

Nos. 6, 7, 8, 9, 10, 11, 12, 13 and
14, June Sessions, 1955, Road D.
IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY, PA.

IN THE MATTER OF THE CHANGE
OF LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE
HIGHWAY ROUTE 222, IN THE
TOWNSHIP OF STONYCREEK,
COUNTY OF CAMBRIA AND STATE
OF PENNSYLVANIA.

Filed: Mar. 13, 1959

OPINION.
ORDER.

FRANCIS J. LEAHEY,
OFFICIAL STENOGRAPHER FOR THE
FORTY-SEVENTH JUDICIAL
DISTRICT

Hesperia

| | | |
|------------------------------|---|-------------------------------------|
| IN THE MATTER OF THE CHANGE | : | IN THE COURT OF QUARTER SESSIONS |
| OF LOCATION AND LINES OF THE | : | OF CAMBRIA COUNTY, PENNA. |
| HIGHWAY KNOWN AS STATE | : | |
| HIGHWAY ROUTE 222, IN THE | : | Nos. 6, 7, 8, 9, 10, 11, 12, 13 and |
| TOWNSHIP OF STONYCREEK, | : | 14 June Sessions, 1955, Road |
| COUNTY OF CAMBRIA AND STATE | : | Docket. |
| OF PENNSYLVANIA. | : | |

APPEARANCES:

For Petitioner, Department of Highways, Commonwealth of Pennsylvania:

Edward F. Peduzzi, Esq., and Michael Deckman, Esq.

For Respondents:

Gerald K. Gibson, Esq., and William Shahade, Esq., for Edward J. Harkins, Esq.

For Cambria County:

William D. Shettig, Esq.

O P I N I O N

McDONALD, J.:

Pursuant to a plan approved by the Governor of Pennsylvania on June 7, 1950, the Pennsylvania Department of Highways (hereinafter referred to as the Department) widened and paved a portion of State Highway Route 222 in Stonycreek Township, Cambria County. As a result of this change of lines and location of said highway, certain owners of property abutting the highway (hereinafter referred to as petitioners) filed petitions requesting the appointment of viewers to ascertain and award damages to their properties.

Upon petitions of the Department filed in each case, rules were issued to show cause why the petitions for the appointment of viewers should not be dismissed, all proceedings to be stayed meanwhile. The Department contends: (1) there was no taking of the property of petitioners; (2) the highway was constructed within the legal right-of-way established by the Governor of Pennsylvania on March 19th, 1924; (3) the condemnation of the properties affected occurred on March 19th, 1924, and all claims for damages are now barred by the statute of limitations. Petitioners filed Answers denying the Department's allegation that the condemnation

occurred in 1924. They aver further: (1) no compensation was paid for the land taken; (2) the condemnation occurred on and after June 7th, 1950, the date of approval by the Governor of the plan for reconstruction of said highway which is recorded in the office of the Recorder of Deeds of Cambria County; (3) that even though an ultimate width of right-of-way may have been established, it was of no effect because the plan was not recorded in Cambria County.

Subsequently the Department filed a petition in each case and rules were issued to show cause why the County of Cambria (hereinafter referred to as County) should not be joined as an additional defendant for the reason that it may be liable in damages to the property owners in the event of an award. In its Answer, the County denied liability and contended: (1) it did not accept and approve the plans for the change of said highway which affected the land of the petitioners, and (2) in any event, damages have been barred by the statute of limitations.

It is agreed Roy B. Griffith and Catherine Marie Griffith, his wife, Frederick E. Griffith and Zelpha Penrod were the owners of the land described in their petitions on and before March 19th, 1924. The other petitioners, to wit: Clyde Edwin Keiper and Kathryn Margaret Keiper, husband and wife, Thomas Richard Smith and Doris Marie Smith, husband and wife, Charles Wissinger and Elda M. Wissinger, husband and wife, Melvin R. Strong and Edna Mae Strong, husband and wife, Karl Montag and Valetta Montag, husband and wife, Melvin C. Strong and Eileen N. Strong, husband and wife, had acquired title subsequent to March 19th, 1924. It is further admitted that no damages have been paid to any of the petitioners.

At the hearing it developed that State Highway Route 222 was formerly part of the Bedford-Scalp Level Turnpike taken over by the Commonwealth. The original right-of-way was forty feet, part of which had been constructed of macadam. The plans for

reconstruction of said highway as approved by the Secretary of Highways on March 4th, 1924, and by the Governor of Pennsylvania on March 19th, 1924, prints of which were introduced in evidence, were filed in the office of the Department of Highways in Harrisburg. According to these plans, the highway was reconstructed of concrete for a distance of 7,302.6 feet, on part of which the properties of petitioners abutted. The paved portion of the road was not widened over its original width and was completely within the original right-of-way, referred to on the plans as "Legal Width of Right of Way", except at the "William Schrader" property where a curve was eliminated. The Schrader property is sixteen hundred feet from the property line of any petitioner. The plans also show a line, ten feet on each side of the original right-of-way and parallel thereto, referred to as "Required Width of Right of Way". Thus the total "Required Width of Right of Way" is sixty feet. While there was a marked deviation of the reconstructed highway from the original road bed at the Schrader property, the deviation from the original center line of the turnpike abutting the properties of petitioners varied from three feet to one-half foot and ^{at} times the new and old center line coincided. Since the highway was reconstructed in the original road bed and at no point (except the Schrader property), considering the combined width of pavement and shoulders, exceeded the original right-of-way width, we may assume this minimal deviation from the original center line would have been difficult to detect other than by survey or expert examination of the plans. No physical entry was made on the additional ten feet width above referred to as within the line of the "Required Width of Right of Way".

The Department also submitted in evidence a plan prepared by the Office of the District Engineer showing the original turnpike right-of-way, the reconstruction of 1924, a widening of the opposite side of the road in 1941 (with which we are not concerned),

and the widening of the highway under the 1950 plans. This last mentioned widening was within the lines of the right-of-way referred to above on the 1924 plans as "Required Width of Right of Way".

Two of the claimants, Zelpha Penrod and Roy B. Griffith, both owners of their parcels in 1924, testified they had received no notice of the condemnation at that time, nor was their property physically entered. The Chief Clerk in the Office of the Commissioners of Cambria County testified that an examination of the records in that office failed to disclose that notice of the proposed reconstruction of 1924 was received by the County Commissioners as required by law. The Department offered no proof that notice was given to the County Commissioners. Frederick Griffith, the other petitioner who owned his property in 1924, was unable to be present at the hearing, however we may conclude, since the Commissioners received no notice or gave any, that he also received none.

This case raises several important questions: (1) may this Court in such a proceeding determine facts upon which to decide questions of law? (2) Did the condemnation occur in 1924 or 1950? (3) If the condemnation occurred in 1924, was there notice, either actual or constructive of the proposed reconstruction and if not, is the statute of limitations tolled? (4) If the condemnation occurred in 1924, may those petitioners who acquired title subsequent to that date recover damages? (5) May the County of Cambria be joined as an additional defendant?

May the Court in this proceeding determine facts upon which to decide questions of law? The Court may determine questions of law or pass upon undisputed facts before the appointment of viewers, or on petition for revocation of their appointment. *Wagner v. Bucks County*, 82 Pa. Superior Ct. 448. While it has been necessary here to determine whether there was a divergence from

the center line of the original highway by the reconstruction in 1924, the testimony of the Department engineers interpreting the 1924 plan indicates there was. This is not contradicted by the petitioners. The Department does not contradict testimony on behalf of the County and the petitioners that no notice of the proposed reconstruction was given in 1924. These are the only two pertinent facts necessary to determine the issue. Since the case involves only these facts which are undisputed, the Court has jurisdiction.

The pivotal question here is when did the condemnation or taking of petitioners' property occur. Under Section 8 of Act of Assembly, May 31st, 1911, P.L. 468 (36 P.S.61) as amended by Act of Assembly, April 6th, 1921, P.L. 107, the State Highway Commissioner (now Secretary of Highways) is given the power in the construction, reconstruction, etc., of any state highway to divert the course or direction, and diverge from the line or route of same, provided the plans therefore shall be approved by the Governor. The second paragraph of this Section (Amendment of 1921) provides for the widening of the road when there is no divergence and also the establishment of ultimate width and lines of any state highway for future construction. In such case, where the plans call for a widening or establishment of ultimate width and lines, they must be recorded in the office of the Recorder of Deeds of the county wherein the highway is located. In matter of the Appointment of Viewers, etc., 103 Pa. Superior Ct. 212. Section 16 of the Act of 1911 as amended by the Act of 1921 (36 P.S. 171) requires the State Highway Commissioner before undertaking the construction, reconstruction, or improvement of a state highway to notify the county commissioners of the proper county in writing of the contemplated change. The county commissioners, when possible, shall enter into an agreement with the owner or owners of the land which is likely to be damaged and pay the amount

agreed upon. In event an agreement cannot be made, the work may proceed and the owner or owners may present their petition to the Quarter Sessions Court of said county for the appointment of viewers.

In *Eshelman v. Commonwealth*, 325 Pa. 521, the Court held: (1) that a deflection in the center line of the road is a divergence within the meaning of Section 8 of the Act of 1911 as amended, although the entire bed of the old road is included within the new road and (2) that when a plan for such divergence is filed in the Office of the Secretary of Highways there is then and there a taking for the full width shown, whether then or later actually occupied for road purposes and (3) that all damages for land shown to be taken must be claimed in one proceeding at the time of the original taking and not at the time of eventual occupation. In the case at bar, the 1924 plans of reconstruction as interpreted by the engineer witnesses for the Department, show a divergence of the new highway over the center line of the original highway. While this divergence was doubtlessly not noticeable in front of the petitioners' property, it was quite marked at the Schrader property about 1600 feet distant from that of the nearest petitioner. Under the holding of the *Eshelman* case above, we must conclude that this deflection in the center line of the highway is a divergence within the meaning of the first paragraph of Section 8 of the Act of 1911 as amended. As such, it was a condemnation of the land within the lines referred to as "Required Width of Right of Way", or of ten feet of the land then or now owned by petitioners. The effective date of condemnation was March 19, 1924, when the plans were approved by the Governor and filed in the office of the Department of Highways, *Eshelman v. Commonwealth*, supra; *Penn Builders v. Blair County*, 302 Pa. 300; *Commonwealth v. Pardee Brothers, et al*, 310 Pa. 353; *Smith v. Commonwealth*, 351 Pa. 68.

Since the condemnation was under the first paragraph of

Section 8 of the Act of 1911 as amended, it was not necessary to record the plans of reconstruction in the office of the Recorder of Deeds of Cambria County. It was only required, after approval by the Governor of Pennsylvania, that they be filed in the Office of the Department of Highways. *May v. Westmoreland County*, 98 Pa. Superior Ct. 488; *Penn Builders v. Blair County*, supra; *Commonwealth v. Pardee Brothers, et al*, supra.

Does the failure of the Department and/or the County to give notice to the owners of the land affected by the condemnation toll the statute of limitations?

Act of Assembly, 1935 June 11, P.L. 302, Section 1, provides that all petitions for the assessment of damages in the case of state highways where the Secretary of Highways has authority to change, alter, or widen, must be presented within 6 years from the date of approval of the plan by the Governor. Under ordinary conditions, this statute of limitations would bar petitioners from having their damages assessed since the petitions for the appointment of viewers were presented later than 6 years after March 19th, 1924. However, under the peculiar facts of this case we must conclude the statute has been tolled and the presentation of the petitions to appoint viewers and assess damages within six years after June 7th, 1950, the first notice of the condemnation of March 19th, 1924, are timely.

While the Act of 1911 as amended, does not require the Department to give notice of the condemnation to the owner or owners of the land, it does require that notice in writing of the contemplated change to the highway be given the county commissioners. Perhaps this requirement is for the protection of the county in permitting timely negotiation of damages with the owner or owners of the land. However, the fact that notice to the owner is not required by the Act is not controlling. As stated by Mr. Justice Musmanno in *Brown and Vaughn Development Company v.*

Commonwealth, 393 Pa. 589; "The power of eminent domain is one of the most awesome as well as arbitrary rights of government. By it the State may take a citizen's property, whether or not he approves of the taking. However, the citizen has a right equally as awesome and that is, his government must pay him the value of the property taken." This "awesome right" of the citizen, however, can only be exercised if he has had notice of the taking of his land. This notice may be actual or constructive. To permit the Commonwealth and/or the County to raise the statute of limitations as a defense, when the failure of petitioners to make timely claim for damages was due to a lack of notice, would make a mockery of due process.

As stated in *Pagniv. Commonwealth*, 179 Pa. Superior Ct. 213; "Statutes concerning eminent domain are to be strictly construed. Statutory Construction Act, Act of May 28th, 1937, P.L. 1019, Article LV, Section 58, 46 P.S. Section 558 (4). We must presume, in interpreting the statute, that the Legislature intended to comply with the Federal and State constitutional requirements. Statutory Construction Act, supra, Section 52, 46 P.S. Section 552 (3). Thus we believe the Legislature contemplated that in the ordinary course of events the actual work in accordance with the plans approved by the Governor would be begun within a reasonable time after their approval. That, of course, would be notice to the landowner and he would have more than sufficient time to file his claim. It certainly was not contemplated that the actual work would not be started until the 6-year period has practically run."

In the Pagni case, the Governor of Pennsylvania on November 20th, 1942, approved a plan appropriating a part of plaintiffs' lands for the relocation of a public highway. No notice of this plan was given to the plaintiffs, nor was it recorded in Allegheny County where the land was located. In July, 1948, the Highway Department entered upon the land and appropriated it for the highway. Plaintiffs petitioned the Court of Quarter Sessions for the

appointment of a Board of View which subsequently rejected their claim. On appeal to the Court of Common Pleas a verdict in the amount of \$2,000.00 in favor of the plaintiffs was rendered. The Commonwealth appealed, contending that more than six years had elapsed after the Governor signed and approved the plan for relocation of the highway and therefore, the claim was barred by the Act of 1935, supra. The Court held that the plan came under the requirement of the second paragraph of Section 8 of the Act of 1911, as amended providing for the establishment of ultimate width and lines of a state highway for future construction, reconstruction, or improvement, and therefore, it should have been recorded in the County where the land was situate. Since the plan had not been recorded, there was no constructive notice to the property owners. Even though this was a plan for future construction, as distinguished from the case at bar which was a condemnation based on the first paragraph of Section 8 of the Act of 1911 as amended, we believe the requirements of notice and due process are nonetheless applicable.

As stated by Mr. Justice Ladner in *Hess v. Westerwick*, 366 Pa. 90, a case involving lack of notice to the owner of land sold at tax sales: "It is a fundamental provision of both our State and Federal Constitutions that no person shall be deprived of property except by the law of the land and due process of law. Without due process of law the right of private property cannot be said to exist. As said by Mr. Justice Pitney in *Ochoa v. Hernandezy Morales*, 230 U.S. 139, 161 (1912), 'The principle, known to the commonlaw before Magna Charta, was embodied in that Charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our Constitutions. Whatever else may be uncertain about the definition of the term, "due process of law", all the authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a

hearing". And see recent case of *Mullane v. Central Hanover B & T Co.*, 339 U.S. 306 (1950), holding that the kind of notice must be such as is reasonable under the circumstances."

We happily accept as applicable here, the following comment in the *Pagni* decision: "Certainly, here, no notice is not 'reasonable' notice."

As stated in the *Pagni* case, the power of eminent domain is qualified by the requirement of Article I, Section 10, of the Pennsylvania Constitution that "just compensation" be made to the owner of the property taken. While the Legislature may prescribe procedure for ascertaining claims and the limitation period within which actions may be brought "it does not follow though that a property owner is barred by this limitation if he has had no notice or has had no reason to believe that there would be a condemnation of his land". While pointing out that the limitation period within which actions must be brought prohibits "unreasonable" delays the Court stated "appellees inaction could not have been unreasonable when they had no knowledge that they had any right which was to be enforced. They were entitled to a notice of some kind, whether it be actual or constructive, whether it be given by the beginning of actual work on the property within a reasonable time after approval of the plans, or whether it be given by the statutory requirement of recording the future plans. The State cannot take advantage of one of the powers given it by the Constitution and at the same time disregard another provision, Art. I, Sec. 9, of the Pennsylvania Constitution, which prohibits the taking of a man's property except by the law of the land or due process."

In the case at bar, three of the petitioners who were owners of the land on March 19th, 1924, had no notice either actual or constructive of the condemnation of their land for highway purposes. There was no physical entry on the land taken, nor did the nature of the reconstruction of that portion of the road to which their

property abutted give notice of the taking. The reconstructed pavement together with the width of the shoulders of the road did not extend beyond the original right-of-way. While it is true there was a marked diversion of the road about 1600 feet from the land of petitioners we cannot hold this was actual notice of a condemnation. Particularly when the diversion of the center line of the new highway and that of the original highway at their properties was minimal and undoubtedly could not have been ascertained other than by survey or expert examination of the plans. In fact, one of the engineers testifying for the Department had difficulty determining the divergence on the prints of the 1924 plans submitted in evidence.

Where there is no actual invasion of one's property or other notice of a taking, we think it would be unreasonable to hold that the mere filing of plans for the reconstruction of a road in the Office of the Department of Highways is constructive notice to the land owner. In 1950, when that portion of the land taken in 1924 was actually entered and a road constructed thereon, the land owners then had notice of a taking. In the interim, however, there was nothing to indicate the Department claimed this land as a right-of-way. True, title to the land passed on the date the plans were approved by the Governor of Pennsylvania and filed in the Department of Highways. However, we believe and so conclude, that the failure of the Commonwealth or its political subdivision, the County, which it should have notified and did not, to give notice of the taking on March 19th, 1924, tolled the statute of limitations until such time as the land owners had constructive notice by recordation of the plans in 1950, or actual notice by physical entry of the land. Therefore, the petitions which were filed within the six-year period from June 7th, 1950, the date of constructive notice by filing of the plans for widening the said highway in the Office of the Recorder of Deeds of Cambria County were timely and the statute of 1935 was tolled.

May the petitioners who acquired title subsequent to March 19th, 1924, recover damages?

Nothing is more settled in the law than the rule that the owner of land at the time of condemnation is entitled to damages. *Briegel v. Briegel*, 307 Pa. 93; *Green v. Pittsburgh*, 311 Pa. 132; *Smith v. Commonwealth*, 351 Pa. 68; *Hunter v. McKlveen*, 353 Pa. 357; *Wood v. Evanitzsky*, 168 Pa. Superior Ct. 484; 369 Pa. 123. The right to damages is personal to the owner and will not pass to a subsequent purchaser unless specifically provided for in the deed of conveyance or by other assignment. *Green v. Pittsburgh*, supra; *Smith v. Commonwealth*, supra.

In the case at bar, three of the petitioners to wit: Roy B. Griffith and Catherine Marie Griffith, husband and wife, Frederick E. Griffith and Zelpha Penrod were the owners of the land on March 19th, 1924. They are, therefore, entitled to have the damages to that land assessed by a Board of Viewers. The other six petitioners to wit: Clyde Edwin Keiper and Kathryn Margaret Keiper, husband and wife, Thomas Richard Smith and Doris Marie Smith, husband and wife, Charles Wissinger and Elda M. Wissinger, husband and wife, Melvin R. Strong and Edna Mae Strong, husband and wife, Karl Montag and Valetta Montag, husband and wife, Melvin C. Strong and Eileen N. Strong, husband and wife, acquired title subsequent to March 19th, 1924, and therefore, not being the owners of the land at the time of condemnation, are not entitled to damages without showing that they have acquired this right by specific provision in the deed of conveyance or other assignment. Since the last mentioned petitioners purchased their property without knowledge that a portion of it had been condemned for highway purposes, which fact in the ordinary course of examining titles could not have been reasonably ascertained, we can only say the law has worked an injustice. However, we are bound by decisions which in our opinion require us to hold that the condemnation occurred on March 19th, 1924, and those which limit recovery of

damages to the owner of land at the time of its taking. Therefore, while we shall dismiss the rules to vacate the appointment of viewers in the cases involving the petitioners who owned their land in 1924, we must reluctantly make absolute those rules relating to the petitions of the landowners who acquired title subsequent to that date.

Having determined that the condemnation occurred in 1924, may Cambria County be joined as an additional defendant in these proceedings? Under Section 16 of the Act of 1911 as amended, in effect at the time of condemnation, the county was liable for damages to the abutting owners where a highway was constructed, reconstructed, or improved. The Act only required that the Department notify the county commissioners of the contemplated change. There was no provision that the county could agree or refuse to agree to the proposed changes as later enacted in the State Highway Law. Since, as discussed above, the statute of limitations was tolled in three cases by a failure of notice to the land owners, either actual or constructive, it is apparent the County may, under the Act be liable for damages. We do not pass on the effect of the Department's failure to notify the County Commissioners of the contemplated change in the highway. This may be decisive as to the County's liability and will be decided later when both the Department and the County have had opportunity to place on the record more facts than now appear. We therefore make absolute the rule to show cause why the County of Cambria should not be joined as an additional defendant in the three petitions heretofore mentioned.

On the basis of the foregoing Opinion we make the following

O R D E R

NOW, March 12, 1959, the rule to show cause why the petition of Roy B. Griffith and Catherine Marie Griffith, husband and wife, for the appointment of Viewers should not be dismissed, is hereby dismissed.

The rule to show cause why the County of Cambria should not be joined as an additional defendant in this proceeding is made absolute and it is hereby ordered and directed that the County of Cambria be joined as an additional defendant.

BY THE COURT:

McDonald

J.

correct page

The Supreme Court of Pennsylvania
Western District

PATRICK N. BOLSINGER
PROTHONOTARY
HELEN D. STEELE
DEPUTY PROTHONOTARY

PITTSBURGH, PA.

June 15, 1960

Joseph C. Wess, Esq.
Clerk of Quarter Sessions
Court House
Ebensburg, Pennsylvania

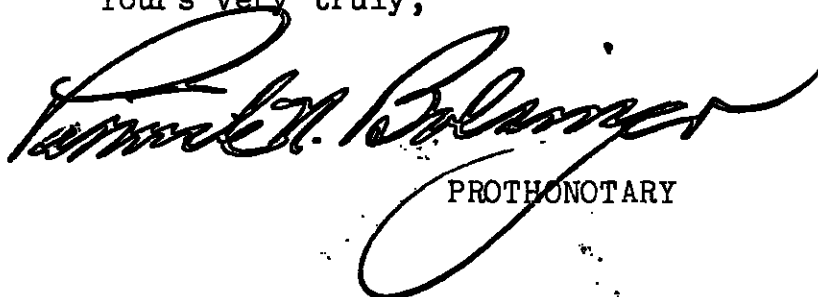
Dear Mr. Wess:

In the Matter of the Change of Location and Lines of
Highway 222, Nos. 143-148 March Term, 1959

I am enclosing herewith the following papers in the
above case:

Records (6)
Testimony
Remittiturs (6)
Exemplification

Yours very truly,


PROTHONOTARY

HS

1 copy

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

IN THE MATTER OF THE CHANGE OF LOCATION AND LINES
OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE NO. 222,
IN THE TOWNSHIP OF STONYCREEK, COUNTY OF CAMBRIA
AND STATE OF PENNSYLVANIA.

No. 7 June Sessions, 1955

STIPULATION OF SETTLEMENT

AND NOW, January 23, 1961, it is hereby stipulated and agreed by
and between counsel for the Department of Highways of the Commonwealth of
Pennsylvania and counsel for Carl Montag and Valetta Montag, husband and wife,
as follows:

1. That the Department of Highways has agreed to pay to Carl Montag
and Valetta Montag, husband and wife, the sum of \$3,450.00 as damages for the
taking of their property as a result of the change in the existing lines and
location of the aforesaid highway in 1950, and Carl Montag and Valetta Montag,
husband and wife, have agreed to accept the said sum in full settlement for
said damages, including interest and/or detention damages.

2. That Carl Montag and Valetta Montag, husband and wife, upon the
payment of the said sum of \$3,450.00 to them by the Department of Highways,
will cause the record in the above captioned proceedings to be marked settled,
discontinued and ended, and/or, if necessary, secure or consent to the
securing of an order of court dismissing the viewers heretofore appointed in
the above captioned proceedings and the termination thereof, and they will not
thereafter present any further or additional claims or demands for damages, in
law, equity or otherwise.

EDWARD F. PEDUZZI

Edward F. Peduzzi
Attorney for Department of Highways

EDWARD J. HARKINS
GERALD K. GIBSON

by Gerald K. Gibson
Attorneys for Carl Montag and
Valetta Montag

*Filed -
Jan. 23, 1961*

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

Petition of Carl Montag and Valetta Montag, husband and wife, for the appointment of Viewers in the matter of the Change of location and lines of the Highway known as State Highway Route 222, in the Township of Stonycreek, Cambria County, Pennsylvania

11/5/54

No 7 June Sessions 1955
Road Docket

IN ACCOUNT WITH LILLIAN BAUMGARDNER, AGENT FOR MAHLON BAUMGARDNER DECEASED

| | | | |
|--------|------------------|--|-------------|
| 1955 | | | |
| June 5 | Making View | | \$12 00 |
| | Mileage 40 miles | | <u>4 00</u> |
| | | | \$16 00 |

11/5/54
Approved by the Court
W. S. ...

Filed -
Nov 5, 1959
J. C. ...

JOHNSTOWN, PA.
FIRST NATIONAL BANK BUILDING
ATTORNEY AT LAW
EDWARD J. HARKIN

BILL OF COSTS ON APPEAL

Edw. J. Harkin

IN THE QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

IN THE CHANGE OF LOCATION AND LINES OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE NO. 222, IN THE TOWNSHIP OF STONYCREEK, IN SAID COUNTY AND STATE.

No. 7 June Sessions, 1955
Road Docket

Appeal of Carl Montag and Valetta Montag, husband and wife.

BILL OF COSTS ON APPEAL

I hereby certify that the following costs on appeal were incurred in the above stated case:

- 1. Share of printing Brief and Record \$37.21.
- 2. Filing Appeal in Supreme Court.....\$12.00.

Total.....\$49.21

Edw. J. Harkin
Attorney for Appellants

PENNSYLVANIA
REGISTRY OF CAMBRIA COUNTY
IN THE COURT OF QUARTERS

Road Docket
No. 7 June Sessions, 1955

No. 7 June Sessions, 1955
Road Docket

IN THE COURT OF QUARTER
~~SESSIONS OF CAMBRIA COUNTY,~~
PENNSYLVANIA

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE HIGH-
WAY KNOWN AS STATE HIGHWAY
ROUTE NO. 222, IN THE TOWNSHIP
OF STONYCREEK, IN SAID COUNTY
AND STATE.

Appeal of Carl Montag and Valet-
ta Montag, husband and wife

Filed 2-20-61

BILL OF COSTS ON APPEAL

EDWARD J. HARKIN
ATTORNEY AT LAW
FIRST NATIONAL BANK BUILDING
JOHNSTOWN, PA.

FOR THE COURT
FILED
CLERK OF COURT
JUN 20 1955
No. 7 June Sessions 1955

IN THE SUPREME COURT OF PENNSYLVANIA
Western District.

IN THE MATTER OF THE CHANGE OF LOCATION AND LINES OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE 222, IN THE TOWNSHIP OF STONYCREEK, COUNTY OF CAMBRIA AND STATE OF PENNSYLVANIA : No. 143 March Term 1959
: :
: :
: :
: :
: Appeal from the Order of the
: Court of Quarter Sessions in
: and for Cambria County, Pa.,
: at No. 13 June Term, 1955.

APPEAL OF MELVIN R. STRONG and
EDNA MAE STRONG

OPINION OF THE COURT

BOK, J.

FILED: June 3, 1960.

Appellants filed a petition in the Court of Quarter Sessions of Cambria County on June 1, 1955, for a Board of View. This was granted. The Commonwealth then filed its petition for a rule to show cause why the appellants' petition should not be dismissed. After answer, hearing, and argument, the rule of the latter petition was made absolute and this appeal was taken.

The petition for a Board of View was filed as a result of the paving and widening of a part of State Highway 222 in Stonycreek Township. The plan authorizing the paving and widening was approved by the Governor on June 7, 1950, and was filed on the same day in the office of the Recorder of Deeds of the County. The Commonwealth later entered upon the land and did the work.

Appellants, husband and wife, own property abutting on the highway, as do the owners of five other parcels. The owners of these six lots acquired title before 1950 but after the date of an earlier plan to reconstruct the highway, which had been approved by the Governor on March 19, 1924. The owners of three other abutting parcels acquired title before March 19, 1924. The owners of all nine lots held title on June 7, 1950.

[304-2]

The highway became part of the State system by virtue of the Sproul Act: May 31, 1911, P.L. 468, 36 P.S. §1194. Section 8 of this Act (36 P.S. §61) provided that where a highway was dangerous or inconvenient the Commissioner of Highways could divert it by a plan approved by the Governor: this plan need be filed only in the Department of Highways in Harrisburg.

An amendment (Act of April 6, 1921, P.L. 107, 36 P.S. §61) provided that where a highway was to be widened without divergence or where widths and lines were to be established for the future highway, the plan should also be recorded in the County where the road lay. This amendment was needed because the original Act of 1911 made no provision for widening an existing State highway: see In the Matter of Appointment of Viewers, 103 Pa. Superior Ct. 212 (1931), 158 A. 296.

The facts appear in the following excerpt from the opinion of Judge McDonald, of the court below:

"At the hearing it developed that State Highway Route 222 was formerly part of the Bedford-Scalp Level Turnpike taken over by the Commonwealth. The original right-of-way was forty feet, part of which had been constructed of macadam. The plans for reconstruction of said highway as approved . . . by the Governor of Pennsylvania on March 19th, 1924, prints of which were introduced in evidence, were filed in the office of the Department of Highways in Harrisburg. According to these plans, the highway was reconstructed of concrete for a distance of 7,302.6 feet, on part of which the properties of petitioners abutted. The paved portion of the road was not widened over its original width and was completely within the original right-of-way, referred to on the plans as 'Legal Width of Right of Way', except at the 'William Schrader' property where a curve was eliminated. The Schrader property is sixteen hundred feet from the property line of any petitioner. The plans also show a line, ten feet on each side of the original right-of-way and parallel thereto, referred to as 'Required Width of Right of Way'. Thus the total 'Required Width of Right of Way' is sixty feet. While there was a marked deviation of the reconstructed highway from the original road bed at the Schrader property, the deviation from the original

center line of the turnpike abutting the properties of petitioners varied from three feet to one-half foot and at times the new and old center line coincided. Since the highway was reconstructed in the original road bed and at no point (except the Schrader property), considering the combined width of pavement and shoulders, exceeded the original right-of-way width, we may assume this minimal deviation from the original center line would have been difficult to detect other than by survey or expert examination of the plans. No physical entry was made on the additional ten feet width above referred to as within the line of the 'Required Width of Right of Way'.

"The Department also submitted in evidence a plan prepared by the Office of the District Engineer showing the original turnpike right-of-way, the reconstruction of 1924 . . . and the widening of the highway under the 1950 plans. This last mentioned widening was within the lines of the right-of-way referred to above on the 1924 plans as 'Required Width of Right of Way'."

No actual notice of the deflection in the center line was given. The plan was not recorded in Cambria County. No compensation was paid or secured under Section 16 of the Act of 1911, providing for damages from divergence.

Under these facts the Commonwealth contends that the condemnation occurred on March 19, 1924; that under the Statute of Limitations (Act of June 11, 1935, P.L. 302, 12 P.S. §43) petitions to assess damages must be filed within six years after approval of the plan by the Governor "but not thereafter"; and that since appellants' petition was not filed until 1955 it was untimely. Appellants contend that the condemnation occurred on June 7, 1950, when the plan was approved by the Governor, and that their petition to assess damages was filed in 1955 and hence was within the Limitation.

The court below held that condemnation occurred on March 19, 1924; that the Statute was tolled, as to the claims of those who owned their land on that date, until notice by recording was given as of June 7, 1950; that the Statute was not tolled as to

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those who acquired their land after March 19, 1924, because no right to damages had been preserved in their deeds; and hence that the claim of appellants, who were in the second category, must fail.

The right of all owners bases on the Constitution of Pennsylvania, Article I, Sections 9 and 10, having to do with due process and with "just compensation being first made or secured" under authority of law for the public taking of private property.

The precedents make clear distinction between cases of divergence, whether or not there is also a widening, in which case the Governor-approved plan need be filed only in the Department in Harrisburg, and cases of widening without divergence and of establishing widths and lines, in both of which latter types of case the plan must also be filed in the appropriate County. In Commonwealth v. Pardee Brothers, 310 Pa. 353 (1933), 165 A. 396, we said, speaking of the Act of 1911:

"The first paragraph of that section expressly provides that the secretary of highways may divert the course or direction of any part of a state highway, provided he first submits a plan of the proposed change to the governor and procures his approval thereof. The act does not require the plan to be recorded in the county or to be filed anywhere except in the department of highways: May v. Westmoreland Co., 98 Pa. Superior Ct. 488... .

"Whether the new portion of the highway is wider or narrower than the old part, or of the same width, can make no difference; it still remains a divergence. There is nothing in the first paragraph of the section [8 of the Sproul Act] which requires a divergence to be of the same width as the old road."

In Eshleman v. Commonwealth, 325 Pa. 521 (1937), 189 A. 340, we said: "The mere fact that the new part of the highway was a widening does not prevent the deflection in the center line from being a divergence within the meaning of the Act of 1911." And in Matter of Appointment of Viewers, supra (103 Pa. Superior Ct. 212), Judge Keller said that, by the Act of 1921,

" . . . a description and plan of the width and lines, so established, whether its actual widening is contemplated, or only the fixing of its ultimate width, is to be made by the Secretary of Highways and acknowledged by him, after being approved by the Governor, and such description, plan and acknowledgment must be recorded in the office of the recorder of deeds of the proper county, in a separate book kept for that purpose: Penn Builders, Inc. v. Blair County, 302 Pa. 300. . . ."

Since there is no dispute that the plan of reconstruction of Highway 222 in 1924 involved a divergence, it is clear that it did not have to be recorded in Cambria County.

We are also of opinion that the court below was correct in tolling the Statute of Limitations as to those who owned their land before March 19, 1924. We feel, however, that those who took title after that date and still held it on June 7, 1950, are in no different case. We held in Angle v. Commonwealth, 396 Pa. 514 (1959), 153 A. 2d 912, and the Superior Court held in Pagni v. Commonwealth, 179 Pa. Superior Ct. 213 (1955), 116 A. 2d 294, that filing a Governor-approved plan in the County where the road lies is constructive notice of condemnation to the landowner who buys his property after the plan has been filed in the County, and that filing it only in the Department in Harrisburg is no notice at all: nor is it notice to successors in title.

We are of opinion that the constitutional requirement of just compensation outweighs the Statute of Limitations in this type of case and requires actual notice such as entry on the land or the giving of a bond to the landowner. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 70 S.Ct. 652, notice by publication of the filing of a trustee's account in accordance with the State Banking Law was held not to be due process. Mr. Justice Jackson said:

"The fundamental requisite of due process of law is the opportunity to be heard' (citing cases). This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

We agree with Judge Ross of the Superior Court when he said, in Pagni:

"Certainly, here, no notice is not 'reasonable' notice. . . Appellees' inaction could not have been unreasonable when they had no knowledge that they had any right which was to be enforced. They were entitled to a notice of some kind, whether it be actual or constructive, whether it be given by the beginning of actual work on the property within a reasonable time after approval of the plans, or whether it be given by the statutory requirement of recording the future plans. The State cannot take advantage of one of the powers given it by the Constitution and at the same time disregard another provision, Art. I, sec. 9 of the Pennsylvania Constitution, which prohibits the taking of a man's property except by the law of the land or due process."

It is true that the Act of 1911, as amended, contains no express provision for notice to an affected landowner, but does contain, in Section 16, a provision which impliedly contemplates such notice. This omission proves nothing except the rule of Mullane, that notice and hearing are always an indispensable part of due process: Angle v. Commonwealth, supra (396 Pa. 514); Hess v. Westerwick, 366 Pa. 90 (1950), 76 A. 2d 745. It was therefore proper to toll the Statute until the State first gave legal notice.

A limitation upon an owner's right to claim damages in condemnation cannot begin to run until he has had notice, actual or constructive, that his property has been condemned.

We agree with the court below that the minor deflection of the center line in 1924, when the entire operation was done within the right of way, was not effective actual notice.

The petitioners relied upon good record title when they purchased their land. Nothing had been filed in the office of the Recorder of Deeds of Cambria County, or in any other County

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office, to give them constructive notice of the Commonwealth's claim to the land. The Commonwealth was not in possession. The highway itself, of course, was in plain view, bordering the property which the appellants were buying, but this property, for which they now claim damages, was not being used for a highway, and, according to their petition, was landscaped and protected by a stone wall with cut stone coping, and with stone steps and sidewalks which led to dwellings; and the taking of their land in 1950 resulted in the total destruction of the stone wall and steps and sidewalks.

Since it is agreed that no payment was either made or secured, as by bond, and since there was no notice, we hold that the rights of all of the property owners accrued from the date when the Commonwealth gave notice by entry that it would widen the highway to the limit of the lines in the 1924 plan.

The condemnation of March 19, 1924, was invalid because it failed to give or secure payment as required by Article I, Section 10, of the Constitution, and because it failed to give notice in accordance with Section 16 of the Sproul Act.

We held in Rosenblatt v. Pennsylvania Turnpike Commission, 398 Pa. 111 (1959), 157 A. 2d 182, that a landowner may either sue in ejectment or treat an allegedly defective condemnation as valid and ask for a Board of View, and that his election is irrevocable. Appellants followed the latter course.

All those owning abutting property on June 7, 1950 are entitled to damages, and we see no reason to distinguish between those who owned their land before 1924 and those who acquired title after 1924 and before 1950. Those who may have bought and sold abutting land between those dates are presumed to have received and

[304-8]

given full value for their purchase, unaffected by the condemnation of 1924 because the public had no legal notice of it.

Since the appellants are of the group that acquired title after 1924, it is necessary to reverse the Order and remand the record for further proceedings consonant with this opinion.

It is so ordered.

Commonwealth of Pennsylvania, } SS:
County of Allegheny

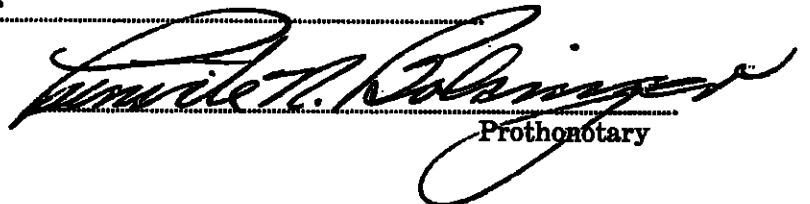
PATRICK N. BOLSINGER,
I, ~~Patrick N. Bolsinger~~ Prothonotary

of the Supreme Court of Pennsylvania for the Western District thereof, the said court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire OPINION

IN THE MATTER OF THE CHANGE OF LOCATION AND LINES
OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE 222, IN THE
TOWNSHIP OF STONYCREEK, COUNTY OF GAMBRIA AND STATE OF PENNSYLVANIA

at No. 143 March Term, 1959, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, this 15th day of June in the year of our Lord One Thousand Nine Hundred and sixty.


Prothonotary

No. 143 March Term, 1959

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE HIGHWAY
KNOWN AS STATE HIGHWAY ROUTE 222,
IN THE TOWNSHIP OF STONYCREEK,
COUNTY OF CAMBRIA AND STATE OF
PENNSYLVANIA

XPS.

EXEMPLIFICATION

Filed - June 16, 1960

J. T. Hagan

Q.S.Cambria

No. 7 June Sessions ~~1955~~, 1955

No. 148

March Term, 19 59

Supreme Court

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE HIGHWAY
KNOWN AS STATE HIGHWAY ROUTE 222,
IN THE TOWNSHIP OF STONYCREEK,
COUNTY OF CAMBRIA AND STATE OF
PENNSYLVANIA

APPEAL OF CARL MONTAG AND VALETTA
MONTAG

REMITTITUR

Filed - June 16, 1960

J. T. Magan

The Supreme Court of Pennsylvania }
Western District } ss:

The Commonwealth of Pennsylvania

TO THE JUDGES of the COURT OF QUARTER SESSIONS for the County of CAMBRIA

GREETING: WHEREAS, by virtue of our Writ of Certiorari at No. 48 of March Term, 19 59 of our Court
a record in the matter of the appeal of CARL MONTAG AND VALETTA MONTAG

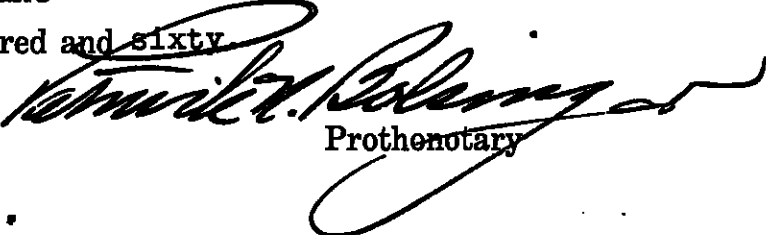
from the order of your said Court at No. 7 of June Sessions ~~Term~~ A. D. 19 55

was brought into our Supreme Court and the said cause was there so proceeded in that on the 3rd day of
June A. D. 19 60 the following decision was rendered, viz:
Pursuant to stipulation filed,
Order reversed and record remanded for further proceedings consonant with
this opinion.

BOK, J.

WHEREFORE, We hereby remit you the record aforesaid with the proceedings thereon and all things touching the
same so far as in this Court they remain, for the purpose of execution as to justice shall appertain in accordance with
the decision of our said Supreme Court as aforesaid.

Witness the Honorable CHARLES ALVIN JONES Chief Justice of our Supreme
Court, the 15th day of June
in the year of our Lord one thousand nine hundred and sixty


Prothonotary

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

Frank M. Steneck
Gordon J. Gibson

[L. S.]

No. 148

March Term, 19 59

Supreme Court
WESTERN DISTRICT

IN THE MATTER OF THE CHANGE OF LOCATION AND LINES OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE 222, IN THE TOWNSHIP OF STONYCREEK, COUNTY OF CAMBRIA AND STATE OF PENNSYLVANIA
APPEAL OF CARL MONTAG and VALETTA MONTAG

CERTIORARI to the

COURT OF QUARTER SESSIONS

for the County of CAMBRIA

Returnable the last Monday

of September A. D. 19 59

Filed - April 27, 1959

A. C. Weiss
Clerk of Courts

Edward J. Harkins
Gerald K. Gibson

FILED

Attorneys for Appellant

SEP 14 1959

SUPREME COURT
WESTERN DISTRICT

The Supreme Court of Pennsylvania, }
Western District } SS:

The Commonwealth of Pennsylvania

TO THE JUDGES of the COURT OF QUARTER SESSIONS for the County of CAMBRIA

GREETING: We being willing for certain causes to be certified of the matter of the appeal of
CARL MONTAG and VALETTA MONTAG
from the Order of your said Court at No. 7 June Sessions, 1955; IN THE MATTER
OF THE CHANGE OF LOCATION AND LINES OF THE HIGHWAY KNOWN AS STATE HIGHWAY
ROUTE 222, IN THE TOWNSHIP OF STONYCREEK, COUNTY OF CAMBRIA AND STATE OF
PENNSYLVANIA

before you, or some of you, depending, DO COMMAND YOU that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at Pittsburgh, in and for the Western District, on the last Monday of September 1959, so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness HON. CHARLES ALVIN JONES, Doctor of Laws, Chief Justice of our said Supreme Court, the 23rd day of April in the Year of our Lord one thousand nine hundred and fifty-nine.

Frank T. Calinger
PROTHONOTARY

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNA.

In re: In the matter of change
of location and lines of the highway
known as State Highway Route No. 222,
in the Township of Stonycreek in
Cambria County, Pennsylvania

No. Road Docket 7 June
Sessions, 1955

Petition of Carl Montag and Valetta
Montag, husband and wife

DOCKET ENTRIES

| | |
|-------------------|--|
| May 31, 1955 | Petition for appointment of viewers filed. |
| May 31, 1955 | Order appointing viewers filed. |
| June 1, 1955 | Order to View issued to Wm. P. Kelly. |
| June 23, 1955 | Petition for Rule to show cause filed by Edward F. Peduzzi, Esq. |
| June 23, 1955 | Rule filed. |
| July 24, 1955 | Certified copy of rule sent to Wm. P. Kelly. |
| November 28, 1955 | Agreement of counsel as to time within with an answer to Rule heretofore granted is to be filed, extended. |
| November 28, 1955 | Answer to petition for rule and to rule to show cause heretofore granted filed. |
| December 6, 1957 | Petition for rule to show cause filed. |
| December 6, 1957 | Order granting rule filed. |
| January 16, 1958 | Answer of Cambria County to Petition for rule to show cause filed. |
| July 17, 1958 | Brief on behalf of Pa. Dept. of Highway, Petitioner, filed. |
| February 6, 1959 | Brief on behalf of petitioners filed. |
| March 13, 1959 | Order of Court dismissing the petition and vacating order thereon and making absolute the rule to show cause why the petition for the appointment of viewers should not be dismissed filed. |
| April 27, 1959 | Certiorari from Supreme Court filed. |

Page 2

No. Road Docket 7 June Sessions, 1955

April 27, 1959

Notice of appeal and acceptance
of service filed.

April 27, 1959

Certificate of amount in
controversy filed.

August 24, 1959

Exception to opinion and order
filed.

No.

7
1955.

June SESSIONS
Road Docket

IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY,
PA.

IN THE MATTER OF THE CHANGE
OF LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE
HIGHWAY ROUTE NO. 222, IN
THE TOWNSHIP OF STONYCREEK,
IN SAID COUNTY AND STATE.

PETITION OF CARL MONTAG AND
VALETTA MONTAG, HUSBAND AND
WIFE, FOR THE APPOINTMENT
OF VIEWERS.

LAW OFFICES

HARKINS AND WHARTON

ELEVENTH FLOOR FIRST NATIONAL BANK BLDG.

JOHNSTOWN, PA.

filed - June 1, 1955

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PA.

IN THE MATTER OF THE CHANGE OF LOCATION
AND LINES OF THE HIGHWAY KNOWN AS STATE
HIGHWAY ROUTE NO. 222, IN THE TOWNSHIP
OF STONYCREEK, IN SAID COUNTY AND STATE.

Road Docket
No. 7
June SESSIONS,
1958.

PETITION OF CARL MONTAG AND VALETTA MONTAG, HUSBAND
AND WIFE, FOR THE APPOINTMENT OF VIEWERS.

TO THE HONORABLE, THE JUDGES OF THE ABOVE NAMED COURT:

The petition of Carl Montag and Valetta Montag, husband
and wife, respectfully represent:

1. Your Petitioners are residents of the Township of
Stonycreek, in Cambria County, Pennsylvania; their residence address
being 1733 Bedford Street, Johnstown, Pennsylvania.

2. Your Petitioners are the owners of two lots of land
situate on the Northerly side of Bedford Street, Stonycreek
Township, County of Cambria and State of Pennsylvania, fronting
98.68 feet on Bedford Street and extending back to Scott Avenue.
The land extends back on the Easterly side a distance of 149.02
feet and on the Westerly side a distance of 161.39 feet.

3. The Department of Highways of the Commonwealth of
Pennsylvania, in changing the location and grade of the public
highway leading from the City of Johnstown, Cambria County, Pennsylv-
ania, to the Borough of Windber, in Somerset County, Pennsylvania,
made certain changes which affected the land owned by your
Petitioners in that the new highway known as Highway Route No. 222
was extended over and above part of the land owned by your
Petitioners, and above described, whereby the Commonwealth of Penn-
sylvania condemned a portion of the land of your Petitioners, said
portion being a strip of land approximately 14 feet in width and
extending from the Westerly line of said above mentioned land to
the Easterly line of said land.

4. Your Petitioners aver that they were the owners of the land hereinabove mentioned at the time of said condemnation, and therefore, they are the only persons entitled to recover damages for the taking thereof.

5. The Secretary of Highways of the Commonwealth of Pennsylvania, under authority of law, has caused changes in existing lines and location of the highway above referred to as State Highway Route No.222 to be made at a point on said Highway where the same now passes along and above the real estate owned by your Petitioners and hereinabove described. Such change, insofar as that portion of said Highway Route No. 222 is concerned, makes a change therein whereby said Highway has been converted into a three lane highway upon a new location which extends over and above part of Petitioners' land. As the result of said changes, the land as owned by your Petitioners has been condemned and taken for public use in connection with the changes in lines and location above referred to.

6. Petitioners are advised, believe and therefore aver that a strip of land approximately 14 feet in width and 98.68 feet in length, comprising approximately 1382 square feet of land was taken for highway purposes.

7. The changes in said Highway so made by the Secretary of Highways have not only taken a large part of the real estate of your petitioners as above set forth, but did cause injury and damage to the remainder thereof.

8. Petitioners aver that the lots of land above mentioned, had extensively been landscaped, and had been landscaped for a number of years and had reached the point where the landscaping was satisfactory to Petitioners. Provision was made so that coal could be delivered to the dwelling erected upon the land from the old highway. The landscaping was taken and destroyed by the con-

demnation. The distance of the land from the old highway was taken into account in the erection of the dwelling house, fronting on that old highway, and the taking of the land, and particularly that portion of the land between the dwelling house and the line of the highway detrimentally affected the entire property. The Terrace or bank along the line of said land in front of the dwelling house was made greater in height and more steep and rough in appearance. The Highway Department, in providing a driveway for an adjoining property owner, took approximately one foot of land owned by your Petitioners, back from the highway for a distance of approximately 20 feet beyond the line of the new highway. The condemnation prevents the delivery of coal in the manner used prior to the condemnation. All of these things have affected the market value of the land owned by your Petitioners herein, at the time of the condemnation.

9. The Commonwealth of Pennsylvania, under the provisions of the Act of Assembly in such case made and provided, is required to assume all damages in connection with the aforesaid changes of the existing lines and location of said highway known as State Highway Route No. 222.

10. By the provisions of Article III, Section 303 of the Act of Assembly of the 1st day of June, 1945, P. L. 1242, it is provided that, if an agreement cannot be made between the owner of property damaged and the Secretary of Highways, said owner or the Commonwealth may present their or its petition to the Court of Quarter Sessions for the appointment of Viewers to ascertain and assess such damages, as well as any benefits accruing to the land owner by reason of the appropriation or taking of the same or a part thereof by the Secretary of Highways in connection with the change in lines and location of State Highway Routes. Said act further provides that such petition shall be presented within 6

years from the date of the approval by the Governor of the plan making the change, but not thereafter. The approval of the plan making the change, in the present case, was dated in the year 1950. While the Viewers to be appointed must take into consideration not only the damages suffered by your Petitioners by reason of the appropriation hereinabove mentioned, but must take into consideration also any benefits which may have accrued to said property by reason of the fact that the highway now passes through and over the land of petitioners; nevertheless, petitioners believe that no benefits have been derived by petitioners thereby.

11. The Petitioners allege that the fair market value of the land owned by your Petitioners at the time of the condemnation was decreased by reason of the condemnation, and by reason of the fact that a certain portion of their land was actually taken for public use, but in addition thereto, they claim that the fair market value immediately after the condemnation, and as affected by the condemnation, was less than the amount of the fair market value immediately before the condemnation.

12. Until this date, Petitioners have not been able to complete an agreement between Petitioners and the Secretary of Highways.

WHEREFORE, your Petitioners pray the Court to appoint Viewers to ascertain and assess the damages which have been suffered by the property of Petitioners by reason of the acts of the Secretary of Highways as hereinabove recited, as well as any benefits derived therefrom.

And they will ever pray, etc.

Carl Montag
Valetta Montag

STATE OF PENNSYLVANIA |
 | SS:
COUNTY OF CAMBRIA |

Personally appeared before me, the undersigned authority,
a Notary Public, in and for said County and State, CARL MONTAG
and VALETTA MONTAG, husband and wife, who being by me first duly
sworn, depose and say that the matters set forth in the foregoing
petition are true and correct to the best of their information,
knowledge, and belief.

Carl Montag

Valetta Montag

Sworn and subscribed to before me
this 31st day of MAY, A. D. 1955.

Robert King
Notary Public

My Comm. Expires at
Johnstown, Cambria County, Pa.
My Commission Expires March 7, 1959

O R D E R

NOW, May 31, 1955, at 12:15 o'clock P. M., the foregoing petition having been read and presented to the Court, the Court does hereby appoint W^m P. Kelly
Walter Baumgardner and Fred Clafflin
to view the property described in the within petition and to report to the Court their findings with respect to the damages suffered by the Petitioner by reason of the appropriation, injury or destruction of certain property in the change of lines and location of State Highway Route No. 222, taking into consideration any benefits which may have accrued to said property by said change of lines and location. It is hereby directed that the above named viewers in assessing the damages shall take into consideration the advantages derived from such road passing through the land of the complainants, if any. Said viewers are directed to make their report in writing to the Court of Quarter Sessions on or before the 1st Monday of August, 1955. The viewers above appointed are hereby directed to give at least ten days' notice in writing to the Secretary of Highways and the Petitioners of the day and hour on which they will view the premises within described and conduct their hearing under this appointment.

BY THE COURT:

W. P. Kelly
J.

IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY
PENNSYLVANIA

IN THE MATTER OF THE CHANGE
OF LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE
HIGHWAY ROUTE NO. 222, IN
THE TOWNSHIP OF STONYCREEK,
IN SAID COUNTY AND STATE

219

PETITION FOR
RULE TO SHOW CAUSE

filed June 23, 1955

EDWARD F. PEDUZZI
LAW OFFICES

~~XXXXXXXXXXXXXXXXXXXX~~
418 LINCOLN STREET
JOHNSTOWN, PA.

AND NOW, this 21st day of June, 1955, service of the within petition
together with true copy thereof is hereby accepted.

HARRIS & WHEATON

[Signature]
Attorneys for Respondents

IN THE MATTER OF THE CHANGE OF : IN THE COURT OF QUARTER SESSIONS
LOCATION AND LINES OF THE HIGH- : OF CAMBRIA COUNTY, PENNSYLVANIA
WAY KNOWN AS STATE HIGHWAY :
ROUTE NO. 222, IN THE TOWNSHIP : No. 7 June Sessions, 1955
OF STONYCREEK, IN SAID COUNTY :
AND STATE. : Road Docket

PETITION FOR RULE TO SHOW CAUSE

TO THE HONORABLE, THE JUDGES OF THE ABOVE NAMED COURT:

The petition of the Department of Highways of the Commonwealth of Pennsylvania respectfully represents:

1. That on June 1, 1955, Carl Montag and Valetta Montag, husband and wife, filed a petition in your Honorable court, entered to the above number and term, praying for the appointment of viewers to ascertain and assess the damages caused to the property of the said petitioners by reason of the change in existing lines and location of the above mentioned State Highway Route No. 222, and in pursuance thereof a board of viewers was duly appointed.

2. That your petitioner, the Department of Highways of the Commonwealth of Pennsylvania, contends that the property of the said Carl Montag and Valetta Montag, husband and wife, was not affected by the alleged changes in the existing lines and location of said State Highway Route No. 222, and that their petition for the appointment of viewers should therefore be dismissed.

3. That in support of its contention, your petitioner offers the following reasons:

a. There was no taking of any land or property, or any part thereof, belonging to the above named petitioners by reason of the alleged changes in existing lines and location of the said state highway.

b. All changes made to the said highway in recent years were made strictly within the legal right of way thereof as established by Section Two of the plan for State Highway Route 222, which plan was approved by the Governor on March 19, 1924.

c. The property in question was condemned by the Commonwealth at or near the time that the legal right of way of the said highway was established, as set forth in the preceding sub-paragraph, and consequently all claims for damages are now barred by the Statute of Limitations as prescribed by the Act of Assembly.

d. The above mentioned petition for the appointment of viewers does not allege the date on which the alleged changes in existing lines and location of said highway were made.

e. The Court, for the reasons above stated, is without jurisdiction to grant the prayer of the petition of the above named individuals for the appointment of viewers.

WHEREFORE, for the reasons stated above and for such other and further reasons as may be advanced at the hearing on this matter, your petitioner prays your Honorable Court for a rule on Carl Montag and Valetta Montag, husband and wife, to show cause why their petition for the appointment of viewers to ascertain and assess the damages caused to their property by reason of the alleged changes in existing lines and location of the said State Highway Route No. 222, should not be dismissed. Your petitioner further prays your Honorable Court to stay all proceedings pending the determination of this matter.

DEPARTMENT OF HIGHWAYS OF THE
COMMONWEALTH OF PENNSYLVANIA

by


District Engineer

COMMONWEALTH OF PENNSYLVANIA

SS:

COUNTY OF BLAIR

Personally appeared before me, a notary public in and for said County and State, V. B. Leopold, who being sworn according to law, deposes and says that he is the District Engineer for the Department of Highways of the Commonwealth of Pennsylvania and that the matters set forth in the foregoing petitionaare true and correct to the best of his knowledge, information and belief.



V. B. Leopold

Sworn to and subscribed before me
this 21 day of June, 1955.



Notary Public

My Commission expires

NOTARY PUBLIC
My Commission Expires December 12, 1956

RULE

AND NOW, this 22nd day of June, 1955, upon consideration of the foregoing petition and on motion of Edward F. peduzzi, Attorney for the petitioner, a Rule is granted upon Carl Montag and valetta Montag, husband and wife, to show cause why their petition for the appointment of viewers to ascertain and assess damages to their property caused by the changes in existing lines and location of State Highway Route No. 222 should not be dismissed. Rule returnable the 5th day of July, 1955.

It is further ordered that the Clerk of Courts notify the board of viewers appointed in this matter to stay all proceedings pending the final determination of this proceeding.

BY THE COURT:

W. E. Kennerly J.

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNA.

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE HIGH-
WAY KNOWN AS STATE HIGHWAY
ROUTE NO. 222, IN THE TOWNSHIP
OF STONYCREEK, IN SAID COUNTY
AND STATE.

No. 7 June Sessions, 1955
ROAD DOCKET

AGREEMENT OF COUNSEL

NOW JULY 5, 1955, it is agreed by and between the
Counsel for the parties in the above entitled case that the time
within which an Answer to Rule heretofore Granted is to be filed,
is extended until the 28th day of November, 1955.

Edward F. Peduzzi
Hankins & Winters
By John J. Hankins

filed 11-28-55

No. 7 June Sessions, 1955
ROAD DOCKET

IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY,
PENNA.

IN THE MATTER OF THE CHANGE
OF LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE HIGH-
WAY ROUTE NO. 222, IN THE
TOWNSHIP OF STONYCREEK, IN
SAID COUNTY AND STATE.

*Check
6-20*

ANSWER TO PETITION FOR RULE
AND TO RULE TO SHOW CAUSE
HEREFORE GRANTED.

LAW OFFICES

HARKINS AND WHARTON

ELEVENTH FLOOR FIRST NATIONAL BANK BLDG.

JOHNSTOWN, PA.

Filed 11-28-55

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNA.

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE HIGH-
WAY KNOWN AS STATE HIGHWAY
ROUTE NO. 222, IN THE TOWNSHIP
OF STONYCREEK, IN SAID COUNTY
AND STATE.

No. 7 June Sessions, 1955
ROAD DOCKET

ANSWER TO PETITION FOR RULE AND TO RULE TO
SHOW CAUSE HERETOFORE GRANTED.

TO THE HONORABLE, THE JUDGES OF THE ABOVE NAMED COURT:

CARL MONTAG and VALETTA MONTAG, husband and wife, file the following answer to the Petition for Rule and the Rule to Show Cause heretofore granted in the above entitled case, and answer the petition of the Department of Highways of the Commonwealth of Pennsylvania as follows:

1. Admitted.
2. The contention of the Department of Highways of the Commonwealth of Pennsylvania, as set forth in the second numbered paragraph of the petition, is denied, and on the contrary, it is averred that the land described in the petition heretofore filed, was affected by the changes in the existing lines and locations of Highway Route No. 222. It is further averred that Petitioners herein received no just compensation for the difference in fair market value of the land as affected by the changes in the lines and locations of said State Highway Route No. 222, and therefore, the Board of Viewers should make an award to the Petitioners.
3. (a) Denied.
(b) Immaterial. No payment has ever been made for the taking of land or the effect of such taking.
(c) It is denied that the property in question was condemned prior to June 7, 1950, and it is contended that

therefore all claims for damages may now be enforced.

(d) Denied. The petition states, "The approval of the plan making the change, in the present taking, was dated in the year 1950."

(e) It is denied that the Court is without jurisdiction to grant the prayer of the Petition for the appointment of Viewers.

4. And further answer to the petition and rule, Petitioners aver that the taking of land and the effect of such taking upon the market value of the land affected thereby was accomplished since 1950 under a plan which was approved by the Governor of the Commonwealth of Pennsylvania on June 7, 1950. That plan is of record in Book No. 2A of the State Highway Right of Way of record in the Office of the Recorder of Deeds, in and for Cambria County, Pennsylvania, where the drawings were designated as drawings for construction and condemnation of a Right of Way of Route No. 222.

5. Petitioners further contend that the establishment of an ultimate width of a State Highway was of No force and effect unless the same was filed of record in the Office of the Recorder of Deeds, in and for Cambria County, Pennsylvania. Petitioners further contend that even though an ultimate Right of Way has been established, the condemnation relates to the time of the taking, and not the time of establishing the ultimate Right of Way. It is the contention of the Petitioners in this case, that the condemnation of the property mentioned in the petition heretofore filed, was effective on and after June 7, 1950, and at no time prior thereto.

WHEREFORE, your Petitioners respectfully request your Honorable Court to discharge the rule granted on the 22nd day of June, 1955, so that the Viewers heretofore appointed, may proceed

to award just compensation to the Petitioners for the difference in the fair market value of the property of your Petitioners immediately before the taking; and the fair market value of the same immediately after the taking, and as affected thereby.

Valetta Montag

Carl Montag

STATE OF PENNSYLVANIA |
 | SS:
COUNTY OF CAMBRIA |

Personally appeared before me, the undersigned authority,
a Notary Public, in and for said County and State, CARL MONTAG and
VALETTA MONTAG, husband and wife, who being by me first duly
sworn, depose and say that the facts set forth in the foregoing
Answer to Petition for Rule and to Rule to Show Cause
heretofore granted, are true and correct to the best of their
knowledge, information and belief.

Valetta Montag

Carl Montag

Sworn and subscribed to before me
this 14th day of July, A. D. 1955.

Murray J. Shiffer
Notary Public

My Comm. Expires: February 17, 1959

IN THE COURT OF QUARTER SESSIONS
OF
CAMBRIA COUNTY, PENNSYLVANIA

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE HIGHWAY
ROUTE 222, IN THE TOWNSHIP OF
STONYCREEK, COUNTY OF CAMBRIA
AND STATE OF PENNSYLVANIA.

Filed: Dec. 6, 1957

PETITION FOR RULE TO SHOW CAUSE

Myers, Taylor & Peduzzi
ATTORNEYS AT LAW
213 S. CENTER STREET - OPPOSITE COURT HOUSE
Ebensburg, Pennsylvania

*And now December, 7, 1957, having written
petition & order is hereby accepted & cause
the issuance of a Rule.
William D. Shetty
County Solicitor*

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE HIGHWAY
ROUTE 222, IN THE TOWNSHIP OF
STONYCREEK, COUNTY OF CAMBRIA
AND STATE OF PENNSYLVANIA

IN THE COURT OF QUARTER SESSIONS
OF CAMBRIA COUNTY, PENNSYLVANIA
Nos. 6, 7, 8, 9, 10, 11, 12, 13
and 14 June Sessions, 1955,
Road Docket.

PETITION FOR RULE TO SHOW CAUSE

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The petition of Edward F. Peduzzi, Attorney for the Department of Highways of the Commonwealth of Pennsylvania, respectfully represents:

1. That various persons who own property abutting on a certain section of State Highway Route 222 in Stonycreek Township, have heretofore filed petitions with your Honorable Court, to the above numbers and term, for the appointment of viewers to assess damages caused by the change of line of the said Highway Route 222 and a board of viewers was appointed in each case.

2. That the Department of Highways subsequently petitioned your Honorable Court for a rule to show cause why the boards of viewers appointed in each case should not be dismissed on the ground that no damages were suffered by the property owners involved as any change of the location and line of said Route 222 was strictly within the legal right of way established on a plan approved by the Governor in 1924.

3. That a hearing on the aforesaid petitions for rule to show cause has been set for December 16, 1957, and as there may be possible liability on the part of the Department of Highways for damages to the various property owners, and, under the Acts of Assembly, such damages, if any, are actually payable by the County of Cambria, the said County of Cambria should be made a party to these proceedings.

WHEREFORE, your petitioner prays your Honorable Court for a rule on the Commissioners of Cambria County to show cause why the County of Cambria should not be joined as an additional defendant in the above captioned proceedings.

Edward F. Peduzzi
Attorney for Department of Highways

COMMONWEALTH OF PENNSYLVANIA §
 : SS.:
COUNTY OF CAMBRIA §

Edward F. Peduzzi, being duly sworn according to law, deposes and says that he is the attorney for the Department of Highways in the above captioned cases and that the facts set forth in the foregoing petition are true and correct.

Edward F. Peduzzi
Edward F. Peduzzi

Sworn and subscribed before me
this 6th day of December, 1957.

James Williams
Notary Public
my com. expires July 24, 1961

ORDER

AND NOW, this 6 day of December, 1957, upon consideration of the foregoing petition and on motion of Edward F. Peduzzi, Attorney for the Department of Highways, a rule is granted upon the Commissioners of Cambria County to show cause why the County of Cambria should not be joined as an additional defendant in all of the above captioned proceedings.

Rule returnable the 10th day of December, 1957.

BY THE COURT,

Driffell
J.

No. 7 June Session, 1955,
Road Docket.

IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY, PA

IN THE MATTER OF THE CHANGE
OF LOCATION AND LINES OF THE
HIGHWAY KNOWN AS STATE
HIGHWAY ROUTE NO. 222, IN
THE TOWNSHIP OF STONYCREEK,
IN SAID COUNTY AND STATE.

Filed: Mar 13, 1959

ORDER.

FRANCIS J. LEAHEY,
OFFICIAL STENOGRAPHER FOR THE
FORTY-SEVENTH JUDICIAL
DISTRICT

Hesperia

IN THE MATTER OF THE CHANGE : IN THE COURT OF QUARTER SESSIONS
OF LOCATION AND LINES OF THE : OF CAMBRIA COUNTY, PENNA.
HIGHWAY KNOWN AS STATE :
HIGHWAY ROUTE NO. 222, IN THE :
TOWNSHIP OF STONYPARK, IN : No. 7 June Sessions, 1955, Road
SAID COUNTY AND STATE. : Docket.

ORDER

NOW, March 3, 1959, in accordance with the Opinion of this Court entered to No. 6 June Sessions, 1955, Road Docket, the rule to show cause why the petition of Carl Montag and Valetta Montag, husband and wife, for the appointment of Viewers should not be dismissed is made absolute and said petition is dismissed and the Order thereon vacated.

The rule to show cause why the County of Cambria should not be joined as an additional defendant is hereby dismissed.

BY THE COURT:

McDonald
J.

No. 7 June Sessions, 1955
(Number in court below)

Notice of Appeal and
Acceptance of Service.

Filed - April 27, 1959

J. C. Wess
Clerk of Court
Cambridge County

NOTE—Rule 43 requires appellant, immediately upon entering his appeal, to serve notice thereof on the opposite party or his counsel and to file promptly in the Court below proof of the service of such notice.

IN THE MATTER OF THE CHANGE OF
LOCATION AND LINES OF THE HIGHWAY
KNOWN AS STATE HIGHWAY ROUTE 222;
IN THE TOWNSHIP OF STONYCREEK,
COUNTY OF CAMBRIA AND STATE OF
PENNSYLVANIA

No. 7 June Term, 19 55
(Number in court below)

To Appellee or his Counsel:

You are hereby notified that on April 23, 1959
an appeal was taken to the Supreme Court of Pennsylvania in the above
entitled case at No. 148 March Term, 19 59 by Carl Montag and
Valetta Montag and that this appeal will be on the
list for the Week of September 28, 1959, at Pittsburgh.

Donald K. Gibson
Attorneys for Appellant.

April 27 1959, Service of the foregoing notice is
hereby accepted.

Edward F. Perry
Atty for Commonwealth
Shelley Swope & Skelley
By: Thomas A. Swope
Attorneys for Cambria County

Filed - Aug. 24, 1959
A. C. Weiss

IN THE MATTER OF THE CHANGE OF : IN THE COURT OF QUARTER SESSIONS
LOCATION AND LINES OF THE : OF CAMBRIA COUNTY, PA.
HIGHWAY ROUTE 222, IN THE :
TOWNSHIP OF STONYCREEK, COUNTY :
OF CAMBRIA AND STATE OF :
PENNSYLVANIA. : No. 7 June Sessions, 1955.

EXCEPTION TO OPINION AND ORDER

To all of which counsel for petitioner excepts and prays
that an exception be noted and bill sealed; all of which is, the
day and year aforesaid, accordingly done.

ALTON A. McDONALD, J. (SEAL)

No. 7 June Sessions, 1955

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

IN THE MATTER OF THE CHANGE OF LOCATION AND LINES OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE 222, IN THE TOWNSHIP OF STONY-CREEK, COUNTY OF CAMBRIA AND STATE OF PENNSYLVANIA.

CERTIFICATE OF AMOUNT IN CONTROVERSY

Filed - April 27, 1955
Joseph C. Wray
Clerk of Courts
Cambria County

RECEIVED
CLERK OF COURTS
CAMBRIA COUNTY
APR 27 1955

FILED IN CASE NO. 100


IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

IN THE MATTER OF THE CHANGE OF LOCATION AND LINES OF THE HIGHWAY KNOWN AS STATE HIGHWAY ROUTE 222, IN THE TOWNSHIP OF STONY-CREEK, COUNTY OF CAMBRIA AND STATE OF PENNSYLVANIA.

No. 7, June Sessions, 1955

Case of Carl Montag and Valetta Montag

I hereby certify that the value of the property and the amount in controversy in the above case tried before me is less than \$5,000.00.


Judge