

COMMONWEALTH v. BOOK, C.P. Franklin County Branch,
Misc. Docket Volume Y, Page 315

Revocation of License - Bus Driver - Heart Attack - Penn DOT Regulations

1. Where a Penn Dot Regulation requires that in order for an applicant for a class 4, bus driver's license, he must have no established medical history of myocardial infarction, even though the applicant is no more likely to have a second heart attack than the general population, his privileges may be denied.

Francis P. Bach, Esq., Assistant Counsel for Commonwealth

Philip S. Cosentino, Esq., Counsel for Appellant

OPINION AND ORDER

EPPINGER, P.J., November 25, 1983:

Thaddeus Book has apparently completely recovered from a "heart attack" (myocardial infarction) which he had in 1980. He is employed by the Fannett-Metal School District as supervisor of school buses and from time to time, in the absence of the assigned driver, he must substitute. For this he needs a Class 4 license which was recalled on August 24, 1983, by the Department of Transportation.

In presenting this appeal he acknowledged the 1980 attack, but told of a medication-free life and presented evidence of his physician that he is no more susceptible to a second episode than the general population is to having a first attack. He also showed that his heart condition was well known to the department and that for the past number of years the provisions under which his license was recalled were waived by the department and the Class 4 license was issued to him.

The Vehicle Code, 75 Pa.C.S.A. Sec. 1519, authorizes the department to determine the incompetency of operators and Sec. 1504(c) gives the department the authority to establish by regulations the qualifications necessary for the safe operation of a school bus.

Book's incompetence to operate a school bus was established by the department under regulations issued by the department's Medical Advisory Board authorized by Sec. 1517 of the Vehicle Code providing that in order to pass the required school bus operator's annual physical examination, an applicant must



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SHERIFF'S SALES, cont.

E.D.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

5-18, 5-25, 6-1

deed of Amos Metcalf and Yvonne Metcalf, his wife, dated October 23, 1971, and recorded in Franklin County Deed Book Vol. 667, Page 523 for a stated consideration of \$60,000.00. The real estate is located in Montgomery Township, Franklin County, Penna., and is described as containing 202 acres and 17 perches neat measure.

3. The petitioner, David L. Herndon, is an attorney-at-law.

4. Since the purchase of the real estate in question, the petitioners have improved it by remodeling most of the home; moving walls, installing a 3-story addition to the home, installing electric heating, new windows, a septic tank, diverting a stream flowing through the basement, installing a new basement, sand-blasting, replanning and repainting the exterior of the home, installing tennis courts and fencing, installing a 20' x 40' ten-foot deep, inground cement swimming pool surrounded by a wall, replaced 90% of the barn roof, sided the barn and refloored it, built and stocked a pond, installed permanent fencing and drainage tiles in the field, removed trees, improved access lane and improved the quality of the land.

5. The petitioner, David L. Herndon, expressed the opinion that the real estate had a minimum fair market value of \$250,000.00.

6. The address of the real estate in question is 11335 Punchbowl Road, Mercersburg, Pa.

7. The petitioners did not lease the real estate in question during the past two years.

8. The petitioner, David L. Herndon, testified that the net income from the farm in 1982 was \$30,000 and in 1981 \$4,000 or \$5,000 but the \$30,000 was an aberration due to the sale of steers that all came of age for sale at the same time.

9. The petitioner, David L. Herndon, attended all three of the Sheriff's Sales of the real estate here in question, and represented himself and his wife, Gilda F. Herndon, when he bid on the real estate at the March and April sales. Attorney Kenneth F. Lee represented the interests of both petitioners from the time he was retained on March 21, 1983.

10. The petitioners had been unable to secure the necessary finances or financing to settle for the real estate in question after their successful bids at the March and April 1983 Sheriff's Sales.

11. The petitioner, David L. Herndon, did not bid on the real estate in question at the May 6, 1983 Sheriff's resale because

he did not have the necessary cash, certified or cashier's checks.

12. The petitioner's downpayments of \$17,800 at the first sale and \$15,100 at the second sale were forfeited, and are held by the Sheriff to be paid to creditors of the petitioners.

13. The real estate in question is subject to a first mortgage in favor of the First National Bank of Mercersburg in the amount of approximately \$32,500.

14. The petitioners testified that a red rectangle marked on an unidentified aerial map (Respondents' Exhibit 8) did not correctly represent the boundaries of their farm, and a line extending from letters A, B, C, and D marked on the map was a more accurate representation of their boundary line.

15. The real estate in question has been assessed at \$15,520 by the Board of Assessment & Revision of Taxes of Franklin County at all times since its purchase by the defendants.

16. The advertisements and handbills posted for the March Sheriff's Sale did not identify any of the improvements to the real estate in question.

17. The advertisement and handbills for the April 22, 1983 Sheriff's Sale specifically identified those improvements to the real estate called to the Sheriff's attention by the letter of petitioners' counsel of March 21, 1983, which inter alia complained of the failure to include in the advertisement reference to improvements.

18. Neither the advertisements and handbills for the March or April Sheriff's Sale specified the address of the real estate in question as 11335 Punchbowl Road, Mercersburg, Pa.

19. The advertisement and handbills for the April Sheriff's Sale specifically provided that if the balance due was not paid by a date and time certain the property would be resold at a date, time and place certain and the full purchase price or all costs, whichever may be higher, would be payable in full.

20. There was no advertisement or posting of handbills for the May 6, 1983 resale.

21. Neither the petitioners nor their counsel made any objection on or before May 6, 1983 to the sufficiency of the advertisements and handbills with regard to the post office address of the subject real estate, and the improvements thereon or the terms and conditions of sale including the provisions for resale.

22. At the advertised Sheriff's Sales of March 11, 1983 and April 22, 1983, and the non-advertised or posted Sheriff's resale of May 6, 1983, the petitioner, David L. Herndon, the respondent, Dillard, a Mr. Martin, Robert C. Schollaert, Esq., Counsel for the Valley Bank & Trust Co., and Richard K. Hoskinson, Esq., Counsel for Allied Lending Corporation were present.

23. The petitioners introduced no evidence of the existence of any financially able bidder interested in the purchase of the real estate in question who did not appear at the Sheriff's Sales by reason of the failure of the newspaper advertisements and handbills to specify the post office address for the real estate and all of the improvements on that real estate or the absence of any advertisements or posting of the date, time and place of the resale.

24. The petitioners introduced no evidence of the fair value of the real estate in question as of the date of the Sheriff's March and April 1983 sales or the resale of May 6, 1983 other than the petitioner, David L. Herndon's, testimony that in his opinion the real estate had a minimum fair market value of \$250,000 and the answer of Valley Bank & Trust Company to paragraph 3 of the petition which inter alia avers the property was appraised in 1981 at \$221,200 for the purpose of taking the property as collateral on a loan to the petitioners, and that the bank believes the appraisal would still be accurate.

DISCUSSION

The petitioners alleged in their petition to set aside sale 9 separate grounds for setting aside the May 6, 1983 sale of their real estate. The petitioners identified, briefed and argued four issues in support of their petition. We will consider all issues not specifically identified in petitioners' brief, briefed and argued as having been abandoned. The issues raised by the petitioners for disposition are:

1. Where the initial advertisement of a Sheriff's Sale fails to strictly conform with the rules of court, should not the sale be set aside?

2. Does the Sheriff have the power to advertise a resale in the same ad as the original sale, and not advise potential bidders that the resale would be held?

3. May the Sheriff advertise and conduct a "lump sum" bid?

4. What is the effect of a low sales price?

Pa. R.C.P. 3129 governs the notice to be given on the sales of real property by the Sheriff on a writ of execution. That rule provides inter alia:

“(b) Notice of the sale of real property shall be given by handbills, by written notice to the defendant in the judgment and the owner or reputed owner and by publication, as hereinafter provided.

“(1) The handbills shall be posted by the sheriff in his office and upon the property at least twenty (20) days before the sale, briefly describing the property to be sold, its location, the improvements if any, the judgment of the court on which the sale is being held, the name of the owner or reputed owner, and the time and place of sale. The handbill shall also include the notice of a schedule of distribution required by subdivision (c) of this rule.

“(4) Notice containing the information required by subdivision (b)(1) shall also be given by publication by the sheriff once a week for three (3) successive weeks in a newspaper of general circulation in the county and in the legal publication, if any, designated by rule of court for publication of notices, the first publication to be made not less than twenty-one (21) days before the date of sale.

“(d) If the sale is stayed or continued or adjourned generally, new notice shall be given as provided by subdivisions (b) and (c). If the sale is continued or adjourned at the direction of the plaintiff to a date certain within forty-five (45) days, and public announcement of the adjournment and new date is made to the bidders assembled at the time and place originally fixed for the sale, no new notice shall be required, but there may be only one such continuance or adjournment to a date certain without new notice.

Petitioners' first ground for setting aside the Sheriff's sale is based on their contention that the advertisement and handbills inadequately and, therefore, to their prejudice:

(a) failed to specifically locate the property by giving the street number and name of the street, ie., 11335 Punchbowl Road, Mercersburg, Pa.

(b) failed to describe fully the improvements made to the real estate and characterized them as being in good condition.

It is the understanding of this Court that due to the decision of Sheriff Hussack to readvertise the sale of the petitioners' real

estate and conduct it ab initio on April 22, 1983, the procedure followed by the Sheriff in advertising and conducting the sale of March 11, 1983, is not a consideration in the disposition of this issue.

The language of Pa. R.C.P. 3129(b)(1) specifically applicable to this issue is “. . . briefly describing the property to be sold, its location, the improvement if any, . . .”

The advertisements and handbills described the real estate as being situate in Montgomery Township, Franklin County, Pennsylvania and then provides a metes and bounds description identifying adjoining owners, and concluding with an identification of the prior owners, the date and place of record of their deed to the identified present owners, and that the property is being sold as the property of the present owners, i.e., the petitioners.

In *Bell v. Mock*, 413 Pa. 71 (1963), the Supreme Court of Pennsylvania concluded that an advertisement describing the property by metes and bounds and lot numbers on certain maps constituted a legally sufficient description. In *Shimkus v. Kalimatis*, 377 Pa. 546 (1954), the Supreme Court concluded that the sheriff's failure to give the street address of the property in the posted notices did not constitute an insufficient description. The court held:

“We think that the sheriff's advertisement and notice, describing as it did the property by lot and block number, by metes and bounds, and by map description sufficiently meets the requirements of the law.” (At page 548).

Thus, it would appear as a matter of law there is no merit to this aspect of the petitioners' contention. In addition we are constrained to observe that from an examination of respondent's Exhibit 8, the aerial map, and the Court's personal knowledge of the area that the petitioners' real estate is located in a rather lightly populated agricultural and woodland area. In such a setting the number and name of a street would be of extremely limited value, and interested prospective bidders would be far more likely to locate the property by securing directions from the Sheriff's Office or from people residing in the area.

As previously noted counsel for the petitioners notified the Sheriff of the failure of the first advertisement to “include the substantial improvements on the real estate, which include a completely renovated five-bedroom home, swimming pool, tennis court, and outbuildings”, and the Sheriff amended the advertise-

ments and handbills for the April sale to include all of the improvements identified in counsel's letter, plus a bank barn. At the hearing petitioner, David L. Herndon, testified in greater detail as to what had been involved in the renovation of the home, the extent of repairs and improvement of the barn, and other improvements such as a stocked pond, permanent fencing and drainage tiles and improvement of the quality of land and the access lane.

The Supreme Court of Pennsylvania has held that a sheriff's advertisement describing a two-story tire shop and dwelling, together with other improvements, as a two-story frame restaurant dwelling and garage was a sufficient description of the improvements, *American State Bank & Trust Company v. Mariades*, 328 Pa. 428 (1938); a two-story duplex containing two separate apartments of five rooms and seven rooms respectively, and a two-car garage as a two-story brick dwelling was held to be a sufficient description of the improvements which were plainly visible to anyone inspecting the property, *Senge v. Border*, 319 Pa. 481 (1935); and the failure to advertise the one-story brick garage as an improvement on the real estate did not render the sheriff's advertisement legally insufficient, *Homebuyers' Building & Loan Association v. Peterman*, 253 Pa. 418 (1960). In the case at bar our judgment is that the description of the improvements is legally sufficient for the description certainly touches upon those improvements which would, adopting the language of the petitioners', characterize their real estate as "something in the nature of a gentleman's estate."

We feel an additional and equally strong ground for the dismissal of the petitioners' contentions under this issue was in effect that the petitioners retained counsel who on their behalf communicated with the Sheriff raising various objections to the original notice of sale advertisements and handbills. No one knew more than the petitioners about the improvements they had made or that existed on their real estate, and no one knew better than the petitioners the post office address for their real estate. No one would benefit more than the petitioners from a successful sale of their real estate. However, they apparently did not see fit to have their counsel provide the Sheriff with the information they now perceive to be essential for a proper sale of their property. In our judgment the petitioner's decision to provide the Sheriff with some but not all of the information they felt necessary for a full and complete advertisement constituted a voluntary waiver of their right to subsequently object to the advertisements and handbills which included all that their counsel requested.

We, therefore, conclude the Sheriff's advertisements and handbills for the April 22, 1983 sale of the petitioner's real estate did conform to the applicable Rules of Court, and the petitioner's contention is dismissed.

The second and third contentions the petitioners raise are whether the Sheriff had the power to advertise a resale in the same advertisement as the original sale, and advertise and conduct a "lump sum" bid thus not advising potential bidders that a resale would be held and depriving persons requiring conventional financing an opportunity to bid.

As indicated in our Findings of Fact the Sheriff's advertisements and handbills specifically stated that if the balance due was not paid on the date and time specified, all monies previously paid would be forfeited and the property would be resold at a specified date and time at which time the full purchase price would be payable in full. There was no additional advertisement or notice given of the resale after the petitioners failed to settle on May 2, 1983, and the successful bidder at the resale was required to pay in full both bids. We understand the objections of the petitioners to be that potentially interested bidders had no notice of a resale and, therefore, did not attend and the requirement that the full purchase price be paid at the time of the resale necessarily deprives persons needing conventional financing of the opportunity to bid because the deed would not be recorded for some time. The petitioners urge that this type of sale is unfair as to them and to the other creditors.

The Rules of Civil Procedure provide no guidance either on the issue of the giving of notice of a resale when a successful bidder fails to settle as required, or on the terms of payment at any Sheriff's Sale. The petitioners' cited a Rules Committee note appearing at 4A Anderson, Pennsylvania Civil Practice p. 478 as authority for the proposition that either there should be a Local Rule of Court determining the necessity or extent of additional notice in the event the sale is required because of failure of the successful bidder to complete the sale, or in the absence of such rule the Sheriff or an interested party should have applied for a special order. The Rules Committee note cited and relied upon by the petitioners referred only to Pa. R.C.P. 3129(e), which provided, "The court may by general rule or special order require additional notice to the defendant." Therefore, it would appear the Rules Committee note referred only to additional notice to the defendant rather than to the general public or to judgment creditors. However, the entire matter has become moot, for Pa. R.C.P. 2129(e) was rescinded effective November 6, 1975, and the Rules

Committee note referring to Subsection e would likewise be of no effect. We do observe Pa. R.C.P. 3129(e) states "rescinded and effective November 6, 1975," and the Rules Committee note referring to Subsection e states, "This subdivision is deleted in view of the amendment of Subdivisions (a) and (b) which provide for a notice to the defendant and owner." 4A Anderson, Pennsylvania Civil Practice 1983 Pocketpart, p. 188. The petitioners have, therefore, provided the Court with no authority in support of their second and third contentions.

The Rules Committee note to Pa. R.C.P. 3139(4) states, "See note to Rules 3128 as to times, terms and conditions of sale. . ." The committee note to Pa. R.C.P. 3128(b) provides:

"From time of sale, terms and conditions as to amount of deposit, time for payment of balance, forfeiture of deposit, resales or forfeits in similar matters are not regulated by these rules and will be governed by local practice in order to permit greater adaptability to the wide variety of local conditions and customs."

"A resale, upon refusal or failure of an execution purchaser to comply with his bid, may be held immediately. Indeed, it is the doctrine of some cases that the execution officer must sell immediately, if the first purchaser fails to furnish the requisite security or to comply with other requisites of the law. Some limitations, however, are generally placed upon the right to resell on the same date. Thus, the resale must be made within the legal hours for an execution sale, and may not be made after the departure of the bidders at the original sale. There are also instances in which an execution resale on a day subsequent to that of the original sale is authorized. Where the successful bidder is given a specified period of time within which to pay his bid, and is informed that the property will be resold if the bid is not paid within that time, the bidder has no standing to object to a resale at the end of the period specified where he failed to pay the bid within that time." 30 AmJur. 2d Executions Sec. 340 (p. 646); See also Sec. 380 (p. 668).

In *East Girard Savings & Loan Association v. Powell*, 11 D&C 2d 289, the published terms of the Sheriff's sale required a deposit of 10% of the highest bid at the time of sale, and the balance to be deposited with the Sheriff within twenty-one days without any demand. The Sheriff permitted a delay in settlement of more than 120 days, and on petition of the junior lienholder the court found the Sheriff had abused his discretion and ordered the property reexposed for resale. The court also observed:

"Our courts have consistently held that the resale of a property after the purchaser has failed to comply with the terms of his bid, is a matter within the discretion of the sheriff. . .

"Whether the sheriff will hold the purchaser to a strict compliance of the conditions of the sale or not is a matter between him and the purchaser of which no one can complain . . . no one else can interfere with the enforcement by him of his right against the purchaser'.

"We should, therefore, intervene only if the sheriff has abused this discretionary power, for: 'An execution is the end of the law and should not be the commencement of a new controversy'"

In *Marine Bank v. Hubta*, 279 Pa. Super. 130, 420 A. 2d 1066 (1980), the judgment debtor's petition to set aside the sheriff's sale on the grounds that the scheduled and advertised sale was stayed by court order and on the day and at the time and place scheduled for the sale the sheriff notified those present that the scheduled sale would be continued until a specified date and time. The judgment debtors argued that the second scheduled sale should have been advertised as provided under Pa. R.C.P. 3129(b) and (c). The Superior Court held that Pa. R.C.P. 3129(d) constitutes an exception to subsections (b) and (c), and affirmed the trial court's dismissal of the petition. The Superior Court stated at page 136:

"Formal notice may be dispensed with if it is likely that it is unnecessary to reach all those who would be interested in the sale and in participating therein. It is safe to assume that in most cases, this class of person will appear at the time and place set for the initial sale. Communication of the postponement to them at that time, even though oral, should suffice and dispense with the need for any further and more formal steps."

"In cases decided prior to the promulgation of Pennsylvania Rules of Civil Procedure, it was recognized that property could be resold under executions because of a failure of the original execution purchaser to comply with his undertaking, even if a part of the bid was paid by the purchaser. Thus, it was held that where the successful bidder was given a specified period of time within which to pay his bid, and was informed that the property would be resold if the bid was not paid within that time, the bidder had no standing to object to a resale at the end of the period specified where he failed to pay the bid within that time period. Moreover, although the law has long provided an action against

the execution purchaser for the purchase price without a resale of the property, it was recognized that under some circumstances, the execution officer could be held liable for neglect to resell the property upon such default. . ." 13 Standard Pennsylvania Practice 2d 75:38.

On the basis of the research of counsel for the parties and our independent research, we conclude that no provisions of the Pennsylvania Rules of Civil Procedure and no statutory law established what procedures shall be followed by the sheriff on the resale of real estate when such resale is necessitated by the failure of the successful bidder to comply with his undertaking to pay the balance remaining due on his bid. We also conclude that there are no Rules of Civil Procedure and no statutory law establishing approved terms and conditions for sheriff's sales of real estate. We have reviewed the Local Rules of Court commencing with the rules for the 16th District composed of Franklin, Fulton, Bedford and Somerset Counties printed in 1866, the rules promulgated in 1887, 1911, 1966 and the current rules regulating the practice in the Court of Common Pleas of the 39th Judicial District, dated May 15, 1974, as amended. None of the rules of this court addressed the problems here under consideration. We therefore, conclude the procedure for sheriff's resale and matters such as the terms and conditions of such sales have been and are regulated by local practice. In the absence of evidence to the contrary, we conclude that the terms of sale set forth in the advertisements and handbills for the April 22, 1983 sale of the petitioners' real estate represent the local practice in Franklin County. No evidence has been introduced which would justify a conclusion by this Court that the Sheriff has abused his discretion. Indeed, no evidence has been introduced by the petitioners to establish that one more financially responsible bidder would have attended a fully advertised and posted resale and/or a resale where the highest bidder would have been required to pay only a percentage of his bid at the time of sale and the balance some reasonable time thereafter. If a resale had been conducted with the full panoply of notices being given, advertised and posted we could only speculate whether a higher bid by a responsible bidder would have been made, but we can be certain the cost ultimately payable out of the proceeds of the sale would have been increased to the detriment of the petitioners' creditors.

We, therefore, find no merit in the petitioners' second and third contentions and they are dismissed.

The fourth and final ground asserted by the petitioners for setting aside the Sheriff's resale is that the sale price received was

grossly inadequate. The petitioners reached their conclusion on the basis of petitioner, David L. Herndon's opinion that the minimum fair market value for the real estate was \$250,000, and the Valley Bank & Trust Company's pleading admission that it appraised the real estate at \$221,200 for the purpose of taking the property as collateral on a loan to the petitioners and the bank believed the appraisal still accurate as compared to the bid of respondent Dillard in the amount of \$119,000 plus the assumption of the first mortgage in the amount of approximately \$32,500. In support of their contention the petitioners cite *Capozzi v. Antonopolas*, 414 Pa. 565 (1964), and *M. Barmann & Sons v. Dice*, 74 D&C 2d 608 (1976).

In the *Capozzi* case the sheriff's sale of stock of the judgment debtors was held without giving notice to the judgment debtors, and the stock testified to having minimum value of \$20,000 was sold by the sheriff for \$58.30, the exact amount of the cost of execution process. The Supreme Court held gross inadequacy of price is a sufficient basis in itself for setting aside a sheriff's sale, and sustained the decision of the lower court granting the petition to set aside. In *Barmann*, the price bid was not grossly inadequate but the court found that other factors such as the filing of a praecipe for a writ of execution in an amount substantially more than the execution creditor knew was due him, coupled with a service charge 100% in excess of that agreed upon between the parties, and a refusal by the execution creditor to supply the judgment debtor/petitioner with the correct balance due, constituted grounds for granting the petition to set aside.

We have no difficulty in accepting the correctness of the decisions in *Capozzi* and *Barmann*. However, the general rule is that the best evidence of a property's fair market value is the price the property attracts at public sale. *Weitz v. Anderson*, 53 D&C 2d 198, 206 (1971); *Plummer v. Wilson*, 322 Pa. 118, 124 (1936). Inadequacy of price alone does not constitute sufficient grounds to warrant the setting aside of a sheriff's sale. *Bend-A-Matic, Inc. v. Franklin Trust Company*, 296 Pa. Super. 492, 442 A. 2d 1158 (1982); *Fidelity Bank v. Pierson*, 437 Pa. 541, 264 A. 2d 682 (1970); *Senge v. Border*, supra.

We are not persuaded by the evidence or the contentions of the petition that the bid of respondent-Dillard was inadequate despite the fact that it was less than the value one of the petitioners attributed to his own property, and less than the bank's appraisal which was made for the purpose of taking the property as collateral. We have no evidence before us as to the

amount of the second highest bid or the identity of those bidders at the March and April sales. Presumably the petitioners believe if the resale were set aside and the real estate readvertised and offered for sale, a better price might be obtained. Obviously, the same assumption might be made in the case of any sheriff sale. A critical point in our judgment is that the petitioners have not come forward with any offer to bid a higher price (and with evidence they could pay it) or produced anyone who would offer a higher price commensurate with the petitioners' idea of the value.

We, therefore, find no merit in the petitioners' fourth stated ground for setting aside the Sheriff's Sale.

Pa. R.C.P. 132 provides:

"Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances."

In the case at bar, we conclude the petitioners have failed to sustain the burden of proving the existence of proper cause for the setting aside of the Sheriff's resale of May 2, 1983 to respondent Duane B. Dillard, and the petition will be dismissed.

ORDER OF COURT

NOW, this 13th day of December, 1983, the petition of David L. Herndon and Gilda F. Herndon, his wife, to set aside Sheriff's Sale is dismissed. Costs to be paid by the petitioners.

Exceptions are granted the petitioners.



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