

No. 1 MARCH Sessions 1938

IN THE COURT OF QUARTER SESSIONS
OF CAMBRIA COUNTY

PETITION OF J. G. NELEN OF
JACKSON TOWNSHIP, CAMBRIA COUNTY,
PENNSYLVANIA FOR THE APPOINTMENT
OF VIEWERS TO VIEW AND APPRAISE
THE DAMAGES SUSTAINED BY REASON
OF DRAINAGE INTO HIS PRIVATE ROAD
IN THE RELOCATION AND CONSTRUCTION
OF STATE HIGHWAY ROUTE NO. 219..

1967

Issuance and service of
rule waived.

Service of copy of within order
and petition accepted.

George W. Spence
Mar 1938 County Solicitor

Filed: Mar. 11, 1938

P. J. LITTLE
ATTORNEY AT LAW
EBENSBURG, PA.

TO THE HONORABLES, THE JUDGES OF THE COURT OF QUARTER SESSION OF
CAMBRIA COUNTY

The petition of J. G. Nelen, of Jackson Township,
Cambria County, Pennsylvania, respectfully represents.

That he is the owner of a piece or parcel of land
situate in Jackson Township, Cambria County, Pennsylvania, beginning
at a post in line of land of S. D. Goughnour and corner of Purpart No. 2
of the Martin Monday Tract; thence along line of the said Goughnour
north sixty-one (61) degrees forty-five (45) minutes west one thousand
three hundred thirty-three (1333) feet to a post, corner of land of David
Rose; thence along land of said David Rose north thirteen (13) degrees
thirty (30) minutes west two hundred eighteen (218) feet to a post; thence
along land of Alexander Dearmand north fifty-one (51) degrees twenty-two
(22) minutes east one thousand seven hundred thirty-four (1734) feet to a
post; thence by same north thirty-nine (39) degrees fifteen (15) minutes
east one hundred (100) feet to a post, corner of Purpart No. 3 of said
Martin Monday land; thence along said Purpart south sixty-one (61) degrees
forty-five (45) minutes east seven hundred forty-eight (748) feet to a post,
corner of Purpart No. 2 of said Monday tract; thence along said Purpart No. 2
south twenty-seven (27) degrees west one thousand eight hundred sixty-three
(1863) feet to a post, the place of beginning; containing forty-eight (48)
Acres and thirty-five and five-tenths (35.5) perches. Subject, however,
to certain reservations and restrictions as in said deed expressed.

That your petitioner obtained title to the undivided
one-half interest in said land by deed of T. Stanton Davis, dated January 30,
1914 and recorded in Cambria County in Deed Book Vol. 378, at Page 82.

That your petitioner became vested in the other undivided
one-half interest in said tract of land by deed of W. A. Krumenacher and

Mollie Krumenacher, his wife, dated January 31, 1924 and recorded in Cambria County in Deed Book Vol. 377, at Page 323.

That your petitioner built a house and barn thereon and has resided upon said property with his family from about April 1915.

That the only way of reaching said farm is by a private lane which had been opened and used for more than one hundred years across the Monday tract from the Highway Route 219 hereafter described. That said road has been more recently used by David Rose, Monday Heira, Joel Simmons and others.

That at this time and since the water has been turned in on said private lane, your petitioner is the only person using or compelled to use said road.

That the State Highway Department in the relocation and reconstruction of the Highway Route 219 leading from Mondays Corner to Goods Corner during the year 1934, crowned the said road with concrete and collected all the water which was gathered on the hill south of Mondays Cross Roads and emptied all of said water collected for some distance along the East and West sides of said road, upon the private road above described and the water follows the private road for approximately five hundred feet before it leaves said road to flow toward Hinkston Run.

That before said road was so constructed, there were two ditches along the old highway, which separated the waters and carried them along the highway to Hinkston Run, which it crossed about three hundred feet below the lane of said petitioner.

That by reason of the gathering of all the water of said road and depositing it all through a single culvert above the lane of your petitioner, the lane has been washed to such an extent that it requires constant care and attention to make and keep it passable. That the bed of said lane is made swampy so that in wet weather and in spring and fall it

quickly cuts into ruts by the passage over it of automobiles and tractors; that water lying on the lane during the winter will render it dangerous because of ice forming. Pedestrians travelling said lane are required to trespass upon the adjoining lands to pass the swamps created by the said road drainage.

That your petitioner has attempted to agree with the County Commissioners upon the damage sustained and which he is likely to sustain by reason of the drainage of the Highway Route 219 into the private lane of your petitioner, but has been unable to agree upon same.

Your petitioner, therefore, prays your Honorable Court to issue a rule upon the County Commissioners of Cambria County, to appear and show cause, if any they have, why viewers should not be appointed to view the said premises and take testimony relative to the damage sustained, if any; all as provided by law and by the rules adopted by your Honorable Court.

And he will ever pray.

J. G. Nealen.

STATE OF PENNSYLVANIA

COUNTY OF CAMBRIA

ss:

Before me, the clerk of the Court of Quarter Sessions of Cambria County, Pennsylvania, personally appeared J. G. Nealen, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his knowledge and belief.

Sworn and subscribed this

10

day of March, 1938.

John L. Hite
Prothonotary

J. G. Nealen.

ORDER

AND NOW, to-wit; this 11th day of March, 1938,
the foregoing petition having been read and considered, and upon
motion of P. J. Little, Esq., attorney for petitioner, the Court
grants a rule upon Lillian D. Keller, Frank P. Hollern and
John Thomas, Jr., County Commissioners of Cambria County, to
show cause why viewers should not be appointed to view the premises
described in the attached petition of J. G. Nelen and to take
testimony relative to the damage sustained, if any. Rule returnable
for Monday of April, 1938.

By the Court

M. J. ...

J.

IN THE COURT OF COMMON PLEAS
OF CAMBRIA COUNTY, PA.

IN RE: PETITION OF J.G. NELEN
OF JACKSON TOWNSHIP, CAMBRIA
COUNTY, PA., FOR THE APPOINT-
MENT OF VIEWERS TO VIEW AND
ASSESS DAMAGES TO PREMISES OF
J.G. NELEN SITUATE IN JACK-
SON TOWNSHIP, CAMBRIA COUNTY,
PA.

Opinion of the court dis-
charging rule.

Filed: Oct. 4, 1938

CLAIR W. LUTHER
OFFICIAL STENOGRAPHER
FOR THE
FORTY-SEVENTH JUDICIAL DISTRICT
PENNSYLVANIA

IN RE: PETITION OF J.G.
NELEN, OF JACKSON TOWNSHIP,
CAMBRIA COUNTY, PA., FOR
THE APPOINTMENT OF VIEWERS
TO VIEW AND ASSESS DAMAGES
TO PREMISES OF J.G. NELEN
SITUATE IN JACKSON TOWNSHIP,
CAMBRIA COUNTY, PA.

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PA.

No. 1 March Term, 1938.

RULE TO SHOW CAUSE.

* OPINION OF THE COURT *

MCKENRICK, J.:

J.G. Nelen, the owner of certain land in Jackson Township, Cambria County, Pennsylvania, presented a petition for the appointment of viewers to view the premises and take testimony relative to damages alleged to have been sustained by him.

The petition for the appointment of viewers sets forth, substantially, that the State Highway Department, in the relocation and reconstruction of Highway Route No. 219 leading from Mundys Corner to Good's Corner, "crowned the said road with concrete and collected all the water which was gathered on the hill south of Mundys Cross Roads and emptied all of said water collected for some distance along the East and West sides of said road, upon the private road above described." The petition further sets forth "That before said road was constructed, there were two ditches along the old highway, which separated the waters and carried them along the highway to Hinkston Run." And further, "That by reason of the gathering of all the water of said road and depositing it all through a single culvert above the lane of your petitioner, the lane has been washed" out. Further, "That the bed of said lane is made swampy so that in wet weather and in spring and fall it quickly cuts into ruts," etc.

To the appointment of viewers, the Commissioners of Cambria County have objected, for the reasons, that the petition does not allege "that the premises of the petitioner are adjacent

to State Highway Route 219 or that any part of said petitioner's premises were taken by reason of the relocation and reconstruction of the said Highway"; "the petition * * * does not allege that the State Highway Department of the Commonwealth of Pennsylvania has entered upon the petitioner's lands or property for the purpose of cutting, opening, maintaining or repairing drains or ditches, inlets or outlets for the purpose of carrying water from said State Highway Route 219"; and that "under the laws of this Commonwealth, the Commonwealth of Pennsylvania is not liable for consequential damages resulting from the relocation or reconstruction of a state highway."

As we understand the law, viewers are appointed for the purpose of determining the damages sustained by an owner of real estate arising from the building of a road. Unless the Commonwealth of Pennsylvania, or the County of Cambria which had a contract with the Commonwealth of Pennsylvania, can be held liable for the payment of damages alleged to have been sustained, there is no jurisdiction in the court to entertain a petition and appoint viewers. It would be futile for the court to appoint viewers and send them out to view premises and assess damages for which the municipality is not liable under the law.

We further understand that a landowner who claims damages arising from public improvements must be able to point to some statute which gives him the right to damages.

We have not been referred to any statute which would support the right of the petitioner to recover damages, even if the viewers should mistakenly award such damages. On the other hand, the damages alleged do not arise from an actual taking on the part of the Commonwealth of Pennsylvania in the building of the road, but are merely consequential. Nowhere does the petition

allege that any of his land was actually taken in the reconstruction of the road in question. It may be that the petitioner has been injured by the collecting of large volumes of water upon his premises, but the injuries, as we understand it, are not compensable, - in other words, it is damnum absque injuria.

This court decided in the case of George E. Wilkinson vs. County of Cambria, No. 180 March Term, 1937, in an opinion by McCann, P.J., that damages cannot be recovered in eminent domain proceedings for injuries resulting where there has not been an actual taking by the Commonwealth or its agencies.

As we have indicated, we have not been referred to any reported decision that holds that damages ^{can} ~~could~~ be recovered in a case such as the one before us. There being, therefore, no right to damages, the court is without jurisdiction to appoint viewers.

We, therefore, discharge the rule to show cause why viewers should not be appointed, and dismiss the petition for the appointment of viewers, this 3rd day of October, 1938.

BY THE COURT:

McKenrick

EXCEPTION

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

Ivan J. McKenrick, J. (Seal).

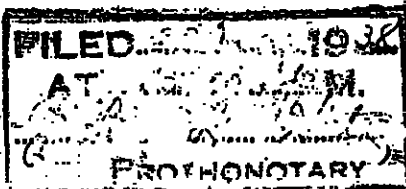
No. 1 *March* Term, 1938

In the Court of Quarter Sessions of
Cambria County, Pennsylvania.

IN RE: Petition of J. G. NELEN,
of Jackson Township, Cambria
County, Pa., for the appointment
of Viewers to view and assess
damages to premises of J. G.
Nelen situate in Jackson Town-
ship, Cambria County, Pa.

#1967

ANSWER TO RULE TO APPOINT VIEWERS



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Filed March 28 1938
argued 4/10/28

GEORGE M. SPENCE
ATTORNEY AT LAW
FIRST NATIONAL BANK BLDG.
JOHNSTOWN, PENNSYLVANIA

Now, March 23, 1938, the undersigned hereby accepts service of the within
Answer to Rule to appoint Viewers, acknowledges receipt of a true and correct copy.



Attorney for J. G. Nelen

IN RE: Petition of J. G. NELEN,
of Jackson Township, Cambria
County, Pennsylvania, for the
appointment of Viewers to view
and assess damages to premises of
J. G. Nelen situate in Jackson
Township, Cambria County, Penn-
sylvania.

In the Court of Quarter Sessions of
Cambria County, Pennsylvania.

No. 1 *March* Term, 1938.

ANSWER TO RULE TO APPOINT VIEWERS

In answer to the petition of J. G. Nelen, of Jackson Township, Cambria County, Pennsylvania, praying for a rule upon the County Commissioners of Cambria County to appear and show cause, if any they have, why Viewers should not be appointed, Lillian D. Keller, Frank P. Hollern and John Thomas, Jr., County Commissioners of Cambria County, hereby respectfully move that the rule to show cause why Viewers should not be appointed to view the premises of J. G. Nelen situate in Jackson Township, Cambria County, Pennsylvania, and to take testimony relative to the damages sustained, if any, be discharged, and set forth the following reasons:

1 - For the purpose of these proceedings it is admitted that J. G. Nelen is the owner of a piece or parcel of land situate in Jackson Township, Cambria County, Pennsylvania, more fully described in the petition of the said J. G. Nelen, and that the only way of reaching said property is by private lane leading across the Monday tract from Pennsylvania State Highway Route 219, and that the Pennsylvania State Highway Department in the relocation and construction of Pennsylvania State Highway Route 219 leading from Mundys Corner to Goods Corner during the year 1934 caused water collected along said road to be discharged upon private lands adjacent to said State Highway Route 219. It is denied, however, that said water is discharged directly upon the private road leading from said State Highway Route 219 to the premises of the petitioner, and that the state highway had taken any part of said petitioner's land

for highway purposes, or had entered upon any part of the petitioner's land and cut, opened or maintained any drains or ditches, inlets or outlets through which said water is conducted or discharged.

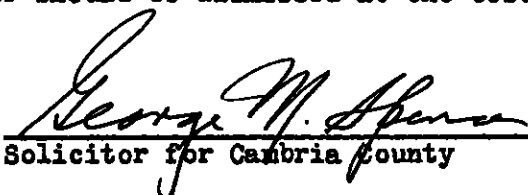
2 - The petition praying for the appointment of Viewers does not allege that the premises of the petitioner are adjacent to State Highway Route 219 or that any part of said petitioner's premises were taken by reason of the relocation and reconstruction of the said Highway Route 219 by the State Highway Department of the Commonwealth of Pennsylvania.

3 - The petition for the appointment of Viewers does not allege that the State Highway Department of the Commonwealth of Pennsylvania has entered upon the petitioner's lands or property for the purpose of cutting, opening, maintaining or repairing drains or ditches, inlets or outlets for the purpose of carrying water from said State Highway Route 219.

4 - Under the laws of this Commonwealth, the Commonwealth of Pennsylvania is not liable for consequential damages resulting from the relocation or reconstruction of a state highway.

5 - Under the laws of this Commonwealth, the County of Cambria is not liable to the petitioner for consequential damages resulting to the premises of the petitioner where there has been no taking of the lands of the petitioner or where there has been no entry upon the lands of the petitioner for the purpose of cutting, opening, maintaining and repairing drains or ditches, inlets or outlets necessary to carry waters from said state highway.

6 - There being no liability upon the County of Cambria for the consequential damages alleged by the petitioner in his petition for the appointment of Viewers, this Court is without jurisdiction to entertain the petition for the appointment of Viewers, and therefore the rule to show cause why Viewers should not be appointed as prayed for should be dismissed at the costs of the petitioner.


Solicitor for Cambria County