

OPINION

PROPERTY OF  
NEW JERSEY STATE LIBRARY  
TRENTON

THE ATTORNEY GENERAL

IN REFERENCE TO

The Abandonment of the Morris Canal

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PURSUANT TO RESOLUTION ADOPTED  
BY THE SENATE FEBRUARY 21, 1921

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TRENTON, N. J.  
MACCULLISH & QUIGLEY CO., STATE PRINTERS

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## OPINION.

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STATE OF NEW JERSEY,  
OFFICE OF THE ATTORNEY GENERAL  
TRENTON, N. J., March 14, 1921.

*To the President and Members of the Senate of New Jersey,  
State House, Trenton, N. J.*

GENTLEMEN—I have considered the questions in the resolution adopted by the Senate on February 21, 1921, containing additional questions to those submitted by your resolution of January 24, 1921. I restate them and answer them in the following order:

*Q. 1.* Under the title of Senate No. 156 is it possible to cut off the rights of the Lehigh Valley Railroad Company, the lessee of the Morris Canal and Banking Company, the name of the lessee not being mentioned in the title?

*A. 1.* The Morris Canal and Banking Company conveyed, by a lease authorized by the act of 1871 (P. L. 444), all its right, title and interest in the canal, properties, etc., which act authorized them to lease the canal, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises. The estate conveyed was a conditional one, dependent upon the performance by the Railroad Company of the various covenants and other provisions of the lease, and a failure of such performance would terminate the lease at the option of the Canal Company. It is so expressly provided in paragraph 17 of the lease. The Canal Company before that time, and as long as the company's estate therein continued, and until the qualification upon which it was limited was at an end, had full rights and privileges over the estate for the purpose and time indicated. I think the Railroad Company, for the time limited in the charter of the Canal Company, under the lease to it, possessed the rights which the Canal Company originally possessed, while it maintained the property as a canal.

It would seem advisable, therefore, as the Morris Canal and Banking Company may have only a right to have the estate revert in it when a breach of conditions occurs, and because of it, which right has never been claimed by it, that something additional to the Canal Company's title should be taken by condemnation, and therefore expressed in the title and directed in the body of the act.

My answer, therefore, to the question is that the title of Senate No. 156 should disclose an intention to acquire the rights of the Lehigh Valley Railroad Company, in order to avoid any reason for interpretation by the courts as to the intention of the Legislature.

*Q. 2.* Would the State of New Jersey have the right to condemn the property of the Morris Canal and Banking Company under the procedure outlined in Senate No. 156 without stating the purpose of the condemnation as to whether it was for canal purposes or some other public purpose?

*A. 2.* A legislative warrant for the necessity of the taking, and that the same is for the public use, must co-exist as conditions precedent to the right of condemnation in all cases. If this proceeding was the one provided for in the charter which permitted the purchase of the canal in the hundredth year, upon an appraisal being made as therein provided, I am reasonably satisfied that the courts would presume the taking to be for a public use, just as the original taking was expressly authorized, there being nothing to indicate that any other public use might be intended.

The courts are reluctant to hold that a use declared public by the Legislature is not so in fact, and the courts will take this course only when the departure by the Legislature is palpable. The question as to the extent to which property shall be taken for public use rests wholly in the legislative discretion; provided that just compensation is made for all so taken. In the present instance, because the condemnation is undertaken not in accord with the terms of the original grant or contract in the charter of 1824, the exercise of the power of eminent domain as against the Canal Company and the Railroad Company should not only be for a stated use, but, I think, upon a properly stated ground or excuse for the exercise at this time of that power under the

police power, and because such necessity has arisen through misuse and non-user, whereby a nuisance exists or there is jeopardy to public health.

There is no expression in Senate No. 156 to indicate the use to which the canal property and its appurtenances may be put. The discretion as to the exercise of the power to take for a public use is a legislative one, but the determination as to whether the particular use is a public use is a judicial question, to be determined from the expressed intent and the authority given. The taking by the State rather than by an authorized private or quasi public body would raise a presumption that the exercise of the sovereign power is to be for a public use, but there is nothing in the act upon which the courts may affirmatively determine that the taking is for such necessary public purpose.

All doubts should be removed in regard to the purpose of the condemnation and the public use, and the necessity for the taking should be sufficiently set forth in the statute.

*Q. 3.* Would Senate No. 156 be construed as a private act? If so, would it require the assent of the Lehigh Valley Railroad Company and the Morris Canal and Banking Company in order to consummate the condemnation?

*A. 3.* I am of the opinion that the act in question is a private or special act. I am advised, however, that the requisite notice of the intention to introduce it was given, and the proof thereof filed as provided by law. It is not necessary, therefore, to determine the question as to whether the act is public or private. In any event, as the power of eminent domain is exercised without regard to the will of the property holder, it is not necessary that the consent of the Morris Canal and Banking Company, nor the Lehigh Valley Railroad Company should be obtained in order to take over the property upon the payment of just compensation.

*Q. 4.* If Senate No. 156 should be construed to be a public act, is it constitutional in that it provides a different method of condemnation from that followed in the condemnation of other properties in the State?

*A. 4.* Having already advised, in the previous answer, that, in my opinion, the act is special, and that the requisite notice of

the intention to introduce the same has been given, it is only necessary to add that the Legislature may, as in this case, prescribe a different method for the exercise of the power than that prescribed in general statutes of similar purport.

*Q. 5.* In a condemnation proceeding such as has been outlined in Senate No. 156, what will be the test of value of the property condemned? Will it be the market value of the land acquired, or will it be figured on the basis of the value of the right of user now held by the Morris Canal and Banking Company and its lessee, which right of user is costing the Lehigh Valley Railroad Company nearly \$200,000.00 (\$100,000.00) a year for operating expenses alone?

*A. 5.* The commissioners in arriving at the value of the property would have to take into consideration the market value of the property for the particular use to which it has been dedicated, and in reduction thereof the value of the State's reversionary right at the expiration of the time limits fixed in the charter, when the entire property would become the property of the State either by purchase at the end of one hundred years, or without any compensation to the Canal Company or its lessee in 1974. The latter portion of this statement will involve the consideration of the franchise which in condemnation proceedings is to be taken into consideration as one of the elements of damage. If the franchise is operated at a loss, the commissioners may take that into consideration. If it is operated at a profit and making a fair return, it adds to the amount of the award.

*Q. 6.* Under the procedure outlined in Senate No. 156 would the Big Basin be condemned?

*A. 6.* The Basin was granted by the State to the Canal Company under the provisions of the act of March 4, 1867 (P. L. 251), under the condition that the company should keep gaps open for navigation, as therein provided, and should pay certain sums to the State. Under the act the company was authorized to erect wharves, piers, docks and warehouses to afford facilities for commerce. In construing the word "commerce" we must bear in mind the rights possessed by the Canal Company to acquire property and operate it for canal purposes only, and, in

my opinion, the legal inference is that the word "commerce" as used in the statute permitting the Canal Company to acquire the basin from the State by lease, was only intended for the business that the Canal Company was originally authorized to do, and that there was no enlargement of the powers of the Canal Company.

Vice Chancellor Stevens, in referring to this transaction, held the view which I now express, citing from Section 25 of the charter, with reference to the property, quoting the words which read: "Shall forever thereafter be esteemed a public highway free for the transportation of goods, on payment of tolls and conforming to the regulations of this act." Vice Chancellor Stevens said that the Canal Company in 1867 wanted better terminal facilities, and that it applied for and obtained a legislative grant of the basin. He said that as its charter would cease to exist in 1974, and the canal property would then become the property of the State, with its improvements, without compensation, it was enacted that the basin property, with its improvements, should at that time become the property of the State, on the same terms and conditions provided in the original charter of the Canal Company respecting the transfer of the property thereof to the State. In other words, the canal with its appurtenances was to come to the State as a canal, and the basin, with the improvements, as a basin; adding that the basin, as an adjunct to the canal is to revert, with its improvements, when the canal reverts.

In 1889, at the same time that the Lehigh Valley Railroad Company paid to the State the capitalized sum of \$357,142.00, which was to have been paid by the Canal Company originally, and at the same time that the Railroad paid to the State the further sum, in consideration of the deed of the Riparian Commissioners, of \$48,000.00, being the statutory price of fifty dollars for each lineal foot, which grant in fee simple to the Lehigh Valley from the Riparian Commissioners was set aside afterwards by the Court of Chancery and the Court of Errors, the Morris Canal and Banking Company released to the Lehigh Valley Railroad Company all its right in the said basin for \$500,000.00, which the Railroad Company paid. This sum was

applied to the mortgage indebtedness of the Canal Company, reducing the sum at that time from \$1,000,000.00 to \$500,000.00, which indebtedness has since that time been further reduced. This release of all the right, title and interest of the Morris Canal and Banking Company, however, is, in my opinion, effective only for such right, title and interest as was in the Canal Company at the time, namely, the full rights and privileges of the estate for canal purposes for the time mentioned in the original charter.

My conclusion is, therefore, that the basin acquired under the act of 1867 made the basin part and parcel of the canal property and could be condemned as such under the provisions of Senate No. 156, although the intention to do so should be made manifest in the act, and a failure to so indicate might operate to prevent the attainment of the object sought in that particular.

*Q. 7.* In condemning the water rights which are desired by the State or other State agencies, what would be the basis of valuation in the condemnation proceedings brought under such an act?

*A. 7.* See answer to *Q. 9.*

*Q. 8.* What is the legal effect of the validating act of 1868 in reference to the lease from the Morris Canal and Banking Company to the Lehigh Valley Railroad Company, in so far as the proposed condemnation proceedings are concerned?

*A. 8.* I presume the question is intended to refer to the act of 1871 (P. L. 444), a further supplement to the original charter, wherein by section one it authorized the Canal Company to lease its canal, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises, to any person or persons, or corporation, either perpetually and for such shorter time, upon such rents and agreements as may be agreed upon. Vice Chancellor Stevens held that this lease was that of the property of the Canal Company and not the property of the State. Both the act and the lease plainly indicate that it can only apply to the leasing to the Railroad Company of such title as the Morris Canal and Banking Company had in the canal and basin, which, by express provision, ended in 1974, by expiration of time, or in 1924 by purchase.

I am of the opinion that the title in the Canal Company and in the lessee was not enlarged by the act of 1871. The lease conveyed for the term only, the property of the Canal Company, not the property of the State for the limited term, and beyond all question no title was conveyed to the Railroad Company which permitted the use of the canal or its appurtenances for any other purpose than that for which the taking was originally authorized.

*Q. 9.* What is the legal effect of the surplus water act of 1871 in so far as condemnation of the water rights are concerned?

*A. 7 and 9.* Section 3 of the act of 1871, authorizing the lease, permitted the Canal Company to dispose of the surplus water of the canal when not needed for navigation, for the various purposes stated therein, and to make contracts with reference thereto, limiting the permission, however, so that it was not to be construed to authorize the diversion of the canal from the purpose of navigation, and with additional limitations forbidding the depriving of certain mill owners of water power. The water in the canal could not be disposed of as surplus until and after the depth of the water had been maintained at a height sufficient for the purpose of navigation. The use and sale of such surplus water, in my opinion, is incidental to the canal purposes, and the right to dispose of the same for profit would cease with the use of the canal for purposes of navigation, and only such element of damage might be properly considered as would pay for any damage resulting from the deprivation of such surplus supply as the result of existing contracts, and could then only be based upon an estimate of the availability and value of such surplus, if it were possible for the commissioners in condemnation to ascertain the basic facts necessary to the valuation as indicated.

Very truly yours,  
THOMAS F. McCRAN,  
*Attorney General.*