

REVISION OF EMINENT DOMAIN LAWS

**REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL
to
THE GOVERNOR
and
THE GENERAL ASSEMBLY OF VIRGINIA**



HD 11, 1962

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1961

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REVISION OF EMINENT DOMAIN LAWS

REPORT

of the

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

Richmond, Virginia, December 7, 1961.

To:

HONORABLE J. LINDSAY ALMOND, JR., *Governor of Virginia*
and
THE GENERAL ASSEMBLY OF VIRGINIA

The General Assembly of 1958 directed the Virginia Advisory Legislative Council to continue its study of the laws relating to eminent domain and to recommend further revisions thereof. The Council made its report, House Document No. 14, 1960, and therein recommended changes in the statutes permitting condemnation for State highways, which were embodied in a bill attached to the report. This bill, substantially in the recommended form, was enacted by the 1960 General Assembly. In this report the Council also set forth an analysis of the general eminent domain laws and the problems incident thereto, pointed out that the time necessary for a comprehensive revision of these laws had not been available, and recommended a continuation of the study.

Pursuant to this recommendation, the General Assembly of 1960 adopted House Joint Resolution No. 38, directing the Council to continue the study of the eminent domain laws. The text of this Resolution follows:

HOUSE JOINT RESOLUTION NO. 38

Directing the Virginia Advisory Legislative Council to continue the study of the laws relating to eminent domain.

Resolved by the House of Delegates, the Senate concurring, That the Virginia Advisory Legislative Council is directed to continue the study of the laws relating to eminent domain which it has made in pursuance of House Joint Resolution No. 19 of the 1958 session of the General Assembly. The Council is directed to have tentative drafts of proposed revisions of the eminent domain laws printed and circulated among interested persons and their comments solicited.

The Council shall submit to the Governor and the General Assembly, on or before October one, nineteen hundred sixty-one, a report of its recommendations, together with suggested legislation necessary to carry such recommendations into effect.

The Council selected Joseph J. Williams, Jr., of Sandston, member of the House of Delegates and member of the Council, to serve as Chair-

man of the Committee to make the initial study and report to the Council. Selected to serve as members of the Committee with Mr. Williams were the following: Russell M. Carneal, member of the House of Delegates, Williamsburg; Delamater Davis, member of the House of Delegates, Norfolk; Ralph H. Ferrell, Jr., Attorney at Law, Richmond; William J. Hassan, Attorney for the Commonwealth, Arlington; Garnett S. Moore, member of the House of Delegates, Pulaski; Henry W. Oppenheimer, a member of the Legal Department of Lawyers Title Insurance Corporation, Richmond; duVal Radford, Attorney at Law and former member of the House of Delegates, Bedford; Beverley H. Randolph, Jr., Attorney at Law and former member of the House of Delegates, Richmond; William Rosenberger, Jr., Attorney at Law, Lynchburg; and William F. Stone, member of the Senate of Virginia, Martinsville. Subsequent to the selection of the members of the Committee, Mr. Williams resigned from membership in the House of Delegates to accept a position with the federal government. Edward M. Hudgins, member of the House of Delegates, Chesterfield County, was appointed by the Speaker of the House to fill the vacancy on the Council created by the resignation of Mr. Williams, and the Council then selected Mr. Hudgins to serve as Chairman of the Committee.

The Committee met and organized, electing Mr. Randolph as Vice-Chairman, and appointing John B. Boatwright, Jr. and Wildman S. Kinchloe, Jr. as Secretary and Recording Secretary, respectively.

A revision of the general condemnation laws was prepared and presented. This was considered in detail. A subsequent revision of this draft, was, in pursuance of the direction of the study resolution, widely circulated among interested groups and individuals. This draft, together with such comments concerning it as had been received, was again considered at length.

Careful consideration was given to the matter of whether any changes should be made in statutes conferring the power of eminent domain specifically on State agencies and political subdivisions, including the Department of Highways.

After a thorough and detailed discussion of these matters the Committee made its report to the Council. Having studied this report at length, the Council makes the following recommendations:

RECOMMENDATIONS

1. That the laws of Virginia relating to condemnation generally be revised to bring them more closely in line, procedurally, with existing statutes relating to condemnation for State highway purposes; and to this end that Chapter 1 of Title 25 of the Code of Virginia be repealed, and that a new Chapter 1.1 of this Title be enacted in lieu thereof.
2. That § 56-49, relating to the powers of public service corporations other than railroad corporations, and § 56-347, relating to powers of condemnation of railroad corporations, be amended to clarify and make uniform their power to condemn land, and to insert certain limitations thereon as to lands in the immediate vicinity of dwelling houses.
3. That § 33-57, relating to the powers of eminent domain in the State Highway Commissioner, be amended to clarify the powers of the Commissioner in cases where structures are situated partially upon any land to be taken by the Commissioner.

SUMMARY OF RECOMMENDATIONS

1. Our proposal for enactment of a new Chapter 1.1 in lieu of Chapter 1 of Title 25 is designed to bring about changes which, in our opinion, will clarify and improve the laws relating to condemnation generally, but without any drastic changes in the substantive rights affected thereby. The pertinent features of these changes are set forth below.

The procedural steps have been made generally similar to those contained in Title 33 relating to condemnation by the State Highway Commissioner. This will eliminate the present wide variation between these two procedures for which there seems to be no logical basis.

Although we have not included the "certificate" or "streamlined" method of taking title prior to institution of condemnation proceedings or prior to the determination of the award of just compensation, as is now permitted in highway condemnation cases, we have included a provision that any public service corporation, or railroad, transportation or transmission company, may, with the permission of the court, enter upon the property to be condemned at any time after the filing of its petition for condemnation and prior to the determination and deposit of the award of just compensation, for the purpose of constructing its works or improvements thereon. Before granting such permission, the court must find that a public necessity or an essential public convenience requires entry for those purposes, and that an emergency exists justifying such entry, before just compensation has been determined and the requisite amount paid into court; and must further find that the interests of the owners will be protected by payment into court for their benefit of the amount of the offer made for the property, and, in the court's discretion, the giving of adequate surety bond. Provision is made for withdrawal by any owner of his share of such payment. This provision places the landowner in a much better position than he now is, and at the same time affords the condemnor the opportunity of dealing with any situation of real emergency.

Matters which shall be contained in the petition for condemnation are spelled out in detail, and a section setting forth the form of notice by publication is included.

Provision is made for joining an intervenor as a party to the proceedings, upon petition and in the discretion of the court, at any time during the pendency of the proceedings, even after the beginning of the trial of the issue of just compensation.

By agreement of the petitioner and all parties who are sui juris and who have appeared or answered, the issue of just compensation may be determined by the court, rather than by a commission.

It is expressly provided that the view shall not be considered by the commission or the court as the sole evidence in the case.

2. §§ 56-49 and 56-347, if amended in accordance with our recommendations, would eliminate the present 100-foot limitation on railroad rights of way, but would continue the prohibition now in Title 25 against taking by condemnation a strip of land for a right of way within sixty feet of a dwelling house by either railroad corporations or public service corporations other than railroad corporations. However, certain exceptions are set forth. In addition to the case in which the court finds that it would be otherwise impractical, without unreasonable expense, to construct the proposed works at another location, such exceptions include the case of oc-

cupancy of the streets or alleys of a county, city or town, when permission has been obtained from the governing bodies thereof, and the case of occupancy of the highways of the State and of any county, when permission has been obtained from the authorities having jurisdiction over such highways.

3. We were advised that it would be helpful both to the State Highway Department and landowners if the State Highway Commissioner were given authority to condemn an entire structure when part of the structure is in a proposed highway right of way. Our recommended amendment of § 33-57 would empower the State Highway Commissioner to acquire by purchase, gift, or the power of eminent domain the remaining portions of such structures as are situated partially upon the remaining lands of the landowner, provided that in the opinion of the Commissioner, the structure cannot be severed, or the value of the portion located in the right of way, together with damages resulting to the remaining portion by reasons of such severance, would equal or exceed the fair market value of the entire structure. The Commissioner would also be permitted to acquire necessary temporary easements upon the remaining lands of the landowner for removal or demolition of such structure.

CONCLUSION

We wish to thank the members of the Committee for contributing their time and effort to the conduct of this study. They performed a great service for the Council, the Bar and the Commonwealth.

We also express our appreciation to the individuals and groups who gave the benefit of their views and suggestions in regard to the draft of the proposed revision of the general condemnation laws.

Attached is a draft of legislation carrying out our recommendations.

Respectfully submitted,

CHARLES K. HUTCHENS, Vice-Chairman

C. W. CLEATON

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A BILL to repeal Chapter 1 of Title 25 of the Code of Virginia, containing §§ 25-1 through 25-46, relating to condemnation generally and procedure in condemnation cases, and to amend the Code of Virginia by adding in Title 25 a chapter numbered 1.1 containing sections numbered 25-46.1 through 25-46.34, relating to the same matters.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding in Title 25 a chapter numbered 1.1 containing sections numbered 25-46.1 through 25-46.34, as follows:

CHAPTER 1.1

Condemnation Generally

§ 25-46.1. The short title of this chapter shall be the "Virginia General Condemnation Act".

§ 25-46.2. Unless otherwise specifically provided by law, all proceedings for the condemnation of property under the power of eminent domain shall be brought and conducted according to the provisions of this chapter.

§ 25-46.3. As used in this chapter, unless otherwise clearly indicated herein or required by the context, the term:

(a) "Court" means the court having jurisdiction and the judge thereof in vacation.

(b) "Date of valuation" means the time of the taking or entry by the petitioner, or the date of the filing of the petition, whichever occurs first.

(c) "Land" means land, lands and real estate and all rights and appurtenances thereto, together with the buildings and other improvements thereon, and any right, title, interest, estate or claim in or to land, lands or real estate.

(d) "Law" means any statute, general, special, private or local, of this State, including, but not limited to, the Code of Virginia or any section thereof.

(e) "Person" may extend and be applied to bodies politic and corporate as well as individuals.

(f) "Petitioner" means any person or public or private entity possessing the power to exercise the right of eminent domain seeking to exercise such power under this chapter.

(g) "Property" means real and personal property, and land, and any right, title, interest, estate or claim in or to such property.

(h) "State" or "Commonwealth" means the Commonwealth of Virginia.

§ 25-46.4. Jurisdiction of proceedings to condemn property under this chapter shall be in the circuit court of the county or in the circuit or corporation court of the city wherein such property, or the greater portion thereof proposed to be condemned is situated. Such proceedings shall be commenced by the filing of the petition in the office of the clerk of such court.

§ 25-46.5. No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unknown or cannot with reasonable diligence be found within this State.

§ 25-46.6. (a) Nothing in this chapter shall be so construed as to authorize the condemnation or acquisition, except by the consent of the General Assembly, of any lands belonging to, attached to the site, or used for the purposes of any university, college, or other seminary of learning owned and controlled by the Commonwealth, or any lands belonging to, attached to the site, or used for the purposes of any State hospital, or the institutions for the deaf and blind, or to authorize the condemnation of any cemetery or burial ground, or any part thereof, established prior to the date of the charter of such company proposing to condemn.

(b) The lands of any university, incorporated college, or other seminary of learning, not owned and controlled by the Commonwealth, shall be subject to condemnation for the purposes of public highways, except that no part of such lands shall be condemned which are within five hundred feet of any building erected and used for school purposes at the time proceedings are instituted, nor through the land which surrounds the school buildings and is used at such time as a campus, park, or athletic ground or field in connection therewith.

§ 25-46.7. The petition for condemnation shall contain :

(a) A caption wherein the person or entity vested by law with power to exercise the right of eminent domain shall be the petitioner, and the named defendants shall be at least one of the owners of some part of or an interest in the property to be taken or damaged, and the property to be taken designated generally by kind, quantity and location.

(b) Short and plain statements of the following :

1. The authority for the taking; provided, however, no public utility shall be required to obtain, as a prerequisite to its filing of its petition for the condemnation of property necessary for ordinary extensions or improvements of its facilities within the territory in which it is lawfully authorized to operate, for use in public utility service, a certificate from the State Corporation Commission under the Utility Facilities Act, Chapter 10.1 of Title 56;

2. The necessity for the work or improvements to be made;

3. The public uses for which the property is to be taken;

4. An exhibit describing the work or improvements to be made and a plat, drawing or plan, in sufficient detail to disclose fairly the nature of such work or improvements, including specifications, elevations, grade changes, etc., so as to enable the owner to be reasonably informed of the nature, extent and effect of the taking and the construction and operation of such works and improvements;

5. The estate, interest or rights to be taken in the property;

6. A description of the property to be taken sufficient for its identification and a plan or plat of the land to be taken shall be attached as an exhibit to the petition;

7. As to each separate piece of property to be taken or damaged, the names and residences, so far as known by petitioner, of the defendants who are joined as owners thereof, or of some interest therein, whose names can be ascertained by a reasonably diligent search of the records; considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned; other persons or classes of persons, where the names are unknown, may be made defendants under the designation of "Unknown Owners";

8. Compliance with the provisions of § 25-46.5 and the manner of such compliance; and

9. Where applicable, compliance with the provisions of § 25-233 and the manner of such compliance.

(c) A prayer asking for judgment that the property or the estate, interest or rights therein be condemned and the title thereto vested in the petitioner, and that just compensation for the property to be taken and the damages, if any, as a result of the taking and use by the petitioner, beyond the peculiar benefits, if any, by reason of such taking and use by the petitioner, be ascertained and awarded, and for such other relief as may be lawful and proper.

(d) Where applicable, there may be included in the petition facts and circumstances on the basis of which the petitioner desires to obtain the right of entry as provided in §25-46.8 and a prayer asking for such right of entry.

(e) The petition shall be verified by affidavit of a duly authorized officer, agent or attorney for the petitioner.

(f) There may be joined in the same petition one or more separate pieces, tracts, parcels or lots of land, whether in the same or different ownership and whether or not sought for the same use, provided, however, the court, on its own motion or on motion of any party in furtherance of convenience or to avoid prejudice, may order a severance and separate trial of any claim or claims or of any issue or issues.

(g) The petitioner shall furnish the clerk one copy of the petition and all exhibits thereto and such additional copies as may reasonably be needed by the clerk or any defendant.

§ 25-46.8. Unless otherwise provided by law, any public service corporation, or railroad, transportation or transmission company, as defined by § 56-1, may enter upon the property to be condemned at any time after the filing of its petition for condemnation and prior to the determination and deposit of the award of just compensation in the manner provided in this chapter, for the purpose of constructing its works or improvements thereon in the manner proposed by the petitioner if, upon the petitioner's application to do so, the court, after thirty days notice to the parties and after hearing all parties in interest, finds (1) that a public necessity or an essential public convenience requires such entry for such purposes, and that an emergency exists justifying such entry, before the time when just compensation can be determined and the amount so determined paid into court, and (2) that the interests of the owners of such property will be adequately protected by the payment into court or to the clerk thereof for the benefit of the owners of the amount of the offer made in accordance with § 25-46.5 and, in the discretion of the court, the giving of a surety bond in an amount and with such surety as the court may determine. Upon such payment and the giving of such bond, if any is required, with

surety in the office of the clerk or with the court, conditioned as required by law and to the effect that the petitioner and its surety or sureties are bound to the owners of the property to be taken or damaged to secure to each of them payment of just compensation therefor as finally determined in the condemnation proceedings, the petitioner shall have the right to enter and construct its works or improvements upon or through the property as described in its petition. At any time after such payment into court or to the clerk thereof, a party whose property or interest therein is to be taken or damaged may apply to the court for the withdrawal of his share thereof in the manner provided in § 25-46.30.

At any time during the condemnation proceedings, if it appears necessary so to do in order to protect the owners of the property or estate or interest therein to be condemned and assure unto them the payment of just compensation to which they are entitled, the court may require the petitioner to give a new and additional bond in an amount and with sureties satisfactory to the court.

If the petitioner enters upon the property under this section and does any work thereon, or causes any injury or damage to such property, it shall not thereafter be entitled, without the consent of the owner, to abandon the proceedings for the condemnation thereof, but shall conduct such proceedings with reasonable dispatch to final judgment and the petitioner shall pay to the owner of the property or into court the amount of just compensation as determined in the condemnation proceedings.

§ 25-46.9. Proceedings for condemnation shall be initiated by filing the petition referred to in § 25-46.7 in the court, or in the clerk's office thereof, having jurisdiction under § 25-46.4. Upon the filing of such petition, the petitioner shall give the owners twenty-one days' notice of the filing of such petition and of its intention to apply to the court for the appointment of commissioners to ascertain just compensation for the property to be taken or affected as a result of the taking and use by the petitioner of the estate, interest or rights to be so acquired. In such notice, the petitioner may also give notice that grounds of defense shall be filed setting forth the valuation of the property to be so taken, an appraisal of any damages which the owner claims will result by reason of such taking and use thereof by the petitioner, and any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners for the determination of such just compensation.

Such notice shall be served on the owners, and within twenty-one days of the service thereof any such owner who desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners shall file his grounds of defense designating the property in which he claims to be interested, his valuation of the property to be taken, an appraisal of any damage which the owner claims will result from the proposed taking and use by the petitioner, the grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners for the determination of just compensation.

Should any such owner fail to file the grounds of defense as hereinabove provided, such failure shall not preclude the owner from appearing on the date set for the appointment of commissioners nor from presenting evidence as to valuation and damage nor from sharing in the award of just compensation according to his interest therein or otherwise protect-

ing his rights, but such failure shall preclude such owner from any other defense by way of pleas in bar, abatement or otherwise. Provided, however, for good cause shown the time for filing such grounds of defense may be extended by the court.

25-46.10. Upon the filing of an affidavit by a duly authorized officer, agent or attorney for the petitioner stating that he believes any owner cannot be personally served because after diligent inquiry within the State such owner's place of residence cannot be ascertained or, if ascertained, that it is not within this State, service of the notice may be made on such owner by an order of publication; such order shall be published in a newspaper published in the county or city where the property or major portion thereof is located, or if there is no such newspaper then in a newspaper having a general circulation in such city or county, once a week for not less than two successive calendar weeks and shall be posted on the front door of the courthouse within ten days after the entry of the order of publication. Unknown owners who may have an interest in the property may be served by order of publication in like manner addressed to "Unknown Owners". The clerk shall mail a copy of the notice by publication to any owner who cannot be personally served but whose place of residence is then known.

Except as otherwise provided in this chapter the publication shall in all respects conform to §§ 8-71, 8-72 and 8-76 and the Rules of Court applicable to orders of publication in equity proceedings.

§ 25-46.11. The form of the notice by publication, to which shall be attached the signature of the clerk, or the deputy clerk for and on behalf of the clerk, shall be substantially as follows:

Virginia: In the (here insert the name of the court)

Name of petitioner

v.

In Chancery

Name of one or more defendants, et al.,

and (.....) acres, more or less, of land in

(city or county) Virginia.

To Whom It May Concern:

Pursuant to an order entered on the day of, 19....., this notice is hereby given:

In this proceeding the petitioner seeks to acquire by condemnation (here state the estate, interest, or right to be acquired) to certain pieces or parcels of land situated in (county or city), Virginia, for the uses and purposes of the petitioner (here state briefly the uses and purposes and nature of the works and improvements to be made), all of which are described more particularly in the petition and exhibits attached thereto on file in the office of the clerk of this court, to which reference is hereby made for a full and accurate description thereof; and for the appointment of commissioners to ascertain just compensation to the owners of any estate or interest in the property to be taken or affected as a result of the taking and use thereof by the petitioner.

For such purposes, the petitioner will apply to the court, sitting at, Virginia, on the day of

19....., at o'clock m., or as soon thereafter as petitioner may be heard; for the appointment of commissioners to ascertain just compensation as aforesaid.

And it appearing by affidavit filed according to law that the following owners are not residents of the State of Virginia, or their names and addresses are not known and that diligence has been used by and on behalf of the petitioner to ascertain such names and addresses without effect: (here set out the names of such owners or classes of owners and addresses where known), it is ORDERED that the aforesaid owners do appear within ten (10) days after due publication of this order in the clerk's office of the (here insert the name of the court) and do what is necessary to protect their interests; and it is further ORDERED that if any of the above named owners desires to assert any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners he shall file his grounds of defense designating the property in which he claims to be interested, his valuation of the property to be taken, an appraisal of any damage which the owner claims will result from the proposed taking and use by the petitioner, the grounds of any objection or defense to the taking or damaging of his property or to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners for the determination of just compensation.

Should any such owner fail to file the grounds of defense as hereinabove provided, such failure shall not preclude the owner from appearing on the date set for the appointment of commissioners nor from presenting evidence as to valuation and damage nor from sharing in the award of just compensation according to his interest therein or otherwise protecting his rights, but such failure shall preclude such owner from any other defense by way of pleas in bar, abatement or otherwise.

An extract, Teste:

.....
Clerk

(Here state name and address of counsel for petitioner)

§ 25-46.12. Personal service of the notice may be made by any person, not a party to or otherwise interested in the subject matter in controversy, on a nonresident owner out of this State and such service shall have the same effect, and no other, as an order of publication duly executed, or the publication of notice under this chapter, as the case may be. In such case the return shall be made under oath, and shall show the time and place of such service, that the party serving the same is not a party to or otherwise interested in the subject matter in controversy, and that the person so served is a nonresident of this State.

§ 25-46.13. If any owner is an infant or insane, incompetent, or a convict and has no guardian or committee in this State, no notice need be issued for or served upon him and a guardian ad litem for such owner shall be appointed in the manner prescribed in § 8-88.

§ 25-46.14. No amendments shall be made to the petition or other pleading after it is filed save by leave of court. Leave to amend for the addition of new parties and for other purposes shall be liberally granted in furtherance of the ends of justice. In granting leave to amend, the court may make such provision for notice and opportunity to make response as the court deems reasonable and proper.

§ 25-46.15. If an owner becomes incapable of defending because of death, insanity, conviction of felony, removal from office, or other cause, his successor in interest may be substituted as a party in his place. Substitution shall be made on motion of the successor or of any party to the proceedings. If the successor does not make or consent to the motion, the party making the motion shall file it in the clerk's office and the procedure thereon and the service of notice of such motion, if any, shall be in whatever manner the court may require as reasonable and proper in the circumstances involved but in no event shall the period of time required for any notice be greater than that which is prescribed for the notice in §§ 25-46.9 or 25-46.10.

§ 25-46.16. Any person not already a party to the proceedings whose property, or any interest or estate therein, is to be taken or damaged, or who claims that his other property, or any interest therein will be damaged as a result of the taking and use by the petitioner, may, upon his petition for intervention filed by leave of court at any time prior to the beginning of the trial of the issue of just compensation, or, in the discretion of the court, at such other times during the pendency of the proceeding upon such terms and conditions as the court deems proper, considering all the circumstances at that time, be made a party to the proceeding and be permitted to assert any claim or defense germane to the proceeding upon such terms and conditions as the court deems reasonable and proper.

§ 25-46.17. At the hearing upon the petition and application for the appointment of commissioners made in accordance with § 25-46.9 if no grounds of defense has been filed objecting to the jurisdiction of the court to hear the case and to proceed with the appointment of commissioners, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a commission or by the court, as provided in § 25-46.19. If any grounds of defense has been filed objecting to the jurisdiction of the court, the court shall determine such issues or other matters in controversy, excepting the issue of just compensation or matters relating to the ownership of any land or other property or the interests of any party in such land or other property, and if the court determines all such issues or other matters involving the jurisdiction of the court in favor of the petitioner, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a commission or by the court, as provided in § 25-46.19.

An order of the court in favor of the petitioner on any of the foregoing preliminary issues or matters shall not be a final order for purposes of appeal but an order against the petitioner on such issues or matters shall be a final order for purposes of appeal, if the petitioner so elects. If the order against the petitioner does not dismiss the petition, the petitioner may elect to proceed with the case without waiving any of its objections and exceptions to the rulings of the court.

At such hearing the court may also determine whether the petitioner shall have the right of entry as provided in § 25-46.8.

§ 25-46.18. No delay in the proceeding for the determination of just compensation shall be occasioned by the claims of the parties with respect to the ownership of any land or other property or to the interests therein of the respective parties, but in such cases the court shall require the retention of the deposit of the award for the whole property, or the part in dispute, until the rights of the respective parties have been determined

in the manner hereinafter provided in § 25-46.28; provided, however, the court shall permit any such claimants to intervene as parties to the proceedings as provided in § 25-46.16.

§ 25-46.19. If the statute granting the power of eminent domain does not specifically provide that a specially constituted tribunal shall determine the issue of just compensation, such issue shall be determined by a commission selected in the manner hereinafter provided in § 25-46.20. By agreement of the petitioner and all parties who are sui juris and who have appeared or answered, the issue of just compensation may be determined by the court.

§ 25-46.20. If the issue of just compensation is to be determined by a commission, the court shall summon nine disinterested freeholders, or five disinterested freeholders if the parties so agree, who shall be residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. If nine are summoned, the petitioner and the owners shall each have two peremptory challenges and the remaining five, or the original five if only five are summoned, shall be appointed, any three or more of whom may act, and shall fix the value of the property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property by reason of the taking and use thereof by the petitioner. Before executing their duties the commissioners shall take an oath before some officer authorized by the laws of this State to administer an oath, that they will faithfully and impartially ascertain what will be the value of the property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property, by reason of such taking and use by the petitioner.

§ 25-46.21. Upon the selection of the commissioners, the court shall direct them, in the custody of the sheriff or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other, unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the commissioners upon such view. Such view shall not be considered by the commission or the court as the sole evidence in the case. Upon completion of the view, the court shall hear the testimony in open court on the issues joined. When the commissioners shall have arrived at their conclusion they shall make their report in writing to the court, or to the judge thereof in vacation. The report may be confirmed or set aside forthwith by the court, or the judge, as the case may be, provided that when the report is so filed and before the court or judge passes thereon, either party shall have the right to file written exceptions to the report, which shall be filed not later than ten days after the rendering of the report by the commissioners. The court or the judge, as the case may be, shall have the same power over the commissioners' reports as it now has over verdicts of juries in civil actions.

Upon hearing of exceptions to the commissioners' report the court shall not recall and question the commissioners as to the manner in which their report was determined unless there be an allegation in such written exceptions that fraud, collusion, corruption or improper conduct entered into the report. If such allegation is made the judge shall summon the commissioners to appear and he alone shall question them concerning their actions. If the court be satisfied that fraud, collusion, corruption or improper conduct entered into the report of the commissioners, the report shall be set aside and new commissioners appointed to rehear the case.

If the court be satisfied that no such fraud, collusion, corruption or improper conduct entered into the report of the commissioners, or no other cause exists which would justify setting aside or modifying a jury verdict in civil actions, the report shall be confirmed.

§ 25-46.22. The commissioners appointed shall, for every day or portion thereof they may be employed in the performance of their duties, receive compensation in an amount to be fixed by the court at not more than twenty dollars per diem, regardless of the number of cases heard on any particular day, to be paid by the petitioner. The persons summoned who appear, but are not appointed to serve as commissioners, shall be paid an amount to be fixed by the court not to exceed five dollars for each day they are summoned to appear.

§ 25-46.23. If the petitioner and the person whose property is being condemned under the provisions of this chapter shall, before the report of just compensation is made, enter into any contract in relation to building, operating, or maintaining the proposed work, or in relation to fencing, culverts, depots, stations, crossings, sidings, cattle-guards, damage from fire, injury to or destruction of property, real or personal, or like matters, and introduce such contract at the trial of the issue of just compensation, such contract shall be accepted and made a part of the report of the award of just compensation, and upon confirmation of such report shall thereafter run as a covenant with the land or with the interest or estate therein taken.

§ 25-46.24. Upon the return of the report of the commissioners or the court, as the case may be, and the confirmation, alteration or modification thereof in the manner provided in this chapter, the sum so ascertained by the court as compensation and damages, if any, to the property owners may be paid into court or to the clerk thereof, upon which title to the property and rights condemned shall vest in the petitioner to the extent prayed for in the petition, unless such title shall have already vested in the petitioner in a manner otherwise provided by law, and the petitioner or its agents shall have the right to enter and construct its works or improvements upon or through the property described in its petition.

§ 25-46.25. Upon the return of the report of the commissioners or the court, as the case may be, and upon payment into court or to the clerk thereof of the sum ascertained therein, the petitioner or its agents may enter and construct its works or improvements upon or through the property as described in its petition, notwithstanding the pendency of proceedings on any objections to such report in the trial court, or upon an appeal of the case, or the ordering of a new trial of the issue of just compensation or otherwise. And no order shall be made nor any injunction awarded by any court or judge to stay the petitioner in the prosecution of its work unless it is manifest that the petitioner or its agents are transcending their authority and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

§ 25-46.26. The order confirming, altering or modifying the report of just compensation shall be final. Any party aggrieved thereby may apply for an appeal to the Supreme Court of Appeals and a supersedeas may be granted in the same manner as is now provided by law and the Rules of Court applicable to civil cases. An order setting aside the report and awarding a new trial of the issue of just compensation shall not be a final order for the purposes of appeal.

§ 25-46.27. The clerk of the court shall make and certify a copy of so much of the orders, judgments and proceedings in the case as shall show such condemnation, including a plat and description of the land or other property, or the estate or interest in the land condemned, and shall have the same recorded in the deed book in the office of the clerk of the court wherein deeds are recorded in such county or city, and indexed in the names of the parties. If any portion of the land lies in two or more counties or cities, or county and city, the clerk shall certify a copy of the proceedings above mentioned to the clerk of the court of each such county or city and such clerks shall record and index the same as above provided. The fees of the clerk for recording shall be the same as for recording a deed, and such fees shall be paid by the petitioner.

§ 25-46.28. Upon the award being paid into court or to the clerk thereof and the confirmation of the report in the manner provided in § 25-46.24, the interest or estate of the owner or owners in the property taken or damaged shall terminate and they shall have such interest or estate in the fund so paid into court as they had in the property so taken or damaged, and all liens by a deed of trust, judgment or otherwise upon such property or any interest therein shall be transferred to the fund so paid into court. If the court is satisfied that the persons having an interest therein are before the court, the court shall make such distribution of such money as to it may seem proper, having due regard to the interest of all persons therein, and in what proportions such money is properly payable.

If it appears from the record in the proceedings or otherwise that the person or persons or classes of persons in the proceedings are vested with the superior right or claim of title in the land or estate or interest therein condemned, or in the proceeds of the award of just compensation, and that the record does not disclose any denial or dispute thereof, by any person or party in interest, the court may direct that the fund, after the payment therefrom of any taxes, be disbursed and distributed accordingly among the persons entitled thereto or to whomsoever they may by writing direct; except that with respect to any persons appearing to be infants, incompetent or under any other legal disability, the court may inquire into their rights or claims, independent of any statement in the record, and any order for distribution shall conserve and protect the rights of such parties in and to the fund. The cost of a commissioner in chancery appointed by the court to assist in making the proper distribution in cases of legal disability as herein set forth may be taxed as a cost of the proceedings, to be paid by the petitioner.

If it appears to the court that there exists a controversy among claimants to the fund, or to the ownership of the property subject to the condemnation, the court shall enter an order setting a time for hearing the case and determining the rights and claims of all persons entitled to the fund or to any interest or share therein. In order to enable the court to determine the proper disposition of the fund, the court may appoint a commissioner in chancery to take evidence upon the conflicting claims. No costs incident to or arising out of a trial or a determination of such issues or out of a determination of the ownership of the fund or the distribution thereof shall be taxed against the petitioner.

Upon a determination by the court of the rights and claims of the persons entitled to the fund, an order shall be entered directing the disbursement among the persons entitled thereto or to whomsoever they may by writing direct. Any party aggrieved thereby may apply for an appeal as provided in § 25-46.26.

§ 25-46.29. If the commission fails to report its award of just compensation within a reasonable time after the issue of just compensation is submitted to it, or the commission reports that it is unable to make such award, or the commissioners' report is set aside, or a final order upon its report has been set aside upon appeal and a new trial ordered, the court shall, without further notice, as often as seems to it proper, appoint other commissioners, and the matter may be proceeded in as hereinbefore prescribed in this chapter.

If a new trial of the issue of just compensation is ordered, either in the trial court or upon appeal, upon an exception by an owner with respect to the insufficiency of the award of just compensation, and the subsequent report of the award of just compensation, which is confirmed, is for a lesser amount, the court shall tax all the costs of the new trial against the owner making such exception and shall order repayment to the petitioner of any sum paid to such owner out of the fund paid into court by the petitioner in excess of the total sum ascertained by the second report with interest thereon at the rate of five per centum per annum from the date the original payment was made to such owner until the date such excess is repaid to the petitioner; and if such owner fails to make such repayment within thirty days from the date of the entry of such order, the court shall enter judgment therefor against such owner.

§ 25-46.30. At any time after payment into court of the sum ascertained in the report of the award of just compensation, notwithstanding the fact that another trial of the issue of just compensation has been ordered or an appeal has been taken from a final order upon the report as provided in § 25-46.26, a party whose property or interest therein is to be taken or damaged may apply to the court, in the manner hereinafter provided, for the withdrawal pendente lite of all, or any portion of his pro rata share, of the amount deposited for his interest in the property to be taken or damaged. If such application requests withdrawal of an amount in excess of fifty per cent of such owner's pro rata share of the amount deposited as aforesaid, the court may require the applicant, before withdrawing any of such excess, to give or file a bond in the clerk's office with surety approved by the court or clerk, conditioned as required by law to the effect that they are bound to the petitioner in such amount as fixed by the court, but not to exceed double the amount of such excess, for the return of the amount withdrawn that exceeds the amount to which the owner is entitled as finally determined in the condemnation proceeding, together with interest at the rate of five per centum per annum from the date of the withdrawal of the amount in excess of fifty per cent of such owner's pro rata share of such amount deposited as aforesaid. Such application shall be verified and shall set forth the owner's interest in the property to be taken or damaged and request withdrawal of a stated amount; a copy of such application for withdrawal shall be served upon the petitioner or its counsel of record. No order permitting such withdrawal shall be entered until at least twenty-one days after service of such application upon the petitioner without its consent. Within such twenty-one day period the petitioner may object to such withdrawal by filing written objections thereto in the clerk's office on the grounds that the amount of, or the sureties upon the proposed bond are insufficient or that other persons are known or believed to have interests in such property, and a copy of any such objections shall be served upon the applicant and such other persons in the same manner as is provided for service of the notice in §§ 25-46.9 through 25-46.12.

If such other persons so served appear and object to the proposed

withdrawal, or if the petitioner so requests, the court shall thereupon determine the amount to be withdrawn, if any, and the persons entitled thereto. No such other persons so served shall have any claim against the petitioner to the extent of the amount so withdrawn.

§ 25-46.31. (a) Where the petitioner has exercised pendente lite the right to enter into and take possession of the land or other property, in the manner provided by this chapter, upon the payment into court of the sum ascertained in the report of just compensation as provided in § 25-46.25, the owner thereof shall receive interest at the rate of five per centum per annum upon the difference between the amount of just compensation as finally determined and awarded to such owner and the amount, if any, which such owner received or was entitled to receive, from the fund so paid into court from the time of such entry by the petitioner until the time the fund paid into court on account of the final award of just compensation to such owner is available for distribution. No interest shall be payable upon any amount which was withheld from such owner on account of questions involving his right, title, interest or estate in the land or other property taken or damaged.

(b) If the petitioner has exercised the right pendente lite to enter into and take possession of the land or other property to be taken or damaged as provided in § 25-46.8, the owner thereof shall receive, in addition to what he is entitled to receive under paragraph (a) of this section, interest at the rate of five per centum per annum upon the amount of the award of just compensation, as finally determined, from the time of such entry until payment into court of the sum ascertained in the report of just compensation as provided in § 25-46.24. If the petitioner fails to pay any of such interest for a period of thirty days, the court shall enter judgment therefor against the petitioner.

(c) No interest shall be allowed during the time any distribution of the fund paid into court was delayed in the trial court or upon appeal, or thereafter, occasioned by any exceptions made by such owner which are not sustained in whole or in part.

§ 25-46.32. Except as otherwise provided in this chapter, all costs of the proceeding in the trial court which are fixed by statute shall be taxed against the petitioner. The court may in its discretion tax as a cost a fee for a survey for the landowner, such fee not to exceed fifty dollars. All costs on appeal shall be assessed and assessable in the manner provided by law and the Rules of Court as in other civil cases.

§ 25-46.33. In any case in which the petitioner may be entitled under the laws of this State to enter upon or condemn any land or other property or any interest or estate therein, the sheriff or sergeant, whenever required, shall attend and remove, if necessary, any forcible resistance to such entry or taking.

§ 25-46.34. (a) If no hearing has begun in the trial of the issue of just compensation for the taking or damaging of property or property interest and the petitioner has not already acquired the title or a lesser interest or estate in or taken possession of such property, the petitioner may upon motion obtain, as a matter of right, an order dismissing the proceeding as to such property.

(b) At any time after a hearing has begun in the trial of the issue of just compensation for the taking or damaging of any property or prop-

erty interest, the petitioner not having already acquired the title or a lesser interest or estate in or taken possession of such property, or paid the amount of just compensation into court, and before the time for noting an appeal from any final order upon a report of just compensation, the petitioner may, upon motion, obtain as a matter of right an order dismissing the proceedings as to such property, which order shall also provide that the petitioner shall pay such owner or owners for the following expenses which have been actually incurred by them in such amounts as the court deems just and reasonable: attorney's fee, witness fees including reasonable expert witness fees, not exceeding three, and other reasonable expenses and compensation for time spent as a result of the condemnation proceedings. If any such expenses are not paid within thirty days of the entry of such order, judgment therefor shall be entered against the petitioner.

(c) In the event the petitioner fails to pay to the parties entitled thereto, or into court, the amount of the award of just compensation within thirty days from the date of the entry of the final order upon the report of just compensation, the owner or owners of the property to be taken or affected may, upon motion, obtain as a matter of right an order dismissing the proceeding as to such property, which order shall also provide that the petitioner shall pay such owner or owners for his expenses as provided in paragraph (b) of this section. If any such expenses are not paid within thirty days of the entry of such order, judgment therefor shall be entered against the petitioner.

(d) Before the vesting of title, or a lesser interest or estate in any tract or parcel of land in the manner prescribed in this chapter, the proceedings may be dismissed, in whole or in part, as to any such property upon the filing of a stipulation of dismissal by the parties affected thereby; and, if such parties so stipulate, the court may vacate any order that has been entered.

(e) Except as otherwise provided in a stipulation of dismissal or order of the court, any dismissal is without prejudice.

(f) The court may at any time drop a defendant unnecessarily or improperly joined.

2. This Act shall not apply to any condemnation proceedings which has been instituted prior to the effective date of this Act. Any such action commenced under Chapter 1 of Title 25 as in force on January one, nineteen hundred sixty-two shall be continued thereunder and the repeal of Chapter 1 of Title 25 by this Act is subject to this exception.

3. If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this Act, or shall adjudge any provision to be inoperative in particular circumstances because of the exertion of federal power, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this Act, or the operation of such provision in other circumstances, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this Act so adjudged to be invalid or unconstitutional or the particular circumstances so in issue.

4. That Chapter 1 of Title 25 of the Code of Virginia, containing §§ 25-1 through 25-46, and all other acts and parts of acts in conflict with this Act, to the extent of such conflict, are repealed.

A BILL to amend and reenact § 56-49, as amended, of the Code of Virginia relating to the powers of public service corporations other than railroad corporations and limitations thereof.

Be it enacted by the General Assembly of Virginia:

1. That § 56-49, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 56-49. In addition to the powers conferred by Title 13.1, each corporation of this State organized to conduct a public service business other than a railroad shall have the power:

(1) To cause to be made such examinations and surveys for its proposed line or location of its works as are necessary to the selection of the most advantageous location or route or for the improvement or straightening of its line or works, or changes of location or construction, or providing additional facilities; and for such purposes, by its officers and servants, to enter upon the lands or waters of any person but subject to responsibility for all damages that are done thereto.

(2) * *To acquire by the exercise of the right of eminent domain any lands or estates or interests therein, sand, earth, gravel, water or other material, structures, rights of way, easements or other interests in lands, including lands under water and riparian rights, of any person, which are deemed necessary for the purposes of construction, reconstruction, alteration, straightening, relocation, operation, maintenance, improvement or repair of its lines, facilities or works, and for all its necessary business purposes incidental thereto, for its use in serving the public, including permanent, temporary, continuous, periodical or future use, whenever the corporation cannot agree on the terms of purchase or settlement with any such person because of the incapacity of such person or because of the inability to agree on the compensation to be paid or other terms of settlement or purchase, or because any such person cannot with reasonable diligence be found or is unknown, or is a non-resident of the State, or is unable to convey valid title to such property. Such proceeding shall be conducted in the manner provided by Chapter 1.1 of Title 25 and shall be subject to the provisions of § 25-233. Provided, however, the corporation shall not take by condemnation proceedings a strip of land for a right of way within sixty feet of the dwelling house of any person except (a) when the court having jurisdiction of the condemnation proceeding finds, after notice of motion to be granted authority to do so to the owner of such dwelling house, given in the manner provided in §§ 25-46.9, 25-46.10 and 25-46.12, and a hearing thereon, that it would otherwise be impractical, without unreasonable expense, to construct the proposed works of the corporation at another location; or (b) in case of occupancy of the streets or alleys of any county, city or town, in pursuance of permission obtained from the board of supervisors of such county or the corporate authorities of such city or town; or (c) in case of occupancy of the highways of this State or of any county, in pursuance of permission from the authorities having jurisdiction over such highways.*

But no corporation shall hereafter have any power to operate turnpikes or toll roads. That power is reserved to be granted from time to time to political subdivisions of the Commonwealth or otherwise as the General Assembly shall determine.

A BILL to amend and reenact § 56-347, as amended, of the Code of Virginia relating to the power of condemnation of railroad corporations and limitations thereof.

Be it enacted by the General Assembly of Virginia:

1. That § 56-347, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 56-347. * *In addition to the powers conferred by Title 13.1, every corporation of this State organized to conduct a railroad business* shall have the power to acquire by the exercise of the right of eminent domain any lands or estates or interests therein, sand, earth, gravel, water or other material, structures, rights of way, easements or other interests in lands, including lands under water and riparian rights, of any person, which are deemed necessary for the purposes of construction, reconstruction, alteration, straightening, relocation, operation, maintenance, improvement or repair of its lines, facilities or works including depots, stations, shops, yards, industrial spurs, switches and sidetracks, terminals or additional tracks or facilities, and for all other necessary railroad purposes and purposes incidental thereto, for its use in serving the public, including permanent, temporary, continuous, periodical or future use, whenever such corporation cannot agree upon the terms of purchase or settlement with any such person because of the incapacity of such person or because of the inability to agree on the compensation to be paid or other terms of settlement or purchase, or because any such person cannot with reasonable diligence be found or is unknown or is a non-resident of the State, or is unable to convey valid title to such property. Such proceedings shall be conducted in the manner provided by Chapter 1.1 of Title 25 and shall be subject to the provisions of § 25-233. Provided, however, such corporation shall not take by condemnation proceedings a strip of land for its right of way within sixty feet of the dwelling house of any person except (a) when the court having jurisdiction of the condemnation proceeding finds, after notice of motion to be granted authority to do so to the owner of such dwelling house, given in the manner provided in §§ 25-46.9, 25-46.10 and 25-46.12, and a hearing thereon, that it would otherwise be impractical, without unreasonable expense, to construct the proposed works of the corporation at another location; or (b) in case of occupancey of the streets or alleys of any county, city or town, in pursuance of permission obtained from the board of supervisors of such county or the corporate authorities of such city or town; or (c) in case of occupancy of the highways of this State or of any county, in pursuance of permission obtained from the authorities having jurisdiction over such highways.*

A BILL to amend and reenact § 33-57, as amended, of the Code of Virginia, relating to the powers of eminent domain in the State Highway Commissioner.

Be it enacted by the General Assembly of Virginia:

1. That § 33-57, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 33-57. (a) The State Highway Commissioner is hereby vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights of way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights of way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable, including locations for permanent, temporary, continuous, periodical or future use, and rights or easements incidental thereto and lands, quarries and locations with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber and other road materials deemed useful or necessary in carrying out the purposes aforesaid. For the purpose of this article "public highway" means highway, road and street; and when applicable, the term "public highway" also includes bridge, ferry, causeway, landing and wharf.

(b) *Whenever structures are situated partially upon any land to be taken by the Commissioner, the Commissioner may acquire by purchase, gift, or power of eminent domain the remaining portions of such structures as are situated partially upon the remaining lands of the landowner; provided, that, in the opinion of the Commissioner, such structures cannot by reason of the construction thereof be severed, or whenever the value of the portions located upon the proposed right of way together with the damages resulting to the remaining portions by reason of the severance of said structures would equal or exceed the market value of the entire structure. The Commissioner may also acquire such temporary easements upon the remaining lands of the landowner as may be necessary for the orderly removal or demolition of said structures. Whenever the Commissioner acts under this paragraph, he shall remove the structures so acquired from the land as soon as may be practicable.*