

No. 34, Original

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF NEW YORK and HUDSON RAPID TUBES
CORPORATION, a corporation of the State of Delaware,
Defendants.

**BRIEF OF DEFENDANT HUDSON RAPID TUBES
CORPORATION IN OPPOSITION TO MOTION
FOR LEAVE TO FILE COMPLAINT**

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The States of New Jersey and New York seek to have this Court relitigate in an original action the quantum of a condemnation award fully considered and determined by the courts of New York.

The condemnation proceeding was brought in the Supreme Court of the State of New York, with the explicit consent of the two States, by a joint agency of the States, Port Authority Trans-Hudson Corporation ("PATH"), to condemn an interstate railroad, the property of defendant Hudson Rapid Tubes Corporation ("HRT"). Both States, aligned with PATH, appeared *amicus* in the New York appellate courts to urge the same arguments as PATH addressed to those courts in support of its contention that

the award was excessive—the same arguments as are now addressed to this Court by PATH, supported by New Jersey as *amicus*, in a petition for a writ of certiorari, which demonstrably fails to meet the standards for the exercise of certiorari jurisdiction.*

The proposed complaint in an original action by New Jersey against New York and HRT again sets forth the same contentions as to the claimed excessiveness of the condemnation award. Although the proposed complaint purports to state a “controversy” between the two States to come within this Court’s original jurisdiction, there is not a semblance of such a controversy. The lack of any controversy between the States is evident from the facts that the complaint only echoes contentions which PATH, New Jersey and New York have previously joined in making, and that the New York brief in response to the motion does not take issue with New Jersey’s contentions in any respect, but merely restates those contentions and subscribes to their submission to this Court.

In plain fact, New Jersey and New York are endeavoring to aid PATH in this Court, as they did in the New York State courts, to avoid its constitutional duty to pay just compensation for the Hudson Tubes, and this cooperative effort cannot be masqueraded as a controversy between the States within the original jurisdiction of this Court.

The ultimate object of this jurisdictional end run is to obtain a ruling that PATH may acquire the Hudson Tubes, an interstate rapid transit railroad formerly owned and operated by HRT, upon payment of scrap value—

* *Port Authority Trans-Hudson Corporation v. Hudson Rapid Tubes Corporation*, petition for cert. filed, 36 U.S.L.W. 3315 (U.S. Jan. 26, 1968) (No. 1054).

which for the railroad's immensely costly and essential complex of tunnels and subways would be *less than nothing*, inasmuch as the tunnels and subways cannot be disassembled and sold as scrap, but would have to be plugged up at a cost of \$100,000 on a liquidation of the railroad such as the States and PATH posit as the premise of their valuation thesis. *Matter of Port Authority Trans-Hudson Corporation*, 20 N.Y. 2d 457, 467n, 231 N.E. 2d 734, 737n (1967), *modifying and aff'g* 27 App. Div. 2d 32, 276 N.Y.S. 2d 283 (First Dep't 1966), *modifying and aff'g* 48 Misc. 2d 485, 265 N.Y.S. 2d 925, *objections overruled*, 52 Misc. 2d 943, 277 N.Y.S. 2d 999 (Sup. Ct. N.Y. Cty. 1965, 1966) (A. 4n).*

In short, the States ask this Court to assert its original jurisdiction, to reverse a considered judgment of the New York Court of Appeals, and to declare that no compensation is just compensation.

To put the case in proper focus and perspective at the outset, the "controversy" which has generated the complaint has nothing whatsoever to do "with the interpretation and enforcement of interstate agreements" (N.J. Br. 3), but involves no more or less than the question (as stated by the New York Court of Appeals): What is just compensation for an eight-mile complex of subterranean and subaqueous tunnels and subways, which are "an essential part of an essential public facility" condemned to be continued in operation, "which cost some \$32,000,000 to construct, which

* For the convenience of the Court, references to the various opinions in the condemnation proceeding will be cited to the appropriate page in the appendices to PATH's petition for a writ of certiorari where those opinions are reproduced. The references will be abbreviated "A.". References to the complaint annexed to New Jersey's motion for leave to file are abbreviated "Compl."; references to New Jersey's brief in support of the motion for leave to file are abbreviated "N.J. Br.".

would cost in excess of \$400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period" (A. 8).

There is neither reason nor precedent for granting original jurisdiction to relitigate such a question, fully tried, appealed and finally determined in the courts of the State chosen by New Jersey, New York and PATH for the determination. To do so would evade the limitation of certiorari jurisdiction to substantial federal questions which there are "special and important reasons" to review (Rule 19(1)) and would thwart the fundamental principle that an issue once decided may not be relitigated by the same parties or those in privy with them.

Statement of the Proceedings

In 1962, the Legislatures of New York and New Jersey enacted identical statutes authorizing the Port of New York Authority ("Port Authority") to effectuate a "port development project" consisting of the creation of a world trade center and the acquisition and operation of the Hudson Tubes railroad, which the Legislatures declared to be "an essential railroad facility serving the northern New Jersey-New York metropolitan area" N.Y. Sess. Laws 1962, ch. 209, §1(3), N.Y. Unconsol. Laws §6601(3) (McKinney Supp. 1967); N.J. Laws 1962, ch. 8, §1(3), N.J. Rev. Stat. §32:1-35.50(3) (Supp. 1962-1963).

The adjective "essential" reflected no exaggeration, for in 1961 (the last calendar year of operations before condemnation), the Hudson Tubes transported 31,560,058 revenue passengers, including one-fourth of all trans-Hudson commuters to New York City during the critical morning peak hour, and one-half of all such commuters entering

Manhattan south of the Lincoln Tunnel (A. 67-68). The Port Authority itself has repeatedly emphasized the railroad's essentiality, explicitly acknowledging that in its absence "trans-Hudson vehicular facilities would be incapable of handling the passenger load" (Tr. 4720-21, 4723).*

In recognition of the fact that the railroad was a unitary operating entity and was to be acquired as an entity, New York and New Jersey authorized its acquisition "in a single action or proceeding notwithstanding that part of the property so to be acquired is located or has its situs in New Jersey and part in New York. . . ." N.Y. Sess. Laws 1962, ch. 209, §14, N.Y. Unconsol. Laws §6614 (McKinney Supp. 1967); N.J. Laws 1962, ch. 8, §14, N.J. Rev. Stat. §32:1-35.63 (Supp. 1962-1963). The proceeding was to be brought in the courts of whichever of the two States the Port Authority "shall estimate contains the greater part in value of all the property to be acquired in such action or proceeding." (*Ibid.*) The court in which the Port Authority elected to bring the proceeding was directed to "apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property

* The trial court thus responded to PATH's suggestion, now reflected in New Jersey's false description of the railroad as having been "on the verge of abandonment" at the time of condemnation (Compl. par. 7; N.J. Br. 3), with the comment that the notion of abandonment was "an impermissible dream" (A. 69). The District Court in the reorganization proceeding not only rejected the argument that transferring the railroad assets to a new corporation was "tantamount to an abandonment of the railroad," but found that the newly created railroad company, defendant HRT, would be "in a sound position to meet its obligations and will have adequate working capital to conduct its operations." *Re Hudson & Manhattan R.R.*, 174 F. Supp. 148, 170, 171 (S.D.N.Y. 1959), *aff'd sub nom. Spitzer v. Stichman*, 278 F.2d 402 (2d Cir. 1960). Therefore, any attempt to shore up the legal theory of scrap value by postulating as a fact that the railroad was on the "verge of abandonment" is sheerest pretense.

which is located or has its situs in the nonforum state and . . . [to] include in the total compensation to be made to any owner of property in both states being acquired in such action or proceeding the increment, if any, in the value of such property in both states, by reason of its being in a single ownership." (*Ibid.*)*

Under the authority of this legislation, PATH, a wholly owned subsidiary of the Port Authority formed specifically to acquire the Hudson Tubes, commenced a condemnation proceeding in the Supreme Court of the State of New York in June 1962. The trial of the proceeding lasted several weeks, during which the trial court heard "uncontroverted" (A. 99) evidence of the reproduction cost less depreciation of the railroad's physical property (\$488,460,000), the actual original cost of property in use at the time of condemnation (\$61,870,000), trended original cost (\$447,560,000), a thorough presentation of the railroad's physical and financial condition and operations,** and an analysis of its services, patterns of ridership and role in the over-all network of facilities furnishing trans-Hudson transportation (A. 67-69, A. 105-12).

* To ensure the conclusiveness of the adjudication rendered in any such single proceeding involving multi-state property, the statute provided that "the port authority and any subsidiary corporation so acquiring such property and the owners of such property shall be bound by the judgments, orders or decrees therein" and that the courts of the nonforum state "shall grant full faith and credit" to any judgment, order or decree "vest[ing] title in or otherwise award[ing] to the condemnor the right to possession of property located or having its situs in the nonforum state" (*Ibid.*)

** Although it had not earned net income after depreciation for a number of years, the railroad had emerged from reorganization under Chapter X at the end of 1961, with adequate working capital and with a demonstrated ability to earn enough to meet its cash operating expenses, although not enough to finance any substantial

At the conclusion of the trial, the court awarded \$55,000,000 as just compensation for the railroad, which it found to have been operating "satisfactorily in safe and sound condition at speed and spacing between trains equal to the performance of New York City subways" (A. 69). Of the total award, \$30,000,000 was attributed to the tunnels and subways, found to be "both sound and safe and have a utility as such into the distant and indefinite future" (A. 125). The remaining \$25,000,000 of the total award was attributed to the non-tunnel physical property (including passenger cars, signal system, electrical equipment, etc.) and to going concern value (see A. 129-32).

Having no interest in the condemnation proceeding different from or in addition to that of its agency, New Jersey made no effort to participate in the trial. Moreover, PATH did not once suggest during the trial or in its post-trial briefs that the principles of determining just compensation prevailing in New Jersey differed from those prevailing in New York or that there existed any decisions of the courts of New Jersey which might be of assistance in determining just compensation for the Hudson Tubes.

It was not until defendant HRT and PATH filed cross-appeals from the trial court's decision that New Jersey first evinced an interest in the proceeding. The State filed a motion in the Appellate Division, asserting that it had "a vital interest in any litigation involving the construction to be given to its constitution and case law" and urging that its Attorney-General "therefore ought to be permitted to participate in proceedings addressed to such question."

capital improvements. The railroad's cash operating throwoff was established in the trial record by the condemnor's evidence, as well as the condemnee's (PATH Exhibit Appendix, p. 9; Tr. 3550-53).

The State was given permission to file a brief *amicus curiae*, as was the State of New York. A sharply divided Appellate Division, with each justice writing a separate opinion, reduced the award for the entire railroad from \$55,000,000 to \$3,500,000 (A. 25-61).

On appeal, with New Jersey and New York again appearing *amicus curiae* in support of their joint agent, the Court of Appeals reversed the Appellate Division, reinstated Special Term's award of \$30,000,000 for defendant HRT's subway and tunnel properties, and remanded for further proceedings the determination of compensation for the non-tunnel properties and for going concern value (A. 1-24). A judgment for \$34,839,636.43 was entered on December 29, 1967, representing the principal of the subway and tunnel award, interest thereon since the date of vesting (September 1, 1962) and taxable costs and disbursements (A. 156-58). By the complaint which it asks leave to file, New Jersey seeks to enjoin enforcement of the judgment.*

As the Court of Appeals stated the case, PATH's valuation contention and the decision of the Appellate Division squarely posed the following question:

“Can it be said by any objective standard that an award of scrap value—*nothing*—is fair and just for the tunnel property, an essential part of an essential public facility, which cost some \$32,000,000 to construct,

* In a transparent effort to disguise the fact that its suit is a collateral attack upon a final judgment, the State has phrased its prayer for relief as a request for an injunction against New York's compelling PATH to pay and against HRT's collecting “damages exceed[ing] the amount awarded by the Appellate Division of the New York Supreme Court which amount represents the loss to the condemnee” (Compl. prayer). A grant of the relief sought would leave the judgment in effect but unenforceable.

which would cost in excess of \$400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period" (A. 8) (emphasis in the original).

"We think not," the Court answered (*ibid.*).

After reviewing all of the factors which the trial court had considered, and giving due weight to the factor of the railroad's unprofitability, the Court of Appeals came to the conclusion that:

"the award of \$30,000,000 made by Special Term and predicated on the conclusion that the condemnees should at least be repaid for the depreciated original cost of the tunnels is fair and just and that an award either considerably above or below that figure would be 'manifestly unjust' to the owner whose property is taken and the people who must pay the bill" (A. 9).

New Jersey chides the Court of Appeals for having "*expressly* refused to follow New Jersey condemnation law" and for "ignor[ing] the mandate of the Agreement to apply New Jersey law to that portion of the condemned railroad (65%) which is located in New Jersey" (N.J. Br. 4, 5) (emphasis in the original). The accusation is baseless, for the Court of Appeals pointedly engaged in a "discussion of New Jersey law," which it deemed "appropriate" in view of the very statutory provision which New Jersey suggests was "ignored" (A. 10).

The Court of Appeals' review of New Jersey law led it to believe that the latter State adheres to the "general rule" that in most cases just compensation can be equated with "the sum of money which [the owner] could have realized in an uncoerced sale in the open market to a will-

ing buyer" (A. 11, A. 5). The proceeding before it, however, "requires an approach different from that generally followed" (A. 11), the court stated, because it falls within the category of cases where "the market value has been too difficult to find or . . . *its application would result in manifest injustice to the owner or public . . .*" (A. 6) (quoting from *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)) (emphasis added by the Court of Appeals). While the court's attention had not been directed to any decision in New Jersey involving operating utility property condemned as an entirety to be continued in operation, the court noted that "the few cases in other jurisdictions which are similar to the one at bar have also departed from the general rule (See 2 Orgel, *Valuation Under Eminent Domain* [2d ed.] §217)" (A. 11).

"We of course cannot state with certainty what approach our brethren on the New Jersey Supreme Court would take to this problem. Perhaps they would award less—perhaps more. We must, however, decide the case and we believe that, because of the manifest injustice of awarding scrap value, it is not unreasonable to assume that the view we have taken would be adopted by that court" (*ibid.*).*

* That the Court of Appeals was fully justified in its belief that the New Jersey Supreme Court would take the same view is amply indicated by what the latter court has said about a taking of utility property, although the case was not actually before it and has never been before it. In *City of Trenton v. Lenzner*, 16 N.J. 465, 477, 109 A.2d 409, 415 (1954), *cert. denied*, 348 U.S. 972 (1955), the Supreme Court observed that condemnation of "the entire plant of a public service corporation . . . with the purpose of continuing its operation as a governmental enterprise" presents a "specialized situation," in which "the plant is to be valued as a going concern." As authority for the latter proposition, the New Jersey Supreme Court cited a New York case, *Banner Milling*

It could not be more plain that the Court of Appeals was in good faith applying New Jersey law as it believed a New Jersey court would do in the circumstances of this case, and any suggestion by New Jersey to the contrary must be rejected. Nevertheless, the suggestion is notable, for it illustrates the distortion inherent in New Jersey's attempt to conceal within the trappings of argumentation addressed to the statute and the Compact Clause the true nature of its underlying contention, which is simply that the award is excessive.

In the same vein, New Jersey contends that the Court of Appeals' decision exceeded "the valuation ceiling" said to have been fixed by the Legislatures when they declared that in any condemnation proceeding brought under the statute, the owner should not be awarded "any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever" (N.J. Br. 24; see Compl. par. 16). N.Y. Sess. Laws 1962, ch. 209, §14, N.Y. Unconsol. Laws §6614 (McKinney Supp. 1967); N.J. Laws 1962, ch. 8, §14, N.J. Rev. Stat. §32:1-35.63 (Supp. 1962-1963).

Plainly, the Court of Appeals had no thought of awarding an "increment" above "just compensation" but applied itself

Co. v. State of New York, 240 N.Y. 533, 148 N.E. 668, *cert. denied*, 269 U.S. 582 (1925) indicating the consistency between the law of the two States and the absence of anything distinctive or unique about New Jersey law which the Court of Appeals can be accused of having overlooked or misunderstood.

New Jersey hardly proves its point by citation of a seventy-eight year old decision which involved, not an operating railroad condemned to be continued in operation, but rather vacant land taken as part of a railroad right-of-way (N.J. Br. 21, citing as "the leading New Jersey case on the subject" *Currie v. Waverly & N.Y.B.R.R.*, 52 N.J.L. 381, 20 Atl. 56 [N.J. Ct. Err. & App. 1890]).

only to a determination of "what constitutes just compensation . . ." (A. 3). Equally plainly, the statute did not fix any measure of compensation, but merely referred to the independently operative constitutional standard of just compensation that would govern in any event. Indeed, had the Legislatures attempted to restrict the measure of the award, the attempt would have failed, for "the ascertainment of compensation is a judicial function and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States v. New River Collieries*, 262 U.S. 341, 343-44 (1923); see *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893); *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936).

Thus it is apparent that New Jersey's incantation of "the faithful performance of compact obligations" (N.J. Br. 5) could not be wider of the mark, and its alignment with its agent PATH in attempted invocation of the statute to permit the acquisition of the subway and tunnel complex of the Hudson Tubes, not only by far the most costly but also "the most vital and important component of an operating trans-Hudson commuter rail system" (A. 126), for a scrap value which is no value at all, cannot mask the gross inequity of their position, which would transform the constitutional guaranty of just compensation into "an instrument of confiscation." *United States v. General Motors Corp.*, 323 U.S. 373, 381 (1945). Nor does the attempted fabrication of a justiciable controversy between New York and New Jersey, which does not exist, mask the lack of any precedent for such a result or the plain fact that the entire effort to come to this Court is an attempt at avoidance of a binding final judgment.

ARGUMENT

I.

This Court Should Not Exercise Its Original Jurisdiction to Retry Issues Which New Jersey Consented to Have Decided by the Courts of New York.

The action is barred by principles of estoppel by judgment.

A final decision has been rendered by the New York Court of Appeals decreeing the just compensation to be paid for the Hudson Tubes and disposing of all of the issues which New Jersey seeks to reopen in an original action.* In the Court of Appeals, not only was New Jersey heard (as it had been in the Appellate Division), but an agency of the State formed specifically to acquire the railroad vigorously urged as a party the very same contentions made by its creator, the State. Hence, all of the elements required to call into play the doctrine of estoppel by judgment are present, and that principle stands as a bar to entertainment of the present action.

There are additional factors which render application of the principle peculiarly appropriate here. New Jersey and New York conferred discretion upon PATH either to condemn in separate proceedings the property taken in each State or to bring a single proceeding in either State for the acquisition of property in both States and choose in

* The decision of the Court of Appeals is final for purposes of *res judicata* unless and until vacated by the Court of Appeals or reversed by this Court on PATH's petition for a writ of certiorari. *Restatement of Judgments* §41, comment d (1942).

which of the two States it would condemn the Hudson Tubes.* In providing for application of the law of valuation of the nonforum State to property located in such State before it was known where the proceeding would in fact be brought, each State gave its consent to have its law construed and applied by the courts of the other State. And this is precisely what has happened; the New York Court of Appeals considered New Jersey law and concluded that "the view we have taken would be adopted by [the New Jersey Supreme Court]" (A. 11).

Simply speaking, New Jersey is endeavoring by bringing an original action to evade its obligation of according full faith and credit to the New York judgment and is attempting to retract the consent which it solemnly gave in the statute, taking the position that the determination of just compensation, while concededly binding on PATH and defendant HRT (see p. 6n, *supra*), may be relitigated by the State itself so long as it couches its objection to the determination as one to a "violation of said Compact and contract" (Compl. par. 1). Permitting New Jersey to attack the Court of Appeals' decision collaterally in an original action not only would violate accepted principles of *res judicata*, but would defeat the carefully drawn statutory scheme for acquisition of the entire railroad in a single proceeding.

* The provision in the bi-state legislation that the proceeding might be brought in "whichever of the two states the port authority shall estimate contains the greater part in value of all the property to be acquired in such action or proceeding" (p. 5, *supra*), left the Port Authority free, as the States undoubtedly realized, to vary its determination by including in, or excluding from, the proceeding to condemn the railroad, the condemnation of the Hudson Terminal office buildings situated atop the railroad's downtown Manhattan terminal.

If this Court will not exercise jurisdiction "where there is no want of another suitable forum," *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939), *Georgia v. Chattanooga*, 264 U.S. 472, 483-84 (1924), it should certainly decline to do so where another forum not only is available but has in fact been availed of, and where the party invoking original jurisdiction has chosen, or authorized the choice of, that very forum.

The action is an impermissible attempt to circumvent this Court's discretionary certiorari jurisdiction.

If any substantial federal question had been created by the Court of Appeals' decision in the condemnation proceeding, this Court could review the decision in the exercise of its certiorari jurisdiction. The availability of such review, if any warrant existed for it, would alone require denial of the present motion.

In *Georgia v. Chattanooga*, *supra*, this Court dismissed Georgia's bill of complaint seeking an injunction against the pending condemnation by Chattanooga for street purposes of part of a railroad yard owned by the State. Having decided that land owned by Georgia was no less amenable to condemnation than any other land in Tennessee, this Court held that dismissal of the bill was required by the availability to Georgia of the courts of Tennessee as a forum in which to raise all other questions, including the amount of compensation.

"If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review. That suits in equity will not be sustained in any case where a plain, ade-

quate and complete remedy may be had at law is declared by statute (Judicial Code, §267) and established by decisions of this Court so numerous that citation is not necessary." (264 U.S. at 484).

The Court of Appeals' decision in the proceeding brought by PATH to acquire the Hudson Tubes has created no substantial federal question which should be reviewed by this Court; defendant HRT has so demonstrated in the brief which it is contemporaneously herewith filing in opposition to PATH's petition for a writ of certiorari. The void created by the absence of a reviewable federal question cannot be filled by invoking this Court's original jurisdiction.

There is no authority for entertaining an original action in the circumstances of this case.

Pennsylvania v. New Jersey, motion for leave to file granted, 309 U.S. 628, dismissed, 310 U.S. 612 (1940), upon which the State here places principal reliance and which is characterized as having presented "an identical situation" (N.J. Br. 2; see also N.J. Br. 30-32), is a far different case in numerous respects:

(1) New Jersey's consent to have the New York courts construe and apply New Jersey law and the State's direct participation in the condemnation proceeding, neither of which factors was present in *Pennsylvania v. New Jersey*, furnish a sharp and decisive distinction.

(2) The motion for leave to file was granted in *Pennsylvania v. New Jersey* only after certiorari had been granted (and even after argument had been held) in the companion case of *Delaware River Joint Toll Bridge Com-*

mission v. Colburn.* Hence, *Pennsylvania v. New Jersey* is not authority for avoiding the appropriate limits of certiorari jurisdiction by the commencement of an original action. See *Georgia v. Chattanooga, supra*.

(3) *Colburn* hinged upon an interpretation of the bi-state enabling legislation. It was a true case of construction of a compact and thus presented a substantial federal question meriting review by this Court. The instant case involved only a condemnation valuation, the determination of just compensation on all the facts which had been adduced at the trial. There is neither warrant nor precedent for having such a state court determination reviewed by this Court at the condemnor's behest (see Brief in opposition to PATH's petition, pp. 10-12).

(4) It would be wholly impractical, as well as improper, to have the determination of just compensation made *de novo* in an original action. In contrast to *Pennsylvania v. New Jersey*, where the sole question was one of the existence of a *right to compensation* for consequential damages, this Court is being asked by New Jersey here to determine the *measure of compensation* for the Hudson Tubes. We know of no case where this Court has decided what is just compensation as a matter of first impression, and it should

* The petition for a writ of certiorari was granted on January 15, 1940, the attention of counsel being directed to "the question of jurisdiction of this Court." 308 U.S. 549. On February 26, 1940, oral argument on the merits was held in the certiorari proceeding, contemporaneously with the holding of a hearing on Pennsylvania's motion for leave to file. The motion was granted one week later, and shortly thereafter the decision of the New Jersey Court of Errors and Appeals in the condemnation proceeding was reversed. 310 U.S. 419. The complaint in the original action was dismissed at the same time, since "the questions sought to be presented . . . have been determined by judgment of this Court in *Delaware River Joint Toll Bridge Commission v. Colburn*." 310 U.S. 612.

not do so where the property is as complex, the relevant proof as varying and extensive, and the range of allowable discretion in reaching a fair and equitable award as broad as here.

II.

The Complaint Does Not Present a Case or Controversy Cognizable Within the Original Jurisdiction of This Court.

There is no controversy between the States.

While New Jersey asserts that jurisdiction rests on the dual ground that its controversy is with both another State and a citizen of another State (N.J. Br. 2-3, 30), its argument and choice of authorities bespeak principal reliance on the former basis of jurisdiction. Nor could the State argue otherwise even if it chose to do so, for New Jersey cannot complain of any action taken or threatened by HRT.

Thus, the complaint may be sustained, if at all, only as one which presents a controversy "between two or more States" within the intendment of the Judiciary Article. U.S. Const. art. III, §2. But New York, as a sovereign acting through its Legislature or its elected or appointed officials, has not acted adversely to New Jersey, nor is there any allegation that it will do so unless enjoined. New York has not renounced or sought to vary its obligations under the 1962 legislation, nor has it prevented or delayed in any way the acquisition of the Hudson Tubes. *Compare Kentucky v. Indiana*, 281 U.S. 163 (1930).

To the contrary, the Attorney General of New York, like the New Jersey Attorney General, filed a brief and argued in the Court of Appeals in support of the States' joint agent, PATH. All of the arguments which New Jersey

sets forth in its complaint as giving it a justiciable interest—"the right to have just compensation determined and applied under the New Jersey, New York and Federal constitutions" (Compl. par. 24) and the interest in avoiding a judgment which would "reduce the amount of funds contractually available for investment by the Port Authority in public transportation, terminal and other facilities of commerce serving both States" (*id.* par. 31)—were equally and cooperatively urged by the State of New York appearing *amicus curiae* below.

New York's response to the motion for leave to file makes it evident that the tendered "controversy" between the two States is sheer pretense. Having been aligned with PATH and New Jersey below, New York continues its alliance in this Court, with each of the three playing its assumed role. In the face of an attack on the decision of its highest court, including the charge that the court did not even act in "good faith" and flagrantly "disregarded" its duty, the Attorney General of New York joins in by restating New Jersey's contention and agreeing that the "matter of the interpretation, application and enforcement of the interstate agreement" is "submitted to this Court for final determination" (Brief of the State of New York, p. 4). This response only confirms that New York and New Jersey are not adversaries between whom there is a conflict of interests, but rather are "partners in litigation," who should be realigned in accordance with the positions which they have taken in the condemnation proceeding. *Indianapolis v. Chase National Bank*, 314 U.S. 63, 74 (1941).

The pretense is further apparent in New Jersey's specification of the "state action" of the State of New York that is assigned as the cause of the "controversy" between the

States. New Jersey contends that it is aggrieved by a decision of New York's highest court which "refused to follow" and "evaded" New Jersey law (N.J. Br. 4, 24).^{*} Analogizing to the Fourteenth Amendment and citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), the State argues that since "a judicial decision constitutes state action," New Jersey's "controversy" with the New York Court of Appeals must be deemed a "controversy" with the latter State itself (N.J. Br. 33-34).^{**}

The attempted assimilation of judicial decision to state action here is particularly inapposite where the subject of the litigation, the determination of just compensation, is peculiarly a judicial function as a matter of constitutional law, which cannot be impaired by legislation, *United States v. New River Collieries*, *supra*; *Monongahela Nav. Co. v. United States*, *supra*, and where the state or its agency as condemnor has no constitutional basis for its claim that the court overestimated the value of the condemned property.

As we have shown, the Court of Appeals' approach to and treatment of New Jersey law will not bear the charac-

^{*} In its *amicus* brief in support of PATH's petition for a writ of certiorari, New Jersey refers to the decision as a "contractual breach by the New York Court of Appeals" and "a flagrant breach of compact" (N.J. *Amicus* Br. 4, 11), which are surely curious characterizations of a determination of just compensation in eminent domain.

^{**} If a controversy between two States within the grant of original jurisdiction were posed every time the courts of one State construed the law of the other and the latter State disagreed with the application, the consequence would be to impose on this Court "a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." *Massachusetts v. Missouri*, *supra* at 19.

terization of a refusal to apply that law or an ignoring of it, and there is every reason to assume that the New Jersey Supreme Court would have reached the same result as did the Court of Appeals (pp. 9-10, *supra*). Even if the Court of Appeals had misconstrued the New Jersey standard of just compensation in its application to this case, such a misconstruction would be even less of a basis for finding a controversy between the States than it would be for a contention that the New York court had failed to give full faith and credit to New Jersey law, a contention which would be untenable. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917); *Johnson v. New York Life Ins. Co.*, 187 U.S. 491 (1903). In the former case, Justice Holmes summarily disposed of such a contention: "There is nothing to suggest that it [the Missouri Supreme Court] was not candidly construing the Colorado statutes to the best of its ability, and even if it were wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article IV, § 1." (243 U.S. at 96).

The incongruity of the "controversy" alleged in the complaint, pointed up by the misjoinder of New York as an adverse party, is conclusively established by the non-joinder of PATH. Apart from the owner of condemned property, there is no more obviously necessary and even indispensable a party to a "controversy" over the amount of a condemnation award than the condemnor who will inevitably be directly affected by any adjudication of the "controversy".*

* Aware of how striking the omission would appear, New Jersey has anticipatorily noted that the Delaware River Joint Toll Bridge Commission was not named as a party in *Pennsylvania v. New Jersey*, *supra* (N.J. Br. 31). But the latter case is hardly authority

Since PATH is incorporated under the laws of New Jersey, as well as New York,* it could not be joined as a defendant. *Jacobson v. N.Y.N.H. & H. R.R.*, 347 U.S. 909 (1954); *Patch v. Wabash R.R.*, 207 U.S. 277 (1907); *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902); *California v. Southern Pacific Co.*, 157 U.S. 229 (1895). Joinder of PATH as a plaintiff would render the action in part an impermissible suit against New York by one of its own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890).

But the impropriety of the action has roots deeper still than any problem of alignment of parties, for the proposed complaint, New York's response, PATH's petition for a writ of certiorari and New Jersey's brief *amicus* in support of the petition, unmask this suit for what it really is, a contrivance to retry the controversy between PATH and HRT as to what is just compensation for the Hudson Tubes, with a State placed on each side as a jurisdictional makeweight.

New Jersey has no justiciable interest in the acquisition of the Hudson Tubes which may be vindicated in an original action.

New Jersey contends that its rights under the 1962 legislation are at stake, but on analysis it is apparent not only

for proceeding in PATH's absence, for there no condemnation proceeding had been begun, much less an award of compensation finally determined and reduced to judgment.

* The complaint properly describes PATH as having been formed under Section 12 of the bi-state legislation, which authorized the Port Authority to form a subsidiary corporation to carry out the statute by "executing and filing with the Secretary of State of New York and the Secretary of State of New Jersey a certificate of incorporation. . . ." N.Y. Sess. Laws 1962, ch. 209, §12, N.Y. Unconsol. Laws §6612 (McKinney Supp. 1967); N.J. Laws 1962, ch. 8, §12, N.J. Rev. Stat. §32:1-35.61 (Supp. 1962-1963).

that any such claim is untrue, but additionally that the State in fact has no justiciable interest in the outcome of the condemnation proceeding.

As we have noted, New York has done nothing to impair, prejudice or affect the statutory plan for acquisition of the Hudson Tubes, and has engaged in no controversy whatsoever with New Jersey as to any aspect of the legislation. Hence, New Jersey's basic rights as a co-author of identical legislation are not in jeopardy. And New Jersey has no independent justiciable interest in the interpretation given to its law by the courts of New York in this case.

In short, it is patent that New Jersey is seeking by the action it would commence only to appeal from a state court decision in a proceeding brought with its consent and in which, though not technically a party, it was heard and its joint agency with New York was a litigant. Indeed, there is no more basis for New Jersey's action than if it sought to appeal from a decision of its own courts.

Casting around for some traditionally recognized basis for suit, the State has alleged that it and its citizens will suffer as a result of the judgment's financial impact, since any monies paid by PATH to defendant HRT in satisfaction of the condemnation award will increase the debt service of the Port Authority (presumably on the assumption that the funds used to pay the award would be borrowed) and decrease the funds available to the Port Authority for investment in transportation and other facilities serving the two States (Compl. pars. 30, 31).

If the condemnation award were enforceable against New Jersey, the State would have a direct financial stake in the outcome of the condemnation proceeding, as it also might have if the States had pledged their respective credit to the

payment of Port Authority obligations, including judgments rendered against the Authority or any subsidiary. But the judgment is not enforceable against the States. Moreover, the States explicitly provided in their 1921 Compact that the Port Authority "shall not pledge the credit of either state except by and with the authority of the legislature thereof." N.Y. Laws 1921, ch. 154, §1, N.Y. Unconsol. Laws, §6408 (McKinney 1961); N.J. Laws 1921, ch. 151, N.J. Rev. Stat. §32:1-8 (Supp. 1962-1963).

The financial interest pleaded is, therefore, "purely speculative, and, at most, only remote and indirect." *Florida v. Mellon*, 273 U.S. 12, 18 (1927). Indeed, the threat of a diminution in funds available for investment could with equal plausibility be urged by the State as a basis for challenging a judgment rendered against any business enterprise in the State.

In virtual confession of its inability to plead and prove a legally cognizable injury as a result of the Court of Appeals' decision in the Hudson Tubes condemnation proceeding, New Jersey asks this Court to take jurisdiction because "other condemnation valuations will be taking place under the Agreement" (N.J. Br. 29). Passing the point that the Court of Appeals decision concerning the condemnation of an operating railroad taken to be continued in operation will have little precedential impact on any acquisition of land, where the market value measure of compensation is readily applied, New Jersey clearly may not impose on this Court's jurisdiction to obtain "guidance as to what the Agreement requires if condemnation proceedings are brought to effectuate this project" (N.J. Br. 29). *Alabama v. Arizona*, 291 U.S. 286, 291 (1934).

The complaint falls far short of alleging "facts that are clearly sufficient to call for a decree in [New Jersey's] favor." *Alabama v. Arizona, supra* at 291; see also *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

CONCLUSION

The motion of the State of New Jersey for leave to file a complaint should be denied.

Respectfully submitted,

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