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

207 VA 1040

Record No. 6337

In the
Supreme Court of Appeals of Virginia
at Richmond

FISHING BAY YACHT CLUB

v.

EDITH D. HANCOCK

FROM THE CIRCUIT COURT OF MIDDLESEX COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6337

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 19th day of January, 1966.

FISHING BAY YACHT CLUB, Appellant,

against

EDITH D. HANCOCK, Appellee.

From the Circuit Court of Middlesex County
John E. DeHardit, Judge

Upon the petition of Fishing Bay Yacht Club, a corporation, an appeal is awarded it from a decree entered by the Circuit Court of Middlesex County on the 12th day of July, 1965, in a certain chancery cause then therein depending wherein Edith D. Hancock was plaintiff and Fishing Bay Yacht Club was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of five hundred dollars, with condition as the law directs.

RECORD

* * * * *

BILL OF COMPLAINT.

To the Honorable John E. DeHardit, Judge of said Court:

Your complainant, Edith D. Hancock, respectfully represents unto Your Honor the following:

(1) That she is the owner of a certain parcel or tract of land situate in Pinetop Magisterial District, Middlesex County, Virginia, lying on the waters of Fishing Bay, said land having been conveyed her by deed dated April 1, 1955, from James M. Bowling, Jr., et ux, et al., recorded in the Clerk's Office of Middlesex County, Virginia, in Deed Book "70", page 122.

(2) That the defendant is the owner of a certain parcel or tract of land situate in Pinetop Magisterial District, Middlesex County, Virginia, lying on the waters of Fishing Bay and adjoining the above-said land of your complainant, said land having been conveyed unto the defendant as "Urbanna Yacht Club" [defendant having since become the "Fishing Bay Yacht Club"] by T. T. Hawksworth and wife by deed dated December 31, 1948, or record in Deed Book "61", page 499 of the aforesaid Clerk's Office.

(3) That on August 31, 1957, the Commonwealth of Virginia, acting through the Commission of Fisheries, assigned unto Edith D. Hancock, your complainant, as her RIPARIAN oyster planting ground one-half acre of bottom land beneath the waters of Fishing Bay in front of her aforesaid highland, or upland; said assignment with its accompanying plat being of record in the aforesaid Clerk's Office in Oyster Plat Book "3", page 191.

(4) That *circa* April, 1962, your complainant learned of the defendant's intention to build a lateral extention of its then-existing pier, or *warf,* in a northwesterly direction which would encroach on her said riparian oyster ground; and before and at the time defendant caused con-
page 2 } struction to be begun on such lateral extention as aforesaid, your complainant protested said construction and asked the officers of the defendant corporation to desist.

(5) Notwithstanding your complainant's protest, said de-

fendant proceeded with the construction of the lateral extention of the pier, or *warf,* as aforesaid, causing same to be built 31.76 feet onto and across her said riparian oyster ground as will more fully appear from a plat of survey (showing complainant's riparian oyster ground, the pier and its said encroaching extention) by Frank E. Miner, CLS, dated February 25 and 26, 1964, which is attached hereto, made a part hereof, and marked "Exhibit A".

(6) That the keeping and maintaining by defendant of said lateral extention of its pier, or *warf,* upon the aforesaid riparian oyster ground of your complainant has and will deprive complainant of the necessary, lawful and legitimate use and enjoyment of property, defeating the inherent right and exclusive use of same and greatly decreasing the value of her said upland with its attendant improvements and appurtenances, thereby causing irreparable injury from which redress at law would be uncertain and inadequate, and the damages resulting therefrom would be impossible of ascertainment. The said complainant has no adequate remedy at law.

WHEREFORE, your complainant prays that a mandatory injunction issue against the defendant and all persons claiming by, through or under it, ordering the immediate removal of the said encroaching lateral extention of said pier, or *warf,* from complainant's riparian oyster ground; and that the defendant and all persons claiming by, through or under it, be perpetually enjoined from placing or maintaining any structure on or over your complainant's oyster ground; and that your complainant may have such other, further, and general relief as her cause may require and as to Equity shall seem meet and just, and your complainant will ever pray.

EDITH D. HANCOCK
By Counsel.

Filed May 7, 1964, Clerk's Office, Middlesex Co., Va.

GARLAND O. REVERE, Clerk
By KATE M. FARRING, Deputy.

* * * * *

page 6 }

* * * * *

ANSWER.

Fishing Bay Yacht Club, a corporation chartered under the laws of the State of Virginia, for its Answer to the Bill of Complaint filed against it, the following:

1. It admits the allegations contained in Paragraph 1 of said Bill of Complaint; and

2. It admits the allegations contained in Paragraph 2 of said Bill of Complaint; and

3. For its answer to the allegations contained in Paragraph 3 of said Bill of Complaint, it says that on August 31, 1957, the Commonwealth of Virginia assigned unto Edith D. Hancock, the Complainant, one-half acre of riparian oyster planting ground beneath the waters of Fishing Bay partially in front of her said highland, and partially in front of the highland owned by your Defendant, Fishing Bay Yacht Club; and

4. For its answer to the allegations contained in Paragraph 4 of said Bill of Complaint, it says that on March 26, 1962, your Defendant, by its Agent and Vice-Commodore, John C. Hoggan, gave notice to Mrs. J. B. Hancock, who is the same as Mrs. Edith D. Hancock, that it intended to extend its dock, as it later did extend its dock; that application was made for approval of the U. S. Army Corps of Engineers; that again on July 23, 1962, notice was given to your Complainant, Edith D. Hancock, by a letter to her
page 7 } (then) attorney, Lewis Jones, Jr., of Urbanna, Virginia, of the construction of the extension to the dock, as it was later constructed, and that said extension to the dock was then constructed during the month of July 1962; and

5. For its answer to the allegations contained in Paragraph 4 of said Bill of Complaint, it says that it made a lateral extension of its dock after obtaining approval from the U. S. Army Corps of Engineers, and after having given notice to the Complainant, Edith D. Hancock, the said extension being made both upriver and downriver, laterally in front of the highland of your Defendant, and that your Defendant does not know whether or not any of the said extension is on the one-half acre riparian oyster ground of the Complainant, but that if any of the said extension of the dock is on the one-half acre riparian oyster ground of the Complainant, it is because the one-half acre riparian oyster ground is partially

in front of the highland owned by your Defendant, and that your Defendant, under the laws of the State of Virginia, Section 28.1-118 of the Code of Virginia, is given the right to construct a necessary pier or *warf* in front of its property, and that anyone having oyster ground thereunder must vacate said oyster ground within one year from notice of construction of said pier, said notice having been given first on March 26, 1962, and again on July 23, 1962, to the Complainant, Edith D. Hancock; and

6. That the Defendant, Fishing Bay Yacht Club, has the right to keep its said lateral extension of its dock where it has *construction* said extension, because said dock is entirely in front of the highland owned by your Defendant,
page 8 } and is necessary to the operations and activities of your Defendant, Fishing Bay Yacht Club, and that under the laws of the State of Virginia, your Defendant has inherent right to construct a pier in front of its highland so as to be able to get full use of its riparian rights; that the said Complainant is not in the oyster business, and that the said Complainant, after the completion of the construction of the said extension to the dock or pier, to-wit: on March 28, 1963, obtained oyster lease for 1.91 acres of oyster grounds immediately upriver and outshore of said one-half acre of riparian oyster grounds, that said Complainant has taken part of her riparian oyster ground in front of the highland of your Defendant.

WHEREFORE, your Defendant prays that the injunction requested may be denied, that your Defendant be allowed to keep its *warf* and pier at its present location, as it is necessary to its operations and use; that this suit as to your Defendant be dismissed, and that your Defendant may have all such other and further and general relief as to its cause may require and as to equity shall seem meet and just.

FISHING BAY YACHT CLUB,
A VIRGINIA CORPORATION,
By C. F. HICKS
Counsel.

Filed May 22, 1964.

GARLAND O. REVERE, Clerk
By KATE M. FARRING, Deputy.

* * * * *

page 16 }

* * * * *

FINAL DECREE.

This cause, which has been regularly matured, set for hearing and docketed, came on to be heard upon the Bill of the Complainant and exhibit therewith; upon the Answer of Defendant; upon certain *de bene esse* depositions; upon a hearing *ore tenus* on May 6, 1965; and was argued by counsel.

It appearing to the Court that the Complainant is entitled to the relief requested for the reasons expressed by the Court in its Opinion at the conclusion of the *ore tenus* hearing on May 6, 1965 (a transcript of which Opinion has been filed herein and is hereby made a part of the record in this cause), the Court doth

ADJUDGE, ORDER and DECREE that the Defendant, Fishing Bay Yacht Club, be, and it hereby is, restrained and permanently enjoined from maintaining the encroaching 31.76 feet of its pier on the oyster planting ground of the Complainant, Edith D. Hancock; and that the Defendant, Fishing Bay Yacht Club, be, and it hereby is, directed to remove the encroaching 31.76 feet of its pier from the oyster planting ground of the Complainant, Edith D. Hancock, in accordance with the Plat filed by the Complainant as an exhibit in this cause, on or before November 6, 1965; to which rulings of the Court, the Defendant, Fishing Bay Yacht Club, by counsel, objected and excepted.

This Final Decree is suspended, on motion of counsel for Fishing Bay Yacht Club, in order that an appeal may be presented to the Supreme Court of Appeals of Virginia, if it be so advised, and provided notice of appeal and assignment of errors are given within sixty (60) days from the date of the entry of this Final Decree, and provided that Fishing Bay Yacht Club, or someone on its behalf, execute a bond in the penalty of Two Thousand Dollars ($2,000.00) conditioned as the law directs within sixty (60) days from the date of the entry of this Final De-

page 17 }

cree and that appeal is perfected in the manner required by law.

I ask for this:

ROGER G. HOPPER
Counsel for Complainant.

Seen and objected to for Reasons filed herewith:

C. F. HICKS
Counsel for Defendant.

Enter this 12th day of July, 1965:

JOHN S. DEHARDIT, Judge.

* * * * *

page 18 }

* * * * *

GROUNDS OF THE DEFENDANT FOR OBJECTIONS AND EXCEPTIONS TO THE RULING OF THE COURT

The Defendant respectfully objects and excepts to the ruling of the Court that, "The Court will require that the lateral addition to the wharf at Fishing Bay be removed in accordance with the plat and exhibit that has been presented here as it is shown to project across the riparian rights of Mrs. Hancock" for the following reasons and grounds:

1. The Complainant did not show by a preponderance of the evidence that the Defendant's lateral addition to the wharf was constructed at an improper location or in a place where the Defendant did not have a right to construct said lateral addition to the said wharf.

2. The Court erred in ruling that navigability is not an issue in this suit, when the evidence shows that sailing boats use this pier which require deeper water than three feet; that the number of vessels and sailing boats using this pier is such as to require additional pier and wharf area and ex-

tensions. The evidence clearly shows that the protection of navigation is involved in this suit, and that the additions to the pier were constructed in accordance with the proper location as determined by common law, statute law, and the decisions and holdings of the Supreme Court of Appeals of the State of Virginia, and the Supreme Court of the United States.

3. The evidence clearly shows that the Defendant had acquired a riparian property right in the bottom whereon it built its pier and the addition thereto prior to the
page 19 } time that the Complainant applied for riparian oyster grounds; and that the Court, in upholding the Complainant's contention requiring removal of said pier where it was located on riparian oyster grounds assigned to the Complainant by the Commission of Fisheries, constitutes the divesting of a riparian right which the Defendant had already acquired, and which could not be divested either by the Complainant, or the Commission of Fisheries, or the Court.

4. The Court erred in ruling that a granting of riparian oyster grounds by the Commission of Fisheries constituted a vesting of property right in the bottom so far as the construction of piers and docks, or the preventing of the construction of piers and docks is concerned; that the granting of oyster grounds by the Commission of Fisheries, whether it be assignment of riparian oyster grounds or general leased grounds, grants no right to the Complainant or anyone else holding said oyster grounds, other than to use said grounds for the taking of oysters off of the bottom, and in no way gives the Complainant the right to build a pier on such ground or to prevent anyone else from building a pier on such ground.

5. The evidence clearly shows that the Commission of Fisheries, in granting such assignment of oyster grounds, did not follow the laws of Virginia or the decisions of the Supreme Court of Appeals of Virginia or the decisions of the Supreme Court of the United States in locating the riparian ground in front of the Complainant's highland.

6. The evidence clearly shows that the Defendant constructed said pier and lateral addition thereto in front of its highland and where it had a prior right to do so, and that the common law, the Constitution of Virginia, and the statute laws of Virginia, the decisions of the Supreme Court of Virginia, and the decisions of the Supreme Court of
page 20 } the United States clearly give the Defendant the right to build a pier and additions thereto in front

of its property, and that the statute laws of Virginia clearly provide that a person may build a pier in front of his property even though it may cross oyster bottom which has been assigned or leased by the Commission of Fisheries to *come*one else.

For the reasons and grounds hereinabove set forth, the Defendant respectfully objects and excepts to the decision and final decree of this Court in this cause.

Respectfully submitted,

FISHING BAY YACHT CLUB
By C. F. HICKS
Counsel.

Filed this 12th day of July, 1965:

GARLAND O. REVERE, Clerk
Circuit Court of Middlesex
County.

* * * * *

page 23 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR BY FISHING BAY YACHT CLUB

Fishing Bay Yacht Club, by counsel, hereby gives notice of its intention to appeal from the Final Decree entered herein on the 12th day of July, 1965 whereby Edith D. Hancock obtained an injunction restraining and permanently enjoining the Fishing Bay Yacht Club from maintaining and encroaching 31.76 feet of its pier on the oyster planting ground of Edith D. Hancock and whereby Fishing Bay Yacht Club was directed to remove, on or before November 6, 1965, the encroaching 31.76 feet of its pier from the oyster planting ground of Edith D. Hancock in accordance with the plat filed by her as an exhibit in this cause.

Fishing Bay Yacht Club assigns as error the following:

I. The Chancellor's failure to dismiss the Bill of Complaint because it failed to allege that the pier of the Fishing

Bay Yacht Club encroached on the dockage or frontage of Edith D. Hancock.

II. The Chancellor's failure to grant the mo-
page 24 } tion of Fishing Bay Yacht Club to strike the com-
plainant's evidence at the conclusion of the complainant's evidence because (a) the evidence failed to show that Fishing Bay Yacht Club had constructed the lateral addition to its wharf at an improper location or in a place where it did not have the right to do so; (b) the evidence showed that Fishing Bay Yacht Club had acquired a riparian property right in the bottom where it constructed its pier and addition prior to the application by Edith D. Hancock for riparian oyster grounds; and (c) the evidence showed the Commission of Fisheries granted an assignment of oyster grounds to Edith D. Hancock contrary to law and partially in front of the highland owned by Fishing Bay Yacht Club.

III. The Chancellor's failure to consider navigability because (a) the evidence showed that sailing boats used the pier which required water deeper than three feet; and (b) the evidence showed that the number of vessels and sailing boats using the pier required additional pier and wharf area and extensions.

IV. The Chancellor's failure to require Edith D. Hancock to vacate her oyster ground within one year after notice of the construction of the pier.

V. The Chancellor's failure to find that Edith D. Hancock was guilty of laches.

VI. The Chancellor's finding that the grant of riparian oyster grounds by the Commission of Fisheries constituted a vesting of a property right in the bottom to the exclusion of
the construction of piers and docks.
page 25 } VII. The Chancellor's finding that the lateral
extension of the dock was not constructed entirely in front of the highland owned by Fishing Bay Yacht Club.

Respectfully,

FISHING BAY YACHT CLUB
By E. MILTON FARLEY, III
Counsel.

Filed September 10, 1965.

KATE M. FARRING, Deputy
for GARLAND O. REVERE,
Clerk.

John C. Hoggan.

* * * * *

Dep.
page 2 }

* * * * *

A transcript of the deposition of John C. Hoggan, taken before V. R. Stevens, a Notary Public in and for the State of Virginia at Large, pursuant to written notice, on the 16th day of April, 1965, at the law offices of Hunton, Williams, Gay, Powell & Gibson, Electric Building, Richmond, Virginia, beginning at 10:45 A.M.; said deposition taken in the above-entitled cause in behalf of the Defendant.

Appearances: Mr. Roger G. Hopper, counsel for the Plaintiff;
Messrs. C. F. Hicks and Patrick A. Gibson, counsel for the Defendant.

Dep.
page 3 } JOHN C. HOGGAN,
called as a witness in behalf of the Defendant, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By Mr. Hicks:
Q. Mr. Hoggan, will you state your name, age, residence and occupation?
A. John C. Hoggan, 55, architect.
Q. Where do you live, Mr. Hoggan?
A. 600 St. Christopher's Road.
Q. Richmond?
A. Yes.
Q. Mr. Hoggan, are you a member of the Fishing Bay Yacht Club located near Deltaville in Middlesex County?
A. I am.
Q. Mr. Hoggan, in the year 1962 what was your position with the yacht club?
A. I was Vice-Commodore.
Q. Mr. Hoggan, in that capacity did you have anything to do with the extension of the then existing Fishing Bay Yacht Club pier?

John C. Hoggan.

A. I did.

Dep. page 4 } Q. Did you draw plans for that extension?

A. I did.

Q. I hand you a copy which we will offer as Defendant's Exhibit No. 1 and ask you if you prepared those plans?

A. I did.

Note: At this point the paper writing just identified, a copy of plans for extension of fishing pier, is marked as Defendant's Exhibit 1 and filed in evidence.

Q. Mr. Hoggan, will you look at those plans and describe the pier that was in existence before January 1, 1962 and what the plans show for extensions?

A. This which is just white was the original pier and came back to the shore line, and this is the extension to the west and this is the extension that we wanted to put on to the east.

Q. The extension to the west you have cross marks or hatch marks running in shore and out shore?

A. Right, marks "New Extension" indication.

Q. What was the length and width of that?

A. It is 6 feet wide by 52 feet 4 inches.

Q. On the eastern extension, is that shown by cross marks or hatch marks running lengthwise with the bay?

A. Right, but it is still marked "New Extension".

Q. What is the dimension on that?

Dep. page 5 } A. 10 feet 2 inches by 26 feet 2 inches.

Q. Mr. Hoggan, when was the actual construction of this new extension commenced?

A. About July 15, right around in there.

Q. Of what year?

A. 1962.

Q. Mr. Hoggan, do you know a Mrs. J. B. Hancock who is also Mrs. Edith Hancock?

A. I do.

Q. Where does she live in relation to Fishing Bay Yacht Club?

A. She is at Deltaville right next door to the Yacht Club property on the west side.

Q. Did you have an occasion to have a conversation with Mrs. Hancock concerning the proposed extension to the pier?

A. I did. She called me one night.

John C. Hoggan.

Q. She called you one night?
A. At home.
Q. Do you know when that was?
A. It was March, the first of March; well, it was just before the first of March.
Q. Just prior to the first of March of 1962?
A. 1962, yes.
Q. What was that conversation in relationship to the pier between you and Mrs. Hancock?

Dep. page 6 } A. Well, to the best of my knowledge she had found out we were about to do something to the dock. She didn't know what it was, I guess, and she wanted to find out from me what we planned to do, and I told her at that time that I wasn't at all certain what we were going to do because we were still in the preliminary stages of planning.

Q. Did you follow that telephone conversation up with a letter?
A. I did; I followed it up with a letter.
Q. I hand you a copy of a letter dated March 1, 1962 and ask you to read that and tell us if you are familiar with it?
A. That is correct, this is the letter that I wrote.
Q. Is that a letter that you wrote Mrs. Hancock?
A. Mrs. J. B. Hancock.
Q. And she gave her name as Mrs. Edith Hancock?
A. That is correct.
Q. Did you mail that letter to Mrs. Hancock?
A. Yes, indeed.
Q. Did you receive any reply to this letter?
A. No reply.

Mr. Hicks: I would like to offer this letter as Defendant's Exhibit No. 2.

Note: At this point the paper writing just identified, a letter dated March 1, 1962, addressed to Mrs. J. B. Hancock, from John C. Hoggan, is marked Defendant's Exhibit 2 and filed in evdence.

Dep. page 7 }

By Mr. Hicks: (Continuing)
Q. Did you later in the month of March write Mrs. Hancock again?
A. I did.

John C. Hoggan.

Q. I hand you a copy of a letter and ask you if you are familiar with that?
A. I did; I wrote this letter.
Q. What is that?
A. A letter to Mrs. J. B. Hancock, Deltaville, Virginia, dated March 26, 1962.
Q. Did you mail that letter to Mrs. Hancock?
A. I did.
Q. Did you receive any reply to that?
A. I did not receive any reply.

Mr. Hicks: We offer this as Defendant's Exhibit No. 3.

Note: At this point the paper writing just identified, dated March 26, 1962, a letter addressed to Mrs. J. B. Hancock, from John C. Hoggan, is marked Defendant's Exhibit 3 and filed in evidence.

By Mr. Hicks: (Continuing)

Dep. page 8 } Q. Mr. Hoggan, did you have certain correspondence with the U. S. Army Corps of Engineers, Norfolk, Virginia relative to the extension of the dock?
A. I did.
Q. Did you undertake it as one of your duties relative to the proposed construction to obtain a permit for the extension of a dock?
A. I did.

Note: At this point paper writings are tendered Mr. Hopper.

Mr. Hicks: I am going to have a subpoena *duces decum* issued to the U. S. Army Corps of Engineers to bring all of their records.
Mr. Hopper: Any correspondence from the Corps of Engineers to this gentleman I am going to object to.

Note: After an off the record discussion at the request of counsel the taking of the deposition continues as follows:

Mr. Hopper: I am just going to object to any of the correspondence from them to him.

John C. Hoggan.

Mr. Hicks: From the U. S. Army Corps of Engineers?
Mr. Hopper: Yes.

Dep. page 9 } Mr. Hicks: Why don't we make this as one exhibit, Defendant's Exhibit No. 4? There are 13 sheets, and if Mr. Hoggan will identify them and starting at the bottom with the number one mark each page 1 through 13, I will ask the reporter to mark this as Defendant's Exhibit No. 4.

Note: At this point a sheaf of papers, containing 13 sheets, are marked collectively as Defendant's Exhibit 4 and filed in evidence.

By Mr. Hicks: (Continuing)

Q. Mr. Hoggan, I hand you a file containing 13 pages and I would like for you in chronological order to briefly describe what that is and whether you are familiar with it? What is sheet No. 1?

A. Sheet No. 1 is a letter from me, John Hoggan, to the U. S. Army Engineer District in Norfolk on February 9, 1962, in which I asked them for a copy of the permit issued to the Fishing Bay Yacht Club back in 1948 or 1949, since we had planned to ask for permission to extend.

Q. What are sheets 2, 3, 4 and 5?

A. Sheet 2 is a copy of the drawing that we sent to the Army Engineers April 26, 1949, requesting a dock in Jackson Creek.

Q. Look at Sheet 5 and tell me what that is. Are you familiar with that?

Dep. page 10 } A. Sheet 5 is a letter from the Corps of Engineers in Norfolk dated 23 February 1962 to me in answer to my letter of February 9 which says in part, "A search of the files transferred to this office when the Washington Engineer District was abolished last year does not reveal any record of a permit issued to the Fishing Bay Yacht Club for a structure in Fishing Bay. However, we do find a permit drawing showing a proposed pier in Jackson Creek, though there is no trace of the permit. We think that the drawing was a part of the permit to which you refer.

We are enclosing the drawing, and request that you revise it to show the existing pier and the proposed extension. No application form is used. The application will consist of a

John C. Hoggan.

brief letter describing the proposed work and its location, accompanied by four copies of the drawing."

Q. Were Sheets 4 and 5 accompanying that letter?

A. Yes, this was a part of the original permit granted to Admiral McCulloy May 19, 1949, and that is Sheets 4 and 3 and, of course, 2 was attached to it.

Q. And all of this you received with your letter of February 23?

A. Yes.

Q. What is Sheet No. 6?

A. Sheet No. 6 is a letter from the Corps of Engineers, Washington District, Washington, D. C., dated May 20, 1949 to just the Fishing Bay Yacht Club, not addressed

Dep. page 11 } to any person in particular and it says, "Enclosed herewith are permits issued by the Division Engineer to the Fishing Bay Yacht Club, dated 19 May, 1949 to construct open-pile wharves in the Piankatank River at Fishing Bay and in Jackson Creek, near Deltaville, Virginia." Do you want me to read the whole thing?

Q. No, that is all. Mr. Hoggan, I hand you Sheets 7 and 8 of Defendant's Exhibit 4 and ask you are you familiar with those and what they are?

A. Yes, this is a letter that I sent to the U. S. Army Engineer District, Norfolk, dated March 26, 1962 to Mr. Jackson and this letter refers to his of February 23, 1962, stating that we have found the original drawings and permit issued to us on May 20, 1949 to build a dock both in Fishing Bay—well, we just stated one in Fishing Bay, copies of which are attached.

Q. What is Sheet 7?

A. Sheet 7 is a drawing of the propoesd dock that was requested in 1949, on which we had indicated the extension that we wanted to add to it, and this application was dated April 20, 1962.

Q. Did you prepare those plans?

A. I did.

Q. Showing the extension?

A. I did.

Dep. page 12 } Q. What did that call for in that application as far as the extension was concerned?

A. It called for an extension at the head of 26 feet to the east of our present L-shaped head.

Q. Of your then existing dock?

John C. Hoggan.

A. Yes, 26 feet added to the exsiting L-shaped head to the east and 52 feet added to the west of the existing dock.

Q. How far does that show that the dock extended off shore?

A. 180 feet off shore.

Q. You did not construct the dock any further off shore than the then existing?

A. No, we did not.

Q. Mr. Hoggan, I hand you Sheets 9, 10, 11 and 12 of the Defendant's Exhibit No. 4 and ask you if you are familiar with that and what that is?

A. Yes, this is a letter from the U.S. Army Engineer District in Norfolk addressed to me, John C. Hoggan, dated April 12, 1962, in which they enclosed a permit to construct addition to the existing L-head dock. That is practically all it said.

Q. What is Sheet 10?

A. Sheet 10 is the permit to construct the dock.

Q. What does that call for in dimension?

Dep. page 13 } A. It says, "Permit to construct an addition to the L-head of an existing open-pile timber pier (the present L-head to be extended 26 feet easterly and 52 feet westerly, resulting in a T-head)"

Q. What is Sheet 11?

A. Sheet 11 is a drawing showing the location of the existing dock with the extensions east and west that we had requested.

Q. What is Sheet 12?

A. Sheet 12 is part of the permit, which the most important item is that we should notify the U. S. Army Engineers when work begins on the dock and when it is completed.

Q. Mr. Hoggan, I hand you Sheet 13 of Defendant's Exhibit No. 4 and ask you if you are familiar with that?

A. Yes, I wrote a letter on July 16, 1962 to the U. S. Army Engineers in Norfolk, to the attention of Colonel J. D. Snow, in which I stated that the construction on the dock commenced on July 13, 1962.

Q. Mr. Hoggan, I hand you this paper writing and ask you if you are familiar with that?

A. Yes, this is a letter from the United States Department of Commerce, Coast and Geodetic Survey, dated July 30, 1962 to me.

John C. Hoggan.

Q. What information did they request? First did you receive this letter?

Dep. page 14 } A. I did.

Q. What information was requested in it?

A. They asked that we advise them as to the date of completion, of the estimated date of completion of the dock, and we had enclosed a postage-free return card.

Q. What did you do?

A. I signed the card and returned it on the 31st of July, 1962.

Q. Had the dock been completed at that time?

A. The dock had been completed.

Q. So the construction was commenced on the 13th of July and it was completed by the 31st of July?

A. That's right.

Q. You made this notation on this letter?

A. Yes, this is my handwriting.

Q. Is this your handwriting "Card returned 7/31/62"?

A. It is.

Q. Did you mail the card on July 31, 1962?

A. I would say I put it in the mail at the same time, sure.

Q. Had the dock been completed at the time you mailed that card back?

A. Yes, it had.

Note: At the request of Mr. Hicks the paper writing just identified by the witness dated 30 July 1962, addressed to the Fishing Bay Yacht Club from the United States Department of Commerce, Coast and Geodetics Survey, signed by Captain John C. Ellerbe, is marked Defendant's Exhibit 5 and and filed in evidence.

Dep. page 15 }

Q. Mr. Hoggan, why was the extension made on the dock in 1962, this 26 feet easterly and 52 feet westerly?

A. We have had an increasing number of members in our dock all along right from the time the club was formed, and we just got completely active and were getting many, many more boats year by year, and we had just plain run out of space to take care of them, regatta times, weekends and every other time.

Q. When was your dock, or the Fishing Bay Yacht Club dock built originally?

John C. Hoggan.

A. 1949 or thereabouts.

Q. When you were Vice-Commodore did you have anything to do with the compiling or issuing of a Fishing Bay Yacht Club Yearbook?

A. Yes.

Q. What did you have to do with that?

A. Well, the notes would come in from the Yearbook Chairman and it was my job to look them over and turn them over to my secretary and have them typed.

Dep. page 16 } Q. I hand you a booklet and ask if you can tell me what that is?

A. This is the Yearbook that we published in 1962.

Q. What is it titled?

A. Fishing Bay Yacht Club Yearbook.

Q. What date?

A. 5 May 1962 was the date of issuance.

Q. How many pages are there in that book?

A. 46 pages.

Q. What does that Yearbook contain primarily?

A. Well, primarily it contained the list of officers, the list of boats of all descriptions that the members owned and the senior membership roster, together with the junior membership roster.

Q. Mr. Hoggan, as I understand it that was prepared in your office?

A. It was. That is it was typed in my office.

Q. But everything was gone over by you personally?

A. That's right.

Q. Does this reflect a true list to the best of your knowledge of the May 5, 1962 of the members?

A. It was the best available data that we could get at that time.

Q. That is of the members of the Fishing Bay Yacht Club and the description of the boats of the members of the Fishing Bay Yacht Club?

A. Yes.

Dep. page 17 } Mr. Hicks: I offer this as Defendant's Exhibit No. 6.

Note: At this point the Yearbook identified by the witness entitled "Fishing Bay Yacht Club, 1962" is marked Defendant's Exhibit 6 and filed in evidence.

John C. Hoggan.

Q. Mr. Hoggan, what use has been made of this dock as extended or what use is made of this dock extended?

A. Well, the primary function it serves now is on weekends during racing events or, rather, in between racing events the small boats come in and they tie up to the dock on all sides.

Q. What is the normal sailing season at Fishing Bay Yacht Club when the dock is extensively used?

A. Well, we usually have a Spring Party, well, around the first week in May and then the actual sailing period lasts I would say until mostly around Labor Day or maybe a week after Labor Day.

Q. The weekends between the first week in May and Labor Day weekend could you handle the boats of the members with the dock as it existed before the extension?

A. Not very well. We had no place to leave the boats. The beaches were all filled up with all sorts of other things and you didn't want to drag them on the bottom, and they would want to come in and get lunch after and everything and they had no place to leave the boats.

Dep. page 18

Q. This is not just during racing season?

A. No, oh, every weekend.

Q. During that four months summer period?

A. Yes.

Q. What kind of boats use this dock primarily?

A. Primarily they are all bay sailers. They are Mobjacks, Jollies, Penguins, Sailfish, all small boats.

Q. Any power boats of any consequence?

A. No, no, no power boats at all, very seldom any cruising sailboats.

Q. What is your distinction between your cruising sailboats and the other types?

A. Well, something you could sleep on, a much larger boat.

Q. In the years since 1962 have your boats and members increased or decreased or stayed the same?

A. The number of boats you say?

Q. Number of members and number of boats.

A. Well, I would say they were on the increase, although I couldn't actually answer that without going to the records, no.

Q. Mr. Hoggan, I am going to ask you to look at Defen-

John C. Hoggan.

Dep. page 19

dant's Exhibit No. 6 which is the Yearbook and look at your membership roster and advise me as to whether or not that roster shows that either a Mrs. J. B. Hancock or a Mrs. Edith Hancock was a member of the Fishing Bay Yacht Club in the year 1962?

A. Yes, there is a listing here of Mr. and Mrs. J. B. Hancock, Deltaville, Virginia.

Q. On what page is that?

A. On page 33 of the senior membership roster.

Q. Do you know whether or not Mr. or Mrs. Hancock have any children?

A. Yes, they do.

Q. Do you know them?

A. I know of them, yes. I am not sure that I can get them all straight. There is an Edith Hancock and that is their daughter and there was a boy and I think his name was Billy Hancock. Well, he is a doctor and I know him, but then there was a boy it seems to me who died sometime ago, but I am not sure, a long time ago.

Q. Would you check the membership roster and tell me whether or not they are listed as members as of May, 1962?

A. There is a Dr. William Cary Hancock listed from Bon View Drive, Richmond, Virginia and I assume that he is the son of Mr. and Mrs. J. B. Hancock.

Q. Mr. and Mrs. J. B. Hancock do have a son who is a doctor who lives in the Richmond area?

Dep. page 20

A. Right, that is correct.

Q. Do you know whether or not the daughter is married?

A. Yes, she is. She is married to Marshall Moseley in Richmond, Virginia.

Q. Do you see any listing there for a Mrs. Marshall Moseley?

A. Yes, there is a listing here, Mr. and Mrs. John Marshall Moseley, 108 North Wilton Road, Richmond, Virginia.

Q. Is Mrs. Moseley formerly *Mrs.* Edith Hancock, the daughter of Mr. and Mrs. J. B. Hancock?

A. Yes, sir; that's right.

Q. Mr. Hoggan, do you have a boat of your own?

A. I do.

Q. What type of boat is it?

John C. Hoggan.

A. It's in the cruising class.
Q. Where do you keep this boat?
A. At the Jackson Creek Dock.
Q. Of the Fishing Bay Yacht Club?
A. Right.
Q. Do you come around with that boat where the other dock is?
A. Yes.
Q. The Fishing Bay Dock?
A. Right.
Q. How long have you been going down to Fishing Bay?

Dep. page 21 } A. I would say since about 1950, something like that.
Q. When you first started going down to Fishing Bay, did Mr. and Mrs. Hancock own any property there adjacent to the Yacht Club or do you know?
A. I don't know that.
Q. When was the first part of your dock built?
A. 1949.
Q. Did you have occasion to either go by boat or from landing on that dock and around that dock during the years 1949 and since that time?
A. Yes, but it was after 1949. It was about 1951 or something like that, 1952.
Q. 1951 or 1952 on?
A. Yes.
Q. How frequently did you go there?
A. Well, every weekend that I was down there.
Q. You say every weekend you were down there. How often was that?
A. Well, until I got my own boat, which was as I recall it about 1953, somewhere in there, and I would only go down to sail on somebody else's boat in the daytime, you know, and on racing weekends and things like that, and so it was whenever I was invited on weekends.
Q. When did you get your own boat?

Dep. page 22 } A. 1953.
Q. Since 1953 how often have you been to the Fishing Bay Yacht Club?
A. Almost every single weekend in the summer. We might miss five during the summer.
Q. How long a period are you using here as a summer?

John C. Hoggan.

A. When we had the first boat we would either start sailing about the 15th of June and we would sail until Labor Day.

Q. During the other times of the year did you ever go down there?

A. Not awfully often, no. You mean in the winter time?

Q. Yes.

A. Not every often but some. We would go and visit with friends who had cottages.

Q. Would you go out on the dock?

A. No.

Q. From 1953 up to the present time during the summer have you frequented the dock every weekend or every other weekend or the area around the dock?

A. Well, I will put it this way: while I am down at Fishing Bay every weekend, I am at Jackson's Creek area and I don't always go down to the Fishing Bay Dock. Quite frequently we sail over there and stop, but we don't use that as our base going or coming.

Dep. page 23 } Q. During the summer would you average at least once a month you would be on the Fishing Bay?

A. Oh, yes.

Q. On the dock?

A. Oh, yes, certainly.

Q. How long of a period of this time were you actually an officer of the Club?

A. 7 years to the best of my knowledge.

Q. What period was that?

A. Well, let's see. We will have to subtract a little bit. I was Commodore in 1963, so 7 from 1963 would make it 1957.

Q. 1956 or 1957?

A. Yes.

Q. During this period of time had you ever seen any oyster stakes within a 100 yards west of your dock?

A. When I first got my boat there was something there because I ran into the thing once, and it was only one stake that I remember and I didn't even know it was an oyster stake. I thought it was marking shoal water, but within a couple years of that time that stake wasn't there.

Q. When was that?

A. About 1953 or 1954.

Q. Do you remember approximately where that stake was?

John C. Hoggan.

A. Yes, it was about, oh, I would say 40 feet off the end of the dock somewhere.

Dep. page 24 } Q. West of the dock?

A. West of the dock. Maybe it was a little further than that because I know you could turn a boat around in that length.

Q. But you only saw one stake?

A. Only one stake there.

Q. And that was in 1953-54?

A. About 1954.

Q. Have you seen any stakes in that area since then?

A. No, none.

Q. Mr. Hoggan, how deep is the water at the end of the dock?

A. I would say a minimum of 7 feet.

Q. Have you ever examined the bottom around the dock and in shore of the dock, that is on the westerly side of the dock?

A. No, no, I never have paid much attention to it.

Mr. Hicks: Your witness, Mr. Hopper.

CROSS EXAMINATION.

By Mr. Hopper:

Q. In the first part of your testimony you testified that you had a conversation with Mrs. Hancock with regards to the proposed construction of this pier or extension?

Dep. page 25 } A. Right.

Q. I wonder if you could tell us a little more about what was said at that point. Did she offer any objection to any extension to the west?

A. No, not at that time because she didn't know what was going on and neither did I. She called me at home one Friday night.

Q. Did she offer any objection to you as to the extension of your then existing pier at any subsequent time?

A. On one occasion, yes. I don't recall the exact words she used, but she said, in essence, "You are building your dock on my property," or something of that type.

Q. What did you tell her?

A. I told her I didn't believe so.

John C. Hoggan.

Q. Now, Mr. Hoggan, you have made a drawing of the pier I believe as it originally existed in 1949 and then for the proposed extension?

A. Yes.

Q. You would be familiar with this whole area then if you had drawn it?

A. Yes.

Q. Could you tell me how far it is from the end of the pier as it now exists on the east, back in an easterly direction, the Fishing Bay Yacht Club property line on the east? Could you give me the approximate distance from the end of this pier to your property line on your east?

Dep. page 25-A

A. Are you talking about extending a line out from the present property line or at right angles to the beach or—

Q. Let's say at right angles to begin with?

A. I couldn't tell you.

Q. Would you hazard a guess or approximate a distance from the end of your pier to your property line extended, let's say?

A. I would guess offhand 30 feet maybe.

Q. 30 feet from the end of the pier as it now exists to the property line extended on it?

A. Yes.

Q. Now, Mr. Hoggan, you said that your main base when you sail out of the Yacht Club was the Jackson Creek pier or dock. I wonder if you would describe for us the approximate dimensions of the dock on Jackson Creek that your club owns?

A. Let me say, without having anything to go by—

Q. Just roughly.

A. I would say offhand that it was about 40 feet possibly to the first slip and then—

Q. Do you mean 40 feet from the shore out?

A. From the shore to the first slip on account of shoal water—

Dep. page 26

Q. Yes, sir.

A. —and I think that there are 8 slips on each side, about 12 feet for each slip.

Q. About 12 feet for each slip?

A. Yes.

Q. Is it a T-shape or—

A. No, no, straight dock.

John C. Hoggan.

Mr. Hopper: I don't think I have any more questions right now.

Note: After an off the record discussion at the request of counsel the taking of the deposition continues as follows:

RE-DIRECT EXAMINATION.

By Mr. Hicks:

Q. Mr. Hoggan, I show you a plat and ask you will you tell me what this is?

A. This plat is a survey that was made by Mr. Frank E. Minor for the Fishing Bay Yacht Club to show our boundary lines and docks.

Q. Did you have anything to do with having that survey made?

A. I made the arrangements with Mr. Minor to do the work, yes.

Dep. page 27 } Q. To make the survey?

A. Yes, I was authorized by the club to do that.

Q. And this plat was furnished to you?

A. Right.

Q. Now the actual blue lines on there, you did not make those?

A. No.

Q. They were furnished you by Mr. Minor?

A. Right.

Q. There are certain red lines or features or letters and drawings on that. Are you familiar with those?

A. Yes, I put the red lines on there myself.

Q. You put all those red lines on there yourself?

A. All the red lines are mine.

Q. Mechanically and as an architect, Mr. Hoggan, what did you do to draw those red lines?

A. I simply drew a line from the corner of Mr. Stull's property.

Q. Is that shown on the Minor survey?

A. Yes, it is. Right here I think it is (indicating). It's a faint line that is on here.

Q. At any rate, that is on which side?

A. It is his western corner mark.

Q. Stull's western corner mark?

John C. Hoggan.

Dep. page 28

A. Yes. I drew a straight line from that point to the corner mark on the eastern side of our property and another straight line from the east side of our property marker to the west side of our property marker, and from the west side of our property a straight line to the corner of Mrs. Hancock's westerly corner marker.

Q. Those marks are as were shown on the plat by Mr. Minor, not the red lines but the marks you used?

A. This I think you will find is a very faint line under here that I simply put a red line over top of it in each case (indicating).

Q. All right, sir.

A. Then our easterly and both our westerly marks, I simply drew lines perpendicular to these straight lines that were drawn on here bisected the angle formed between those two.

Q. You did what you did mechanically on that plat?

A. That's right.

Q. Mr. Hoggan, there is shown on that survey by Mr. Minor the dock and there are in connection with that some red lines. Did you draw those?

A. I did. They represent the extension we made on our dock easterly and westerly.

Q. Did you draw those to the same scale that Mr. Minor did?

Dep. page 29

A. The same scale, right.

Q. At what scale was that? Do you have a ruler with you?

A. I can read it here. It's 40 feet to the inch.

Q. Do you have a ruler with you?

A. No.

Note: At this point a ruler is tendered the witness.

Q. All right.

A. The easterly extension scales exactly 26 feet.

Q. On the red lines that you put on there?

A. Right.

Q. All right, sir.

A. And the westerly at 51 feet.

Q. Mr. Hoggan, using that scale and just from this plat, as far as this plat is concerned, could you tell me the dis-

John C. Hoggan.

tance to the east from this line that you used bisecting your perpendicular line, your shore line, to the end of the easterly lot and the same there to the west of the dock?

A. May I extend this to a point here?

Q. Do it yourself in red.

A. All right, I will do this side, too. Is that what you want?

Q. Yes, on each one of those extensions put the number of feet according to the scale.

A. This will be from the inner land side of this because it would be different.

Dep. page 30 }

Q. That's right, the in shore side.

A. That would be 34 feet in shore.

Q. Put your little arrow and that it was 34 feet.

A. All right.

Q. All right, now on your westerly side?

A. 17 feet.

Q. Would you also mark that?

A. Yes.

Q. Mr. Hoggan, you have not made any of these measurements on the ground?

A. No, no.

Q. These are what you have done working from—

A. From the survey.

Q. —from the survey that was ordered by you on behalf of the club from Mr. Frank E. Minor?

A. That's right.

Q. This is a calculated survey which was furnished you by Mr. Minor?

A. Yes, it is.

Mr. Hicks: I would like to offer this plat as Defendant's Exhibit No. 7.

Note: The plat identified by the witness as being made by Frank E. Minor, dated March 20, 1962, is marked Defendant's Exhibit 7 and filed in evidence.

Dep. page 31 }

RE-CROSS EXAMINATION.

By Mr. Hopper:

Q. I don't care whether you draw a red line on this plat or not, but would you produce this eastern property line and tell me how far it is from the end of your existing dock?

John C. Hoggan.

Note: After an off the record discussion the taking of the deposition continues as follows:

By Mr. Hopper: (Continuing)

Q. Mr. Hoggan, using the green line, would you extend the property line that I just asked you?

A. Yes.

Q. And do the same thing on the west, if you would?

A. 132 feet—wait just a minute. This should be from the dock or from the extension?

Q. Where it is now?

A. Oh, that is different. Oh, from where it now is?

Q. Yes, from here to there (indicating).

A. It's 105 feet.

By Mr. Hicks:

Q. Would you place an X right there?

A. Yes.

Q. You can do the same thing on the other one.

A. You mean you want to measure how much it is over or what?

Dep.
page 32 } By Mr. Hopper: (Continuing)

Q. How about doing it this way: from the end of the pier then in an easterly direction until you hit that line?

A. Well, we have measured everything on the inside so far.

Q. All right.

A. 27 feet.

Q. Now while you are looking at this plat I direct your attention to the Jackson Creek side of it again. Is this navigable creek in Jackson's Creek where the slips are shown?

A. Yes, it is. You can't come in any part of it this way (indicating).

Q. I think you previously stated it was approximately 40 feet?

A. I was just guessing.

Q. That you had to come out 40 feet to get to navigable waters—

Mr. Gibson: It's more than that.

Q. So it is more than that. Is there anything to preclude

John C. Hoggan.

any other docks, or at least one dock being built here (indicating)?

A. No, we can't get anything more on this side here.

Q. Why?

Dep. page 33 } A. All of this are big cruising boats. There are no small boats at all and they take a considerable distance to make your turn to get back in the main bed of the creek. If you put one here, you couldn't get the big boats out, and that is all that any of this is used for over here are the big boats.

Q. You could build enough construction of a pier here and, theoretically, you could sail boats in here and dock them?

A. I don't believe you could.

Q. There is not enough water?

A. No, it is not a matter of water. I don't think it's enough room.

Q. Let's assume that you didn't have cruising vessels here.

A. Yes.

Q. Could you do it then?

A. Yes, you could do it with small boats.

Mr. Hopper: I don't think I have anything else.

RE-REDIRECT EXAMINATION.

By Mr. Hicks:

Q. How far by water is it from your dock to your dock on Fishing Bay?

Dep. page 34 } A. Well, I would say it's at least four, four or five miles.

Q. Mr. Hoggan, would you also extend the westerly property line of Mrs. Hancock, just on a straight extension of the line, not perpendicular, but would you mark that in green and label that

A. In other words, just extend this property line as it is drawn on here?

Q. Yes, in a straight line.

A. All right.

Q. Would you label that "Hancock westerly property line extended"?

A. Yes.

Q. In a straight line from the on shore property line?

A. All right.

John C. Hoggan.

Mr. Hicks: I do not have any more questions.
Mr. Hopper: I do not have any more.

And further this deponent saith not.

Signature waived by Agreement of Counsel.

* * * * *

page 3 }

* * * * *

Mr. Hicks: Your Honor, at this time on behalf of the defendant we would like to make a motion which goes to the merits of the case.

Your Honor, we would like to make a motion that this Bill of Complaint be dismissed because it sets out no grounds whereby in equity this court can grant the complainant the relief which she asks. She only alleges that this dock is on her riparian oyster grounds. She in no way alleges it encroaches on her dockage or frontage, and the law of Virginia in relation to riparian oyster grounds is that nothing in this section shall be construed to prevent erection by riparian landowners of wharves, landings or other structures otherwise permitted by law. And she has in no way, in any way, alleged in her Bill of Complaint that that wharf is in front of her property or that it encroaches on any wharfage rights or rights such as that. And all of page 4 } the grants of oyster grounds in Virginia are made subject to wharf rights, and she does not therefore allege any grounds whereby this court can give her relief.

The Court: Thank you, Mr. Hicks. Mr. Hopper

Mr. Hopper: Your Honor, the Bill of Complaint sets forth that the complainant, Mrs. Hancock, has had assigned to her by the Commission of Fisheries a half acre of riparian oyster ground. The half acre of riparian, the statute says, is an invested right. I hardly see how we could be expected to state much more. We have alleged that it was an unlawful use of her enjoyment of the property and that it damaged her property, and I can't see that the Bill of Complaint could be any more conclusive. And I would respectfully submit that defendant's motion be denied.

The Court: Further argument?

Edith D. Hancock.

Mr. Hicks: No, sir, except to say it only says that it's on her oyster grounds, and that the statute, law, and everything else in Virginia is that oyster ground in no way prevents a person from using his riparian right to put
page 5 } a dock there.

The Court: Thank you, gentlemen, for your argument. The Court overrules the motion.

The Hicks: Note our exception, Your Honor.

The Court: All right. Gentlemen at the bar, do you wish to make an opening statement? Mr. Hopper?

Mr. Hopper: Your Honor, it would be very brief. Mr. Hicks, do you want to make an opening statement?

Mr. Hicks: I don't see any need to.

Mr. Hopper: I think we had better get along with the evidence.

The Court: All right, gentlemen at the bar, the Court is ready to receive the evidence.

page 6 } EDITH D. HANCOCK,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hopper:

Q. Would you state your name and address?

A. Edith—

Q. Mrs. Hancock, speak up so the Judge can hear you.

A. You want Mrs. J. B. Hancock, or—Mrs. John Beverley Hancock.

Q. Are you also known as Mrs. Edith D. Hancock?

A. That's right.

Q. Where do you reside, Mrs. Hancock?

A. Fishing Bay.

Q. In Middlesex County?

A. Yes.

Q. How long have you resided in Middlesex County?

A. Since '57 or '58. I bought the place in '55.

Q. You bought your place on Fishing Bay in 1955?

A. '55.

Mr. Hopper: Mr. Hicks, will you stipulate that that Deed Book is from the Clerk's office, or do you want me
page 7 } to get the Clerk up here?

Mr. Hicks: Do you have a copy of the deed?

Edith D. Hancock.

Mr. Hopper: No, sir, just the deed.

Mr. Hicks: Your Honor, I don't see any need to have the Clerk come up. This is the original record of this court.

The Court: Gentlemen, you all are advised what the Code says about introducing deeds. Now, you are not introducing the deed to this property? Mr. Hopper, what is your pleasure?

Mr. Hopper: I merely want to show that Mrs. Hancock owns the property, and would ask her to read from the deed in the book and ask her is that her property.

Mr. Hicks: Your Honor, I feel that there should be a certified copy of the deed in this record. I don't want to hold up proceedings now to get it, but I would be willing for the Court to continue on with the understanding that—

Mr. Hopper: I would be glad to do that, Your Honor. I would be glad to have a certified copy made of the deed.

The Court: All right. Proceed.

By Mr. Hopper:

Q. Mrs. Hancock, what were the circumstances page 8 } surrounding your acquiring this property?

A. I don't understand.

Q. When did you decide to purchase this property?

A. In about 1955. I don't remember — I think April. Should I talk to you, or to the Judge?

Q. Talk to the Judge.

A. April, 1955.

Q. When you obtained your deed for this land, did the land next to it belong to Fishing Bay Yacht Club?

A. I am perfectly sure it did.

Q. Yes, ma'am.

A. Is that right?

Q. At any time subsequent to 1955, did you obtain from the Commission of Fisheries an assignment of oyster ground?

A. I think it was in 1956. I didn't look that date up. I think it was '56.

Q. But you did obtain an assignment from the Commission of Fisheries?

A. Yes, I did.

Q. Now, Mrs. Hancock, are you familiar with the pier that runs from the Fishing Bay Yacht Club property out into the waters of Fishing Bay?

Edith D. Hancock.

A. Yes, I am. Yes.
page 9 } Q. Are you familiar with how it exists today?
A. Yes.
Q. Has it always been such?
A. No.
Q. When was the first time that you noticed it had been changed or any change was taking place in the structure of the pier?
A. I heard some work going on out there in '62, and I'm not sure of the month. I went out to see what was happening and they were putting down pilings for the extension of the pier. So I immediately called the vice commodore and told him that they were over on my riparian rights, and we have several letters about that. Is that all right?
Q. You don't remember the month that you first observed this construction going on?
A. No, I don't. I'm sorry.
Q. You did call, you say, the vice commodore?
A. Yes.
Q. Mrs. Hancock, I show you this letter—

Mr. Hopper: I think, Mr. Hicks, that this is already in evidence under Mr. Hoogan's deposition.

(Paper exhibited to defense counsel)

Mr. Hopper: Your Honor, this letter has al-
page 10 } ready been introduced by the defense during their deposition of Mr. Hoggan, which was taken some time ago. Their depositions haven't been offered as evidence yet. Do you want me to make this a plaintiff's exhibit, or refer to it by the defendant's exhibit number?
The Court: What is your pleasure, Mr. Hopper?
Mr. Hopper: That is the original letter. Let's just call it Plaintiff's Exhibit 1.
The Court: Plaintiff's Exhibit No. 1.
Mr. Sheriff, will you bring it up and let it be marked, please?

(Paper tendered to the Court)

Q. Mrs. Hancock, I show you this letter and—
A. It's March, '62.

Edith D. Hancock.

Q. —and ask you to note the date and whom it is from?

A. It is March, '62. March 1st, 1962, and it's from Jack Hoggan, the then vice commodore of the club.

Q. Does that letter acknowledge your conversation with him concerning the pier?

A. Let's see what it says. Yes, it certainly does.

Q. What does the letter tell you?

page 11 } A. Do you want me to read it?

Q. Well, yes, ma'am.

A. It's a nice friendly letter. He said: I didn't mean to be abrupt with you the other day when we were discussing the yacht club's plans to extend our dock. I certainly hope you didn't think I was. Frankly, I didn't know all the answers at that time, so undoubtedly I must have seemed somewhat vague. Our requirements indicate that our dock should be about one hundred ten feet long, however, we certainly do not want to tread upon your interest in any way, as you must know. The simple truth is that our club is growing and therefore demands more and better facilities to expand. The board has authorized me to procure the services of a surveyor to establish the actual location of our dock with reference to your property lines and that of Mr. Stull, who is on the eastern side of my property. I feel certain that this will be a decided help in determining what should be done in the way of extending our dock. Rest assured we will do everything possible to—rest assured we will work together in every possible way. And it's signed John C. Hoggan, Vice Commodore.

Q. Mrs. Hancock, did you have any further conversation with Mr. Hoggan relative to this pier construction subsequent to March the 1st?

page 12 } A. I talked with him several times. I could not give you the dates. I just talked with him several times about this.

Q. And what did he inform you, if anything?

A. Well, at one time he said, We realize we might be wrong, but we are going ahead with the work anyway. And I don't remember—

Mr. Hicks: Your Honor, I object to any hearsay evidence as to—that this lady testifies to, unless she can show that this person had authority to—This is a corporation which

Edith D. Hancock.

she is suing, not an individual, and it's not an admission as to the corporation as to what some individual says.

The Court: All right, Mr. Hicks. Mr. Hopper, you have heard the objection.

Mr. Hopper: (Shaking head)

The Court: The Court would ask that the last answer be stricken. All right, gentlemen.

Q. Well, Mrs. Hancock, did you or did you not offer any objection to the construction of this pier?

A. I did.

Q. The extension of it.

A. I did.

Q. Why, Mrs. Hancock, do you object to the ex-
page 13 } tension towards your side of this pier?

A. Mainly because it would make it impossible for a person buying that end of the property, which I intend to sell sometime, to build a pier out, because the club has taken the deep water.

Mr. Hicks: Your Honor, I object to this because this is not responsive to the pleadings and in the pleadings she has alleged nothing about interfering in any way with dockage rights or pier rights. She only in the pleadings it *encoraches* —alleges that it encroached on her riparian oyster grounds.

Mr. Hopper: No, the pleadings allege it does in fact damage her high land, and that is exactly what she is testifying to at the present time—Why it does.

The Court: All right, sir. Further argument?

Mr. Hicks: No, sir.

The Court: The Court overrules the objection. Proceed.

Q. All right, Mrs. Hancock, would you go back and tell us why?

Mr. Hicks: Note our exception, please.

Q. Would you go back and tell us why you ob-
page 14 } jected to the extension of the pier as the club built it?

A. Well, we were talking about it ruining the saleability of this lot, because if a person buying that lot wanted to build a pier out to deep water, they couldn't do it without cutting off the existing pier which they have built—which the club

Edith D. Hancock.

has built now. That would be very bad. We don't want to do that, in the first place.

Mr. Hicks: Your Honor, I object to this lady's testimony in this line unless she can show that she is a qualified engineer and speaking as a qualified engineer that this existing pier does in fact cut off the dockage rights for her property; that she is a qualified engineer or surveyor and that this existing pier of the Fishing Bay Yacht Club does cut off her dockage rights. If she is not a qualified engineer, then she can only speak to her personal objections and not as to anything that may be possible.

The Court: I believe the question asked her objection, Mr. Hicks.

Mr. Hopper: Yes, I was asking for her personal objections, not her expert testimony, Your Honor.

Q. Would you continue, Mrs. Hancock?

A. Then of course they are on my riparian
page 15 } rights, which they should not have come on, as I
understand it.

Q. Mrs. Hancock,—

A. And on my oyster rights. I have oyster rights besides that that connect with the riparian, and I run right up along where the—I'm not sure—Roger, you should correct me—whether the riparian rights come up to the end of the pier or the oyster rights begin there, but they all abut. And I have the oyster rights for three acres of them right on that side.

Q. Mrs. Hancock, how about the view from your house towards Fishing Bay?

A. We just feel like when people come to see us and there are no boats there to break it, we feel that they say, Well what is that sticking out on your property? I think that is very ugly.

Mr. Hicks: I object to what other people say.

The Court: Mrs. Hancock, if you would, only speak of your own objection being that.

A. Well, it is very ugly when it's not in a regatta. It's very ugly when it's not full of beautiful boats. Is that what I should say?

Edith D. Hancock.

The Court: The point is not to say what someone else told you.

page 16 } Q. That is hearsay. Mrs. Hancock, do you have any objection to the boats as Fishing Bay uses them at their volition?

A. I love the boats. I have no objection to them at all. I am fond of the boats. I want them.

Q. Yes, ma'am.

A. And all of my friends have boats, and my family has boats. And as a matter of fact, if I may say this, that when there are special times—regatta week ends, special races—they have always had the privilege of beaching on my front, and there are many times when the boats have been just like that (Indicating) all across my front, and I don't think I could say I object to boats if I do that.

Q. All right. Do you and your husband belong to Fishing Bay Yacht Club, Mrs. Hancock?

A. We do. We did.

Q. What do you mean?

A. We did. Well, I mean we do. It's still in effect for a year.

Q. How long have you been a member of Fishing Bay Yacht Club, Mrs. Hancock?

A. Well, it would be hard for me to say, it's been so many years. We were members when my son, who died around '45, was a sailor there some years. It's hard for me to say unless to look it up.

page 17 } Q. It's been a long time?

A. It's been a long time. We were members when we were at Urbanna.

Q. Mrs. Hancock, you testified you have oyster shore. To your knowledge, have you ever taken or had taken for you any oysters from your shore?

A. I have never hired a boat to go out and get oysters, but the men come so often that I have gone out on the club pier and asked them to come in and sell me some of the oysters, sell me some of mine. And they would shuck them and throw the shucks right into the water, and I have bought my own oysters, many a time.

Q. Yes, Mrs. Hancock, how close would you say your house is to the clubhouse of Fishing Bay Yacht Club? Your residence.

Edith D. Hancock.

A. I'm a very poor judge of distance like that. I never thought about it.

Q. Well, I mean, is it relatively close, or is it—

A. Oh, yes. It's relatively close. Close as you would want to be to any house.

Q. Is it closer to them on that side line than it is to your other side line?

A. Oh, yes. Yes.

Q. Mrs. Hancock, do you know whether or not
page 18 } Fishing Bay Yacht Club has any facilities on Jackson's Creek?

A. Yes.

Q. Do they have docks in Jackson's Creek or slips or—

A. Yes.

Q. Would you know how many they have?

A. Approximately about seventeen slips. That is a guess.

Mr. Hicks: Your Honor, I have to object to this and anything involving Jackson Creek and property that is not in any way involved in this suit. This suit is involved—relating to dockage rights and certain alleged riparian rights and oyster rights in Fishing Bay. We are talking about an entirely different body of water.

The Court: Mr. Hicks. Mr. Hopper, you have heard the objection and the reason therefor.

Mr. Hopper: Your Honor, no objection to—

The Court: The Court will sustain the objection and order the last question and answer be stricken. All right, gentlemen.

Mr. Hopper: I don't think I have any further questions at this time, Mrs. Hancock. Would you answer
page 19 } Mr. Hicks?

CROSS EXAMINATION.

By Mr. Hicks:

Q. Mrs. Hancock, then you had notice that there was going to be this extension on the Fishing Bay Yacht Club dock—

A. I did not.

Q. —in March of 1962?

A. Yes, but then it had already begun.

Q. Now, when you received this letter, had the construction actually begun?

A. Begun, and that was why the letter was written—be-

Edith D. Hancock.

cause I had complained. That was the reason for the letter.

Q. This was March of 1962?

A. '62.

Q. And so you have had knowledge since March of 1962 concerning this—

A. That's right. That's right.

Q. —concerning this dock and had notice at that time?

A. Yes.

Q. March of 1962?

A. That's right.

page 20 } Q. And Mrs. Hancock, you mentioned that in addition to your riparian one-half acre of oyster grounds you have leased certain other oyster grounds?

A. Yes.

Q. When did you lease that?

A. Haven't you got the records?

Q. Didn't you actually lease that after this dock was extended?

A. Probably.

Q. In 1963?

A. Probably. Probably, I don't remember.

Q. And as you stated on the stand, you of your own knowledge don't know whether this dock crosses your riparian oyster grounds or leased grounds?

A. I meant to say I didn't know whether my oyster grounds began at the far end of that dock—and I think they do. At the far end of it, you see. At the end.

Q. This ground—

A. At the T.

Q. But this ground which you have leased over and above the riparian assignment actually was leased in 1963?

A. I can't answer that because I don't know what day it was leased. But you have the record.

page 21 } Q. You do know it was leased after the dock was extended?

A. I think it very probably was.

Q. That was leased after the dock was extended?

A. I think it probably was, but I would have to look it up.

Q. And, Mrs. Hancock, you say that you and your family are members of Fishing Bay Yacht Club?

A. (Witness nodding head)

Q. Do you know approximately how many boats there are

Edith D. Hancock.

that belong to the members of the Fishing Bay Yacht Club?

A. No, that wouldn't be anything I would know about.

Q. Tremendous number?

A. Quite a few. Lots of them have very small boats, some of them have very large ones.

Q. And you don't—Do you take any issue that they need a dock this large?

A. Do I take any issue that they need a dock this large?

Q. Yes, ma'am.

A. Just what do you mean by that?

Q. Isn't it a fact that Fishing Bay Yacht Club needs a dock as large as the one they have?

page 22 } A. Probably do, but that doesn't alter the fact they shouldn't build on someone else.

Q. I'm not talking about that. I'm talking about the size of it.

A. They probably do, but they should have built on the other side of them.

Q. But as far as the size is concerned, you feel they probably do need a dock this large?

A. Probably do. I don't know anything about it.

Mr. Hicks: No further questions.

RE-DIRECT EXAMINATION

By Mr. Hopper:

Q. Mrs. Hancock, Mr. Hicks asked you did the Fishing Bay Yacht Club have a tremendous number of boats. Your answer was that they had quite a lot.

A. Well, I have no way in the world of telling how many boats. I haven't thought about that. There isn't any way I can tell how many boats are there, because it hasn't been my business to look it up.

Mr. Hopper: All right. We have no more.

The Witness: We do have a lot of boats.

page 23 } Mr. Hopper: We have no more questions. Mr. Hicks?

Mr. Hicks: (Shaking head)

The Court: Thank you, Mrs. Hancock, you may stand aside.

(Witness stood aside)

JOHN M. BAREFORD,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hopper:
Q. Would you state your name, sir?
A. John M. Bareford.
Q. Where do you live, sir?
A. I live in Saluda, Virginia.
Q. Would you tell us your occupation?
A. I'm an attorney.
Q. Do you have any other business endeavor?
A. My brother and I are the owners of the
page 24 } Southside Sentinel, which is a weekly newspaper published in Urbanna, Virginia, in Middlesex County.
Q. In your capacity as owner of the Southside Sentinel, do you ever have occasion to take any pictures?
A. All of the pictures that have been taken for this paper have been taken by me since June 1st of 1963.

Note: At this point photographs were exhibited to defense counsel, and a discussion inaudible to the court reporter was had between counsel.

Q. Mr. Bareford, I hand you these pictures and ask you if you could identify them?
A. These seven pictures were taken by me on Tuesday afternoon, May 4, 1965, at approximately 2:00 p.m. from the property owned by Mrs. Hancock on Fishing Bay.
Q. Yes, sir.
A. I used a Polaroid Land Camera, Model 95A, which develops black and white film in ten seconds.

Mr. Hopper: We would like to offer these in evidence, Your Honor.
Mr. Hicks: Your Honor, I don't mean to be technical. The only thing I do think Mr. Bareford should state is whether these depict the true picture of the property as
page 25 } they depict it from the view.

Q. Mr. Bareford, do these pictures you made depict the true picture of Mrs. Hancock's property, the pier, and the adjoining area around Fishing Bay?
A. One picture depicts the pier of Fishing Bay, showing

John M. Bareford.

Mrs. Hancock's house and the Fishing Bay Yacht Club on the shore. Another picture—

Q No, we just need to know—

Mr Hicks: I think while he is testifying those pictures should be identified as A, B—

Mr. Hopper: That is what I was trying to do.

Q. But do they clearly represent the scene as you saw it?

A. Surely.

Mr. Hopper: All right, sir.

(Photographs tendered to the Court)

The Court: Complainant's Exhibits 2 through 8.

Q. Mr. Bareford, I show you Plaintiff's Exhibit No. 2. Would you describe what it depicts, sir?

A. This picture was taken from a boat on the off-shore side of the Fishing Bay Yacht Club pier. The
page 26 } buildings to the right in the background are the buildings of the Fishing Bay Yacht Club. The big large white building to the left is the home of Mrs. Hancock.

Q. All right, sir. I show you Plaintiff's Exhibit No. 3. Would you tell us what that depicts?

A. This is a picture taken from approximately the same spot as the previous picture, which is on the off-shore side of the Fishing Bay Yacht Club pier, showing in the background the dwelling or home of Mrs. Hancock.

Q. Mr. Bareford, Exhibits 4, 5, 6, 7 and 8, did you take those in a logical sequence?

A. These pictures were taken from the front lawn of Mrs. Hancock's home, starting around to the southeast, in a complete panoramic view of Fishing Bay and all of its facilities. If you desire, I can lay them down in sequence.

Q. Would you show His Honor, please, sir, and Mr. Hicks?

A. The picture which I am pointing—

Mr. Hicks: Are they in sequence?

Mr. Hopper: I think. I tried to get them that way. Yes. This is 4, 5, 6, 7 and 8. All right. Excuse me, Mr. Bareford, I messed them up.

John M. Bareford.

page 27 } A. Picture 4 was taken from the front lawn of Mrs. Hancock's home, shows the Fishing Bay Yacht Club, and in the background is the section known as Stove Point.

Picture next to that, which would be No. 5, shows the far section of the pier of Fishing Bay Yacht Club, in the background would be the skyline along Gwynn's Island in Mathews County.

Plaintiff's Exhibit No. 6 shows the skyline of Gwynn's Island in Mathews County and the very tip of the point in Middesex County upon which is located the subdivision known as Berryville Shores.

Picture No. 7 picks up the very tip end of the point in Middlesex County showing Berryville Shores and follows along showing the Deagle's Marina and Boatyard.

The last picture, No. 8, picks up at Deagle's Marina, shows the boatyard of Ruark and follows around the line of Fishing Bay to the front yard of Mrs. Hancock.

Q. So, Mr. Bareford, looking at these five pictures as a whole it would depict Fishing Bay as it looks from Mrs. Hancock's house

A. Those pictures would be the same as if I had taken them with a wide-lens camera. It's a complete panoramic view of Fishing Bay taken in sequence.

page 28 } Mr. Hopper: I thank you. Would answer Mr. Hicks, please?

CROSS EXAMINATION.

By Mr. Hicks:

Q. Mr. Bareford, taking pictures is something like seeing something, except that the angle of the camera can make a whole lot of difference as to perspective, can't it?

A. Sir, I am not familiar with what you mean. I took a picture of what I saw and the picture gives it.

Q. Well, as to location—relative location of a point relating to another point, won't that as you view it appear to change to your view and also to the eyes of the camera depending on where you stand in relation to those two points? They can look like they are in a straight line if you are standing on a third point in a straight line.

John M. Bareford.

A. Mr. Hicks, I can't answer that. I took the picture, and they reproduce what was down there on Tuesday.

Q. But what I am getting at, Mr. Bareford, is taking pictures with a camera is just the same as a person, the perspective you get, its relative location as to various objects will change depending on where you are standing at the time, isn't that true?

A. I do not know, sir. Those pictures reproduce
page 29 } what was shown on Tuesday.

Mr. Hopper: Your Honor, he has asked the same question three different ways and the witness has answered he doesn't know. So could we perhaps go along with the testimony?

The Court: Thank you, Mr. Hopper.

Mr. Hicks:

Q. You do not know as to what effect various locations will have as to the angles that are depicted?

A. No, sir.

Q. Mr. Bareford, those pictures show that this is not—this is not a straight-line shore in this area?

A. The pictures will reveal that, sir.

Q. That it is a—Actually you have a bay curving around from Stove Point around to Ruark's Railway and Marina, don't you?

A. The pictures will show it as a bay of a circular nature.

Q. Shore line.

A. Shore line.

Q. And it is not a straight shore line. And Fishing Bay does not have a narrow clearly-defined channel, does it, sir?

A. I do not know, sir. I took no soundings or—I know nothing about it.

page 30 } Mr. Hicks: No more questions.

Mr. Hopper: No further questions, Mr. Bareford.

(Witness stood aside)

FRANK ERASTUS MINER,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hopper:

Q. Would you state your name, please?

A. Frank Erastus Miner.

Q. And where do you live, sir?

A. Hartfield, Virginia.

Q. Is that in Middlesex County?

A. That is in Middlesex County.

Q. What is your occupation?

A. Certified Land Surveyor.

Q. Mr. Miner, how long have you been surveying?

A. I have been surveying since 1950, and I have
page 31 } been certified since 1957.

Q. Yes, sir. Mr. Miner, have you or do you now currently hold a commission in the Coast Guard?

A. I hold a commission in the Retired Coast Guard.

Q. Yes, sir. And what rank would that be?

A. Commander.

Q. Mr. Miner, did you have occasion to do some surveying for Mrs. Hancock in relation to the riparian oyster ground that was assigned her by the Commission of Fisheries?

A. I did.

Q. Mr. Miner, did you also show the existing pier of the yacht club?

A. Yes, sir.

Q. Did you make a plat of that, sir?

A. Yes, sir.

Q. Do you have a copy with you?

A. I do. That is it.

Q. Mr. Miner, would you, looking at the plat— That is your plat, is that right?

A. Yes, sir.

Q. Would you tell the Court what you have depicted on this plat?

A. On this survey I located the riparian rights
page 32 } oyster ground assigned to Mrs. Hancock using
certain monuments that had been set or used by the Fisheries Commission. They were respectively a stone at the Hancock-Munce line shown as Station Han on Commission of Fisheries survey August 31, 1956, and at Station A on the survey of March 28, 1963. Another station was shown

Frank Erastus Miner.

as Station East on survey of August 31, 1956. A third station was Station 67, on the Fisheries Commission survey of March 28, 1963. Using the base lines incidental to those three monuments, I found her riparian rights ground to have been laid out on her east property line produced, and that the east boundary of her riparian rights ground went across part of the head, across the head on the Fishing Bay Yacht Club pier, and that her southeast corner was outside, outboard of the crosshead.

Q. Well, Mr. Miner, does your plat accurately depict the exact location of the riparian half-acre according to the Commission of Fisheries survey?

A. Yes, sir.

Q. All right, sir. Now, looking at the plat, would you tell us how far, if any, the pier encroaches upon the half-acre of riparian oyster ground?

A. The dolphin at the southwest corner of the pierhead is thirty-one point seventy-six feet into the riparian ground.

page 33 } Mr. Hopper: All right.

(Paper tendered to the Court)

The Court: Complainant's Exhibit No. 9.
Mr. Hopper: Mr. Hicks, your witness.
Mr. Hicks: Could I have that survey?

(Paper tendered to defense counsel)

CROSS EXAMINATION.

By Mr. Hicks:

Q. Mr. Miner, as I understand, you went out and re-established on the ground the riparian assignment of oyster ground?

A. Yes, sir.

Q. Where did you get your information re-establishing this?

A. From the oyster or Fisheries Commission plat cited on my plat.

Q. Recorded in the Clerk's Office?

A. They would be recorded in the Oyster Plat Book.

Q. In Middlesex County?

Frank Erastus Miner.

A. In Midlesex County.

Q. And did you find any markers at these four corners when you went on the ground? Did you yourself?

page 34 } A. As I recall, there was one stake left which was at—If I may see that a moment.

Q. (Exhibiting plat to witness)

A. It was at this point here, which was shown as Corner 1 on the survey of August 31, 1956, and as Corner 8 on the survey of the 8th of March—28th of March, 1963.

Q. That is on the shore line—approximately on the shore line?

A. Yes, sir. That is at mean low water.

Q. This is the only marker that you found?

A. That is the only marker that was left.

Q. Well, this is the only one you found. Do you of your knowledge know whether there were any other markers?

A. I do not know whether the other markers had ever been —Now, of my own knowledge. I had been informed they had been set and removed. That is the only one I know of.

Q. Only one you found was the one on the shore?

A. The only one of her boundary points that I found was the one on the shore. If you will refer to the monuments, the base line monuments, I did find those.

Q. Yes, sir. Mr. Miner, as I understand, you said that you found that this riparian ground was laid on her east property line produced?

page 35 } A. Yes, sir.

Q. Is that the property line between Mrs. Hancock and Fishing Bay Yacht Club?

A. That is the line between Mrs. Hancock and Fishing Bay Yacht Club.

Q. What do you mean by the word produced, so far as surveyors are concerned, so we laymen can understand?

A. Extended. I used the word property line extended because I do not know what becomes of the property line when it crosses the mean low water.

Q. But in other words, this line (Indicating)—

A. This line continued.

Q. Is this in a straight line?

A. In a straight line.

Q. On out past mean low water?

A. Past mean low water.

Q. For a distance of two hundred ten feet?

Frank Erastus Miner.

A. Yes, sir.

Q. Now, Mr. Miner, what is the angle of the—Let me ask you this: Is the angle of the property line between Mrs. Edith Hancock and the Fishing Bay Yacht Club property at a ninety degree right angle at the mean low water mark?

A. No, sir.

Q. It is not?

page 36 } A. It is not. If you—Do you mean is it a right angle to the—

Q. Yes.

A. —the line at mean low water? No, it is not.

Q. What is that angle, approximately?

A. Approximately one hundred eleven degrees, sir. I say that because with the transit at Station Han here and sighting Munce, this angle in here is one hundred eleven degrees.

Q. And that is one hundred eleven?

A. By the way, the Station Munce is about the same distance off mean low water that Station East is.

Q. Mr. Miner, this is the—Is that one hundred eleven degrees from—is that the angle on Mrs. Hancock's side?

A. May I give it to you? It was an angle off ninety, off a right angle instead—

Q. Yes, sir.

A. Let's say that the angle—the line inclines eleven degrees towards the yacht club. I believe that is what you are talking about.

Q. Eleven, or one?

A. One hundred eleven. Wait a minute, I may be wrong. Excuse me there. It's one hundred one degrees.

page 37 } Yes, sir, I wish to correct that one hundred eleven degrees. It is a hundred and one degrees. It's eleven degrees more than a right angle towards the yacht club.

Q. Towards the yacht club?

A. Un huh.

Q. So that this line extended comes over in front of the yacht club by eleven degrees?

A. If by in front of you mean ninety degrees off the shore line, yes, sir.

Q. Yes, sir. Mr. Miner, what is the characteristic of the shore line of Fishing Bay Yacht Club? Are you familiar

Frank Erastus Miner.

with the shore line of Fishing Bay from Stove Point to where Ruark's railway is?

A. Not intimately. Not all of it.

Q. Are you familiar with the general characteristics?

A. I have done some surveying in that immediate location.

Q. Well, just generally, from Stove Point coming up the bay away from the Chesapeake Bay to Ruark's Marina and Railway, what is the general condition of the shore line?

A. From the end of Stove Point in to, I would say, somewhere on proporety of Mr. Stull it comes around in a curve.

page 38 } At the Stull property the curve eases considerably. I can state that because I have turned the angle. There is a bend of approximately four degrees at the Hancock and yacht club line. It runs moderately straight parallel to Route No.—I believe it's 11 or 1211 down there almost to Ruark's and then curves out again near Ruark's and out toward the point where you could say that the bay rejoins the river.

Q. As I understand it, then, Mr. Miner, there is a—the property line of Mrs. Hancock extended is eleven degrees from a right angle towards the Fishing Bay Yacht Club property?

A. Yes, sir.

Q. And that there is approximately a four-degree bend in the shore at this immediate point?

A. That's right.

Q. So that actually that is fifteen degrees—

A. Well, no, sir. I wouldn't say it could be fifteen degrees. You can take a right angle off a straight line, but when you are establishing a normal or radial point at an angle point, you would have to bisect the angle. So the most I could say there would be two degrees more, bisecting that four-degree bend.

Q. But at the place where Mrs. Hancock's east property line that separates her property from Fishing Bay hits low

page 39 } water, there is a curvature in the shore and the line does not approach at a right angle to the low water mark.

A. Substantially, yes.

Q. Mr. Miner, do you know the distance of the frontage of Mrs. Hancock's property at low water along Fishing Bay? Does your plat show?

Frank Erastus Miner.

A. As I recall, it's two hundred eighty feet. Oh, excuse me. Measured along low water. No. Two hundred ninety.

Q. Mrs. Hancock has two hundred ninety feet—

A. Yes, sir.

Q. —along low water—

A. Yes, sir.

Q. —from the point where she and Fishing Bay Yacht Club join at low water to her neighbor to the west?

A. Yes, sir. The Hancock-Yacht Club line, the yacht club-Stull line and Mrs. Hancock's west line are all parallel lines.

Q. And she has two hundred ninety feet?

A. Yes, sir.

Q. And you found this riparian ground laid along the easternmost extremity of this two hundred ninety feet?

A. Yes, sir.

Q. One hundred five feet along the shore and
page 40 } two hundred ten feet out from shore?

A. Approximately. Yes, sir.

Q. At an angle of eleven degrees from a right angle over towards Fishing Bay Yacht Club?

A. Yes, sir.

Mr. Hicks: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Hopper:

Q. Mr. Miner, I am just a little bit confused about the question that was asked were you familiar with the shore line from Stove Point to Fishing Point. How about confining your considerations to these two properties?

A. I prefer to.

Q. How much curvature is there in the shore line of Fishing Bay along the front of the Hancock line? And I mean the Hancock property in front of the Fishing Bay Yacht Club property.

A. There is a rather poorly defined curvature. As I said, the line at mean low water comes to approximately four degrees—about like that—parallel to this line here to the monuments. I'm aware of that because this monument here, Station 69, was invisible, and therefore I set a point when I was checking her riparian ground. I set a point out here which was the same distance from the water as Station East here.

So you have a very slight convergence there that page 41 } I say is pretty fairly—

Q. A slight convergence which is pretty fairly general?

A. Yes.

Mr. Hopper: All right, sir. Mr. Hicks, do you have any more?

Mr. Hicks: Just one on this last point.

RE-CROSS EXAMINATION.

By Mr. Hicks:

Q. You say it's four degrees. By bisecting the angle it would be two degrees, so that actually the combination of the angle at which the property line is extended and the curvature of the shore is plus fifteen degrees from a right angle towards Fishing Bay Yacht Club?

A. Yes, sir.

Mr. Hicks: Thank you, sir.

The Court: All right, Mr. Miner. Thank you, sir.

(Witness stood aside)

page 42 } GEORGE H. BADGER, JR.,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hopper:

Q. Would you state your name, sir?

A. George H. Badger, Jr.

Q. Would you state your occupation?

A. Chief Engineer for the Commission of Fisheries.

Q. Chief Engineer for the Commission of Fisheries. Mr. Sinclair, are you familiar with the oyster records—Excuse me, not Mr. Sinclair. Mr. Badger, are you familiar with the oyster records pertaining to Fishing Bay?

A. Yes, sir.

Q. And more particularly to Mrs. Hancock and to Fishing Bay Yacht Club?

A. Yes, I am. I have the records with me.

George H. Badger, Jr.

Q. Yes, sir. Do you have the riparian plat of Mrs. Hancock?

A. Yes, I do.

Q. Is this from the records at your office in the Commission of Fisheries?

A. This is the copy of the records from the Commission of Fisheries.

page 43 } Q. Mr. Badger, I show you Oyster Plat Book 3 from the records of the Clerk's office of Middlesex County, Virginia, and show you this plat on Page 191. Is it the same, to the best of your knowledge, as the copy you brought with you?

A. It is a copy of this.

Q. It is a copy. All right, sir.

A. Yes, sir.

Mr. Hopper: All right, sir.

(Paper tendered to the Court)

The Court: Introduced as Exhibit 10.

Q. Mr. Badger, I show you the plat of the riparian half-acre of oyster ground of Mrs. Hancock's, and I also show you this plat by Mr. Miner, Exhibit—Plaintiff's Exhibit No. 9, and ask you to look at the riparian ground as Mr. Miner has indicated in on his plat and compare it with this plat to the best of your ability and tell the Court if Mr. Miner's plat represents a true picture of the Fisheries' plat.

Mr. Hicks: Your Honor, I think there are certain things he can testify to and certain things he can't, unless he is personally familiar with the Miner plat. He can say the courses—distances shown on the Miner plat and locations are the same as shown on the other one.

page 44 } The Court: All right, Mr. Hopper, if you would lay the foundation, sir.

Mr. Hopper: Yes, sir.

Q. Mr. Badger, would you look at the reference points that Mr. Miner has used and the reference points that is on your plat and see if they are the same?

A. According to the riparian survey of 1956, the east prop-

erty line was marked by a station called East, which is a creosote post and a fence. I notice on Mr. Miner's plat he refers to Station East as of the 1956 survey, which is the same. Now, I can only say that according to these two plats that it is the same point. I have not visited the field or checked anything else on it.

Q. All right. Mr. Badger, there has been testimony here today that this half-acre of riparian oyster ground was assigned along the property line produced between Mrs. Hancock and Fishing Bay Yacht Club. Sir, is this the ordinary way that the Commission of Fisheries assigns oyster riparian half-acres?

Mr. Hicks: Your Honor, I have to object as to what is the ordinary way. I think he can testify to any established regulations, or something like this, that this man as Chief Engineer has to carry out.

The Court: All right. Mr. Hopper, if you page 45 } would reword your question, please, sir. Thank you.

Q. As far as your regulations permit and dictate, Mr. Badger, would you tell us how the Commission of Fisheries proceeds to lay out riparian half-acres?

Mr. Hicks: Your Honor, I would have to object unless he cites the regulations under which they are operating first.

Mr. Hopper: Your Honor, I think we are being a little bit technical. I am sure if the witness was permitted to answer the question he would probably explain it—what authority he is going to answer it under.

The Court: Ask him how they do it, Mr. Hopper, please sir.

Q. Mr. Badger, how does the Commission of Fisheries assign riparian half-acres?

A. Riparian half-acres are assigned in front of the properties of applicants. If it is close to a property line, the property lines are extended in the water to make up the half-acre. If it is a narrow lot or small lot, for one hundred five feet or one hundred ten feet, both property lines would extend in the water until you made your half-acre. We follow the property line extensions.

George H. Badger, Jr.

Q. Why do you follow them, Mr. Badger?
page 46 } A. It is the only practical way that we have—

Mr. Hicks: Your Honor, I have to object unless there is some regulation or something that says he shall do this or statute that says this is the way it is done. This is the thing I have been getting at all along. Here is a man that says what they do, but he is not saying under what statute or regulation this is done. And I have to object to it.

Mr. Hopper: Well, Your Honor, certainly the Code of Virginia gives the Commission of Fisheries the authority to assign the ground. This is the Chief Engineer of the Commission of Fisheries. I don't see the technical point involved.

The Court: Mr. Hopper. Any further argument, Mr. Hicks?

Mr. Hicks: Your Honor, an officer of the state can only operate under such powers that are conferred upon him by statute or by regulations duly enacted. And this is the thing. Before this person testifies further as to how riparian oyster grounds are assigned, I must think that it is improper for this evidence to come in unless he as an officer of the state says under what statute or regulation he is operat-
page 47 } ing to assign them in this manner.

Mr. Hopper: Your Honor, may I show him Volume 5 of the Code of Virginia, without having to introduce it into evidence thereby losing my book, to see what authority he assigns it under.

Mr. Hicks: Your Honor, if Mr. Hopper wants to take the witness stand and testify, that is fine; but Mr. Badger is the man on the witness stand, and I object to any testimony of his as to how grounds are assigned unless he shows what statute or regulation he is operating under.

The Court: Well, gentlemen, in words, I presume you are speaking of 28.1-108.

Mr. Hopper: Yes, sir.

Mr. Hicks: I assume that is the statute he is operating under.

Mr. Hopper: I will be glad to ask him, Your Honor.

The Court: Rephrase your question.

By Mr. Hopper:

Q. Mr. Badger, do you know what statute of the Code of

Virginia, 1950, or under what authority you assign these oyster ground half-acres under?

A. The commission makes the assignment, sir.

Q. Yes, sir. But by what authority do they make it?

A. I would have to look at the statute, sir. I
page 48 } don't know which one it is. I imagine it is correct—what you said.

Q. You do know it is a statute?

A. Oh, yes.

Mr. Hopper: Your Honor, will that suffice?

The Court: (Nodding head)

Q. Mr. Badger, we had come to the point where you had the authority to assign the riparian half-acre, and you told us briefly how you did. Will you tell us why you follow that procedure?

A. Well, now, the commission has the authority to make the assignment. I as the engineer approve the plats, surveys, and so forth. The only practical way that we can assign or survey riparian rights, as I said before, is an extension of the property lines in the water for the various properties we are on. There are any number of cases where the shore lines are not perpendicular to the property lines. In those instances, the only practical solution is an extension of the property lines. You would run into great difficulty if you attempted to make a ninety-degree off of the property lines or off of the low water mark in every case. You would be overlapping. And the extension of the property lines is the only way you will not overlap various properties.

page 49 } Q. Yes, sir. Mr. Badger, will you tell the Court approximately how many riparian assignments the state has at the current time?

A. It's purely a guess. We have something like eleven thousand surveys on record, and maybe seven or eight, nine hundred riparians. That is purely a guess, sir.

Q. All right, sir. Mr. Badger, do you know whether or not Fishing Bay Yacht Club has any—been assigned any oyster ground or leased any oyster ground?

A. I checked that yesterday afternoon, and they do not lease any oyster shore.

Q. Do not lease any oyster shore?

A. No, sir.

George H. Badger, Jr.

Q. Does anyone else lease any oyster shore in front of the Fishing Bay Yacht Club?

Mr. Hicks: Your Honor, I have to object to this, unless Mr. Badger can qualify as to what he means by in front of, because this calls for an opinion.

The Court: All right. Mr. Hopper, if you would qualify him as to his knowledge of that phrase, please, sir.

Q. Well, Mr. Badger, I maybe can explain it in two ways. Let's say in front of, to begin with, by property

page 50 } lines produced.

A. You mean the yacht club?

Q. Yes, producing the side lines of the yacht club property. To the best of your knowledge, does anyone have any oyster ground under lease or assignment?

A. No, they do not.

Q. All right, Mr. Badger, let's take the lines from the yacht club at right angles perpendicular to the shore. Does anyone have any oyster ground under lease or assignment between these points?

A. Wait a minute now.

Q. Instead of producing the property lines out into the water, sir, turn them until they run at right angles to the shore. Does anyone have any ground leased in front of it?

A. Yes, sir. There is assignment in front of it at a ninety degree angle off of point East.

Q. At a ninety degree angle?

A. Ninety degree angle either way there would be something leased in front of that. Yes, sir.

Mr. Hopper: All right. Thank you, Mr. Badger. Mr. Hicks?

Mr. Hicks: Yes. Just one second.

page 51 } CROSS EXAMINATION

By Mr. Hicks:

Q. Mr. Badger, actually the local inspector makes the assignment, doesn't he?

A. The local inspector has the authority as an agent for the commission to make assignments.

Q. But the statute says the inspector shall assign them and you just make surveys where requested, isn't that right?

George H. Badger, Jr.

A. We make the surveys and approve the surveys, and the inspector will only assign after they have been approved.

Q. The application comes in to him?

A. Application is made to the inspector first.

Q. And the application is supposed to approve or specify as to where the applicant wants the oyster ground, is that right?

A. The application is pretty general.

Q. And then—Well, then in this—

Mr. Hicks: May I have that exhibit, please? Do you have it?

(Paper tendered to defense counsel).

Q. Mr. Badger, I am showing you Plaintiff's Exhibit No. 10, which you say is a copy of the riparian oyster ground of Mrs. Edith Hancock, and where does it show that one-half acre in relationship to the property line of Mrs. Edith Hancock and Fishing Bay Yacht Club?

page 52

A. It shows it to be on the east property line of Mrs. Hancock.

Q. Produced?

A. Produced. Extended in the water. And of course beyond the west property line of Fishing Bay Yacht Club.

Q. Right up on that line produced, isn't that true?

A. Yes. This is an extension of the property line.

Q. All right, sir. And also now, Mr. Badger, looking at that plat—I'm asking you as a qualified engineer and surveyor—what does that show as to the angle at which the property line between Mrs. Edith D. Hancock and Fishing Bay Yacht Club is at low water mark?

A. I can't answer that. These plats do not represent the exact low water mark, and this is a sketch of a low water mark. And I can't answer the angle it would be off low water.

Q. Let me ask you this, too, Mr. Badger: As to the corners, are any of the four corners of this half-acre right angles?

A. No, they are not.

page 53

Q. Actually this is askew, isn't it?

A. I guess you could call it that.

Q. And actually the property is less than half-acre there, isn't it?

A. I don't think so. I think it would be half-acre.

George H. Badger, Jr.

Q. Isn't a half acre one hundred five by two hundred ten feet—

A. No, sir.

Q. —with right angles?

A. It's a fraction less, sir. One hundred four something by two hundred eight and a fraction. The law says we have to have at least one hundred five feet.

Q. But that is set off at right angles. A rectangle.

A. A half-acre would be those figures of two hundred eight plus and one hundred four plus would make a half acre.

Q. Let me ask you this, Mr. Badger: Why, in laying this off, didn't you put that half-acre with corners at right angles?

A. Well, one reason we put it, the law says that the riparian starts at low water mark. And if you put it at right angles, it wouldn't—you couldn't do it at the low water mark.

page 54 } Q. And have right angles on all corners?

A. On the inside shore corners.

Q. All right. How much frontage does Mrs. Hancock—This wasn't a case of just one hundred five feet, that is all the frontage she had?

A. No, she had more frontage, according to this diagram. She had more frontage.

Q. And your testimony, I believe on direct examination, was that if you take the words in front of to mean the line—property line extended, then this riparian oyster ground was in front of her property; but if you take the words in front of to mean taking the property line at the low water mark and then going at approximately right angles out from there, part of her oyster ground is not in front of this property Isn't that true, or that there is part of the oyster ground in front of Fishing Bay?

A. The question was asked me if you took the point near the low water mark and turned a right angle, and my answer was in either way if you turn a right angle you would be crossing leased ground or occupied ground. And I said that in front we follow the extension of the property lines.

Q. All right. Then you said you would be crossing occupied ground at the time this riparian ground was

page 55 } granted?

A. No, sir. No, sir. The question was asked me if we turned a ninety degree angle with the shore line at

point East, would we be crossing occupied ground or leased ground. I said yes, we would.

Q. At the present?

A. At present.

Q. But at the time this riparian ground was granted, that ground was not—

A. I am speaking of riparian only, sir.

Q. Now, Mr. Badger, are there any regulations that have been duly adopted by the Commission of Fisheries that your department is to operate under relative to what is in front of property high land, as far as riparian assignments are concerned?

A. I can't say there is a regulation to that effect. The law is to the effect that it's to the front and begin at low water mark. The policy has been for the past nineteen years to—I can't go any further than that.

Q. But there is no regulation?

A. But the policy has been the extension of lines for riparian rights.

Q. Mr. Badger, you have never varied this policy in the last nineteen years?

A. I can't remember any cases of it. May have. I have done a whole lot of them. I don't remember any.

page 56 } Q. Suppose you have a piece of property where it hits the low water mark at approximately one hundred five to one hundred ten feet and the lines are converging all the time?

A. We assign out to the convergence point.

Q. And assign no more?

A. Quarter of an acre. We have any of a number of instances of that.

Q. But there is no regulation on the Commission of Fisheries on this in any way to your knowledge?

A. To my knowledge, it's not.

Q. And the only thing that you know that you are operating under is the section of the statute and the words in front of?

A. It's been the policy of the commission, and the commission is well aware of what we have been doing, for the past nineteen years that I can speak of, that all property lines are extended as the basis of our riparian rights, whether they converge or open or what happens.

Q. This is for riparian oyster ground?

A. Riparian rights oyster ground.

Q. Oyster ground?

George H. Badger, Jr.

A. Riparian rights only.
Q. Well, oyster ground?
A. Oyster ground.
page 57 } Q. This half-acre is for oyster ground, isn't it?
A. That is what the law says.
Q. It's titled Riparian Oyster Ground?
A. Yes, sir.
Q. Doesn't mention any other riparian rights, does it?
A. No, sir.
Q. Mr. Badger, who decides whereabouts in front of a piece of property the approximate location where the land is—oyster riparian rights is to be laid out?
A. If the land is more than a hundred and five feet—in other words, if it's, oh, say four hundred feet long—and it's vacant shore in front of the property at the time of the application for the riparian, the owner of the property or the applicant of the riparian has the choice of where he wants to put it.
Q. Suppose it's as much as two hundred eighty, two ninety, the owner has his choice?
A. Two hundred eighty?
Q. Two hundred eighty to two ninety?
A. If it's vacant bottom in front of property at that time, she would have the choice.
Q. All right, sir. Now, Mr. Badger, when you grant—when you make a survey for riparian oyster ground, if
page 58 } it's not vacant property adjacent to it, do you show on that survey the names of the lease holders?
A. If it is not vacant. You mean if the riparian comes out of someone else's—
Q. Yes, sir.
A. —shore? That is—Surveys are made for that.
Q. Aren't riparian—aren't those adjacent lease holders shown?
A. You mean on here?
Q. Yes, sir.
A. Not necessarily. We could show it by A, B, or something that would be representing certain owners.
Q. Is there anything, though, on this plat or anything in your records that you have with you today to show that this oyster ground in front of the entire two hundred eighty, two hundred ninety feet of Mrs. Hancock was under lease at the time she made application in 1956 for riparian ground?

George H. Badger, Jr.

A. At the time she made—at the time the survey was made, no, we do not have it. I have something at a later date.

Q. There has been an application and a lease at a later date?

A. Yes, sir.

page 59 } Q. What was that?

A. Assignment was made July the 6th, 1963.

Q. July 6, 1963?

A. I believe that's right.

Q. And who was this assignment made to?

A. Edith D. Hancock.

Q. And where is this assignment in relation to the one-half acre riparian oyster grounds that are shown on Plaintiff's Exhibit No. 10, I believe it is?

A. It joins—According to the plat I have in front of me, it joins the low water mark on the west side of Mrs. Hancock's property line extended. It runs out to the Baylor survey on the south and it joins vacant ground on the east and on the inshore side and on the east side it also adjoins her riparian rights.

Q. So on two sides of her riparian rights she now has leased oyster grounds which were leased in July of 1963?

A. Yes, sir.

Mr. Hicks: I have no further questions.

page 60 } RE-DIRECT EXAMINATION

By Mr. Hopper:

Q. Mr. Badger, do you have in your records when the riparian assignment was made, the date of the assignment? Not the survey.

A. Yes, sir.

Q. Would you tell us that, please?

A. According to these records, it was made August 31, 1957.

Q. 1957?

A. Wait a minute. August the 31, 1957.

Q. 1957?

A. Yes. That is the date of the assignment.

Q. From the records you have, Mr. Badger, has Mrs. Hancock paid all the rent, surveyor's fees, and everything that is required of her on this oyster ground?

George H. Badger, Jr.

A. According to the records in the commission office all—everything has been paid.

Mr. Hopper: All right, sir. I have no more questions.
The Court: All right, sir, you may step aside.

(Witness Stood Aside)

page 61 } The Court: Gentlemen at the bar, it's now approximately 11:30. Everyone has been sitting approximately an hour and a half. The Court will give you a break for approximately ten minutes.

(Recess)

The Court: Gentlemen at the bar, are you ready to proceed?
Mr. Hopper: Yes, Your Honor.
Mr. Hicks: Defense is, Your Honor.
Mr. Hopper: Your Honor, at this time the complainant rests.
The Court: Thank you, Mr. Hopper.
Mr. Hicks: Your Honor, at this time the defense would make a motion to strike the complainant's evidence and to dismiss the Bill of Complaint, renewing our original motion; but after the presentation of the evidence in chief by the complainant, she still has not stated any grounds for relief. She has proven—And we are to look at it in the most favorable light to her. She has proven that she got a one-half acre riparian oyster ground, and if you will look at Plaintiff's Exhibit No. 10 and also the complainant's witness Mr. Badger, the chief engineer for the Commission of Fisheries, page 62 } this is an assignment of riparian oyster ground, and that is all. She has shown that a portion of the dock extends over on this riparian oyster ground. She has also by her own evidence and her own testimony—and I don't think she can rise any higher than her own testimony—that she had notice in March of 1962 of this dock extension and the location thereof.

Secondly, that for the number of boats that are there at Fishing Bay Yacht Club, that the size of the dock is probably necessary and reasonable, that it's only the location that she feels is against her, by the complainant's own witnesses. And there is no equivocation about it. We have shown that

this is a curved shore line, that the property line between Fishing Bay Yacht Club and Mrs. Edith Hancock approaches the shore line not at a right angle but at an angle—when you take a curvature of the shore line in consideration it's a right angle plus thirteen degrees over towards Fishing Bay Yacht Club. And it is this line, a right angle plus thirteen degrees over towards Fishing Bay Yacht Club, that cuts across the end of the Fishing Bay Yacht Club pier.

page 63 } Your Honor, the laws of Virginia are quite clear that the Commission of Fisheries has authority to assign oyster ground. This assignment was made by the inspector pursuant to Section 108, and that last clause in that section is that nothing in this section—and this is what Mr. Badger said this assignment is made under, Section 28.108—shall not be construed to prevent erection by riparian landowners of wharves, landings, or other structures that are otherwise permitted by law.

The law is also quite clear as to the jurisdiction of the Commission of Fisheries, that it has jurisdiction on all commercial fishing, all other marine fish, marine shell fish, marine organisms. There is nothing in the law that gives the Commission of Fisheries any jurisdiction relative to the location of private docks. There was an amendment in 1962, which did not go into effect until after actually this dock was constructed, relating to permits from the Commission of Fisheries for commercial—Well, it's been construed to say you have to have it for commercial docks, but that law did not go into effect or amendment did not go into effect until

page 64 } after this dock was constructed, by Mrs. Hancock's own testimony. So there is nothing giving the Commission of Fisheries any jurisdiction relating to the location of private docks. And the Supreme Court of Appeals of Virginia—in fact, you can go back even before the existence of the Commonwealth of Virginia—says that the riparian right of a man to get to navigable water is an incident of property. * * * * * (Motion argued)

The Court: Gentlemen, the Court overrules the motion.

Mr. Hicks: We note our exception for the reasons made.

The Court: We will proceed, gentlemen, until approximately 1:00 o'clock. It is now approximately 12:00.

Mr. Hicks: Your Honor, there were certain depositions taken of Mr. John C. Hoggan, after notice, in the City of Richmond, which is more than fifty miles from Saluda. And counsel for the complainant was also present at the time. We would like to—And I think the original of those have been

mailed to the court. We would like to ask that they be offered in evidence along with the complainant—along with
page 65 } the exhibits thereto attached.

The Court: Respondent's Exhibit A.

Mr. Hopper: Your Honor, if it please the Court, an objection was duly noted in these depositions as to the admissibility of any letters or correspondence from the Army Corps of Engineers to Mr. Hoggan, since it was all hearsay. It was offered in evidence to prove the truth or falsity of it so quite a bit of the exhibits you have were objected to by counsel for the complainant, which is duly noted in here.

The Court: Thank you, Mr. Hopper.

Mr. Hicks: At this time, I would like to call Mr.—

Your Honor, may I ask as to this deposition, would this be considered an exhibit? There are certain exhibits in there that are designated as Complainant's—

Mr. Hopper: Defendants.

Mr. Hicks: I mean Defendant's Exhibits 1 through 7.

The Court: It's all been introduced as Exhibit A, Mr. Hicks.

Mr. Hicks: We are asking that that be considered as evidence in the case as if he were here today, be-
page 66 } cause—

The Court: All right.

Mr. Hicks: I ask for Mr. Yoder from the Corps of Army Engineers.

STERLING N. YODER,

having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hicks:

Q. Would you please state your name, residence and occupation?

A. Sterling N. Yoder, Norfolk. You want the whole address?

Q. Yes, sir.

A. 1026 Larchmont Cresent, Norfolk, Virginia, 23508. I am a civil engineer with the Corps of Engineers, U. S. Army, Norfolk District.

Q. Mr. Yoder, in what division of the Corps of Engineers in the Norfolk office do you work?

A. In the Operations Division.

Sterling N. Yoder.

Q. And, Mr. Yoder, what are your duties in con-
page 67 } nection with that?

A. I am Chief of the Permits and Statistics Branch.

Q. Now, how long have you been—have you held this position?

A. I have been a part of this particular kind of work for about twenty years. I have been chief of the branch for less than one year.

Q. But were you in the Permit Division?

A. For about twenty years.

Q. And as such, do you have custody of certain records of the Corps of Army Engineers relating to permits for docks?

A. I keep certain records. I don't know that you would say I have custody of them. We have a central file section.

Q. Have you brought certain records from that office in response to a subpoena *duces tecum* from the Corps of Engineers?

A. I have.

Q. Mr. Yoder, what are those records that you have brought with you?

A. I have a request for a permit or for the amendment of an old permit, I suppose you might say, for the extension of an existing dock owned by the yacht club.

page 68 } Q. Mr. Yoder, at this time, I would like to ask you to produce those records.

A. This is a request of March the 26th, 1962.

Q. What is that March 26, 1962? What is that, and who is it from, and who is it addressed to?

A. It's addressed to U. S. Army Engineer District, Norfolk, attention Mr. E. K. Jackson. It is from the Fishing Bay Yacht Club. Shall I read the whole letter?

Q. Yes, sir.

A. With reference to your letter NAOO-P, dated January 23, 1962, we have unearthed the original drawings and permit issued May 20, 1949, authorizing the Fishing Bay Yacht Club to construct a dock in Fishing Bay, copies of which are attached. You will note that the original permit covered a dock two hundred twenty-five feet long terminating in a forty foot T-shaped head. The present dock was actuarly built as shown on the enclosed construction plans EXH-1 and is only one hundred eighty feet long with a L-shaped head of thirty-two feet. Due to the rapid growth of the fleet we find it most desirable to provide additional docking facilities. We therefore

request permission to extend the existing head twenty-three feet two inches in an eastwardly direction and fifty-two feet four inches westerly, as shown on the attached drawing. Anything you could do to expedite this application would be greatly appreciated, as we would very much like to
page 69 } have the dock work completed prior to the approaching sailing season. Sincerely yours, John C. Hoggan, or Hoggan, Vice Commodore.

Q. And that was received, and that letter was received in the office of the Corps of Engineers in the section in which you work?

A. Yes.

Q. And in response to that letter, what did the records reveal as to anything that was—

A. In response to the letter, a permit was issued for that extension on the 12th of April, 1962, to the Fishing Bay Yacht Club. And I have here the permit itself and the covering letter.

Mr. Hicks: Your Honor, we would like for this permit to be introduced into evidence, and I have introduced that Your Honor with the right to withdraw it and substitute these copies—photostatic copies.

The Court: Mr. Hopper, have you seen them?

(Papers exhibited to complainant's counsel)

The Court: All right. Respondent's Exhibit B.

Mr. Hicks: As I understand, Your Honor, these are being offered in lieu of the original copies in the file
page 70 } from the Corps of Engineers?

The Court: Yes, sir.

Q. Mr. Yoder, I ask you to look at the attached diagram with the permit and from that diagram testify as to what your permit covered.

A The permit—This permit that we are referring to here, which was just introduced, covered the—an extension of the T-head of the pier, an extension of fifty-two feet, I believe, to the west—westward, and twenty-six feet to the eastward.

Q. And, Mr. Yoder, does that show certain sounding lines?

A. Yes. The contours. Several bottom contours are shown here.

Sterling N. Yoder.

Q. And they are shown in feet at mean low water on this application—I mean this—

A. Should be. Soundings are in feet at mean low water. That is a note on the drawing.

Q. No harbor lines established?

A. No harbor lines.

Q. No bulkhead lines?

A. No bulkhead lines or harbor lines.

Q. Bulkhead—

A. Bulkhead lines and pierhead lines are both

page 71 } harbor lines.

Q. There are none established in this area?

A. None.

Q. So that each application is acted on individually as it comes in for a permit for dockage?

A. That's right.

Q. Do you have in your records there anything to show when the dock was completed, construction of this extension was completed?

A. I don't think that would be in this file. We keep working records, you see. These files are kept—most official documents are kept in a central record section, and notes as to what the state of completion is of the various projects are kept elsewhere by us.

Q. You do not have those with you?

A. They are not—No, there is nothing to indicate that here. There is a letter here from the vice commodore of the club dated July the 16th, 1962, addressed to U. S. Army Engineers, Norfolk, and it reads this way: This is to advise that construction commenced on July the 13th, 1962, on the dock extension of Fishing Bay Yacht Club. The project is expected to be completed in ten days.

Q. Mr. Yoder, I understand that you are a civil engineer?

A. Yes.

page 72 } Q. And how long have you been working with the Corps of Engineers in this capacity?

A. Twenty years in this particular capacity.

Q. This particular capacity?

A. (Witness nodding head)

Q. Mr. Yoder, in issuing permits, is the location of the dock taken into consideration and of concern to you?

A. Yes, it is.

Q. In what respect?

Sterling N. Yoder.

A. We do not—The Corps of Engineers does not issue a permit to any applicant where there is any doubt in our minds that the applicant has—does not have a legal right to use—

Mr. Hopper: I object, Your Honor. I object. I think this witness should confine himself to navigation, not anybody else's understanding. The Army Corps of Engineers has nothing to do with the bottom of the bays and creeks and rivers and what not. That is the State of Virginia. What his opinion of the law is is completely immaterial. So I would ask the Court that he be directed to confine his testimony to navigation.

Mr. Hicks: Your Honor, I think he should con-
page 73 } fine his testimony to those things which come under their authority in issuing these permits. And that is all I want to ask him.

The Court: Mr. Hicks, if you would reword your question, please, I believe this gentleman says he—

Mr. Hicks: It's his legal opinion.

The Court: But that is a broad statement. That is a very broad statement. So you can ask him. Rephrase your question.

Q. Mr. Yoder, what laws and regulations do you in your department operate under in issuing these permits?

A. River and Harbor Act of March 3rd, 1899.

Q. Which is a Federal Law of Congress?

A. That is a law passed by Congress. Yes.

Q. What does this relate to?

A. It relates to navigable waters.

Q. Navigable waters?

A. That is not the only law we operate under, but that is the main covering authority on—

Q. Mr. Yoder, is Fishing Bay a tidal navigable stream?

A. As far as the Corps of Engineers is concerned. We do exercise authority over it as a navigable water of the United States.

page 74 } Q. Mr. Yoder, are permits required for the erection of docks in this water?

A. In any navigable water in the United States.

Q. And Mr. Yoder, in issuing those permits, what are the laws, regulations that you operate under as to location of particular docks or structures in those navigable waters that you have jurisdiction over?

Sterling N. Yoder.

A. I don't know that I follow you exactly. But—except I might say this: When we receive an application for a permit for a structure, we satisfy ourselves that that structure is to be either on the property or in front of the property of the applicant or else in front of property that he has leased or has some authority to construct it on.

Q. And this is a requirement of your department before issuing permits?

A. That's right.

Q. A permit was issued in this case for the extension, as you have testified and as the permit shows?

A. It was.

Q. Has that permit ever been revoked or altered in any way?

A. No. There may have been a second—It isn't in here. Seems to me in my memory that there was another extension.

This may have been the second one. I don't want page 75 } to rely on my memory, though, there.

Q. Isn't it a fact that was another body of water and not this one?

A. That could have been. I don't know. I'm not sure of that. I know we had two cases with the yacht club.

Mr. Hicks: No further questions.

The Court: All right, Mr. Hicks. Mr. Hopper?

CROSS EXAMINATION.

By Mr. Hopper:

Q. Mr. Yoder, on this exhibit—the permit—you say that it did show soundings. Do you mean—This is Exhibit—Respondent's Exhibit B—the soundings that are shown here? Is this what you mean? Up there?

A. Yes, the figures that you see.

Q. How familiar are you with those soundings?

A. Well, I didn't take them, if that is what you mean.

Q. Yes, sir. Do you know at what distance they are taken apart?

A. That would depend. I mean that would be told by the scale on the chart.

Q. But, in other words, the sounding has been page 76 } taken everywhere we see a little number?

A. That's right. Approximately. Close as can be shown on a piece of paper.

Sterling N. Yoder.

Q. All right, sir. You say there are no bulkhead or pierhead lines in Fishing Bay?

A. That is true. There are none.

Q. Are there any in the Piankatank River?

A. No.

Q. Any post warden lines?

A. No, we don't have post warden. They are not federal.

Mr. Hopper: I have no more questions.

RE-DIRECT EXAMINATION.

By Mr. Hicks:

Q. Just one question to clarify something, Mr. Yoder: You said as to location to see that they are in front of. Now, what regulations or policies do you operate under as far as in front of is concerned?

A. Approximately within the lines or—Well, let's put it this way: We don't always know where the property lines of an individual come to or hit the low water shore line. Sometimes we do, sometimes we don't. And it's impossible, without a great deal of surveying and a lot of expense, to determine on the thread of the stream—where the owner's prop-
page 77 } erty lines would wind up on the thread of the stream. So naturally we only guess at the thing and come at it as an approximation.

Q. Do you take the property lines extended?

A. No. We realize that it is not a matter of extending the property lines from the shore in the same direction.

Mr. Hopper: Objection, Your Honor. This is opinion.

Mr. Hicks: I am only asking as to their—This is their policy, Your Honor.

The Court: The Court would allow this answer to be made.

Mr. Hopper: Your Honor, I respectfully note an exception, if it please the Court, and might I have some time to file a written objection?

Q. Mr. Yoder, you have been there twenty years in this particular phase of this work?

A. Yes.

Q. During that twenty years, has it been the policy that you do not, as far as you are concerned—as far as your de-

Sterling N. Yoder.

partment is concerned, take the property lines that are extended for in front of?

A. To be—I suppose you mean that the property line itself is not extended in the same direction?

page 78 } Q. Yes, sir.

A. Not necessarily.

Mr. Hopper: Excuse me, Your Honor.

The Court: The Court would like to ask one question after you gentlemen have finished.

Mr. Hopper: I would like to ask him again. I understood Mr. Yoder to say that they satisfy themselves that their permits are in front of the landowner's property.

RE-CROSS EXAMINATION.

By Mr. Hopper:

Q. Is that right, sir?

A. Yes, sir.

Mr. Hopper: All right, sir.

By the Court:

Q. Mr. Yoder, based on certain laws that certain laws are reserved for the state, is it not true that the Army Corps of Engineers by act of Congress is guided—has only navigation in mind when they consider the placing of piers? Is that not true, sir?

A. Basically, yes. That is true.

Q. You are only concerned with obstructing navigability?

A. We are concerned to this extent, otherwise.

page 79 } Our regulations, the regulations of the chief of engineers, which are promulgated by the chief of engineers to impliment the law, specifically says that we will not—care will be taken to see that a permit is not issued to an applicant when that applicant is not entitled by law to use the water.

Q. In other words, your branch takes no position that they have any control over the bottom, do they?

A. No, we do not control the bottom. No.

The Court: All right. Thank you. Any more questions, Mr. Hopper? Mr. Hicks?

Mr. Hopper: No, we don't.

Frank Erastus Miner.

The Court: All right, gentlemen. You may step aside.

(Witness stood aside)

Mr. Hicks: Mr. Miner.

page 80 } FRANK ERASTUS MINER,
having been duly sworn, upon being recalled by the respondent, testified further as follows:

DIRECT EXAMINATION.

By Mr. Hicks:

Q. Mr. Miner, I believe you have already been sworn and that you have made a survey of the property of Fishing Bay Yacht Club and specifically the line between Fishing Bay Yacht Club and Mrs. Edith Hancock?

A. Yes, sir.

Q. Mr. Miner, I hand you a plat and ask if you can identify that?

A. Yes, sir. I would say it is a copy made from a copy of a plat which I made for the Fishing Bay Yacht Club. The reason I say I consider it a possibly—probably a reproduction is that these lines here evidently represent where the original plat was folded. That is, the original blueprint.

Q. Are you familiar with that plat?

A. Yes, sir.

Q. Is that a correct copy of the plat of the property?

A. Yes, sir, it is.

Q. Mr. Miner, I would like to also ask you if you placed these red lines on that plat?

page 81 } A. No, sir, I did not.

Q. But have you at my request had occasion to take this plat with the red lines and do certain checking on the ground?

A. Yes, sir. I have verified the red lines at the Hancock-Yacht Club line.

Mr. Hicks: Your Honor, we would like to offer this as Defendant's Exhibit—

The Court: C.

Mr. Hicks: C.

Q. Mr. Miner, looking at Respondent's Exhibit C, and will you testify as to what is the course and distance of the

Frank Erastus Miner.

property lines shown on that between the Fishing Bay Yacht Club property and the property of Mrs. Edith Hancock?

A. Yes, sir. That portion of the side line runs north twenty degrees, twenty minutes east, two hundred eighty-five points. Fifty-eight feet.

Q. And, Mr. Miner, at what angle does this property line approach the mean low water line at the point between Mrs. Hancock and Fishing Bay Yacht Club?

A. On mean low water—of course before and after a northeaster would be two different things. But if you want the mean low water as of last Tuesday—

Q. Yes, sir, this past Tuesday of this week.

page 82 } A. Yes, sir. It crosses that line at, I would say, askew of eleven degrees. That is eleven degrees off the right angle.

Q. And what curvature of the shore is there at this point?

A. There is a bend in the shore, I would say, of—coming from Munce across Hancock and towards the yacht club bending to the right of approximately four degrees. In other words, I would say these red lines that someone has put on here represent what you might call a mean of where mean low water is.

Q. Mr. Miner, have you checked on the ground the red lines shown on that plat as to—and what does that represent on the ground?

A. First of all, finding out what was done here with the red lines, I perceived that they got the same bend of approximately four degrees that I did. That makes your angle this way one hundred eighty-four degrees. Bisecting the angle that way you would have ninety-two degrees.

Q. The angle this way? You mean in-shore it's one hundred eighty-four degrees?

A. This way of course it would be—

Q. One hundred seventy-six?

A. One hundred seventy-six, or bisecting that

page 83 } you would figure it out. Eighty-eight.

Q. Eighty-eight degrees?

A. Eighty-eight degrees from either line would be the bisector obviously misses the pier.

Q. That bisector line misses the pier?

A. Yes, sir.

Q. The pier is the pier as extended?

A. The pier as it appeared last Tuesday. It was clear of the pier then. Now, I could—

Frank Erastus Miner.

Q. That was checking it on the ground?
A. On the ground. Yes, sir.
Q. Approximately how many feet?
A. Scale misses, too, by fifteen feet. I had no means of measuring of course out in the water, so I have to do it by scale.
Q. But you have checked it on the ground?
A. I have checked it on the ground, and that angle does not hit the pier.
Q. Now, and I—Mr. Miner, I ask if you are familiar with the overall view of the general area looking from Fishing Bay in towards the shore line?
A. I have not seen an aircraft photo of it before, but I would recognize this as a pier and this as Mrs. Hancock's house, that line of bushes as approximately the property
page 84 } line, and the pier over on Jackson Creek.

(Photograph exhibited to complainant's counsel)

Mr. Hicks: I am going to ask him in his opinion if this represents the true view.

Q. Mr. Miner, I hand you a color photograph and, before I introduce it, ask you if you can recognize what that depicts and whether that—What does that depict to your view?
A. Well, it's an airplane photo of a portion of Stove Point.
Q. And what particular portion?
A. It shows the—apparently shows the Hancock residence, the yacht club, and what I assume to be Mr. Stull's stables over here.
Q. Mr. Miner, does that picture represent a true picture of that immediate area?
A. I am sorry, photography is one branch of surveying I haven't gotten into. So I can't testify as to possible distortions, as you said yourself, from an angle at which a picture is taken. But in that respect, as a layman, I would say it's a very good picture.
Q. Of this area?
A. Yes, sir.

Mr. Hicks: We would like to offer this as—
page 85 } The Court: D.
Mr. Hicks: Respondent's Exhibit D.

Frank Erastus Miner.

Q. Mr. *Hancock,* from what position is that picture? What does this show looking in—Which direction are you looking when you look into that picture?

A. This line is northeast. I would say we are looking approximately east, but I would not—No, hold it. Yes, you would be approximately east.

Q. And do you see a certain projection out into the water there?

A. Yes, I do.

Q. And what is that?

A. That is the Fishing Bay Yacht Club pier, the original pier and the additions, more or less.

Q. Fishing Bay Yacht Club pier with the extensions as it exists today?

A. I would—I would judge that it is, but I don't know. I'm curious about when this picture was taken, because this road here—if this is that—has been altered. There has been some dredging in here, which I can see. Whether or not this road here still exists or not, I don't know. It looks like—and I cannot swear that it is—approximately where the road was before. However, I do not recognize this land mass over here at all, and I also think you ought to be able to see across Jackson Creek.

page 86 } Q. So you are—

A. That, sir, I cannot be positive about anything there.

Mr. Hicks: I have no further questions. Your witness.

CROSS EXAMINATION.

By Mr. Hopper:

Q. Mr. Miner—

Mr. Hopper: Flip, before you hand that over there, may I see it?

(Paper tendered to complainant's counsel)

Q. This plat here with the red lines on it, you were directed to put these lines on here?

A. No, sir, I did not. I was not so directed, and I did not do it.

Frank Erastus Miner.

Q. You did not do it? You say that you checked the lines as drawn on the plat on the ground, though?

A. I checked them as drawn on the ground.

Q. Did you check them just to see if where they were drawn on the plat was correct?

A. I can tell you what—my procedure there. I was a—

Q. Yes, sir.

A. I was aware of the bearing of this line, which page 87 } is the property line produced.

Q. Yes, sir.

A. Now, these red lines are not shown with bearings or angles or anything of that kind. They are purely scaled. So with the transit at Station East here and sighting down the property line—I could determine by scale, at least, where this bisector line went, and sighting down the bisector line, naturally it missed the pier.

Q. Well, Mr. Miner, this plat was given to you to check the accuracy of the lines that were drawn on it, is that correct?

A. As I understand it, my instructions were to see if the —one, if that bisector line—this line here—missed the pier, and two, to see if these lines here representing low—an average of low water were approximately correct.

Q. You don't know why the lines were drawn on the plat?

A. I have no idea what their significance is at all.

Q. Thank you, sir. Mr. Miner, you testified the shore line would vary as various winds blew—northeast or southeast or what have you. And looking at Respondent's Exhibit D, with particular emphasis on the shore line, does page 88 } the shore line look approximately the same now as it did when this picture was taken?

A. I would say it looks somewhat like this. There are things that I would expect to see in that area that I don't, but I am assuming that this is a photograph of that area. That obviously is a pier which is extended in both directions.

Q. Yes, sir.

A. And this obviously is a short L-head of another pier which I know to be over in that direction and coming out at about that angle. This also shows, I would say, approximately a very slight bend in the short line, taking the line from this, which I assume is the Fishing Bay corner, past the boat sheds, bending at the Hancock corner and coming back this way. In other words, the lines—that is about all the variation there

Frank Erastus Miner.

is in the shore line from the Munce-Hancock line to the Fishing Bay-Stull line.

Q. Yes, sir. You said you drew the original plat that this Respondent's Exhibit C—that this is a copy of the plat, is that right, sir?

A. Yes, sir.

Q. And you drew this entire thing at the request of Fishing Bay Yacht Club?

A. Yes, sir.

page 89 } Q. Mr. Miner, I direct your attention to it. Would you point out or scale, if you would, what frontage is shown on Jackson Creek back here?

A. I would say they have about one hundred seventy feet.

Q. Mr. Miner, have the property lines changed any since you made this plat of your knowledge?

A. I have been engaged since this plat was made to make two plats for a proposed exchange of land between—I believe it's John Hancock, on this side of the property, and a lady I believe named Richardson, who owns this portion here. Now, as to whether that has been consummated or not, I don't know. I have made the surveys and have been paid for it, and that is all I know about it.

Mr. Hicks: Your Honor, I hate to keep interrupting, but it seems to me that anything relating to Jackson Creek, which is an entirely separate body of water, is immaterial in this case before Your Honor today.

The Court: Mr. Hicks, I believe you introduced this exhibit, did you not?

Mr. Hicks: Yes, sir.

The Court: And it shows on this exhibit Jackson Creek?

page 90 } Mr. Hicks: Yes, sir. But as far as what property owners are planning on doing back there—

The Court: Well, the Court sustains the objection as to what has been done or plans to be done; but what is shown on that exhibit, this gentleman is entitled to testify to.

Mr. Hopper: Yes, sir.

Q. Now, Mr. Miner, let me direct your attention to this part. I thought I heard you testify a while ago that Mrs. Hancock's lines were parallel and that the Fishing Bay Yacht Club's property lines were parallel and all of them were parallel to Stull, who is the owenr on—

Eugene Ruark.

A. That is correct. Stull is the owner on the east.

Q. Does that line look parallel to you?

A. No, sir. I have no idea what that line represents, nor does this one look parallel. And I don't know what it represents.

Q. Yes, sir.

A. This definitely does not represent the Munce-Hancock line.

Q. All right, sir.

A. Because Mrs. Hancock's side lines are parallel, as I testified before.

Q. Yes, sir.

A. And at a distance of two hundred eighty feet
page 91 } from this line.

Q. Yes, sir.

Mr. Hopper: I don't have any more questions. Mr. Hicks?

Mr. Hicks: I have no further questions.

(Witness Stood Aside)

EUGENE RUARK,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hicks:

Q. Mr. Ruark, will you please state your name, place of residence and occupation?

A. Eugene Ruark, Deltaville, Virginia, County of Middlesex, marina and railway operator.

Q. Mr. Ruark, how long have you been operating your marina and railway?

A. Ten, fifteen years.

Q. Whereabouts is this located?

page 92 } A. In Fishing Bay.

Q. On Fishing Bay?

A. On Fishing Bay.

Q. Mr. Ruark, where is it in relationship to—Are you familiar with the location of The Fishing Bay Yacht Club?

A. Yes, sir.

Q. Are you familiar with the residence of Mrs. Edith Hancock?

A. Yes, sir.

Eugene Ruark.

Q. Where is your railway and marina in relation to this property?

A. I am to the west of Mrs. Hancock about, well, maybe a thousand yards, twelve hundred yards, something like that.

Q. What is the condition of the—What comprises Fishing Bay on that side of the bay? What comprises the shore line of Fishing Bay?

A. It's a little gradual curve from my place right on around to Mrs. Hancock's. It looks like a horseshoe curving around. She is on one end and I'm on the other.

Q. Right down to Stove Point, isn't it?

A. Yes, sir.

page 93 } Q. And, Mr. Ruark, are you familiar with the number of boats that the members of Fishing Bay Yacht Club own?

A. Yes, sir. I would say they have between one hundred forty, one hundred fifty, one hundred sixty, altogether—large boats and small.

Q. And. Mr. Ruark, were you familiar with the Fishing Bay Yacht Club pier before an extension was made in 1962—the size of it?

A. Yes, sir.

Q. And are you familiar with the pier since the extension has been made in 1962?

A. Yes, sir.

Q. Mr. Ruark, was it an adequate pier, in your opinion, to handle the number of boats that were attempting to use it before the extension was made in 1962?

A. I wouldn't say it was. It had been growing very fast in the last eight or ten years, thereabouts.

Q. And at the present time, is the pier larger than is needed for the number of boats that are there using it?

Mr. Hopper: I am going to have to object to this opinion testimony. I don't see that it's relevant at all.

page 94 } Mr. Hicks: Your Honor, the statute says the question about a pier is whether it's reasonable or not. And I think as a—

The Court: The Court would allow this gentleman—

Mr. Hicks: —marina operator there on the bay—

The Court: —to answer the question.

A. I don't think it's big enough, to be frank about it and

truthful, the way the club is expanding and picking up. I mean membership. On several days in the summer they have, I guess, two or three hundred boats there landing on the shore and landing everywhere on those particular days.

Q. Mr.—

A. I imagine it's about four hundred, four hundred fifty members there.

Q. Mr. Ruark, are you familiar with the depth of the water at mean low tide at the approximate end of the pier?

A. Oh, I would say mean low probably six feet, run from six to ten feet probably, depending on the wind. Westerly winds blow it all out, not too much water there. About six feet, I would say.

Q. And does this pier extend out any further than is necessary in order to adequately afford access?

page 95 } A. I don't think so. No, sir. The smaller boats— It's a lot of large boats can't get behind this pier. It's right on the edge of the deep, I would say. The bottom goes down from the sand.

Mr. Hicks: No further questions.

CROSS EXAMINATION.

By Mr. Hopper:

Q. Mr. Ruark, have you ever sounded out there around the pier?

A. No, sir.

Q. What do you base your depth on, sir?

A. I happened to be there this morning, Mr. Hopper, and you could see the bottom very plainly near the dock.

Q. You could see very plainly.

A. And I estimated the depth.

Q. You estimated it?

A. Yes, sir.

Q. All right. Mr. Ruark, tell us, do any oysters grow in Fishing Bay?

A. Yes, sir.

Q. They do: Do you have any oyster shore yourself?

A. Yes, sir.

page 96 } Q. How much do you have, sir?

A. Well, about an acre and two thirds. Less than two acres.

Q. Do oysters grow on your shore?

Eugene Ruark.

A. Yes, sir.
Q. Do you have to plant them?
A. I haven't planted any there, but it has been quite a few shells years ago planted on this property, and we have been oystering from them since. They strike. It's a very good strike on my shore.
Q. A natural strike?
A. Yes, sir.
Q. Would there be other oysters out in Fishing Bay around?
A. Very few, I would say, from the edge of the deep. If you go out one hundred feet, one hundred fifty feet, any way, you hit soft mud. It's none from there all over Fishing Bay. But it is a hard layer of shore line and oyster bottom, I would call it, all around the whole Fishing Bay.
Q. All around the whole Fishing Bay?
A. Yes, sir.
Q. Mr. Ruark, you say you have an acre and how much?
A. Something under an acre—something under
page 97 } two acres. Not quite two acres.
Q. Do you have any riparian ground assigned to you by the Commission of Fisheries in Fishing Bay?
A. Yes, sir.
Q. What is the purpose of your riparian ground?
A. Well, I have always heard if you had—

Mr. Hicks: Your Honor. I object as to what the purpose of the riparian ground is. If he has riparian ground assigned to him he can testify what he actually uses it for. When he asks what the purpose is he is asking for a conclusion.
The Court: The Court will sustain the objection.

Q. Mr. Ruark, what do you use yours for?
A. I don't do anything with mine. I have two railways running over it. I bought a half-acre from the state, and they assigned me a half-acre of riparian in front of it.
Q. And the railway is over top of it?
A. Yes, sir.
Q. Do any oysters grow under it?
A. No, sir, not on that.
Q. Have you ever seen anybody seeding oysters
page 98 } in Fishing Bay?
A. No, sir, I haven't.
Q. It's just a natural strike?
A. Yes, sir.

Eugene Ruark.

Q. All right. Now, let's see. Are you a member of Fishing Bay Yacht Club?
A. No, sir.
Q. Do you know what their enrollment is?
A. I have heard.
Q. Do you actually know?
A. No, sir, I don't know.

Mr. Hopper: All right, sir. I don't have any more questions.

RE-DIRECT EXAMINATION

By Mr. Hicks:
Q. Mr. Ruark, just one question. Along the shore of Fishing Bay Yacht Club and the Hancock property, along in there, what kind of bottom is it?
A. Well, I would say at least seventy-five or hundred feet it's just hard oyster bottom all around Fishing Bay.
Q. I mean starting at mean low water coming out.
A. At mean low water it's hard sand beach, oh,
page 99 } one hundred fifty, two hundred feet before you hit this oyster shore.
Q. It's sand beach?
A. Hard sand from the low water out to the edge of the deep.
Q. Edge of the deep?
A. That's right.
Q. In that area, is it suitable for oysters?
A. No, sir. Just sand there. From the dead low out that far, I would say the oysters are there from beyond the edge of the deep.
Q. What do you mean by the edge of the deep?
A. Well, that is where the water starts to go down, gets six to some places eight, fifteen, eighteen feet after you get over the hard sand beach.

Mr. Hicks: No further questions.
The Court: The Court would like to ask Mr. Ruark one question, since he's a neighbor and also qualified as an expert.

By the Court:
Q. How far out from the shore in relation to the wharf does navigability begin?

Eugene Ruark.

A. Well, from the pierheads of the wharves in there, it's navigable from the pierheads out. The pierheads usually go to the edge of the deep, I call it. I would say page 100 } seven to eight feet to ten feet, depending upon the tide. It's navigable all out from there. Those wharves have to run out to the edge to have any water to tie boats with a deep draft.

The Court: Thank you, sir.
Mr. Hopper: No more questions.

RE-REDIRECT EXAMINATION.

By Mr. Hicks:
Q. Mr. Ruark, as I understand it, you say this Fishing Bay pierhead goes out to that edge of the deep water?
A. Yes, sir.
Q. In your opinion, does it go beyond that?
A. No, sir. It goes to the edge of the deep. On the inside you can look at it like that and you can see it get a little shallower. The wharf is about six feet wide, and on the inshore side you can look at it and notice where it varies a little. It goes down in six feet, I would say, about a foot.
Q. So it goes to the edge of the deep and that is as far as it goes?
A. To the edge of the deep.

By the Court:
Q. You are speaking, Mr. Ruark, of the long pier extended, not—when you reach navigability by the pier page 101 } before the extension was added.
A. Well, the pier—the extension is even with the end of the pier. One runs east and one runs west. I imagine the pier is right in the center of it.

The Court: Thank you, sir.

(Witness Stood Aside)

The Court: All right, gentlemen at the bar, it's now approximately five minutes to 1:00. We will adjourn for lunch until 2:00 o'clock.

Note: At this point a luncheon recess was had. Thereupon, the hearing continued as follows:

Allan Hicks.

The Court: All right, gentlemen at the bar, we are ready to proceed.

Mr. Hicks: Mr. Allan Hicks.

page 102 } ALLAN HICKS,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hicks:

Q. Mr. Hicks, please state your name, residence, and occupation.

A. Allan Hicks, Gloucester, Virginia—Dutton, Virginia, I guess it is. I operate a farm, a nursery.

Q. Mr. Hicks, are you in any way connected with Fishing Bay Yacht Club?

A. I have been a member about—I guess ten or twelve years.

Q. Mr. Hicks, what was your capacity, if any, with Fishing Bay Yacht Club in the period of March to—through July of 1962?

A. I don't remember what capacity I had, but I was appointed to look after the building and a new dock on Fishing Bay. Hurricanes had damaged it one time.

Q. You were appointed to look after it on behalf of the club?

A. Right.

Q. The building and the—

A. Pier. Addition to the pier.

Q. Addition to the pier?

page 103 } A. (Witness nodding head)

Q. Mr. Hicks, in that capacity, did you have occasion to talk to Mrs. Edith Hancock about this?

A. Yes, I saw her—she and Mr. Hancock several times when the dock was being constructed, and I do remember in particular they came down one morning not very long after it had been started. They were working on the east—westward side, which is towards Mr. Hancock's property. And there was some discussion in there that things didn't seem to be quite satisfactory, and I suggested to the builder if he would mind moving over and working on the eastern side of the dock for a few days until we could talk things over a little bit and see how things turned out.

Q. Mr. Hicks, when was the dock actually constructed?

Allan Hicks.

A. Well, the exact date I couldn't be positive.
Q. It was in the year 1962?
A. Right.
Q. What time during that year?
A. Late spring—early summer.
Q. Late spring—early summer?
A. (Witness nodding head)
Q. Approximately how long did it take to construct the dock?

A. Oh, I think it got held up there once maybe
page 104 } two weeks, something like that, would be a guess.

Q. Mr. Hicks, are you familiar with the number of boats owned by members of the Fishing Bay Yacht Club—approximate number?
A. Oh, yes. The registration of the yachts—They have a registrar there that will tell you exactly how many there were, but there must be thirty or forty small boats or more. I don't know how many—It's more than that, I expect. And then they have your big boats, too, which must be at least that many.
Q. Mr. Hicks, during the year 1962 and the years since that time, how often do you go to Fishing Bay Yacht Club?
A. Well, I think that I have been on the race committee now three years. Maybe it's the fourth year. I'm not sure. And I have been there practically every week end for the sailing.
Q. And how many boats regularly use this dock on the Fishing Bay side?
A. You mean for pleasure and sailing?
Q. Yes, sir.
A. You mean come—
Q. How many boats use it regularly.
A. Some of them don't always race, but they are there. They sail.

page 105 } Q. Yes, sir. I mean regularly use it.

A. Well, I would say twenty-five or thirty, something like that. Just a guess.
Q. Twenty-five or thirty regularly use it?
A. Well, sometimes more, sometimes less. A bad week end it would be very little using it.
Q. Because of bad weather?
A. Raining, storming or something.
Q. Do you have any special events at Fishing Bay Yacht Club?
A. Three or four times a year, I think, maybe six or eight

times, a Fishing Bay Regatta, then they have the regionals, some of the smaller classes. They bring in quite a few boats, and quite a bit of sailing at that time, too.

Q. How many boats during those special events would use this dock?

A. Well, on big regattas I imagine pretty close to a hundred, or in that neighborhood.

Q. Mr. Hicks, does Fishing Bay—

A. Excuse me. They can't all use this. All use it that can get on it. They can't all get on it.

Q. You have more boats than can actually—

A. Yes, sir, that's right. Ten times as many—five times as many.

page 106 } Q. Mr. Hicks, does Fishing Bay Yacht Club have any other property fronting on Fishing Bay?

A. Fronting on Fishing Bay side?

Q. Yes, sir.

A. No, sir.

Q. Now, does it have any property on the Jackson Creek side?

A. Right.

Q. How far is it by water down to Jackson Creek from Fishing Bay?

A. I think it's as much as three and a half, four miles.

Q. And to get from the Jackson Creek side around to Fishing Bay, how do you have to go?

A. From Jackson Creek?

Q. Yes, sir.

A. You have got to go out through Jackson Creek around through the Chesapeake and come around Stove Point.

Q. Through the Chesapeake?

A. That's right. You are in the Chesapeake Bay more than half the way.

Q. Now, Mr. Hicks, you have two general types of boats that belong to members of Fishing Bay, aren't there? Don't you have two general categories?

page 107 } A. Well, if you mean cruising class and larger boats, then small sailboats. Is that what you mean?

Q. Yes, sir.

A. We do.

Q. And where do the smaller sailboats sail?

A. Well, all the small boats that I have ever seen, they would have to use the Fishing Bay side.

Q. Why is that?

Allan Hicks.

A. Well, they have access to the water they can sail in. If they are on the other side, they would have a time to get out of the creek, and after they got out of there—I mean it's kind of rough out there.

Q. In the bay itself?

A. Might go out there once in a while, but really the place to sail from for a small boat is on—That is what it was built for, and they reserved it. In fact, they had a fight over it.

Q. Is that what the dock was built for on the Fishing Bay side?

A. That's correct.

Q. Is there any dockage space there for small boats now?

A. Well, not when they—Well, it's—anytime there is any group of boats down there on active week ends, it's very rarely enough room to tie up at the pier. A lot
page 108 } of them go on shore. Not a lot of them; some of them do. Some of the men who are strong and if it isn't blowing too hard or the wind isn't blowing north, they will go to shore. But if there is a southwest wind off shore, then they all tie up at the dock that can get down to the pier. Of course you should allow ten feet between boats so they won't be whamming each other. So there isn't so much room there for boats anyway.

Q. Mr. Hicks, were you there when the dock—the extension to the dock was actually constructed?

A. Yes, indeed. I was there the day it started. I mean, they had some trouble with the dock before. Apparently there were no specifications how deep the pilings were going to be.

Q. And you have been there numerous times—on this dock numerous times since it has been built?

A. Practically every week end in the summer.

Q. What is the condition of the bottom right where the dock is?

A. You mean the pier that goes off, or the pierhead?

Q. Well, the pierhead itself.

A. What is the condition of the bottom?

Q. Yes, sir.

A. It's mostly sand.

page 109 } Q. Mostly sand?

A. (Witness nodding head)

Q. And at the time the dock was built, did you run into any oysters there where the dock was being built?

A. No, sir. And the reason I came up is because they

couldn't drive the pilings in because of the sand. When they put them in, they pumped them down into the sand.

Q. Pumped them?

A. You can't drive a piling through sand.

Q. And the bottom right there is sand?

A. That's right.

Mr. Hicks: Your witness, Mr. Hopper.

CROSS EXAMINATION.

By Mr. Hopper:

Q. Mr. Hicks, do you remember when the pilings for the pier were brought down to Fishing Bay Yacht Club?

A. Well, I couldn't tell you the exact date. No, sir.

Q. Well, was it summer, or spring, or winter?

A. Well, it was prior to the time the dock was constructed.

Q. How much prior, sir?

A. You know, you really got me on that one.

page 110 } Q. Well, I don't want to pin you down. Just estimate. Was it a month or—

A. I would say a week or month, something like that. Just guessing at it.

Q. Week or month?

A. Just guessing at it.

Q. Now, you say it was about three and a half miles from the Jackson Creek dock around to the front dock of Fishing Bay?

A. As a guess.

Q. Yes, sir. Could you tell us how far it is from the pier if you would get off the boat and walk to the clubhouse from the Jackson Creek dock?

A. Get off where?

Q. Get off a boat at the Jackson Creek pier and walk to the clubhouse.

A. Jackson Creek to the clubhouse?

Q. Yes.

A. Oh, the pier is about—I guess the pierhead is—pierhead must be two hundred fifty feet long to the shore, and perhaps it's that much further to the clubhouse. Guessing at that.

Q. Yes, sir. You said there weren't any small boats being operated on the Jackson Creek dock, is that right?

Allan Hicks.

A. I think there might be an outboard motor-
page 111 } boat tied up, no sail boats. I'm not speaking of motorboats. I'm speaking of sailboats.

Q. Yes, sir, I understand. You said the small boats would have trouble getting out of Jackson Creek. Why would a small boat have trouble getting in and out of Jackson Creek if the large ones don't? I'm confused.

A. That's right. You must ask these questions. The small boats have motors, but sailboats do not have any motors and the channel is narrow, and to get out of that place is difficult. You make an elbow. The channel is about thirty feet, and they pile up on the shore if they are not careful about the crossing. But with the little motor on them they can go on out.

Q. When they tie up their boats to a dock, either on the front—well, let's take on the Fishing Bay side, do they ever anchor the boats by the dock? Do they tie them to the dock and anchor the boats?

A. I don't quite understand what you mean by your question.

Q. You testified you have to tie them ten feet apart so they won't wham into each other. Do they not drop anchors when they tie up at the pier?

A. When they have a regatta and are there all night. But when they come in after a race—you have a series of three or four races—come in to have lunch, come in to
page 112 } rest, they tie their bow and hardly ever throw an anchor out. Not if the wind is on the shore.

Q. Do you know how many boats actually use the Jackson Creek dock?

A. You mean how many berth there?

Q. How many boats can tie up there on a regatta week end.

A. On Jackson Creek?

Q. Yes, sir.

A. You talking about cruising boats?

Q. Any kind of boat that is there, sir.

A. They have slips over there, and the record will show how many slips there are. But I would say—I would say ten slips on the side. That would be twenty slips. Maybe it's more, maybe it's less. I'm just guessing at it. And those slips, you can get in that slip, but you can't get but one boat in there because, you see, catwalks are on both sides.

Q. How about the end of the pier?

A. One boat can tie on the end of the pier if she's not any

length. If she projects out beyond both sides—But you might get another boat on the T. At least, I didn't notice it the last time I looked at it.

Q. You said you're kind of the superviser of the building, you said hurricanes kind of damaged the out
page 113 } buildings, and you see that everything is secured down properly?

A. That's correct.

Q. And you are not sure when the pilings were brought down to the work before the actual construction started?

A. I would not like to say. Detail like that almost slips you.

Q. Yes, sir. Yes, sir.

Mr. Hopper: I have no more questions.

Mr. Hicks: Thank you, Mr. Hicks.

(Witness Stood Aside)

page 114 } WILLIAM C. B. ROBERTS,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hicks:

Q. Please state your name and residence to the Court.

A. William C. B. Roberts, Deltaville, Virginia.

Q. Mr. Roberts, what is your occupation?

A. I'm steward for the Fishing Bay Yacht Club.

Q. You are steward for Fishing Bay Yacht Club?

A. (Witness nodding head)

Q. Mr. Roberts, how long have you been connected with Fishing Bay Yacht Club?

A. Just before they opened in 1949.

Q. You have been there with them since 1949?

A. Since it was established. Yes, sir.

Q. Mr. Roberts, where do you actually live in relation to Fishing Bay Yacht Club?

A. Where do I actually live?

Q. Where do you live in relation to the Fishing Bay Yacht Club? How far from it?

A. Well, I live about a mile and a half. I live on Fishing Bay.

Q. You live on Fishing Bay?

William C. B. Roberts.

A. I guess you would call it. On the Piankatank
page 115 } River.

Q. How often do you go to the Fishing Bay Yacht Club?

A. Every day.

Q. Every day?

A. Just about.

Q. And have you been doing this since 1949?

A. Sixteen years. Yes.

Q. Is that one of your primary duties as steward?

A. Is to look after the boats.

Q. Look after the boats and the property?

A. Keep the place up.

Q. Mr. Roberts, do you know Mrs. Edith Hancock, the plaintiff in this case?

A. Yes, sir.

Q. Where does she live?

A. She lives adjoining the yacht club on the west side.

Q. And how long has she lived there?

A. I think it's been since she first moved here in '57 or '58. I'm not too sure.

Q. Mr. Roberts, are you familiar with the location of the yacht club dock on the Fishing Bay side?

A. Yes, sir.

page 116 } Q. And are you familiar with the condition of the bottom where the end of the pier runs?

A. Well, it's complete sand bottom filling up there. But it's sand all the way through.

Q. Sand bottom at the end of the pier?

A. Yeah.

Q. Coming from the end of the pier in shore, what is the condition of the bottom from the end of the pier into the low water line?

A. Well, I would say about thirty feet from the north side —that is the in-shore side of the dock—about thirty feet away from that dock you come up on a sand bar, and then it's sand all the way to shore. But about thirty feet it drops down. It's about five feet of water there on the north side of the dock, then on the south side it would average about seven feet of depth.

Q. Mr. Roberts, in the time that you have been there since 1949, how many oysters have you seen of your own knowledge do you know have been taken from the bottom from the low water mark out to the end of the out-shore line of the pier?

William C. B. Roberts.

A. Well, I tell you, that is hard to say. As far as I am concerned, I never actually saw any come off the bottom on the in-shore side of the dock; but on the outside, during the winter there when the weather is rough, oystermen page 117 } come in and oyster from the dock on out.

Q. How about in shore from the dock?

A. Oh, there is nothing in there. In other words, there is nothing up there to oyster.

Q. There are no oysters from the dock in shore in your opinion?

A. No.

Q. To your knowledge?

A. No. In fact, the water is too shallow for them to oyster in. Have to get them in a skiff. Out to the end of the dock at the most it's five feet.

Q. Mr. Roberts, have you ever gotten oysters for Mrs. Hancock?

A. Well, I get Mrs. Hancock some oysters from time to time. Not in the last couple of years, because oysters died a lot. And various years oysters given to Mrs. Hancock to eat them, I would get them from my own cove or Jackson Creek.

Q. Have you ever been able to get any oysters there on the Fishing Bay side?

A. I never tried.

Mr. Hicks: No further questions. Your witness, Mr. Hopper.

page 118 } CROSS EXAMINATION.

By Mr. Hopper:

Q. Mr. Roberts, have you ever tried to tong any oysters out there by the pier?

A. Nope. I don't tong oysters.

Q. You don't tong them?

A. I don't bother those oysters.

Q. Do you own a boat?

A. No.

Q. Or have access to one where you could get oysters off the bottom?

A. No.

Q. Now, Mr. Roberts, you said the bottom was filling in, and did I understand you correctly to say that thirty feet out from the dock it drops down to about five feet of water?

Patrick A. Gibson.

A. From the north side. That is on the in-shore side of the dock.

Q. Walking out towards the end of the dock?

A. No, walking in to shore.

Q. Walking in to the shore. Oh, I'm sorry. I understand you. So coming in to shore it drops down at about thirty feet to five feet of water in there?

A. After you get on the bar it runs about two and a half to three feet on low water.

Q. Yes, sir.

page 119 } Mr. Hopper: I don't have any more questions, Mr. Roberts.

(Witness Stood Aside)

Mr. Hicks: Mr. Gibson.
Mr. Gibson: I withdraw as counsel, Your Honor.
The Court: Have you been sworn?
Mr. Gibson: Yes, sir.

page 120 } PATRICK A. GIBSON,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hicks:

Q. Mr. Gibson, please state your name, residence, and occupation.

A. Patrick A. Gibson, 104 College Road, Richmond, Virginia. I'm an attorney.

Q. Mr. Gibson, are you a member of Fishing Bay Yacht Club?

A. Yes, I have been for a long time.

Q. How long have you been a member?

A. Well, I was a charter member in the formation of the club in 1939. I believe—I don't know whether my membership was carried on the books in my absence between '41 and '45 or not, but as soon as I got back to Richmond in '45 I was back in the club and have been since.

Q. Now, when you first joined the club, what was its official name?

A. Urbanna Sailing Association, and shortly became Urbanna Yacht Club.

Patrick A. Gibson.

Q. When did this change to the Fishing Bay Yacht Club?
A. In 1949.

Q. What transpired at that time as to—

page 121 } A. In the year 1948—we had until then been operating our activities, first in '38, in Sarah's Creek near Yorktown. We found the tides were too strong there for small sailboat racing and moved to Urbanna. By 1948 all the shores around Urbanna were simply pre-empted. We ran out of land. We appointed a site committee to make a systematic investigation around tidal waters within a range of fifty to a hundred miles from Richmond, which was the base or the home of most of the members, and we picked Fishing Bay as ideal. We negotiated with the owner of most of the property on Stove Point, including the then yacht club property, and acquired it by deed—acquired the yacht club site by deed of December 31, 1948. I promptly began construction of the original building, and which we have added to gradually through the years, and the two docks—Jackson Creek and Fishing Bay.

Q. Mr. Gibson, when was the original dock built on the Fishing Bay side?
A. 1949.
Q. And what was the size of that dock?
A. I think I recall that the length of it was one hundred eighty feet. We had a permit for a longer one, but it's quite expensive to go beyond the one hundred eighty feet, because at that point the depth of water drops down so you have to get much longer and more expensive pilings to

page 122 } build out into the deep water. So we built a practical length, and the original dock had an L on it to the west.

Q. Approximately how long was this L?
A. I think it was twenty odd feet. I don't recall exactly.
Q. Mr. Gibson, was an extension made to this dock in 1962?
A. Yes, it was.
Q. And were you a member of the club continuously from 1949, when the first dock was built?
A. From '45 and from '49 both. Yes.
Q. Up until 1962?
A. Yes.
Q. And what had transpired as far as membership and ownership of boats by—concerning Fishing Bay Yacht Club—in that period of time?
A. Well, when we first moved down in 1949 we had what

Patrick A. Gibson.

might appear on paper to be at that time a pretty large class of—large fleet of small boats, but in fact there were not very many that were active. Our largest individual class was a so-called Handicap Class, consisting of all different kinds. Each boat was a different kind of boat, and there was no very satisfactory way that they could compete together, never got a satisfactory time allowance for the entirely different small boats.

page 123 } Gradually during the years one-design classes developed. I think the first of—the first one-design class to develop any number in Fishing Bay was the Penguin Class, which was, as a matter of fact, created over night or during the winter by all men who came back from the war and had no way to get out sailing again. They started a community project and during the winter they turned out seventeen penguins. And so at the beginning of the year 1948 we had a fleet in Urbanna of fifteen, sixteen, seventeen penguins.

In the '50's, the one-design planing type of boat developed first in the jolly boats, and I believe that was about 1957 or '58, and we got a jolly boat fleet established in Fishing Bay. And that was followed very shortly afterwards by similar small one-design planing type of boat, the mobjack, which is built in Gloucester County at the Mobjack Boat Corporation. And that developed as a very active fleet.

Meanwhile, the fairly large collection of miscellaneous boats in the Handicap Class that we had had on paper at Urbanna had rather melted away and had never been active as a fleet. And what we had as a snipe fleet before the war, that had gone. That went with the war. And during the '50's the Hampton Class fell off. But these two—three new fleets, then after that catamarans began coming and sailfish,

page 124 } and that type.

So we did have a rapid rate of development during the late '50's of the small one-design boats that race in Fishing Bay on the Fishing Bay side of this dock—club, which the course now really now occupies the peninsula lying between Fishing Bay and Jackson Creek and the Piankatank River.

Q. Mr. Gibson, from 1962 up to the present, how many boats regularly use the dock on the Fishing Bay side?

A. Well, I should think that on an active club series racing date there would be some twenty to thirty either actively racing or just sailing on the week end.

Patrick A. Gibson.

Q. But regularly use the dock?

A. And there would in addition be from time to time one of the cruising—one of the boats of the cruising fleet touching base at the dock and then leaving, coming in and out.

Q. And this is just on a regular week end during the yachting season?

A. On regular series dates. Sometimes a series is not scheduled on a given date because there will be a lower bay regatta and those sailing will be lower in number.

Q. Does Fishing Bay have any special events during the yachting season?

page 125 } A. It has its own large annual regatta. It rotates with other clubs for the Virginia Sailing Regatta. It has quite frequently the competition for a Chesapeake Bay Championship and given classes, such as the Junior Championship or Lady's Championship, or it may hold the Regional Championship in given years for such as jollies or mobjacks.

Q. How many of these special events would there be during a year's time?

A. I would say there would be three to five for the small boats, and then also there might be two to four special events in the Cruising Class, which would give that class occasional reason to be touching on the Fishing Bay side in fleet just to come ashore for lunch, dinner, or something.

Q. And how many boats would use the dock on these special events on the Fishing Bay side?

A. Anywhere from forty to a hundred.

Q. Mr. Gibson, as the dock was originally constructed and existed prior to 1962, could it handle these boats?

A. Well, it certainly was not adequate as it existed before 1962. It would mean more people might have to spill over on Mrs. Hancock's beach, whether they had any right to do it, or on Mr. Stull's beach, or they would just bump into

page 126 } each other tied up along the length of the dock. The difficulty about bringing many of the small boats in shore from the T end is that it's quite shallow, and sometimes at very low tide you have hardly over six or eight inches for one hundred fifty feet from shore out along the—along the dock itself. And you cannot handle a small sailboat in any fresh breeze without enough water to get your rudder down and sun blade. So you really have a great need for space to tie up out in deep water where you can operate.

Q. Mr. Gibson, do you have any excess of dockage at the present time?

Patrick A. Gibson.

A. We certainly do not. If we had not put that addition on that we did, we would be terrifically cramped now. Really, we couldn't operate any way. We—I don't believe we actually foresaw the tremendous expansion in the cruising fleet, in addition, which also makes some use of this dock.

I might point this out for the Court. The Court may be familiar with the fact that the Fishing Bay dock is not used for permanent storage of any of the boats either large or small, and all of the small boat racing classes nowadays are hauled out of the water to dry the sails, and that keeps the bottom from fowling up from barnacles and seaweed and that stuff. Makes them faster. And if it happens page 127 } to be a wood boat rather than glass, it keeps it from taking up excess weight by leaving it in the water. And besides, the Fishing Bay side is far too exposed to leave a boat tied up there in any case. So they take them all up out of the water on trailers and leave them in the yards or on the trailers between week ends.

Q. Mr. Gibson, how far is it around from the Jackson Creek side of your property to the Fishing Bay side of your property by water?

A. As Mr. Hicks said, I think it's about—I would think about three and a half miles. It's a full three and a half if you have to go around Stove Point bar, which is nearly a mile to the south—southeast of Stove Point itself.

Q. Where do your small boats that belong to members of the Fishing Bay Yacht Club regularly sail?

A. They sail in the sheltered water of the mouth of the Piankatank, which is an ideal area for that activity. It is wide enough and has great enough east-west depth to make an ideal race course. And then, any number of arrangements of ideal race courses can be made according to the wind direction, and at the same time it has protection from the heavy seas of the Chesapeake by the protection afforded by the length of Stove Point, which itself is about a mile and a quarter long. And then immediately on out in the page 128 } Chesapeake below that is Gwynn's Island, and then converging with Mathews County. So there is a perfect natural basin about two miles north and south and four or five miles east and west for small boat sail racing.

Q. Mr. Gibson, are you familiar with when Mrs. Hancock purchased the property adjacent to Fishing Bay Yacht Club?

A. Well, I recall the date of the deed as 1955. I don't recall more than that.

Patrick A. Gibson.

Q. And was the yacht club in existence and in use at that time?

A. In very active use. Yes, It was active from the very first season that it moved there in 1949.

Mr. Hicks: I have no further questions. Your witness, Mr. Hopper.

CROSS EXAMINATION.

By Mr. Hopper:

Q. Mr. Gibson, do any boats anchor off away from the pier?

A. Oh, yes. A Cruising Class boat will do that at regatta time or at nighttime if they happen to be lying in Fishing Bay overnight. Small boats, no. It's rather impractical to get back and forth if your small boat is anchored away from the pier. It's best to leave it at the pier to get to

page 129 } shore.

Q. Do small boats have anchors on them?

A. They are being required to now by the Chesapeake Bay Yacht Racing Association as a safety matter. From the—For a long time some specific classes of small boats have required that, others did not. But now they are all being required to.

Q. Mr. Gibson, are there any current plans for increasing the membership of Fishing Bay Yacht Club?

A. I think there is nothing in the way of a plan to increase the membership, and we have never had a membership campaign or membership drive. We have just existed by people continuing to be interested. We lose people that move away. We lose people as time goes on, but others come in, others go up. And it has remained a popular group.

Q. So you have no membership drive—

A. No, never have had one.

Q. —or recruiting of members of any sort?

A. Not that I know of. We have tried to enlist the interest of others in developing some class boats, but not as a membership drive.

Q. You say sometimes it's six inches to eight inches one hundred fifty feet out from the shore along the dock?

A. I really don't think that is an exaggera-

page 130 } tion. But I have seen it when it was dry a long ways out along the dock.

Q. In what time of year would that be?

A. Well, that would be after a sustained west wind and

Patrick A. Gibson.

when the moon is in the right condition to make very low tides. I don't think I can be very scientific about it.

Q. But I mean ordinarily would it be?

A. Could happen any time.

Q. I see. When you testified that you remembered the date of Mrs. Hancock's deed, did you say you—

A. The year.

Q. Year, Excuse me. Do you remember any circumstances surrounding the acquisition of the property by Mrs. Hancock? I mean by that, sir, did Mrs. Hancock offer Fishing Bay Yacht Club the right to buy that land instead of her before she came there?

A. I never heard that that was done. From time to time that property had been available on the market, and we just felt too poor to buy more land. I guess we were short-sighted. We could have expanded over more land, too. We didn't feel financially able to take on the acquisition of another tract of land.

page 131 } Q. Mr. Gibson, if your club keeps increasing, what are you going to do for space? Are you going to build any more piers over towards Mrs. Hancock?

A. I think we have been quite definite in what we have told Mrs Hancock about that—what we told her in 1962. That—The matter was brought up with me with Lewis Jones. I do not recall, Your Honor, whether Lewis Jones called me personally or whether the question was relayed to me from Lewis Jones. But his suggestion was relayed to me that we really needed to work out a defined precise water line between Mrs. Hancock and the yacht club. And I replied I did not think that was necessary because the club was not interested in going to the last extremity of its rights and was not interested in going any further.

Q. Mr. Gibson, my question is: Do you have any current plans to extend or build any more docks between the current dock and Mrs. Hancock?

A. No.

Q. You do not?

A. No.

Q. Has the Fishing Bay Yacht Club recently purchased any additional land on the Jackson Creek side?

A. No.

Q. They have not?

Patrick A. Gibson.

A. There's been none available for purchase
page 132 } that we know of.

Q. They are not in the process of procuring any?

A. No. We had some negotiations in which we had hoped to gain some additional frontage on Jackson Creek. They fell through. The matter was taken out of our hands and the land was not available to us.

Q. I see. Are there any more slips being dredged currently in the Jackson Creek area?

A. Yes. Yes. We are dredging in the inboard end of the Jackson Creek dock so as to make full use of the slips that already exist there when the water is too shallow. We are advised by people that live in the area that if you dredge the inboard end of a dock in a rather quiet creek, that you could expect the depth of the water to remain a fairly long time before it fills in again.

Q. Has the club ever maintained any other facility out in the water in front of Mrs. Hancock's land?

A. I do believe we did. A long time ago I think a swimming platform was put there for the children.

Q. What was the location of that?

A. And I think that Mrs. Hancock said she didn't like that, and we looked at the location of it and decided that we ought not to maintain it—ought not to maintain it there, so we took it down.

page 133 } Q. You took it down?

A. I think we did. Mrs. Hancock may remember that better than I do.

Mr. Hopper: All right, sir. I don't have any more questions.

Mr. Hicks: You may step down, sir.

(Witness Stood Aside)

Mr. Hicks: Defense rests, Your Honor. There is a question of these depositions as to whether they should be actually read into the evidence, but they are in the evidence and we want them considered as evidence and not just as an exhibit.

The Court: All right, Mr. Hicks. Mr. Hopper, any further evidence?

Frank Erastus Miner.

Mr. Hopper: Yes, sir. I would like to call a rebuttal witness. Mr. Frank Miner.

Might I beg the Court's indulgence just a moment to find something in these depositions that Mr. Hoggan testified to?

The exhibit of the large plat with the red lines
page 134 } on it, Your Honor. That was put in the evidence
during the taking of these depositions.

Let's see now. On page 27, sir, Mr. Hoggan said, speaking of the plat that was furnished him by Mr. Miner—Question: There are certain red lines or features or letters and drawings on that. Are you familiar with those? Yes, I put the red lines on there myself On Line 12, Your Honor. You put all those red lines on there yourself? All the red lines are mine. Let's see. I simply drew a line from the corner of Mr. Stull's property. Is that shown on the Miner survey. Yes, it is. Right here I think it is. Indicating. It's a faint line that is on here. Stull's western corner mark? Yes, sir. On Line 1 through 4 he says: I drew a straight line from the east side of our property marker to west side of our property marker, and from the west side of our property a straight line to the corner of Mrs. Hancock's westerly corner marker. Those marks are as were shown on the plat by Mr. Miner, not the red lines, but the marks you used? This I think you will find

is a very faint line under here that I simply put
page 135 } a red line over top of it in each case. Indicating.

FRANK ERASTUS MINER,

having been duly sworn, upon being recalled by the complainant, testified further as follows:

DIRECT EXAMINATION.

By Mr. Hopper:

Q. Now, Mr. Miner, I would ask you, sir, do you have the original plat that I was referring to?

A. I don't have the tracing from which those copies were made, but I could probably—Now, that, I would say, is not it.

Q. No. Do you have the original plat that you made these copies from?

A. Not with me. It's in my records at home. That is a tracing. I have, however, another blueprint that I ran off from it yesterday.

Q. All right, sir. Would you produce that for me?

Frank Erastus Miner.

A. (Witness presenting paper)

Q. Mr. Miner, I show you this plat. You say
page 136 } this is a print from the original that you made
the plat in evidence by?

A. Yes, sir. It's a print from the original, and the original has never gone out of my possession.

Q. Mr. Miner, I would like for you to compare Respondent's Exhibit C with the red lines indicated on same, and I would direct your attention to the property lines as indicated. Did you hear the testimony I read by Mr. Hoggan about—

A. Yes, sir, I did. And I did not indicate mean low water beyond the—where you see the lines shown as mean low water in Fishing Bay.

Q. Did you indicate by any method the Stull property line on this plat?

A. If you mean the Stull and beyond property line—in other words, we will say the east line of Stull—no, sir, I did not. Because I don't know where it was. I was not engaged to survey it.

Q. How about the line or the boundary of Mrs. Hancock, which is shown here on Respondent's Exhibit C here?

A. No, sir, I—

Q. That would be to the east.

A. I have not checked that, but I don't believe I could have
indicated that. If you will allow me, with the in-
page 137 } dulgence of the Court, I will put a scale rule on
this. But I don't think this tracing was wide enough to get that one.

Q. Before you do that, Mr. Miner, would you tell us whether or not the property lines of Mrs. Hancock are parallel?

A. Yes, sir.

Q. They are parallel?

A. Yes, sir. Bearing on both is north twenty degrees, forty minutes east. That is also the bearing of the yacht club-Stull line and of both Hancock lines.

Q. I direct your attention again to Respondent's Exhibit C. Is the east property line of Mrs. Hancock shown parallel to the west line?

A. On there it is not.

Q. It is not. Do you know the distance between the two lines of Mrs. Hancock's?

A. I believe it is two hundred eighty feet between parallel

lines, and that is why it's about two hundred ninety feet on the slight askew along mean low water.

Q. Would you measure the property line where it's indicated on Respondent's Exhibit C and see if that scales out properly, sir?

A. If I can find my scale rule somewhere. If page 138 } you want to make a right angle, the easiest way to do it would be to measure, I believe, two hundred ninety feet at this angle, which is along the line from East to Han. The scale is forty feet and that is—that scales two hundred feet to there and, see, the two hundred forty brings you off the pace. In other words, the line would be over here somewhere.

Q. All right, sir. Mr. Miner, I show you Plaintiff's Exhibit 1, and I direct your attention to the third paragraph of the letter from Mr. Hoggan to Mrs. Hancock: The board authorized me to procure the services of a surveyor to establish the actual location of our dock with reference to your property line and that of Mr. Stull. Did Fishing Bay Yacht Club contact you apropos to this?

A. Yes, sir.

Q Did you make a survey for Fishing Bay Yacht Club concerning this?

A. Yes, sir.

Q. Do you have a copy of that survey with you, sir?

A. It's—Here it is. Plat dated March 16, 1962.

Q. Now, was this made for Fishing Bay Yacht Club?

A. Yes, sir. Under the direction, I think it was, page 139 } of Mr. Hoggan, Vice Commodore.

Q. Do you have any correspondence that you personally sent to Mr. Hoggan with reference to same?

A. Well, I have the letter from Mr. Hoggan ordering the survey.

Q. Well, you testified that they did—he did request a survey?

A. Yes.

Q. And that you did do the survey?

A. And he specifies a scale of one inch for forty feet.

Q. I assume you complied with that?

A. Yes, sir.

Q. Now, would you show us the letter that you returned to Mr. Hoggan with the plat?

A. Yes, sir. There were two letters concerning it. First—Shall I read this?

Frank Erastus Miner.

Q. No, sir. We will show it to counsel first.

(Paper exhibited to defense counsel)

Q. All right, Mr. Miner, would you read your letter in its entirety?

A. Yes, sir. Mr. John C. Hoggan, Box 1194, care of Vepco, Richmond, Virginia. Dear Mr. Hoggan: Enclosed herewith are five copies of a plat showing the pier in relation to the nearest—parenthesis, Hancock—property line.

page 140 } Note that the present pier is well within the yacht club line. If the pier were to be extended in the same direction—parenthesis, south thirty-four degrees zero four minutes west—it would meet the Hancock line at a point eighty-six point seventy-three feet further out. Paragraph.

This survey is made as monumented not following the deed description. Note that although the deed calls for parallel lines one hundred eighty feet apart, the east—parenthesis, Stull—line converges toward the south and diverges toward the north if we are to recognize the monuments on the land. The north Stull stone seems to be one point ten feet on Stull and the south Stull stone seems to be five point forty feet on the club. I will investigate this matter further before completing the plat of the entire property. The west—parenthesis, Hancock—line conforms to the Hancock's own west line, which was the line of a prior conveyance. I hope this plat is what you need and that it reaches you in time.

Q. Mr. Miner, would you indicate for His Honor and for the record what distance you showed on your plat from the end of the pier to the property line extended?

A. Yes, sir. I have shown this as the property line produced off shore. In other words, on the same bearing. I have shown the axis of the pier, the way it runs. In

page 141 } other words, south thirty-four zero four west, and a perpendicular distance of twenty point ten feet between the Hancock line produced and the nearest portion of the pier.

Q. In other words, you show that twenty point ten feet could be built without encroaching?

A. Yes, sir. Or if they carried the same askew twenty point ten feet—

Mr. Hicks: I object to any conclusion as to this thing of encroaching. I don't care what the—

Frank Erastus Miner.

The Court: The Court would sustain the objection to any conclusion. He may state what facts are within his knowledge.

(Papers tendered to the Court)

The Court: Plaintiff's Exhibit 11 and 12.

Q. Mr. Miner, we have heard testimony here today that the depth of the water from the shore line out to the approximate end of the Fishing Bay Yacht Club pier is anywhere from six feet to eight inches. In the depositions we find that they say it was seven feet. Have you had any occasion to take soundings or depths of the water in this vicinity?

A. Yes, sir, I have.

page 142 } Q. Would you tell us when you took them?

A. Tuesday, May 4. I believe it was May 4.

Q. Tuesday, May 4?

A. Uh huh.

Q. Mr. Miner, do you have your field notes with you, sir?

A. I have a plat with the sounding on it.

Q. Would you use it to refresh your memory?

A. Well, if this is the plat to be used, I would like the indulgence of the Court to explain the mechanics of it.

Q. Just testify as to your own knowledge refreshing your memory from your notes.

Mr. Hicks: I would like, before Mr. Miner goes any further, for the groundwork to be laid as to the time of day and the condition of the tide at the time.

Mr. Hopper: We will do that, Mr. Hicks, right away.

Q. Mr. Miner, would you tell us what time of day, how you set up your survey, how you established the condition of the tide, any relations between the moon and the sun, and things that I don't know too much about?

A. Yes, sir. Well, to begin with, the sun and moon are quadrature. That means that they are approach-

page 143 } ing ninety degrees of our planet. Now, you get your extreme when the sun and moon are in convergence. That is, both on the same side pulling the same way; or when they are in opposition, when they are stretching the water out like that, you get high tides at noon and midnight and extreme low tides in between. I went down there about 7:30 in the morning, which was pretty close to

low tide. I also reset a stake at what was, I believe, the corner of one of Mrs. Hancock's riparian rights ground survey, it representing low water. I found that at that point the stake was just about awash where I drove it. I did that because I knew that I would not be taking soundings until afternoon and I wished some sort of a bench mark from which to operate and to adjust the observed soundings to that of mean low water.

I occupied East with the transit and sighted Station Han and turned angles and read stadia, and the depths were read with a level rod or stadia rod, twelve-foot rod. I considered that more accurate than sounding with a line. I had a weighted one hundred fifty foot steel tape available in case we hit any depths for which the twelve-foot rod would be inadequate.

The three-, four-, and five-foot curves, as shown on this plat, we determined by the trace contour method. That is, you keep moving the rod man or in this case the rod boat around until—Well, at noon he read a four point two feet, page 144 } which would be three feet at mean low water; then recorded the stadia reading and the bearing of it and kept a'feeling around that way to trace the three-, four-, and five-foot curves. The others are merely spot readings without any particular attempt to establish those contours.

Q. Mr. Miner, were you able to establish the three-foot curve and four-foot curve and five-foot curve?

A. I would say with a reasonable degree of accuracy I did. Yes, sir.

Q. Would you tell us at what approximate distance—I know it's not constant—

A. Uh huh.

Q. —but at what approximate distance from the shore the three-foot curve runs?

A. Well, it varies from about a hundred feet to approximately one hundred twenty, one hundred thirty.

Q. What depths did you find at the end of the pier itself?

A. Pretty close to what's been testified: Seven six at one corner, eight four in another, eight eight at another, and eight five at another.

Q. Now, what other soundings did you obtain?

A. We took a chain of soundings from the root of a pier which I believe to be on Mr. Stull's land out to page 145 } the head of it. That of course was running from mean low water at the land end and apparently has seven feet at the end. And the gradient there, the slope

of the beach, was quite similar to what we found in the other places. In other words, from mean low water to the three-foot curve takes about hundred feet to drop three feet. Now, when you go from the three-foot curve to the five-foot curve, it does that in approximately thirty feet. I think it corresponds to that edge of the deep that Mr. Ruark spoke of.

Q. All right, sir. Now, if you were standing at the base of the pier looking out the pier towards Fishing Bay, would there be more water to the right or to the left in Fishing Bay between the pier and the shore line? In depth, sir.

A. I understand what you mean, sir, and I would say it would be about equal to the five-foot curve. There would be a little bit better water east of the pier if you are concerned with the three-foot curve. If you are concerned with your existing depths around the head of the pier, around the T, it would be pretty nearly the same, possibly a little bit better. I say that because moving that straight across you would be hitting eight five at the back of it, eight nine at the front. Furthermore, when you get over to the Stull line, why the same distance off shore it would be about seven

page 146 } point six.

Q. Yes, sir. Mr. Miner, in your expert opinion, could or could not the club have built its pier at another location on Fishing Bay to a greater advantage apropos of depth?

Mr. Hicks: Your Honor, I don't understand this question especially. Is he asking just as to depths and taking nothing else into consideration?

Mr. Hopper: Yes, sir.

A. Well, naturally that depends on what depth you want. And once again, if you wanted a five-foot depth, why you might get it six or seven feet closer to shore. If you wanted a eight- or nine-foot depth, I would say it could have been equally well established where it deepens. But I don't see where there would be any improvement.

Q. Mr. Miner, is the water more navigable on the right side, or the left side of the pier?

A. On the east side of the pier you do have the five-foot curve dipping in a little bit closer to shore. I believe that is shown or rather the general shoulder is shown on the aerial photo.

Q. Mr. Miner, would it have been possible to construct a pier of the same type in the same depth of water between the

Frank Erastus Miner.

property lines extended on the Fishing Bay Yacht
page 147 } Club property?

A. In my opinion, it would have been. Yes.

Q. It would have been. One more question, Mr. Miner: Does the extension of the pier towards Mrs. Hancock, does it actually go out towards deep water, or does it point in towards shore?

A. It doesn't go into deeper water. I would say it runs roughly parallel to the five-foot curve and the shoaling, except that I notice in general there is a little bit less water at that corner of the pier than there is at the east corner. I, however, did not take enough soundings out there to see if that were a trend or not.

Q. Mr. Miner, I show you Respondent's Exhibit D. Now, from the soundings that you have taken and from this aerial photograph, although I realize we do not know the date of the photograph and your soundings are quite current, from looking at the water and the pier and what your results have been, would they correspond?

A. I would say so. Yes, sir. It seems to me you can generally see the line of the shoal along that way, although it doesn't appear right there in the hook. I don't know. But it does come around and it hits the Stull pier three-foot curve somewhere around a hundred feet off shore.

Q. Does it appear to be deeper on this side,
page 148 } or that side of the pier?

A. Well, your shoal runs a little—your deep water does run back in here, which roughly follows my three-foot curve here.

Q. Yes, sir. So in summary, Mr. Miner, you find that navigable water on a three-, four-, and five-foot curve exists between the pier and the end of the dock, is that true, sir? Between the—Excuse me. Between the shore line and the dock you hit the three-, four-, and five-foot curve?

A. Yes, sir. I believe somebody said that somewhere around thirty feet in from the end of the pier, although I notice my five-foot curve here scales just about thirty feet in from the inboard side of the T.

Q. From the inboard side of the T?

A. The inboard side of the T. The three-foot curve scales about fifty feet over here and possibly fifty-five on this side.

Mr. Hopper: All right, sir. Mr. Hicks?

Frank Erastus Miner.

CROSS EXAMINATION.

By Mr. Hicks:

Q. Mr. Miner, you show another pier on this property?

A. On this plat?

page 149 } Q. On this plat, I mean.

A. Uh huh.

Q. What pier is that?

A. I do not know. I assume that it belongs to Mr. Stull.

Q. That is the next pier over?

A. It is the next pier over. There are no piers between her and this.

Q. Now, let me ask you this: Do you know how the property line runs between Fishing Bay and Mr. Stull?

A. Yes, sir, I do.

Q. And where is that property line in relationship to the shore?

A. That property line is a hundred and eighty feet off this line at a right angle and parallel to it.

Q. Could you on this plat of yours draw that line in something—

Mr. Hopper: Mr. Hicks, this hasn't been made an exhibit yet. I haven't offered this an exhibit.

Mr. Hicks: Your Honor, he has been testifying from something that hasn't been offered as an exhibit, and I think it should be offered as an exhibit.

page 150 } The Court: Mr. Hopper?

Mr. Hopper: Well, he was—I asked him to refresh his memory from the notes he had made and sketches, and that is what he did, sir.

The Court: All right, sir. We will refer to it as Complainant's Exhibit 12, I believe—Complainant's Exhibit No. 13.

Q. Mr. Miner, will you label that line so that we will—and tell us as you label it what you are labeling it?

A. This is the Stull-yacht club property line produced.

Q. Mr. Miner, on that exhibit, could you also—do you have on that exhibit showing the mean low water line for both the Hancock-Fishing Bay—for all three, I should say—Hancock, Fishing Bay, and Stull property?

A. Yes.

Q. And that is designated as Line MLW?

Frank Erastus Miner.

A. Right.

Q. Do any of these lines, the Hancock-Fishing Bay or Fishing Bay-Stull line hit that mean low water at right angles or approximate right angles?

A. Oh, no.

page 151 } Q. Mr. Miner, could you at both the Fishing Bay-Hancock line and the Stull-Fishing Bay line bisect the angle and extend the line out, and make it a broken line to distinguish it?

A. I believe I can. We've got an inside angle there of one hundred sixty-nine degrees—one hundred sixty-eight degrees.

Q. That is the angle of the off shore angle?

A. Yes, sir. Towards the water.

Q. Towards the water?

A. Uh huh.

Q. This is the Stull-Fishing Bay?

A. This is the Stull-Fishing Bay line as scaled from here, and bisecting that would be eighty-four degrees. That would come out roughly in that direction.

Q. Would you extend that line out? And I wish, if you would, use a broken line to distinguish it rather than a solid line. And please label that line.

A. Bisector scaled.

Q. And, Mr. Miner, would you also give the bisector scaled line of the Fishing Bay-Hancock line on the exhibit, and make that a broken line and label it. Make it a broken line.

A. (Witness drawing on plat)

page 152 } Q. Mr. Miner, would you measure on your plat there the distance from the end of the pier as it existed, as you show it on your Complainant's Exhibit No. 13, which is dated May 4, 1965, the distance from the end of that pier northwesterly to the bisected scaled angle of the Hancock-Fishing Bay line, and tell us approximately how many feet that is?

A. About ten feet.

Q. Ten feet?

A. Let me check this thing while we are here.

Q. Yes, sir.

A. Well, I scaled that wrong. It would have to be eighty-four degrees off both of them.

Q. Will you correct it?

A. Let me check it this time.

Q. Yes, sir.

Frank Erastus Miner.

A. All right. It's eighty-four off that one, and it's eighty-four off that one. Okay.

Q. Check the other one also.

A. Eighty-eight. Yes, sir, that is the way it should be.

Q. How far is it from the end of the pier to the bisected angle line between Fishing Bay and the Stull property?

A. At right angles you have got fifty feet by scale.

page 153 } Q. And you have also, though, checked this on the ground, that is, the bisected angle line between the Hancock property and the Fishing Bay property, isn't that correct, on the same day that you made this plat?

A. Yes, sir.

Q. And on the ground you found that bisected line was well west of the pier?

A. Yes, sir.

Q. And that the pier did not extend beyond that—

A. That's right.

Q. —that line? Mr. Miner, as this shore line goes around to the east, it starts to curve rather sharply, doesn't it?

A. I do not know how much of the transition—how much of the curve has been accomplished by the time you get to Stull's, but I would say that the curve flattens out somewhat beyond there, that it's not an abrupt curve. If it were, it would come right back on itself.

Q. Right. Mr. Miner, taking property lines extended without any regard to the angle which they approach shore line, you can effectively greatly increase or greatly decrease any frontage there, isn't it?

A. Yes, sir.

page 154 } Q. It all depends. A man could have a very small piece of property on shore but entering the shore at a large angle he could effectively cut off rights of his neighbors on both sides, isn't that true?

A. I don't know what he could do to his neighbors' rights, but his lines produced would be further apart as they got out in the water.

Q. As they got out in the water? And at the same time, if he had—if they were converging lines as he approached the shore, even though he may well have over one hundred five feet—

A. If the river had resided sufficiently, he wouldn't have any water front.

Frank Erastus Miner.

Q. Wouldn't have any water front?
A. By that doctrine. Yes, sir.

Mr. Hicks: Thank you, sir.
Mr. Hopper: Your Honor, could we be sure to have for the record the pencil marks were put on there at the request of counsel for the defendant and the blue marks for the original plat.
The Court: All right, Mr. Hopper.
Mr. Hopper: Mr. Miner, I don't have any more questions.
The Court: All right, you may step aside, Mr. Miner.

(Witness Stood Aside)

page 155 } The Court: Any more evidence? Do you rest, Mr. Hopper?
Mr. Hopper: Yes, sir.
The Court: How much time would you gentlemen wish for argument? Mr. Hopper?

(Discussion had hereon)

* * * * *

Note: At this point a recess was had, after which counsel argued the case to the Court. Thereupon, another recess was had for the Court to read the deposition and to study the exhibits, after which the Court gave its opinion as follows:
The Court: First, I want to thank counsel at the bar for their kindness and consideration extended the Court today and also all the witnesses, parties, officers of the court, and everyone, who have shown their good will to the Court today. Also I would ask the patience of those who are required to stay for approximately fifteen minutes for me to give my opinion to the court reporter. Since I don't have a secretary, it makes it very difficult to have it typed up later on.
page 156 } Gentlemen, I will say that this case has given me some concern for some few days, and I have tried not to lightly consider the issues that have been raised by the pleading. First of all, I will give my decision and the reason therefor. The Court will require that the lateral addition to the wharf at Fishing Bay be removed in accordance with the plat and exhibit that has been presented here as it

is shown to project across the riparian rights of Mrs. Hancock. At this point I would say that a period of approximately six months would be reasonable to remove it since at this time of the year the Court can take judicial notice of the fact that the pier places and wharf builders are extremely busy and it may take that period of time to have it removed. In this opinion gentlemen, I will try to give some brief background of the laws, the statute laws, and the common law, and constitutional law of the State of Virginia.

The body of water which is the subject of this suit is a navigable river and therefore the bottom of the river below mean low water mark is owned by the Commonwealth of Virginia. Code of Virginia 1950, Section 62-1 and 62-2; Taylor versus Commonwealth, 102 Virginia 759, 47 South-
page 157 } eastern 875; *McCrady versus Virginia,* 94 U.S. 391. Also William and Mary Law Review, Volume 1 No. 2, year 1958, Page 287.

Prior to the present century the Supreme Court of Appeals of Virginia held that bottom of navigable waters was not alienable by the Commonwealth and was incapable of private ownership. *Home versus Richards,* 4 Call 441; *Norfolk City versus Cook,* 27 Grattan 430.

Since the adoption of the present constitution of 1902, the Court has held that subject to Section 175 of that constitution, relating to natural oyster rocks and to the public rights of the people, such as navigation, there is no constitutional prohibition as to the alienation of such river bottoms. *James River and Kanawha Power Company versus Old Dominion Iron and Steel Corporation,* 138 Virginia 461, 122 Southeastern 344; *Commonwealth versus City of Newport News,* 158 Virginia 521. Also 164 Southeastern page blank. But ever since the constitution of 1902 has been in force, the statute now appearing as Code Section 62-1 has been in force prohibiting the grant of any such bottom. Code of 1950, Section 62-1; Code of 1919, Section 35-73; Code of 1887, Section 13-38.
page 158 } This statute excepts from its provisions the laws relating to oyster planting grounds and fishing rights—now Title 28.1—and is further modified by the Code of Virginia 1950, Section 62-139 granting the riparian owners the right to erect a wharf, pier, or bulkhead, provided navigation be no obstructed nor the private rights of any person be otherwise injured thereby.

The regulation of wharves belongs *prima facie* and in the first instance to the states, and would only be assumed by congress when its exercise by the states is incompatable with

the interest of commerce. *Parkersburg and Ohio Railroad Transportation Company versus the City of Parkersburg,* 107 U.S. 691, 2 Supreme Court 732. Congress has entered the field of wharf regulations—33 U.S. Code Annotated, Section 403—but this action did not strip the states of their basic powers in this respect, and regulatory power is still in the states—it's refreshing to know the states still have some power—subject only to the requirement that the consent of the federal government through the Department of the Army be secured. *Cummings versus Chicago,* 188 U.S. 410, 23 Supreme Court 472. *North Shore Boom and Driving*
page 159 } *Company versus Nicomen Boom Company,* 212 U.S. 406, 29 Supreme Court 355.

In this case the requisite consent of the federal government has been secured and there is therefore no federal question involved. The navigability issue in this suit is not in issue since the water is navigable nearer to the shore than the end of the pier in question. The federal government is only interested in the navigability involved, in this section. The riparian owner's right to wharf out to the line of navigability is a property right in the bottom and more than a mere easement or right of passage. *Peek versus City of Hampton,* 115 Virginia 855, 80 Southeastern 593; *Taylor versus Commonwealth, supra*—quoted before—*Yates versus Milwaukee* 10 Wall 497.

And as the cases show, this is an ancient common law riparian right of which the Code of Virginia 1950, Section 62-139, is merely declaratory. The statute simply makes clear the two limitations on the right. For example, the protection of navigation, which is not involved in this suit, and of private rights, which are involved in this suit, the riparian
page 160 } rights of the property owner. *Grover versus Foster,* 94 Virginia 647, 27 Southeastern 493.

This right, in the nature of a property right in the bottom, belongs to the riparian owner alone, in contradistinction to the general public. *Taylor versus Commonwealth, supra.* In the case involved, this is not in issue because the respondent reaches navigability long before he gets to the end of the pier. Even so, the extension also does not increase navigability.

Sine, then, the Commonwealth as proprietor of the bottom of the river in question has restricted the right to construct wharves to the riparian owners of the shores—Code of Virginia, Section 62-139—and in the suit at bar navigability is not involved; and since complainant through the State of Virginia by the Commission of Fisheries has applied for and received without objection from anyone a one-half acre of

oyster planting ground riparian right, and which right is a property right—see *Taylor versus Commonwealth, supra*—then it definitely follows clearly, according to the law of the Commonwealth, that the private rights of a person have been injured thereby. Also Section 28.1-118 makes ex-
page 161 } ception to riparian owners in Section 28.1-108. And Section 28.1-108 excepts other laws as to wharves. To wit: 62-139. The complainant as holder of her statutory riparian right, which right in no way affects respondent's right to get to navigable water, is clothed with the riparian common law and statutory right with the expressed consent, by assignment, of the Commonwealth of Virginia.

As you know, the one-half acre riparian right is a sacred right, and in every instance, when it has been once assigned, it goes with the high land upon divise or sale. The complainant, as assignee of the State of Virginia, is entitled to have the projection of the pier of the respondent removed. It affects the property right of the complainant and also lies in front of the complainant's property, and further, it is unreasonable. Hundreds of riparian owners throughout the Commonwealth of Virginia have valuable property worth millions of dollars that this point would involve. If it were held otherwise, then when the basic power of the Commission of Fisheries, who grants those one-half acre riparian rights based on a projection of the property line, is withdrawn, it would
page 162 } be inequitable to the fullest. As has been stated and shown, respondent's projection of the wharf exists without legal authority and is a private nuisance. A private nuisance is defined as the using or authorizing the use of one's property or of anything under one's control so as to injuriously affect an owner or occupier of property: One, by diminishing the value of that property. Two, by continuously interfering with the power of his control or enjoyment of that property. Three, by causing material disturbance or annoyance to him in his use or occupation of that property. *Virginia Railroad Company versus London,* 114 Virginia 334, 76 Southeastern 306.

Complainant holds his property by virture of a legal right exercised, and the existence of respondent's projected pier falls within all three of the above in that the respondent has virtually destroyed the full and complete riparian right of the complainant, thus diminishing the value of the complain-

ant's property and continually interfering with the complainant's enjoyment of her property.

The jurisdiction of a court of equity to restrain by an injunction the creation of an easement or continu-
page 163 } ance of a nuisance which is likely to produce irreparable injury is well established and constantly exercised.

Also, would the law give to a man who has acted in a negative manner a reward when he also has the right to apply for his one-half acre of riparian property?

The issue in this case, gentlemen, is not that the Court by this opinion says that a man cannot get to navigable water. He would get to navigable water regardless, even if his property were only eighty feet wide. That is an inherent property right. A man has to get to navigable water. That point which has been decided by the State Supreme Court says that that is a right; he can get to navigation. But that point is not involved in this case. The respondents here get to navigation long before they get to the end of the pier. Also, 28.1-108 says that the inspector shall assign. He is an arm of the State of Virginia.

This case sort of reminds me of the words used in a burial service: The Lord giveth, and the Lord taketh away. In this particular case, the State has given, and only the State can take it away, since they own the bottom.

Also, gentlemen, what would prevent Fishing
page 164 } Bay from possibly putting ten extensions on this property? The point of a pier—the broad general point of a pier, as everyone knows, is for the purpose of getting to navigable water. That is the essence of it all. And Fishing Bay can get to navigable water.

And it's inequitable because their use has increased so that they should infringe on private property.

Thank you very much, all of you, for your consideration here today.

Mr. Hicks: Your Honor, we of course take exception to Your Honor's ruling, and we would like leave for time to have Your Honor's opinion typed up by the court reporter and to file our assignment—to note our assignments of error and file a written memorandum at that time on that.

The Court: All right.

(Court Adjourned)

page 165 } CERTIFICATE OF COUNSEL.

Final judgment in the foregoing matter having been rendered on the 12th day of July, 1965, counsel for the complainant and the respondent hereby affix their signatures to the foregoing transcript of testimony and other incidents of trial to the end that the same may become part of the record on appeal.

Given under our hands this 10th day of September, 1965.

ROGER G. HOPPER, Esquire
Counsel for the Complainant.

Given under our hands this 10th day of September, 1965.

By I. MILTON FARLEY, III
Of Counsel for the Respondent.

page 166 } CERTIFICATE OF TRIAL JUDGE.

Date tendered September 10, 1965.
Date signed September 10, 1965

JOHN E. DeHARDIT, Judge

CERTIFICATE OF CLERK.

Date received September 14, 1965.

Garland O. Revere, Clerk

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Bill of Complaint	2
Answer	4
Final Decree—July 12, 1965	6
Grounds of the Defendant for Objections, etc.	7
Notice of Appeal and Assignments of Error	9
Witnesses:	
John C. Hoggan (Depositions)	11
Edith D. Hancock	32
John M. Bareford	42
Frank Erastus Miner	46, 73, 102
George H. Badger, Jr.	52
Sterling N. Yoder	65
Eugene Ruark	79
Allan Hicks	85
William C. B. Roberts	91
Patrick A. Gibson	94
Proceedings	31, 63, 113
Certificates	118