

Bill of Costs
5-20-51

BILL OF COSTS ON APPEAL

PENNSYLVANIA
SECTION OF CAMBRIA COUNTY
IN THE COURT OF QUARTERS

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.

QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

No 14 June Sessions. 1955
Road Docket

Appeal of Melvin C. Strong and
Eileen N Strong, 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

Edward J. Harkin
Attorney for Appellants

No. 14 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 Melvin C. Strong and
Eileen N. Strong, husband and
wife.

Filed - 2-20-61
BILL OF COSTS ON APPEAL

EDWARD J HARKINS
ATTORNEY AT LAW
FIRST NATIONAL BANK BUILDING
JOHNSTOWN PA

No L D 14 June
1955

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Filed Jan 23 1961

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IN THE COURT OF QUARTER SESSIONS OF GAMBRIA 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 GAMBRIA AND STATE OF PENNSYLVANIA.

No. 14 June Sessions, 1955

STIPULATION OF SETTLEMENT

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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 Melvin G. Strong and Eileen N. Strong, husband and wife, as follows:

1. That the Department of Highways has agreed to pay to Melvin G. Strong and Eileen N. Strong, husband and wife, the sum of \$3,100.00 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 Melvin G. Strong and Eileen N. Strong, husband and wife, have agreed to accept the said sum in full settlement for said damages, including interest and/or detention damages.

2. That Melvin G. Strong and Eileen N. Strong, husband and wife, upon the payment of the said sum of \$3,100.00 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 Melvin G. Strong and Eileen N. Strong

Filed
Jan. 23, 1961

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. 147 of March Term, 1959 of our Court a record in the matter of the appeal of MELVIN C. STRONG AND EILEEN N. STRONG

from the order of your said Court at No. 14 of June Session ~~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

Q.S.Cambria

No. 14 June Sessions ~~1955~~ 1955

No. 147 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 MELVIN C. STRONG AND
EILEEN N. STRONG

REMITTITUR

Filed - June 16, 1960
A. T. Glasgow

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
MELVIN C. STRONG AND EILEEN N. STRONG
from the Order of your said Court at No. 14 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 19 59 , 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.

Samuel N. Bolinger
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.

James H. Harkins
Gerald K. Gibson
..... [L. S.]
..... [L. S.]

e. *F2*

No. 147 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 MELVIN C. STRONG and EILEEN N. STRONG

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
J.C. Wiser

Edward J. Harkins
Gerald K. Gibson
FILED Attorneys for Appellant

SEP 14 1959
SUPREME COURT
WESTERN DISTRICT

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 14 June
Sessions, 1955

Petition of Melvin C. Strong and
Eileen N. Strong, husband and wife

DOCKET ENTRIES

May 31, 1955	Petition for appointment of viewers filed.
May 31, 1955	Order appointing viewers filed.
June 3, 1955	Order to view issued.
June 23, 1955	Petition for rule to show cause filed by Edward F. Peduzzi, Esq.
June 23, 1955	Rule filed.
June 24, 1955	Certified copy of rule sent to Theodore Hunt.
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 Highways, 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 14 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.

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 MELVIN C. STRONG
AND EILEEN N. STRONG, HUSBAND
AND WIFE, FOR THE APPOINT-
MENT 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.

Y
I No. *14-Road Work*
I *June* SESSIONS,
I 19*85*

PETITION OF MELVIN C. STRONG and EILEEN N. STRONG,
HUSBAND AND WIFE, FOR THE APPOINTMENT OF VIEWERS.

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

The petition of Melvin C. Strong and Eileen N. Strong,
husband and wife, respectfully represents

1. Your Petitioners are residents of the Township of
Stonycreek, in Cambria County, Pennsylvania; their residence address
being 1921 Bedford Street, Johnstown, Pennsylvania.

2. Your Petitioners are the owners of certain property
in the Township of Stonycreek, County of Cambria and State of
Pennsylvania, fronting 58.10 feet on Bedford Street.

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 58.10 feet in length, comprising approximately 813 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 prior to the change in the Highway above mentioned, the property was landscaped and protected by a stone wall, and the house fronting on the highway, was located a proper distance from the highway. The change of the highway resulted in the total destruction of the stone wall and steps and part of a side walk, and the taking of certain portions of the land, and interfering with the landscaping and leaving the appearance of the property, from the front, in a more or less

dilapidated condition, which will be expensive to remodel and repair.

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.

Melvin C. Strong

Eileen H. Strong

STATE OF PENNSYLVANIA |
COUNTY OF CAMBRIA | SS:

Personally appeared before me, the undersigned authority, a Notary Public in and for said County and State, MELVIN C. STRONG AND EILEEN N. STRONG, 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.

Melvin C. Strong

Eileen N. Strong

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

Helen Keating
Notary Public

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

O R D E R

NOW, May 31, 1955, at 1215 o'clock P. M., the foregoing petition having been read and presented to the Court, the Court does hereby appoint Wendell Hunt
Robert S. Mayer and Fred Clapham,
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:

Dr. Smith
J.

IN THE COURT OF QUARTER
SESSIONS OF GAMBRIA 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 STONYPARK,
IN SAID COUNTY AND STATE.

PETITION FOR
RULE TO SHOW CAUSE

EDWARD F. PEDUZZI
LAW OFFICES
XXXXXXXXXXXXXXXXXXXX
418 LINCOLN STREET
JOHNSTOWN, PA.

filed June 23, 1955

AND NOW, this 22nd day of June, 1955, service of the within
petition together with a true copy thereof is here by accepted.

HARKINS & WHARFON

[Handwritten 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. 14 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, Melvin C. Strong and Eileen N. Strong, 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 Melvin C. Strong and Eileen N. Strong, 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 No. 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 Melvin C. Strong and Eileen N. Strong, 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 *W. B. S. S. S.*
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 petition are true and correct to the best of his knowledge, information and belief.


V. B. Leopold

Sworn 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 22 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 Melvin C. Strong and Eileen N. Strong, 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. Kennedy
C.

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.

0 IN THE COURT OF QUARTER
0 SESSIONS OF CAMBRIA COUNTY
0 NO. 14 JUNE SESSIONS, 1955.
0
0 ROAD DOCKET

NOTICE TO VIEW

We, the undersigned Viewers, appointed by the above Court to View and Inspect the land and premises of Melvin C. Strong and Eileen N. Strong, husband and wife, in Stonycreek Township, Cambria County, Pennsylvania fronting 58.10 feet at #1921 Bedford Street in the Township aforesaid, and to determine and estimate the damages or benefits that have resulted or that may seem likely to result by reason of the change in location and lines of a highway known as State Highway Route No. 222, in the Township of Stonycreek, said County and State, affecting their property in said Township.

The Board of Viewers will meet upon the premises on the 8th day of July, 1955 at 10 o'clock A.M. D.S.T. as per order of the Court for the purpose of performing the duties of our appointment.

Theodore Hunt

Robert G. Mayer

Fred Claflin

Viewers

June 24, 1955.

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. 14 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
W. H. ...
W. J. ...

*Filed
11-28-55*

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

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

*Clear
6/22*

ANSWER TO PETITION FOR RULE
AND TO RULE TO SHOW CAUSE
HERETOFORE 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. 14 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:

MELVIN C. STRONG and EILEEN N. STRONG, 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 Common-
wealth 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.

Melvin C. Strong

Richard W. Strong

STATE OF PENNSYLVANIA

COUNTY OF CAMBRIA

SS:

Personally appeared before me, the undersigned authority, a Notary Public, in and for said County and State, MELVIN C. STRONG and EILEEN N. STRONG, 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.

Melvin C. Strong

Eileen N. Strong

Sworn and subscribed to before me
this 1st day of ~~July~~ ^{August} A. D. 1955.

Mrs. Dorothy A. Davis
Notary Public

Johnstown, Cambria County, Pennsylvania

My Comm. Expires: July 13, 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

ANSWER OF CAMBRIA COUNTY TO PETITION
FOR RULE TO SHOW CAUSE

Filed: Jan. 16, 1958

William D. Shettig, Esq.
County Solicitor
Ebensburg, Pennsylvania

*Ind. Proc. This 15th day of January 1958 acceptance
of service of the within answer is hereby acknowledged*

*Edward J. Herkimer &
Donald K. Robinson
by Donald K. Robinson
Edward F. Redberg
att'y for Highway Dept.*

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

ANSWER OF CAMBRIA COUNTY TO PETITION FOR RULE TO SHOW CAUSE

Cambria County files the following Answer to the Petition for Rule and Rule to Show Cause heretofore granted in the above captioned cases as follows:

1. Admitted.
2. Admitted.
3. The averments in the third paragraph of the Petition are denied, and it is averred to the contrary that any damages payable to the property owners should not come from Cambria County for the following reasons:

- A. Under the Acts of Assembly in such case made and provided, the County must accept and approve any plans for the change in width, lines and location of any State Highway before it can become liable for damage to abutting property owners, and in these cases the County has not accepted or approved any plans for changes in the State Highway affecting these property owners.

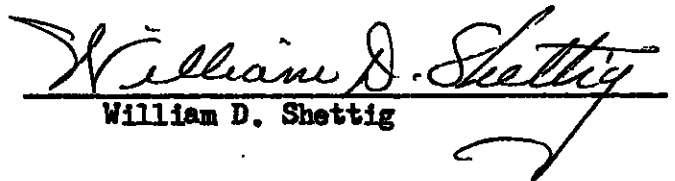
- B. In any event an action for damages to property in these cases has been barred by the Statute of Limitations.

WHEREFORE, the County of Cambria respectfully requests your Honorable Court to discharge the Rule granted on the 6th day of December, 1957.


County Solicitor

STATE OF PENNSYLVANIA |
 | SS:
COUNTY OF CAMBRIA |

William D. Shettig, being duly sworn according to law, deposes and says that he is the Solicitor for Cambria County and is authorized to execute this Answer on its behalf.



William D. Shettig

Sworn to and subscribed before
me this 15th day of January,
1958.



Notary Public

My commission expires January 27, 1959.
Ebensburg, Cambria County, Pennsylvania

IN THE COURT OF QUARTER SESSIONS
OF
CAMBRIA COUNTY, PENNSYLVANIA

IN RE: PETITIONS OF ROY B.
GRIFFITH, ET AL., 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.

BRIEF ON BEHALF OF PENNSYLVANIA
DEPARTMENT OF HIGHWAYS, PETI-
TIONER

July 17, 1958
Filed

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

2 copies

IN RE: PETITIONS OF ROY B. GRIFFITH AND CATHERINE MARIE GRIFFITH, HUSBAND AND WIFE; CARL MONTAG AND VELETTA MONTAG, HUSBAND AND WIFE; ZELPHA PENROD; CLYDE EDWIN KEIPER AND KATHRYN MARGARET KEIPER, HUSBAND AND WIFE; THOMAS RICHARD SMITH AND DORIS MARIE SMITH, HUSBAND AND WIFE; CHARLES WISSINGER AND ALDA M. WISSINGER, HUSBAND AND WIFE; FREDERICK E. GRIFFITH; MELVIN R. STRONG AND EDNA MAE STRONG, HUSBAND AND WIFE; AND MELVIN C. STRONG AND EILEEN N. STRONG, 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.

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

BRIEF ON BEHALF OF PENNSYLVANIA DEPARTMENT OF HIGHWAYS, PETITIONER

HISTORY OF THE CASE

The Pennsylvania Department of Highways, hereinafter referred to as the Department, pursuant to a plan approved by the Governor on June 1, 1950, widened and paved a portion of State Highway Route No. 222 in Stonycreek Township. As a result of the change of location of the lines and the width of the said Route 222, a number of residents of Stonycreek Township who owned properties abutting on the highway filed petitions on June 1, 1955, in the Court of Quarter Sessions of Cambria County to the above numbers and term, praying for the appointment of viewers to ascertain and determine the damages to their respective properties, and in accordance therewith, viewers were appointed in each case.

On June 23, 1955, the Department filed a petition in each of the above mentioned proceedings for the appointment of viewers praying for a rule to show cause why the petition for the appointment of viewers should not be dismissed on the grounds that:

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

2. All changes made to the highway were made within the legal right of way thereof as established by the plan for State Highway Route 222, approved by the Governor on March 19, 1924.

3. The condemnation of the properties abutting the highway took place on March 19, 1924, and all claims for damages are now barred by the Statute of Limitations.

On November 28, 1955, the property owners filed an Answer to the Department's petitions for rule in each case, denying the Department's allegations and contending that the establishment of an ultimate width of a state highway has no force and effect unless the plan showing such ultimate width were filed of record in the Recorder's Office of Cambria County, and that even though an ultimate width was established, the condemnation relates to the actual time of the taking of the land.

Subsequently, the Department filed petitions for rule on the Commissioners of Cambria County to show cause why the County of Cambria should not be joined as an additional defendant in each of the aforesaid proceedings for appointment of viewers on the ground that if any damages are payable to the property owners by reason of the widening of Route 222, the County of Cambria may be liable for the payment of the same and therefore the County should be made a party to these proceedings.

In its Answer to the Department's petition, the County denied any liability for the reasons that the County did not accept and approve the plans for changes in the said highway affecting the property owners involved in these proceedings and that in any event action for damages has been barred by the Statute of Limitations.

At the hearing on this matter, the Department through its District Plans Engineer, introduced in evidence prints of the official plans of the Department which were approved by the Secretary of Highways on March 4, 1924, and by the Governor on March 19, 1924. These plans show the lines of Route 222 as reconstructed in 1924. The legal right of way of the highway prior to 1924 was 40 feet--20 feet on each side of the center line of that particular

highway. The plans approved on March 19, 1924, provided for legal right of way lines on each side of the center line as shown on said plan of 30 feet, making a total right of way of 60 feet in width. The plan further showed the location of the highway as it existed prior to its reconstruction in 1924 by broken lines.

The Department then offered in evidence a plan prepared by the District Plans Engineer showing thereon the lines of the highway as the same existed prior to 1924, the changes made to the lines by the plans approved by the Governor in 1924, 1941 and 1950. The 1941 plans are of no concern in this case as the same did not effect the properties of the persons involved herein. The 1950 plan is important as that is the plan for the widening of the highway which effected the properties of the persons involved in this case. The 1950 plans show that the widening of the highway was well within the 60 foot legal right of way as established by the plan of 1924.

At the second hearing the Department again offered in evidence the highway plan approved March 19, 1924, showing thereon the center line of the original highway plotted from a description of the same found in Miscellaneous Book Vol. 6, Page 133, records of Cambria County, as well as the center line of the highway as reconstructed in 1924. This plan, with the center line of the original highway superimposed, shows that the center line of the highway as constructed in 1924 deviated at various points from the center line of the original highway and that in some instances, there was a complete relocation of the highway. This plan shows that the center line of the road as constructed under the 1924 plan deviated from the center line of the original highway as much as three feet in certain places and that the deviations or diversions occurred in front of the properties in question.

Roy B. Griffith, one of the property owners who filed a petition for the appointment of viewers, testified that he had title to the property in 1924, that no part of his land was physically taken when the highway was reconstructed in 1924, that he received no notice from any source of the extension of the right of way line, that the County Commissioners did not, in 1924, or any time

thereafter, discuss with him the matter of damages. On cross-examination he admitted that he knew that the highway was completely relocated in front of Schrader's property, situate about one-half mile from his own property.

Zelpha Penrod, another property owner, then testified that she had acquired title to her property in 1923, that there was no physical entry on her land in the reconstruction of the highway in 1924, that the County Commissioners in 1924 or thereafter, had not discussed with her the matter of damages, that in 1950 she was notified to move her gasoline station pumps as they were within the right of way of the highway.

QUESTIONS PRESENTED

1. Does the Court have jurisdiction to pass upon the issues raised by the pleadings filed in this case as amplified by the testimony taken, and to determine preliminarily the questions of law raised by the pleadings and the testimony?

2. Was it necessary for the Department of Highways to record the plan approved by the Governor on March 19, 1924, for the reconstruction of Route 222 in the Recorder's Office of Cambria County?

3. Does the fact that the entire width of the highway as shown on the plan approved March 19, 1924, was not used in the reconstruction of the same, give rise to claims for damages when the said highway is subsequently widened to the width of the right of way as shown on said plan?

4. Are any claims for damages now barred by the statute of limitation and if not, is the county liable for the same?

ARGUMENT

1. The Court has jurisdiction in this case to pass upon the issues raised and to determine preliminarily the questions of law.

The Court was concerned about the question of jurisdiction because, in a proceeding of this nature, it could not determine any disputed question of fact, as the finding of facts is within the prerogative of a board of

viewers. The Court may determine preliminarily questions of law or pass upon undisputed facts before the appointment of viewers or on petition for revocation of their appointment. *Wangner v. Bucks Co.*, 82 Pa. Super. 448, 48 Lancaster Law Review 501.

The purpose of this hearing was to present the facts to the Court in order that the Court would then be in position to render a decision on the law applicable to those facts. Actually none of the testimony adduced at the hearing was disputed. The dispute arises in the application of the law.

There is no dispute as to the fact of the existence of the original highway or turn-pike which was taken over by the Commonwealth in 1911; nor to the fact that the plans for the reconstruction of the original highway were approved by the Governor on March 19, 1924, and that those plans show the extension of the right of way from 40 to 60 feet; nor to the fact that in 1924 the original highway was reconstructed and completely relocated in certain sections particularly at the Schrader property; nor to the fact that the center line of the highway as reconstructed in 1924 deflected or deviated in many sections from the center line of the original highway, and that there were major deviations as well as relatively minor deviations and that the deviations occurred in relation to the properties owned by the persons involved in these proceedings or their predecessors in title; nor to the fact that in 1950 the highway was widened to the full extent of the 60 foot right of way established by the 1924 plan; nor to the fact that the County Commissioners in 1924 did not negotiate with the abutting property owners, with the exception of the Schraders, for settlement of the question of damages; nor to the fact that the property owners, in 1924, with exception of the Schraders, did not receive any damages as a result of the reconstruction of the highway and the condemnation of the additional right of way in accordance with the plan approved March 19, 1924; nor to the fact that the 1924 plan was not recorded in Cambria County; nor to the fact that the County Commissioners were not able to find in their records any written notification from the Secretary of Highways of the

changes of the existing lines and location made by the 1924 plan to the original highway.

The foregoing are the essential facts in this case and are not disputed by any of the parties to this proceeding. The difficulty in the case arises in the application of the law to these facts which can be determined preliminarily in this proceeding. The effect of the extension of the legal right of way as established by the 1924 plan as the same affects the abutting properties is to be determined by consulting the provisions of Sec. 8 of the Sproul Act of May 31, 1911, P. L. 468 as amended by the Act of April 6, 1921, P. L. 107, and the decisions of our Courts construing these Acts.

Therefore, since none of the essential facts in this case are in dispute, the Court may consider the same in passing upon the preliminary questions of law raised by the Department's petitions.

2. It was not necessary for the Department of Highways to record the plans approved by the Governor on March 19, 1924, for the reconstruction of Route 222 in the Recorder's Office of Cambria County as said plan was not merely a plotting of a contemplated future taking, or a paper widening of an existing highway without divergence, but showed an actual divergence of the center line of the new construction from the center line of the existing roadbed and in some places a complete relocation of the center line.

This case is governed by the provisions of Sec. 8 of the Sproul Act of May 31, 1911, P. L. 468, which section, as amended by the Act of April 6, 1921, P. L. 107, provides as follows:

"Section 8. Whenever, in the construction, reconstruction, maintenance, and repair of any of the State Highways, it shall appear to the Commissioner that any portion of a State Highway . . . is dangerous or inconvenient to the traveling public in its present location, . . . the commissioner is hereby empowered to divert the course or direction of same, and he may diverge from the line or route of same. . . . Provided, that the said commissioner shall first submit a plan of the proposed change to the Governor, and that the same shall be approved by him.

The State Highway Commissioner shall also have the power, with the approval of the Governor, to establish the

width and lines of any State Highway before or after construction, reconstruction or improvement of the same Whenever the State Highway Commissioner shall establish the width and lines of any such State Highway, he shall cause a description and plan thereof to be made, showing the center line of said highway and the established width thereof, and shall attach thereto his acknowledgment. Thereupon such description, plan, and acknowledgment shall be recorded in the office of the recorder of deeds of the proper county"

The second paragraph above quoted is the amendment added by the Act of 1921 to the Sproul Act. These two paragraphs have been construed by our courts as pertaining to two distinct things: (1) the diversion or divergence of a part of or portion of a state highway, where the safety or convenience of the public, or the expense of improvement, might warrant it, and (2) the actual widening of an existing state highway, which necessitates the condemnation of and payment for the land taken by such widening and/or the establishment of the ultimate width of the highway, which calls for no present appropriation of land. In the first instance, the plan need not be recorded in the proper county, but in the second instance where the plan is for the establishment of the ultimate width, the said plan must be recorded. In the Matter of Appointment of Viewers, 103 Pa. Super. Ct. 212.

It is contended by the Department that the case at bar is one in which an existing highway was diverted and in some cases completely relocated, so that the plan approved March 19, 1924, for the reconstruction of the existing turn-pike did not have to be recorded in the office for the recording of deeds in and for Cambria County. All that was necessary was that the plan be approved by the Governor and filed in the Department of Highways, which was done. The plan approved by the Governor on March 19, 1924, called for the reconstruction of a portion of the Bedford turn-pike in Stonycreek Township from station 1864 / 77.1 to station 1938 / 57, or a distance of 7,302.6 feet.

The Department introduced into evidence the 1924 plan showing the center line of the highway upon which had been superimposed the center line of the original highway. The 1924 plan completely relocated several sections of the turn-pike, especially along the Schrader property. In addition, the plan clearly shows a diversion or divergence from the center line of the original turn-pike in many places, so that it cannot possibly be construed as a plan

merely establishing the ultimate width of the highway. Furthermore, in 1924, there was an actual entry on the land, the old turnpike was removed and a new concrete highway was constructed.

2
The argument has been raised that there may not have been a divergence of the center line in front of some of the properties owned by some of the persons involved in these proceedings. It is contended that such argument cannot prevail because the plan of 1924 was designed for the construction of a portion of the present Route 222 between definitely specified stations for a distance of 7,302.6 feet. Thus, the plan of 1924 must be considered in its entirety and not piece meal; it is one plan, it was approved as a unit, and the diversion may appear in any part or several parts of the entire plan.

Since the plan of 1924 showed an actual divergence from the center line of the existing roadbed and since that plan was neither a plotting of a future taking nor a paper widening without diversion, the said plan did not have to be recorded as the same did not come within the provisions of the Act of April 6, 1921, amending Section 8 of the Sproul Act, in accordance with the decisions cited above.

3. The fact that the entire width of the highway as shown on the plan approved March 19, 1924, was not used in the reconstruction of the same, does not give rise to claims for damages when the said highway is subsequently widened to width of the right of way as shown on said plan.

It is admitted that the highway as reconstructed pursuant to the 1924 plans did not occupy the entire width for the road as shown on the plan, but that is not material in this case.

In the case of May, Appellant v. The County of Westmoreland, 98 Pa. Super. Ct. 488, the court stated on page 490:

" . . . whatever the plan, as approved by the Governor and filed in the Department of Highways pursuant to Section 8 as originally enacted, authorizing the divergence of state highway routes, may show as the width of the new road, is to be taken as the measure of taking and appropriation when the land is entered on for the construction of the highway, and all damages sustained by a land owner because of such taking and appropriation, for the full width shown in the plan, are to be ascertained and assessed in one proceeding."

On page 492 of the May case, supra, the Superior Court made this statement:

"But this plan diverging the state highway is not concerned with the plotting of widths and lines to be opened in the future as permitted by the Amendment of April 6, 1921, supra. It is intended to deal only with lines and widths presently to be taken and appropriated. Whatever is included in it must be considered as the measure of the present taking and appropriation, on entry by the Department for opening and construction, even though a lesser width may be actually occupied in its construction. It is equivalent to the final order confirming a report of viewers in road cases in the quarter sessions, under which damages are awarded for the full width ordered to be opened whether the road be actually occupied of that width or not. . . ." (Emphasis added)

The case at bar is exactly parallel with the case of Eshleman v. Commonwealth, 325 Pa. 521. In that case an existing macadam highway was replaced by a concrete highway pursuant to a plan approved July 17, 1929. The work was begun in 1929. The plan also set forth the width of the highway, and specified the northern and southern boundary lines in front of Eshleman's premises. In 1935, construction of an additional ten-foot concrete lane was begun. All the construction was confined within the right-of-way line shown by the 1929 plan. A small strip in front of Eshleman's property, which had not theretofore at any time actually been occupied for highway purposes, was taken. The viewers awarded Eshleman damages in the sum of \$350.00, and on appeal, the Court of Common Pleas sustained the viewer's award. The Supreme Court, in reversing the judgment of the Common Pleas Court, stated:

"The decision of the court below was based upon the ground that the Plan of 1929 involved merely the 'establishment of width and lines' under the Act of April 6, 1921, P. L. 107, and that there was no taking until 1935, when the Commonwealth was liable for damages resulting, under the Act of January 2, 1934, P. L. 209. This Act was itself an amendment of Sec. 16 of the Act of 1911 and substituted the Commonwealth in place of the county as the party responsible for damages to abutting property owners when the County Commissioners had not consented and agreed to the changes in width, lines and location contemplated by the proposed construction. It is admitted that the County Commissioners had not consented and agreed to the changes made by the 1929 plan.

The problem before us is solely one of the effect of the Plan of 1929. If that plan were merely a plotting of a contemplated future taking (May v. Westmoreland County, 98 Pa. Super. Ct. 488) or a present paper widening of an existing

highway without divergence (In the Matter of Appointment of Viewers, 103 Pa. Superior Ct. 212) there would be no doubt that the taking thereunder would have occurred in 1935, when construction was begun. . . (295 Pa. 538 - 302 Pa. 300) . . . and that liability would, as the court below held, be imposed on the Commonwealth under the Act of 1934.

Such, however, is not the case here. The Plan of 1929 was plainly neither a plotting of a future taking or a paper widening without divergence. It showed an actual divergence of the center line of the new construction from the center line of the existing roadbed, which line was shifted to the south, in some places as much as five feet. . . .

It follows that the damages claimed and allowed by the court below were incident to the taking in 1929, and if, at that time, there was any damage legally assessable, the county and not the Commonwealth was liable." (Emphasis added)

In the instant case, the plan of 1924 was plainly neither a plotting of a future taking nor a paper widening without divergence, but showed an actual divergence from the center line of the highway constructed in 1924 from the center line of the existing roadbed, which was shifted, in certain sections, for many feet (Schrader property) and in other sections for a lesser number of feet. There can be no question here as to the fact that there was a deflection or divergence of the center line as between the old turnpike and the new construction.

See also the case of Penn Builders v. Blair County, 302 Pa. 300. Here the plan fixed 100 feet as the right of way, although the new construction occupied but one-third of that width. The court held that damages are recoverable for the entire width taken and that recovery is not limited to the strip actually occupied since the appropriation, as designated on the map, was not merely a paper plotting, unaccompanied by any entry on any part.

4. The County of Cambria is liable for damages, if any.

Three questions present themselves at this point: (1) Are the claims for damages barred by the statute of limitations? (2) Was the County of Cambria on notice of the changes made by the reconstruction of the highway in 1924? (3) If any damages are payable, are the present property owners entitled to the same?

It is contended that the reconstruction of Route 222 was done pursuant to the plans of condemnation approved by the Governor in 1924; that such

plan was not merely a plotting of a contemplated future taking or ultimate width; that such plan did not constitute a paper widening of an existing highway without divergence; that the 1924 plan showed an actual divergence of the center line of the new construction from that of the existing roadbed. Therefore, under the decisions above cited and quoted, the taking occurred in 1924 and claims for damages should have been made at that time or within six years from March 19, 1924, the date the plan was approved by the Governor. Again, as pointed and above, the fact that the entire width of the right of way, as shown in the 1924 plan, was not used in the reconstruction of the highway in 1924, is immaterial insofar as claims for damages are concerned. There was an actual taking in 1924 to the full width shown on the plan and an actual entry on the land, so that claims for damages should have been made at that time or within six years, as stated above.

The Act of May 23, 1891, P. L. 109, Section 1, 12 P. S. 43, provides as follows:

" . . . In the case of State highways . . . which the Secretary of Highways has authority to change, alter or widen, with the approval of the Governor, such petitions shall be presented within six years from the date of the approval of the plan by the Governor, but not thereafter. All claims shall be forever barred after the expiration of the said period of six years."

The petitions referred to in the above quoted Act are petitions for the appointment of views. It is pertinent to note that several property owners did file claims for damages against Cambria County. These are the claims of Herbert Schrader and others and of Curtis F. Schrader, against the county entered to Nos. 316 September Term, 1925, and 317 September Term, 1925 respectively in the Court of Common Pleas of Cambria County. These claims for damages resulted from the reconstruction of Route 222 pursuant to the plan of March 19, 1924, and said claims were settled in favor of the property owners.

In view of the above, it is contended that the present claims for damages are now barred by the statute of limitations, unless some occurrence has taken place which has tolled the running of the statute.

The statute may have been tolled because of the fact that Cambria County did not negotiate with the property owners, other than the Schraders,

for settlement of the question of damages. When Route 222 was reconstructed in 1924, the county was liable for the payment of any damages in accordance with Section 16 of the Sproul Act, supra, as amended by the Act of 1921, supra, which provided as follows:

"16. Before the State Highway Commissioner shall undertake the construction, reconstruction, or improvement of any State Highway, on the plan of the State Highways, wherein a change of width or of existing lines and location is necessary, and damage is likely to result to abutting property, he shall notify the county commissioners of the proper county in writing of the contemplated changes in such existing lines and location, whereupon the county commissioners, when possible, shall enter into an agreement with the owner or owners of said property as to amount of damages to be paid to the said owner or owners, which damage, if agreed upon, shall be paid by the county . . ." (Emphasis added).

The Act further provides that in the event no agreement is reached, then proceedings are to be instituted for the appointment of viewers and the county again will pay for the amount of damages awarded.

The above quoted Section 16 of the Sproul Act, as amended, provided that the Highway Commissioner merely notify the County Commissioners of the proposed changes to any highways within the county. The Act did not require the commissioners to first accept and approve the plans as stated in the Answer of Cambria County to the Department's petition.

It is very obvious that the Commissioners of Cambria County did negotiate with the Schraders for the settlement of the damages to their properties as a result of the reconstruction of Route 222 in 1924. In fact viewers were appointed to assess the damages and the county even appealed from the award of the viewers. These proceedings are on record in Cambria County to Nos. 316 and 317 September Term, 1925. Why, then, did the county commissioners not negotiate settlement with the other property owners? The fact that there is no letter from the Department of Highways in the files of the County Commissioners at the present time does not mean that such letter was mailed nor received. Section 16 of the Sproul Act, above quoted, provides that the county be given notice of the proposed highway changes. In view of the proceedings

relative to the Schrader properties, the Commissioners of Cambria County must have had notice of the 1924 plans--no other conclusion is possible. In the Eshleman case, supra, the Court ruled that the county was liable for the damages, even though it was admitted that the County Commissioners had not consented and agreed to the changes, and no mention was made in that case of any notice to the Commissioners. See *In re Northern Pipe Line*, 132 Pa. Super. Ct. 406.

However, even though Cambria County did not negotiate with the property owners other than the Schraders for damages resulting from the reconstruction of Route 222 in 1924, the fact remains that the majority of the property owners who are claiming damages at the present time did not own their respective properties in 1924. Only three of the claimants were owners of property at that time: Roy B. Griffith, Zelpha Penrod and Frederick E. Griffith.

It is well settled that the owner of land at the time of condemnation is entitled to damages. Subsequent grantees of such owners are not so entitled unless there has been an assignment of the right to receive the damages. *Hunter v. McKlveen*, 353 Pa. 357; *Smith v. Commonwealth*, 351 Pa. 68.

It is admitted in the evidence that the property owners who are presently claiming damages, other than the three persons above named, were not the owners of their respective properties in 1924. Since the taking of the properties involved in this proceeding was incident to the taking in 1924, and if there are damages legally assessable, then only the three persons above named are entitled thereto. It is desired to point out again, that for the reasons above stated, if any damages are payable, the County of Cambria is liable for the same. *Eshleman case, supra*.

CONCLUSION

It is respectfully submitted that:

(1) The Court has jurisdiction in this case to pass upon the facts presently and determine preliminarily the questions of law raised by the

pleadings and the testimony.

(2) The 1924 plan was not merely a plotting of a contemplated future taking, or a paper widening of an existing highway without divergence, but showed an actual divergence of the center line of the new construction from the center line of the existing roadbed and consequently

(a) It was not necessary that the plan be recorded in Cambria County,

(b) The taking of any property was incident to the said plan and all damages were payable as of the time of the taking, regardless of the fact that the full width of the right of way was not used.

(3) The County of Cambria is liable for any damages.

Respectfully submitted,

MYERS, TAYLOR & PEDUZZI

by Edward F. Peduzzi

Nos. 6,7,8,9,10,11,12,13 and 14,
June Sessions, 1955, Road Docket

IN THE COURT OF QUARTER SESSIONS
OF
CAMBRIA COUNTY, PENNSYLVANIA

IN RE: PETITIONS OF ROY B.
GRIFFITH, ET AL., 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

Filed - 2-6-59

J. C. Wass
BRIEF ON BEHALF OF PETITIONERS

EDWARD J. HARKINS
GERALD K. GIBSON

ATTORNEY AT LAW

611 U. S. NATIONAL BANK BLDG.
JOHNSTOWN, PA.

IN RE: PETITIONS OF ROY B. GRIFFITH AND CATHERINE MARIE GRIFFITH, HUSBAND AND WIFE; CARL MONTAG AND VELETTA MONTAG, HUSBAND AND WIFE; ZELPHA PENROD, CLYDE EDWIN KEIPER AND KATHRYN MARGARET KEIPER, HUSBAND AND WIFE; THOMAS RICHARD SMITH AND DORIS MARIE SMITH, HUSBAND AND WIFE; CHARLES WISSINGER AND ALDA M. WISSINGER, HUSBAND AND WIFE; FREDERICK E. GRIFFITH; MELVIN R. STRONG AND EDNA MAE STRONG, HUSBAND AND WIFE; AND MELVIN C. STRONG AND EILEEN N. STRONG, 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

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

BRIEF ON BEHALF OF PETITIONERS

STATEMENT OF FACTS

Petitions for the appointment of viewers were filed by your petitioners on June 1, 1955 in the Court of Quarter Sessions of Cambria County to assess damages occasioned by the appropriation of portions of their lands pursuant to a plan of the Department of Highways of the State of Pennsylvania. Said plan was signed by the Governor of Pennsylvania on June 1, 1950 and duly recorded in the office for the Recorder of Deeds in Cambria County. This plan widened and paved a portion of State Highway Route No. 222 located in Stoneycreek Township, Cambria County, requiring the Highway Department to enter onto the lands of your petitioners.

By Order of Court, a Board of Viewers was appointed to each petition, thereafter the Department of Highways petitioned for a Rule to Show Cause why the Board of Viewers heretofore appointed should not be dismissed. The Department alleged, in support of their Rule that there was no condemnation in 1950, but that the entry onto the land of your petitioners was pursuant to a condemnation of said land on March 19, 1924.

The testimony indicates that the plan of 1924 changed the existing 40 feet right-of-way to a 60 feet right-of-way, and said plan was signed by the Governor and recorded with the Department of Highways, in Harrisburg, Pennsylvania. Said plan was never recorded in the Recorder of Deed's Office, Cambria County.

The facts also show that during the 1924 reconstruction, that the department never entered on any portion of your petitioners land but kept within the limits of the original 40 feet right-of-way. During the 1924 reconstruction, neither the Department, nor the Commissioners of Cambria County negotiated, agreed nor attempted to agree with your petitioners or predcessors in title as to damages allegedly arising out of the taking of an additional 20 feet right-of-way. The first notice or knowledge that the Department of Highways claimed any portion of their lands was at the time of construct in 1950.

QUESTIONS

1. Does the Court have jurisdiction to determine facts and questions of law applicable thereto upon a petition to dismiss the appointment of viewers?
2. What was required of the Department of Highways for a valid condemnation of a right-of-way under the Act of 1911, May 31, P.L. 468 as amended by the Act of 1921, April 6, P.L. 107?

ARGUMENT

As to the question of jurisdiction, I am unable to find any case raising the specific question, such procedure as presently before the Court seems to have been condoned in *May vs the County of Westmoreland* 98 Pa Super 488. In that case a condemnation proceeding was before the Superior Court on a motion to quash the appointment of viewers and the Court stated that since no depositions were taken nor a certified copy of the plan showing the taking placed in evidence, it was impossible to determine^{the question} before them and returned to the lower Court for further action, however the Court did not criticize the mode of determining the issues.

To determine the proper method of condemnation on the question before the Court, we must look to the Statute creating the present highway system in Pennsylvania. The system was created by the Act of 1911, May 31, P. L. 468, which stated specifically those routes which were to comprise said system of which Route No. 222 was one of those so designated. The act further provided that in those instances where the routes which were designated as state highways contained portions which were dangerous or inconvenient to the traveling public,

the Commissioner could divert the route to correct the danger or inconvenience by submitting a plan to the Governor and approval by him (Act 1911, May 31, P.L. 468, Sec. 8). Section 16 of the Act also provided a method of compensation a land owner where his property was taken by reason of the aforesaid divergence. This section required that, "Before the Commissioner shall undertake the construction, reconstruction, or improvement of any State Highway on the plan of the State Highways, wherein a change of existing lines and location is necessary and damages is likely to result to abutting property; he shall when possible, enter into an agreement with the owners of said property as to the amount of damages to be paid to said owner or owners by the state _____." The remainder of Section 16 provides in event agreement could not be reached, the Commissioner may proceed with construction and the owners may present their petitions to the Court for appointment of viewers to assess damages.

The act of 1921 April 6 P.L. 107 amended Sections 8 and 16 of the aforesaid act to provide under Section 8, a means of widening highways and establishing ultimate widths for future construction by placing a plan on record in the proper counties. Section 16 of the Act was amended to provide that before the Commissioner shall undertake construction etc., where there may be damage to abutting property owners, he shall notify the County Commissioners of the proper county in writing of the contemplated change in existing lines and locations, whereupon the County Commissioners, when possible, shall enter into agreement with owners as to damages, which damages if agreed upon shall be paid by the county, if can not reach agreement, the owners can petition for the appointment of viewers to assess damages.

The Pennsylvania Constitution Art. I, Section 10, qualifies the states right of eminent domain by requiring "just compensation" be made to the owner of property taken. Art. I, Section 9, of the Constitution of Pennsylvania states that no one can be deprived of his life, liberty or property, unless by judgment of his peers or the law of the land. The Fourteenth Amendment to the Constitution of the United States requires that no state deprive any person of life, liberty or property without, "due process of law". These sections of both the Pennsylvania Constitution and the Constitution of the United States require as a fundamental request of due process that there be notice and an opportunity for hearing,

(Millane v Central Hanover Bank & Trust Co. 339 US 506 (1950), 70 s. ct. 652)

(Pagni v Commonwealth 179 Pa Super 213)

The Act of 1937 May 28, P.L. 1019 Art. IV Section 58 requires strict construction of all laws in derogation of the common law and particularly provisions conferring the power of eminent domain.

The Act of 1911 May 31, P.L. 468 as amended by the Act of 1921 set up a reasonable means of condemnation for highway purposes under the states power of eminent domain. One of the requirements of the Act of 1911 was that the Commissioner of Highways enter into or attempt to enter into agreements with abutting property owners whose property would be damaged as to their damages. The Amending Act of 1921 relieved the State of the payment of damages and placed this burden on the County, it set forth a mandatory requirement that the Commissioner of Highways notify the County Commissioners in writing of the probability of damages to abutting property owners. In addition, this amendment set forth a mandatory requirement that the County Commissioners agree, where possible, with damaged property owners as to the amount of their damages. In the case before the Court none of these acts were done. For the legislature to set forth a constitutional method of exercising the eminent domain by the state highway department, but not to require the department to follow that method is to make a mockery of the safeguards of the constitution of the Commonwealth of Pennsylvania and the United States.

Art. 1, Section 9 of the Pennsylvania Constitution and the 14th Amendment of the United States Constitution prohibit the taking of property without due process of laws, the fundamental requirements of due process are reasonable notice and an opportunity for hearing. The exercise of the right of eminent domain by condemnation proceeding is a taking of property and must be by due process of law, failure of reasonable notice and an opportunity for hearing invalidates the condemnation. In effect there is no exercise of eminent domain by the Department of Highways until they have complied with all of the required procedures as outlined by the Act of Assembly granting them that power.

The case of Pagni v. Commonwealth 179 Pa Super 213 (1955) is similar in facts as the question before the Court, however it was only argued and decided on the question of the Statute of Limitations as set forth in Act of June 11, 1935 P. L. 302 Section 1, 12 PS Section 43. The Courts reasoning in that case would seem to support our contention, that there can be no valid exercise of eminent domain unless all the requirements imposed by the Act of the Legislature have been complied with, otherwise the legislature would have to be presumed to have disregarded Art.1, Section 9 of the Constitution of Pennsylvania and the 14th Amendment of the Federal Constitution. In the face of the Act of May 28, 1937 P. L. 1019 Art. IV, Section 52, 46 P. S. 552 (3) this presumption would not be valid.

The Department in its brief has cited numerous cases dealing with divergence and establishing of ultimate widths, however since there is nothing to the contrary discussed in these cases it must be assumed that the Department and/or the County Commissioners complied with Section 16 of the Act of May 31, 1911 P. L. 468 or amended, or there was an actual physical entry upon the land so as to provide notice of a taking to the owners. That is not the case before this Court, under the plan of 1924 all construction was within the original 40 ft. road bed and at no time until 1950 was there an entry onto the lands of your petitioners. The testimony in this case further shows that there was no notice in writing to the County Commissioners nor attempt by either the Department or County Commissioners to agree with the owners as to damages. Either of these two happenings would probably have been notice of the Departments taking, but they did not happen.

The Department further contends that if Section 16 was not complied with and no notice given to the owners in 1924 that this would at most, only toll the Statute of Limitations and the County is liable to only those three petitioners who owned their properties in 1924. To permit this theory to stand would allow the Department to confiscate property of six of your petitioners under the guise of eminent domain thereby ignoring the constitutional requirement of "due compensation" and "due process of law".

CONCLUSION

It is respectfully submitted that:

(1) The Court has jurisdiction to pass on the facts and questions of law.

(2) The alleged condemnation under the plan of 1924 did not comply with the Act of the legislature granting the Department of Highways the use of eminent domain and therefore was not a valid exercise of eminent domain.

(3) The plan of June 1, 1950 was the first proper exercise of eminent domain by the Department of Highways and the taking of the property of your petitioners was under that plan.

(4) Your petitioners filed their petitions for the appointment of viewers within the statutory period and are entitled to just compensation for the taking of their property, from the Department of Highways of the Commonwealth of Pennsylvania.

Respectfully submitted;

EDWARD J. HARKINS
GERALD K. GIBSON

by Gerald K. Gibson

No. 14 June Sessions, 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 STONYCREEK,	:	No. 14 June Sessions, 1955, Road
IN SAID COUNTY AND STATE.	:	Docket.

ORDER

NOW, March 13, 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 Melvin C. Strong and Eileen N. Strong, 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.

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. 14 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. 147 March Term, 1959, by Melvin C. Strong and
Eileen N. Strong and that this appeal will be on the
list for the Week of September 28, 1959, at Pittsburgh.


Ronald K. Gibson
Attorneys for Appellant.

April 27 19 59, Service of the foregoing notice is
hereby accepted.

Edward F. Peduzzi
att'y for Commonwealth
Shelby Swope & Shetty
By: Thomas A. Swope
attorneys for Cambria County

No. 14 June Sessions, 1955
(Number in court below)

Notice of Appeal and
Acceptance of Service.

 Filed. Apr. 27, 1959
J. C. Hess

No. 14 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 HIGH-
WAY KNOWN AS STATE HIGHWAY ROUTE
222, IN THE TOWNSHIP OF STONY
CREEK, COUNTY OF CAMBRIA AND
STATE OF PENNSYLVANIA.

CERTIFICATE OF AMOUNT IN CON-
TROVERSY

IN SENATE

OFFICE OF THE JUDGE
COUNTY OF CAMBRIA, PENNSYLVANIA
JUNE TWENTY-NINE, 1959

I hereby certify that the above case tried before me in the
County of Cambria, Pennsylvania, is of the value of one hundred and fifty
dollars (\$150.00).

Page

*Filed: Apr 27, 1959
J.C. Hess*

IN THE COURT OF QUARTER SESSIONS, CAMBRIA COUNTY, PENNSYLVANIA

RECORDED AND INDEXED
JUN 15 1955

RECORDED AND INDEXED
JUN 15 1955

RECORDED AND INDEXED
JUN 15 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.

No. 14 June Sessions, 1955

Case of Melvin C. Strong and Eileen N. Strong

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

Filed August 24, 1959 - J. C. W.

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 STONYPARK, COUNTY :
OF CAMBRIA AND STATE OF :
PENNSYLVANIA. : No. 14 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)

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 RE: PETITIONS OF ROY B.
GRIFFITH, ET AL., 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,
COUNTY OF CAMBRIA AND STATE
OF PENNSYLVANIA.

TESTIMONY.

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

V

IN RE: PETITIONS OF ROY B. : IN THE COURT OF QUARTER SESSIONS
 GRIFFITH AND CATHERINE MARIE : OF CAMBRIA COUNTY, PENNA.
 GRIFFITH, HUSBAND AND WIFE; :
 CARL MONTAG AND VELETTA MONTAG; :
 HUSBAND AND WIFE; ZELPHA PENROD; :
 CLYDE EDWIN KEIPER AND KATHRYN :
 MARGARET KEIPER, HUSBAND AND :
 WIFE; THOMAS RICHARD SMITH AND :
 DORIS MARIE SMITH, HUSBAND AND :
 WIFE; CHARLES WISSINGER AND :
 ALDA M. WISSINGER, HUSBAND AND :
 WIFE; FREDERICK E. GRIFFITH; :
 MELVIN R. STRONG AND EDNA MAE :
 STRONG, HUSBAND AND WIFE; AND : Nos. 6,7,8,9,10,11,12,13, and
 MELVIN C. STRONG AND ELILEEN N. : 14 June Sessions, 1955,
 STRONG, IN THE MATTER OF THE : Road Docket.
 CHANGE OF LOCATION AND LINES OF :
 THE HIGHWAY KNOWN AS STATE HIGH- :
 WAY ROUTE NO. 222, IN THE TOWN- :
 SHIP OF STONYCREEK, COUNTY OF : PETITION FOR RULE TO SHOW CAUSE
 CAMBRIA AND STATE OF PENNSYLVAN- :
 IA. :

I N D E X

<u>PETITIONER'S</u> <u>WITNESSES:</u>	<u>DIRECT</u> <u>EX.</u>	<u>CROSS-</u> <u>EX.</u>	<u>REDIRECT</u> <u>EX.</u>	<u>RECROSS-</u> <u>EX.</u>
Frank P. Naus	15	22	26-45-54	28-49-59
Howard E. Breneman	36	37		

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RESPONDENTS'
WITNESSES:

Roy B. Griffith	60	62		
Zelpha Penrod	64	66		
Maurice A. Springer	67	68		

IN RE: PETITIONS OF ROY B. GRIFFITH AND CATHERINE MARIE GRIFFITH, HUSBAND AND WIFE; CARL MONTAG AND VALETTA MONTAG; HUSBAND AND WIFE; ZELPHA PENROD; CLYDE EDWIN KEIPER AND KATHRYN MARGARET KEIPER, HUSBAND AND WIFE; THOMAS RICHARD SMITH AND DORIS MARIE SMITH, HUSBAND AND WIFE; CHARLES WISSINGER AND ALDA M. WISSINGER, HUSBAND AND WIFE; FREDERICK E. GRIFFITH; MELVIN R. STRONG AND EDNA MAE STRONG, HUSBAND AND WIFE; AND MELVIN C. STRONG AND ELILEEN N. STRONG, 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. :

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

Nos. 6,7,8,9,10,11,12,13, and 14 June Sessions, 1955, Road Docket. :

PETITION FOR RULE TO SHOW CAUSE. :

Courthouse,
Ebensburg, Pa.,
January 15, 1958.

BEFORE THE HONORABLE ALTON A. McDONALD, JUDGE OF THE FORTY-SEVENTH JUDICIAL DISTRICT.

APPEARANCES:

For Petitioner, Department of Highways, Commonwealth of Pennsylvania: Edward F. Peduzzi, Esq., and Michael Deckman, Esq.

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

For Cambria County: William D. Shettig, Esq.

BY THE COURT:

Mr. Peduzzi, since you are the petitioner on the rule perhaps you should start by giving us a background of the matter.

BY MR. SHETTIG:

If the Court please, there is another petition for rule to show cause why Cambria County should not be joined as a party defendant in the proceedings.

BY MR. PEDUZZI:

If the Court please, there was a change of location or widening of a road in Cambria County known as Route No. 222 in the

Township of Stonycreek, and as a result thereof certain of the owners of property abutting on the said highway filed petitions in the Court of Quarter Sessions for the appointment of viewers to assess damages. The Commonwealth of Pennsylvania, Department of Highways, has filed a petition for rule to show cause why the petition for appointment of viewers should not be dismissed, and it alleges as a reason that there was no taking of any property by the widening or relocation of the highway in 1950, for the reason that any taking or change in the highway was done within the legal right-of-way as was established by the Department of Highways on March 19, 1924, and that all the taking that was done in 1950, I believe, was the taking of the property that was condemned by the Commonwealth in its plan of the highway that was made on March 19, 1924. Of course, we would like to allege other reasons.

BY THE COURT:

Is there then a factual question here that will have to be determined as to the lines of the original right-of-way in 1924?

BY MR. GIBSON:

Well, the unfortunate situation is, your Honor, the Commonwealth of Pennsylvania has all the facts in their control.

BY MR. PEDUZZI:

What we propose to do this morning is present whatever facts the Commonwealth has, present its plans, to form the basis on which a decision can be made on these questions.

BY THE COURT:

Then, that is, you would propose to show there was no actual taking of any land in 1950, that the road is within the lines of the right-of-way of the 1924 taking?

BY MR. PEDUZZI:

That is right.

BY THE COURT:

You will show that. Is that what you are referring to, Mr.

Gibson?

BY MR. GIBSON:

Yes. They have all the facts.

BY MR. PEDUZZI:

Of course, as Mr. Gibson knows, there is a considerable question of law still involved, and we would like to have the facts placed on record so that the law that was then applicable can be applied, or if it wasn't applicable, the law in 1950 can be applied, depending on the facts established.

BY THE COURT:

The primary purpose heretoday then is to get the facts on the record?

BY MR. PEDUZZI:

That is right.

BY MR. GIBSON:

The Commonwealth's facts, because to date we really haven't known what their contentions are. We know they are relying on their plan of twenty-four, but that is the extent of it.

BY THE COURT:

All right. Mr. Gibson, what is your position?

BY MR. GIBSON:

Our position is simply that they have not complied with the requirements of the statutory provisions for a State Highway System, and until we have all the facts that the Highway Department have, we are not in much of a position to go forward, but we do contend with the knowledge we have that they have not complied with the statutes applying in this case, and that the actual taking was in the year 1950, at which time the plan was put on record in Cambria County. The plan signed by the Secretary of Highways and the Governor, and recorded in the Recorder of Deeds Office for Cambria County.

BY THE COURT:

Well, do you mean you cannot say now without testimony in

what way they have not complied with the provisions?

BY MR. GIBSON:

I can only speculate it at the present time. I believe the burden is on the Commonwealth to prove that they have complied with the law. This is a statutory highway, and I think it requires strict construction of all of the procedures set forth in the Act.

BY MR. SHETTIG:

If the Court please, representing Cambria County, we have been brought in on a petition for rule to show cause why we should not be joined as a party defendant in these some nine condemnation proceedings before the board of viewers. This was done just last month, quite sometime after the proceedings were instituted. We were brought in on the theory that the county is responsible, either under an Act of Assembly, or by agreement with the Highway Department, for either all or at least a portion of the damages which may have been sustained by the various property owners involved. I have prepared an answer to the petition and have acceptance of service by the attorneys involved and would like to file that in open court, if I may, setting forth that the facts in the first two paragraphs of the petition, which are merely the fact that a board of viewers has been appointed and that the Highway Department has been named as a defendant in the original petition, but the averment in the third paragraph is to the effect that the county is responsible for any property damages in these nine cases, and we deny that for two reasons. One, under the Acts of Assembly the county must accept and approve the plans for any changes in widths or lines or location before it can become liable for damages to a property, abutting property owners, and that the county did not accept or approve these particular plans; and secondly, that we raise the question of the Statute of Limitations having expired. Now, the county is somewhat in

same position as Mr. Gibson as far as just what was done by the Highway Department when, but I have reviewed the different Acts of Assembly pertaining to the county's responsibility and also what must be done by the Highway Department by way of preparation of plans, the approval by the Governor, and recording, and so on, and, as I understand the facts, some of which are not in the petitions or on record yet, but which will put in ^{the} record, there are actually three plans involved in this controversy pertaining to this particular section of highway. There was a plan prepared by the secretary, or, I believe, he was then the Commissioner of Highways in 1924, approved by the Governor, and some work of construction was done in accordance with this plan. The Highway Department take the position that the damage which these people are claiming now was done at that time, or at least the property was condemned at that time.

BY THE COURT:

That was a widening, was it?

BY MR. SHETTIG:

A widening, as I understand. I should say the property was condemned in accordance with the width of lines on that map. Now if such was a fact, the county then would take the position that any claims are barred by the Statute of Limitations, and we, or anybody else, shall not be a party to these proceedings. There was another plan in 1941 which was prepared by the Secretary of Highways and approved by the Governor. Now, in backing that up as far as pointing to the county, the Highway Department makes reference to a resolution adopted by the County Commissioners on August 8, 1941, where the Commissioners resolved that Cambria County agrees that they will assume the liability for changes of State Highway Route 222-5 in Stonycreek Township between stations 1916-64.5 and station 1938-56.83. The county also assumes all damages arising out of any change or alteration of the drainage

resulting from the construction of this particular highway. Now, that was in 1941 that the county agreed to that. At that time the Act of Assembly as far as the responsibility, or who was responsible for damage to abutting property owners was governed by the Act of 1935 and prior Acts. The prior Acts briefly provided that the--I am sorry, that should be the Act of 1937 and prior Acts, which provided that after a plan is prepared by the Secretary of Highways and approved by the Governor that he shall notify the Commissioners of any changes in these plans from existing plans in writing and then the Commissioners shall enter into agreements with the various property owners and regardless of whether or not an agreement is entered into the State may go ahead and construct and either the county or the property owner may petition the Court of Quarter Sessions for the appointment of viewers and so on for a final determination. The county if it refuses to agree then, I should say, if it accepts the changes, these plans, automatically assumes the property damage and liability, but if it refuses to agree, then it is the State's responsibility. Now, in this case, the State is pointing to this 1941 resolution, or at least I imagine they are going to say that we have accepted responsibility here. However, I would like to call the Court's attention to the fact that this was in 1941, the actual condemnation or construction and damage to the property was not until 1954, and after, or between those two dates, forty-one and fifty-four, there was a change in the law as to the method of determining the responsibility between the State and the county for damages, and we don't think that the county could be held to a resolution in 1941 accepting responsibility because of the change in the law and also the change in value of the properties. I think the Court could take notice that the values of property greatly increased between those two dates, and the county acceptance in 1941 would have been predi-

cated on an estimated damage to the property owners and so on, and then to hold the county actually sixteen years later liable would greatly increase the amount of damage. Now, as I understand Mr. Peduzzi's position, he takes the 1924 plans and says that the condemnation was effective as of that date. If such is a fact, then the county and everybody else is out, because of the claims being barred by the Statute of Limitations. If, if I understand Mr. Gibson's position correctly, he is taking the 1950 plans and saying that is when the condemnation was effected, and the petitions for the appointment of viewers were filed within the Statute of Limitations, which is six years. We believe that that would let the county out, because there was a change in 1945 in the Act as to the responsibility between the State and the county for the road damages and requiring that we agree, specifically requiring that we agree to assume the damages, and we have not agreed in 1950 to the damages, to assume the damages under the 1950 plans.

BY THE COURT:

Tell me what happened between 1924 and 1941 that brought about the agreement with the county--was there a change in the plan?

BY MR. SHETTIG:

Well, in 1941 there were plans prepared, but I don't believe there was any construction.

BY MR. PEDUZZI:

Yes.

BY MR. SHETTIG:

Was there construction?

BY MR. PEDUZZI:

Yes. There was construction on the other side of the highway.

BY THE COURT:

Were any of these properties affected by that construction?

BY MR. PEDUZZI:

No, none of these properties. They are on the opposite side.

BY THE COURT:

You have the county's agreement as to that particular damage

BY MR. SHETTIG:

I believe that is true.

BY THE COURT:

Rather than the damage that is at issue here today.

BY MR. PEDUZZI:

That may be.

BY MR. SHETTIG:

The question is though that worries me, is the fact that these width lines at that time on that 1941, if the width lines are wide enough to bring in these properties whether or not the county was in it. I think, as far as I reviewed this thing last night, there is only one way that the county can be held and that is if the Court adopts that the 1941 plans were the ones that condemned it, the property, and then the claims are barred by the Statute of Limitations.

BY THE COURT:

Well, that may be. I can see there are a lot of complicated questions here. I am not too much concerned about the legal questions, but I am concerned about the jurisdiction of this Court to determine the factual questions in a proceeding such as this.

BY MR. SHETTIG:

Your Honor, can I analyze what we have before us. Maybe it will help all of us. At least it will help me, sometimes thinking out loud. We have petitions for the appointment of viewers filed and in one or two cases the viewers met upon the property for the view itself, then the matter laid dormant for quite sometime, and was recently revived by a petition for rule to show cause why the appointment of the viewers should not be stricken. On the basis, as I understand Mr. Peduzzi, the condemnation was actually in 1924, and therefore he is raising the Statute of Limitations as a bar to any claims. Is the question of Statute of Limitations for the determination of the board of viewers or for the Court?

Is that a question of law, or is it a question of fact? Now, in determining whether or not the statute is barred, or the Statute of Limitations is a bar here, the Court must, I think, find certain facts, because they are not clear, and we have gotten ourselves into a point where ^{it is} a question of mixed law and fact, and then it is for the Court's determination rather than a board of viewers or a jury.

BY THE COURT:

Assuming that the viewers had gone ahead with their proceeding, of course, first of all they establish title. Now, in the title here is the question of the right-of-way. Certainly if the right-of-way was condemned properly back in 1924, then the Statute of Limitations is applicable; but don't we have to determine the facts before we can determine the law, before we can determine whether the statute does apply, and the facts would almost have to be determined by some other tribunal.

BY MR. SHETTIG:

If I may interrupt. We have either one of two courses facing us. Either this is a question of mixed law and fact, which is for the Judge; or a question of plain and pure simple fact, which is then for a board of viewers.

BY THE COURT:

This is not an equitable proceeding where the Judge can determine the facts.

BY MR. SHETTIG:

No, I will grant that, but I think in any proceedings where you have such a mixed question of law and fact that it is hard to determine just which is fact and which is law that that is then for the Court to determine. I believe I cited that to you in a brief.

BY THE COURT:

Well, wouldn't the question law as to the viewers' report be decided on exceptions to the report after the viewers have found

the facts?

BY MR. SHETTIG:

Well, that is one method, but isn't this another method, just the same way as we have in regular ^{civil} actions that I can file an answer and then move for judgment on the pleadings, or I can wait and move for a compulsory nonsuit or directed verdict?

BY THE COURT:

That is quite true, but then you have all of your facts established by the pleadings. Here we have not. We have to establish facts on sworn testimony here. I concede that we do at times determine questions of law as they apply to facts, but the facts are agreed, but here apparently there is no agreement. Now, if you can agree on the facts, then I can apply the law to them; but you certainly cannot agree on Mr. Peduzzi's position, because if you do it is obvious the Statute of Limitations bars the claims.

(Off the record discussion).

BY MR. SHETTIG:

I can agree with either one, and get out of it completely.

BY THE COURT:

I can see your position. You figure you are out under 1924 or 1950. I am thinking about the position of the Commonwealth and the position of the claimants here. Well, since we are all here, how detailed is the testimony going to be?

BY MR. PEDUZZI:

As far as we are concerned it is not going to be too great a detail. We want to present the plans and offer those in evidence and show what the Department of Highways has, and that is it.

BY THE COURT:

Up to this point there is not too much known by the property owners. Perhaps it would be better to bring it out on the record.

then you can proceed from there, unless you object to taking testimony at all?

BY MR. GIBSON:

Well, I would like to know what constitutes plans. I mean, I don't want a plan of 1924 claiming what was originally a right-of-way when there is no original right-of-way plan. When a State Highway Department took over this road as a state highway, did they have a plan of that highway of the widths and so forth?

BY MR. PEDUZZI:

The 1924 plan shows the lines of the original highway.

BY MR. GIBSON:

Where is the original plan of that highway?

BY MR. PEDUZZI:

I don't know whether there is any such plan in existence. It was a turn-pike, I understand.

BY MR. GIBSON:

I think that is going to have to be put on record before we can do anything.

BY THE COURT:

Is this the Bedford-Scalp Level turnpike?

BY MR. PEDUZZI:

Yes.

BY THE COURT:

And you are talking about the original lay-out of that road?

BY MR. GIBSON:

When the State Highway took it over--when the State Highway Department took it over, or the State took it over.

BY MR. PEDUZZI:

That is when they took it over, in 1924.

BY MR. GIBSON:

No. It was designated in 1911 as a State Highway.

BY MR. SHAHADE:

In order to show diversions, you will have to show the

original plan, if you want to show a diversion.

BY MR. PEDUZZI:

Well, the 1924 plan does show where the original highway laid, then it shows the superimposed new highway on it.

BY THE COURT:

Was it a State Highway in 1924, that is Mr. Gibson's question?

BY MR. GIBSON:

Well, it was a state highway, but what was the original state highway, or the original highway taken over by the State, and when and what were the widths?

BY THE COURT:

Maybe they can answer that.

BY MR. GIBSON:

I mean, I don't see where they can incorporate in a plan of 1924 lines they contend were the original lines, if there is no plan showing the original lines when the State took it over. How else can you determine diversions?

BY MR. PEDUZZI:

That is it. The 1924 plan does show the original lines of the highway and it shows then the changes.

BY MR. GIBSON:

All right. Where did they get that information? I want the plan that they superimposed in your plan of 1924.

BY MR. PEDUZZI:

They get the information from the survey that was made at the time the 1924 plans were prepared. They show the right-of-way of the road as it existed and also the right-of-way of the road as it was changed. One is superimposed on the other.

BY MR. GIBSON:

But where do the original widths of the highway come from? I mean, when were they established?

BY MR. PEDUZZI:

I don't think we have that information. I don't think it is necessary.

BY THE COURT:

In view of the fact the road was there, ^{and} was there longer than twenty-one years, would it matter?

BY MR. GIBSON:

If they are going to stay in the road bed, I say no.

BY THE COURT:

The 1924 plan was a widening rather than a diversion, was it?

BY MR. PEDUZZI:

It was a reconstruction of that highway.

If the Court please, I would like to introduce Michael Deckman. He is an attorney for the Department of Highways. I would like to have Mr. Deckman admitted specially for this matter.

BY THE COURT:

We will allow the admission.

BY MR. DECKMAN:

Thank you. I would like to get into this discussion here. As far as the original road, the road may have been taken over in 1911 by the Sproul Act, but at that time no plans were drawn up. The government just took over the roads as they lay on the ground. This 1924 plan is the first plan that the State Highways drew up regarding this particular road, and the plan shows how the old road lay right on the ground. It is shown on this plan by dotted lines, and you can see by other lines where we put the 1924 construction.

BY MR. PEDUZZI:

So that is all the department can possibly have.

BY MR. DECKMAN:

If you want more than that, I don't know where you would

ever get it, because it just doesn't exist.

BY MR. GIBSON:

I don't know where you could get it either. They are contending diversions, we would have to have something to start with.

BY THE COURT:

A reconstruction.

BY MR. GIBSON:

A reconstruction, not a diversion. Do I understand that - -

BY MR. DECKMAN:

A reconversion from this road that lay on the ground, and our plan shows that.

BY THE COURT:

Well, a reconstruction may be a diversion or a widening. It may be both.

BY MR. DECKMAN:

It is both. In some places its an actual relocation, goes many feet from the old road. In many places it is just a slight divergence, the rounding off of a curve.

BY MR. PEDUZZI:

If this 1924 plan did not have drawn on it the old road, then I can see Mr. Gibson's point of view, but it does. It is definitely plotted on the plan, plus the new road as it was paved.

BY MR. GIBSON:

Wasn't this road paved prior to 1924 with macadam?

BY MR. DECKMAN:

I don't believe so.

BY THE COURT:

I believe it was.

BY MR. DECKMAN:

This is the first pavement that the State put on.

(Off the record discussion).

BY THE COURT:

Well, rather than discuss it any more, I think we can see the

problems that are involved. Let us get the facts on the record and argue it later.

Mr. Shettig, did you say you had another petition to file?
BY MR. SHETTIG:

No. Mr. Peduzzi actually has two petitions. One to dismiss the board of viewers, and one to bring in the county as a party.

BY MR. PEDUZZI:

I would like to call Frank P. Naus.

FRANK P. NAUS, called, sworn.

DIRECT EXAMINATION BY MR. PEDUZZI:

Q Where do you reside, Mr. Naus? A 608 Clark Street, Hollidaysburg.

Q Are you employed at the present time, and if so with whom?
A I am employed by the Pennsylvania Department of Highways at the present time.

Q And in what capacity? A As District Plans Engineer.

Q How long have you been employed by the Highway Department?
A Since 1925.

Q Are you a registered engineer? A Yes, sir.

Q And how long have you been a registered engineer? A Approximately, I would say from memory, about eleven years.

Q Have you served with the Department of Highways in this district for sometime? A In this district, District 9, since 1928 when the district was established as District 9.

Q Mr. Naus, do you have with you the official plans of the Highway Department showing the location and lines of the highway as established in 1924 for Route 222, Stonycreek Township? A I have.

Q These plans that I show you, Mr. Naus, are the official plans of the Department of Highways of the Commonwealth of Pennsylvania, is that correct? A That is right.

Q And they are maintained at your office at Hollidaysburg in District 9? A Prints of the plans which we have here are our file

plans. The originals, I believe, are in Harrisburg; but these are prints of the original plans.

Q These are prints of the original plans as maintained in your office? A That is right.

Q Do these prints show when these plans were approved by the Secretary of Highways and the Governor of the State? A The plans were approved by the Secretary of Highways on March 4, 1924, and by the Governor on March 19, 1924.

BY MR. PEDUZZI:

Do you have any objection to these plans, Mr. Gibson? They are prints that they maintain in their office.

BY MR. GIBSON:

Q Do you know of your own knowledge whether these plans are on record in Harrisburg? A We have to get our prints from the original plans in Harrisburg. The original tracings for these plans are in Harrisburg from which we get our prints.

BY MR. PEDUZZI:

Q That are maintained in your office? A And these are the prints that we get from the central office in Harrisburg, from the original tracings. The central office--I might bring out--our central office in Harrisburg keep on file the original tracings and if we require prints of those plans we get them through our central office and they make blueprints from the original tracing.

Q In other words, none of the districts maintain any original tracings at all, is that correct? A No. The original tracings are on file at the central office.

Q In the Department of Highways in Harrisburg? A That is correct.

Q And these are prints made from the original tracings? A That is right.

BY MR. GIBSON:

Are you offering these, Mr. Peduzzi?

BY MR. PEDUZZI:

No, I haven't offered them.

BY MR. GIBSON:

Well, when you do, I want to know for what purpose.

BY MR. PEDUZZI:

Q Now, Mr. Naus, do those plans show the location and the lines of State Highway Route 222 as established in 1924? A That is right. They do.

Q And do those show the location, the location and the lines of State Highway Route 222 as established in 1924 as affecting these properties of the persons involved in these various proceedings? A I didn't quite understand the question.

Q I mean, do they show the lines of the highway as established in 1924 as they affect the properties of these people here involved in these proceedings? In other words, abutting these people's properties? A The people involved that were involved by this plan may not own the property at the present time. I will bring that out. The plan as presented here is a plan as the road was constructed in 1924, adjoining the properties, I would say, that are in question.

Q That is right. A Whether they are the same property owners I don't know.

Q Now, Mr. Naus, will you turn to the section of the plan affecting the properties that are in question? A (Witness does so).

Q Now, Mr. Naus, does that plan show the original lines of the highway as ^{they} existed prior to 1924? A Yes.

Q How is it shown on that plan? A On this plan the edge of the pavement as existed prior to the construction of this plan is shown by dashed lines.

Q And according to these plans what was the original width of the highway as shown by the dotted lines? A There is no dimen-

✓
sion given on the plan as actual dimension. The only thing I can tell is the scale dimension between the original pavement edges, which in this case, would vary. Now, back here, you see, in that case it seems to scale 18 feet. There it seems to scale 16 feet. There is seems to be 16 feet.

Q In other words, the original roadway as shown by the dotted lines on this plan was at various widths? A It seems variable in width. There it scales about fourteen feet. Its a variable scaled width.

Q And what was the right-of-way line of the Commonwealth in 1924? A Prior to the adoption of this plan?

✓
Q Yes. A 40 feet as shown on this plan.

Q That was the right-of-way prior to the adoption of this plan? A That is right; and marked as legal right-of-way on this plan of 1924.

Q Now, did this plan of 1924 then take in an additional right-of-way? A That is right. It took an additional right-of-way from an established center line.

Q And the right-of-way that was established by the 1924 plan and as shown by the plan is what? A 60 feet. 30 feet on each side of an established center line.

Q And this 1924^{plan} then did establish a center line of this highway, is that right? A That is right.

Q Now, does that plan anywhere along the way show any diversion from the center line of the old existing highway? A It does.

Q And can you tell us whether any portion of that highway was diverted, or the center line of that highway was diverted where these properties in question are involved? Do you know what I mean? A Yes, I see what you mean. Right in here you have a diversion (indicating on plan).

Q Where is that? A (No answer).

Q That is in front of the William Griffith property as it appears

on this plan, is that correct. A. That is right. As it appears on the 1924 plan.

Q Which side of the highway are we involved with at the present time? A. The east side.

Q And which side is that as shown on this plan? A. On the righthand side.

Q On the righthand side? A. Yes.

Q In other words, we are involved with this portion in here? A. That is right. This is your north point, which would be on the east side of the highway.

BY THE COURT:

This William Griffith land which you pointed out which one of the parties involved here would that be?

BY MR. PEDUZZI:

Well, that was on the 1924 plan. We are trying to tie that in with a later plan.

BY THE WITNESS:

Here we have two properties which are the same, John D. Strayer.

BY MR. PEDUZZI:

Q Can you tie that in with the 1924 plan? That is what I want.

A. Yes. I think I can.

(Off the record discussion).

Q In other words, what is shown on this plan that you have before you is what existed in 1924? A. That is right. We were trying to establish here the location of this plan in connection with the 1950 plan.

Q That is right. A. As far as the location is concerned we are trying to determine any deviation from the old road as existed before the 1924 plan and the construction of the 1924 plan.

Q That is right. A. And at the location of the J. D. Strayer property, I guess that is the same name, the road did deviate

from the center of the present road there at that location, and of course on the opposite side would be the Hoffman property.

BY THE COURT:

Q Do you mean the deviation^{that} occurred in 1924 from the old road or the 1950 from the 1924 road? A There was a deviation from the old pavement which existed before 1924 when the pavement was constructed in 1924 by that plan.

BY MR. PEDUZZI:

Q There were various deviations along that roadway as established in 1924, is that right? A That is right. Here is a complete relocation back on the Sarah Schrader property.

BY THE COURT:

Is that one of the properties in question?

BY MR. PEDUZZI:

No.

BY THE COURT:

We do not want to put anything on the record that is not pertinent here.

BY MR. DECKMAN:

If it please the Court, our point is that the road did deviate in many spots, and once the road deviated, then the whole plan under the Act need not be recorded.

BY MR. GIBSON:

Well, it could deviate three miles from where these people were.

BY MR. DECKMAN:

Oh, but this is all one plan - -

BY MR. GIBSON:

Yes, I understand that.

BY MR. DECKMAN:

And we record the plan as a plan, not each property individually. Our point is that the road that ^{covers} the map did deviate in some

spots, therefore the plan comes under that section of the Act that does not require recording.

BY MR. PEDUZZI:

Q Now, Mr. Naus, perhaps it might be well to introduce that map which you made. Did you have a map prepared from these 1924 plans and also from the forty-one plans and the 1950 plans showing the changes made in each of the stages? A That's right. I did.

Q And that plan was prepared under your supervision from the original plans, is that correct? A That is right.

Q Now, is this the plan that was prepared under your supervision from these various plans of the State Highway Department? A It is; with the information, this plan was prepared on the plan of 1950, superimposed the plans of 1924 and 1941.

BY MR. PEDUZZI:

Now, this is the one I would like to offer in evidence.

BY MR. GIBSON:

Aren't you going to offer the others in evidence?

BY MR. PEDUZZI:

We can't leave those plans here.

BY MR. GIBSON:

Why not?

BY MR. PEDUZZI:

I had them make this plan from those so we could offer this in evidence. This was done under the direct supervision of Mr. Naus.

BY MR. DECKMAN:

This is the one we are basing it on.

BY MR. GIBSON:

I feel that one should be the basis of your case.

BY MR. PEDUZZI:

Well, we will offer this original plan of 1924 in evidence.

Do you have any questions on it, Mr. Gibson?

BY MR. GIBSON:

Well, I object to that portion of the plan setting forth the old highway. I don't see what you base that on, or how you arrived at the old original right-of-way.

BY MR. PEDUZZI:

Q Now, Mr. Naus, these dotted lines that are shown on these 1924 plans portraying the old original highway, those lines were determined by survey, is that correct? A Those are the actual lines of the road as it existed prior to the construction of the road under the 1924 plan was located by survey from a construction line which appears on the 1924 plan, from actual surveys, dimensions from the center line shown on the 1924 plan.

Q And at the sametime you surveyed the new lines that were established by the 1924 plan, is that right? A That is right. When the survey for the 1924 plan was made, actual location of the existing road was made from measurements from the established center line on the plan of 1924, so your dimensions are tied in with the center line of the plan of 1924.

CROSS-EXAMINATION BY MR. GIBSON:

Q My question is, how did you determine the center line of the original road in preparing these plans and setting up this plan in 1924? A How was the center line established?

Q Yes. A The center line was established--I didn't establish the center line--I am only assuming that the center line was established not from the existing center line of the old road, but as a line that would improve and nearly follow the line of the existing pavement. Our existing center line on the twenty-four plan does not follow exactly the center line of - -

Q What I am trying to get at, Mr. Naus, how you got the dotted line that you show on the 1924 plan as being the old road? How you arrived at that location for the old road? A That old road was located after the alinement for the construction of this plan

was set.

Q Well, then you arbitrarily put lines--you didn't actually locate the old road, did you? A Oh, yes. The old road was located from a line laid on the ground, from the survey line that was established on the ground, from that survey line the location and the off-sets to the existing road was taken.

Q How did you determine the center line of the road prior to 1924 when these plans were prepared? A We didn't determine the center line of the road prior to 1924. We determined the edges of the road on the survey of 1924.

Q Is that the paved portion? A That is the edge of the traveled road.

Q The paved portion, or does that include shoulders? A No, that wouldn't include the shoulders. That would be your traveled portion of the road.

Q How did you determine the 40 foot right-of-way as existing prior to the construction of this road in 1924? A That would have had to have been determined from previous records, right-of-way records.

Q Where are those records? A I can't answer that question where the records are, other than I can determine that that is the legal right-of-way as shown on this plan as the right-of-way as existing at that time. I can only identify the plan as to what it shows.

BY MR. GIBSON:

If it please the Court, I again object to this plan being submitted with those lines on it. They have not established where the original road was, and in order to determine a divergency by the plan of 1924 they are going to have to show definitely where the original road was when the State took it over. Without that we have no starting point. They can't arbitrarily place lines on a map and say well we diverged.

BY THE COURT:

Well, I think that the map would be proper to show where the traveled portion of the road was, but the question of the width of the right-of-way is another matter entirely. I don't think the map would be proper to show the right-of-way without some underlying method of arriving at it.

BY MR. DECKMAN:

If it please the Court, we are ^{not} entangled with this 40 foot right-of-way. We are not basing any claim on that. We are simply at this point trying to establish where the old road was and then to show that our 1924 road diverged from that road, and it is the 60 foot right-of-way that we took by this plan that we claim voids all these claims.

BY THE COURT:

So that in some cases even though there had been a 40 foot right-of-way there, the taking would be a lot wider in some places than others?

BY THE WITNESS:

In all cases.

BY MR. DECKMAN:

In every case.

BY THE COURT:

It would not matter whether they took a hundred feet or whether they took 40 feet in 1924, if they actually took it, is that your position?

BY MR. DECKMAN:

That is right.

BY THE COURT:

Well, I can see that then.

BY MR. DECKMAN:

But other than an actual survey on the ground there is no other way to establish where that road actually lay.

BY THE COURT:

I think that we would almost have to take, subject, of course, to countervailing testimony, that the hard portion or traveled portion of the highway is as indicated on the public record, or on the highway record. We cannot bring the engineers in.

BY MR. GIBSON:

My theory in a case like this, your Honor, is that the old line was put in after they determined where they wanted to go on this taking.

BY THE COURT:

He says not.

BY MR. GIBSON:

He didn't do the surveying either. The thing that bothers me, your Honor, is that they have got a uniform right-of-way of 40 feet from this paved portion of the road. Now, if they run a survey, it seems strange to me it would be so uniform when they were taking existing road on the ground. I maintain we have no starting point. The Commonwealth has not proved a starting point in order to go forward and prove a divergency from the former road.

BY MR. DECKMAN:

This 40 foot is undoubtedly based on the turnpike's charter, and would be so many feet from each side of all of the actual road that was lying on the ground. 40 feet was generally the width of a turnpike; but that is irrelevant as far as this discussion goes.

BY THE COURT:

I do not think the width of the right-of-way has much to do with it if there was a taking in 1924. The taking, they say, was 60 feet.

BY MR. DECKMAN:

That is right. It overlapped the 40 in every case.

BY MR. GIBSON:

Yes, but before they can take without recording this plan

in the Recorder's Office here in Cambria County, which they didn't do, they must show that they diverted, or diverged from the original road.

BY THE COURT:

And isn't that what they are doing now?

BY MR. GIBSON:

But where is the original road, and how did they determine that?

BY THE COURT:

The original road, they say, was the broken lines as indicated on this map.

BY MR. GIBSON:

And what I want to know is how they determined that?

BY THE COURT:

By survey.

BY MR. SHAHADE:

But where is your center line of the old road?

BY THE COURT:

There isn't any.

BY THE WITNESS:

There isn't any. The edges of the road were located from a line on this plan, whether eight feet to the left, or ten feet to the right, or whatever. Your dimensions are taken from this survey center line, the same line that your right-of-way is established from. In other words, the edges of the road are a certain distance whatever from your center line the same as your right-of-way actually measured on the ground.

REDIRECT-EXAMINATION BY MR. PEDUZZI:

Q This center line that was established then by the 1924 map would show any divergence from the center line of the existing road by moving either closer or further away from the edges of the old existing road, is that right? A That is right.

Q That would be any diversions from the center line? A Well, how are you going to tell. Let's take one section here and see how it diverges.

Q Right here? A Yes. Let's take something that is a little more hard to determine.

BY MR. GIBSON:

You may be right in the center.

BY MR. PEDUZZI:

Well, you would still follow the center.

BY MR. DECKMAN:

Some places we do follow the line and some places we diverge.

BY THE WITNESS:

Some places you may be on the center line and - -

BY THE COURT:

Just a minute. We are not getting a very good record here.

Mr. Gibson, you have objected to the admission of the maps, and Mr. Peduzzi then went further on, or rather, you began to question the witness as to how they determined the centerline. Are you finished questioning the witness on your objection to the admission of the maps?

BY MR. GIBSON:

To the admission of the map, no. I object to it for the reasons set for. No further questions.

BY THE COURT:

We will overrule the objection. Exception noted.

ALTON A. McDONALD, J. (SEAL)

BY MR. PEDUZZI:

Q Now, Mr. Naus, you prepared from these official maps another map showing in color the various changes that were made by the plans of 1924, 1941, and 1950, is that correct? A That is correct.

Q The 1924 highway as established by the 1924 plan is shown on

this plan in what color? A In red.

Q And the 1941 changes are shown in what color? A In green.

Q And the 1950? A In yellow.

Q These are strictly construction plans? A I mean the color shows the construction rather than the right-of-way? A The construction, yes.

Q Now, the different colors show the construction of the highway at the different times in 1924, 1941, and 1950? A Yes.

Q Now, as you show on your 1924 plan the right-of-way as established by that plan was 60 feet, is that correct? A That is right.

Q And did any of this construction that was done in 1924, 1941, and 1950 exceed or go outside the 60 feet right-of-way?

A You mean the construction?

Q Yes. A Other than the limit of slope on the 1950 plan.

Q That is not a property that is involved here, is that correct? A That is right. The only two places that exceeded the required right-of-way line was taken as necessary for slope easement and which did not affect the properties in question in this case.

BY MR. PEDUZZI:

That is all.

We would like to offer this plan in evidence, petitioner's exhibit No. 2.

RE-CROSS-EXAMINATION BY MR. GIBSON:

Q Mr. Naus, did I understand you to say on direct examination, or previous cross-examination, as to the plan of 1924 that the right-of-way lines as shown on that plan as existed prior to construction in 1924 were arbitrarily put in, the only actual figures were the paved portion of the highway? A I wouldn't say they were arbitrarily put in, they must have been put in from some record, the right-of-way line. We don't establish right-of-way

lines just arbitrarily.

Q But you don't know how those right-of-way lines were established? A I don't know from what record they were established. I will say it that way.

Q Now, from the plan of 1924 can you determine if any of the properties here involved if there was any actual entry on the real estate by the Highway Department in 1924? A By the acquisition, or by the plan - -

Q By actual either construction on the real estate or any other means? A By this plan of 1924?

Q Yes. A There was a taking on this plan of 1924.

Q What was that taking? I am talking about actual construction outside the old road bed lines as you have shown there? A Our actual taking would be out to our required right-of-way.

Q I am not asking you that, Mr. Naus. I am asking you if there was any actual construction on the real estate of the parties involved here in 1924 outside the old road bed as shown on your map?

BY THE COURT:

So that we understand. When you are talking about actual construction, as you termed it, you are not referring to a right-of-way?

BY MR. GIBSON:

Not a right-of-way. Not a line that is somewhere.

BY THE WITNESS:

A Actual paving. Your actual width would be in construction of the shoulder, would be taken beyond the actual pavement width.

BY MR. GIBSON:

Q Possibly. I am asking if any was done on the real estate here involved in 1924? A We would have construction beyond the actual pavement width if we had to change the grade at different locations, which would naturally lead me to believe without

the use of cross-sections, to believe that there was actual a taking beyond the existing , you might say, shoulder line of the original pavement before the plan of 1924.

Q Do you know if there was any actual construction or taking, physical taking, of the real estate in 1924 outside of the old road bed as shown on that map? A Without the use of cross-sections I can't tell you that.

Q Who has the cross-sections? A I imagine we could get that. I don't know for sure whether they are on file in Harrisburg at the central office or not. We could find out.

Q Would you know of your own knowledge, or through the records in the State, if the parties involved here, or their predecessors in title, were ever given actual notice of the widening of this right-of-way to the 60 foot width? A I can't tell you that. I have no knowledge of that.

Q Did you check those matters before you came here today?
A No.

Q Do you have access to the records in Harrisburg, the Department of Highways? A That would not come under my department. I am in the Plans Department. That would be in the Right-of-way Department.

BY THE COURT:

They take the position no notice was necessary, is that correct?

BY MR. PEDUZZI:

That is right.

BY MR. GIBSON:

Q You have nothing to do with the payment of damages?

A I do not.

BY MR. GIBSON:

That is all.

BY THE COURT:

Q Mr. Naus, you said there was a diversion at the property of

J. D. Strayer, is that correct? A That is right.

Q Well now, I did not understand at the time you testified, do you mean that is one of the properties here in question?

A I was really--I would have to compare that with this one. That would be close to the Keiper and Smith property on the east side of the road.

BY MR. PEDUZZI:

Q Thomas R. Smith? A That would be all right. The Keiper property would be right in here somewhere.

(Off the record discussion between witness and Mr. Peduzzi).

BY THE WITNESS:

A There would be some difference between the center line of the old road before construction and the construction of the road under plan of 1924 at the location of the Keiper property and the Smith property. They are both under one ownership.

BY THE COURT:

Q Is it a diversion to the opposite side of the road, or is it onto the property of Smith and Keiper? A In this case it would be a diversion to the opposite side, but our point is that there was a diversion.

I understand that. I am trying to arrive at an answer to Mr. Gibson's question as to where there was actually a construction or taking of the land of any of these parties for construction purposes in 1924. Is that what you wanted to know, Mr. Gibson?

BY MR. GIBSON:

That is right.

BY THE COURT:

I thought perhaps we could arrive at it that way.

BY THE WITNESS:

I would say at that location without the use of cross-sections, I would say at that location we did have a change of grade, which

in my mind would say that there would be some taking, because the grade was lower at that location, which in my mind I would say there was some taking beyond the existing pavement, beyond the existing road as it existed at that time. We lowered the grade here (indicating on map) about a foot. So naturally, it would tend in my mind to say that there was some taking of ground beyond the original old road that was in there, actual construction.

BY THE COURT:

Q But you are not sure of that? A I am not sure. Without the use of cross-sections I couldn't be sure.

BY MR. PEDUZZI:

Q Are there any further diversions of the highway north of that particular point of the Keiper property? A North of the Keiper property there are no diversions affecting any properties in this case.

Q Of course, north of that there was a considerable relocation of the highway on the Schrader property? A There was some change in location beyond that property, north of that.

BY THE COURT:

Q Was that part of this 1924 reconstruction plan?

BY MR. PEDUZZI:

Q The Schrader property? A The Schrader property^{ty} was south of that.

Q South of that? A Yes.

BY MR. DECKMAN:

Will you answer the Judge's question?

BY THE COURT:

Q This relocation that you were talking about on the Schrader property, is that part of the 1924 construction? A That is right.

Q And do you know of your own knowledge the distance that the Schrader property would be from any one of these properties, or

all of them? A. I could tell. I would have to figure it out.
(Off the record discussion as to distances and properties on map)

BY THE WITNESS:

Now, what was the question?

(Question read by stenographer as follows)

Q And do you know of your own knowledge the distance that the Schrader property would be from any one of these properties, or all of them?

BY THE WITNESS:

A. Approximately sixteen hundred feet. The Schrader property would be approximately sixteen hundred feet south of the properties involved.

BY THE COURT:

Q Of the nearest property? A. Of the nearest property. That is right.

BY MR. GIBSON:

That is all.

BY MR. PEDUZZI:

That is all.

RE-CROSS-EXAMINATION BY MR. SHETTIG:

Q Just a few questions, if I may, Mr. Naus. I would like to have you watch your exhibit No. 2, I believe it is, which is your prepared plan superimposed on your 24, 41, and 50 plans. Now, as I understand, on that prepared plan you have the 1924 plan in red, is that correct? A. The construction, the pavement, we will say, shaded in red.

Q The construction as of 1924 is in red, is that correct?

A. Yes.

Q Then the 1941 is green. Just what is that? Is that the construction in 1941? A. That is the widening of the pavement on the left, which would be on the west side.

Q West side? A. That is right.

Q Suppose we stick to west and east? A All right.

Q The west side is the opposite side from where these properties are situated? A That is right.

Q That are involved in these proceedings, is that correct? A That is correct.

Q Now, in 1941 was the right-of-way line changed to include any of these properties located on the east side and which are involved in these proceedings? A In 1941 the right-of-way line was not changed.

Q The right-of-way line was not changed from the 1924 right-of-way, is that correct? A That is right.

Q On the east side of the highway? A That is right.

Q All that was changed was construction was done on the west side of the highway, is that correct? A In 1941 on the west side of the highway was for the construction.

Q Was the right-of-way widened in 1941 on the west side of the highway? A No.

Q The construction then was all within your 60 foot right-of-way as established by the 1924 plan, is that correct? A That is right.

Q And all the construction was definitely on the west side? A In 1941.

Q That is right, we are talking about 1941. Now, the yellow represents the construction, as I understand, in 1950, is that correct? A That is correct.

Q Did the plan of 1950 widen the right-of-way as it existed from ^{the} twenty-four plan, which was a 60 foot right-of-way, or was all of the construction in 1950 within that 60 foot right-of-way? A It did not widen the right-of-way.

Q So therefore all of the construction in 1950 was within the right-of-way lines as established by the 1924 plan, is that correct? A That is right; with the exception of the slope ease-

ment as was mentioned in previous testimony that did not affect these properties involved.

Q There were, as I understand, several slope easements acquired by the Department of Highways in 1950 in furtherance of your construction? A That is right.

Q Now, will you explain to the Court what a slope easement is, so that everybody will understand what we are talking about? A A slope easement is that portion of land required in the construction of the highway beyond and outside of the required or legal right-of-way.

Q This land is outside your required right-of-way? A That is right.

Q And it may be a bank or something like that? A Or it may be at the bottom of the slope.

Q At the bottom of the slope where you either want ^{to} cut down the slope of the bank or fill in? A That is right.

Q And in this case I think it was all cutting down in 1950? I think all the properties are situate higher than the road?

A I believe that is right on the righthand side. It would be at the top of the cut.

Q In other words you would be just leveling off or sloping the ground a little bit, but they were all outside the right-of-way lines of the 60 foot right-of-way as established in 1924, is that correct? A That is right.

Q Now, did the 1941 or 1950 plans change the right-of-way lines? Did they extend from 60 feet to any other footage?

A Are you speaking of the 1950 plan?

Q The 1950 and forty-one plans? A The 1950 plan and the 1941 plan, the right-of-way width is the same as is shown on the 1924 plan, sixty feet, thirty feet from either side of the established center line.

Q Did the plans of 1941 show any construction which may not have been done, or I should say, any proposed construction which

may not have been done on the east side of the highway, or was all of the proposed construction and proposed changes located on the west side? A. The 1941 plan was for the improvements or widening of the present road on the west side, and the construction would be on that side.

Q And everything that is shown on that 1941 plan was constructed? A That is right.

BY MR. SHETTIG:

I was just eliminating the possibility there may be something over on the other side of the street that you didn't do.

Those are all the questions I have.

BY MR. GIBSON:

That is all.

BY MR. PEDUZZI:

That is all.

HOWARD E. BRENEMAN, called, sworn.

DIRECT EXAMINATION BY MR. PEDUZZI:

Q Mr. Breneman, where do you live? A I live on Allegheny Street, Hollidaysburg, Pa.

Q And are you an employee of the Department of Highways for the Commonwealth of Pennsylvania? A I am.

Q How long have you been so employed? A Starting in 1924 I have almost completed thirty-two years service.

Q Are you a registered engineer? A I am.

Q How long have you been a registered engineer? A 1941, sixteen years.

Q In what capacity are you employed? A I am District Right-Of-Way Engineer.

Q And how long have you been employed in that capacity?
A Outside of the title which has been changed occasionally I have been there for over nine years.

Q As right-of-way engineer? A As right-of-way engineer.

Q There has been some question here concerning the original road in the case involved here, the original turnpike, can you throw any light on that as to the width of that? A The original turnpike, which was the Scalp Level, and I believe Scalp Level to Johnstown, was established by Pamphlet Law--I can't tell you the exact year now without referring to the law book--with a definite width of 40 feet.

Q And do you know whether this turnpike was actually paved prior to 1924, of your own knowledge? A Not personally. I would presume that it had been paved, because of references to it in the past. I had not seen it prior to 1924.

Q Was this construction that was done in 1924, did that follow the same route or did it actually go beyond the old route in certain instances? A It generally followed the line, outside of some relocated sections.

Q There were definite relocated sections along the highway? A Definitely.

Q That was pointed out by Mr. Naus, is that correct? A That is right.

CROSS-EXAMINATION BY MR. GIBSON:

Q Mr. Breneman, you say you don't know if the road had been paved prior to 1924? A I did not know the type of paving, but from other references in the past there was a paving on it, but I had never seen it personally.

Q And how wide was it paved from the references that you speak of, that is, prior to 1924? A That I don't know, not having seen it.

Q Well, you speak of references? A Well, we had references to it being paved from other cases, not this particular proposition. The portion on the other side of Geistown I have been involved in cases and there were references made at that time to

the turnpike being paved.

Q Do you know when the State took over this particular section of the road as a state highway? A No. That was taken over by law, and I do not know the exact year.

Q But you do know that the turnpike was 40 feet? A That was the legal right-of-way width for the turnpike.

Q What is your source of information? A I just mentioned previously that it was by Pamphlet Law in the establishment of this turnpike.

BY THE COURT:

It seems to me that both of those facts could be established by perhaps stipulation.

BY MR. PEDUZZI:

I think so.

BY THE COURT:

You could examine the records in the library and determine the charter for the turnpike which would probably give the width of the road and then the taking over of the turnpike probably would be by Act of Assembly, that is, if it was a turnpike.

BY THE WITNESS:

The Act also would stipulate the width of the paving.

BY MR. GIBSON:

Q Do you handle damage cases on road construction, your department? A Yes.

Q Is that under your supervision? A That is right.

Q And you have all the records of any payment of damages on the roads under your jurisdiction? A I do.

Q Do you have the records for 1924? A No. We did not have any damages to settle in 1924. At that time they were all assumed by the county.

Q Wasn't the Commonwealth required to notify the county in 1924 of any proposed construction that they might be liable for

damages? A. They notified the County Commissioners, that is all.

Q. Do your records show that on this particular piece of highway in 1924 that the County Commissioners were notified of this particular construction? A. I do not.

Q. You don't know? A. No.

Q. Would that information be in your files? A. I don't believe in twenty-four that the Department of Highways contacted the County Commissioners from our angle, that's from construction or right-of-way.

Q. Well, where would that be in 1924, whose jurisdiction would that be in? A. That I couldn't say.

Q. Did I understand Mr. Naus to say that there had been certain parties paid for damages in this particular section due to the 1950 construction? A. That is right.

Q. How many were paid, if you know? A. Within this particular area?

Q. In this particular area, yes? A. There were four properties for which a claim was settled.

Q. And what was the reason they were paid? A. Due to the fact that there was a slope easement outside of the legal right-of-way which involved a partial taking.

Q. Can you locate the Zelpha Penrod property on those right-of-way maps? A. I can.

Q. And can you locate the property of Mrs. Dorothy Doney?
A. Yes.

Q. Was Mrs. Doney one of the parties paid for slope easement?
A. She was; and the name is D-o-n-e-y, Doney.

Q. And that is the only property between or adjoining Mrs. Penrod that required slope easement, is that correct? A. The Doney property does not adjoin the Penrod property. There is a Montag property between. That is the only slope easement in that block from Penrod Street down to Wissinger Street.

BY MR. GIBSON:

That is all.

CROSS-EXAMINATION BY MR. SHETTIG:

Q In 1950--I am talking about the 1950 plan now? A Right.

Q Did the county agree to be liable for any of the property damages? A They resolved not to be liable for any property damages.

Q Now, these slope easements which reference has been made to, any damages or any compensation due those people was paid by the State then? A That is right.

Q In 1924 did you know or do your records reveal whether or not the State Highway Department gave the county notice in writing of any changes or deviations in the road at that time? A We have no record to indicate that the department contacted the County Commissioners relative thereto.

Q Would there be any records in Harrisburg which would indicate that? A I would seriously doubt it.

BY MR. SHETTIG:

That is all I have, thank you.

BY MR. PEDUZZI:

That is all I have.

BY MR. PEDUZZI:

If the Court please, in answer to Mr. Shettig's question we do have on record in this courthouse entered to No. 316 September Term, 1925, and No. 317 September Term, 1925, petitions for the appointment of viewers, and it was an appeal of County Commissioners in regarding the awarding of damages to Curtis F. Schrader. So taking from the records the County Commissioners had assumed the payment of damages for the relocation and widening of this highway in 1924, from these records.

BY MR. SHETTIG:

I think that is an assumption that is not correct, your Honor.

In 1924, as I understand the Act of Assembly, fixing the county's responsibility, the Commissioner of Highways was allowed to construct, reconstruct, or improve any lines or change any lines or location of a highway with the approval of the Governor, and after this was done he should then notify the County Commissioners in the county wherein the change or width or lines would be and also advise them of the likely damages in writing. It specifically set forth in the Act that the notice must be in writing. Thereafter it was the duty of the Commissioners to enter into agreements with any abutting property owners, but I don't think we can assume, and my question was directed specifically to any written notice to the county, I don't believe we can assume from the fact that there were proceedings that the county was notified in writing. My question was very limited. We were bound under the law in 1924 to assume the damages. I wouldn't argue with that, once the Highway Department notified us in writing. In 1925 when those appeals were taken the county solicitor may not have raised the question as to whether or not they were notified in writing. He may have waived that.

BY MR. PEDUZZI:

Well, your office, the county office, have not been able to find any records relative to this 1924 change of plans of this highway.

BY MR. SHETTIG:

That is correct.

BY MR. PEDUZZI:

All with the exception of these two proceedings that I have.

BY THE COURT:

What was the outcome?

BY MR. PEDUZZI:

It was settled. There is a paper of settlement filed. Apparently the damages were paid. Now, December 6, 1926, the plaintiff

having received the full compensation by agreement of the cause the Prothonotary is hereby directed to mark the above entitled case discontinued; and the plaintiffs were the Schraders. In both instances there was a settlement. So apparently the county did assume the responsibility of paying damages for the relocation of this particular highway.

BY MR. SHETTIG:

It is not a question or whether we assumed it or not. We were bound under the law in 1924, as I understand it, to pay the damages providing we were notified in writing by the Secretary of Highways.

BY THE COURT:

It does not matter much as far as the county is concerned anyway because if there were damages the statute has already gone providing we decide the proceedings were proper, so it does not matter really.

(Off the record discussion).

BY THE COURT:

Is there anything further? Do you intend to offer testimony, Mr. Gibson?

BY MR. GIBSON:

I haven't had an opportunity to prepare testimony. We did not have the facts. I do not believe the petitions sufficiently showed them. I think we should be given the opportunity at another date to offer any testimony that we like.

BY THE COURT:

This is actually your first examination of any of these maps?

BY MR. GIBSON:

Yes.

BY THE COURT:

Incidentally, Mr. Peduzzi, I do not think you offered this map.

BY MR. PEDUZZI:

It was offered, but it wasn't admitted.

BY THE COURT:

Is there any objection to petitioner's exhibit No. 2?

BY MR. GIBSON:

No objection.

BY THE COURT:

Let it be admitted.

(Off the record discussion as to continuance of hearing).

BY MR. SHETTIG:

If the Court please, I would like to place these citations on the record showing the county's responsibility at various times since 1911 for property damages. The first Act is the Act of May 31, 1911, P.L. 468, Section 16; the next Act is the Act of April 6, 1921, P.L. 107, Section 1; the next Act is the Act of May 23, 1923, P.L. 341, Section 1; the next Act is the Act of May 4, 1927, P.L. 692, Section 1; the next Act is the Act of June 26, 1931, P.L. 1388, Section 4; the next Act is the Act of 13, 1933, P.L. 41, Section 1; the next Act is the Act of Special Sessions of January 2, 1934, being the special sessions of 1933, P.L. 209, Section 1; also the Act of July 12, 1935, P.L. 946, Section 3; the Act of June 21, 1937, P.L. 1951, Section 1; all of the Acts which I have enumerated so far can be found in 36 P.S., Section 171; the next Act was the Act of June 1, 1945, P.L. 1242, Article III, Section 301, and following sections, was codification of these prior Acts, and is found in 36 P.S. at Section 670-301 in the Pocket Parts. Those various Acts show the county's responsibility at various times when these plans were adopted.

BY MR. DECKMAN:

Your Honor, as far as Mr. Shettig relieving himself in this matter, I think there is one possibility that he could be held on, depending on the finding of the facts, if it would be found that

the 1924 plan was effective, for instance, but that notice had not be given to the parties, then it would be the county's business to pay the damages. That is just one possibility. There are probably others. I really do not feel that they should be relieved until the bitter end.

BY THE COURT:

In other words, not considering the 1950 plan as a new plan?

BY MR. DECKMAN:

That is right.

(Off the record discussion).

HEARING CONTINUED UNTIL FEBRUARY 7, 1958, AT 10:00 O'CLOCK, A.M.

AND NOW, FEBRUARY 7, 1958, AT 10:00 O'CLOCK, A.M., HEARING RESUMED.

BY MR. PEDUZZI:

It is hereby stipulated and agreed between the respective counsel to amend several of the petitions for Rule to Show Cause to show changes made to the highway in consideration here were made by a plan approved by the Governor on March 19, 1924, and that several of these petitions for Rule to Show Cause erroneously state a plan that was approved in 1941, and those petitions are to be amended to read that the plan was approved on March 19, 1924.

We would like recall Mr. Naus.

FRANK P. NAUS, recalled.

BY THE COURT:

Mr. Naus, you have been sworn and the obligations of your oath are still binding.

BY MR. DECKMAN:

I would like to have this plan marked for the purposes of identification as petitioner's exhibit No. 3.

REDIRECT EXAMINATION BY MR. DECKMAN:

Q Mr. Naus, I show you this plan which has been marked as exhibit No. 3 for purposes of identification, will you tell the Court wherein this plan differs from the other plan that we had submitted previously? A The difference is that - -

BY THE COURT:

Now, when you are referring to the other plan, you are referring to the map of 1924?

BY MR. DECKMAN:

Yes, your Honor.

BY THE WITNESS:

A This plan differs in one respect to the original plan of twenty-four as previously submitted as exhibit, I believe No. 1.

BY MR. PEDUZZI:

I believe that is correct.

BY THE WITNESS:

In that it superimposed the alignment to show the location

of the original turn pike as recorded in the courthouse at Ebensburg. It was recorded January the 23, 1893, incorporated in 1858-1863.

BY MR. DECKMAN:

Q Will you read the Deed Book there? A It is Miscellaneous Book 6, Page 133.

Q In other words, am I correct in saying that you took the calls for the original plan of this road that's recorded in the courthouse and superimposed that on the 1924 plan of the Highway Department? A And that is shown on this 1924 plan in red pencil. That is right.

Q Is there a difference between the plotting of this original road and the plotting of your 1924 construction? A It deviates slightly from the center line of the 1924 construction.

Q Will you point out some of the stations where there is a deviation? A Well, back here at station 900 on the plan of 1924, the original turn pike plan description was approximately 80 feet - -

BY THE COURT:

Q What station was that? A Station 900 on the 1924 plan. It would be 80 feet east of the 1924 plan center line; and at station 907 it is approximately 6 feet to the east of the center line of the 1924 plan.

BY MR. GIBSON:

One moment. May I interpose a question, your Honor?

Q Does this superimposing of the old turn pike on this particular map differ from your exhibit No. 1 where you show the old turn pike by a dotted line? A We didn't show the old turn pike, the center line of the old turn pike.

Q You didn't show the center line, but you showed the outside lines? A We showed the existing pavement edges.

Q Does this differ from that? A I don't know? Well, this

is not the same. This is the center line of the original turn pike as from record, and on the 1924 plan, which we spoke of before, it is the pavement edges as built then.

Q In this particular map that you are testifying to now where you superimposed the turn pike showing the center line, do your outside edges differ from your exhibit No. 1? A There were no outside edges on the original turn pike plan, just the center line.

Q Talking about exhibit No. 1, I - -

BY MR. PEDUZZI:

Just a minute. I think I know what you are driving at, off the record.

(Off the record discussion).

BY MR. DECKMAN:

Q Is it true then that the base plan on which you have superimposed the center line is the exact same plan as in exhibit one?

A That is right, with the exception of the superimposing of center line.

Q Well, outside of that superimposing, it is the same basic plan? A That is right.

Q You have testified, have you, that the 1924 construction center line diverges from the center line of the original turn pike as laid out, is that correct? A It does.

Q And you have also testified previously that the 1924 center line diverges in several places from the center line of the existing pavement as it is shown on the 1924 plan, is that correct?

A That is correct.

Q All in all, in your opinion as a professional engineer, would you call this construction, this job in 1924, a reconstruction or a widening, or would you call it either of these? A I would call it a reconstruction.

Q Will you explain to the Court why you consider it to be that rather than the other? A A reconstruction job really means

just what the word says, reconstruction insofar as it means a replacing or changing of one type to another where you have to remove the original pavement and replace it ^{with} pavement of a different type, while a widening job is merely holding the existing pavement that was in there and adding to on either side of the present pavement.

Q And what kind of pavement was put in in 1924? A Reinforced concrete pavement 18 feet wide.

BY THE COURT:

Q Do I understand ^{you} then to say that the original paving that was there, whatever composition it was, was removed and the new paving was put in? A That is correct.

BY MR. DECKMAN:

Q Though you have classified it as a reconstruction job, was there any widening of the existing pavement? A Not on this plan. Not on the plan of 1924.

Q I ask you to examine this here on page 6. Is the existing pavement narrower or wider than the pavement laid out in 1924?

A At station 909 the existing pavement as shown on the plan of 1924 scales a narrower width than was reconstructed.

Q So that there was some widening although the general classification of - - A There was no widening. There was an increase in width in pavement.

Q Increase in width, put it that that.

BY MR. DECKMAN:

I believe that we have no further questions at this time.

I would like to introduce this plan as an exhibit too.

BY THE COURT:

Do you have any objection to this plan?

BY MR. GIBSON:

No, your Honor.

BY THE COURT:

Very well, let it be admitted.

CROSS- EXAMINATION BY MR. GIBSON:

Q Mr. Naus, you just testified at station 909 there was a widening in the construction in 1924 over the previously existing highway, is that correct? A There was an increase in width between the existing pavement as shown on the plan and that as was constructed on the twenty-four plan.

Q How much? A Approximately two feet, scaled, approximately.

Q Is that a foot on either side? A No, I can't tell you whether it is a foot on either side. The original plan in 1924 shows the existing pavement as approximately six feet on the west side and approximately ten feet on the east side.

Q Isn't that in effect nothing more than replacing places in the old road, that is, prior to the 1924 construction, that may have been broken or sunken, or things like that? There was no general widening of the road in 1924? A There was no widening of the existing road, because it was reconstruction at that location.

Q Now, you have testified at station 900 there was a deviation, is that correct? A That is right.

Q Where did that deviation commence? What is the first station where there is a deviation between the old forty foot right-of-way as existed prior to 1924?

BY THE COURT:

I would like these deviations to relate to the properties in question if possible.

BY MR. GIBSON:

That is what I am getting at, your Honor.

BY THE WITNESS:

Well, when you speak of a deviation, you mean a major deviation, or any deviation whatsoever?

BY MR. GIBSON:

Q Well, what were you speaking of when you were testifying as to station 900? A That was one point that was just merely

picked out as a station to show - -

Q Is that a major or minor deviation? A That's a major deviation.

Q Where is the first station where the major deviation commences?
A The station where that major deviation began at, it would be approximately station 96 plus, approximately, thirty, would be the beginning of that relocation.

Q Is that 996? A That would be 896 plus about 30.

Q Are any of the properties here in question located on or along the road from the station you just mentioned, 896 plus 30, east?
A 896 plus 30, that would be north.

Q I am talking about the road continuing east, whatever way it went, towards Harrisburg or Bedford, or whatever? A Well, I would like to know which way you want to go.

Q On the road to Windber? What is this direction? A That would be east.

Q Are any of our properties in question here located on or along that stretch of road east from point 986 or 896? A No.

Q What is the closest point on your maps to the property of Zelpha Penrod, or formerly in the names of James Penrod and Zelpha Penrod? A I will have to get the other map.

(Off the record discussion).

BY THE WITNESS:

I would like to make one correction in station. I misquoted a station. The station I previously quoted as 900 is 1900. It is hard to see that; and the other station I quoted as 909 would be 1909. That is misleading on that.

BY THE COURT:

Q Then your deviation began at 1896 plus 30? A That is correct.

BY MR. GIBSON:

May I have the last question?

(Question read by stenographer as follows).

Q What is the closest point on your maps to the property of Zelpha Penrod, or formerly in the names of James Penrod and Zelpha Penrod?

(Off the record discussion).

BY MR. GIBSON:

Q What I want to know, what is the number of the station in front of or near the property owned by Zelpha Penrod and James Penrod on this particular map? A The closest property line would be at 1916 plus 60.

Q Now, looking--what did you say that was? A 1916 plus 60.

Q 1916 plus 60 going west to the line of Stonycreek Township and the City of Johnstown are there any major deviations?

A I would class that as no major deviations.

Q Now, listen to my question carefully: From the points just described are there any deviations outside of the 40 foot right-of-way that the State took over from the old turn pike as shown on your map? A I will state that the center line of the original turn pike right-of-way, which was 40 feet, would fall within the 60 feet right-of-way.

Q That is not the question I asked you, Mr. Naus. I asked you the 40 foot right-of-way as shown on that map that the State ^{took} over as a state highway, I presume in 1911, you have that set forth in those plans, have you not? A Yes.

Q Now, is there any deviation in the construction of the road in 1924 outside of those lines between these particular stations?

A Outside of the right-of-way?

Q Yes. A Yes.

Q Where? A Well, through the entire plan, because we took 60 foot of right-of-way.

Q That is not my question, Mr. Naus. You know what I am asking. I am asking you if there was any construction outside of that 40 foot right-of-way? Construction I am talking about. Did you put

the road outside--did you put the paved portion of the road?

A. I will have to check the plan through in its entirety to find that out. I can't answer that question without the use of cross-sections.

Q. You had those maps prepared, did you not? A. Yes.

Q. And you are an engineer. Why can't you tell if there is any construction outside the 40 foot right-of-way? You have it marked, have you not? A. This is the right-of-way mark here.

Q. And what do you call that? You call that the legal width, don't you? A. Legal right-of-way.

Q. Is that what we are talking about? A. Yes.

Q. Now, you have superimposed here very dark lines showing your construction, reconstruction of the highway in 1924. Do they go outside of that 40 foot right-of-way at all? A. I will have to examine each individual sheet as to the actual construction. There is only one fact that I might bring out to you in this case, our heavy lines are at the edge of the shoulder and which do not include the slope area and the slope area is not shown on this plan, and without the use of cross-sections I could not tell you whether or not the slope extended beyond the shoulder line. If we had a cut or fill there, it would naturally extend beyond the solid lines shown on this print. We will speak of it as the shoulder line.

Q. All right. A. I can see no place on this plan where the width between shoulder lines exceed and was extended beyond the legal right-of-way line shown on this plan.

Q. That is the 40 foot right-of-way that you term the legal right-of-way? A. Yes, that is between shoulder lines.

Q. Mr. Naus, isn't it true that all of the properties here in question are located north of this highway? A. Well, I think we are a little confused. This road really runs practically north and south. We will speak of it as a road running north and south to keep the record straight. We may have a deviation that would show

on one plan, that is, maybe one part would show and - -

Q Well, between the stations 1916 and, the stations that you testified to, as affecting our property and the city line, what is the relation of our properties here in question? A The properties would show generally on the northeast side of the road, we will say. Now, your question again.

Q That was it. You answered it. Mr. Naus, do the plans, particularly petitioner's exhibit No. 1, or petitioner's exhibit No. 3, designate what these plans are? A Drawings for a construction.

Q Now, where does it say that? A That is on sheet one of the plans.

Q That is the title sheet, is that correct? A That's the title sheet, yes.

Q Does the plan, 1924, either exhibit No. 1, or exhibit No. 3, show anywhere in the body of the plan what these particular plans are, outside of the title sheet? A You mean as far as title is concerned?

Q What they are? Does it explain anywhere in the body just what those plans are? A No. Other than the details of the plan that are in the body of the plan.

Q In other words, that is a construction map? A It is a construction plan.

Q And it is for the use of the engineers? A That is right.

Q That is what they do in following construction or reconstruction? A Yes.

BY THE COURT:

Q So that I understand what we are getting at here, the properties in dispute, are they located between this station 1916 plus 60 and the city line? A Penrod is the first property.

BY MR. GIBSON:

Yes.

BY THE WITNESS:

A. That would be the 1916 plus 60 station.

BY THE COURT:

Q They would all be located between that station and the city line? A Penrod is your most southerly property?

BY MR. GIBSON:

Yes.

BY THE WITNESS:

A That station is the southern terminus, approximate station, of the Penrod property, which is the first property that they have in question.

BY MR. GIBSON:

That is all I have.

REDIRECT EXAMINATION BY MR. DECKMAN:

Q I would like to go into one thing. Mr. Naus, is there any deviation from the center line of the 1924 road--let me phrase that again. Is there any deviation between the center line of our 1924 road and either the edges of the existing highway at that time or the center line of the eighteen hundred turn pike as it was laid out in the Recorder's Office downstairs, is there any diversion between these in front of any of these properties that are in dispute today? A Yes.

Q Will you point out in detail what diversions there are in front of any of the properties that are in dispute, and just start at the southern most part of the map and work your way north?

A Do you mean the most southern part of the map, or the properties in question?

Q The properties in question.

BY MR. GIBSON:

I think the station is 1916.

BY MR. DECKMAN:

Q Start at 1916 and work north.

BY MR. GIBSON:

Plus 60.

BY THE WITNESS:

A I think I stated this one time before. At 1923 there is a deviation of approximately three feet, scaled.

BY MR. DECKMAN:

Q In front of whose property is that? A I will have to get the other map. We will make this in reference to the 1924 map.

Q All right. A Then the property will be in relation to the station. That would be in front of the property of Dan Wissinger as shown on the 1924 plan.

BY MR. SHAHADE:

Q What station was that again? A 1923.

BY MR. DECKMAN:

Off the record.

(Off the record discussion).

BY MR. DECKMAN:

Q What station is that? A That is station 1923.

Q Whose property is just to the south of that? A Roy Strong.

Q Is there any deviation in front of that property? A Yes.

Q And how much approximately? A Well, - -

BY MR. SHAHADE:

That would be deviation of center line?

BY MR. DECKMAN:

Q Deviation--just explain that? A We are speaking of center line deviation now between the 1924 plan and the turn pike, the original turn pike center line.

Q All right. A We are speaking just of center lines.

Q Now, what did you say about the Roy Strong property? What did he say about Roy Strong?

BY STENOGRAPHER:

Q Whose property is just to the south of that? A Roy Strong.

Q Is there any deviation in front of that property? A Yes.

Q And how much approximately?

BY MR. DECKMAN:

Q Will you answer that question? How much deviation in front of the Roy Strong property? A Approximately one foot to, oh, approximately, two or two and a half feet, as scaled dimension.

Q Whose property is just south of that one? A James Penrod.

Q Is there any deviation there? A There is, yes. There is a deviation. The largest deviation at that property would be a scaled width, a scaled deviation of approximately three feet.

Q And what station is that? A That occurs at approximately station 1920 plus 45.

Q Now, let's go the other way. A That would be north.

Q Whose property is just north of Wissinger? A E. E. Constable.

Q Is there any deviation there? A The two center lines seem to follow very close together.

Q All right. Let's take the next one. Oh, let's put it this way: What's the next significant deviation as you go northward?

A At station 28 in front of the William Griffith property it is approximately one-half to one foot.

Q Proceed. A And proceeding north it increases in variation to, in front of the L. E. Griffith property, to approximately a foot. That is at 1929 plus - -

Q Could you make a general statement as to the deviations of these properties beginning at the extreme lefthand side of the plan on page six and going over to the last Griffith, which is L. E. Griffith at station 34--1934--just make a general statement?

A A general statement in that connection as far as deviations are concerned would be, your maximum deviation, which I would say would be of the two center lines, would be approximately three feet.

BY MR. DECKMAN:

I think that is all.

○ ○ ○ ○

BY MR. DECKMAN:

I hope we have cleared up the deviations.

BY THE COURT:

Well, as far as the Court is concerned, the testimony is admissible, but what I am concerned about, why can't we blow up one of these sections here and show that deviation on a map, that is, where it is apparent. He is scaling quickly there with a ruler. He says approximately a half foot to a foot. That is a pretty close approximation. Isn't it possible to get a map, and take that part of your road map and blow up the map showing your center line of 1893, the turn pike, and the center line in 1924, with respect to the width of the road of the original turn pike and the new construction in 1924?

BY THE WITNESS:

That would be possible to do that, but you must consider that there is no absolute tie, I will say this, between the turn pike center line and the center line of the 1924 plan, that is, to make an absolute tie as to the point being to a hundredth of a foot which we would measure in present day conditions. This turn pike record was given as to general locations for intersections of roads. See what I mean, it isn't that our center line is absolutely tied in, that both center lines are absolutely tied together, but they are insofar as general location is concerned.

BY THE COURT:

Since the State is depending on a divergency theory, I think it is very, very important that they show the diversions accurately, because it is susceptible of an accurate answer.

BY THE WITNESS:

I will say this, that the courses and distances do not follow exactly the courses and distances--I will say--the courses and distances on the turn pike recording does not follow exactly the courses and distances as shown on the 1924 plan, but they are in

the general location of that road. We don't have the same courses and distances on both plans on both center lines.

BY MR. DECKMAN:

If the Court please, we have the work sheet from which this was drawn and possibly that would show you how we arrived at this deviation. That is on a larger scale. I will offer that in evidence.

BY THE COURT:

Q Another thing, Mr. Naus, when we talked about the reconstruction plan of 1924, what are the termini of that plan? A That would be from 1864 plus 77.1 to 1938 plus 57.

Q And that is the entire plan of construction? A Yes, of 1924.

Q And can you tell me what the length of the road was that was constructed, that is, from terminus to terminus? A 7,302.6 feet.

BY MR. DECKMAN:

We will have this marked for the purposes of identification as petitioner's exhibit No. 4.

Q I will ask you to explain this plan to the Court? A This alignment as shown on the lower portion of the hard topping was plotted from the courses and distances as recorded, previously mentioned, in Miscellaneous Book⁶, Page 133, and recorded January 23, 1893, as the turn pike courses and distances, and the portion immediately above shown in pencil is the alignment as plotted from the courses'and distances' angles shown on the 1924 plan. The alignment of the turn pike was traced on vellum for the purpose of overlaying on the center line of the 1924 plan. We reproduced this on vellum so that we can make an overlay on the center line of the 1924 plan.

Q Will you find a common point and overlay it? A (Witness does so.)

(Off the record discussion).

○ ○ ○ ○

BY MR. DECKMAN:

Q What was the construction of our, 1924 road? A. 18 foot reinforced concrete pavement in 1924.

Q And what about the road that had been in before, what was done with that? A. It was removed. It was replaced by reinforced concrete pavement.

BY MR. DECKMAN:

That is all.

RE-CROSS-EXAMINATION BY MR. GIBSON:

Q You just testified as to certain deviations from the center line as you had laid it out, that is, the center line of the 1893 turn pike as laid out and the 1924 plan before the properties here involved. Now, did those deviations put, as you previously described, the shoulder line of that road as put in in 1924 outside of the 40 foot right-of-way that you have claimed by virtue of the plan of 1893 or the original laying out of the turn pike?

A. The shoulder line as shown on the 1924 seems to fall within the 40 foot right-of-way as established on the 1924 plan.

Q In petitioner's-exhibits No. 1 and No. 3, which I believe are identical, and the cross-section was superimposed so it could be seen plainly, the construction in 1924 and the original turn pike, do those maps show an ultimate width? A. On the 1924 plan?

Q Yes. A. No. I don't see the ultimate width shown on the plans of 1924.

Q And what is the line which denotes the 60 foot right-of-way as shown on that map? A. You mean how it is headed?

Q Yes. Well, what is it? A. It is, required width of right-of-way.

Q That is the terminology that you use? A. Yes.

Q Wouldn't it be true that it is also the ultimate width of that highway for future construction? A. No.

Q Well, why didn't you do any construction within that 60 foot

right-of-way before the properties here involved until at least 1950 or thereafter? A. The only thing I can answer that is, that additional construction wasn't necessary.

BY MR. GIBSON:

That is all.

BY THE COURT:

Q On the map which you have just examined, in answer to Mr. Gibson's question you said the 60 foot right-of-way was designated as the required width of right-of-way, is that correct? A. That is correct.

Q Now, there is also designated on that map, legal width of right-of-way, what does that refer to? A. Legal width of right-of-way refers to the width of right-of-way which is in effect at the time prior to the signatures on this plan, the approval of the plan. The legal right-of-way width is the right-of-way width that is in effect prior to acquisition of additional right-of-way on this plan.

BY MR. PEDUZZI:

That is all we have.

BY MR. GIBSON:

I would like to call at this time Mr. Roy Griffith.

ROY B. GRIFFITH, called, sworn.

DIRECT EXAMINATION BY MR. GIBSON:

Q What is your full name please? A. Roy B. Griffith.

Q And where do you live, Mr. Griffith? A. Stonycreek Township.

Q What is your home address? A. 800 Oakland Street, Johnstown.

Q Are you one of the parties before the Court? A. I am.

Q Or interested in the matter before the Court? A. I am.

Q Is your home property for which you claim damages by virtue of the taking of land in the construction during the nineteen

fifties? A That is not my present home, no.

Q It is not your present home? A No.

Q Where do you live at the present time? A 800 Oakland Street. This property is at 1517 Bedford Street.

Q 1517 Bedford Street, and you still own this property?

A No.

Q Who does? A My son.

Q And did you convey it to him? A Yes.

Q Were you the owner of the property at 1517 Bedford Street prior to March 19, 1924? A I was.

Q When did you first acquire that property? A In the latter part of 1916, November or December.

Q And did you reside in it at that time? A Yes.

Q Were you residing in that home in the year 1924? A Yes.

Q Do you recall the State Highway Department improving the road in front of your place? A Yes, I do.

Q Was that during the year 1924? A I believe that's the year. Yes, I understand, from the dates.

Q Now, at the time of that construction as you recall it, or during the year 1924, or in the years thereafter, did the Highway Department notify you formally that they were claiming ^{an} additional ten or fourteen feet from the old roadway as you knew it, from your line, that is? A No, they didn't.

Q And during the construction in 1924, or shortly thereafter, did any portion of the new constructed roadway come onto any portion of your land? A The 1924?

Q Yes, in 1924? A No, not the 1924.

Q Was there any physical entry on your land by the State Highway Department during the year 1924? A You mean - -

Q By the Highway Department, or its agents? A You mean by taking or putting a road there?

Q Yes. A No.

Q When was ~~the~~ first time that the Pennsylvania Department of

Highways came onto your land? A Well, that was in this last construction in 1950 or thereabouts.

Q And when was the first time that you had notice that the Pennsylvania State Highway Department was claiming ten to fourteen feet of your land? A Well, the only time I had notice was when they came along and constructed this last addition to the highway.

Q Was that in 1950, or - - A Yes, in 1950, or fifty-one, whenever that time was.

Q And when they came on your land did you then file petition for viewers to assess the damages? A We did. I did.

Q Now, Mr. Griffith, in 1924, say March 19, 1924, or anytime thereafter, did the County Commissioners of Cambria County, or any of their agents, discuss damages to your property by the reconstruction of the highway in 1924? A No.

Q Did you at anytime know that the State Highway Department was claiming any of your land outside of the construction in 1950?

A No, I didn't.

Q You say your son now owns this property, is that right?

A That is right.

Q When did you transfer it to him? A About six years ago.

Q Was it after this construction in 1950? A That's right.

BY MR. GIBSON:

That is all.

CROSS-EXAMINATION BY MR. SHETTIG:

Q Did you acquire this property from Isaac Edmond Griffith?

A Yes.

Q Fronting 40 feet on Bedford Street? A That is right.

Q That deed was into you individually, is that right?

A Yes.

Q Was this property later put into the names of you and your wife? A I think it was, but that I couldn't be sure of without checking the record, but I think later it was put in both names.

BY MR. SHETTIG:

That is all I have.

CROSS-EXAMINATION BY MR. PEDUZZI:

Q Mr. Griffith, do you remember any survey that was made in 1924 before the construction of the new highway? A No, I don't.

Q You don't remember any survey? A No, I don't.

Q How far is the Schrader property from your's, Roy?

A Which Schrader?

Q The greenhouse property? A Oh, that's the best end of a half mile.

Q But you knew the road was relocated at that point? A At Schrader's Greenhouse, yes.

Q And were you aware also that there was a petition for the appointment of viewers and damages paid paid for that particular relocation? A At Schrader's, no. I didn't know that.

Q Did the County, or the Commissioners, or any of their agents, contact you regarding this construction of the new road? A No.

BY MR. SHETTIG:

You are talking about 1924, I assume?

BY MR. PEDUZZI:

Yes.

BY THE WITNESS:

1924, I assume that is what he is talking about.

BY MR. PEDUZZI:

Yes, that is right.

Q Do you remember what was done out there, Roy, as far as the road itself was concerned? A Yes.

Q What was that? What was the original road, what type of construction? A As I remember the original road it was what they call water bound macadam, or at least a macadam road.

Q And was that taken out? A Well, I remember the construction along there, but whether they took that out--yes, that was taken out.

Q And what was put in? A A cement road.

Q A cement road? A Yes.

BY MR. PEDUZZI:

That is all.

ZELPHA PENROD, called, sworn.

DIRECT EXAMINATION BY MR. GIBSON:

Q What is your full name please? A Zelpha Penrod.

Q And where do you live, Mrs. Penrod? A 1737 Bedford Street.

Q Is that the property involved in this proceeding? A Yes.

Q Mrs. Penrod, when did you first acquire your home? A Well, I really owned that since 1911, but we didn't get a deed for it until 1923.

Q And who owned it in 1923? A My husband's mother and father, Mr. and Mrs. James D. Penrod.

Q In 1923? A Oh, 1923, my husband and I owned it.

Q What was your husband's name? A Edgar Penrod.

Q Was it Edgar James Penrod? A Yes.

Q And is Mr. Penrod living at the present time? A No.

Q When did he die? A 1928.

Q Have you continually resided in your present home? A That is right.

Q Now, on or after March 19, 1924, did the State Department of Highways, or any of their agents, come on any part of your real estate? A Well, I don't think. I don't think they did with that old road there.

Q Did they take any of your real estate to your knowledge in 1924 for the reconstruction of that road? A No. That new road followed the old road, and I don't think they took any at that time.

Q Now, Mrs. Penrod, did you have any reason to inquire from the State Highway Department of the State of Pennsylvania in the year 1923 as to their claimed right-of-way? A Yes. We built a gas station at that time and we had to get a permit to put the gasoline

tanks in and we had to put them off of the right-of-way.

Q And at that time did you put the gasoline pumps in?

A Yes.

Q And were they put where the Highway Department designated was off their highway, off their right-of-way? A Yes.

Q When was that, Mrs. Penrod? A We built the station in the summer and fall of 1923, and then the road was built the following spring.

Q Did the Highway Department at that time tell you that due to the new construction, or the reconstruction of the road in 1924, that your gasoline pumps were now on their right-of-way?

A No. They didn't say anything to me about it.

Q Were you ever required to remove those pumps or move them?

A Yes. The pumps had to be moved when this last road was put in in 1950.

Q And where are those pumps now? A Well, they were moved back for awhile, and then we didn't have enough space there so I had to close out the station entirely.

Q In 1924, or in the years thereafter up until 1950, did you have any knowledge, or were you informed by the State Department of Highways that they claimed at least ten feet, or fourteen feet, of your land from the point they designated that you could install your pumps, your gasoline pumps? A Let me see what you mean there. Did they tell me I was on their property?

Q Let me phrase it this way: - - A When we had to move our pumps--see, I had rented the station at that time--and I think they told us at that time how far we had to go back. That was in 1950.

Q What I am talking about, in 1923 the Highway Department told you where - - A To put the tanks.

Q So you would not be on their right-of-way, is that correct? A Yes.

Q And you did put the tanks in? A That's right.

Q Now, after March 19, 1924, did the Highway Department inform you at anytime through any of its agents that they were claiming an additional ten or fourteen feet from that point? A No. We had a driveway between the tanks and the road.

Q In 1924, Mrs. Penrod, after March 19, 1924, did the County Commissioners of Cambria County, or any of their agents, discuss the question of settlement or the taking of your land? A No, sir.

Q Did you ever have any knowledge that in 1924 the State Department of Highways claim^{ed} an additional ten or fourteen feet of your ground? A No.

Q When did you first have knowledge of that? A Well, when they started to put this last road in and told me that my pumps were on the right-of-way.

Q Was that 1950 or thereafter? A Yes. I was very much surprised.

Q And is that why you filed this petition for viewers?
A Yes.

Q In 1924, Mrs. Penrod, do you recall when they reconstructed that road? A Yes.

Q Did any portion of that road come on upon your property as you understood it to be at that time? A No.

BY MR. GIBSON:

That is all.

CROSS-EXAMINATION BY MR. PEDUZZI:

Q You say your gasoline tanks were put on your property in 1923? A Yes.

Q And in 1950 you were advised to move them? A That is right.

Q Because they were in the right-of-way? A That is right.

BY MR. PEDUZZI:

That is all.

BY MR. GIBSON:

Do you have any questions, Mr. Shettig?

BY MR. SHETTIG:

No.

MAURICE A. SPRINGER, called, sworn.

DIRECT EXAMINATION BY MR. GIBSON:

Q What is your full name please? A MauriceA. Springer.

Q And where do you live, Mr. Springer? A I live in Ebensburg.

Q What is your occupation? A I am Chief Clerk for the Cambria County Commissioners.

Q And how long have you served in that capacity? A About ten years.

Q Were you an employee of the County Commissioners prior to that time? A Yes, sir.

Q In what capacity? A As a clerk.

Q In the County Commissioners' office? A Yes.

Q Now, Mr. Springer, by reason of the matters now before the Court did you search or have caused to be searched the records of Cambria County in an endeavor to determine if the County Commissioners in the year 1924, or thereafter, made any attempt to settle with the parties here involved a matter of land damages for the taking of land in 1924? A That is correct. We did make a search.

Q And did you find any evidence that the County Commissioners ever made any attempt to settle any damages with the parties here involved? I believe you are familiar with them? A Yes, sir. They did not.

Q They did not? A That is correct.

Q And did any of the particular parties here involved file a petition for viewers at that time? A Not - -

Q From your records? A Not from our records, no.

BY MR. GIBSON:

That is all.

CROSS-EXAMINATION BY MR. PEDUZZI:

Q Do you know, Maurice, whether the county engineer at that time had any plans of this highway? A I do not know that.

Q Who was the county engineer at that time? A I believe that would be L. R. Owens at that time.

Q But your office, your county engineer, is furnished plans of any construction of state highway right along, is that right?

A That is right.

Q Maurice, are you familiar with any action that was brought against the County Commissioners for damages as a result of this relocation of the state highway in 1924? A No, I am not.

Q You are not familiar then that there are two cases on record? A No.

Q One to No. 316 September Term, 1925, and another to No. 317 September Term, 1925, against the County Commissioners for damages as a result of the relocation of this highway? A No, I am not familiar with that.

BY MR. PEDUZZI:

That is all.

CROSS-EXAMINATION BY MR. SHETTIG:

Q Mr. Springer, in the course of the investigation which you conducted into the records of your office were you able to determine or find any notice that the Commissioners had received from the Commissioner of Highways in 1924 or thereabouts notifying the Commissioners in writing of a change in the width or location or grades of this particular highway which we are involved with?

A I was unable to find any correspondence in regard to that matter.

BY MR. SHETTIG:

That is all.

CROSS-EXAMINATION BY MR. PEDUZZI:

Q How complete are your files? A We have the minutes, and a matter of this kind is usually recorded in the minutes, so we made

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a search of the minutes to see if there was anything recorded in regard to this matter.

Q You record the resolutions passed by the County Commissioners?

A That is right.

BY MR. PEDUZZI:

That is all.

BY MR. GIBSON:

That is all we have, your Honor.

BY MR. PEDUZZI:

We have nothing further.

BY THE COURT:

Anything, Mr. Shettig?

BY MR. SHETTIG:

I am still in a state of confusion, and I was the last time I was here, and I haven't gotten any smarter the last couple of weeks. As I understand, we have two questions before us, one is whether or not the Board of Viewers in these nine cases heretofore appointed should be dismissed; and No. 2 is whether or not the County of Cambria should be brought in as an additional defendant. Now, most of the testimony in the last two hearings has been directed at the 1924 plans as prepared by the Department of Highways and approved by the Governor, on the theory there was a divergence from the center lines of the existing highway in these new plans of 1924, and if there was a divergence it was not necessary for the Department of Highways to record the plan in the county in which the highway was located, thereby giving notice to the property owners of a change--I should say, abutting property owners of a change in the roadway, either in its actual construction stage or right-of-way limits. The theory upon which the county is attempted to be brought in here is on the basis of the Act of 1911 as amended once, I believe, in 1921, or possibly twenty-three, that the County was at that time responsible in 1924 for property damage on the

change of location of highways, but, as I read that act, there was a condition precedent which must be fulfilled before the county's responsibility is vested, and that is that the Department of Highways through its Commissioner, I believe at that time, notify the County Commissioners in writing of any changes. Now, we have no testimony that that was done. We have testimony that the Commissioners did not receive any notice or have no record of receiving any notice. I am wondering if the county is at all involved in this proceeding if that condition precedent was not fulfilled.

BY THE COURT:

Perhaps the State has a theory of how it can involve the county.

BY MR. PEDUZZI:

If the Court please, there is no testimony here to the effect that there is positive proof that the State did notify the County Commissioners in writing of the contemplated changes in the highway, however, we do have two records at least of proceedings against the County Commissioners involving the same highway at the same time, which to my mind is definite notice to the County Commissioners that they were liable for damages along that particular highway.

BY THE COURT:

Is there an averment in there that they were notified in writing?

BY MR. PEDUZZI:

That the County Commissioners were notified in writing?

BY THE COURT:

Yes.

BY MR. PEDUZZI:

Not that I can read in here.

BY THE COURT:

Are those petitions of property owners for the appointment of viewers, or are they petitions of the County Commissioners?

BY MR. PEDUZZI:

They are petitions of property owners for the appointment of viewers and it is an appeal from the Board of Viewers, and the appeal is against John D. Walker, Homer George, and William J. Cavanaugh, Commissioners of Cambria County.

BY MR. SHETTIG:

I believe at that time, your Honor, the Commissioners could not petition the Court for the appointment of viewers, only the property owner could.

BY MR. PEDUZZI:

Nevertheless, the actions were brought against the Commissioners, and it was settled. There is a paper of settlement filed here and it is signed by the property owners and the County Commissioners. So the county had assumed damages at least to that portion of the highway, that particular spot. So it would seem to me the Commissioners were on notice definitely on these changes.

BY THE COURT:

After the plans had been prepared and filed, but does the act require that notice be given in writing before the plans are approved in Harrisburg?

BY MR. PEDUZZI:

The Act says that the Secretary of Highways shall notify the County Commissioners of the proper county in writing of the contemplated changes in such existing lines and location, whereupon the county commissioners, when possible, shall enter into an agreement with the owner or owners of said property.

BY THE COURT:

Let us assume that the commissioners were notified, and therefore they had some responsibility back in 1924, and they did not carry out that responsibility, if the theory of the Commonwealth is correct, and a diversion of the road established the lines as far as the required right-of-way then was concerned, the Statute of

Limitations has run against the county, and if the Commonwealth is not correct and the 1950 plan is the plan which establishes the right-of-way, which means, of course, then that the petition of the State under that theory would have to be dismissed. The county is not liable at the present time unless it voluntarily assumes a part of or all of the damages, is that correct?

BY MR. DECKMAN:

I would like to interject onethird possibility. I don't say that it should be the law, but I think it is possible that failure on the part of the county to notify these property owners in 1924 that their land was taken might be considered to delay the Statute of Limitations until such time they are notified. In that case that would not affect the condemnation, because the signature of the Governor on the plan condemns the land, and in that case the land would have been condemned in 1924 at the time when the county was liable, but these people would even at the present time be able to go against the county for the damages.

BY MR. SHETTIG:

I take exception to that.

BY MR. DECKMAN:

I do not say that is the law.

BY MR. SHETTIG:

Let us keep in mind that ^{there are} only three of the petitioners that owned property in 1924 out of the nine, the other six bought their property, some of them a good ways after 1924, so when we talk about the county's responsibility here, it must be limited to those three.

BY MR. GIBSON:

Now, wait a minute. If we are going to do that, then I am going to object to this whole proceeding, for the simple reason that we have a right to go back to our change of title, there is a presumption that they are paid, but I have a right to refute that

presumption if I show by the property owners at that time that they never had any notice and no damages were ever paid.

BY MR. SHETTIG:

All right, but your right to damages, Mr. Gibson, do not pass with the land. That remains with the person who was the owner of the land at the time of the condemnation or the taking. (Off the record discussion).

BY THE COURT:

Well, we have several legal questions involved here. The first and most important one to me at the present time is the matter of jurisdiction. I am not satisfied, even after having looked over some^{of} the law since the last hearing, that this Court has the jurisdiction now to determine any facts that are necessary in order to apply whatever the law is, whether it is the law Mr. Gibson says or the Commonwealth says. I have read several of the cases. In fact, all of the cases that I have read come about not through the question raised by an objection to the appointment of viewers or an attempt to set them aside, but rather by exceptions or appeal from a viewers' verdict. All of the cases I have read come about that way, and in each one of those, of course, there has been some notice, at least implied, in the facts of the case, that we can't tell actually without knowing what happened, that there was a negotiation between the county and the property owners at the time. I would like counsel in any brief that you submit^{to} cover first of all the question of jurisdiction. It may be that we cannot decide the facts here.

BY MR. SHETTIG:

Well, if the Court please, wouldn't you still be faced with the same decision if the question was raised before the Board of Viewers and exceptions taken by one side or the other to the report of the Board of Viewers?

BY THE COURT:

No. The exceptions might raise the question of law to the report of the viewers, but it would not necessarily be raised before the viewers. It would be raised after an award of the viewers, and then it would be a matter of law.

BY MR. SHETTIG:

What I mean, the same question is going to get here to the Court regardless whether it is raised on a petition to dismiss or whether it is raised by exceptions. It is still going to be identical in that there is going to be some mixed fact and law.

BY THE COURT:

That may be so, but I am still not satisfied, or rather, that is what we want to determine first of all, rather than go through an entire proceeding here and have an opinion and an order and then have that attacked for a jurisdictional matter because one side or the other has the opinion against them. We may all agree right now that the Court has jurisdiction and you might be satisfied if I find certain facts, but what happens after an order is made adverse to one party of the other, somebody is going to take advantage of it.

BY MR. DECKMAN:

I might say that the Commonwealth would be willing to stipulate as to the jurisdiction of the Court.

BY THE COURT:

That cannot be stipulated. Well, we will have to go into that first of all, and as far as these other legal matters are concerned, if you are satisfied that you have everything on the record that is necessary - -

BY MR. SHETTIG:

Well, I would like to put one other thing on by stipulation, that the other owner that owned the property in 1924 was Frederick E. Griffith, and then we have practically everything in there. He

was the only other property owner involved here who owned his property at the time of the 1924 plan, and owns it today. Just so we have the three on the record as far as I am concerned that the county may be responsible for.

BY MR. GIBSON:

Mr. Griffith is in New York, otherwise he would have been here.

TESTIMONY CLOSES.

(EXHIBITS FILED UNDER SEPARATE COVER).



STENOGRAPHER'S CERTIFICATE.

I hereby certify that the proceedings and evidence are fully and accurately contained in the notes taken by me on the hearing of the above cause, and that this copy is a true and correct transcript of the same.


Official Stenographer.

CERTIFICATE OF TRIAL JUDGE.

The foregoing record of the proceedings and evidence had upon the hearing of the above cause is hereby approved, and the same is hereby directed to be filed.


J.