

Opinion No. 15-1443

February 24, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Dr. G. N. Fleming, Chairman, Special Committee, House of Representatives, Santa Fe, New Mexico.

As to the payment for clay taken by the Penitentiary from property northeast of the city of Santa Fe.

OPINION

{*33} I understand from what you have said to me this morning that your special committee is one to which has been referred House Bill No. 214 providing for the payment for clay taken and used by the Penitentiary from property northeast of the city of Santa Fe, and that you desire some expression of opinion from me as to that bill.

In October, 1909, this matter was called to my attention because the then Superintendent of the Penitentiary had been made a party defendant in case No. 6544 on the civil docket in the District Court of Santa Fe County, that case being entitled Leandro Lovato et al. {*34} v. Lucia Lacassagne, et al. On behalf of the Superintendent I filed an answer admitting the allegations that he and his predecessors in office had taken clay from the premises described in the complaint, payment therefor having been made until sometime within the next preceding two years when, in consequence of some notice or claim made by one or more of the plaintiffs, such payments were stopped, the Superintendent taking the position that until the conflicting claims of the parties should be adjudicated by the court it would not be proper to make payments to anyone. At that time it was not anticipated that there would be any great delay in obtaining such adjudication, and I am not informed as to why the case has not been long since decided, but in view of that belief the answer expressed a willingness and a promise to pay a fair value of the clay taken whenever the court should decide the question of ownership so that it could be known to whom payment should be made.

It was also set out in the answer that this particular clay was adapted to the manufacture, not only of ordinary brick and tile, but also of a superior quality of vitrified brick of a kind which had not been manufactured at any other place in New Mexico, and that such brick met a public demand which would otherwise go unsatisfied, and that any restraint of the making of the brick would be an injury not only to the Penitentiary, but to the then territory at large and the various communities where the brick was being used both for building and paving purposes.

In view of this answer counsel for plaintiffs stated to me that no effort would be made to press the application for an injunction to stop the taking of the clay by the Penitentiary, and as I am informed, the use of that clay has continued down to the present time. I

believe it would be impracticable now for the Penitentiary authorities, out of the ordinary appropriation, to make the payment which was promised in the answer when no one expected that the litigation would run, as it has, for more than five years.

There can be no doubt that the clay has been taken and used, and clearly there can be no doubt that ordinary honesty requires that provision should be made for its payment.

The bill in question appears to provide for an adjudication by the district court, not only of the right of ownership of the land from which the clay was taken, but also for an adjudication of the amount and value of the clay or other material taken and used. When thus ascertained the bill provides that the money shall be paid into court, and the clerk is required, under the direction of the court, to distribute the moneys to the persons entitled thereto according to their respective interests.

I can see no valid objection to the passage of this bill. It will be the duty of my office, acting on behalf of the state and of the Superintendent of the Penitentiary, to see that the adjudication of the court as to the amount and value of the clay and other materials taken is correct. I assume that the Penitentiary records will show how much clay has been actually taken, and we would naturally insist that those records should be taken as conclusive evidence of the amount. There may be somewhat more of difficulty in { *35 } arriving at the value, but this is a matter of evidence to be passed upon by the court, and no better method can be devised than that which judicial procedure provides.