Chapter 269 of the laws of 1903, the title to which is 'An Act to authorize cities in this state to purchase lands and erect suitable buildings for city purposes and to sell lands and buildings now used for such purposes', does not authorize the condemnation of lands, for the reason that such object, although embraced in the body of such act, is not expressed in its title."

We respectfully submit that the title of Chapter 319, P. L. 1927, does not express an intention to give the State Highway Commission power either to purchase or condemn lands. Certainly it does not express the object of giving the Highway Commission power to condemn lands not for the purpose of building highways, but to afford users thereof unobstructed views over adjoining properties.

The word "improvement" is defined in paragraph 118, page 730, as:

"The original work on a road or right-of-way which converts the same into a road which shall, with reasonable repairs thereto,

at all seasons of the year, be firm, smooth and convenient for travel. Improvement shall consist of location, grading, surface, and sub-surface drainage provisions, including curbs, gutters, and catch basins, foundations, shoulders and slopes, wearing surface, bridges, culverts, retaining walls, intersections, private entrances, guard rails, shade trees, illumination, guide-posts and signs, ornamentation and monumenting. All of these component factors need not be included in an original improvement."

The words "betterment, reconstruction, resurfacing, maintenance, repair", indicate not the acquiring by purchase or condemnation of new or additional property for highways, but for work on existing highways.

Paragraph 120 (P. L. 1927, p. 732) provides that this Act shall be considered as a revision of "An Act to establish a State Highway system", &c., being Chapter 14, P. L. 1917, and the acts amendatory thereof and supplementary thereto, excepting that it is the purpose of this act to constitute the routes of the State Highway System (Revision of 1927).

Paragraph 121 provides that

"All acts or parts of acts inconsistent herewith are repealed, and this act shall take effect immediately."

"Highway" is defined in P. L. 1927, p. 730, as being any public right-of-way, whether open or improved or not, including all existing factors of improvements.

"State Highway System" is defined as:

"All highways included in the routes set forth in this act, or others added thereto, including all bridges, culverts, such necessary gutters, guard rails, along the route thereof."

The act creating the State Highway Commission, Chapter 15, P. L. 1917, is entitled, "An Act to establish a State Highway Department and to define its powers and duties; and vest therein all the powers and duties now devolved by law upon the Commissioner of Public Roads, and the existing State Highway Commission and Highway Commission."

Paragraph 8 of this Act provides that the State Highway Department shall succeed to and exercise all the powers and perform all the duties now exercised or performed by or conferred or charged upon the State Commissioner of Public Roads, or upon the existing State Highway Commission, or the Highway Commission by virtue of any existing law or laws, and shall have full control and direction of all projects and *work on State highways*.

Paragraph 12, amended by Chapter 204, P. L. 1923, provides that in addition to, and not in limitation of its general powers, the State Highway Commission shall have power:

"(e) To construct, build, improve, widen, straighten and regrade any State highway and for such purpose and for any use incident thereto or connected therewith to acquire any lands, bridges or approaches thereto and rights therein by gift, devise, purchase, or by condemnation, according to the procedure as contained in an act entitled 'An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use' (Revision of 1900), approved March twentieth, one thousand nine hundred, and vacate any State highways or any part thereof. The State Highway Commission shall have the right and power to enter upon and take property in advance of making compensation therefor in any case where it cannot acquire land or other property by agreement with the owner,

whether by reason of disagreement as to the price, or the legal incapacity or absence of the owner, or his inability to convey valid title, or by reason of any other cause. In any such case, upon the said Highway Commission exercising this right and entering upon and taking land in advance of making compensation therefor, it shall present a petition, and proceedings shall be had to fix the compensation to be paid to the owner, as provided in the said act entitled 'An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use' (Revision of 1900), approved March twentieth, one thousand nine hundred. To do and perform whatever may be necessary or desirable to effectuate the object and purposes of this act. To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission or the Highway Commission. The powers are to be liberally construed" (p. 522).

It would seem that Section 12 of Chapter 204, P. L. 1923, was repealed by Section 111 of Chapter 319, P. L. 1927 (see repealing clause Section 121, P. L. 1927, page 732), for the reason that Section 111 of Chapter 319, P. L. 1927, is an almost exact copy of Section 12, Chapter 204, P. L. 1923, excepting that in paragraph (e) the words, "construct and build," are omitted in Chapter 319, P. L. 1927. In the last sentence of paragraph 111 (e) of the 1927 Act the word "these" is substituted for the word "the" in the 1923 Act. We submit that in this respect the 1927 Act was designed to and did repeal the 1923 Act. No power of condemnation was left in Chapter 15, P. L. 1917.

The question therefore arises what powers the Commission takes from the sentence in Chapter 319, P. L. 1927, Section 111 (e) reading as follows:

“To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission and the Highway Commission. These powers are to be liberally construed.”

The answer is “none,” for the reason that the statutes providing for the appointment of a State Commissioner of Public Roads (Comp. Stat. Vol. 4, p. 4625), and “An Act constituting a State Highway Commission and defining its powers and duties” (Comp. Stat. Vol. 4, p. 4627) were repealed by Chapter 15, P. L. 1917, Sections 14 and 16.

The words, “now required by law to be done and performed by the State Commissioner of Public Roads,” inserted in the 1927 Act ten years after the repeal of those powers, undoubtedly originated in the last sentence of paragraph 12, Chapter 15, P. L. 1917, p. 39. That Act, which repealed the statutes relating to the State Commissioner of Roads and the Highway Commission transferred their powers to the State Highway Commission.

Assuming that the 1927 Act, however, relates back to and is construed to include all the powers given to the Commissioner of Public Roads and the Highway Commission, the position of the State Highway Commission is not helped thereby.

Neither the Commissioner of Public Roads nor the Highway Commission had power to condemn for the purposes here claimed.

We seriously doubt whether, since Chapter 319 of the Laws of 1927 was passed, the State Highway Commission has the power of condemning lands at all, since the power of condemnation contained in Section 12, Chapter 204, P. L. 1923, was repealed by Chapter 319, P. L. 1927, and the object of giving condemnation powers to the State

Highway Commission in Chapter 319, P. L. 1927, is not expressed in its title. Certainly the power to condemn to "construct and build" in the 1923 Act was taken away by the 1927 Act.

In any event there is nothing in any of the legislation we have been able to find in the books that goes so far as to indicate an intention on the part of the Legislature to give the State Highway Commission power to condemn lands not reasonably required for the construction of a road. The idea of condemning more than is required for the construction of a road seems to have been a recent idea of the engineer of the State Highway Commission. Even the resolution of the Commission does not refer to the taking of more than is required for Route 29 (see Stipulation of Facts and Return, par. 4, p. 17, and Exhibit "A"). It is only the detail of Exhibit "B" which shows that a considerable part of prosecutor's lands to be taken are not to be used at all, but are to be left vacant.

If the Commission has the power in this case to take two parcels from the prosecutor, there is no reason at all why by the same line of argument it does not have the power to take large tracts of land about every intersection and establish "sights" or parks or provide for "view". Unless this power is clearly given it should be denied. Experience shows that a red light is the best warning of danger at an intersection, and it would be far better to compel the State Highway Commission to install red lights at important intersections than to take an owner's lands for the purpose of widening the motorists' view, if merely the question of the safety of the traveling public is involved.

POINT III.

The Supreme Court was correct in holding that the State Highway Commission cannot by condemnation acquire a fee simple estate, but only an easement.

The Supreme Court held that the Highway Commission in condemnation proceedings acquires only an easement (opinion below, Record, p. 38).

The State Highway Commission has appealed from so much of the judgment below as determines that only an easement is acquired, and that portion which requires the proceedings to be amended to pray for the condemnation of an easement.

The petition recites paragraph 109 (p. 24) that the State Highway Commission has determined to acquire the lands set forth therein, "together with all right, title and interest of Joseph S. Frelinghuysen in and to West End Avenue adjacent to the above described premises, together with such slope rights as may be required for the grading", &c. (p. 27).

In paragraph 5 of the Stipulation of Facts and Return (p. 17) it is stated that:

"The State Highway Commission claims it will acquire a fee simple estate through said proceedings in the lands condemned; prosecutor claims it is entitled in condemnation to no more than an easement."

The right to acquire prosecutor's lands is claimed under paragraph 111, section (e), (P. L. 1927), "by condemnation, according to the procedure as contained in an act entitled 'An act to regulate the ascertainment and payment of compensation for property condemned or taken for

public use' (Revision of 1900)'' (P. L. 1927, p. 725).

The Eminent Domain Act must be construed according to the common law.

15 Cyc., page 1018, says:

“It rests solely in the wisdom of the Legislature to see what estate shall be taken. In construing the statutes, however, it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy its language and object, or than the Constitution allows; and although a taking of the fee may be authorized where necessary, in the absence of express words, the statute will not be so construed where its purposes will be satisfied by the taking of an easement.”

and at page 1021:

“Where the Constitution and statute are both silent on the subject, nothing more than an easement can be taken. As a general rule an easement only is acquired in property condemned for public highway” * * *.

American and English Encyclopedia of Law, 10, page 1068:

“The courts enforce a strict construction, and where the quantity and interest to be taken are not definitely set forth by the Legislature, only such an estate or interest and quantity can be taken as are necessary to answer the purpose in view.”

In *DeCamp vs. Hibernia Underground Railroad Company*, 47 N. J. L., p. 43, this Court in an opinion by Justice Depue said:

“In construing acts of the legislature granting powers of condemnation, two rules are universally recognized: first, that the company shall take that which the legislature empowers it to take, and in the state and condi-

tion prescribed by the legislature; and second that all powers of this nature will be strictly construed—what is not expressly given is withheld. The company cannot carve out such an interest in, or incident of, property authorized to be taken as will suit its convenience, and condemn that. It must take what the legislature authorizes it to take, and in the state and condition prescribed by the legislative will.”

In *New Jersey Zinc & Iron Co. vs. Morris Canal & Banking Co.*, 44 N. J. Eq., at page 404, Vice-Chancellor Van Fleet said:

“Where the State invests a corporation with the sovereign prerogative of eminent domain, for the purpose of enabling them to construct and operate a public highway, and they take land by force of their charter, or by any other means than by grant, for the purpose of such highway, it is manifest, that the plain purpose of the grant to them is not to give them capacity or invest them with power to take a fee, but merely to give them power to acquire such an easement in the land as will enable them fully to accomplish the purposes for which they were created. The plain design of the grant, in such a case, is to enable them to acquire what they require for the construction and successful operation of their highway, but nothing more. The title to the land taken remains, in such cases, in the owner, subject only to such servitude as the corporation has power to impose, and their power in this respect is limited, as a general rule, to such use of the land as may be reasonably necessary for a right of way. *Taylor v. New York & Long Branch R. R. Co.*, 9 Vr. 28; 1 Redf. on Railways, 270. Such grants, like all public grants, are to be strictly construed. The grantee takes nothing except what is plainly given either in express terms, or by necessary and unavoidable implication. What is not plainly given is to be understood as

withheld. Any ambiguity in the terms of his grant will be fatal to his claim. To doubt in such a case is to deny" (*Affirmed 47 N. J. Eq.*, p. 598).

Chief Justice Beasley in his opinion in *State vs. Laverack*, 34 N. J. L., p. 201, points out that when the public takes a person's land for its ordinary use as a highway it does not have the power thereafter to impose an additional burden such as permitting a public market to be held in the street to the detriment of the owner. Chief Justice Beasley says:

"I think the true rule is, that land taken by the public for a particular use cannot be applied, under such a sequestration, to any other use, to the detriment of the land-owner. This is the only rule which will adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the land-owner has been compensated, to be applied to another and additional purpose for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of the State. Land taken and applied for the ordinary purposes of a street would often be an improvement of the adjacent property; an appropriation of it to the uses of a market would, perhaps, as often be destructive of one-half of the value of such property. Compensation for land, therefore, to be used as a highway, might, and many times would be totally inadequate compensation, if such land is to be used as a public market place. Few things would be more unjust than when compensation has been made for land in view of one of these purposes, to allow it to be used, without compensation, for the other. The right of the public in a highway consists in the privilege of passage and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes. These subordinate

privileges are entirely consistent with the primary use of the highway, and are no detriment to the land-owner. But I am not aware of any case in which it has been held that the public has any right in a highway, which is incongruous with the purpose for which it was originally created, and which at the same time is injurious to the proprietor of the soil. Such certainly has not been the course of judicial decision in our own courts. Indeed the cases appear to be all ranged on the opposite side.’’

See also the decision of Mr. Justice Minturn in *Rutsen Estates, Inc. vs. County of Hudson*, 102 N. J. L., p. 265.

It is the accepted law of this State that lands on which streets and highways have been laid the fee is in the abutting owner.

Hoboken Land & Improvement Company vs. Mayor &c. of Hoboken, 36 N. J. L. 540;

Starr vs. Camden &c. R. R. Co., 24 N. J. L. 592;

Rogers vs. Warranington, 90 N. J. L. 654 (E. & Ap.).

In *Weller vs. McCormick*, 52 N. J. L. 470, it was held that an abutting property owner was liable for damages caused by a tree which stood in the public highway, upon the ground that he was the owner of the fee and was bound to keep it clear for the public travel.

It has long been held that a public easement, whether acquired by condemnation or otherwise, does not give telephone or telegraph companies the right to erect their poles.

Nicholl vs. New York Telephone Company, 62 N. J. L. 733, citing a number of cases.

The intention of the Highway Commission to take a fee is indicated by the statement that it "has determined to acquire in the name of the State of New Jersey" all that certain property, &c.

It is the rule that statutes establishing a highway insofar as they authorize the taking of private property for public use will be strictly construed, but so far as matters of procedure are concerned, they should be liberally construed.

29 Corpus Juris, 401.

"Where the language of the statute will bear a construction which will leave the fee in the land owner, that construction will be preferred rather than one which will wrest the fee from him."

Elliott on Roads and Streets, 175.

We submit that by no reasonable construction can the statute be held to give the State Highway Commission more than an easement in lands condemned. The words of Chapter 319, P. L. 1927, page 725, paragraph (e) are:

"The State Highway Commission shall have the right and power to enter upon and take property in advance of making compensation therefor in any case where it cannot acquire land or other property by agreement with the owner, whether by reason of disagreement as to the price, or the legal incapacity or absence of the owner, or his inability to convey valid title, or by reason of any other cause."

In the first part of paragraph (e) the power is given the Commission, "to acquire any lands or rights therein by gift, devise, purchase or by condemnation, according to the procedure" contained in the Eminent Domain Act.

Of course, where the Commission is given, devised or purchases land, it receives that estate which the will or deed conveys, and no more.

Where the Commission, on the other hand, condemns, it takes no greater title than the statutes and the law give. The "rights" which are acquired by condemnation are well defined in the authorities herein mentioned.

The injustice of allowing the Commission to take a fee is made apparent by Chapter 96 of the Laws of 1926, a supplement to Chapter 15, P. L. 1917.

This supplement provides that whenever the State Highway Commission shall come into possession or control, or whenever it shall take any lands, premises or real estate, or any interest in the same in the name of the State, "for the use of the State in the improvement, betterment, reconstruction or maintenance of any State highway, and said Commission shall thereafter determine that such lands thus acquired, *are no longer required for such use*", it may convey, grant, bargain and sell the same or any portion thereof at public sale, or may "assign, transfer or exchange all or any portion of such lands, premises or real estate, or any interest in and to the same, with or without improvements thereon, including the hereditaments, appurtenances, easements and rights of way". All deeds are to be executed by the chairman of the Commission and attested by its secretary for and on behalf of the Commission and on behalf of the State.

Under this statute the Commission after taking these two parcels of land from the prosecutor, and after the construction of the highways, would have it in its power to sell these lands at public or private sale or exchange them for other property.

In other words, the Commission, if it has the power claimed, can take every corner created by intersecting highways from the owners thereof,

and sell or exchange the same for the profit of the State, or exchange the same for other lands.

We cannot believe that the Legislature ever intended to place such powers in the hands of the State Highway Commission. Where it acquires lands by devise, gift or purchase, of course, the Highway Commission should have the right to sell or exchange the same when it has no further use for them. It is a far different thing, however, to place in the hands of this Commission the power to take land by eminent domain, use such as it pleases, and later sell it for the profit of the State and to the detriment of the owner. This has been the practice in Russia since the foundation of the Soviet Government, but it has not yet been recognized in America.

CONCLUSION.

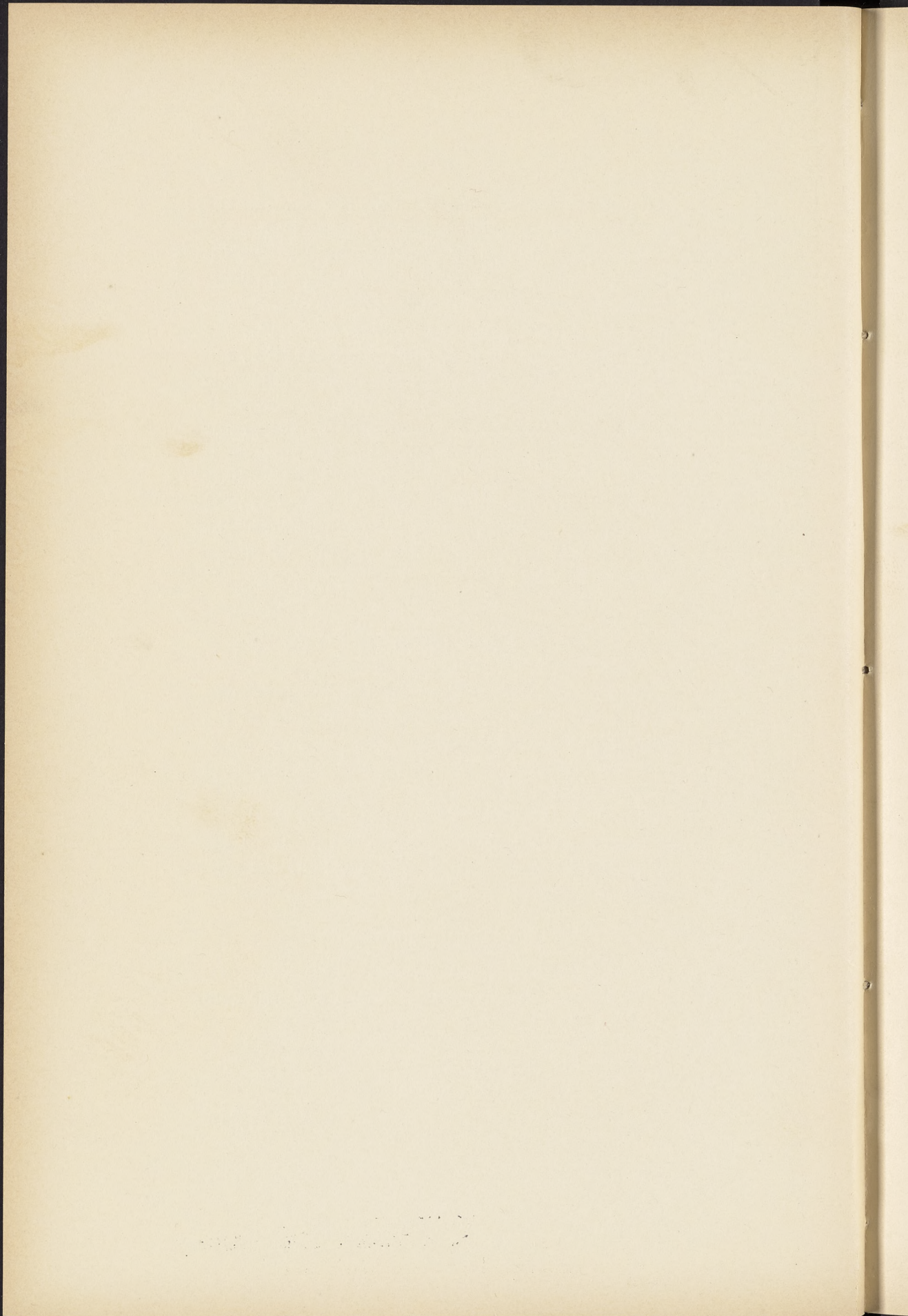
It is respectfully submitted that the judgment of the Supreme Court should be upheld to the extent that it holds that the State Highway Commission in condemnation takes only an easement to construct a highway.

The judgment of the Supreme Court should be reversed insofar as it upholds the right of the Highway Commission to take lands for the purposes of view.

Respectfully submitted,

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JAMES D. CARPENTER, JR.,
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New Jersey Court of Errors and Appeals

JOSEPH S. FRELINGHUYSEN,
Prosecutor-Appellant,

vs.

THE STATE HIGHWAY COMMISSION
OF THE STATE OF NEW JERSEY,
Defendant-Appellee.

On Certiorari:
On Appeal from
Supreme Court.

REPLY BRIEF FOR PROSECUTOR-
APPELLANT.

I.

On the authority of cases cited by the
Attorney General the Highway Commission
may not condemn for the purposes of view.

Mr. Justice Dixon in *Albright vs. Sussex County
Lake & Park Commission (E. & Ap.)*, 71 N. J. L.,
303, said:

“Under our state constitution (article 1,
paragraph 16) private property can be taken
only for public use. Whether the end sought
to be attained by the taking is a public use
is a question to be determined by the courts,
although it is said there is a presumption in
favor of a use declared by the legislature to
be public. *Mills Em. Dom.*, Sec. 10; *Lewis
Em. Dom.*, Sec. 158; *Scudder v. Trenton Dela-
ware Falls Co.*, Sax. 694, 727; *Olmsted v.
Morris Aqueduct*, 18 Vroom, 311; *National
Docks Railroad Co. v. Central Railroad Co.*,
5 Stew. Eq., 755, 764. The language of the
constitution does not authorize property to
be taken ‘for public enjoyment’ or ‘for public

purposes', or, generally, 'for the public'. Its expression is 'for public use', which implies an idea of utility, of usefulness, not necessarily inherent in the other phrases mentioned."

Later on at page 306 of his opinion Mr. Justice Dixon said:

"But not only does the constitution require that the property taken should be for the public; it is also necessary that it should be for use. The chief purpose in the enjoyment of the property must be utility."

The same jurist speaking for this Court in *National Docks R. R. Co. vs. Central R. R. Co.*, 32 N. J. Eq., at page 764, said:

"The courts may see that compensation is made, that the use is public, and that the case is one wherein the legislature has indicated its will that the power should be enforced, but beyond that the judiciary is without authority."

In this case the right to condemn a crossing over lands of another railroad was involved. Concluding his opinion Justice Dixon said:

"Any attempt to take the complainants' land not necessary for such crossing, or to cross in a manner not authorized by law, can be resisted before the judicial tribunal whose aid is requisite for the condemnation; and if, in the use of the crossing so made, conflict arises between the companies, then the interposition of equity may be invoked."

Mr. Justice Lloyd in his opinion in the Supreme Court (Record, p. 35) placed the approval of the Supreme Court of the power to condemn appellant's lands to prevent him from using it; or,

otherwise stated, for the purposes of view, upon the development of super-highways upon which automobiles travel at high speed.

We urge that the opinion of the Supreme Court did not take into consideration the limitations of the constitutional provision, namely, "that private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made".

The opinion of the Supreme Court would lead to a substitution of "public convenience" or "public benefit" for the constitutional words "public use". They are not the same as indicated by Mr. Justice Dixon in the *Albright* case, *supra*.

What is the meaning of the words, "but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made"?

The opinion of the Chancellor in *Scudder vs. Trenton Delaware Falls Co.*, 1 N. J. Eq., at page 723, indicates that public highways referred to were ordinary roads from one neighborhood or settlement to another.

Certainly prior to the organization of the present Highway Commission it has never been suggested that "public use", in connection with the building of roads, included corners at important intersections.

The Court below by its construction extends the power of the State Highway Commission to condemn far beyond the intention of the framers of the Constitution.

Since no use is to be made of the portions of appellant's property in question; since they are to be left wholly vacant, merely for the purpose of preventing the appellant ever to use or build any structure upon them at any time in the future, we submit that the taking is not for a public use.

II.

The cases relied upon by the State establish what the State takes in condemnation is an easement.

The case of *United States Pipe Line Co. vs. D. L. & W. R. R. Co.*, 62 N. J. L., 254, is not in point at all because in that case the grantors by deed did "grant, bargain, sell, convey and confirm to the railroad", and it was held that the operative words of conveyance vested in the corporation an estate in fee.

In *Currie vs. Waverly & N. Y. B. R. R. Co.*, 52 N. J. L. 381, it was not held that a fee was acquired in condemnation. Merely the question of damages was involved.

In *Currie vs. New York Transit Co.*, 66 N. J. Eq., 313, this Court held that:

"The quantity of interest which a railroad corporation acquires in land, taken by it under the power of eminent domain, is that which the statute conferring the power authorizes it to take. When the statute declares that the corporation shall be seized and possessed in fee simple of the land so taken, an estate in fee becomes vested in the corporation; when the statute limits the acquisition to a less estate than a fee, only such less estate passes."

In *New York, Susquehanna & Western R. R. Co. vs. Trimmer*, 53 N. J. L. 1, the Supreme Court in an opinion by Chief Justice Beasley held that a railroad company may maintain ejectment for lands condemned under the General Railroad Act. He said:

"It has been repeatedly decided, and is now conclusively settled by the courts of this State, that ejectment will lie to obtain pos-

session of the public highways and of lands dedicated to public uses; it would be superfluous to refer to the reported cases. And the ground of this train of authority is, that in the lands devoted to such purposes the public have, from necessity, the right of possession. So far as the principle underlying the subject is concerned, these decisions are in point."

The case of *National Docks &c. Co. vs. United New Jersey Railroad & Canal Co.*, 53 N. J. L. 217, simply held that one railroad company may condemn the right to cross the lands of another company of the same character; that in such a condemnation all that is acquired is the privilege or easement of crossing.

It is respectfully submitted that if the State Highway Commission has the power of condemnation, no statute gives it more than an easement.

Such easement will, of course, continue as long as the highway is maintained. When the highway is abandoned we submit that the title reverts under the cases cited in our principal brief.

It is respectfully submitted that so much of the judgment of the Supreme Court as determines that the Highway Commission may condemn only an easement, should be sustained.

To the extent that the judgment below affirms the right of the Commission to take lands not required for the building of the highway, but to prevent the owner from using them because of their proximity to the highway, the judgment should be reversed.

Respectfully submitted,

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Prosecutor-Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

New Jersey Court of Errors and Appeals

JOSEPH S. FRELINGHUYSEN, <i>Prosecutor-Appellant,</i>	}	On Certiorari.
<i>vs.</i>		
THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, <i>Respondent-Appellee.</i>		
—————		
JOSEPH S. FRELINGHUYSEN, <i>Prosecutor-Appellee,</i>	}	On Appeal from Supreme Court.
<i>vs.</i>		
THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY, <i>Respondent-Appellant.</i>		
—————		

BRIEF FOR THE STATE HIGHWAY COMMISSION OF THE STATE OF NEW JERSEY

The appeals from the judgment of the Supreme Court by both parties respectively have been combined in a common state of the case.

The appeals bring before this Court for review the judgment of the Supreme Court which appears under the title "Rule of Affirmance with Modifications" (page 40, state of the case). The reasons under which the proceedings were submitted to the Supreme Court are summarized in the opinion of that Court under three (3) heads:

"(1) That the Commission is without power

under the Eminent Domain Law to take lands for such purposes."

"(2) That the title of the Act is not sufficiently broad to confer a power of condemnation."

"(3) That the State cannot constitutionally take, as in this case is demanded, all of the right, title and interest of the prosecutor."

POINT I.

This Court should sustain so much of the judgment of the Supreme Court whereby that Court determines that the Commission has the power under the Eminent Domain Law to take lands for the purpose of eliminating obstacles to the view of travelers on the intersecting highways, and that the title of the Act is sufficiently broad to confer a power of condemnations.

For the reasons set out in the opinion of the Supreme Court and on the authority of the following cases, it is respectfully submitted that the judgment of the Supreme Court and the Rule of Affirmance pro tanto should be affirmed by this Court:

Olmsted v. The Proprietors of the Morris Acqueduct &c., 47 N. J. L. 311.

Albright v. Sussex County L. & P. Comm., 71 N. J. L., 303.

Delaware River Transportation Co. v. The Inhabitants of the City of Trenton, 85 N. J. L., 479. Affirmed 86 N. J. L., 680.

Haycock v. Jannarone, 99 N. J. L., 183.

Harry Darlington v. West Jersey and Seashore Railway Co., et als., 1 N. J. Misc. R. P. 412.

Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694.

Costa v. The Tidewater Co., 18 N. J. Eq. 54, and same case, page 518.

National Docks Railroad Co. v. Central Railroad Co., 32 N. J. Eq. 755.

The only remaining question is that under the third head above quoted dealing with the right of the State Highway Commission to take all of the right, title and interest of the prosecutor in the lands required; and on this question the respondent below has appealed from the judgment of the Supreme Court.

The grounds of appeal of the State Highway Commission may be summarized as follows:

1. That the Court below erred insofar as it ordered that the petition of the State Highway Commission be amended so as to pray for condemnation of an easement for highway purposes in the lands of the prosecutor.

2. That the Court below erred in determining that the State Highway Commission for the State of New Jersey may not sell lands wherein it has acquired its rights through condemnation.

3. That the Court below erred in determining that the State Highway Commission may not take all of the right, title and interest of the prosecutor in the lands under condemnation.

POINT II.

"Valid Title," when acquired means ownership in fee, whether the acquisition be by conveyance or through condemnation proceedings.

The Statute of 1927 with its amendments and supplements authorizes the taking of a fee simple.

The learned Court below, in its opinion, refers to Section 11, Act of 1927 (p. 724), providing that the

Commission may lay out, open and improve new roads over "acquired rights of way," and there is nothing further in the Act of 1927 indicating a broader purpose.

Turning to the statute, and the page cited, we are unable to find the quotation above referred to. On page 718 of that statute, under Section 100, the language cited in the opinion appears as a part of a paragraph and is supplemented in the same paragraph by the following:

"And may also lay out routes in continuation of, connecting with or in addition to the routes above specified."

Again turning to the statute in question, under Section 111, on page 725, the statute provides for additional powers, and under sub-division E, of the above Section, the power to acquire "lands or rights therein" is dealt with. Dealing with the right to enter upon and take property in advance of making compensation therefor, the following is provided:

Where it cannot acquire land or other property by agreement with the owner; the statute provides that this land or other property shall be acquired under the Condemnation Act of 1900.

What the State Highway Commission may acquire by these condemnation proceedings appears plainly to be indicated in the language of this Section, as follows:

"In any case where it cannot acquire land or other property by agreement with the owner, or by reason of disagreement as to the price, or the legal incapacity or absence of the owner, or his inability to convey valid title, or by reason of any other cause."

This brings us squarely to the legislative intent in using the term "valid title," and also to the question whether this Section does not clearly intend that by condemnation the State Highway Commission, upon compensation paid through condemnation, shall acquire the same valid title which it would acquire by purchase.

So far as the quality of title acquired by Railroad Companies, under the General Railroad Act is concerned, the language of that Act being practically identical with the language of the statutes involved in the instant case, it would seem that the decisions interpreting that quality of title as to Railroad Companies must be binding until this Court overrules its previous adjudications. There is, however, as to the extent of the title acquired by a Railroad Company and that acquired by the State of New Jersey an important distinction. The use for which the land was acquired in the case of a railroad company must of necessity be extinguished with the extinguishment of a private company and, therefore, the exercise of the right of Eminent Domain granted to the private corporation for the purpose of exercising the powers within its charter is thereby limited to that extent; whereas The State of New Jersey exists in perpetuity.

In the case of *Pipe Line Co. v. D. L. & W. R. R. Co.*, 62 N. J. L., 254, this Court, in determining the quality of the title of the defendant-in-error distinguishes between the incorporeal hereditament of an easement and a fee in lands, and as follows:

"The grantors, for the consideration aforesaid, did grant, bargain, sell, convey and confirm to the said Morris & Essex Railroad Co., and to its successors and assigns forever, a tract of land and premises described in its deed, and with full power to make use of the same in all lawful ways for the purpose of the extension of its said railroad and as a part of the route thereof, to have and to hold the said above described tract of land and

premises, with the appurtenances, unto the said Morris & Essex Railroad Co., and its successors and assigns forever, for all of the purposes mentioned in said Act of incorporation and the several supplements thereto passed and to be passed. The operative words of conveyance in this deed are such as, by the common law, would vest in an incorporation an estate in fee."

Upon the point made by counsel that the Morris & Essex Railroad Co., by its deed from Stuart, took only an easement and that the fee was subsequently conveyed to Breckenridge, the Court says:

"This contention raises the question of the nature and extent of title acquired by the railroad Company under its charter for lands required for the construction and use of its railroad. The argument is that, by their charters, these companies can take by condemnation, no title, but an easement only, and that a grant of lands by the owner to such a company, no matter how expressed, will not confer any greater right or estate."

In dealing with the rule of law as to construction of legislative grants, that "what is not plainly given is withheld," the Court says:

"Wherever the legislature has given in plain terms, that which the Company has the capacity to take, the Court is not justified in frittering away the legislative grant by denying the legal effect of words of technical signification contained in it, when on a reasonable construction there is nothing in the subject matter or context which would prevent the grant so construed from taking effect."

Summarizing the powers conferred upon the Company, the Court concludes that the Company had power to take, hold, occupy and use lands for the construction of the Company's railroads; and dealing with that provision of the charter empowering the Company to resort to condemnation proceedings if the Company and the owner of the land cannot agree as to the price for the same then, through such proceedings, upon assessment of the value of the lands and all damages sustained, and payment or tender of the sum so found either by the Commissioners or by the jury "the said corporation shall be deemed to be seized and possessed in fee simple of all such lands and real estate." Proceeding, the Court says:

"The meaning of the terms used being ascertained, construction is at an end. The Company is to take under the designation of 'lands' with the prescription that the condemnation, when consummated, shall be plenary evidence of the right of the Company 'to have, hold, use, occupy, possess and enjoy said lands.' These are technical words of conveyance of legal signification wholly incapable of anything else than a corporeal hereditament, 'land' in its legal signification. The words in this legislative grant are entirely inappropriate to an easement. They are senseless unless applied to such an estate as in a legal sense is comprehended in the term 'land' whereof the unqualified use and possession are obtained for the legitimate purposes of the Railroad Company." (*DeCamp v. Hibernia Railroad Co.*, 18 Vroom, p. 43).

Continuing, this Court deals with the case of *N. Y. Susq. & Western Railroad Company v. Trimmer*, 24 Vroom, 1, wherein Chief Justice Beasley, speaking for the Supreme Court and dealing with the contention of

the defense that the Railroad Company had "no title to the premises in question, but only an easement in them," and says:

"But the interest in the lands now in question is not an easement. In cases of easements there must be not only a servient tenement, but also a dominant one, and which latter constituent is entirely lacking in the present instance. The action of ejectment is * * * a possessory remedy and can be resorted to only when a right of entry exists, and where the thing or interest is tangible, so that possession can be given by the Sheriff. It is manifest, therefore, that if the interest of the Railroad Company in these premises were a naked right of way, it would constitute no such right of possession of the land itself as would sustain this action; for such a right would be an incorporeal one, upon which there could be no entry, nor could possession of it be given under an *habere facias possessionem*."

This Court, again referring to the DeCamp case, *supra*, and pointing out that the Company, by force of the statutory procedure, could not acquire a qualified right in the lands, quotes the language of that Court, saying:

"The statute only authorizes the taking of lands, and the occupation and use of lands, in the State and condition of lands in the legal sense of that term."

And then dealing with what the Company would acquire through the award of Commissioners and payment or tender as being "to have, hold, use, occupy, possess

and enjoy the said lands or materials," proceeds with its determination as follows:

"There seems to be no reason why this language, as it stands in this statute, is to be interpreted differently from what it would if it were found in a deed from a land owner to the Company, and in this latter event it is not probable that a doubt would arise in the mind of any one as to the Company's right to immediately enter upon the lands thus condemned and to hold them in exclusive possession for the uses of its road."

In this case of *Pipe Line Co. v. D. L. & W. R. R. Co.*, *Supra*, this Court then proceeds by pointing out that the earlier decision in *Taylor v. N. Y. & Long Branch R. R. Co.*, 9 Vroom, 28, in which Chief Justice Beasley designated the right acquired under condemnation proceedings "as a mere easement," but endeavored to differentiate that easement from an incorporeal right; was by the same learned Chief Justice, in the latter case of *N. Y. Susq. & Western Railroad Co. v. Trimmer*, *Supra*, declared that the right acquired in that case "on the most cogent reasoning" that the land acquired was not an easement, but was an estate comprehending title to land.

Finally, with respect to the above case here discussed, it is urged that no part of the language of this Court, nor upon any authorities cited, can the theory that the State acquires, by condemnation, only an easement be supported.

It necessarily follows that whatever Chief Justice Beasley may have held, in speaking for the Supreme Court, in *State v. Laverack* (34 N. J. L. p. 201), must be cited subject to his later opinion in this Court and other decisions in this Court on the point involved in the Laverack case.

The brief for the prosecutor, on page 22, asserts that it is the accepted law of this State that lands on which

streets and highways have been laid the fee is in the abutting owner. In support of that statement of the law *Hoboken Land and Improvement Company v. Mayor, etc., of Hoboken*, 36 N. J. L., 540; *Starr v. Camden R. R. Co.*, 24 N. J. L. 592, and *Rogers v. Warrington*, 90 N. J. L., 654, are cited.

In the case of Hoboken Land and Improvement Company, the land owner dedicated the land in question for a particular use.

In the Starr case—turns on the question as to whether or not the owner is entitled to compensation.

The Rogers case is determined upon the same principles and cites the Hoboken Land & Improvement Company and Starr cases. None of these cases has anything to do with the question involved in the case, sub judice, where a land owner has received, or is to receive just compensation.

Weller v. McCormack, 52 N. J. L., 470, likewise is inapplicable for the reason that it was presumed that the title of the abutting land owner extended to the center of the street and that the land owner, or his predecessor in title, had maintained the tree in question as his own property.

Nicholl v. New York Telephone Co., 62 N. J. L. 733, likewise is inapplicable for the same reason that, as the opinion shows, the abutting land owners owned to the center of the street, and further that the placing of telephone poles on the right of way imposed an additional servitude upon the fee and therefore, without just compensation, could not be acquired.

It has been uniformly held in this State that by Eminent Domain the private property of one person cannot be taken to be given to another. The opinion of the Supreme Court deals with this subject on the theory that to permit the State Highway Commission to acquire more than an easement would open the door to wide and dangerous invasions, and that a power thus conferred would permit the acquisition of private property for a

public use "with its one ultimate destination intended to be devoted to a private use and foreign to the cause for which it was condemned."

It is conceded that if the taking were intended to bring about the ultimate destination devoted to private use that such power has not and could not be conferred by the legislature, nor exercised by the State. But the statute of 1926, Chapter 96, does not contemplate such intentment. The constitution protects private property except it be needed for public use, but there is no constitutional or statutory inhibition against the use of private property for any public use, after just compensation has been made to the owner. The Act of 1926 provides that where lands are no longer required for such use they may be sold. This clearly implies that the lands, after acquisition, have been applied to public use, but are no longer needed for that purpose.

There is no distinction in the quality of title acquired where lands are taken for highway purposes than where lands are acquired by condemnation for armory purposes, or for the building of a state house, administration buildings, a public school, a public park, a preserve, or any other public purpose. It would seem to be a wanton destruction of the property rights of the public if all such lands when unsuitable for further use for the original purpose should be deemed to revert to the former owners. The logic of the constitutional provision would seem to dictate that they might be applied to any other public use, having served the original one. In this connection it is further urged that although the actual land itself in such case were not continued in public use, but, in fact, sold to some private owner, the proceeds thereof would, in contemplation of law, still be realty to be devoted to a public use consistent with the purpose of the original taking. Just as the money from an award stands for the land, so on a resale the money would once more be the equivalent of the land.

The State is obliged to pay the full market value for the land taken and is thereby entitled to all the rights of which the land owner is deprived, including the power to alienate.

In *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199, Chancellor Green said:

“He (the land owner), is entitled to receive full and adequate compensation for the land and for his damages;”

and for the reasons that the *damages* were limited to the time of the taking a new trial was granted.

In *Van Schoick v. The Del. & Raritan Canal Co.*, 20 N. J. L. 249, the Court discusses the duties of the Commissioners appointed by a Justice of the Supreme Court, stating them to be the making of a just and equitable estimate of the value of the Land and assessment of the damages. In commenting on the significance of the meaning of damages the Court says that this certainly did not mean damages done to the land actually taken “for the owner is to receive the price or value if such lands and the company is to take and hold them.” And also

“I believe the legislature intended that the award of the Commissioners, or in case that should be set aside, the verdict of the jury followed by the judgment of the Court, should be final and conclusive between the parties, both as to the value of the land and the damages sustained.”

In the case of *Halsey v. Rapid Transit Railroad Company*, 47 N. J. Eq. 380, Vice-Chancellor Van Fleet, speaking for the Court, refers to the opinion in this Court in *Hoboken Land & Improvement Co. v. Hoboken*, 7

Vroom, 540, 581, and also the case of *Sullivan v. North Hudson Railroad Co.*, 22 Vroom 518, 543, and says:

“Both the nature and extent of the public right are well defined. Lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually of his land.”

and while, in this opinion, the Court refers to other cases and re-asserts the doctrine that the easement of the highway is in the public, although the fee is technically in the adjacent owner,—and that it is the easement only which is appropriated; it must be borne in mind that the character of taking, with its offset of benefits, is unlike the character of acquisition of land for these public highways. Also are the subsequent obligations of owners in whom the fee is said to rest different from the obligations of abutting land owners respecting these highways. Where land is taken for public streets in a municipality, under condemnation, compensation to the land owner for the land contributed is the value of the land offset by the benefits assessed against him. It is his street because he has never been compensated to the extent of the market value of his land at the time of the taking, because of the assessment against the remainder.

In *Curry v. Waverly, etc. Railroad Co.*, 52 N. J. L. 381, Mr. Justice Garrison, speaking for this Court, at page 392, says:

“He (the land owner), is to be paid the value of the land included in the petition of the condemning agent, and secondly, he is entitled to an award for such damages as result to the residue of his tract.”

In the reasons assigned by the plaintiff-in-error there, to support his contention, that case, on page 382, sets out the following:

“There seems to be no question in law that the words ‘just compensation,’ as used in connection with proceedings of this nature in the constitution, has been judicially interpreted to mean, not only in this State, but in all the States, a compensation in money based upon those elements for which the land taken is best adapted, its best and highest use in view of its adaptability for those purposes which give the land its highest and best value, that highest and best value is just compensation in contemplation of the constitution.”

Citing *Virginia &c. Railroad Company v. Henry*, 8 Nev. 171, Chief Justice Witman, of the Supreme Court of that State, is quoted as follows:

“But the word ‘just’ compensation is used, evidently, to intensify the meaning of the word ‘compensation’—to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample—and no legislation can diminish by one jot the rotund expression by the constitution. So are all the decided cases.”

and quoting further from Lewis on Eminent Domain, section 479, is the following:

“The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make

up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation."

Citing with approval *Boon Co. v. Paterson*, 98 U. S. 403.

By reference to *Boon Co. v. Paterson*, *Supra*, Syllabus No. 3, is as follows:

"In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties. The inquiry in such cases being, what, from their availability for valuable uses, are they worth in the market."

On this point Mr. Justice Field, speaking for the Supreme Court, says:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. Inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless, because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

It would appear that every element of value most advantageous to the land owner may be taken into consideration in determining what just compensation shall be paid to him for his land and that the purpose for which the land is used before the taking is not the conclusive measure of its value. Thus, where the highway built upon land taken for that purpose might, and probably does, create an increase in value for the remainder of the land, nevertheless it is a settled rule of law in this State that in condemnation proceedings of this nature no general resultant benefits may be offset against the full market value of the land taken. Only in estimating the damages to the remainder may commissioners or a jury take into consideration special benefits in assessing the amount of consequential damages. To emphasize this point we contend no countenance would be given to a theory that if special benefits resulting to the remainder land were greater than any computed element of consequential damages, the benefits—in dollars and cents—could be deducted from the value of the land actually taken.

While the Curry case, like many of the other cases cited, refers to the rule of law in our State that the fee to streets, roads and highways is in the abutting land owner, and that case distinguishes certain decisions in other States, principally in the State of New York, where the fee is in the municipalities by legislative enactment, we beg leave again to emphasize our contention that the Legislature of New Jersey provides that a "valid title" should be acquired by the condemnation proceedings.

The distinction, we think, is illustrated by a supposititious case which, in actual experience, is nevertheless frequent. Where an existing road or highway is taken over for the purpose of becoming a part of the state highway system, and the abutting land owners have the fee to the center of this road, being thirty feet in width. The new highway is to be 100 feet in width and all of the land re-

quired for the additional width is, by condemnation, taken from A. B is the abutting land owner directly across the old highway. A, for the 70 feet of land taken is given its full market value by award or verdict, together with all consequential damages to his remainder land. Thereafter that portion of the State Highway ceased to be a necessary part of the state highway system. *Query*: Does B, on abandonment of the highway, obtain any rights to the center of the 100 foot highway? If he does, he receives from the private property of A a fee to land for which he has never paid to A nor to the State any compensation whatever, and A would then, in fact, be deprived of his private property for the private use of another.

Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, is particularly relied upon to support the contention of the prosecutor that all of his right, title and interest in the lands in question may not be taken. The Court below, in its opinion, excerpts a single paragraph from page 762, of that case:

“Private property shall not be taken for private use. The legislature has no right to take the property of one man and give it to another, even upon compensation being paid.”

The facts in the instant case do not warrant even the suggestion that the property is taken for private use. A highway is in fact upon the property. The true point at issue might tersely be stated thus:

“Shall a land owner be paid out of the public treasury for what he does not surrender?”

A careful review of the *Scudder* case will result in material more valuable for the proper determination of the case now before this Court than the quotation of an

admitted proposition of law, which is in no way involved for decision here. In the Scudder-Trenton Falls Case the points of conflict were::

1. The jurisdiction of the Court of Chancery to question the constitutionality of the act of the Legislature;

2. The constitutionality of the act on two grounds—

- a. That the act assumes to vest the complainant's right and property in his lands, or a part of them, in the defendants, without just compensation therefor, and without an opportunity of having compensation ascertained by a jury of the country; (page 720) and

- b. That the land is sought to be taken, not to answer any state necessity, nor for the benefit of the community at large, nor for any public use whatever, but solely for the private gain and emolument of the said company. (page 721).

Admittedly the Trenton Delaware Falls Company was not a public body, but a private concern; yet the right of the Legislature to grant the power to take private property was sustained, and that upon the ground of public use.

Important in considering that case with the arguments of learned counsel is the fact that both contentions of the property owner were decided adversely to him. Thus even one hundred years ago neither counsel nor the court had any doubt on the question, whether private property could be taken for private use, even though compensation be made. What the learned Court really decided is that the view taken by the property owner was "too narrow," and that the principle of public use sought to be established by the defendants was not "too limited." More appropriate for the purpose of the instant case is

the rule of law there enunciated by the Chancellor in the following:

“There must be a public use or benefit; that is indisputable; but what that shall consist of, or how extensive it shall be to authorize an appropriation of private property is not easily reducible to general rule.”

The Court, in that case, assuming for this point of the case that the property to be taken is for public use, declared “That it may, under the Constitution of the United States, BE DIVESTED ON MAKING JUST COMPENSATION.”

Reasoning that no jury could have the power to pass on the sovereign right of the state freely to take private property “on all proper occasions,” the Court proceeds to determine whether “just compensation” can be ascertained in any other mode than by jury.

In reviewing the historic background of the methods of assessing damages for taking private property, the Court points out legal landmarks, interesting and important to the question here under review. Back in 1681 it would seem that certain commissioners for the settling and regulating of lands in this province were ordained; that the owners of lands, when such public highways shall be laid forth, “shall be allowed reasonable satisfaction in lieu thereof, at the discretion of the commissioners.” (page 722).

Then, in 1765, “provision was made by law for the assessment of damages by commissioners, on the occasion of LAYING OUT CERTAIN STRAIGHT ROADS in the province. (page 723, citing Allison, 273):

“Before this time, there was a general road law by which private property was taken and

appropriated as it now is, without compensation, and which had reference only to the ordinary roads from one neighborhood or settlement to another."

Then follows the opinion of the Court as to the legislative motive:

"It was supposed by the legislature that it would greatly facilitate the conveyance of letters by the post, be of great importance to his Majesty's service, and to the commercial interests and general convenience of the inhabitants of the province, TO HAVE SOME OF THE PRINCIPAL HIGHWAYS SHORTENED (*Capitals ours*). Commissioners to make the necessary surveys and estimates were appointed, with power to enter and pass any lands through which the STRAIGHT ROADS might run. They were directed to make estimate of the whole expense, and also of the damages it might occasion to any person through whose lands it might pass, and a provision was made for paying the whole expense by lottery."

Here is the borning of the principle that when public requirements demand of an individual the surrender of property in excess of his share for "ordinary roads from one neighborhood or settlement to another," he is to be compensated, but not out of the public treasury; and not only his damages, but "the whole expense" is raised by lottery. The legislature distinguished between contribution of land for ordinary roads and for these STRAIGHT ROADS, as is said by the Chancellor:

"It would appear from this, that the legislature thought these communications, when thus

opened, would be more immediately important to the public at large, and especially to the government; and that in taking private property for these purposes, there was a propriety and moral fitness in making compensation to the owners. Commissioners, as will be seen, were appointed to make an assessment of the damages to be sustained by individuals. These cases are important to show what was the practice before the Revolution; and if, in consequence of the payment of damages, the property of the soil became vested in the State, as I apprehend was the fact in the last case, it is directly in point. That the property was absolutely divested, and became the property of the State is inferred from the fact that these particular roads have been, in all our road laws save the last, excepted out of their general operation, and declared to be unalterable by surveyors of the highway, or any other person."

The Court also speaks of the fact that since the year 1800 almost all of the acts passed have provided for assessments by a jury WHERE LANDS HAVE BEEN TAKEN ABSOLUTELY. (page 725).

Thus it would seem that this case, instead of supporting any theory that the state acquires but an easement after just compensation for the value of the land taken and damages, it is conclusive upon the point that a distinction exists between the retained fee where land is taken for ordinary roads, in which streets would be included, and these STRAIGHT ROADS which are the forerunners of our modern highway system.

In conclusion as to this case it should be observed that payment for damages to the land owner for taking land for STRAIGHT ROADS was provided for by the Legislature more than one hundred and fifty years ago on the theory of "propriety and moral fitness"; and that for

the compensation flowing to such land owner from the proceeds of the lottery "the property of the soil became vested in the state." On what theory of "propriety and moral fitness" could the Legislature of to-day provide that in consideration of the payment out of the public treasury for the entire value of the land and also of all damages by reason of the taking—"valid title" should mean only an easement. We respectfully submit that it would be "impropriety and unmoral" thus unjustly to enrich one citizen at the expense of the people as a whole. It is of no importance that what is called by the Court below an easement for a right of way may be perpetual and serves every purpose for which it was acquired. The test as to the "propriety and moral fitness" of such legislative intent lies in the answer to the question, as to whether the State would be obliged again to pay to this land owner for his so-called retained fee; if the land once paid for should cease to be necessary as a part of the modern "straight road" system, but, either as an "ordinary road" or for some other public use, had a value reducible either to money or to some other public service.

The Court below holds that the power to sell conferred by Chapter 96 P. L. 1926 "must be limited to such lands as to which it acquired a fee, by deed, gift, grant or other lawful transfer from the owner. It was not intended to apply to 'rights of way' acquired by condemnation."

The land coming into the possession or control of the State by deed, gift, grant or other lawful transfer from the owner, and which the Court below says 'the State may sell, must be the land constituting so much of the "rights of way" as such land covers. But the statute is much broader than is implied in the reasoning of the learned Court below, for the words "come into its possession or control" are supplemented and amplified by the words there following "or whenever it shall take any such lands, premises or real estate." If, as is conceded by

the Supreme Court, the State under the conditions given, may, through the State Highway Commission, sell the lands coming into its possession or control by deed, gift, grant or other lawful transfer from the owner, is it not self-evident that the legislature by the added phraseology respecting lands taken, intended this power to apply to such lands taken by condemnation?

It is respectfully submitted that to limit the power of sale by the exclusion of lands taken by condemnation upon the reasoning that an inclusion of the latter would empower the State to sell that in which it had never received "valid title" would be to attribute to the legislature a paucity of intelligent expression not warranted.

The term "Valid Title," used in the Statute, connotes a fee.

The word valid is used to emphasize the quality and extent of the title to be acquired by condemnation. The synonyms of the word are "strong, powerful, efficient and binding."

It must be conceded that a sovereign state has the right to take private property for public use. The second section of the Eminent Domain Act of 1900 provides that "the party exercising the right of taking" shall do certain things:

1. Present a petition * * * "for the appointing of commissioners to fix the compensation to be paid,"
2. Include in the petition a particular description of the land and property required,
3. Set forth the names of the owner and occupant, if any there be, and of the persons appearing of record to have any interest in said property.

The inquiry then is, what is to be accomplished according to the statute. The answer must be, that, by

this method "the party exercising the right of taking" receives the equivalent of the conveyance of "valid title" where such a conveyance cannot be obtained for the reasons given in the first section of the Act.

To emphasize this contention it is only necessary to point out that one of the conditions conferring the right to condemn is, "the lack of authority of the party determining to acquire the property to do so by agreement."

In further support of the contention that this term "valid title," means a fee, the language of Section 7, of the Act is referred to, which provides *inter alia* that upon payment or tender of payment of the amount awarded "said report, petition and orders * * * and proof of payment or tender * * * shall at all times be considered as plenary evidence of the right of the petitioner to have, hold, use, occupy and enjoy the said land and property." This language has been repeatedly held to be the equivalent of all present estate, right, title and interest in the land.

This Court, in *Curry v. New York Transit Co., and National Dock & Railway Co.*, 66 N. J. Eq. page 313, at page 316, says:

"The quantity of interest which a railroad corporation obtains in land taken by it under the power of Eminent Domain is that which the statute conferring the power authorizes it to acquire. The legislature may authorize the taking of the fee, or any less interest, in its discretion. *United States Pipe Line Co. v. Delaware, Lackawanna & Western Railroad Co.*, *Supra*; *Sweet v. Buffalo, etc. Railroad Co.*, 79 New York 299, 300. It is manifest, therefore, that it cannot rightly be said, on the one hand, that nothing is ever acquired by such proceedings except a mere easement in or right of way over the land condemned; nor, on the other hand, that some-

thing more than a mere easement, or right of passage over or through the land, is always acquired."

This Court then deals with the expression of opinion by Justice Depue, in the United States Pipe Line Company case, where the statute prescribes that upon payment of the award the company shall be deemed to be seized and possessed in fee simple of all such lands and real estate, and distinguishing that provision from the power conferred by the statute involved in the decision of the case of *DeCamp v. Hibernia Mine Railroad Co.*, and concludes as follows:

"It needs no argument to show that the interest acquired in land by virtue of proceedings taken under the one statute is as widely different from that acquired from proceedings taken under the other, as would be the case were the interests obtained by deed or grant from the land owner instead of by the exercise of the power of Eminent Domain."

Dealing then with the provisions of the General Railroad Law, identical in language with the provisions of the Eminent Domain Act of 1900, the Court, on page 318, interprets the true meaning of the words "to have, hold, use, occupy, possess and enjoy the said land," as follows:

"When they have made the payment they are to have, hold, use, occupy, possess and enjoy the land so long as they devote it to the uses for which they are authorized to acquire it."

"Where land is held by a railroad company, under a deed containing the words of this statute, it can hardly

be doubted that the conveyance, having been made in consideration of the payment of the full value of the land, operates to strip the grantor of all present estate, right, title and interest in the land, and to vest the same in the company, so long, at least, as its corporate life continues to exist and so long as it continues to devote the land to the uses which its charter proscribes "and there seems no reason (to quote the language of Chief Justice Beasley, in *New York Susq. & Western Railroad Co. v. Trimmer*, Supra) why this language as it stands in this statute, is to be interpreted differently from what it would if it were found in a deed from the land owner to the company."

"It is contended that, because the right of the company to enter and take possession of the land, after payment of the award, is given by the statute 'for the purposes aforesaid,' the land owner still retains such an interest in the land as will enable him to restrain an unauthorized use of it by the company. But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceedings, or to reserve to the land owner any rights in the land taken. They merely limit the uses to which the lands may be put, and it is to be observed that this limitation is not confined to lands taken by the exercise of the power of Eminent Domain. The charter of the company (The General Railroad Law) imposes it equally upon lands acquired by conveyance from the owner. Whether the land be acquired by the one method or the other, when the company enters upon and takes possession thereof it does so, for the purpose of subjecting it to the uses which its charter authorizes."

Under the statute, lands acquired, whether by deed, gift, grant or other lawful transfer is taken in the name of the State of New Jersey. Whatever rights are acquired by condemnation proceedings for the taking of land, vest likewise in the State of New Jersey. There is neither a constitutional nor a statutory limitation put upon the State of New Jersey, except that private property when taken shall be for public use. In the case of railroad companies and other like bodies, the uses are limited either by statute or provisions of charters. Hence, so much of the decisions of this and other Courts as refers to the duration of corporate existence and particular uses can have no application as to the quantity of title acquired by the State.

If any further argument is necessary to support the point made, it would seem to be conclusive to refer to the provisions in the same section of the Eminent Domain Act, which makes the award, if not paid within twenty days after filing of the report "a lien upon the property taken and any improvements thereon." Thus if it were intended that only an easement and not a "valid title" should pass, this provision would indicate an absurdity by giving to the owner of the fee a lien upon his own land. If he owned the fee he could eject the claimant.

The attention of this Court is also invited to the provisions in this Condemnation Act, which refer to the compensation to be awarded by the Commissioners, or reflected in the verdict of the jury and judgment thereon. Commissioners *view and examine* the land or other property and make a just and equitable appraisal of the value of the same; and the assessment of the amount to be paid by the petitioner is for such land and other property and damage. In cases of an appeal the statute provides that the jury shall assess the value of the said land or other property and the damages sustained.

In conclusion, as to this statute, it should be noted that as to condemnation proceedings by the State Highway

Commission, the procedure prescribed by this Act supercedes all other methods for the ascertainment of compensation. Condemnation by the State Highway Commission not coming within the excepted cases where land is taken for public improvement and benefits to be assessed for the improvement may be wholly or partially set off against the award for land taken and damages. The quality, quantity and extent of the "valid title" required for State highways is characterized by the completeness of the just compensation to which the owner is entitled.

On page 3 in brief for the property owner the case of *DeCamp v. Hibernia Underground Railroad Company*, 47 N. J. L. page 43 is referred to, and a part of the opinion of Mr. Justice Depue in this Court quoted. The excerpt from the opinion as quoted, does not give the law of the case on the point at issue before this Court, as will be seen by an examination of the case and the following illustration:

"The section under which these proceedings were had authorizes the condemnation of land. the application for the appointment of Commissioners is to describe the land required. The Commissioners are to examine and appraise the land. On payment or tender of the amount awarded; the company is empowered to enter upon and take possession of the said lands, and the Commissioners' report is plenary evidence of the company's right 'to have, hold, use, occupy, possess and enjoy the said lands;' and its position within the location must necessarily be exclusive except where another public right, such as the crossing of the highway or another railroad intervenes."

"Pierce on Railroads, 159. Under this designation, as was said by the Chief Justice in *Taylor v. N. Y. & L. B. R. R. Co.*, 9 Vroom,

28, 30, "the right to use for the specified purpose everything which, in the legal sense, is comprehended in the term 'land' is transferred."

"In *Watson v. Acquackanonk Water Co.*, 7 Vroom 195, the company was incorporated as a water company. 'It had power to obtain by purchase the right to use, divert and appropriate any springs, streams or ponds of water.' The opinion then proceeds to describe what power the water company had to enter upon all lands, etc. and to show what the company proposed to do. This Court in that opinion then held that the proposed assessment of damages by the Commissioners was not warranted by the company's charter, and that under that charter lands must be taken in order to warrant any assessment of damages."

"All it needed was a limited and qualified right in the lands to abstract and pollute the waters flowing over them. This Court held that such a right or interest in lands could not be acquired by condemnation, for the reason that the company's charter gave it power only to condemn lands."

The opinion then cites a long list of cases distinguishing the taking of land from the taking of a mere right of way and quotes *Jesselm M. R.*, as follows:

"That such a privilege of running trains over land is not land is clear. Is it, then, land within the meaning of the third section, which says that the word 'lands' shall extend to messuages, lands, tenements and hereditaments of whatever tenure."

* * * * *

"No English judge has intimated that, under the designation of land, an easement or right in,

or use of lands, short of the estate comprised in the legal signification of lands, could be taken; and the English Courts have expressly decided that the word 'lands' in the sixth section of the Lands Clauses Consolidation Act includes mines and minerals." *Smith v. G. W. R. R. Co.*, 3 App. Cas. 165; *Ewington v. Met. Dist. R. R. Co.*, 19 Ch. D. 559. "Our statute completely removes the subject from the region of doubt. It not only gives the power to take under the designation of lands, but it prescribes that the condemnation, when consummated, shall be plenary evidence of the right of the company 'to have, hold, use, occupy, possess and enjoy the said lands'—technical words of conveyance, wholly inapplicable to anything else than a corporeal hereditament—land, in its legal signification." * * * * *

"I think it is clear that under the General Railroad Act, where the condemnation is of lands not already impressed with corporation franchises, the condemnation must be of lands, in the legal sense of that term, whereof the exclusive possession and use for the purposes for which they are taken will be transferred, and that any lesser interest in lands than the unqualified use and possession for the legitimate purposes of the company cannot be obtained by condemnation; and corporations organized under the Act of 1869 can only take that which, and in the manner which, the legislature has prescribed in the General Railroad Act."

By reference to page 55, of the above case, it will be seen that the gravamen of this decision is that a *qualified right* in the lands sought to be acquired by condemnation

is proscribed, and that the determination of the matter as to the illegality of the order appointing condemnation Commissioners is summed up as follows:

“The statute only authorizes the taking of lands, and the occupation and use of lands, in the state and condition of lands in the legal sense of that term.”

With respect to the case of *N. J. Zinc & Iron Co. v. Morris Canal & Banking Company*, 44 Eq. page 398, the excerpt from the opinion quoted on page 20 of the brief for the prosecutor and found on page 404 of the reported case, is so qualified by what follows in the opinion as to make it inapplicable to the case here sub judice. It will be noted that in so much of the opinion of that case as the brief quotes, the “title” to the land taken remains in the owner “subject only to such servitude as the corporation has power to impose, and their power in this respect is limited, as a general rule, to such use of the land as may be reasonably necessary for a right of way.”

Pursuing the opinion beyond the point quoted by the prosecutor, it appears clearly that the Court has construed the word “lands” according to the limited powers conferred by the charter of the company, and that the legislative scheme in granting this charter, rigidly restricted the right which the company may acquire, where it took land merely for a right of way, and by any other means than by grant.

“To such an easement as it should be necessary for them to have to fully accomplish the purpose of their creation, leaving the fee of the land in its owner with good right and full power on his part to make any use of the land which would not deprive the defendants of the full beneficial enjoyment of their easement.”

Referring again to part of the opinion in which the Court says that the title to the lands in dispute is in the complainants, subject, however, to an easement in favor of the defendants to use, as a part of their right of way, etc., the Court in adjudicating that the complainants are entitled to a decree says:

“That they hold the land in dispute by a good and valid title, and that the defendants have no right or interest in it, except a right of way for their canal and towpath, over so much of it as their canal and towpath now occupy.”

Particular attention is invited to the use of the words “a good and valid title.” This supports the argument made on behalf of the respondent that the legislature empowered the State Highway Commission to acquire that kind of title, and that it is not an easement.

Respecting the above case it is further pointed out as indicated by the Court, on page 406:

“That what they acquired should be inalienable, and that they should derive no benefit from it, except such as might be obtained by using it for the purposes for which they were authorized to take it. The words of limitation employed in both clauses demonstrate, I think, with great clearness, that it was an important part of the legislative scheme, in granting this charter, to rigidly restrict the right which the defendants might acquire. * * * * *”

Thus, if the Zinc Co., owning the fee thereby holds “a good and valid title,” and the Canal Co. had “no right or interest therein, except a right of way,” how would a right of way or easement supply to the State of New Jersey “a valid title” as prescribed by the statute

shall be acquired for it by condemnation proceedings.

The next case cited by the prosecutor in his brief (page 21), is that of *State v. Laverack*, 34 N. J. L. page 201, and it will be observed that the issue before the Court was not analogous to the question now under review before this Court. The decision in the Laverack case turned on the power of the City of Paterson under its charter to prescribe and locate certain streets to be used as public markets. There the right of the legislature to grant this franchise was the crux of the controversy, and the excerpt from the opinion quoted must be read in conjunction with the main point decided in the case, which was that the legislative grant imposed upon the land abutting such public streets *an additional burden which was being taken without just compensation* in contravention of the constitutional rights of the land owner.

Having determined in that case to hold a market in a street is an easement additional to its ordinary use as a highway, the Court says:

“To permit land taken for one purpose, and for which the land owner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of this State.”

In this connection and on the authority of the Laverack case (*Supra*) it is respectfully urged that the decision does not determine the quantity of title which may be acquired, but, per contra, decides that the rights of the municipality shall not extend to an easement injurious to the property owner for which he has not received compensation.

This is further emphasized by the opinion of this Court in *Barnett v. Johnson*, 15 N. J. Eq. 481, wherein this Court overruled the Chancellor who dissolved an injunc-

tion restraining the building of a structure over the bed of a canal, thereby shutting off light and air from the property of the complainant abutting upon the canal. It will be noted that this case likewise turns on the question as to whether or not the land owner has been compensated for the deprivation. The Court says:

“When streets and villages have been built up along a public highway, the right to light and air from it becomes vested, and even the legislature would have no more right to deprive them of it without compensation than they would to draw off the water from a navigable stream.”

In Cyc, under Eminent Domain, the following appears:

“The use of the land taken must be in accordance with and for the purpose which justified its taking, although within such purpose the manner of the use and occupation is within the discretion of the condemning corporation. If after condemnation and possession any other than the authorized use is made of the land, from which injury results, the owner is entitled to additional damages, unless he has received as compensation the full market value of his land, and the other use to which the land is put is a public one. These rules have been applied to lands condemned for purposes of a street or highway, for a sewer, or for a wharf.” (15 Cyc., page 1024).

Citing *National Docks &c. v. State*, 53 N. J. L. 217:

“A fortiori, if the legislature provides means by which the land owner receives just compensation for all of his right, title and interest, he is upon receipt of such just compensation stripped

of every vestige of right or title in those lands appropriated to public use, except as he is a part of the community enjoying equally that public use."

In the case of *Hepburn v. North Jersey District Water Supply Commission*, 100 N. J. L. 148, this Court, in dealing with the petition for condemnation, speaks of "the right of way" of the respondent, and that the Commission desired to acquire the fee to the land it proposes to take. Further reference is made to the fact that by this condemnation a certain right which would clearly be an easement is likewise referred to as a right of way.

By reference to the statute of 1916, Chapter 71, Section 11, among other things provides:

"For such purpose the said Commission shall have the power, and be authorized in its own corporate name, but at the expense of the contracting municipalities as herein provided, to acquire, by purchase or condemnation, any part or all of the water plant, water rights, easements, distribution system or other property of any existing private corporation or of any water company * * *. Said Commission shall have the power to acquire lands, easements, rights of way, water rights and all other property and rights that may be needful for the construction of any reservoir or the obtaining of any water supply * * *."

It will be noted that there is no specific authorization in this Act empowering this corporation to acquire by condemnation the fee to the lands required. It is obvious that this Court must have considered that the Water Commission could acquire by condemnation what it could have acquired by purchase, except for the same reasons that would necessitate the State Highway Commission resort-

ing to condemnations for its acquisition of land. From the language of the learned Justice, speaking for this Court in that case, it would appear that the words "desired to acquire the fee of the land" were sufficient to determine its right so to do. A desire to acquire for public use is certainly not as strong as the language employed in the petition of the State Highway Commission in its condemnation proceedings where that Commission determines on its statutory authority that the land is required for public use.

In the case of *Bowers v. Town of Bloomfield*, 81 N. J. Eq. 163, this Court, on the question of just compensation, says:

"What the land owner is entitled to by the statute and under the constitutional provision is just compensation for what is taken from him. He is to be made whole for the loss of his land, but he is not to gain by reason of the condemnation at the expense of his neighbors. The amount awarded by the Commissioners or the jury is not always or necessary, perhaps not often, the same as the just compensation of the owner of the fee. The award represents in a lump sum the total value of the land, including the interest of every one therein, and where there are divers interests the statute provides that the money may be paid into the Court of Chancery, to be distributed according to law:"

Further this Court says, on page 166, referring to the duty imposed upon the Chancellor to ascertain the amount of the just compensation for each interest:

"However difficult the task may be, the legislature has imposed it upon the Court of Chancery

and the task must be performed before the award, which represents the whole value of the land, can be distributed."

This Court then proceeds to define the just compensation in the following language:

"The just compensation to which the appellant is entitled is the sum which would have been paid him if he was willing, but not compelled, to sell by a buyer who desired, but was not compelled to buy."

In the case of *Essex County Park Commission*, 80 N. J. Eq. 1, at page 6, Vice-Chancellor Emery deals in no uncertain terms with the question of the continuity of title in the owner of the lands as well as with the time and circumstances at and under which there is a complete extinguishment of all title taken by condemnation proceedings. A study of this case can leave no doubt that the claim of the land owner that he was divested of his title when the lands were "taken" was acquiesced in and confirmed by the Court. This for the reason that the point of conflict on this subject related only to the time when the rights of the property owner ceased and the cogent reasoning of the learned Vice-Chancellor as to the rule of law that title to land must vest somewhere, and that it vests in the owner until he is divested thereof by the money equivalent, either received, tendered or deposited in the Court of Chancery, confirms the contention made by the present respondent that no vestige of interest remains in the property owner until just compensation has been paid.

A further consideration of that case shows a further extent to which condemnation proceedings vest in the condemning party complete title. Vice-Chancellor Emery concludes as follows:

“This right to future liens on the land existing in the city from the time of the delivery of the report to the collector arose pending the condemnation proceedings, and was therefore subject thereto and was cut off and destroyed when the condemnation was perfected by the payment of the money, and the right or interest of the city in the lands being thus cut off, its rights in the land existing at the time the title was divested, or transferred to the compensation money which is paid for the fee simple estate, including all interests, and the city is entitled to be paid therefrom.”

The above case was dealt with in *Bowers v. Bloomfield*, Supra, and the decree below was affirmed with costs. In this Court the character of the divestiture of all interests in the land taken is referred to as “a clear title to the land free of liens,” by paying its value at the time of filing the petition as the statute intends it shall.

This same decree involved in the case of Essex County Park Commission, Supra, was again under consideration by this Court in the case of *Bowers v. City of East Orange*, 81 N. J. Eq. 207, and by per curiam was affirmed unanimously with costs for the reasons stated in the opinion in *Bowers v. Bloomfield*, ante, page 163.

POINT III.

The Courts will not restrain or abridge the authority vested in the State Highway Commission unless the legislature has transcended its constitutional powers.

The prosecutor in his brief refers to what the State Highway Commission might do with lands to which it had acquired title. The logical inference from the argument presented on this point is that because the State

Highway Commission might take every corner from the owners thereof at intersecting highways, and sell or exchange the same for the profit of the State, that, therefore, there is no authority to take at the point of intersection in the instant case. In other words, because it could take many it should be permitted to take none.

Counsel for the prosecutor expressed a belief that the Legislature never intended to place in the hands of the State Highway Commission the power that Commission seeks to exercise in these condemnation proceedings. The respondent contends that if by clear language and just and equitable principles of construction, and by taking into account "propriety and moral fitness," the legislative intent is apparent and within its constitutional powers. Individual beliefs or opinion as to the wisdom of the Legislature are of no importance.

In the case of *State Highway Commission v. Elizabeth*, 102 N. J. Eq. 221, Vice-Chancellor Berry, writing the opinion for the Court of Chancery, at page 227, says:

"In considering the powers of the State Highway Commission as conferred by the above-quoted language, it must be borne in mind that the State Highway Commission is an *alter ego* of the State itself." *Curtis and Hill Gravel and Sand Co. v. State Highway Commission*, (91 N. J. Eq. 421). "It is, for the purpose of this suit, the State itself, and not a mere subordinate *ibid*, and if the positions of complainant and defendant were reversed this suit could not be maintained without the consent of the State. Therefore, when the State of New Jersey, through its Legislature, says that the State Highway Commission shall have power 'to do and perform whatever may be necessary or desirable to effectuate the object and purposes' of the act of its creation, it is but another way of saying 'you are our agent

and representative; and we invest you with all of our powers in furtherance of the objects and purposes for which you are created,' and this declaration of authority shall be liberally construed."

"It is immaterial whether the grant of power is contained in the express words of the statute or arise by necessary implication. Its force and effect, when established, are not more potent in the one case than in the other." *VanReiden v. Jersey City*, 58 N. J. L. 262.

In an effervescent rectorial exuberance the prosecutor attempts to denounce the powers which the respondent contends are being lawfully exercised by this Commission as the *alter ego* of the State. Wholly misconceiving the insistence on the part of the respondent that this Commission does not claim to be permitted to use such of the lands acquired "as it pleases," but, on the contrary, that it does and will only acquire by condemnation such lands as are required for public use in conformity with the law, and that when it sells under its given power it will do so for public use to benefit the State, and shall not be called on to surrender for private enrichment that which belongs to the people of the State.

By implication the prosecutor likens the action of this Commission, in filing its condemnation petition and holding itself ready to pay just compensation for all that is taken, to the practices of the Russian Soviet Government.

We deem it our prerogative and duty to protest against this unfounded imputation. On behalf of the distinguished citizens constituting the State Highway Commission of New Jersey, we assert that the established patriotism, the unimpeachable integrity, the high intellectual qualities and the relentless vigilance and fidelity to the service of the public entitles them to immunity from reckless, unfounded imputations or insinuations, when it is

self-evident that they have acted, as in the instant case, in good faith, following the procedure established for more than thirty years since the present Eminent Domain Act was passed.

It is not intended in the least to reflect upon the good faith with which the land owner in this case entered upon a determination to have the law as to his rights adjudicated. His high standing as a citizen puts him beyond the pale of carping criticism. Therefore, any illusion made as to the unjustness of a claim to any retained interest after just compensation, has no personal allusion, but deals only with the abstract subject.

The questions here involved are of tremendous importance to the public of the State of New Jersey as a whole. Hundreds of millions of dollars are being spent for the establishment of this great highway system. No part of it may ever be abandoned as being no longer of use to the system. Whatever rights the State has in that for which it pays should be jealously conserved for this and future generations.

The whole question might well be summed up in a brief paragraph that if it is to be a declared rule of law in this State, that in return for just compensation for land and all damages, the State, by its *alter ego* can obtain only an easement or a right of way when it invokes the sovereign right of Eminent Domain, the people upon whom the burden of payment falls, may well ask of their servants, not in the ancient text of 1 Samuel, 27,10 "Whether have ye made a road to-day?" but according to the revised version of that text "Whither have ye made a raid to-day?"

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court should be upheld to the extent that the Commission has the power under the Eminent Domain

Law to take the lands in question and that the title of the act is sufficiently broad to confer the power of condemnation.

The judgment of the Supreme Court should be reversed insofar as it denies the power of the Commission to take all of the right, title and interest of the prosecutor in the lands in question; and that the rule of affirmance with modifications should conform thereto.

Respectfully submitted,

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