

Road

DOCKET No. 5

Number Term Year

12 Dec 5 1921

Petition of J. M. Askey for viewers
to assess damages

Versus

TO THE HONORABLE, THE JUDGE OF THE COURT OF QUARTER
SESSION OF THE COUNTY OF CLEARFIELD.

Your undersigned petitioner who is a resident of the Township of Sandy, Clearfield County, Pennsylvania, respectfully showeth;—

That he is the owner of certain real estate situated in the said Township of Sandy, Clearfield County, Penna. consisting of a farm containing about fifty-two acres, which is bounded on the North by lands of Thomas Long and also S. J. Schrecongost; on the East by lands of John and George Kotzbauer; on the South by William Utzinger, and on the West by lands of S. J. Schrecongost;

That through said lands extending in a general North and South line is a public road formerly a part of the system of public roads of the said Township of Sandy but some years ago, by Act of Assembly was made a part of the Primary System of State Highways of the Commonwealth of Pennsylvania, and is a part of that particular section known as Route Number Fifty-Nine;

That some time since the said State Highway Department, by contract with Johnston & Keamns had a part of this said Highway improved by laying thereon a cement surface and that the said roadway and land adjacent has been underlaid with pipes for drainage;

That at the point where the line between the Townships of Brady and Sandy cross the said state Highway the said Commonwealth of Pennsylvania has caused to be laid a large drain pipe across the said road and into the said pipe or drain there has been conducted the waters of a constantly flowing spring from lands of William Utzinger; which said waters formerly flowed across the said Utzinger lands from said spring and from thence across the said Highway and again on other lands of said Utzinger and eventually found their way into Pents Run, but since said improvement of the Highway has been made the waters from said spring have been diverted from their accustomed channel and by said drain pipe have been diverted to lands of your petitioner, which are valuable farming lands and have caused much damage thereby and that such damage will continue as long as the said drainage pipe is in its present location.

That said work has been done within one year last past and that your petitioner has tried from time to time to make satisfactory settlement for said damage with the Commissioners of the County of Clearfield, believing that the county of Clearfield is liable for damage done him by reason of said improvement of the said State Highway, but that he has been unable to effect a settlement of any kind and your petitioner therefore prays that the Court may appoint proper persons as Viewers to view and assess the damage done to his lands by reason of the diversion of the waters as aforesaid, as in such case by law made and provided. And he will ever pray.

J. M. Arkey

Clearfield County SS;
Pennsylvania

Before me, a Notary Public duly commissioned in and
for the County of Clearfield, personally came J. M. Askey,
who by me being duly sworn according to law deposes and says
that the matters set forth in his foregoing petition, are
true and correct to the best of his knowledge and belief.

Sworn and subscribed before me this seventeenth day of
October, A. D. 1921.

J. M. Askey

James Askey

Notary Public
My Commission Expires May
2, 1923.

Oct 12 Dec 1921

Oct 21 1921. French Station.
Dr. E. Gray and George Johnson
are appointed receivers as managing
agents without boundaries within
limits of the County of Clayfield
to deny from below.

By W. French
French Station

RECEIVED
OCT 22 1921
Geo. W. RAISMAN
CLERK

In the Court of Quarter Sessions of Clearfield County, Penna.

In Re. Assessment of damages) No. 12 December Sessions, 1921.

to J. M. Askey.)

J. M. Askey presented his petition praying for the appointment of Viewers to assess damages caused to real estate of the petitioner by the construction of a part of that portion of the primary system of State highways known as Route 59, in this regard. After setting out the existence through his land of this highway, he averred "The State Highway Department had a part of this said highway improved by laying thereon a cement surface and that the said roadway and land adjacent has been underlaid by pipes for drainage; that at the point where the line between the Townships of Brady and Sandy crosses the said State highway the said Commonwealth of Pennsylvania has caused to be laid a large drain pipe across the said road and into the said pipe or drain there has been conducted the waters of a constantly flowing spring from lands of William Utzinger; which said waters formerly flowed across the said Utzinger lands from said spring and from thence across the said highway and again on other lands of said Utzinger and eventually found their way into Pentz Run, but since said improvement the waters from said spring have been diverted from their accustomed channel and by said drain pipe have been diverted to lands of your petitioner, causing great damage". In accordance with the petition-Viewers were appointed, who reported on April 24th, 1922, and on July 24th, 1923 no appeal having been taken or exceptions filed the Report was confirmed. On July 25th, 1923 the County appealed from the award of damages, and on September 5th, 1923 the Plaintiff presented a petition praying the appeal be quashed for reasons apparent on its face. On November 16th, 1923 the County

made a motion to quash all the proceedings in the case "for the reason that there was no jurisdiction in road viewers to award damages and no jurisdiction in this Court to try said case for damages." At Bar it was explained that this means that ~~xxx~~ on the face of the petition there was no jurisdiction in the Quarter Sessions Court to appoint viewers or to proceed whatever in this matter.

Assuming the facts to be as set out in the petition and the report of the viewers, it appears that the water was diverted from its natural channel and thrown upon the lands of the petitioner, and had this work of construction been done by a township under the rulings of the Appellate Courts the petitioner would have a right to compensation. The pending question, however, is the right to conduct the present proceeding, and while we are personally entirely in accord with the spirit of justice which was indicated in *Allison vs Biglow*, 68 Penna. Superior Court 219: "There is certainly nothing in the law or spirit of the Constitution to prohibit a legislative enactment that the State itself, in the construction of great public improvements for the benefit of the people at large, should not respond to the same liability as is imposed upon the great municipalities of the Commonwealth through whose agency the government of the State is exercised"; and while we personally feel that a great injustice is being done to property owners by injury to their properties by change of grade, diversion of water flowage and the maintenance upon their lands of open and other drains, we are bound by the law and unless there is a legislative enactment rendering the State liable damages cannot be awarded in the manner here attempted. The Supreme Court has said: "The Commonwealth in the construction of public highways is in exercise of its sovereign authority and never liable for damages unless made so by express enactment". The Acts of Assembly under which

this petition is presented have been exhaustively examined in State Highway Route No. 72, 71 Penna. Superior Court '85, and by the Supreme Court in 265 Pa. St. 369. Both of the Appellate Courts have held that unless there is an actual taking of a part of the land of the petitioner by the construction of the highway the proceeding cannot be sustained, and it has been positively stated "that the viewers were without jurisdiction to assess damages"; and these Courts have held that the proceeding by which damages payable by the County may be assessed is restricted to those cases "wherein a change of existing lines and location is necessary". The construction in this case is not done by the County of Clearfield and the County is only liable at all because an Act of the Legislature has imposed liability upon it. The reconstruction is by the Commonwealth of Pennsylvania and there is no means known to use by which any proceeding may be had against the Commonwealth, except by virtue of some positive Act of the Legislature. The finding of the Appellate Courts is binding upon us and as they have expressly found that the viewers were without jurisdiction to assess damages, we can do no less than obey their mandate.

We may add, however, that nothing short of a want of jurisdiction would move us to quash this proceeding after all the expenses have been incurred and we are perfectly clear that this petitioner should not have these costs imposed upon him. The County having sat silent while the proceeding went on, ought in common justice to pay the costs and expenses.

Now, November 17th, 1923, the proceedings had to No. 12 December Sessions, 1921, are quashed for want of jurisdiction. Exception noted and bill sealed to petitioner.

By the Court,

Singleton Buel

P. J.

No. 12 December Sessions, 1921.

In Re. Assessment of Damages
to J. M. Askey.

OPINION and DECREE

