

The State highway department appealed from the superior court's decision to the Supreme Court of New Jersey. The latter court noted the present plans of the highway department (which were not available to the superior court) revealed that there would be no physical invasion of the school premises and that the school would not be encircled by the new highway or the access roads or ramps.

The supreme court stated that study of the entire record gave rise to the inescapable conclusion that at the present time the issue sought to be presented by the board of education was purely hypothetical. The effect on the school, as a school, if any, was speculative. It would continue to be so until the construction work was completed and sufficient time had elapsed to permit an informed judgment to be made as to whether any damage had been suffered by the board in the constitutional sense of a taking. (The New Jersey constitution provides for the payment of compensation only when private property is taken for a public use.) It, therefore, held that the present action was premature so that the trial court was correct in dismissing it. The decision of that court was affirmed, but without prejudice to the institution of a new action by the board, if deemed advisable, at an appropriate time after completion of the highway project and after its use for the designed purpose.

The supreme court pointed out that it expressed no view as to whether the conditions described in the superior court's opinion could be considered such a taking as would expose the highway department to liability to pay compensation to the board. Decision on that issue was expressly reserved for a future time if the board brought a new action. (Board of Educ. of Town of Morristown v. Palmer, 218 A.2d 153, March 1966)

180-3 SUPERIOR COURT OF NEW JERSEY RULES STATE HIGHWAY COMMISSIONER CAN ACQUIRE PARK LAND WITHOUT CONSENT OF A PARK COMMISSION

The New Jersey State Highway Department, through its commissioner, attempted to buy land from the Union County Park Commission in connection with the construction of Interstate Highway 78. The park commission refused to sell the desired park land at the offered price, whereupon the department brought an action to condemn the land. The park commission contended that a statute prohibited the use of its property for a highway without its consent. However, both parties agreed that in the event the highway commissioner was barred by that statute from acquiring the property in question, the Federal Government could, under Federal law, institute condemnation proceedings to acquire the land since it was to be used for a part of the National System of Interstate and Defense Highways. The superior court stated that, nevertheless, it would consider the rights and duties and authority of the State highway commissioner and the Union County Park Commission as they were set out and provided for under State laws and under other laws applicable to sovereign States.

The court pointed out that the "prior public use rule" which denied the exercise of the power of condemnation when the proposed use would destroy an existing public use (unless there had been an express or implied authority to take such property) did not apply when the condemner was, in essence, the sovereign, either Federal or State. It noted that the State highway department, by statute, was made a part of the executive branch of the State and was, therefore, the alter ego of the State. Alter ego is defined in Black's Law Dictionary as "second self". A county park commission, like a county or municipality, was a creature of the State, and the State or its alter ego could take property devoted to a public use which was owned by such a creature unless there was a statute preventing this.

The statute relied on by the park commission in its contention that its property could not be condemned provided as follows:

In the location of state highway routes the commissioner shall not locate, lay out, construct, use or improve any route in, over, under, through or across a park * * * owned by or under the control and jurisdiction of any park commission * * * without the consent of the park commission.

The state highway commissioner and the county park commission may contract with each other in relation to the location * * * of a state highway route or routes in, over, under, through or across any park * * * owned by or under the control and jurisdiction of the county park commission, fixing the location thereof * * * and until the making and delivery of the contract the state highway commissioner shall not enter in or upon any park * * * for the purpose, except for preliminary surveys and examinations, of laying out * * * any state highway route in, over, under, through or across any such park * * *.

To effectuate the contract the park commission may convey to the state highway commissioner any lands or rights in lands of such park commission in, over, under, through or across which any state highway may, pursuant to the terms of any such agreement, be located.

There was another statute which provided that the State highway commissioner could acquire lands by gift, devise or purchase, or by condemnation, and could enter upon and take property in advance of making compensation therefor where for any reason he could not acquire the property by agreement with the owner.

The court ruled that the statute pertaining to buying park property limited the power and authority of the highway commissioner to enter park lands before condemnation, but there was no prohibition therein on the highway commissioner's authority to condemn park lands. The "park" statute required the highway commissioner to do all that was possible to reach an agreement with a park commission as to the layout and construction of highways on park lands. Failing in this, he could take steps to utilize the power granted him in the other statute to condemn lands. There was nothing in that statute which prohibited the taking of land already devoted to a public use. The court pointed out that there had been a statute (since repealed) which prohibited the taking of county park lands for the construction of railroads. While the legislature saw fit to insert such a provision in that statute, it did not see fit to prohibit the construction of highways across county park lands. (State v. Union County Park Comm'n, 214 A.2d 446, October 1965).