

WILSON AND WIFE VS. SHORE AND WIFE, C.P., Fulton County Branch, No. 35 of 1988 C.

Open Private Road - 36 P.S. 32731 - BiFurcated Proceedings

1. The statutory procedure for opening a private road is bifurcated, first a determination is made as to whether a road is necessary and second, damages are determined.
2. Where a board of view finds a road necessary and the defendants file a deed of right of way, plaintiffs are not required to accept the right of way granted by the plaintiff but may insist that damages be determined first.

James M. Schall, Esquire, counsel for Plaintiffs
Gary D. Wilt, Esquire, counsel for defendants
David S. Keller, Esquire, Chairman, Board of Viewers

OPINION AND ORDER

Walker, J. August 31, 1990:

STATEMENT OF FACTS

The plaintiffs, Samuel and Rena Wilson, "Wilsons" filed a complaint on February 26, 1988 asking the court to open a private road. The defendants, Richard and Anne Shore, "Shores" own land adjacent to the Wilsons. The Wilsons' property does not front on a public roadway, and they have used an existing roadbed as their means of ingress and egress. This right of way, as shown in the survey attached to the complaint, runs across the Shores' property.

A board of view was appointed on August 31, 1989. The viewers met and viewed the disputed area on October 18, 1989. The board filed its report on November 9, 1989.

On April 3, 1990, the Shores recorded an "Indenture of Right of Way" naming the Wilsons as grantees. The Wilsons were given a draft for review and had rejected it by letter dated March 23, 1990. On April 10, 1990, the Wilsons filed a rule to show cause why the road should not be opened as stated in the report of the board of viewers. The Shores filed an answer to the rule on May, 11, 1990.

A hearing on the rule to show cause was held before this court on July 3, 1990. The matter is now ripe for determination.

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DISCUSSION

The Wilsons contend that they are not bound to accept the indenture of right of way recorded by the Shores on April 3, 1990. The court agrees with this contention.

The Wilsons' complaint regarding the recently recorded right of way is that the location is subject to change by the defendants, and that the width is unspecified. The Wilsons wish to proceed with the damages hearing which follows the report of the board of viewers and avoid the possibility of future litigation regarding the width or location of the right of way.

The statutory authorization to designate a board of viewers to open a private road is found in Purdon's Pennsylvania Statutes Annotated, Title 36, Section 2731. This section states as follows:

The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies, or corporations, for a road from their respective lands or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway, or upon the petition of the chief executive officer of any executive or administrative department of the State Government for a road from any public highway across any lands of any person, association, or corporation to the boundary line of any lands owned, controlled, or administered by the commonwealth, direct a view to be had of the place where such road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth June, one thousand eight hundred and thirty-six. (Footnote omitted)

36 P.S. §2731. This procedure is bifurcated to include two separate proceedings. First there is a determination whether a private road is necessary, and second to determine what damages are owed to the landowner. The damages procedure is set out in section 2736 which states as follows:

The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons, associations, partnership, stock companies, corporations, or executive or administrative department of the Commonwealth, at whose request the road was granted or laid out: Provided, That no such road shall be opened before the damages shall be fully paid.

36 P.S. §2736. In the case at bar, the board of viewers has filed its report, finding that a private road is necessary, and recommending a location and width for the private road, but the board of viewers has not yet held a hearing to determine damages.

Since no exceptions to the report of the board of viewers were filed by either party, the court finds that the Wilsons are not bound to accept the right of way which was filed by the Shores, and that the matter should proceed to a damages hearing before the board of viewers.

The indenture of right of way states in pertinent part as follows:

the said right of way to follow initially the existing road bed but its location shall be subject to change if deemed necessary by the Grantors and the proposed location not inconvenient to Grantees and shall be of unspecified width but shall at all times and seasons permit Grantees their heirs, successors and assigns to travel upon, along and over the right of way with any vehicle, equipment or machinery of any width without violating this indenture.

(Indenture of Right of Way recorded in Fulton County Deed Book 160, pages 330-332). The court finds that the above right of way may cause future litigation regarding its location or width.

Based on the above, the court finds that the Wilsons are not bound to accept the indefinite right of way granted by the Shores, and the court directs that this matter proceed to a damages hearing before the board of viewers as provided for in 36 P.S. §2736.

ORDER OF COURT

August 31, 1990, the court confirms the report of the board of viewers and finds that the Wilsons are not bound to accept the indefinite right of way granted by the Shores. The court directs that this matter proceed to a damages hearing before the board of viewers as provided for in 36 P.S. §2736.

KOSAR VS. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, C.P. Franklin County Branch, Misc. Doc. Vol. AA, Page 53