Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

201 VA 514

Record No. 5017

In the Supreme Court of Appeals of Virginia at Richmond

ARTHUR ARNOLD DILLON, ET AL.

v.

F. A. DAVIS, COMMISSIONER, ETC.

FROM THE CIRCUIT COURT OF FRANKLIN COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5017

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 18th day of March, 1959.

ARTHUR ARNOLD DILLON, ET AL., Appellants,

against

F. A. DAVIS, COMMISSIONER, ETC., Appellee.

From the Circuit Court of Franklin County

Upon the petition of Arthur Arnold Dillon and Vera D. Dillon an appeal is awarded them from a decree entered by the Circuit Court of Franklin County on the 31st day of October, 1958, in a certain proceeding then therein depending wherein F. A. Davis, State Highway Commissioner, was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 5 }

* * * * *

PETITION.

To the Honorable Langhorne Jones, Judge of the Circuit Court of Franklin County, Virginia:

(1) Your Petitioner, F. A. Davis, State Highway Commissioner of the State of Virginia, respectfully represents unto this Honorable Court that it is necessary for the construction, reconstruction, alteration, maintenance and repair of a portion of a highway embraced in the Virginia State Highway System, known as Route A220, Franklin County, Virginia, to acquire in fee simple a strip or parcel of land through certain real property, which on or before the 8th day of May, 1958, was owned by Arthur Arnold Dillon and Vera D. Dillon, husband and wife, as shown by lines on a blue print map of a portion of said highway, identified as Sheets Nos. 4A, 4C, 4D and 4E, Project No. 7220-033-032, on file in the office of the Department of Highways, Richmond, Virginia, a copy of which blue print map was attached to the certificate hereinafter referred to and recorded simultaneously therewith in the State Highway Plat Book among the land records of Franklin County, Virginia.

(2) Your Petitioner further represents unto this Honorable Court that it is requisite and suitable that the said strip of real property through the said property of Arthur Arnold Dillon and Vera D. Dillon be of the width and on page 6 } the grades as shown on the said blue print map hereinabove referred to and outlined in red on said map: and the said parcel of real property to be condemned as aforesaid, located in Franklin County, Virginia, is more particularly known and described as follows:

Being as shown on plans approved October 16, 1957, and lying on the northwest (left) side of the survey centerline and adjacent to the northwest right of way line of existing Route 220 from the lands of Howard E. Dalton opposite approximate Station 1101 plus 60 to the lands of Raymond Tyree opposite approximate Station 1105 plus 57 and containing 0.78 acre, more or less, land.

(3) Your Petitioner further alleges that all, or a portion of said Route herein involved has been designated as a Limited Access Highway in accordance with the provisions of Title 33, Chapter 1, Article 3 of the 1950 Code of Virginia, as amended, and your Petitioner represents that it is requisite and suitable and necessary to take and to condemn any and all easements of access, light or air, incident to the lands of the landowner abutting upon said Limited Access Highway and/or upon any of its ramps, loops, or connections at or with interesecting highways, and the line or lines upon which said easements are taken being shown in blue on said map filed in the Clerk's Office of the Circuit Court of Franklin County, Virginia, and said line or lines being more particularly described as follows:

From a point on the proposed northwest limited access line, opposite approximate Station 1101 plus 60 (survey centerline), the lands of Howard E. Dalton, thence along said proposed northwest limited access line to a point opposite approximate Station 1105 plus 57, the lands of Raymond Tyree.

(4) Your Petitioner further alleges that he has attempted to purchase the said real property from the owner thereof, but has been unable to do so.

(5) That on or about the 8th day of May, 1958, your Petitioner filed with the Clerk of the Circuit Court of Franklin County, Virginia, a certificate issued by the State Highway Commissioner and countersigned by the State Treasurer, stating that the sum of Fifteen Thousand Three Hundred Twenty-five Dollars and Fifty ($15,325.50) Cents, or so much thereof as might be directed by the Court would be paid, pursuant to the order of the Circuit Court of Franklin County, Virginia, as provided by Article 5, Chapter 1, Title 33, of the 1950 Code of Virginia, as amended, to the owner or other persons interested therein.

page 7

(6) That thereupon, pursuant to the provisions of the aforesaid Article 5 of Chapter 1 of Title 33 of the 1950 Code of Virginia, title to the land described in Paragraph 2 and the easements along said lines described in Paragraph 3 vested in the Commonwealth of Virginia.

(7) That your Petitioner and the land owner has been unable to agree on the amount of compensation and damages and therefore that it is necessary that the aforesaid land be condemned by your Petitioner.

(8) That the aforesaid State Highway Commissioner has designated N. B. Hutcherson, Jr., as his attorney in this matter and has authorized him to institute condemnation

proceedings and to make oath to the Petition pursuant to the statute in such cases.

WHEREFORE, your Petitioner respectfully prays to this Honorable Court in accordance with the provisions of Article 5 of Chapter 1 of Title 33 of the 1950 Code of Virginia, as amended, that Commissioners may be appointed to ascertain and report what will be a just compensation for the land herein proposed to be condemned and what will be a just and proper award to the owners for damages, if any, resulting to the property of the said owners or to the property of any other person from the construction and operation of the highway over the land of the said owner hereinabove described; that this Court shall direct all necessary inquiries to be taken by a Commissioner of this Court to ascertain what persons are entitled to any award which may be page 8 } allowed herein; that pursuant to the provisions of Article 5 of Title 33 of Chapter 1 of the 1950 Code of Virginia, as amended, any and all defendants hereto who may be required within ten days after the return date of the notice herein to file in writing in this case any grounds of defense which they may have hereto; that Arthur Arnold Dillon and Vera D. Dillon be made parties defendant to this suit; that the Court be directed to confirm the vesting of title in the Commonwealth as aforesaid and take all such other steps to carry out the intention of Article 5 of Chapter 1, Title 33, of the 1950 Code of Virginia, as amended, as may be necessary; and that your Petitioner may have such other, further and general relief as the nature of his case may require.

And your Petitioner will ever pray, etc.

F. A. DAVIS
State Highway Commissioner
By N. B. HUTCHERSON, JR.
His Agent and Attorney.

• • • • •

(on back)

Filed in the Clerk's Office the 16 day of May, 1958.

Teste:

EDWIN GREER, Clerk.

* * * * *

page 9 } The State Highway Commissioner of Virginia declares that it is necessary for the construction, reconstruction, alteration, maintenance, and repair of a section of road embraced in the Public Highways of the State, Route A220, Project 7220-033-032, (Old) 1833-32 in Franklin County, to acquire by the exercsie of the power of eminent domain certain land, or interest therein, belonging to Arthur Arnold Dillon and Vera D. Dillon, husband and wife, Co-tenants, and more particularly described in Certificate No. A 1618 of the Commonwealth of Virginia, recorded in the Office of the Clerk of the Circuit Court of said County in Deed Book ....., page ....., to which reference is hereby made, a *bona fide* but ineffectual effort to acquire same by purchase having previously been made.

The State Highway Commissioner hereby appoints N. B. Hutcherson, Jr., Rocky Mount, Virginia, his attorney in this matter, and authorizes him to institute condemnation proceedings as provided in Title 33, Chapter 1, Article 5, of the 1950 Code of Virginia, as amended, in the name of and on behalf of the State Highway Commissioner, and as his attorney to make oath to the petition, all in accord with the statutes in this State in such cases made and provided.

H. B. FUGATE
Deputy State Highway Commissioner of Virginia.

Dated at Richmond, Virginia. May 8, 1958.

* * * * *

page 24 }

* * * * *

MOTION TO DISMISS FOR LACK OF JURISDICTION.

NOW COME the defendants Arthur Arnold Dillon and Vera D. Dillon, by counsel, and move the Court to dismiss this cause for lack of jurisdiction, upon the following grounds:

1. The petition does not set forth with reasonable particularity a description of the land sought to be condemned.
2. There was not filed with the petition herein a plat of the survey of the land sought to be condemned.

3. The petition does not set forth compliance with Section 25-7 of the Code of Virginia of 1950, and the manner of such compliance.

This motion will be based upon the grounds stated herein, upon the files and records in this case, upon the affidavit of Thomas Fralin attached hereto, upon the memorandum of points and authorities filed herewith, and upon such evidence, oral and documentary, as may be adduced at the hearing thereof.

ARTHUR ARNOLD DILLON
VERA D. DILLON
By T. KEISTER GREER

8/25/58 2:05 P. M.

* * * * *

page 26 }

* * * * *

AFFIDAVIT.

Thomas Fralin, being first duly sworn, deposes and says as follows:

1. That he is a surveyor duly licensed and certified to practice this calling, and a resident of Franklin County, Virginia.
2. That he has read the description set forth in the petition on file in the cause above styled, and that the said description is not adequate to enable a surveyor to locate the boundaries of the parcel sought to be described without reference to the plans therein referred to, that is to say, that the words of the description are not sufficient to enable a surveyor to run the lines of the said parcel.

THOMAS F. FRALIN.

Subscribed and sworn to before me this 23rd day of August, 1958.

BETSY D. HARRIS
Notary Public.

My commission expires October 18, 1959.

8/25/58 2:05 P. M.

* * * * *

page 33 }

* * * * *

ORDER.

This cause came on to be heard on August 30th, 1958, the papers formerly read, and upon a Motion to Dismiss, for lack of jurisdiction filed by the defendants on August 25th, 1958, and the Court heard arguments of counsel and evidence in support of the Motion so filed.

And it appearing to the Court that the defendants had heretofore been represented by counsel and filed their Bill of Particulars, designated as answer, and an Order entered on June 12th, 1958, adjudicating the matters before the Court at that time and appointing Commissioners to meet on July 23rd, 1958, on which date this cause was continued by reason of the death of original counsel, and since the Motion to Dismiss reached the jurisdiction of the Court, the Court agreed to hear arguments on the Motion, and after hearing arguments and evidence, the Court ordered the Petitioner to produce and file the plans, or a copy thereof, referred to in the Petition, and a certified set of plans were

page 34 } presented to the Court and filed and the Court overruled the Motion to Dismiss on Grounds Nos. 1 and 2 of the Motion, and upon the said plans being filed, the Court informed counsel for the defendants that if the defendants had been prejudiced, due to the fact that the plans had not been heretofore filed, the Court would grant the defendants a reasonable continuance.

The Court further heard evidence on Ground No. 3 of the Motion to Dismiss, which Ground alleges that the Petitioner did not comply with Section 24-7 of the 1950 Code of Virginia.

The Court, after having read the pleadings and heard the evidence adduced, is of the opinion that Paragraph No. 3 of the Petition filed by the Petitioner complies with Section 25-7 of the 1950 Code of Virginia, and from the evidence adduced, that a *bona fide* effort had been made by the Petitioner to purchase the land from the landowner, and the Court overruled Ground No. 3 of the Motion to Dismiss.

WHEREUPON, the Court accordingly overruled all of the

grounds of the Motion to Dismiss, filed by the defendants, to which the defendants except, for reasons stated in the memorandum filed August 25th, 1958.

WHEREUPON, the Court accordingly overruled all motions of the defendants and does continue this cause to September 3rd, 1958, as of the date for the Commissioners to meet, as set out in an order entered by this Court on June 8th, 1958, and continued from time to time.

Enter this 12 day of Sept., 1958.

L. JONES, Judge.

* * * * *

page 39 }

* * * * *

EXCEPTIONS TO REPORT OF COMMISSIONERS.

NOW COME the defendants Arthur Arnold Dillon and Vera D. Dillon, by counsel, and file these their exceptions to the report of the Commissioners in this cause, which said report bears date of September 3, 1958:

First Exception: The Court had no jurisdiction to appoint Commissioners, and the Commissioners no jurisdiction to act, upon the grounds, and each of them, set forth in the motion to dismiss for lack of jurisdiction heretofore filed by these defendants August 25, 1958.

* * * * *

Third Exception: The Commission was improperly constituted, in this, that it contained only four members, although these defendants were entitled under the statutes in such case made and provided to a commission of five impartial and qualified individuals.

page 40 }

* * * * *

Fifth Exception: One member of the Commission misconducted himself in this, that he slept during several stages

of the proceedings in this cause, always at times when testimony was being adduced on behalf of these defendants.

* * * * *

Seventh Exception: The Petitioner failed to file with the petition or prior to the trial a map or plat showing the land of these defendants likely to be damaged by the taking accomplished herein.

Eighth Exception: The Petitioner failed to file, or to include in any paper filed by him, a description of the land of these defendants likely to be damaged by the taking accomplished herein.

Ninth Exception: The Petitioner failed to file with the petition or prior to the trial a profile showing the cuts and fills of the contemplated improvement.

Tenth Exception: The Petitioner caused to be prepared a sketch purportedly of the property of these defendants, which said sketch was not revealed to the Court or to these defendants until the day of trial, which was then marked for identification and introduced into evidence, and which has been revealed by study and analysis to be grossly incorrect and inaccurate.

Wherefore the said defendants doth except to the said report of the said Commissioners and pray that their said exceptions may be sustained, and that the said report may be set aside.

Dated: This 13th day of September, 1958.

page 41 }

ARTHUR ARNOLD DILLON
VERA D. DILLON
By T. KEISTER GREER, Esq.

* * * * *

page 42 }

* * * * *

STIPULATION

NOW COMES the petitioner, F. A. Davis, State Highway Commissioner, by counsel, and stipulates that the cardboard map lettered "Property A. A. Dillon," which has been identified in the lower right-hand corner thereof by the initials

of counsel for the petitioner and for the defendants, is an exact duplicate of a cardboard map which was prepared by petitioner and marked for identification and received in evidence during the trial of this cause. The said exhibit has been lost or mislaid since the said trial, and the present cardboard map is intended to take its place.

The said petitioner F. A. Davis, State Highway Commissioner, by counsel, further stipulates that the portion of the said map colored in pink is a correct representation of the land of these defendants condemned in the cause above styled. The lines of the uncolored portion of the map are not accurate boundaries of the remaining portion of the property. The petitioner stipulates that the boundary lines of the page 43 } Dillon property are correctly shown on the plat drawn by Thomas Fralin, surveyor, which plat was marked for identification and introduced in evidence by the defendants at the hearing on the exceptions to the Commissioner's report. The petitioner further stipulates that there is not now of record in any deed book or state highway plat book of Franklin County, Virginia any map or plat filed by this petitioner correctly setting forth the boundaries of the remaining lands of these defendants not condemned.

Dated: This 27th day of October, 1958.

F. A. DAVIS
State Highway Commissioner
State of Virginia
By N. B. HUTCHERSON, JR.
His Attorney.

Enter 10/31/58.

L. JONES.

page 44 }

* * * * *

FINAL DECREE.

THIS DAY came the Petitioner, by counsel, as well as Arthur Arnold Dillon and Vera D. Dillon, landowners, by Counsel; and,

It appearing to the Court that the Commissioners heretofore appointed in this cause have appeared before this Court in the Courtroom thereof, on September 3, 1958, and

taken the oath prescribed by law, and thereafter, the said Commissioners, in the custody of the Sheriff, having viewed the premises sought to be condemned in the presence of the Judge of this Court and of counsel for Petitioner and Defendants, and the said Commissioners, after having returned to Court, and after hearing the evidence in this cause, and having been duly instructed as to the law, by the Court, and the said Commissioners having on September 3, 1958, filed their report in this cause, and the said Arthur Arnold Dillon and Vera D. Dillon, the defendants and landowners in this cause, having, by leave of Court filed their exceptions to the said report of the said Commissioners on the 13th day of September, 1958, and the Court having heard evidence *ore tenus* on the said exceptions so filed, the Court doth hereby over-rule the exceptions to the Report of the Commissioners,

page 45 } and the defendants, Arthur Arnold Dillon and Vera D. Dillon, the defendants and landowners, except to the ruling of the Court for the reasons stated in the record; and,

It appearing to the Court that the said report is regular in every respect, and the exceptions thereto having been overruled, the same having been filed in the Clerk's Office for more than ten 10) days, the Court doth ADJUDGE, ORDER and DECREE that the report of the said Commissioners be, and the same is hereby confirmed and approved; the award for compensation for the value of the land taken by the Commissioners being fixed by the Commissioners at $15,000.00; and, the sum of $1,850.00 for damages to the adjacent property of Arthur Arnold Dillon and Vera D. Dillon; and,

It further appearing to the Court that the Commonwealth of Virginia, in accordance with an order entered in this cause on the 12th day of June, 1958, did pay to the Clerk of this Court the sum of $13,792.95, which sum was paid to Arthur Arnold Dillon and Vera D. Dillon by the Clerk of this Court, on July 3, 1958; and,

It further appearing to the Court that the Commonwealth of Virginia did, on the 25th day of September, 1958, pay unto the Clerk of this Court the sum of $3,057.05, and accrued interest for the said Arthur Arnold Dillon and Vera D. Dillon, the Court doth Order that there be vested in the Commonwealth of Virginia, in fee simple, the land mentioned and described in the petition in this cause, the same containing 0.78 acres, more or less, being shown on plans approved October 16, 1957, and lying on the northwest (left) side of the survey centerline and adjacent to the northwest right of way line of existing Route 220 from the lands of

page 46 } Howard E. Dalton opposite approximate Station 1101 plus 60, to the lands of Raymond Tyree opposite approximate station 1105 plus 57, together with any and all easements of access, land or air incident to the lands of the landowners abutting upon said limited access highway, and/or upon any of its ramps, loops or connections at or with intersecting highways, and the line, or lines upon which said easements are taken being shown in blue on said map filed in the Clerk's Office of the Circuit Court of Franklin County, Virginia.

And the Clerk of this Court is directed forthwith to make a certified copy of the Order appointing Commissioners in this cause, the Report of the Commissioners, and of this Order, and record the same, together with the proper plats as furnished by the Petitioner, in the Deed Book of Franklin County, Virginia, and index the same in the name of Arthur Arnold Dillon and Vera D. Dillon, husband and wife, as Grantors, and the Commonwealth of Virginia, as Grantee.

And the Court doth further ORDER that the Petitioner pay the costs of this proceeding, which was accordingly done.

And the Court doth further ADJUDGE, ORDER and DECREE that the Clerk of this Court do pay to Arthur Arnold Dillon and Vera D. Dillon the balance due on the award in this case, to-wit: $3,057.05, with $30.49 accrued interest as compensation for the land described in the Petition.

Enter this the 31 day of Oct., 1958.

L. JONES, Judge.

* * * * *

page 47 }

* * * * *

Filed 12-18-58. 4:35 P. M.

DEFENDANTS' NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Pursuant to the provisions of Rule 5:1, §4 of the Rules of the Supreme Court of Appeals of Virginia, the defendants Arthur Arnold Dillon and Vera D. Dillon hereby give notice of their appeal to the Supreme Court of Appeals of Virginia, from the Final Decree of the Circuit Court of the

County of Franklin, entered herein on the 31st day of October, 1958.

For their assignments of error, also filed pursuant to the aforementioned rule, the defendants state as follows:

1. The Trial Court erred in overruling the defendants' motions to dismiss this case for lack of jurisdiction, it appearing that

(a) The petition did not contain a description of the land sought to be condemned, as required by §33-60 of the Code of Virginia.

(b) There was not filed with the petition a plat of the survey of the land sought to be condemned, as required by §25-9 of the Code of Virginia.

(c) The petition did not set forth compliance with §25-7 of the Code of Virginia, and the manner of such compliance, as required by §25-8 of the Code of Virginia.

page 48 } (d) The petition contained no description of the remaining property of these defendants not taken, but likely to be damaged, nor was any plat filed of such remaining property, as required by §25-9 of the Code of Virginia.

(e) There was not filed wtih the petition a profile showing the cuts and fills of the contemplated improvement.

2. The Trial Court erred in overruling the defendants' tenth exception to the commissioners' report, it appearing that Plaintiff's Exhibit I, received in evidence before the commission as a map of the entire property of these defendant, was grossly incorrect and inaccurate.

3. The Trial Court erred in overruling the defendants' motion to discharge the commission, following challenge of a commissioner for cause, it appearing that only four commissioners remained, and that the defendants were entitled to a commission originally constituted of five impartial and qualified individuals.

4. The Trial Court erred in overruling the defendants' first, third, seventh, eighth, and ninth exceptions to the commissioners' report, which said exceptions restated for the rceord the issues of lack of jurisdiction and defective composition of the commission.

5. The Trial Court erred in overruling the defendants' fifth exception to the commissioners' report, it appearing that a commissioner slept during the reception of evidence on behalf of the defendants. The Trial Court further erred in declining to receive testimony during the hearing on the

commissioners' report from the Judge of the County Court and a deputy sheriff with reference to the known tendency of this commissioner to fall asleep in the daytime.

Dated this 18th day of December, 1958.

ARTHUR ARNOLD DILLON
VERA D. DILLON
By Counsel.

• • • • •

Mr. Greer: May it please the Court, on Wednesday, August 29th, the defendants brought on for hearing certain matters addressed to the jurisdiction of the Court in both of these cases. I will not re-state the grounds of these motions. The Court denied these motions; however, ordering the petitioner—ordering the condemnors to file plats of the property taken. I have had occasion since the hearing to examine the plats filed by the petitioner and I respectfully renew my motion to dismiss upon the grounds stated and the points and authorities cited, and with and upon the further ground that the plat filed as to the Dillon property does not show the land to be damaged. I call your attention to §25.9 of the Code, and the attention of the Court to *Virginia Electric and Power Company* v. *Webb,* 196 Va. 555-565. The condemnor is required to state the interest or estate to be taken and file a plat that describes the land in which an interest is sought. In the Dillon case, we are losing .7 of an acre, leaving four acres not taken. The Code specifically requires that the property to be damaged shall be described in the plat. On the grounds stated, I respectfully renew my motion to dismiss.

The Court: The motion will be overruled.

Mr. Greer: We respectfully except to the Court's ruling upon the grounds heretofore stated.

If it please the Court, the condemnees, Vera and Arnold Dillon and W. T. Harrison, further move that the Commission be discharged on the grounds that: (1) that it has very recently come to my attention that the Commissioner Tyree is the father of the land owner immediately adjacent to Mr. and Mrs. Dillon. That the son of this commissioner compromised and settled his case wtih the Commission. While I am certain that Mr. Tyree is qualified in every way to serve, I believe it to be a delicate matter with a person who still

has his own case with the Commission.

9/3/58 page 2 } The Court: We have five commissioners, I believe. Would you be agreeable to proceed. The law says any three or more may act.

Mr. Greer: I believe, Your Honor, that it reads any three of five qualified commissioners.

The Court: Do you want this case put off or do you want it tried?

Mr. Greer: I want to try it, but I believe I am entitled—Nothing I have said is to be construed as reflecting on the character of Mr. Tyree, but it appears to me that it is not appropriate under the circumstances for him to serve.

• • • • •

9/3/58 page 3 } Mr. Hutcherson: Concerning the appointment of these commissioners, Mr. J. B. Allman, deceased, was representing Harrison and Dillon. Mr. Allman was well aware of the fact that Mr. Tyree's son had property adjoining the Dillon property and had settled with the Highway Department. At the time of Mr. Tyree's appointment, it was brought to his attention by the attorney for the State Highway Commission and he made no objection thereto.

• • • • •

The Court: Gentlemen, the only point that bothers me is the question of this one commissioner. Do you know of any person whom you can agree upon who is in close proximity here who we might get to act in this case, that you can agree upon. That is, if you cannot agree I will appoint somebody. Otherwise, I will let this man stand aside and have only four.

Mr. Greer: If Your Honor please, I believe that the Code as stated contemplated a five man commission.

The Court: I don't desire to discuss the matter any further except to this extent: This man, or rather these men, were appointed at the time that your client was represented by counsel. No objection whatsoever was raised to these men, certainly not to me. They were agreed upon by counsel and the names submitted to me for approval. I know all the men, and I thought they were excellent men. The strikes were made in my presence. If you desire, and you can agree on a man, otherwise I will appoint one myself; or you may take four men out of the five which are there and proceed and let this gentleman stand aside.

Mr. Greer: I am at a handicap, not having been counsel in this case to begin with, Mr. Allman having died. But the objection was suggested to me by my client, and in
9/3/58 good conscience, I am sure. I am not able to go
page 4 } forward with this case without having a brief conference with my clients, and I will request compliance with the suggestion of the Court.

How about Grady Gregory?

The Court: He has been testifying in these cases.

Mr. Hutchinson: I would object to that; he has testified.

The Court: Can you think of anyone else? Minter Patterson—would he act?

Mr. Hutchinson: He is in the middle of two funerals.

Mr. Greer: I have discussed the Court's suggestion with both of my clients. I will quote the reply of one of my clients, who is not a lettered man. He said "The others had five commissioners and I think we should too."

I would like to make a suggestion to the Court. I just saw one of the members of the bar of Franklin County and he suggested Mr. Allen Simpson. We would be happy to have him.

Mr. Hutchinson: He was one of my strikes. He is my first cousin.

The Court: I am going to say this—the statute says that you shall have a panel of seven; that each side shall have a strike. That has been done. If you cannot agree upon them —That was done when this case was first set for hearing. The statute further states that of the five, and I think the order should so state; the statute reads: [§33-63] * * * "In the event seven are summoned, the petitioner and the landowner shall each have one peremptory challenge and the remaining five, or the orginal five if only five have been summoned, any three of whom may act, shall fix the value of the land taken and the damages, if any, which may accrue to the residue."

Mr. Greer: I respectfully submit that in the event that there is one commissioner who should be stricken
9/3/58 for cause, he should not be allowed to serve.
page 5 } The Court: I'm going to send four men out there.

Mr. Greer: I take the position that they are entitled to a valid commission of five. The Code provision means any three of a valid five man commission, and these defendants respectfully except to the Court's ruling.

* * * * *

9/3/58
page 7

* * * * *

Mr. B. D. Tyree was called into the Judge's chambers outside the hearing of the other Commissioners.

The Court: Mr. Tyree, I want to thank you for coming over here today, and I am going to relieve you of acting in this case.

Do you have any objection to my telling Mr. Tyree why the Court is doing this itself?

Mr. Greer: No, sir.

The Court: We understand one of your children has some land in this area and we felt that somebody might feel that—we didn't want any suspicion cast on it.

9/3/58
page 8

* * * * *

The Court: I believe this drawing may be used by stipulation or agreement—that one which is on a piece of cardboard. Mark that Exhibit I.

Mr. Greer: If the plaintiff will represent to me what this is, I will stipulate to that effect.

Mr. Hutchinson: This is a drawing of the property proposed to be taken by the Department of Highways and we will designate it as Exhibit I for the plaintiff.

The Court: If I understand this, this is a plat here or a map, which is by consent an Exhibit to the Commissioners on the grounds at the time of the viewing. It is proposed to be a plat of all the property owned by the landowners, Arthur A. and Vera Dillon. The yellow markings show the present location of the present highway right of way. The red or pink portion shows that portion of the property which is proposed to be acquired. The remaining portion, which is white, is the remaining portion of the land. It is filed as Exhibit I.

The first witness,

MR. M. L. ENGLISH,
after being duly sworn, testifies as follows:

* * * * *

9/3/58
page 10 }

* * * * *

I am going to show you, Mr. English, plaintiff's Exhibit Number I which has already been identified in the record. I have been given to understand that the yellow area is the present highway right of way, and the pink area delineates the portion being taken by the State.

A. That's right.

Q. Is the present structure being taken by the State?

A. Yes, sir.

Q. Is the well being taken?

A. Yes, sir.

Q. The area shown in white on plaintiff's Exhibit I is the area left?

A. Yes.

* * * * *

9/3/58
page 13 }

* * * * *

(Cross examination of Mr. English, continued).

* * * * *

9/3/58
page 14 }

* * * * *

Q. As to the land to be taken, what value did you put on that per acre?

A. Three thousand dollars.

Q. Three thousand dollars on the back land, same as on the front land?

A. No, sir. Three thousand dollars for what they taken. I just put damages on the land that was left to them.

Fred L. Gray.

Q. Now you are talking about the land—the pink here—is that right?

A. No, sir. I am talking about the white land.

Q. You put that at three thousand dollars an acre?

A. No, sir. The pink is three thousand dollars an acre. The severance damage is on the land back here. The white land.

* * * * *

9/3/58
page 30 } The witness,

FRED L. GRAY,
after being sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Greer:

Mr. Greer: Has this been marked in our present case?

The Court: Yes, sir. If not, we will mark it as Exhibit II.

* * * * *

Q. Mr. Gray, we show you this sheet from a number of sheets here. What do you call this entire combination of papers?

A. Approved plans for the Rocky Mount By-pass.

Q. How would you describe this sheet?

A. Sheet number 4 of the Approved Plans for the Rocky Mount By-pass.

Q. Does Sheet number 4 show the land being taken from Mr. A. A. Dillon and his wife?

A. Yes.

Q. Does this show the work to be accomplished from this condemnation?

A. No, sir.

Q. Does it show the remainder of the Dillon property?

A. No.

Q. Is there a sheet which does?

A. Yes, sir. Sheet 31. They are not in this set of plans.

9/3/58
page 31 } Q. Perhaps I can be of assistance to you. I show you three sheets given to me by Mr. Hutchinson and I ask you if these sheets show the profiles as they relate to the Dillon property?

Fred L. Gray.

A. The Dillon property is affected by the construction of the service road. The profile of the service road is not on these sheets. It is on Sheet 31. I have a copy of it.

Q. Would you produce it, sir?

A. Yes, sir—This is a profile of the service road.

Q. When you say "this," what are you referring to?

A. Sheet number 31 of the approved plan.

Q. You are looking at a different document—what is the difference?

A. This is a photostat.

Q. Why is it the one I hold in my hand doesn't have Sheet 31 and the photostat you have does?

A. Apparently this is not a complete set of plans.

Q. Is it a complete set of plans in so far as it relates to the property of Arnold Dillon?

A. I will have to look again to be sure Sheet 31 isn't here because Sheet 31 is involved—Sheet 31 isn't here.

Q. Sheet 31 is not contained in the sheets of blue appearance which have been marked as defendant's Exhibit II?

A. That is correct.

Mr. Greer: May it please the Court, I would like to respectfully draw the attention of the Court to the absence of the profiles in the condemnation proceedings. I believe that is a requirement of condemnation proceedings.

9/3/58 page 32 } The Court: I'll see you gentlemen in chambers.

Mr. Greer: The point I want to make is that I respectfully submit that it is a jurisdictional requirement that a plat of the property being taken and of the land being damaged, and that the profile be filed along with the papers. Admittedly there has been no plat showing the land being damaged and the profile itself, Sheet 31, is just now being filed.

Mr. Hutchinson: As I understand it, the profile for the main road has been filed.

Mr. Greer: There is no profile for the service road.

The Court: The Court will hold thusly: This should have been filed. The Court will permit it to be filed. If, by the filing of the same, the land owner has been in any way prejudiced, the Court will continue this hearing until the 9th and complete the hearing at that time. I think it would be too much expense to the land owners to bring all these witnesses back here.

Mr. Greer: If it please the Court, I am not going to ask for a further continuance. I think my people would prefer

to conclude the case. I appreciate the Court's offer. Our position will be that the filing of these papers—that the papers have been filed too late.

(Resume direct examination of Mr. Gray by Mr. Greer).

Q. Mr. Gray, have you now found Sheet 31 which you made reference to in your previous testimony?

A. Yes, sir.

Q. Would you describe what set of documents that sheet appears in?

A. This is the approved plans for the Rocky Mount By-pass—a copy of it.

9/3/58 page 33 } Q. I think this should show just which will effect Mr. Dillon's land, that it should be marked Exhibit III and filed with the records in this case. Are there any other profiles which will affect this property, which will affect the remaining land of Arnold Dillon, other than the profile shown in Sheet 31?

A. We have the profile of the main line which would be the next road over there. I don't know if you would consider that road—

The Court: Are they filed in this proceeding?

A. Yes.

Q. Are they now before the Court and this commission, all the profiles which could possibly affect the Dillon property—is that Exhibit II?

A. Yes.

Q. Mr. Gray, I will further show you a small sheet which bears a notation "filed 8/29/58," which bears my initials and Mr. Hutchinson's showing we have seen this map. Was that prepared for the Department of Highways?

A. Yes, sir.

Q. I will ask this map be marked Defendant's Exhibit IV and entered in evidence. Does Exhibit IV delineate the land damaged by this taking? Do you understand my question?

A. Not exactly, no, sir.

Q. You notice the area in red?

A. Yes, sir.

Q. What does that indicate?

A. The land within the red outline indicates land we are

Fred L. Gray.

buying from Mr. Dillon.

9/3/58 page 34 } Q. Does Mr. Dillon have some more land not being taken?

A. Yes.

Q. Is that on the paper?

A. No, sir.

Mr. Greer: I will renew my motion with respect to that.

The Court: That has been ruled on and overruled.

Mr. Greer: We respectfully except to the Court's ruling.

* * * * *

9/3/58 page 45 }

* * * * *

9/3/58 page 46 } The Court: I would like to call Mr. Gray a minute about this map.

Mr. Hutchinson: If it please the Court, I am told that Sheet 31 was missing from there and they didn't know it. Here it is, taken from another set of plans. We want to add this to it. It is being added to the defendant's exhibits.

* * * * *

Rocky Mount, Virginia
September 29, 1958.

Before: Honorable Langhorne Jones, Judge of The Circuit Court of Franklin County, Virginia.

Appearances: Nathan B. Hutcherson, Jr., Esq., counsel for the Plaintiff, and

Thomas Keister Greer, Esq., counsel for the defendants.

* * * * *

9/29/58 page 7 }

* * * * *

The Court: Fifth—

Arnold Dillon.

Mr. Greer: We have further testimony to present at this time.

The Court: I will hear no more testimony on that, sir; except to it.

9/29/58 page 8 } Mr. Greer: If your Honor please, may I make an offer of proof?

The Court: No, sir; I observed the man that day. We had the matter up at that time and timely exception was made. I don't care to hear any more.

Mr. Greer: Your Honor, that was in the Harrison case. The offered proof I now make was in the Dillon case, while Mr. Dillon was on the stand.

The Court: Wait a minute; we were only trying one case at a time.

Mr. Greer: That's correct, your Honor.

The Court: And this motion was only made in one case.

Mr. Greer: Yes; your Honor, and after the Dillon case was over, it was called to my attention by my client that that particular commissioner had again gone to sleep and I have, therefore, in this particular case filed an exception in that manner.

• • • • •

9/29/58
page 10 } MR. ARNOLD DILLON,

a defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greer:

Q. Please state your name, Mr. Dillon.

A. Arnold Dillon.

Q. Where do you live?

A. South 220.

Q. Are you one of the defendants in this case, and when I say "this case," I mean of F. A. Davis, State Highway Commissioner, State of Virginia, against Arnold Dillon and Vera Dillon?

A. Yes, sir.

Q. I believe you testified at one interval in the case of Davis against W. T. Harrison and his wife; is that correct?

A. Yes, sir.

Arnold Dillon.

Q. And you testified as to having seen one of the commissioners go to sleep?
A. I did.
Q. What was the name of that commissioner?
A. Mr. Ellis—Jim Ellis.
Q. Now that was on September 3, 1958?
A. Yes, sir.
9/29/58 page 11 } Q. Mr. Harrison's case was tried before your case?
A. Yes, sir.
Q. Do you remember the approximate time of the day that your case went on to trial?
A. Oh, not for sure—around 3:00 or 4:00 o'clock. It was late getting—it was getting late.
Q. Your case went on trial later in the afternoon than Mr. Harrison's case?
A. Yes, sir; later.
Q. Did you testify in your own behalf in the course of that case?
A. Yes, sir.
Q. Did you observe Mr. Ellis during the course of your testimony?
A. Yes, sir; I certainly did.
Q. I want you to tell the Court what you saw.
A. Well, as he did in the trial before mine, he went to sleep again and dropped his pencil and the gentleman sitting on his left picked his pencil up and gave it back to him.
Q. After that trial, did you call that to my attention?
A. Yes, sir; I certainly did.
Q. And do you know whether or not I incorporated that particular point in the exceptions to the Commissioners' Report filed in this cause?
A. Yes, sir I think so, yes, sir.

9/29/58
page 12 } By the Court: (interposing)
Q. When?
A. Beg pardon.
Q. Was the Court's attention ever called to it?

Mr. Greer: I didn't see him go to sleep, your Honor, during Mr. Dillon's trial. I was watching my witness and I didn't see that particular commissioner asleep.
The Court: What I'm trying to get at is, when did you—in

other words, this is the first time my attention has ever been called to it.

Mr. Greer: It is the first time we've had an opportunity to, your Honor. We called it to your Honor's attention in the exceptions which were duly filed.

The Court: Frankly, I didn't look at the exceptions. I should have. I left it for the counsel for the complainant in this matter but I don't recall ever before having this matter before me, and it looks to me like it should have been made at that time.

Mr. Greer: Well, your Honor, I couldn't make it at the time because I didn't know it. My witness couldn't say anything about it because he was on the stand and answering questions.

9/29/58 page 13 } The Court: Well, didn't he get through testifying?

Mr. Greer: I don't remember the order in which he testified but he called it to my attention after the trial.

The Court: Well, the commission stayed. He was on the stand a good while.

Mr. Greer: It wasn't called to my attention until after the trial. This man is a layman; he may not have realized that it should have been called to my attention.

The Court: He testified about a similar incident—an alleged incident—in the trial just before his, didn't he?

Mr. Greer: He did, your Honor.

The Court: And you don't think he understood what it was?

Mr. Greer: Well, I think this. I can represent to the Court only this—that he called it to my attention after the conclusion of the trial. As a matter of fact, I think it was possibly the day following the trial.

By Mr. Greer: (continues examination)

Q. Mr. Dillon, when did you first call my attention to the fact that you saw Mr. Ellis go to sleep during your testimony?

9/29/58 page 14 } A. Well, that was the next morning, I think, after the trial. I'm pretty sure it was when I was up in your office and I told you then that he went to sleep, after we came out of the little room back there, and that's when you asked me if it was while my trial was going on. I told you it was.

Arnold Dillon.

Q. And you told me it was during the time that you were giving testimony?
A. Yes, sir.

Mr. Greer: Witness with you.

CROSS EXAMINATION.

By Mr. Hutcherson:
Q. Mr. Dillon, how do you know he was asleep?
A. Well, the man closed his eyes and lost control of his hands so far as to drop the pencil out of his hand.
Q. He had a pad in his hand, did he not?
A. Yes, sir.
Q. Do you know whether or not he had all the figures that were quoted during the testimony on that pad?
A. Not from where I was sitting. I couldn't see whether he had all the figures, but I did see this—after he got his pencil and straightened himself up, he looked over at the man on his right and looked at his figures and then looked at the man on his left and looked at his figures and then wrote something on his pad. From where I was sitting, I couldn't see what he did.
Q. All you're going on is that he dropped his
9/29/58 head and dropped his pencil?
page 15 } A. Yes, sir.

By the Court:
Q. That was the length of time that he dropped his head and dropped his pencil and then somebody picked it up and he raised up and looked across at each person on his left and right?
A. Yes, sir.
Q. Did it last over a minute?
A. Well now, that I couldn't tell you how long it lasted. I really couldn't say.

* * * * *

Mr. Greer: May it please the Court, as long as this witness is on the stand, I'd like to ask him a question about a related matter—that is, it relates to another exception—and then I will be through.
The Court: I thought you had no other exceptions.

Arnold Dillon.

Mr. Greer: If the Court please, we haven't come to this particular exception yet. I can defer it.

The Court: What is the other exception?

Mr. Greer: With reference, if your Honor please, to the adequacy of the map filed by the State.

The Court: I think we have ruled on that.

Mr. Greer: Your Honor, this is a point that I have never even had an opportunity to make to the Court.

9/29/58 page 16 } The tenth exception, "The petitioner caused to be prepared a sketch purportedly of the property of these defendants, which said sketch was not revealed to the Court or to these defendants until the day of trial, which was then marked for identification and introduced into evidence and which has been revealed by study and analysis to be grossly incorrect and inadequate."

Mr. Hutcherson: Now, I want to be heard on that.

The Court: Wait a minute. Don't get so excited. I want to ask a question, and this is the question I want to ask.

Q. Did we take all of your land or part of it?
A. Part of it, sir.
Q. Part of your land?
A. Yes, sir.

The Court: There was a sketch filed by the Highway Commission which was exhibited, as I recall, after we got to the property.

Mr. Greer: That's the sketch I'm talking about. That was received in evidence and taken into the jury room.

The Court: At that time, didn't I, on the ground, ask that you and your client observe that map before we entered it into the evidence?

Mr. Hutcherson: You sure did, sir.

9/29/58 page 17 } The Court: And you all took it around behind an automobile or near an automobile and looked it over together?

Mr. Hutcherson: And came back and said they had no objections.

The Court: Didn't you do that?

Mr. Greer: Well, Mr. Hutcherson's recollection is more accurate than mine in the matter, your Honor. I don't remember going back behind an automobile but that was on the—

The Court: Do you remember my handing it to you and your client on the ground?

Arnold Dillon.

Mr. Greer: I'm sorry to state, your Honor, I do not. I remember that the sketch was first shown to us when we took our view of the property.

The Court: Yes, sir, and it was over there on the ground and didn't I ask you and your client to look at it and see if you had any objections to it and at that time you took it off and looked at it and it was explained to you by the State—

Mr. Hutcherson: The engineer.

The Court: —engineer, and you came back and he pointed out the marks to you all?

Mr. Greer: It was apparently explained to our man and that he knew nothing about the land. I have no
9/29/58 independent knowledge of that land.
page 18 } The Court: Where is that exhibit?

Mr. Hutcherson: I imagine it's supposed to be with the papers. Of course, it's too big to get in there and I imagine it was just put in the Clerk's Office.

The Court: (Addressing the Clerk of the Court) Do you have it, Mr. Greer?

Mr. Hutcherson: It's on a cardboard.

Mr. Greer (The Clerk of the Court): The pink one, your Honor?

Mr. Hutcherson: Yes; it's down there.

Mr. Greer (The Clerk of the Court): I will see if I can find it.

The Court: That is my recollection definitely.

RE-DIRECT EXAMINATION.

By Mr. Greer:

Q. In that connection, Mr. Dillon, did I earlier today ask you to see if you could find Mr. Thomas Fralin?

A. Yes, sir.

Q. Will you tell the Court what you did in an attempt to find him?

A. That's how come me up here not shaven and cleaned up. I came uptown and looked all over town and called his home and there was no answer there and, through
9/29/58 someone I met on the street, I was told that he was
page 19 } surveying some land in Boones Mill some place and it was a party by the name of Sink up in there.

And I did get Mr. Sink on the 'phone and he said if I'd go just beyond the river into the road that goes through Kidd's place and walk through the woods I could find him. And I went through a hollow and I walked way up to the top of a hill and I found his instruments and I couldn't find him

so then I came back in my car and drove around to the house and went into the house.

By the Court:

Q. You mean you went out to find him and couldn't find him?

A. Yes, sir.

By Mr. Greer: (continues examination)

Q. Did you have any more time to find Mr. Fralin—did you know before today that there was going to be a hearing this afternoon?

A. No, sir; I was ready to go to a funeral and which I wasn't able to attend.

The Court: Did I understand there is objection to my having the hearing on this case today?

Mr. Greer: No, sir; I just want to show that we have exercised due diligence to have Mr. Fralin here. We do not object to that, but I do want the record to show that we have exercised due diligence in an attempt to bring Mr. Fralin in.

9/29/58
page 20

The Court: All right.

Mr. Greer: All the other questions I have, your Honor, relate to the map.

By the Court:

Q. Let me ask him something. You know where the stakes were on your property—do you know where the stakes were set?

A. Yes; I know where most of them were set. Now, they came out there and set—you referring to what part—what stakes?

Q. I'm referring to the stakes which showed where your property bordered on the highway and the stakes to where it would go after it was taken.

A. Yes, sir.

Q. Did you see those stakes?

A. Yes, sir.

Q. Now, did you see them before the hearing?

A. Well now, not knowing which stakes was which, your Honor, but I saw the stakes that was there.

Q. Did you know what land they were taking before the hearing?

A. Oh, yes; yes, sir.

Arnold Dillon.

Q. So the amount of footage in the front, you knew what that was, didn't you?

9/29/58 page 21 } A. Well, I didn't measure it off, but I know where the stakes were at; yes, sir.

Q. And you knew where or what depth they went back?

A. Yes, sir.

Q. And you had conferred with the representatives of the Highway Department before that, I believe?

A. I had talked with them at times when they was out there surveying; yes, sir.

Q. Now, were you in any way taken by surprise over there the day that this hearing was held about the amount of land they were taking?

A. About the boundary land?

Q. Uh-hum.

A. —line—no, I have been told, of course, that there was some stakes in the back that we did have some questions about and he merely said they were stakes for people—I've forgotten how he said that—to show the line from, or something or another, or he shot a grade and I asked him how come there's a line of stakes here and another line back of it, and he said they meant nothing.

Q. Offset stakes?

A. Offset stakes, or something.

Q. Weren't you over there that day and saw those yellow stakes that were set up with a flag on them?

A. Yes, sir.

9/29/58 page 22 } Q. Wasn't that where you understood the line was to go?

A. That's right.

Mr. Greer: Your Honor, I think I can perhaps help the Court by making the observation that the problem here relates not to the land which was taken but to the remaining land of this defendant, which was injured. We have taken the position, before the Court, that the State is required to furnish us a plat not only of the land taken but also of the land likely to be damaged. "Likely to be damaged" is the language of the Code.

And we take the position, if the Court please, that the plaintiff did not comply with that Code section and that the sketch that was introduced is in no way a compliance with the Code section because that sketch bears practically—

The Court: That is the substance of your motion?

Arnold Dillon.

Mr. Greer: That is the substance of the tenth exception, if the Court please.

The Court: All right, the motion will be overruled.

Mr. Greer: Well, I would respectfully ask the Court to permit me to make reference to the exhibit which Mr. Greer has gone to get and also to introduce, by means of this witness, after that exhibit has been brought up here a plat of the land as made by Mr. Fralin. I'd like the Court, if your Honor please, to afford me an opportunity to place this plat in the record.

9/29/58
page 23

The Court: You can place them in there but, in going over the record, I think the evidence going in afterwards—I don't think is admissible, but I want you to except to it and put them in and you can stipulate, as far as Mr. Fralin I assume that Mr. Fralin made a correct survey.

Mr. Hutcherson: Well, I would say so. I have nothing—I would like this, for us to show in the record though about this drawing that it was explained to Mr. Greer on the premises and that that was not drawn to any rule.

Mr. Greer: Wasn't drawn to scale you mean.

Mr. Hutcherson: That's right—not drawn to scale.

Mr. Greer: That's not my objection.

Mr. Hutcherson: And the Judge asked, before that was introduced, if Mr. Greer had any objections and he took that map or that drawing and he and his client looked back and came back and handed it to Mr. Gray there in my presence and in the Court's presence and said he had no objection.

The Court: That's my recollection of it. I understand his objection is not to the drawing, which is not to scale.

9/29/58
page 24

Mr. Greer: Not at all, your Honor; I do not object to it.

The Court: There was no objection to that. His objection was that you didn't place in the record a detailed metes and bounds description of the entire piece of property which is being taken. Is that right, Mr. Greer?

Mr. Greer: That isn't quite correct, your Honor.

The Court: And that the law requires, in his interpretation, that a full map of the entire property, as well as a plat showing what is being taken.

Mr. Hutcherson: I understand his objection but I just wanted to get it clear on this drawing that we have.

The Court: There is a misunderstanding about the map that was offered as an exhibit.

Arnold Dillon.

Mr. Greer: Insofar as that map purported to relate to the land taken, I have no objection to it. Insofar as it purported to show the land of these defendants, Arnold and Vera Dillon being taken, I have no objection, but insofar as it purports to designate in any way the land not taken, it bears no relationship whatsoever to the shape of that land and I think that the record in this case should so demonstrate.

9/29/58 page 25 } And I don't believe that anything I could possibly have said could be taken as conceding that a map, which is not accurate, is accurate. I am not an engineer. I know nothing whatsoever and knew nothing whatsoever at that time, or knew nothing whatsoever of the shape of the land. This was a cardboard—

Mr. Hutcherson: It was a poster paper.

The Court: It was asked to be put in the record.

Mr. Greer: It was marked for identification and received in evidence.

Mr. Hutcherson: I thought that lady took it myself; the lady that was taking that case.

The Court: I am too lax about some of those things.

Mr. Hutcherson: I thought the lady had it laying right here when last I saw it and marked as an exhibit.

Mr. Greer: Well, if it is missing, the record is incomplete. I will vouch for the record my recollection of that exhibit is that it showed something substantially rectangular—

The Court: It did.

Mr. Greer: I wouldn't state but I think probably that it showed the property as being perhaps a little bit larger horizontally than vertically, but in any event the angles also in it—

9/29/58 page 26 } The Court: Rectangular in form.

Mr. Greer: Yes. Now, if it please the Court,—

Mr. Hutcherson: Excuse me just a moment, Keister. I don't think that's going to bother us because, as well as I remember,—did it show the back line of the property?

Mr. Greer: It purported to.

Mr. Hutcherson: I don't think it did.

Mr. Greer: Yes; it did, and he testified that it did. May it please the Court, here is a drawing of the line of that property (indicating) and there is no relationship whatsoever between the actual lines of the property and the sketch that the State filed.

If the Court please, that sketch doesn't show the property taken but it would be this (indicating).

Arnold Dillon.

The Court: Back of the sketch?

Mr. Greer: Yes, sir. Did you want to see a copy of this, Nate?

Mr. Hutcherson: Yes; let me look at it.

The Court: If I recall—I don't recall it—but if I recall, that was more running all the way back across.

Mr. Greer: The angles were right angles.

The Court: I don't remember the depths.

9/29/58 page 27 } Mr. Hutcherson: They didn't give any depths, Judge.

The Court: Yes; it did.

Mr. Hutcherson: It didn't have any figures on it.

Mr. Greer: It purported to be the entire property and Mr. Gray so testified. My recollection on that is quite specific.

The Court: All right. You may introduce this over the—in other words, the Court overrules your motion, but you may introduce this.

By Mr. Greer: (continues examination)

Q. Mr. Dillon, I show you this paper which is headed, "A. A. Dillon and Vera D. Dillon property situated in Rocky Mount Magisterial District, Franklin County, Virginia," and which appears to bear the stamp of Thomas F. Fralin, Certified Land Surveyor, Serial Number 719.

And I ask you if this paper, which I hand you, was prepared by Mr. Fralin pursuant to your request?

A. Yes, sir; certainly was.

Q. I appreciate that you are not an engineer, but to the best of your knowledge, information and belief does that sketch or plat adequately represent the boundaries of your property, as you know them to be?

A. Yes, sir.

Q. And when I say the boundaries of your property, I mean the property taken and the remaining property not taken by the Highway Commission; is that correct?

9/29/58 page 28 } A. Yes, sir; yes, sir.

Mr. Greer: No further questions, may it please the Court. We will offer this as the defendant's, Dillon's, exhibit next in order.

The Court: Well, just put it Exhibit X, and you will be pretty safe.

Deputy Sheriff John Price.

Mr. Greer: All right, sir; and we will ask that it be received in evidence for the purpose of these exceptions.

The Court: Yes. All right; this is in the Dillon case—this is Dillon Exhibit X. Now, all of those things, Mr. Greer, be sure and get.

(The plat referred to above was received in evidence and marked, Dillon Exhibit X.)

Mr. Greer: And may it please the Court, I don't know what to say about the missing exhibit, but the record will be incomplete without it.

The Court: I think a search should be made to try to find it.

Mr. Greer: If it turns out to be missing, I will have to come to your Honor with an application that it be duplicated.

The Court: I think it should be duplicated as near as possible.

Mr. Greer: All right, sir; that's all, Mr. Dillon.

The witness stands aside.

9/29/58
page 29 } DEPUTY SHERIFF JOHN PRICE,
called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greer:

Q. State your name for the record, sir.

A. John Price.

Q. Where do you live, Mr. Price?

A. Rocky Mount.

Q. What is your occupation, sir?

A. Deputy Sheriff.

Q. How long have you been a police officer, Mr. Price?

A. Oh, just—this is going on three years.

Q. That is to say, a deputy sheriff in and for the County of Franklin and the Commonwealth of Virginia?

A. Yes, sir.

Q. Are you familiar with several of the condemnation cases which have been pending in this Court?

A. Yes, sir.

Q. I believe you were here serving in the function and capa-

city of the bailiff when we tried the Dillon and Harrison cases on September 3rd?

A. Yes, sir.

Q. Do you know Mr. James Ellis who was one of the commissioners?

9/29/58 page 30 } A. Yes, sir.

Q. Do you know him personally?

A. Yes, sir; I've known him.

Q. How long have you known him?

A. I've known him for 15 or 20 years.

Q. Will you state to the Court, based upon your experience as a police officer, whether or not you know Mr. Ellis has a tendency to go to sleep in the daytime?

Mr. Hutcherson: I object to that.

The Court: What has that got to do with this case?

Mr. Hutcherson: May it please the Court, I can't see how it could have any relevancy.

The Court: Let's see what he did on this day.

Mr. Greer: Well, if your Honor please, I think I'm entitled to show by a man who is in position to tell the Court that this man constantly goes to sleep in the daytime.

The Court: Has he seen him; did he see him at the time of the trial?

Mr. Greer: I'm going to try to develop that in my questioning.

The Court: Ask him. You can ask him if he saw him on the day of the trial when he went to sleep allegedly, or had gone to sleep.

9/29/58 page 31 } Mr. Greer: Well, may it please the Court, I don't know where Mr. Price was. I suspect he was back here where he usually stays.

The Court: I just want to know that. It may have a lot to do with my ruling.

By Mr. Greer: (Continues examination)

Q. Will you answer the Court's question, Mr. Price?

A. You mean did I see him sleep here that day? No, sir; I didn't see him sleep. You see, I was up there and he had his back to me.

Q. Now, when you say you were up there, what do you mean?

A. I was up there beside the Judge.

Q. Oh; you were up there beside the Judge?

A. Yes, sir.

Deputy Sheriff John Price.

Q. Will you tell the Court how many accidents Mr. Ellis has had because of going to sleep?

Mr. Hutcherson: I object to that.
The Court: No; you can put that in the record. Don't misunderstand me. You can put it in the record but the Court is overruling the motion.
Mr. Greer: (Addressing the reporter) Mr. Reporter, read my question back.

(The reporter read the last question above.)

The Court: I am overruling the question as be-
9/29/58 ing improper on an objection made by Mr. Hutch-
page 32 } erson, which is the condemnor.
Mr. Greer: You can answer the question, Mr. Witness.
The Court: I am letting it go in the record for whatever it may be worth.
Mr. Greer: I understand your Honor's ruling as sustaining the objection.
The Court: Yes.
Mr. Greer: But permitting it to go in the record?
The Court: Yes; so you can have it as a basis for your exception.

By Mr. Greer: (continues examination)
Q. Answer the question, Mr. Price.
A. You want to know—repeat your question again.
Q. Has this man—has this man, James Ellis, had automobile accidents resulting from his having gone to sleep in the daytime while driving?
A. I know of two accidents he had.
Q. From that reason?
A. Yes, sir.
Q. Did you personally investigate one or two of them?
A. No, sir; I didn't investigate them.
Q. Did you come by immediately after one of them?
A. I came back immediately after one of them;
9/29/58 yes, sir.
page 33 } Q. What had happened?
A. He said he didn't see the car—that he was asleep.
Q. He didn't see the car and that he was asleep?
A. Yes, sir.

Judge William A. Alexander.

Q. Does he have the reputation known to peace officers of this community for having a decided proclivity or tendency to go to sleep in the daytime?

Mr. Hutcherson: I object to that.
The Court: The objection will be sustained, but it goes in for the purpose I have mentioned before.
Mr. Greer: May the answer come in, your Honor, for the record?
The Court: Yes; I said the answer may come in just like it did before but over the objection.

By Mr. Greer: (continues examination)
Q. Mr. Reporter, would you read that question to him, please?

The Court: Over the ruling of the Court, it may come in, in order that you might carry on your case further if you want to make up the record.

(The reporter read the last question above.)

A. All I know is I have heard it but the only time I come by one wreck after he had the wreck down there—
9/29/58 that was about three years ago, or four years ago.
page 34 } Now, so far as me knowing it, I don't know for sure. In other words, I have been told that now, but I haven't seen him sleeping.

• • • • •

JUDGE WILLIAM A. ALEXANDER,
called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greer:
Q. What is your name, sir?
A. W. A Alexander.
Q. And please state your address and occupation.
A. Rocky Mount, Attorney at Law.
Q. Now, I believe you are also Judge of The County Court?
A. Yes, sir.
Q. Do you know the commissioner whom we are now discussing, Judge Alexander—Mr. James Ellis?

Judge William A. Alexander.

A. Yes; I know him.
9/29/58 Q. How long have you known him?
page 35 } A. Approximately 30 years.
Q. To your personal knowledge, does he have a tendency for or proclivity to go to sleep in the daytime?

Mr. Hutcherson: I object.
The Court: Objection sustained. The evidence may be introduced to complete the record.

A. Shall I give the answer?

The Court: Yes, sir.

A. Yes, sir; I know Mr. Ellis, and he does have a tendency to doze or go to sleep while he is in conversation, especially during warm weather. The fact of it is, he was in my office sometime ago—

Mr. Hutcherson: I object to that, your Honor, because that is privileged.
The Court: Objection sustained.
Mr. Greer: May the witness complete his answer for the record?
The Court: Yes, sir.

By Mr. Greer: (continues examination)
Q. Will you complete your answer, Judge?
A. He was in my office sometime ago, and in just a conversation—it wasn't business; we were just talking—and he dozed off to sleep in his chair right in the middle of the conversation. I don't mean to be criticizing the man but he can't help it.

9/29/58
page 36 } Mr. Greer: Witness with you.

CROSS EXAMINATION.

By Mr. Hutcherson:
Q. Now, Mr. Alexander, you see a whole lot of people that go to sleep, don't you? I mean, they doze off. I see them in my office and I'm sure you see them in your office, who sit there and doze off?
A. There are a few people of that type that I deal with

Judge William A. Alexander.

quite often. Mr. Alfred Fralin was one who was very bad at it.

Q. And when you see them on jury duty over here sometimes they are very attentive and don't go to sleep?

A. Very attentive as a usual thing.

Q. Now, on the day that this case was tried, did you see Mr. Ellis go to sleep?

A. No, sir; I wasn't here at all.

Mr. Hutcherson: All right, sir; you can stand aside.

By Mr. Greer:

Q. Judge, reference has been made to people staying awake when they should stay awake. Do you know whether Mr. Ellis had accidents arising from the fact that he went to sleep?

A. I only heard of it, sir.

• • • • •

9/29/58
page 37 } Mr. Greer: May it please the Court, we have no further testimony to present in support of the exceptions, and will stand upon the exceptions as filed and upon each and every exception heretofore made in the course of these proceedings.

The Court: As indicated, the Court will overrule the motion, or exceptions, which I consider to be—in the first place, the motion was timely made when your client's grievance—who has testified to the fact that on the day of the hearing, while he was testifying, that he saw him nod—in his opinion, nod momentarily—in which he dropped his pencil; his head slumped and one of the commissioners immediately picked up the pencil and handed it to him and he looked at each one of their tablets and wrote something down.

He also testified that a similar motion had been made in another case—another condemnation case—which was tried, and which he had been a witness to a similar incident.

The Court well remembers the original motion in the case tried just prior to the present case under consideration, which is the Dillon case. At that time the Court overruled your motion and was very observant—as near as the Court could be—to the demeanor of the commissioners thereafter
9/29/58 and certainly there was never any indication as far
page 38 } as the Court could see of any inattention or drowsiness to the extent of inattention which could be

observed by the Court. Of course, the Court is like everybody else—it is not infallible about what it sees.

Mr. Greer: Yes, sir. I wonder if the record might show, your Honor, that in this particular courtroom the commissioners sit in the jury box and that the arrangement of the courtroom is such that the commissioners face toward the witness and that the commissioners and the Court both face in the same direction?

The Court: Yes, sir.

Mr. Greer: The point I wish to make for the record, with all respect—

The Court: —is that the commissioners have their backs to the Court.

Mr. Greer Yes, your Honor:.

The Court: All right, sir. Yes, sir; you may certainly stipulate that.

Mr. Greer: Your Honor, Mr. Hutcherson and I had occasion to discuss two plats and I believe we have a stipulation which I will state and in which he may indicate his acquiescence, if I understand it to be his acquiescence.

9/29/58 page 39 } I hold in my hand a book from the Clerk's Office entitled, "State Highway Plat Book No. 2", which the Court can take judicial notice of as being one of the official records of the Court. At page 148, there is a plat purporting to describe the land of W. T. Harrison. At page 164, there is a plat purporting to describe the land of Arnold Dillon. I understand Mr. Hutcherson and myself to have a stipulation that the originals of these two plats, which were filed by and on behalf of the plaintiff, may become exhibits in their respective cases—that is to say, that the Dillon plat, at page 164, in Highway Plat Book No. 2, may become an exhibit in the Dillon case, and that the Harrison plat at page 148 of the said plat book may become an exhibit in the Harrison case.

And Mr. Hutcherson and I have further stipulated that we will ask leave of the Court to have photostatic copies of these plats substituted for the originals thereof.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Petition and Exhibit	2
Motion to Dismiss for Lack of Jurisdiction	5
Affidavit of Thomas F. Fralin	6
Order—September 12, 1958	7
Exceptions to Report of Commissioners	8
Stipulation	9
Final Decree—October 31, 1958	10
Notice of Appeal and Assignments of Error	12
Proceedings	14, 39
Witnesses:	
M. L. English	18
Fred L. Gray	19
Arnold Dillon	23
Deputy Sheriff John Price	34
Judge William A. Alexander	37

201 VA 514

Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5018

In the Supreme Court of Appeals of Virginia at Richmond

W. T. HARRISON, ET AL.

v.

F. A. DAVIS, COMMISSIONER, ETC.

FROM THE CIRCUIT COURT OF FRANKLIN COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5018

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 18th day of March, 1959.

W. T. HARRISON, ET AL., Appellants,

against

F. A. DAVIS, COMMISSIONER, ETC., Appellee.

From the Circuit Court of Franklin County

Upon the petition of W. T. Harrison and Lillie Myrtle Harrison an appeal is awarded them from a decree entered by the Circuit Court of Franklin County on the 20th day of October, 1958, in a certain proceeding then therein depending wherein F. A. Davis, State Highway Commissioner, was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 5 }

* * * * *

PETITION.

To the Honorable Langhorne Jones, Judge of the Circuit Court of Franklin County, Virginia:

(1) Your Petitioner, F. A. Davis, State Highway Commissioner of the State of Virginia, respectfully represents unto this Honorable Court that it is necessary for the construction, reconstruction, alteration, maintenance and repair of a portion of a highway embraced in the Virginia State Highway System, known as Route A220, Franklin County, Virginia, to acquire in fee simple a strip or parcel of land through certain real property, which on or before the 7th day of May, 1958, was owned by W. T. Harrison and Lillie Myrtle Harrison, his wife, as shown by lines on a blue print map of a portion of said highway, identified as Sheets Nos. 4B, 4C, 4D and 4E, Project No. 1833-32, on file in the office of the Department of Highways, Richmond, Virginia, a copy of which blue print map was attached to the certificate hereinafter referred to and recorded simultaneously therewith in the State Highway Plat Book among the land records of Franklin County, Virginia.

(2) Your Petitioner further represents unto this Honorable Court that it is requisite and suitable that the said strip of real property through the said property of W. T. page 6 } Harrison and Lillie Myrtle Harrison be of the width and on the grades as shown on the said blue print map hereinabove referred to and outlined in red on said map; and the said parcel of real property to be condemned as aforesaid, located in Franklin County, Virginia, is more particularly known and described as follows:

Being as shown on plans approved October 16, 1957, and lying on the north (left) side of and adjacent to the survey centerline for connection Route 674 from the existing east right of way line of present Route 220 at approximate Station 10 plus 42 to the lands of Dallas Turner at approximate Station 14 plus 60 and containing 2.15 acres, more or less,

land of which 0.14 acre is included in the existing right of way and 2.01 acres, more or less, is additional land.

(3) Your Petitioner further alleges that he has attempted to purchase the said real property from the owner thereof, but has been unable to do so.

(4) That on or about the 7th day of May, 1958, your Petitioner filed with the Clerk of the Circuit Court of Franklin County, Virginia, a certificate issued by the State Highway Commissioner and countersigned by the State Treasurer, stating that the sum of Nineteen Thousand Six Hundred Five ($19,605.00) Dollars or so much thereof as might be directed by the Court would be paid, pursuant to the order of the Circuit Court of Franklin County, Virginia, as provided by Article 5, Title 33, Chapter 1 of the 1950 Code of Virginia, as amended, to the owners or other persons interested therein.

(5) That thereupon, pursuant to the provisions of the aforesaid Article 5 of Chapter 1 of Title 33 of the 1950 Code of Virginia, as amended, title to the land described in Paragraph 2 vested in the Commonwealth of Virginia.

(6) That your Petitioner and the land owners have been unable to agree on the amount of compensation and damages and therefore that it is necessary that the aforesaid real property be condemned by your Petitioner.

(7) That the aforesaid State Highway Commis-
page 7 } sioner has designated N. B. Hutcherson, Jr., as his attorney in this matter and has authorized him to institute condemnation proceedings and to make oath to the Petition pursuant to the statute in such cases.

WHEREFORE, your Petitioner respectfully prays to this Honorable Court in accordance with the provisions of Article 5 of Title 33 of Chapter 1 of the 1950 Code of Virginia, as amended, that Commissioners may be appointed to ascertain and report what will be a just compensation for the land herein proposed to be condemned and what will be a just and proper award to the owners for damages, if any, resulting to the property of the said owners or to the property of any other person from the construction and operation of the highway over the land of the said owners hereinabove described; that this Court shall direct all necessary inquiries to be taken by a Commissioner of this Court to ascertain what persons are entitled to any award which may be allowed herein; that pursuant to the provisions of Article 5, Title 33, Chapter 1 of the 1950 Code of Virginia, as amended, any and all defendants hereto may be required within ten days after

the return date of the notice herein to file in writing in this case any grounds of defense which they may have hereto; that W. T. Harrison and Lillie Myrtle Harrison may be made parties defendant to this suit; that the Court be directed to confirm the vesting of title in the Commonwealth as aforesaid and take all such other steps to carry out the intention of Article 5, Title 33, Chapter 1 of the 1950 Code of Virginia, as amended, as may be necessary; and that your Petitioner may have such other, further and general relief as the nature of his case may require.

And your Petitioner will ever pray, etc.

F. A. DAVIS,
State Highway Commissioner.
By N. B. HUTCHERSON, JR.
His Agent and Attorney.

page 8 }

* * * * *

Filed in the Clerk's Office the 16 day of May, 1958.

Teste:

EDWIN GREER, Clerk.

* * * * *

page 21 }

* * * * *

8/25/58 2:05 P. M.

MOTION TO DISMISS FOR LACK OF JURISDICTION.

NOW COME the defendants W. T. Harrison and Lillie Myrtle Harrison, by counsel, and move the Court to dismiss this cause for lack of jurisdiction, upon the following grounds:

1. The petition does not set forth with reasonable particularity a description of the land sought to be condemned.
2. There was not filed with the petition herein a plat of the survey of the land sought to be condemned.
3. The petition is uncertain, ambiguous, indefinite and a void foundation for eminent domain proceedings, in this,

that the parcel sought to be taken is described therein as a "strip of real property through the said property of W. T. Harrison and Lillie Myrtle Harrison," although these defendants are informed and believe, and upon such information and belief allege, that it is the intent and aim of the petitioner herein to condemn the whole of their property rather than any strip therein.

4. The petition does not set forth compliance with Section 25-7 of the Code of Virginia of 1950, and the manner of such compliance.

This motion will be based upon the grounds stated herein, upon the files and records in this case, upon the page 22 } affidavit of Thomas Fralin attached hereto, upon the memorandum of points and authorities filed herewith, and upon such evidence, oral and documentary, as may be adduced at the hearing thereof.

W. T. HARRISON
LILLIE MYRTLE HARRISON
By T. KEISTER GREER.

THOMAS KEISTER GREER
Attorney for Defendants
Rocky Mount, Virginia.

• • • • •

page 23 }

• • • • •

AFFIDAVIT.

Commonwealth of Virginia,
County of Franklin, to-wit:

Thomas Fralin, being first duly sworn, deposes and says as follows:

1. That he is a surveyor duly licensed and certified to practice this calling, and a resident of Franklin County, Virginia.

2. That he has read the description set forth in the petition on file in the cause above styled, and that the said description is not adequate to enable a surveyor to locate the boundaries of the parcel sought to be described without reference to the plans therein referred to, that is to say, that the words of the

description are not sufficient to enable a surveyor to run the lines of the said parcel.

THOMAS F. FRALIN.

Subscribed and sworn to before me this 23rd day of August, 1958.

BETSY D. HARRIS
Notary Public.

My commission expires October 18, 1959.

8/25/58 2:05 P. M.

* * * * *

page 40 }

* * * * *

ORDER.

This cause came on to be heard on August 30th, 1958, upon the papers formerly read and upon a Motion to Dismiss for lack of jurisdiction, filed by the defendants on August 25th, 1958, and the Court heard arguments of counsel and evidence in support of the Motion.

It appearing to the Court that the defendants had heretofore been represented by counsel, which counsel filed a Bill of Particulars and Petition, and an order was entered on June 12th, 1958, adjudicating the matters before the Court at that time and appointing Commissioners to meet on July 23rd, 1958, on which date this cause was continued by reason of the death of original counsel; since the Motion, as filed, claimed to reach the jurisdiction of the Court, the Court agreed to hear arguments on the Motion, and after hearing the arguments of counsel and the evidence, the Court ordered the condemnor, or Petitioner, to produce and file the plans, or a copy thereof, referred to in the Petition, and a certified set of plans were presented to the Court and filed as an Exhibit, and the Court doth overrule the Motion to Dismiss as to the
page 41 } grounds designated as Nos. 1 and 2 of the Motion, and upon the Petitioner filing the certified set of plans, the Court informed counsel for the defendants that if the defendants were prejudiced, due to the fact that the

plans had not been previously filed, the Court would grant unto the defendants a reasonable continuance.

And it further appearing to the Court that the Petition filed by the Petitioner did allege that the land to be condemned was a strip of land through the lands of the landowner, whereas, it was admitted in open Court that the entire land of the defendants was being taken and the map shown in the plans as filed on this day fully acquainted the landowner with the land to be taken, the Court overruled the said Motion, to which the landowner excepts, for reasons stated in the memorandum filed in this cause by the defendants on August 25th, 1958.

The Court further heard arguments of counsel as to Ground No. 3 of the Motion to Dismiss, and overruled Ground No. 3 of said Motion, to which the landowner excepts, on the grounds stated in motion filed and for reasons in memorandum of authorities.

The Court further heard evidence on Ground No. 4 of the Motion to Dismiss, which alleged that the Petitioner did not comply with Section 25-7 of the 1950 Code of Virginia.

The Court, after having read the pleadings and heard the evidence adduced, is of the opinion that Paragraph No. 3 of the Petition filed in this cause complies with Section 25-7 of the 1950 Code of Virginia, and from the evidence heard, that a *bona fide* effort had been made by the Petitioner to purchase the land herein involved from the landowner and page 42 } and the Court doth overrule Ground No. 4 of the said Motion, to which the landowner excepts on grounds stated.

WHEREUPON, the Court accordingly overrules all of the grounds of the Motion to Dismiss filed by the defendants, and does hereby continue this cause to September 3rd, 1958, as the date for the Commissioners to meet, as set out in the order entered on June 8th, 1958, and continued from time to time.

Enter: This 12 day of Sept., 1958.

L. JONES, Judge.

• • • • •

page 47 }

• • • • •

EXCEPTIONS TO REPORT OF COMMISSIONERS.

NOW COME the defendants W. T. Harrison and Lillie Myrtle Harrison, by counsel, and file these their exceptions to the report of the Commissioners in this cause, which said report bears date of September 3, 1958:

First Exception: The Court had no jurisdiction to appoint Commissioners, and the Commissioners no jurisdiction to act, upon the grounds, and each of them, set forth in the motion to dismiss for lack of jurisdiction heretofore filed by these defendants August 25, 1958.

Second Exception: The Commission was improperly constituted, in this, that it appears that the same Commission has sat to determine the awards to be made in each of the cases arising from the construction of the improvement described in the petition on file herein, although the statutes applicable to condemnation proceedings for the State Highway Commission contemplate that each landowner shall be entitled to a separate Commission.

Third Exception: The Commission was improperly constituted, in this, that it contained only four members, although these defendants were entitled under the statutes in such case made and provided to a commission of five impartial and qualified individuals.

Fourth Exception: The Commission was not properly instructed, in this, that numerous instructions tendered by these defendants were refused by the Court, reference being made to the said instructions, which are in the file of this case marked "Refused," for a fuller statement of the principles of law not given to the Commission.

page 48

Fifth Exception: One member of the Commission misconducted himself, in this, that he slept during several stages of the proceedings in this cause, and always at times when testimony was being adduced on behalf of these defendants.

Sixth Exception: The award of the Commissioners was grossly inadequate, and contrary to the laws and the evidence.

Wherefore the said defendants doth except to the said report of the said Commissioners and pray that their said exceptions may be sustained, and that the said report may be set aside.

Dated: This 13th day of September, 1958.

W. T. HARRISON
LILLIE MYRTLE HARRISON
By T. KEISTER GREER.

THOMAS KEISTER GREER
Attorney for defendants
Rocky Mount, Virginia.

* * * * *

page 49 }

* * * * *

FINAL DECREE.

This day came the Petitioners, by counsel, as well as W. T. Harrison and Lillie Myrtle Harrison, landowners, by counsel, and it appearing to the Court that the Commissioners heretofore appointed in this cause have appeared before this Court in the Courtroom thereof, on September 3rd, 1955, and taken the oath prescribed by law, and thereafter, the said Commissioners, in the custody of the Sheriff, having viewed the premises sought to be condemned, in the presence of the Judge of this Court and of counsel for Petitioners and defendants, and the said Commissioners, after having returned to Court and after hearing the evidence in this cause, and having been duly instructed as to the law by the Court, and the said Commissioners having on September 3rd, 1958, filed their report in this cause, and the said W. T. Harrison and Lillie Myrtle Harrison, the defendants and landowners in this cause having, by leave of Court, filed their exceptions to the said Report of the said Commissioners on the 13th day of September, 1958, and the Court having heard evidence *ore tenus* on the said exceptions so filed, the Court doth hereby overrule the exceptions to the report of the Commissioners, and the defendants, W. T. Harrison and Lillie Myrtle Harrison, the defendants and landowners, except to the ruling of the Court for the reasons stated in the record.

page 50 } And it appearing to the Court that the said report is regular in every respect, and the exceptions thereto having been overruled, the same having been filed in the Clerk's Office for more than ten (10) days, the Court doth ADJUDGE, ORDER and DECREE that the report of the said Commissioners be, and the same is hereby confirmed and approved; the award for compensation for the

value of the land taken by the Commissioners being fixed by the Commissioners at $22,500.00.

And it further appearing to the Court that the Commonwealth of Virginia, in accordance with an order entered in this cause on the 2nd day of June, 1958, did pay to the Clerk of this Court the sum of $17,644.50, which sum was paid to W. T. Harrison and Lillie Myrtle Harrison by the Clerk of this Court.

And it further appearing to the Court that the Commonwealth of Virginia did, on the 25th day of September, 1958, pay to the Clerk of this Court the sum of $4,855.50, and accrued interest, for the said W. T. Harrison and Lillie Myrtle Harrison, the Court doth ORDER that there be vested in the Commonwealth of Virginia in fee simple, the land mentioned and described in the Petition in this cause; the same containing 2.15 acres, more or less, being as shown on plans approved October 16th, 1957, and lying on the north (left) side of and adjacent to the survey centerline for connection Route 674 from the existing right of way line of present Route 220 at approximate Station 10 plus 42 to the lands of Dallas Turner at approximate Station 14 plus 60, and containing 2.15 acres, more or less, land, of which 0.14 acres is included in the existing right of way, and 2.01 acres, more or less, is additional land.

And the Clerk of this Court is forthwith directed to make a certified copy of the Order appointing Commis-
page 51 } sioners in this cause; the report of the Commissioners and of this Order, and record the same, together with the proper plats as furnished by the Petitioners, in the Deed Books of Franklin County, Virginia, and index the same in the name of W. T. Harrison and Lillie Myrtle Harrison, husband and wife, as Grantors, and the Commonwealth of Virginia as Grantee.

And the Court doth further ORDER that the Petitioners pay the costs of this proceeding, which was accordingly done.

And the Court doth further ADJUDGE, ORDER and DECREE that the Clerk of this Court do pay to W. T. Harrison and Lillie Myrtle Harrison the balance due on the award in this case, to-wit: $4,855.50, with $57.90, accrued interest, as compensation for the land described in the Petition.

Enter: This the 20 day of Oct., 1958.

L. JONES, Judge.

• • • • •

page 52 }

• • • • •

DEFENDANTS' NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Pursuant to the provisions of Rule 5:1, §4 of the Rules of the Supreme Court of Appeals of Virginia, the defendants W. T. Harrison and Lillie Myrtle Harrison hereby give notice of their appeal to the Supreme Court of Appeals of Virginia, from the Final Decree of the Circuit Court of the County of Franklin, entered herein on the 20th day of October, 1958.

For their assignments of error, also filed pursuant to the aforementioned rule, the defendants state as follows:

1. The Trial Court erred in overruling the defendants' motions to dismiss this case for lack of jurisdiction, it appearing that

(a) The petition did not contain a description of the land sought to be condemned, as required by §33-60 of the Code of Virginia.

(b) There was not filed with the petition a plat of the survey of the land sought to be condemned, as required by §25-9 of the Code of Virginia.

(c) The petition did not set forth compliance with §25-7 of the Code of Virginia, and the manner of such compliance, as required by §25-8 of the Code of Virginia.

page 53 } (d) The petition described the parcel sought to be taken herein as a "strip of real property through the said property" of these defendants, although the condemnor actually sought to take, and the judgment herein awarded, the whole of their property.

2. The Trial Court erred in overruling the defendants' motion to discharge the commission, following challenge of a commissioner for cause, it appearing that only four commissioners remained, and that the defendants were entitled to a commission originally constituted of five impartial and qualified individuals.

3. The Trial Court erred in overruling the defendants' motion to discharge the commission during the trial, it appearing that a commissioner slept while an expert witness for the defendants was testifying. The Trial Court further erred

in declining to receive testimony during the hearing on the commissioners' report from the Judge of the County Court and a deputy sheriff with reference to the known tendency of this commissioner to fall asleep in the daytime.

4. The Trial Court erred in overruling the defendants' first, third, and fifth exceptions to the commissioners' report, which said exceptions restated for the record the issues of lack of jurisdiction, defective composition of the commission, and the fact of the said commissioner having slept during the reception of evidence.

Dated this 18th day of December, 1958.

W. T. HARRISON
LILLIE MYRTLE HARRISON
By Counsel.

* * * * *

Mr. Greer: May it please the Court, on Wednesday, August 29th, the defendants brought on for hearing certain matters addressed to the jurisdiction of the Court in both of these cases. I will not re-state the grounds of these motions. The Court denied these motions, however, ordering the petitioner—ordering the condemnors to file plats of the property taken. I have had occasion since the hearing to examine the plats filed by the petitioner and I respectfully renew my motions to dismiss upon the grounds stated and the points and authorities cited, and with and upon the further ground that the plat filed as to the Dillon property does not comply with the Code, in that it shows only the land to be taken and does not show the land to be damaged. I call your attention to §25.9 of the Code, and the attention of the Court to *Virginia Electric and Power Company* v. *Webb,* 196 Va. 555-565. The condemnor is required to state the interest or estate to be taken and file a plat that describes the land in which an interest is sought. In the Dillon case, we are losing .7 of an acre, leaving four acres not taken. The Code specifically requires that the property to be damaged shall be described in the plat. On the grounds stated, I respectfully renew my motion to dismiss.

The Court: The motion will be overruled.

Mr. Greer: We respectfully except to the Court's ruling upon the grounds heretofore stated.

If it please the Court, the condemnees, Vera and Arnold Dillon and W. T. Harrison further move that the Commission be discharged on the grounds that: (1) that it has very

recently come to my attention that the Commissioner Tyree is the father of the land owner immediately adjacent to Mr. and Mrs. Dillon. That the son of this commissioner compromised and settled his case with the Commission. While I am ceratin that Mr. Tyree is qualified in every way to serve, I believe it to be a delicate matter with a person who still has his own case with the Commission.

9/3/58 page 2 } The Court: We have five Commissioners, I believe. Would you be agreeable to proceed. The law says any three or more may act.

Mr. Greer: I believe, Your Honor, that it reads any three of five qualified commissioners.

The Court: Do you want this case put off or do you want it tried?

Mr. Greer: I want to try it, but I believe I am entitled—Nothing I have said is to be construed as reflecting on the character of Mr. Tyree, but it appears to me that it is not appropriate under the circumstances for him to serve.

• • • • •

9/3/58 page 3 } Mr. Hutcherson: Concerning the appointment of these commissioners, Mr. J. B. Allman, deceased, was representing Harrison and Dillon. Mr. Allman was well aware of the fact that Mr. Tyree's son had property adjoining the Dillon property and had settled with the Highway Department. At the time of Mr. Tyree's appointment, it was brought to his attention by the attorney for the State Highway Commission and he made no objection thereto.

• • • • •

The Court: Gentlemen, the only point that bothers me is the question of this one commissioner. Do you know of any person whom you can agree upon who is in close proximity here who we might get to act in this case, that you can agree upon. That is, if you cannot agree I will appoint somebody. Otherwise, I will let this man stand aside and have only four.

Mr. Greer: If Your Honor please, I believe that the Code as stated contemplated a five man commission.

The Court: I don't desire to discuss the matter any further except to this extent: This man, or rather these men, were appointed at the time that your client was represented by counsel. No objection whatsoever was raised to these men, certainly not to me. They were agreed upon by counsel and

the names submitted to me for approval. I know all the men, and I thought they were excellent men. The strikes were made in my presence. If you desire, and you can agree on a man, otherwise I will appoint one myself; or you may take four men out of the five which are there and proceed and let this gentleman stand aside.

Mr. Greer: I am at a handicap, not having been counsel in this case to begin with, Mr. Allman having died. But the objection was suggested to me by my client, and in good conscience, I am sure. I am not able to go forward with this case without having a brief conference with my clients, and I will request compliance with the suggestion of the Court.

9/3/58
page 4

How about Grady Gregory?

The Court: He has been testifying in these cases.

Mr. Hutchinson: I would object to that; he has testified.

The Court: Can you think of anyone else? Patterson—would he act?

Mr. Hutchinson: He is the middle of two funerals.

Mr. Greer: I have discussed the Court's suggestion with both of my clients. I will quote the reply of one of my clients, who is not a lettered man. He said, "The others had five commissioners and I think we should too."

I would like to make a suggestion to the Court. I just saw one of the members of the bar of Franklin County and he suggested Mr. Allen Simpson. We would be happy to have him.

Mr. Hutchinson: He was one of my strikes. He is my first cousin.

The Court: I am going to say this—the statute says that you shall have a panel of seven; that each side shall have a strike. That has been done. If you cannot agree upon them—That was done when this case was first set for hearing. The statute further states that of the five, and I think the order should so state; the statute reads: [§33-63] * * * "In the event seven are summoned, the petitioner and the landowner shall each have one peremptory challenge and the remaining five, or the original five if only five have been summoned, any three of whom may act, shall fix the value of the land taken and the damages, if any, which may accrue to the residue."

Mr. Greer: I respectfully submit that in the event that there is one commissioner who should be stricken for cause,

he should not be allowed to serve.

9/3/58 page 5 } The Court: I'm going to send four men out there.

Mr. Greer: I take the position that they are entitled to a valid commission of five. The Code provision means any three of a valid five man commission, and these defendants respectfully except to the Court's ruling.

* * * * *

9/3/58
page 7 }

* * * * *

Mr. B. D. Tyree was called into the Judge's chambers outside the hearing of the other Commissioners.

The Court: Mr. Tyree, I want to thank you for coming over here today, and I am going to relieve you of acting in this case.

Do you have any objection to my telling Mr. Tyree why the Court is doing this itself?

Mr. Greer: No, sir.

The Court: We understand one of your children has some land in this area and we felt that somebody might feel that—we didn't want any suspicion cast on it.

* * * * *

9/3/58
page 18 }

* * * * *

The next witness,

RIVES S. BROWN, JR.,

after being duly sworn, testifies as follows:

* * * * *

9/3/58
page 21 } Q. Tell the Court the opinions and conclusions that you reached based upon your investigation.

Rives S. Brown, Jr.

A. In my appraisal report, there is one thing I would like to make clear. I did not measure the frontage on 220; it was taken from the highway department maps by scale. From scale, there was 250 feet of frontage on Route 220 and approximately 400 feet on Doe Run Road.

(Witness read from prepared appraisal statement as follows:)

"September 2, 1958: Appraisal of W. T. Harrison Property. *Location*: The location is on the East side of Route 220 at its intersection with the Doe Run Road. The property is in a neighborhood of small businesses and small dwellings. The property contains 2.15 acres and is located well for both business and residential. There is 250 feet, approximately, frontage on Route 220 and approximately 400 feet along the Doe Run Road. (I took these measurements from the Highway plat by scale.) In arriving at the appraisal of the land I have considered the first 150 foot deep on Doe Run Road as belonging to a part of the lot which faces 250 feet on Highway 220. This is maximum depth for business property.

"*Improvements*: There is a store building facing Route 220. The building measures 20′ x 32′. The downstairs formerly housed a restaurant. The upstairs is divided into a five-room apartment. The building is two stories and is approximately seven years old. To the rear of this store building there is a small cinderblock house 24′ x 24′. This house was built in 1956. The house contains four rooms and has provisions for a bath, but there is no bath installed. The house is of cinderblock construction with an asphalt shingle roof, hardwood floors. There is no central heat.

9/3/58 page 22 } Approximately 100 feet to the east of this building is the principal dwelling of Mr. Harrison. The house contains six rooms, is a frame construction, has two brick chimneys and two fireplaces. The floors are hardwood, the ceilings and side walls are of dri-wall construction and there is rubber tile in the kitchen, foundation is of concrete; there is no basement but a crawl-space. There is a 29-foot deep water well pump located on the property and it serves all three of the dwellings. The small cinderblock house now rents for $30.00 a month. The upstairs of the store building rents for $25.00 a month and the downstairs for $35.00 a month. There is a wood shed to the rear of the main dwelling 8 feet by 12 feet. There is a metal

wood shed 10 feet by 15 feet to the east of the main dwelling. The house is surrounded by ample shrubbery including some large boxwood. The size of the house is 30 by 32 and it is a one and a half story construction.

"*Appraisal Value of Land Taken*: I have appraised the land along Route 220 at $20.00 per front foot for a depth of 150 feet along Doe Run Road; therefore, this figure is $5,000.00. Along the Doe Run Road there are 250 feet remaining. This could be split into four lots if one so desires and the value would be $1,000.00 per lot, or $4,000.00 total. The shrubbery and trees I have appraised at $250.00.

"*Value of Improvements*: The main dwelling I have appraised at $7.00 per foot and there are 1,460 feet of usable space in the house; therefore, the value of the house is $10,220.00. The wood shed I have appraised at $150.00. The well and pump I have estimated at $600.00. The metal shed I have estimated at $100.00. The small four-room house is of standard factory type construction which can be built in this area at $4.50 per square foot. I have appraised this at $2,492.00. This is the depreciated value. The store building contains 1,280 square feet. I have considered this as factory construction at a depreciated value of $4.50 per square foot, making a total of $5,760.00 for the store building.

9/3/58
page 23 } Summation:

The land along Route 220	$ 5,000.00
The land along Doe Run Road	4,000.00
Shrubbery and trees	250.00
Dwelling	10,220.00
Wood shed	150.00
Well and pump	600.00
Metal shed	100.00
Four-room cinderblock house	2,492.00
Store building	5,760.00
Total	$28,572.00

The appraiser does not have nor has he had in the past nor does he contemplate having in the future any personal interest in the property appraised. The employment to appraise and the compensation agreed upon is in no manner continued upon the valuation given. All statements and data

in this report are, to the best of my knowledge and belief, true and correct and no effort has been made by me to overlook or hide important or pertinent information.

Signed: Rives S. Brown, Jr.

Mr. Greer: May it please the Court, I would like to make a motion in chambers.

Mr. Greer: May it please the Court, we are already one commissioner short. I believe my clients are entitled to a full and fair hearing. This is a matter of great import*ant* to them. One of my clients just called my attention to the fact that one of the commissioners is asleep. At one time in the four minutes I observed him, he opened his eyes. At the time, he slumped forward quite obviously in slumber. I don't want to aggravate the Court; on the other hand, this testimony is of the greatest import*ant* to my people. I have asked the Court to hear me in chambers to ask the Court what should be done. It is my personal feeling that this commission should be discharged because one of the commissioners is now asleep.

9/3/58 page 24 } The Court: I often close my eyes on account of the glare. I do it frequently.

Mr. Greer: He doesn't just have his eyes closed—but he slumped forward. His appearance leads me to believe he is asleep.

The Court: The only way I know is to ask the commissioner if he was asleep or not. It was Mr. Ellis.

Mr. Greer: I will further ask the Court whether or not the Court will rule on my motion to discharge the commission.

The Court: No.

Mr. Hutchinson: I would like for the Court to call the man's attention to it—

Mr. Greer: That obviously would prejudice my case. That commissioner will immediately know that I moved to come in here so that he could be wakened up.

The Court: I think, under the circumstances, we should go on and conclude the case. I have been on cases when the jury was getting a little sleepy.

Mr. Greer: This case is mighty important to my clients. May I bring my client in and offer evidence that he was asleep?

The Court: If you want to.
The witness,

MR. ARNOLD DILLON,
was called into chambers and after being duly sworn testifies as follows:

DIRECT EXAMINATION.

By Mr. Greer:
Q. What is your name?
A. A. A. Dillon.
Q. Have you been present in the *Courtoom* during these proceedings?
A. Yes, sir.
Q. Did you call to my attention a moment or two ago the condition of one of the commissioners?
9/3/58 page 25 } A. Yes, I said look at Mr. Ellis—he's asleep.
Q. Will you tell the Court whether or not you were facing directly toward Mr. Ellis?
A. Yes, I was.
Q. What continued to lead you to believe he was asleep?
A. I kept watching the entire bunch and I called Mr. Harrison's attention and Mr. English's attention to it.
Q. Has Mr. Ellis continued to be asleep ever since Mr. Brown has been testifying?
A. He would wake up a little bit and his head would fall back again.

The Court: In other words, he would nod and shake his head?

A. Yes.

The Court: And could you see his jaws drop down and his lips fall down?

A. He dropped his head forward.

Mr. Greer:
Q. How long did he stay asleep for a given period?
A. That would be hard to say.

MR. W. T. HARRISON,
was brought into chambers and testifies as follows:

The Court: Have you been watching Mr. Ellis?

A. Not until he (indicating Mr. Dillon) called my attention to it.

Q. Was he asleep?

A. I couldn't say, but he looked like it.

MR. M. L. ENGLISH,

was brought into chambers and testifies as follows:

9/3/58
page 26 } The Court: Did you watch Mr. Ellis?

A. Yes, sir.

The Court: Did Mr. Ellis appear to be asleep to you?

A. Yes, sir. He finally dropped a pencil he had in his hand; he dropped it on the floor after you came in here.

The Court: The motion is overruled.

Mr. Greer: The defendant excepts to the ruling of the Court upon the grounds stated.

RIVES S. BROWN,

continued

DIRECT EXAMINATION.

By Mr. Greer:

Q. Mr. Brown, will you tell the Court how you arrived at the depreciation figures?

A. Yes, sir. The actual figure for a building of this type—I know of several buildings that had been built at $5.00 a foot. I have taken fifty cents a foot off for the depreciation. You can do it either way—you still get the same answer.

* * * * *

9/3/58
page 29 }

* * * * *

Rives S. Brown.

The Court: I would like to see you gentlemen in chambers.

A motion was made here about a juror repeatedly having been dozing or asleep. The jury is immediately in front of the Court. On returning to the Court room and following this motion, I observed all of the commissioners, and particularly the commissioner which has been mentioned here. He has on his tablet complete—more complete notes than I have taken, of everything testified to. He has evaluations on his notes. If he dozed—if there was any dozing—it was during the period Mr. Brown was being qualified. The other two expert witnesses who testified, he has their evaluations written down. I could see them. So have the others. As a matter of fact, I think Mr. Finney has less notes than anybody else I have observed.

Mr. Greer: I have been watching, and the commissioner in question has definitely been awake this time.

The Court: If the juror we are speaking of was asleep, I think it was probably while Mr. Brown was being qualified.

9/3/58 page 30 } I think Mr. Brown is well known in this area. I think everybody knows him. I happen to know him myself. I think it was, we convened here at approximately quarter to one and the motion was made at twenty minutes past one.

* * * * *

9/29/58 page 7 }

* * * * *

The Court: Fifth—

Mr. Greer: We have further testimony to present at this time.

The Court: I will hear no more testimony on that, sir; except to it.

9/29/58 page 8 } Mr. Greer: If your Honor please, may I make an offer of proof?

The Court: No, sir; I observed the man that day. We had the matter up at that time and timely exception was made. I don't care to hear any more.

Mr. Greer: Your Honor, that was in the Harrison case. The offered proof I now make was in the Dillon case, while Mr. Dillon was on the stand.

The Court: Wait a minute; we were only trying one case at a time.

Mr. Greer: That's correct, your Honor.

The Court: And this motion was only made in one case.

Mr. Greer: Yes; your Honor, and after the Dillon case was over, it was called to my attention by my client that that particular commissioner had again gone to sleep and I have, therefore, in this particular case filed an exception in that manner.

• • • • •

9/29/58
page 10 } MR. ARNOLD DILLON,

a defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greer:

Q. Please state your name, Mr. Dillon.

A. Arnold Dillon.

Q. Where do you live?

A. South 220.

Q. Are you one of the defendants in this case, and when I say "this case," I mean of F. A. Davis, State Highway Commissioner, State of Virginia, against Arnold Dillon and Vera Dillon?

A. Yes, sir.

Q. I believe you testified at one interval in the case of Davis against W. T. Harrison and his wife; is that correct?

A. Yes, sir.

Q. And you testified as to having seen one of the commissioners go to sleep?

A. I did.

Q. What was the name of that commissioner?

A. Mr. Ellis—Jim Ellis.

Q. Now that was on September 3, 1958?

A. Yes, sir.

9/29/58 page 11 } Q. Mr. Harrison's case was tried before your case?

A. Yes, sir.

Q. Do you remember the approximate time of the day that your case went on to trial?

Arnold Dillon.

A. Oh, not for sure—around 3:00 or 4:00 o'clock. It was late getting—it was getting late.

Q. Your case went on trial later in the afternoon than Mr. Harrison's case?

A. Yes, sir; later.

Q. Did you testify in your own behalf in the course of that case?

A. Yes, sir.

Q. Did you observe Mr. Ellis during the course of your testimony?

A. Yes, sir; I certainly did.

Q. I want you to tell the Court what you saw.

A. Well, as he did in the trial before mine, he went to sleep again and dropped his pencil and the gentleman sitting on his left picked his pencil up and gave it back to him.

Q. After that trial, did you call that to my attention?

A. Yes, sir; I certainly did.

Q. And do you know whether or not I incorporated that particular point in the exceptions to the Commissioners' Report filed in this cause?

A. Yes, sir; I think so, yes, sir.

9/29/58
page 12 } By the Court: (interposing)
Q. When?

A. Beg pardon.

Q. Was the Court's attention ever called to it?

Mr. Greer: I didn't see him go to sleep, your Honor, during Mr. Dillon's trial. I was watching my witness and I didn't see that particular commissioner asleep.

The Court: What I'm trying to get at is, when did you—in other words, this is the first time my attention has ever been called to it.

Mr. Greer: It is the first time we've had an opportunity to, your Honor. We called it to your Honor's attention in the exceptions which were duly filed.

The Court: Frankly, I didn't look at the exceptions. I should have. I left it for the counsel for the complainant in this matter but I don't recall ever before having this matter before me, and it looks to me like it should have been made at that time.

Mr. Greer: Well, your Honor, I couldn't make it at the time because I didn't know it. My witness couldn't say

anything about it because he was on the stand and answering questions.

The Court: Well, didn't he get through testifying?

9/29/58 page 13 } Mr. Greer: I don't remember the order in which he testified but he called it to my attention after the trial.

The Court: Well, the commission stayed. He was on the stand a good while.

Mr. Greer: It wasn't called to my attention until after the trial. This man is a layman; he may not have realized that it should have been called to my attention.

The Court: He testified about a similar incident—an alleged incident—in the trial just before his, didn't he?

Mr. Greer: He did, your Honor.

The Court: And you don't think he understood what it was?

Mr. Greer: Well, I think this. I can represent to the Court only this—that he called it to my attention after the conclusion of the trial. As a matter of fact, I think it was possibly the day following the trial.

By Mr. Greer: (continues examination)

Q. Mr. Dillon, when did you first call my attention to the fact that you saw Mr. Ellis go to sleep during your testimony?

A. Well, that was the next morning, I think, after the trial. I'm pretty sure it was when I was

9/29/58 page 14 } in your office and I told you then that he went to sleep, after we came out of the little room back there, and that's when you asked me if it was while my trial was going on. I told you it was.

Q. And you told me it was during the time that you were giving testimony?

A. Yes, sir.

Mr. Greer: Witness with you.

CROSS EXAMINATION.

By Mr. Hutcherson:

Q. Mr. Dillon, how do you know he was asleep?

A. Well, the man closed his eyes and lost control of his hands so far as to drop the pencil out of his hand.

Q. He had a pad in his hand, did he not?

A. Yes, sir.

Q. Do you know whether or not he had all the figures that were quoted during the testimony on that pad?

A. Not from where I was sitting. I couldn't see whether he had all the figures, but I did see this—after he got his pencil and straightened himself up, he looked over at the man on his right and looked at his figures and then looked at the man on his left and looked at his figures and then wrote something on his pad. From where I was sitting, I couldn't see what he did.

9/29/58 page 15 } Q. All you're going on is that he dropped his head and dropped his pencil?

A. Yes, sir.

By the Court:

Q. That was the length of time that he dropped his head and dropped his pencil and then somebody picked it up and he raised up and looked across at each person on his left and right?

A. Yes, sir.

Q. Did it last over a minute?

A. Well now, that I couldn't tell you now how long it lasted. I really couldn't say.

• • • • •

9/29/58
page 29 } DEPUTY SHERIFF JOHN PRICE,

called as a witness in behalf of the deefndant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greer:

Q. State your name for the record, sir.

A. John Price.

Q. Where do you live, Mr. Price?

A. Rocky Mount.

Q. What is your occupation sir?

A. Deputy Sheriff.

Q. How long have you been a police officer, Mr. Price?

A. Oh, just—this is going on three years.

Q. That is to say, a deputy sheriff in and for the County of Franklin and the Comonwealth of Virginia?

A. Yes, sir.

Deputy Sheriff John Price.

Q. Are you familiar with several of the condemnation cases which have been pending in this Court?

A. Yes, sir.

Q. I believe you were here serving in the function and capacity of the bailiff when we tried the Dillon and Harrison cases on September 3rd?

A. Yes, sir.

Q. Do you know Mr. James Ellis who was one of the commissioners?

9/29/58 page 30

A. Yes, sir.

Q. Do you know him personally?

A. Yes, sir; I've known him.

Q. How long have you known him?

A. I've known him for 15 or 20 years.

Q. Will you state to the Court, based upon your experience as a police officer, whether or not you know Mr. Ellis has a tendency to go to sleep in the daytime?

Mr. Hutcherson: I object to that.

The Court: What has that got to do with this case?

Mr. Hutcherson: May it please the Court, I can't see how it could have any great relevancy.

The Court: Let's see what he did on this day.

Mr. Greer: Well, if your Honor please, I think I'm entitled to show by a man who is in position to tell the Court that this man constantly goes to sleep in the daytime.

The Court: Has he seen him; did he see him at the time of the trial?

Mr. Greer: I'm going to try to develop that in my questioning.

The Court: Ask him. You can ask him if he saw him on the day of the trial when he went to sleep allegedly, or had gone to sleep.

9/29/58 page 31

Mr. Greer: Well, may it please the Court, I don't know where Mr. Price was. I suspect he was back here where he usually stays.

The Court: I just want to know that. It may have a lot to do with my ruling.

By Mr. Greer: (continues examination)

Q. Will you answer the Court's question, Mr. Price?

A. You mean did I see him asleep here that day? No, sir; I didn't see him sleep. You see, I was up there and he had his back to me.

Q. Now, when you say you were up there, what do you mean?

A. I was up there beside the Judge.

Deputy Sheriff John Price.

Q. Oh, you were up there beside the Judge?
A. Yes, sir.
Q. Will you tell the Court how many accidents Mr. Ellis has had because of going to sleep?

Mr. Hutcherson: I object to that.
The Court: No; you can put that in the record. Don't misunderstand me. You can put it in the record but the Court is overruling the motion.
Mr. Greer: (Addressing the reporter) Mr. Reporter, read my question back.

(The reporter read the last question above.)

9/29/58 page 32 } The Court: I am overruling the question as being improper on an objection made by Mr. Hutcherson, which is the condemnor.
Mr. Greer: You may answer the question, Mr. Witness.
The Court: I am letting it go in the record for whatever it may be worth.
Mr. Greer: I understand your Honor's ruling as sustaining the objection.
The Court: Yes.
Mr. Greer: But permitting it to go in the record?
The Court: Yes; so you can have it as a basis for your exception.

By Mr. Greer: (continues examination)
Q. Answer the question, Mr. Price.
A. You want to know—repeat your question again.
Q. Has this man—has this man, James Ellis, had automobile accidents resulting from his having gone to sleep in the daytime while driving?
A. I know of two accidents he had.
Q. From that reason?
A. Yes, sir.
Q. Did you personally investigate one or two of them?
A. No, sir; I didn't investigate them.
Q. Did you come by immediately after one of them?
9/29/58 page 33 } A. I came back immediately after one of them; yes, sir.
What had happened?
A. He said he didn't see the car—that he was asleep.
Q. He didn't see the car and that he was asleep?
A. Yes, sir

Judge William A. Alexander.

Q. Does he have the reputation known to peace officers of this community for having a decided proclivity or tendency to go to sleep in the daytime?

Mr. Hutcherson: I object to that.
The Court: The objection will be sustained, but it goes in for the purpose I have mentioned before.
Mr. Greer: May the answer come in, your Honor, for the record?
The Court: Yes; I said the answer may come in just like it did before but over the objection.

By Mr. Greer: (continues examination)
Q. Mr. Reporter, would you read that question to him, please?

The Court: Over the ruling of the Court, it may come in, in order that you might carry on your case further if you want to make up the record.

(The reporter read the last question above.)

A. All I know is I have heard it but the only time I come by one wreck after he had the wreck down there—that
9/29/58 was about three years ago, or four years ago.
page 34 } Now, so far as me knowing it, I don't know for sure. In other words, I have been told that now, but I haven't seen him sleeping.

* * * * *

JUDGE WILLIAM A. ALEXANDER,
called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greer:
Q. What is your name, sir?
A. W. A. Alexander.
Q. And please state your address and occupation.
A. Rocky Mount, Attorney at Law.
Q. Now, I believe you are also Judge of The County Court?
A. Yes, sir.

Judge William A. Alexander.

Q. Do you know the commissioner whom we are now discussing, Judge Alexander—Mr. James Ellis?

A. Yes; I know him.

9/29/58 page 35 } Q. How long have you known him?

A. Approximately 30 years.

Q. To your personal knowledge, does he have a tendency or proclivity to go to sleep in the daytime?

Mr. Hutcherson: I object.

The Court: Objection sustained. The evidence may be introduced to complete the record.

A. Shall I give the answer?

The Court: Yes, sir.

A. Yes, sir; I know Mr. Ellis, and he does have a tendency to doze or go to sleep while he is in conversation, especially during warm weather. The fact of it is, he was in my office sometime ago—

Mr. Hutcherson: I object to that, your Honor, because that is privileged.

The Court: Objection sustained.

Mr. Greer: May the witness complete his answer for the record?

The Court: Yes, sir.

By Mr. Greer: (continues examination)

Q. Will you complete your answer, Judge?

A. He was in my office sometime ago, and in just a conversation—it wasn't business; we were just talking—and he dozed off to sleep in his chair right in the middle of the conversation. I don't mean to be criticizing the man but he can't help it.

9/29/58 page 36 } Mr. Greer: Witness with you.

CROSS EXAMINATION.

By Mr. Hutcherson:

Q. Now, Mr. Alexander, you see a whole lot of people that go to sleep, don't you? I mean, they doze off. I see them in my

Judge William A. Alexander.

office and I'm sure you see them in your office, who sit there and doze off.

A. There are a few people of that type that I deal with quite often. Mr. Alfred Fralin was one who was very bad at it.

Q. And when you see them on jury duty over here sometimes they are very attentive and don't go to sleep?

A. Very attentive as a usual thing.

Q. Now, on the day that this case was tried, did you see Mr. Ellis go to sleep?

A. No, sir; I wasn't here at all.

Mr. Hutcherson: All right, sir; you can stand aside.

By Mr. Greer:

Q. Judge, reference has been made to people staying awake when they should stay awake. Do you know whether Mr. Ellis had accidents arising from the fact that he went to sleep?

A. I only heard of it, sir.

* * * * *

9/29/58
page 37 } Mr. Greer: May it please the Court, we have no further testimony to present in support of the exceptions, and will stand upon the exceptions as filed and upon each and every exception heretofore made in the course of these proceedings.

The Court: As indicated, the Court will overrule the motion, or exceptions, which I consider to be—in the first place, the motion was timely made when your client's grievance—who has testified to the fact that on the day of the hearing, while he was testifying, that he saw him nod—in his opinion, nod momentarily—in which he dropped his pencil; his head slumped and one of the commissioners immediately picked up the pencil and handed it to him and he looked at each one of their tablets and wrote something down.

He also testified that asimilar motion had been made in another case—another condemnation case—which was tried, and which he had been a witness to a similar incident.

The Court well remembers the original motion in the case tried just prior to the present case under consideration, which is the Dillon case. At that time the Court overruled your motion and was very observant—as near as the Court could be—

9/29/58 page 38

to the demeanor of the commissioners thereafter and certainly there was never any indication as far as the Court could see of any inattention or drowsiness to the extent of inattention which could be observed by the Court. Of course, the Court is like everybody else—it is not infallible about what it sees.

Mr. Greer: Yes, sir. I wonder if the record might show, your Honor, that in this particular courtroom the commissioners sit in the jury box and that the arrangement of the courtroom is such that the commissioners face toward the witness and that the commissioners and the Court both face in the same direction?

The Court: Yes, sir.

Mr. Greer: The point I wish to make for the record, with all respect—

The Court: —is that the commisioners have their backs to the Court.

Mr. Greer: Yes, your Honor.

The Court: All right, sir. Yes, sir; you may certainly stipulate that.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
RECEIVED
AUG 25 1959
RECEIVED
RICHMOND, VIRGINIA