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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD No. 740495

OLD DOMINION IRON AND STEEL CORPORATION,
A VIRGINIA CORPORATION,
Plaintiff in error,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
A VIRGINIA CORPORATION,
AND
CITY OF RICHMOND, VIRGINIA,
A MUNICIPAL CORPORATION,
Defendants in error.

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ORDER ENLARGING RECORD ON APPEAL

Entered August 22, 1974

The defendants having moved the Court for the entry of an order enlarging the record on appeal, and deeming it just and proper so to do, it is Ordered that the Joint Motion be, and the same is hereby, granted and that the following be made a part of the record on appeal:

(1) All papers and pleadings, including memoranda and exhibits of the parties in support of their various motions, filed as a part of the original action in equity, brought by the plaintiff;

(2) The Final Decree of the Court entered September 10, 1973, and the transcript of the July 17, 1973 hearing incorporated in such Final Decree;

(3) The transcript of the December 12, 1973 hearing on the City's Demurrer and on the Power Company's Motion for Summary Judgment to plaintiff's Motion for Judgment.

The clerk is directed to prepare the record in accordance with this Order and to transmit it forthwith to the Clerk of the Supreme Court of Virginia.

Enter this: /s/ Richard L. Williams
Dated: 8/9/74

BILL OF COMPLAINT

Filed .....

To the Honorable Judges of the Hustings Court of the City of Richmond, Part II:

Comes now the Plaintiff, Old Dominion Iron And Steel Corporation, by counsel, and represents unto the Court as follows:

1. The Plaintiff is a Virginia corporation engaged in the manufacture of oil storage tanks, chemical-process heat exchangers and packaged water heaters on approximately 12 acres of land owned by the City of Richmond (the "City"), on Belle Isle, an island in the James River, in the City of Richmond.

2. Defendant Virginia Electric and Power Company ("Vepco") is a Virginia public service corporation.

3. Defendant City is a municipal corporation chartered by the Commonwealth of Virginia.

4. By Deed dated January 29, 1926, recorded June 17, 1926, in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia, in Deed Book 332C, at page 86, Old Dominion Iron and Steel Corporation and others, predecessors in title to Plaintiff, conveyed to Vepco all of the right, title and interest of the Grantors in said Deed in the steel highway bridge connecting Belle Isle with the north bank of the James River. At the same time, Old Dominion Iron & Steel Works, Incorporated, a successor in interest to the Grantors in the aforementioned Deed recorded as aforesaid in Deed Book 332C, at page 86, in the aforementioned Clerk's Office, and a predecessor in title to Plaintiff, desired as between it and Vepco to recognize and define their rights and obligations with respect to the use and maintenance of the steel highway bridge. Accordingly, by Agreement dated January 29, 1926, recorded June 17, 1926, in the aforesaid Clerk's Office in Deed Book 332C, at page 100, the said Old Dominion Iron & Steel Works, Incorporated, and Vepco accepted as binding the following provisions contained in a Deed dated January 29, 1926, recorded January 30, 1926, in the aforesaid Clerk's Office in Deed Book 328B, at page 82, wherein Old Dominion Iron and Steel Corporation and others, predecessors in title as aforesaid to Plaintiff, conveyed to Old Dominion Iron & Steel Works, Incorporated, the 12 acres of land now occupied by Plaintiff as aforesaid:

> It is hereby understood and agreed that insofar as title thereto may be lawfully reserved by the Old Dominion Iron and Steel Corporation and conveyed to the Virginia Electric and Power Company by the aforesaid deed of even date herewith the title to the steel highway bridge connecting Belle Isle with the north shore of James River, shall be conveyed to and vested in the Virginia Electric and Power Company and its successors, in title, but the right is hereby granted to said Old Dominion Iron and Steel Works Incorporated, and its successors in title, to use the same for passage or persons, automobiles and vehicles and other reasonable and proper uses, subject to two conditions to which the party of the second part by accepting this deed covenants on behalf of itself and its successors in title to be bound (a) that such uses shall not result in any overloading or damage to said bridge and shall not be

inconsistent with the uses and purposes of the Virginia Electric and Power Company, or its successors in title and (b) that said Old Dominion Iron and Steel Works Incorporated, and its successors in title, shall *jointly* with the Virginia Electric and Power Company and its successors in title, *maintain* the same and shall contribute equally with said Virginia Electric and Power Company, and its successors in title, towards the cost of maintenance upkeep repair and replacement of said bridge and towards the settlement and discharge of any claims or actions at law, for damage or personal injury to property or persons growing out of the use, maintenance upkeep and repair of said bridge.

5. By Agreement between Vepco and Old Dominion Iron & Steel Works, Incorporated, predecessor in title as aforesaid to Plaintiff, dated May 13, 1933, Vepco released the said Old Dominion Iron & Steel Work, Incorporated, from all liabilities to maintain the steel highway bridge, and Vepco became solely responsible for the maintenance, repair and replacement of the bridge so long as no other adequate roadway connection was available to the north shore of the James River.

6. By mesne conveyances Plaintiff was, until September 12, 1968, successor in title to 6.208 acres of land on Belle Isle as to which the said Agreements of January 29, 1926, and May 13, 1933, mentioned in paragraphs 4 and 5, were covenants running with the said land and agreements made for Plaintiff's use, enjoyment and benefit.

7. On September 12, 1968, an Order was entered by this Court in condemnation proceedings styled *City of Richmond* v. *Old Dominion Iron and Steel Corporation and 6.208 Acres of Land, More or Less, etc.,* vesting title in the City to the 6.208 acres then owned by Plaintiff on Belle Isle. At the time of entry of the aforesaid Order, the City deposited in Court $170,000.00 as estimated just compensation for the taking of the Plaintiff's property.

8. Since September 12, 1968, Plaintiff has continued to occupy and conduct its business on the aforementioned 6.208 acres on Belle Isle by and with the full knowledge and consent of the City, by reason of which all the rights and benefits conferred by the aforementioned agreements of January 29, 1926, and May 13, 1933, have continued unimpaired and in full force and effect for Plaintiff's use and enjoy-

ment. Until on or about the 23rd of June, 1972, Plaintiff used the steel highway bridge aforementioned as the only access for its trucks and other vehicles needed by it to conduct its business.

9. Since about the 15th day of January, 1970, Plaintiff has leased from the City of Richmond 6.81 acres on Belle Isle immediately adjacent to the 6.208 acres aforementioned. This additional property and the improvements upon it have been used by Plaintiff as a part of its manufacturing plant facilities.

10. Plaintiff believes and alleges that on or about March 27, 1972, the City and Vepco entered into an Agreement pursuant to which the City agreed to purchase and Vepco agreed to sell certain property owned by Vepco on Belle Isle, including the aforementioned steel highway bridge. The Agreement between the City and Vepco further provided that Vepco would continue to maintain the bridge so long as Plaintiff's occupancy of property on Belle Isle continued, with the understanding that the City would as soon as possible consummate acquisition and occupancy of the said property. This latter agreement was in confirmation of the duties and obligations of Vepco as hereinabove alleged with respect to the bridge and was made for Plaintiff's use, enjoyment and benefit.

11. On or about June 23, 1972, the steel highway bridge connecting Belle Isle with the north bank of James River was destroyed by flood waters and has not been replaced either by Vepco or by the City.

12. As a result of the failure of either Vepco or the City to replace the bridge, the Plaintiff has sustained and will continue to sustain irreparable harm unless the relief herein sought is granted it; it has sustained and will continue to sustain substantial damages to its business in that it has been unable to continue its manufacturing operations as conducted by it prior to June 23, 1972; it has had to expend large sums of money to provide alternate methods of access and transportation to and from its plant on Belle Isle, including the cost of barges and boats, winches, ramps and landings, dredges and cranes; it has incurred and will continue to incur additional labor costs in view of the added time consumed in its employees' gaining access to and from its plant; it has incurred and will continue to incur losses in its business on account of its inability to meet production schedules; and it has been

forced to close down its plant at various times because of its inaccessibility from the north shore of the James River.

Wherefore, Plaintiff, being without remedy save in a court of equity, prays that a permanent injunction be immediately granted directing the Defendants to replace the steel highway bridge which was destroyed as alleged on or about June 23, 1972; that Plaintiff be allowed to recover their damages incurred as aforesaid by reason of the actions of the Defendants in at least the amount of $500,000.00 and that it have general relief.

* * *

ANSWER AND GROUNDS OF DEFENSE
Filed December 21, 1972

Comes now the City of Richmond, by counsel, and files its Answer and Grounds of Defense to the Bill of Complaint of the plaintiff as follows:

1. The City of Richmond admits the allegations contained in paragraphs numbered 1, 2 and 3 of the Bill of Complaint.

2. The City of Richmond has no knowledge of the allegations contained in paragraphs numbered 4, 5 and 6 of the Bill of Complaint and calls for strict proof thereof.

3. The City of Richmond admits the allegations contained in paragraph numbered 7 of the Bill of Complaint.

4. The City of Richmond denies the allegations contained in paragraphs numbered 8, 9 and 10 of the Bill of Complaint.

5. The City of Richmond admits the allegations contained in paragraph numbered 11 of the Bill of Complaint but specifically denies any responsibility to replace the steel highway bridge.

6. The City of Richmond denies the allegations contained in paragraph numbered 12 of the Bill of Complaint.

7. The City of Richmond denies the legal conclusions of the Bill of Complaint.

8. The City of Richmond affirmatively asserts that the Bill of Complaint was not filed within the period prescribed by Section 10.04 of the Charter of the City of Richmond, and Section 8-653 of the Code

of Virginia of 1950 as amended, the Statute of Limitations governing actions against the City of Richmond.

9. The City of Richmond affirmatively asserts that from and after September 12, 1968 the plaintiff by reason of the Order Vesting Title in the City of Richmond entered by this Court on September 12, 1968 in the condemnation proceeding styled *City of Richmond* v. *Old Dominion Iron and Steel Corporation and 6.208 Acres of Land, More or Less, etc.* has been divested of both the legal and equitable title to the land. The legal and equitable title from and after September 12, 1968 is vested in the City of Richmond.

Wherefore, the City of Richmond asks the Court to adjudge, order and decree that the City of Richmond is not liable for any of the matters raised by the allegations contained in the plaintiff's bill of complaint.

* * *

DEMURRER
Filed December 21, 1972

Comes now the City of Richmond, by counsel, and files its Demurrer to the Bill of Complaint of the Plaintiff on the following grounds:

1. That from and after September 12, 1968 the plaintiff by reason of the Order Vesting Title in the City of Richmond entered by this Court on September 12, 1968 in the condemnation proceeding styled *City of Richmond* v. *Old Dominion Iron and Steel Corporation and 6.208 Acres of Land, more or less, etc.* has been divested of both the legal and equitable title to the land. The legal and equitable title from and after September 12, 1968 is vested in the City of Richmond.

* * *

DEMURRER TO BILL OF COMPLAINT AND MOTION TO DISMISS
Filed December 29, 1972

The defendant, Virginia Electric and Power Company, by counsel, says that the Bill of Complaint of the plaintiff, Old Dominion Iron and Steel Corporation, insofar as relief is sought, is not sufficient in law and states the grounds of demurrer relied upon as to be as follows:

(1) The Bill of Complaint fails to state with sufficient particu-

larity any duty owed by the defendant, Virginia Electric and Power Company, to the plaintiff which has been violated by such defendant.

(2) The Bill of Complaint fails to set forth facts sufficient to constitute a cause of action by the plaintiff against the defendant, Virginia Electric and Power Company.

(3) The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Deed dated January 26, 1926, and recorded June 17, 1926, in which Old Dominion Iron and Steel Corporation and others conveyed to Virginia Electric and Power Company the right, title and interest in the steel highway bridge connecting Belle Isle with the north bank of the James River.

(4) The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Agreement dated January 26, 1926, recorded June 17, 1926.

(5) The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Agreement dated May 13, 1933.

(6) The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Agreement on or about March 27, 1972, between the City of Richmond and Virginia Electric and Power Company.

(7) The Bill of Complaint fails to show how the defendant Virginia Electric and Power Company, can be liable to the plaintiff on alleged covenants running with the land since the plaintiff admits that it no longer owns the land with which the covenants are alleged to run.

(8) The Bill of Complaint fails to show how the defendant, Virginia Electric and Power Company, can be liable to the plaintiff in respect of alleged Agreements that pertained to the plaintiff's ownership of land which the plaintiff no longer owns.

(9) The Bill of Complaint fails to show how the defendant, Virginia Electric and Power Company, can be liable to the plaintiff by the alleged Agreement between Virginia Electric and Power Company and Old Dominion Iron and Steel Works, Incorporated, dated May 13, 1933, in view of the fact that the plaintiff has failed to allege that no other adequate roadway connection was available to the north shore of

the James River, which fact plaintiff's Bill of Complaint shows to be a condition precedent required for it to recover under that Agreement.

(10) The Bill of Complaint fails to show how the defendant Virginia Electric and Power Company, can be liable to the plaintiff under the alleged Agreement between the City of Richmond and the Virginia Electric and Power Company of March 27, 1972, in view of the fact that the plaintiff does not even allege that it was a party to the Agreement.

(11) The Bill of Complaint fails to show how the defendant, Virginia Electric and Power Company, can be liable to plaintiff under the alleged Deeds and Agreements in which the Virginia Electric and Power Company allegedly agreed to maintain the steel bridge because the plaintiff has alleged only that the Virginia Electric and Power Company agreed to maintain the bridge and not to rebuild a bridge that has been destroyed by an Act of God and through no fault of the defendant, Virginia Electric and Power Company.

(12) The Bill of Complaint is fatally deficient because it states no grounds for equitable jurisdiction; equity cannot be asked to enforce the alleged covenants that run with the land because the plaintiff no longer owns the land with which the covenants are alleged to run; equity will not require specific performance of the alleged covenant or agreement to maintain a bridge; the only remedy to which the plaintiff could be entitled under the facts it has alleged is damages; accordingly, any claim the plaintiff might have should be brought at law and not in equity.

Your defendant, Virginia Electric and Power Company, further moves the Court for an Order dismissing the Bill of Complaint herein as to your defendant, Virginia Electric and Power Company, and for such other and further relief as the Court shall deem proper.

* * *

AMENDED DEMURRER TO BILL OF COMPLAINT AND MOTION TO DISMISS
Filed July 17, 1973

The defendant, City of Richmond, by counsel, pursuant to leave granted by the Court to amend its demurrer previously filed, hereby files its amended demurrer to bill of complaint and motion to dismiss,

and says that the bill of complaint of the plaintiff, Old Dominion Iron and Steel Corporation, insofar as relief is sought, is not sufficient in law and states the grounds of demurrer as follows:

1. That from and after September 12, 1968, the plaintiff by reason of the Order Vesting Title in the City of Richmond entered by this Court on September 12, 1968, in the condemnation proceedings styled *City of Richmond* v. *Old Dominion Iron and Steel Corporation and 6.208 Acres of Land, more or less, etc.* has been divested of both the legal and equitable title to the land. The legal and equitable title from and after September 12, 1968, is invested in the City of Richmond.

2. The Bill of Complaint fails to state with sufficient particularity any duty owed by the defendant City of Richmond, to the plaintiff which has been violated by the defendant.

3. The Bill of Complaint fails to set forth facts sufficient to constitute a cause of action by the plaintiff against the defendant, City of Richmond.

4. The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Deed, dated January 26, 1926, and recorded June 17, 1926, in which Old Dominion Iron and Steel Corporation and others conveyed to Virginia Electric and Power Company the right, title and interest in the steel highway bridge connecting Belle Isle with the north bank of the James River.

5. The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Agreement dated January 26, 1926, recorded June 17, 1926.

6. The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Agreement dated May 13, 1933.

7. The Bill of Complaint fails to allege any facts upon which plaintiff is entitled to relief under the alleged Agreement on or about March 27, 1972, between the City of Richmond and Virginia Electric and Power Company.

8. The Bill of Complaint fails to show how the defendant, City of Richmond, can be liable to the plaintiff on alleged covenants running with the land since the plaintiff admits that it no longer owns the land with which the covenants are alleged to run.

9. The Bill of Complaint fails to show how the defendant, City of Richmond, can be liable to the plaintiff in respect of alleged Agreements that pertained to the plaintiff's ownership of land which the plaintiff no longer owns.

10. The Bill of Complaint fails to show how the defendant City of Richmond, can be liable to the plaintiff by the alleged Agreement between Virginia Electric and Power Company and Old Dominion Iron and Steel Works, Incorporated, dated May 13, 1933, in view of the fact that the plaintiff has failed to allege that no other adequate roadway connection was available to the north shore of the James River, which fact plaintiff's Bill of Complaint shows to be a condition precedent required for it to recover under that Agreement.

11. The Bill of Complaint fails to show how the defendant, City of Richmond, can be liable to the plaintiff under the alleged Agreement between the City of Richmond and the Virginia Electric and Power Company of March 27, 1972, in view of the fact that the plaintiff does not even allege that it was a party to that Agreement.

12. The Bill of Complaint is fatally deficient because it states no grounds for equitable jurisdiction; equity cannot be asked to enforce the alleged covenants that run with the land because the plaintiff no longer owns the land with which the covenants are alleged to run; equity will not require specific performance of the alleged covenant or agreement to maintain a bridge; the only remedy to which the plaintiff could be entitled under the facts it has alleged is damages; accordingly, any claim the plaintiff might have should be brought at law and not in equity.

Your defendant, City of Richmond, further moves the Court for an Order dismissing the Bill of Complaint herein as to your defendant, City of Richmond, and for such other and further relief as the Court shall deem proper.

* * *

LETTER LEASE AGREEMENT

[LETTERHEAD OMITTED]

April 21, 1971

Robert N. Pollard, Jr., Esquire
Williams, Mullen & Christian
United Virginia Bank Building, Suite 510
9th and Main Streets
Richmond, Virginia 23219

Re: Occupancy by Old Dominion of Property Formerly Owned by Ajax Realty

Dear Mr. Pollard:

With further reference to our letters concerning the terms and conditions under which the City of Richmond would permit Old Dominion Iron and Steel Corporation to occupy the property formerly owned by Ajax Realty Company, I will take this opportunity to set forth in one document those terms and conditions. Old Dominion will signify its acceptance of these terms and conditions by indicating its approval in the space provided in this letter.

1. The City agrees to permit Old Dominion to occupy the property formerly belonging to Ajax Realty on an at-will basis with termination provision of six months. Said notice of termination may be given by either party to the other.

2. The rental for such use and occupancy shall be $1,000.00 per month payable on the 15th day of each and every month during the term of this occupancy.

3. As a condition precedent to Old Dominion's use and occupancy under the terms of this lease, Old Dominion will be required to pay rent from January 15, 1970 through April 15, 1971. Accordingly, the City of Richmond should be forwarded Old Dominion's check in the amount of $16,000.00 which represents rent for all months of the occupancy by Old Dominion together with the use and occupancy for the period April 15, 1971 to May 14, 1971.

4. Old Dominion will be required to give its bond without corporate surety conditioned upon its restoring the Ajax property to substantially the same condition as existed on January 14, 1970.

5. Old Dominion will be required to comply with all applicable City Ordinances with respect to the use and occupancy of this property.

6. Old Dominion accepts this property on an as is basis, and will be responsible for any maintenance of the roof, furnace and plumbing as Old Dominion may deem necessary for its comfort and convenience. Old Dominion may make such minor alteration to the interior of the building as they deem advisable provided that such alterations are expressly subject to the provision for restoration of the property as provided in paragraph numbered 4 above.

7. Old Dominion will be permitted to install such of its machines and equipment on the Ajax property as it may deem necessary subject, however, to the provision relating to restoration of the property as contained in paragraph numbered 4 above.

8. Old Dominion will be entitled to use all of the buildings on the Ajax property during the term of this use and occupancy.

I trust that the foregoing comprehensively and accurately sets forth the agreement with respect to Old Dominion's occupancy of the Ajax property. If such is the case, please indicate Old Dominion's acceptance in the space provided in this letter.

Very truly yours,

/s/ A. J. FitzPatrick

Albert J. FitzPatrick
Assistant City Attorney

AJF:gh
Agreed And Accepted:
Old Dominion Iron and Steel Corporation

By /s/ W. W. Morris
Vice-President

Attest:

/s/ J. D. Davis
Assistant Secretary

* * *

December 13, 1972

Certified Mail—Return
Receipt Requested

Mr. W. W. Morris, Vice-President
Old Dominion Iron & Steel Company
Belle Isle
Richmond, Virginia 23219

Re: Lease by Old Dominion Iron & Steel Corporation of property formerly owned by Ajax Realty

Dear Mr. Morris:

It has come to my attention that rental payments for the use and occupancy of the Ajax property have not been made for the period July 15, 1972 through the present date. Such failure to make the rental payments constitutes a default under the terms of the lease agreement between the City and Old Dominion Iron & Steel Corporation. Accordingly, the City considers and by this letter notifies Old Dominion Iron & Steel Corporation that the lease is terminated as of July 15, 1972.

In accordance with the terms of said lease the City hereby notifies Old Dominion Iron & Steel Corporation to immediately vacate said property.

Sincerely,

A. J. FitzPatrick
Assistant City Attorney

AJF.CJ
cc:
Mr. Robert N. Pollard, Jr.
Attorney at Law
United Virginia Bank Building
Richmond, Virginia 23219

* * *

December 13, 1972

Mr. W. W. Morris, Vice-President
Old Dominion Iron & Steel Corporation
Belle Isle
Richmond, Virginia 23219

Dear Mr. Morris:

In accordance with the terms of the lease agreement between the City of Richmond and Old Dominion Iron & Steel Corporation, the City of Richmond gives notice of termination of said lease as of the date of this letter.

Sincerely,

A. J. FitzPatrick
Assistant City Attorney

AJF.CJ
cc:
Mr. Robert N. Pollard, Jr.
Attorney at Law
United Virginia Bank Building
Richmond, Va. 23219

Certified Mail—
Return Receipt Requested

[1] * * *

HEARING ON DEMURRER AND MOTION TO DISMISS

Date: July 17, 1973
Time. 8:30 o'clock a.m.
Before: Honorable Richard L. Williams, Judge

[2] Appearances:

Mr. Robert N. Pollard, Jr.
Mr. Julious P. Smith, Jr.
Counsel for Old Dominion Iron & Steel Corporation

Mr. E. Milton Farley, III
Mr. John E. McDonald
Counsel for Virginia Electric and Power Company

Mr. Albert J. FitzPatrick
Assistant City Attorney

[3] The Court: Good morning, gentlemen.

Mr. Farley: Good morning, Your Honor.

Mr. Pollard: Good morning, Your Honor.

Mr. FitzPatrick: Good morning, Your Honor.

The Court: Mr. Farley, I believe you are here to present the matters on the grounds stated in the original demurrer filed in Old Dominion's case against Vepco and the City?

Mr. Farley: Yes, sir, Your Honor.

The Court: Do you have any brief or anything that you want to file?

Mr. Farley: I think that we have previously filed a memorandum.

The Court: I read that. That was more on the initial issue raised by the City's demurrer, wasn't it?

Mr. Farley: Well, I think both the City's demurrer and the power company's demurrer are substantially the same, Your Honor.

The Court: You have more grounds for it?

[4] Mr. Farley: Yes, sir. In the hearing that Judge Spain had on the City's demurrer, the power company was not afforded an opportunity at that time to argue the case. As a matter of fact, I was not present at that hearing. I had a young lawyer from my office who had not even passed the bar exam at that time.

So, with the Court's approval, we just wanted to have an opportunity to state very briefly what our grounds are. We don't want to get into a falling out with the City, but I think there is one substantial additional ground that we have that does not exist as far as the City is concerned, and that is that the Bill of Complaint shows on its face that the power company and the City entered into a contract which was in the form of an ordinance that was actually adopted by City Council whereby the power company agreed to sell and the City agreed to purchase that bridge before it washed away.

Now, the deed actually transferring the title to the bridge had not been delivered, and I don't think it has been delivered as of this date. But the Complaint shows on its face, [5] we say, that the equitable title to that bridge by virtue of that ordinance was in the City, not in the power company at the time of the flood.

Now, Mr. McDonald will elaborate very briefly and quickly on our major contentions.

The Court: All right. Fine. Proceed, Mr. McDonald.

Mr. McDonald: Your Honor, I believe we have summarized this in the reply memorandum which has previously been submitted, and which I believe the Court is familiar with.

The Court: I have read that.

Mr. McDonald: But, briefly, the case is in this posture as far as the citing of authorities with respect to the parties in that the Plaintiff has conceded that it is the former owner of this property. I am not exactly sure of their complete position on this point, but I think it is clear that, as we pointed out, the City has complied with the terms of the city ordinance by depositing its estimate of just compensation, and therefore, title is vested in the City. And I would assume that that is the basis of the Plaintiff's concession on that point.

[6] The Court will recall that we have pointed out in our memorandum that this served to extinguish as a matter of law the covenant by merging the dominant and servient tenement at that point when the title to Belle Isle vested in the City. I would expand on Mr. Farley's point by advancing that I believe that this was the motive of the City and the power company entering into this joint agreement which Mr. Farley has referred to.

So what this brings us all down to is the Plaintiff claims, as we understand it, on the face of the Bill of Complaint that it is there as a tenant at will on that island, whatever contractual relationship it had with the City.

And maybe we have gone beyond the face of the Complaint by exhibiting copies of the termination of this tenancy by the City. But even accepting the proposition that is advanced by the Plaintiff that they are tenants of some sort on that island with some sort of contractual relationship, they cite no authority for this.

The Court: How do you get that lease before the Court in such a way that it can be [7] considered as part of the pleading on the demurrer? Can you crave oyer to that allegation in his Bill of Complaint?

Mr. McDonald: This is what we would attempt to do.

The Court: Well, you can do it on the deeds, I know, but I don't

know whether you can on the lease or not. But once that is done, then I think that can be considered as part of the Bill of Complaint for purposes of the demurrer can it not?

Mr. McDonald: Yes, sir. But my point is this, Judge, that there is no authority cited by the Plaintiff other than cases relating to a tenant under a long-term lease. I believe the lease case which was cited, the *Alexander's Department Stores,* a New Jersey case, was a fifty-five-year term.

Now, this is quite a different situation than the position that the Plaintiff is in, which we have characterized as a tenant at will because it could be terminated. And, of course, the best evidence of that is that it has been, even though that is not before the Court on the [8] pleadings.

Now, the Iowa case, that is, the *Jensen* case, involved no covenant running with the land.

And the third case is *Johnson* v. *Robertson,* which is another Iowa case, involved a building line restriction wherein all property owners on a particular block agreed to build no closer than so many feet to the street. And that was more by way of a suit for specific performance of this covenant rather than trying to enforce a negative covenant, as they are in this particular case.

And I think those are the points that we feel are the strongest in this whole case. One, they have no legal title. This has been conceded, and I think it is clear as a matter of fact that they don't.

Finally, their tenancy is so tenuous that they have no right to enforce this covenant, or whatever agreement there might be between the City, and that would have to be the new agreement between Vepco and the City, because the prior covenant has merged upon the vesting of [9] title in the City of Richmond.

The Court: Mr. Pollard.

Mr. Pollard: Your Honor, Mr. Smith will respond.

The Court: All right. Mr. Smith, proceed.

Mr. Smith: Yes, sir. Well, as to one point, I think Mr. McDonald has conceded, at least alluded to the fact that since we are here on the demurrer they should properly be restricted to the facts in our Bill of Complaint.

One fact, though, since it has been brought up, I think should be clarified. Although the City did send Old Dominion a letter which in effect terminated its lease, Old Dominion has continued to pay rent under the lease, and in fact, the City has once again this time given the six-month notice required to terminate the lease. So I think that while we are talking about the lease, the actions of the City since their original termination notice have not been consistent with having terminated the lease, as Mr. McDonald contended.

But, as we have stated in our brief, [10] we basically feel that there are three points upon which Old Dominion is entitled to pursue the claim in this case. And I will not go into them in great detail, but will briefly allude to them.

First, the question of the lease as to the provisions of the lease as to whether or not it would be of substance enough to support this claim, I think this is a matter of proof, something which is not properly heard on a demurrer. In the *Alexander's Department Stores* case, which was actually for twenty-five years with three renewals, which is a substantial lease, of course, we would concede. But there is language in there which I have quoted which says that in these cases the courts proceed on the theory that the benefit of a covenant is primarily attached to the possession of the covenantee, and that what has transpired by creating a lessor estate beneficiary treated as temporarily passing with the possessory interest of the tenant or the license.

That is obviously the case that we have here. In December of 1970, Old Dominion leased this Ajax property. If the Court will recall, [11] it was originally a thirteen-acre tract which was divided into two smaller tracts. We have leased the Ajax property for over three years now. At the time we leased the property, we took possession of it.

The Court: But what sort of a term do you have, Mr. Smith?

Mr. Smith: Well, the lease is an exhibit by Vepco, and is on a letter lease provision which provides for six-month cancellation.

The Court: But you are not suggesting that you have any better standing than what that letter reflects, are you?

Mr. Smith: No, sir, other than the other provisions as we have brought out in our brief, I think that it accurately portrays the lease. I would also point out, as I say, it is still in effect as far as we are concerned, and we have been there for three years.

And when we leased the property, the bridge was there. We took possession of the property with means of access from the shore. And it is our position that under this lease we have the right to go ahead and establish that taking [12] possession of this property under lease and having a means of access. The lease in and of itself would give us the right to protect our access.

The Court: But, Mr. Smith, bear one thing in mind, that you have asked for affirmative injunctive relief here on a negative covenant, and the law looks upon injunctive relief as one of the harshest and most far-reaching types of relief that can be given a litigant, and the Court is very reluctant to give it unless there is such a clearly defined right that the litigant cannot get redress any other way.

Now, here the very most that you have is a letter-type lease that seems to me that it is terminable at a maximum of six months. You may be a tenant by sufferance under it, as best as I can tell. If that is so, any claim that you would have would be with monetary damages rather than the type of relief that you are seeking, and I really don't disagree with you a whole lot. Maybe they can't reach you on their demurrer without some—and I don't know whether you could do it in an equity action—crave oyer to that lease agreement or that letter of lease, which you have [13] not really incorporated by reference in your Bill of Complaint.

But if they can crave oyer to that, then it becomes a part of your pleadings for the purpose of a demurrer, and I could dispose of that on a demurrer. But the way the case is postured now, I doubt if a demurrer is the right way to attack this thing.

But I will tell you right now, just from having gone into your case and reading everything and from reading these cases that you won't get any injunctive relief. My guess is that we will put you over on the law side, and you will go after damages.

And then as soon as they can move for summary judgment, my guess is that you will get knocked out that way. So your case looks to me like it is that tenuous, even though technically they may not be able to knock you out of the box today.

Mr. Smith: Of course, the lease aside, we do have two other bases which we have set forth in our memorandum, and I hope that the Court will not overlook these. There is the [14] agreement of March of 1972, which again, we think would be a question of proof as to

whether or not Old Dominion was a third-party beneficiary to that agreement.

The Court: But that would entitle you to money damages is all.

Mr. Smith: Well, again, we are contending—

The Court: Bear in mind you have got to have such a precise state in here to get injunctive relief that you can't be just swimming around grabbing at straws on it, because you know how reluctant the courts are to grant injunctions in the strongest of cases.

Mr. Smith: Well, we are not intending to be grabbing at straws. But granted that you have, of course, put your finger on the point that the lease is for a short time, but this agreement in March of '72 when read in conjunction with the original covenant makes the power company liable to maintain, and we would contend to replace the bridge if Old Dominion is the beneficiary of this agreement.

Old Dominion is sitting out there [15] on the island. They are the only people using the bridge. It would be our position that this would be enough to support a claim to have the bridge rebuilt.

Basically, when Vepco says we are going to maintain, we contend they say they are going to replace the bridge. Then we feel as a beneficiary of this agreement, Old Dominion, having had expenditures, is then in a position to come in and say, all right, you said that you were going to do this. Do it. Put the bridge back so we can get off the island and we can use it to carry on our business for whatever purposes are necessary.

The Court: Why didn't you negotiate your rights to the bridge with the City directly after you lost your fee title and became a tenant under some loose leasing agreement? Your only landlord was the City from then on, wasn't it?

Mr. Smith: Well, I think when the City negotiated this agreement with Vepco to acquire the property, I think the fact is that there is language in the agreement which refers to the bridge and continues Vepco's obligation even past the closing date to maintain, and we would [16] say replace the bridge, is in effect a negotiation for our benefit to have that bridge in place.

And our position is that although we did not negotiate with the City on the point, the effect of this agreement is that they have negotiated for our benefit.

The Court: But that is simply a matter of a contractural right that you would be entitled to money damages. If you don't get a bridge rebuilt for that, you get your damages. That is about all.

Mr. Smith: We would contend that if they have agreed to replace the bridge as part of this agreement, we are a beneficiary under that agreement. We would have as much right to enjoin them to replace that bridge as would the City.

The Court: Well, realistically, so we get off dead center, I am not going to order the bridge to be rebuilt. But sooner or later, you will get your case postured in such a way that you will go out on prayer for injunctive relief

Now, whether or not you have anything that is maintainable in a damage action, that is something else. But this is a simple matter [17] to align the parties so that you get a fair whack at your damages.

That being so, and knowing that you are not going to get your bridge rebuilt, start thinking in those terms for the future of the case, and you will streamline it a great deal.

Mr. Smith: Yes, sir. Well, that being the case, of course, we would still contend on the same points—

The Court: I understand. And hopefully you would get a redress on this broader basis. But you won't in the posture of the case now. So I am just wondering that if counsel, realizing that there won't be any court-ordered bridge rebuilt, if you can't take just in the practicalities of life a new look at it, that might be meaningful to your clients and everybody else.

Mr. Smith: Well, I would think that we would, Your Honor, with the fact that the bridge is not going to be rebuilt.

The Court: So the posture of the case would be that you got a clear denial for your request for injunctive relief, and you could then [18] go immediately over to the Court of Appeals to one judge and either get it reversed or affirmed.

But once you realize that your dream of a bridge is gone forever, then this becomes just a garden variety lawsuit that I think everybody could look at realistically and evaluate for all practical purposes and get rid of.

Mr. Smith: Well, with the hope of getting the bridge rebuilt gone, if the Court has so ruled, then obviously we would have to pursue the damage aspect of the case.

The Court: Well, I am just saying that the thing may not be postured so that that is a proper way of disposing of it at this time. I see nothing in the estate that you aspire to establish that would ever give you that interest, that would entitle you to injunctive relief.

Now, if you would like to have an order entered carrying that out so that you could take it over to the Court of Appeals immediately and get it reviewed by one judge, it seems to me that would be a better procedure for you so that you can say forever good-bye to the injunction, and then go on to something else in the case.

[19] Mr. Smith: Your Honor, do I understand that the Court is ruling that both with respect to the property which Old Dominion contends it leases and the condemned property that the Court is holding that the title of Old Dominion or the claim based upon its assertion of right of occupancy in these two different parcels of land is so tenuous that it would not support a claim for injunctive relief of either aspect of Old Dominion's claim?

The Court: On either aspect of it. But I am also saying that the attack that has been made on your Bill of Complaint by the demurrer may not be the proper vehicle to reach it, because your allegations, as far as the lease is concerned, may support you getting by a demurrer on it.

But just realistically, it wouldn't be of any great advantage to either of you to avoid the ultimate reckoning by the technicalities of the pleadings.

Mr. Pollard: If, in fact, the proof of the lease wouldn't sustain the claim?

The Court: That is right. I should say that if you amended your Bill of Complaint [20] to set out the terms of the lease that you really claim under in such a way that by craving oyer the Defendants make that a part of your Bill of Complaint, then I would sustain the demurrer. But that may be just for getting up a record in the clean way.

Mr. Pollard: Well, if we elected to amend, we would put the lease in so it wouldn't be necessary for them to crave oyer of the lease itself.

But our decision, based upon Your Honor's comments, will have to be whether it is worth amending to set it out.

The Court: Right. But just so that you get your record perfected in such a way that you get an appealable point, because bear in mind that if I sustain the demurrer, then I would dismiss the Bill of Complaint. That would have the finality that would be appealable.

As it is now, I can't get my teeth into anything that gives you any definitive relief anyway, I don't believe. I mean, I have denied the demurrer just to get a chance to get at it in a little better way.

Mr. Pollard: And our point, Your Honor, on the right to injunctive relief is based [21] upon our occupation since the condemnation of the condemned land, the 6.208 acres, as Mr. Smith was pointing out to the Court, the agreement of March of 1972 between Vepco and the City was for Old Dominion's benefit and was in confirmation of the 1926 agreement and the 1933 agreement, both of which are plead and which we feel properly sustains Old Dominion's claim for injunctive relief.

Mr. Farley stated at the outset of this hearing that he didn't want to get in a controversy with the Co-Defendant, but there I think the pleadings clearly show that the March, 1972, agreement recognized as valid and carries forward Vepco's obligation to continue to maintain the bridge. Now, it doesn't say replacement, but we think that if this agreement is read with the 1926 and the 1933 agreements, it can be fairly said that Vepco in its agreement confirmed by ordinance and adopted in March of 1972, continued to remain liable for the actual extent of its obligations in these 1926 and 1933 agreements.

And that is what our Bill of Complaint intends to say.

The Court: I understand that. But [22] here if you have such a contract right, isn't it just a matter of money damages that you are suffering for whatever period of time that you are fairly entitled to stay down there? And that it is a matter of easy and certain ascertainment, I would think.

Mr. Pollard: Well, of course, we asked for money damages in this suit.

The Court: But I mean, that part of it can be transferred over to the law side of the thing and continued on that way. But you won't ever get the bridge back under my ruling. So just under my ruling,

recognizing that is a fact, just figure out how much longer you are going to be on that homestead over there. Don't plan on being in business over there too long.

So I am trying to get you postured so that you will be in your new location and you can be happy in life and be getting some barges together to get all that stuff off of there.

Mr. Pollard: Well, sir, we can't help but refer back to the condemnation suit. And now that the Court has ruled in that case that the moving costs must be determined as of the date of [23] the taking when the bridge was there, and now, of course, the bridge is not there, and Old Dominion must move. And the cost of moving must necessarily be increased by the fact that Old Dominion must move without a bridge, although the Court has ruled that those costs are determined as of the date of taking.

The Court: And you may conclude that you ought to phase out about nine-tenths of that stuff, that the value of moving is greater than the value of the property, so you just leave it there for the City to enjoy when they get it set up as a park.

They have not tried to force you to move some of that stuff, have they?

Mr. Pollard: Well, they have asked for immediate possession by motion filed in the condemnation case, Your Honor.

The Court: But you can walk away and leave it setting over there, can't you?

Mr. Pollard: Well, I don't think, Your Honor, that the concept of damage for moving costs under the Constitution contemplates that the owner of the machinery and the equipment and the [24] tangible personal property can saddle the cost of moving it on the condemnor, and that is what would result.

The Court: No. Here is what I was telling you, that the true measure of your damages is the diminution of it by the condemnation proceeding. And if that is so, then you have been wiped out, and you are entitled to those dollars because you have been wiped out. And this is the whole concept of damages in Virginia.

Mr. Pollard: Well, we feel that the concept of damages that the Court must apply in the condemnation case is the cost to the condemnee

to replace the machinery which is susceptible of being moved, and that includes the freight, to Old Dominion of acquiring a similar piece of machinery. That is what it is worth. That is its value in place.

So we say in every case that the value in place must take into account what it costs to get a similar machine where the one that is condemned is rather than where the one that is to be moved is located. So what I am saying, Your Honor, is that this bridge if Old Dominion is not [25] to get some relief on account of its loss in this injunction suit, then it necessarily must get it in the condemnation suit.

The Court: Well, I mean, the law is what it is. If it gives you that happy relief, fine, because I understand your problems there. But my ruling at least lets you know where you stand.

The condemnation speaks of a date of take, which was September 12, 1968. And if you don't get a bridge rebuilt, then the only hope that you have on that score is for money damages under the—

Mr. Pollard: Under the Constitution?

The Court: Right.

Mr. Pollard: Well, Your Honor has given us sufficient guidelines so we know how to proceed in this case.

The Court: I won't make any definitive ruling until you all discuss this and find out how you want to posture it so that you can get an order.

Mr. Farley: Your Honor, may I be heard?

[26] The Court: Yes.

Mr. Farley: Because I think the case is in a posture for a definitive ruling.

The Court: All right.

Mr. Farley: Now, I think the law requires that the landowner is to be made whole in the condemnation proceeding, as whole as he can be made under the guiding principles that are applicable in a condemnation proceeding. Now, the condemnation proceeding has been severed from this case.

Now, I am very sympathetic with Mr. Pollard's problems in connection with the fact that the date of the take controls his measure of damages. And how he works around that and what the rulings of the

Court are in connection with that are totally immaterial as far as this particular proceeding is concerned.

The Court: I agree.

Mr. Farley: Although I know Your Honor is not going to do anything that is ridiculous or ludicrous, I mean the Court can't be expected to just completely divorce itself from reality that exists.

[27] But the things that Mr. Pollard complains about are fortuitous circumstances that are not recognizable in law. They could have moved when they were condemned. They elected to stay there and remain to continue operating on that island, and that was of some benefit to them. And how that was determined, I don't care. But they elected to stay there.

Now, the bridge washed away without fault, negligence or anything by anybody concerned. There is not a scintilla of evidence inferred, implied, alleged, or anything that the City or power company was guilty of any negligence or wrongdoing, or anything like that in connection with that bridge. It washed away by an act of God.

Now, what I wanted to do in this proceeding was to get to the heart of the matter, to get to the jugular vein and get rid of this one thing once and for all and try to streamline it for the Court. Now, I recognize it is a problem on the demurrer and the lease. Now, Your Honor, I labeled the pleadings demurrer and a motion to dismiss.

Now, I respectfully submit to the [28] Court that the Plaintiff absolutely cannot raise any higher than paragraph 10 of the Plaintiff's Bill of Complaint. Now, in that particular paragraph, they allege two things. They allege that the power company and the City entered into an agreement whereby the power company would sell the bridge to the City and the City would purchase the bridge from the power company.

Now, Your Honor, the law—and I am not much of a real estate lawyer—but I suggest that the fundamental real estate principles are that the equitable title in that particular situation to that bridge was transferred to the City. It is, again, basic real estate law that in the absence of a provision—and we all do this when we are drafting real estate contracts, we say specifically that the risk of loss should be on the seller, the risk of loss should be on the buyer, or whatever. But my recollection of the law is that in the absence of such a provision the risk of loss is on the purchaser. This is basic hornbook law.

Now, just on that principle right there, we have no interest in that bridge. We may [29] have had legal title, but we do not have equitable title, and the risk of loss was on the City at the time that the bridge washed away.

Now, secondly, and I don't care if they want to bring the whole agreement in here as Mr. Pollard says you have to do, look at the whole agreement between the power company and the City in connection with that bridge, and that will show the Court that the power company had something more to do than just maintain. Well, they should have alleged it. The Complaint is defective on its face when it says the only duty that the power company had was to maintain.

Now, Your Honor, there is no reason why this Court should indulge in any semantics or any hidden meaning or anything like that. The word "maintain" is a simple, readily-understandable word, and it does not embrace replacement. I don't care what you look at, it does not embrace replacement.

Now, under no stretch of the imagination would it do that. Now, I say that—

The Court: What is your motion to dismiss the equivalency of in a law action, a motion [30] for summary judgment?

Mr. Farley: Yes, sir.

The Court: On the pleadings?

Mr. Farley: I don't think that we have summary judgment available to us on an equity action, because I think that a motion to dismiss is available on an equity action. And I think that from the authorities that they have alleged and all of the things discussed in the memorandum, if you just look at their pleadings on its face it is defective.

Now, they have got more than that, then. They maybe should be given leave to amend the Complaint to attach the entire agreement between the City and the power company with respect to that bridge. But I represent to Your Honor, as an officer of this court, that after you look at this whole agreement, it isn't—

The Court: But they have conceded that—

Mr. Farley: It isn't going to raise any higher than that word "maintain." And that word "maintain" does not include replacement.

And you can take judicial notice of [31] this, even though it

severed, this Court has said that, and they allege it, they agree that the title to the property they own is vested in the City in September of 1968.

Now, I don't see how under that ruling there could possibly be any basis even for a suit at law in damages. Now, the one possible exception, again being fair to the Court, may be this lease situation that they had between the City and themselves. But I don't see how that gives them the right to maintain a suit at law for damages against the power company.

We didn't lease the property to them, and we were not a party to that agreement, implied or expressed. And the only way that they have the power company in this suit is on the realty covenants, and they were wiped out by the—

The Court: Well, I am satisfied that they are gone.

Mr. Farley: Yes, sir, by the condemnation. And the only other thing that they have got against the power company is that agreement between the power company and the City, which they contend that they were a party beneficiary.

[32] And that is a nice question, but even giving that, because the Court has to bend over backwards on this motion—

The Court: You wouldn't have to do any more than you contracted to do.

Mr. Farley: Right. But even if they were a third party beneficiary, as I understand, this is an extraordinary relief that we are asking for to dismiss the suit—and you have got to bend over backwards to see if there is anything in there there will support their claim—even doing that, on fundamental hornbook real estate law, and reading the plain English language, they don't have a case. And I think that the power company is entitled to a definitive ruling. And if you want to give them leave to amend, that is fine. We will face that.

The Court: They have stated that they can't elevate their case any higher than it is right now, just on the technicalities of what you call it, whether it is a demurrer or something else, that everybody understands what their case is.

Mr. Farley: I may have not done it right, but I don't know anything more to do than [33] to demur and to move to dismiss under our rules. And there has just got to be some way that this Court—

The Court: And I want to rule on it so that he can take it across the street here.

Mr. Farley: There has got to be some way so we can get to the end of it.

The Court: Mr. FitzPatrick, all that you did was demur to this thing; is that correct?

Mr. Fitzpatrick: That is correct, Your Honor.

The Court: How about amending your answer on it to call it a demurrer and a motion to dismiss, and I will sustain both of them and enter an order in the case getting rid of it.

And that gives you everything that you can get in a simple record to take across the street if you want to.

But there has obviously got to be some way that this thing can get knocked out at this stage if you know the nomenclature to call it by. And a sweeping thing like a motion to dismiss ought to cover everything.

[34] Mr. Farley: I think so, Your Honor.

Mr. Pollard: Your Honor, may I just make a couple of observations on Mr. Farley's argument to the Court?

The Court: Yes.

Mr. Pollard: At the outset, Mr. Farley stated that Old Dominion had elected to stay on the island after the condemnation suit was filed. And I call the Court's attention to the fact that when the suit was filed no amount was recognized as included in the deposit that covered damage—

The Court: Well, Mr. Pollard, that doesn't make any difference. This is just one of the flukes of life that comes across when they condemn your property and they are not generous in putting up money. The effect of it is still the same, and this is a quantitative thing.

Mr. Pollard: I don't think so, Your Honor, because Old Dominion in its response or answer to the condemnation petition contended that it was entitled to damages on account of the cost of moving its tangible personal property. We contended that from the outset.

[35] The Court: I understand that you got overruled and you

won your point. But that doesn't change the fundamental and substantive law.

Mr. Pollard: But the statement has been made that Old Dominion elected to remain there. But we have always maintained that we were entitled to be paid for the cost of moving.

The Court: Which you have been now, and you are still perched over there.

Mr. Pollard: But we had not been paid that when the bridge washed out, and that was almost six months after the Supreme Court said on the 17th of January, 1972, that we were entitled to moving costs under the Constitution. And the City didn't deposit an additional amount to cover that aspect of the case until December of 1972.

So in the interim the bridge washed out. So it is not that Old Dominion elected to remain. Old Dominion wasn't in the position to move because it had not been paid what it was entitled to be paid under the Constitution.

The Court: Well, I don't know all the intricacies of Old Dominion's financing, but I know businesses like Old Dominion that have [36] a line of credit and are successful and have good management, and they can figure out how to do these things, Mr. Pollard. So the hearts and flowers aspect of it doesn't really help me a whole lot, really.

Mr. Pollard: I am strictly arguing the legal points involved, Your Honor.

The Court: Well, fine. I will let the City amend its answer to include a motion to dismiss, and I will sustain both the demurrer and the motion to dismiss and enter a judgment to that effect.

Mr. Farley, you and Mr. FitzPatrick prepare the order on it so that he can—

Mr. Pollard: We would like leave to plead over, I believe, as the statute permits, in this order.

The Court: All right. Realistically, tell me what you are going to plead.

Mr. Pollard: I would like to tell you, Your Honor. Now, Old Dominion has not made this point yet, because the City didn't recog-

nize the right of the moving costs when they filed a condemnation petition as the Supreme Court said [37] they should have. I am not sure that the filing of the petition was effective to vest the title in the City. Now, that is a position that we have not argued yet.

The Court: All right. Don't piggyback it into this one. I keep telling you that I like things nice and simple, the way condemnation cases are. But you raise that in the condemnation case and I will rule on it whenever that comes up.

You can fire away at this one in the legal grievances that you have in this case, but don't piggyback any condemnation matters into this one, because they go out, zip.

Mr. Pollard: Well, the point that I would make and what we would be concerned with here is, Your Honor, that the covenants continued for Old Dominion's benefit because title never vested in the City for the City's failure to recognize a constitutional right which Old Dominion had. And we would amend to allege that in this case.

The Court: All right. Go ahead, and I will give you—even though you are not [38] entitled to advisory rulings—I will tell you right now that I am going to dismiss that as soon as it comes up, because I think that it belongs in the condemnation case. I won't rule on the merit of it, but it will be knocked out of this one altogether.

Mr. Pollard: Well, I just have stated to the Court what I had in mind in amending.

The Court: Well, to protect your record, do that. But that is a proper matter for the condemnation case, I think, on balance. But just to protect yourself on both sides, go ahead and do amend it, and I will take care of it.

Recess court, Mr. Bailiff.

HEARING ADJOURNED.

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FINAL DECREE
Entered September 10, 1973

This cause came on again to be heard on the Bill of Complaint; the Demurrer of the City of Richmond; the Demurrer to Bill of Complaint and Motion to Dismiss of the Virginia Electric and Power Company; the Amended Demurrer to Bill of Complaint and Motion To Dismiss of the City of Richmond; the Memorandum of counsel; and was argued by counsel. Upon consideration whereof, for the reasons expressed by the Court at the hearing on July 17, 1973 and more fully set forth in the transcript of such hearing, which transcript is hereby made a part of the record in this cause, it is

Adjudged, Ordered and Decreed that the Demurrer to Bill of Complaint and Motion To Dismiss heretofore filed on behalf of Virginia Electric and Power Company and the Amended Demurrer to Bill of Complaint and Motion To Dismiss heretofore filed on behalf of the City of Richmond be, and the same hereby are, sustained and this cause is dismissed with prejudice, to which rulings and actions of the Court the Plaintiff, Old Dominion Iron and Steel, by counsel, objects.

On motion of the Plaintiff, notwithstanding the dismissal of this proceeding in equity with prejudice, it is Further Ordered that this cause is hereby transferred to the law side of the Court for purposes of a proceeding to seek money damages from the defendants, and the plaintiff is hereby granted until the 25th day of September, 1973, to file such amendment to its pleading to conform to procedure at law, and the defendants are granted 21 days thereafter to file such responsive pleadings or motions as they may be advised, to which action of the Court transferring this cause to the law side of the Court, the defendants, by counsel, object.

And nothing further remaining to be done in this cause it is Ordered that the same be stricken from the docket and placed among the ended causes.

Dated: September 10, 1973
Enter This:

/s/ Richard L. Williams
Judge

* * *

MOTION FOR JUDGMENT
Filed September 24, 1973

To the Honorable Judges of the Circuit Court of the City of Richmond, Division II:

Comes now the Plaintiff, Old Dominion Iron And Steel Corporation, by counsel, and by leave of Court granted in the Decree rendered in this proceeding on September 10 1973 files this amendment to the Bill of Complaint heretofore filed by it and represents unto the Court as follows:

1. The Plaintiff is a Virginia corporation engaged in the manufacturer of oil storage tanks, chemical-process heat exchangers and packaged water heaters on approximately 12 acres of land owned by the City of Richmond (the "City"), on Belle Isle, an island in the James River, in the City of Richmond.

2. Defendant Virginia Electric and Power Company ("Vepco") is a Virginia public service corporation.

3. Defendant City is a municipal corporation chartered by the Commonwealth of Virginia.

4. By Deed dated January 29, 1926, recorded June 17, 1926, in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia, in Deed Book 332C, at page 86, Old Dominion Iron and Steel Corporation and others, predecessors in interest to Plaintiff, conveyed to Vepco all of the right, title and interest of the Grantors in said Deed in the steel highway bridge connecting Belle Isle with the north bank of the James River. At the same time, Old Dominion Iron & Steel Works, Incorporated, a successor in interest to the Grantors in the aforementioned Deed recorded as aforesaid in Deed Book 332C, at page 86, in the aforementioned Clerk's Office, and a predecessor in interest to Plaintiff, desired as between it and Vepco to recognize and define their rights and obligations with respect to the use and maintenance of the steel highway bridge. Accordingly, by Agreement dated January 29, 1926, recorded June 17, 1926, in the aforesaid Clerk's Office in Deed Book 332C, at page 100, the said Old Dominion Iron & Steel Works, Incorporated and Vepco accepted as binding the following provisions contained in a Deed dated January 29 1926, recorded January 30, 1926, in the aforesaid Clerk's Office in Deed Book 328B, at page 82, wherein Old Dominion Iron and Steel Corporation and others, prede-

cessors in interest as aforesaid to Plaintiff, conveyed to Old Dominion Iron & Steel Works, Incorporated, the 12 acres of land now occupied by Plaintiff as aforesaid:

> It is hereby understood and agreed that insofar as title thereto may be lawfully reserved by the Old Dominion Iron and Steel Corporation and conveyed to the Virginia Electric and Power Company by the aforesaid deed of even date herewith the title to the steel highway bridge connecting Belle Isle with the north shore of James River, shall be conveyed to and vested in the Virginia Electric and Power Company and its successors, in title, but the right is hereby granted to said Old Dominion Iron and Steel Works Incorporated, and its successors in title, to use the same for passage or persons, automobiles and vehicles and other reasonable and proper uses, subject to two conditions to which the party of the second part by accepting this deed covenants on behalf of itself and its successors in title to be bound (a) that such uses shall not result in any overloading or damage to said bridge and shall not be inconsistent with the uses and purposes of the Virginia Electric and Power Company, or its successors in title and (b) that said Old Dominion Iron and Steel Works Incorporated, and its successors in title, shall jointly with the Virginia Electric and Power Company and its successors in title, maintain the same and shall contribute equally with said Virginia Electric and Power Company, and its successors in title, towards the cost of maintenance upkeep repair and replacement of said bridge and towards the settlement and discharge of any claims or actions at law, for damage or personal injury to property or persons growing out of the use, maintenance upkeep and repair of said bridge.

5. By Agreement between Vepco and Old Dominion Iron & Steel Works, Incorporated, predecessor in interest as aforesaid to Plaintiff, dated May 13, 1933, Vepco released the said Old Dominion Iron & Steel Works, Incorporated, from all liabilities to maintain the steel highway bridge, and Vepco became solely responsible for the maintenance, repair and replacement of the bridge so long as no other adequate roadway connection was available to the north shore of the James River.

6. The said Agreements of January 29, 1926, and May 13, 1933, mentioned in paragraphs 4 and 5, were made for Plaintiff's use, enjoyment and benefit.

7. On September 12, 1968, an Order was entered by this Court in condemnation proceedings styled City of Richmond v. Old Dominion Iron and Steel Corporation and 6.208 Acres of Land, More or Less, etc., vesting title in the City to the 6.208 acres then owned by Plaintiff on Belle Isle.

8. Since September 12, 1968, Plaintiff has continued to occupy and conduct its business on the aforementioned 6.208 acres on Belle Isle by and with the full knowledge and consent of the City, by reason of which all the rights and benefits conferred by the aforementioned agreements of January 29, 1926, and May 13, 1933, have continued unimpaired and in full force and effect for Plaintiff's use and enjoyment. Until on or about the 23rd of June, 1972, Plaintiff used the steel highway bridge aforementioned as the only access for its trucks and other vehicles needed by it to conduct its business.

9. Since about the 15th day of January, 1970, Plaintiff has leased from the City of Richmond 6.81 acres on Belle Isle immediately adjacent to the 6.208 acres aforementioned. This additional property and the improvements upon it have been used by Plaintiff as a part of its manufacturing plant facilities.

10. Plaintiff believes and alleges that on or about March 27, 1972, the City and Vepco entered into an Agreement pursuant to which the City agreed to purchase and Vepco agreed to sell certain property owned by Vepco on Belle Isle, including the aforementioned steel highway bridge. The Agreement between the City and Vepco further provided that Vepco would continue to maintain the bridge so long as Plaintiff's occupancy of property on Belle Isle continued, with the understanding that the City would as soon as possible consummate acquisition and occupancy of the said property. This latter agreement was in confirmation of the duties and obligations of Vepco as hereinabove alleged with respect to the bridge and was made for Plaintiff's use, enjoyment and benefit.

11. On or about June 23, 1972, the steel highway bridge connecting Belle Isle with the north bank of James River was destroyed by flood waters and has not been replaced either by Vepco or by the City.

12. As a result of the failure of either Vepco or the City to properly maintain, keep up and repair the bridge by reason of which

failure the bridge was destroyed as aforesaid and as a result of the failure of either Vepco or the City to replace the bridge, all in violation of the duties and obligations of Vepco and the City pursuant to agreements made as aforesaid for Plaintiff's use, enjoyment and benefit, Plaintiff has sustained and will continue to sustain substantial damages to its business in that it has been unable to continue its manufacturing operations as conducted by it prior to June 23, 1972; it has had to expend large sums of money to provide alternate methods of access and transportation to and from its plant on Belle Isle, including the cost of barges and boats, winches, ramps and landings, dredges and cranes; it has incurred and will continue to incur additional labor costs in view of the added time consumed in its employees' gaining access to and from its plant; it has incurred and will continue to incur losses in its business on account of its inability to meet production schedules; and it has been forced to close down its plant at various times because of its inaccessibility from the north shore of the James River.

Wherefore, Plaintiff moves the Court for judgment against the defendants jointly and severally for their damages incurred as aforesaid by reason of the actions of the Defendants in at least the amount of $500,000.00 and its costs in this behalf expended.

* * *

DEMURRER
Filed October 16, 1973

The defendant, City of Richmond, by counsel, says that the motion for judgment of the plaintiff, Old Dominion Iron and Steel Corporation, insofar as the relief sought, is as against this defendant not sufficient in law and states its grounds of demurrer relied upon as follows:

1. That from and after September 12, 1968, the plaintiff, by reason of the Order Vesting Title in the City of Richmond entered by this Court on September 12, 1968, in the condemnation proceeding styled *City of Richmond* v. *Old Dominion Iron and Steel Corporation and 6.208 Acres of Land, more or less, etc.*, has been divested of both the legal and equitable title to the land. The legal and equitable title from and after September 12, 1968, is vested in the City of Richmond.

2. The motion for judgment fails to state any legal or contractual obligation owed by the defendant, City of Richmond, to the plaintiff.

3. The motion for judgment fails to set forth facts sufficient to constitute a cause of action by the plaintiff against the defendant, City of Richmond.

4. The motion for judgment fails to allege any facts upon which plaintiff is entitled to damages against this defendant, City of Richmond, under the alleged Deed, dated January 26, 1926, and recorded June 17, 1926, in which Old Dominion Iron and Steel Corporation and others conveyed to Virginia Electric and Power Company the right, title and interest in the steel highway bridge connecting Belle Isle with the north bank of the James River.

5. The motion for judgment fails to allege any facts upon which plaintiff is entitled to damages against this defendant, City of Richmond, under the alleged Agreement, dated January 26, 1926, and recorded June 17, 1926.

6. The motion for judgment fails to allege any facts on which plaintiff is entitled to damages against this defendant, City of Richmond, under the alleged Agreement dated May 13, 1933.

7. The motion for judgment fails to allege any facts upon which plaintiff is entitled to damages against this defendant, City of Richmond, under the alleged Agreement on or before March 27, 1972, between the City of Richmond and Virginia Electric and Power Company.

8. The motion for judgment fails to show how the defendant, City of Richmond, can be liable to the plaintiff on alleged covenants running with the land since the plaintiff admits that it no longer owns the land with which the covenants are alleged to run.

9. The motion for judgment fails to show how the defendant, City of Richmond, can be liable to the plaintiff in respect of alleged Agreements that pertained to the plaintiff's ownership of land which the plaintiff no longer owns.

10. The motion for judgment fails to show how the defendant City of Richmond, can be liable to the plaintiff under the alleged Agreement between the City of Richmond and the Virginia Electric and Power Company of March 27, 1972, in view of the fact that the plaintiff does not even allege that it was a party to that Agreement.

11. The motion for judgment is deficient in that it fails to show how the defendant, City of Richmond, can be liable to the plaintiff under the alleged Deeds and Agreements in which the defendant, Virginia Electric and Power Company, agreed to maintain the steel highway bridge, said motion for judgment failing to show that this defendant, City of Richmond, agreed to maintain the steel highway bridge.

12. The motion for judgment is fatally deficient because it states no facts which would give rise to either legal or contractual grounds for a suit to assert damages for the violation thereof.

Accordingly, this defendant, the City of Richmond, moves the Court that its demurrer be sustained and that it be dismissed as a party defendant in this proceeding.

* * *

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, VIRGINIA ELECTRIC AND POWER COMPANY
Filed October 16, 1973

Defendant, Virginia Electric and Power Company (Vepco), by counsel, hereby moves the Court pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, to enter Summary Judgment in Vepco's favor dismissing plaintiff's Motion for Judgment as to Vepco on the grounds that the Court has overruled the claim of the plaintiff as set forth in its Motion for Judgment at the hearing on the Demurrer and Motion to Dismiss of the respective defendants held July 17, 1973, the transcript of which was made a part of the Final Decree in the Chancery proceeding in this cause entered on September 10, 1973.

This Motion is based upon: (i) the pleadings on file with the Court; (ii) the rulings of the Court in the hearing on the Demurrer and Motion to Dismiss of the respective defendants held July 17, 1973; (iii) the Final Decree of the Court entered September 10, 1973, incorporating by reference the transcript of such hearing held July 17, 1973.

* * *

TRANSCRIPT OF HEARING

[1] * * *

Date: December 12, 1973
Time: 9:00 a.m.
Before: Hon. Richard L. Williams, Judge

[2] Appearances:

Mr. Robert N. Pollard, Jr.
Mr. Julious P. Smith, Jr.,
Counsel for the Plaintiff

Mr. E. Milton Farley, III
Mr. John E. McDonald, Jr.,
Counsel for Virginia Electric
and Power Company

Mr. Albert J. Fitzpatrick,
Assistant City Attorney

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[3] The Court: Good morning, gentlemen.

Mr. Pollard: Good morning, Your Honor.

Mr. Farley: Good Morning, Your Honor.

The Court: What is the order of procedure here this morning?

Mr. Pollard: Your Honor, there are two matters pending in the case of *Old Dominion Iron & Steel Corporation* v. *Virginia Electric and Power Company* and the *City of Richmond.* Old Dominion filed a Motion for Judgment pursuant to leave of Court, and leave was granted to the defendants to file responsive pleadings.

Virginia Electric and Power Company has filed a Motion for Summary Judgment, and the City of Richmond has filed a demurrer, and those matters are set for hearing this morning.

The Court: Mr. Pollard, in reviewing the file I didn't see an Amended Motion for Judgment, but just assumed that you adopted your original Bill of Complaint as Motion for Judgment. Or did you actually file one?

[4] Mr. Pollard: We filed one, Your Honor.

The Court: May I have a copy of it and read it over? I know that leave has been granted to you, but it may have gone to Hustings Court and just never got transferred over here. Does anybody actually have a—

Mr. Pollard: It was certified and filed on the 24th of September, Your Honor, and I want to be certain—this is the correct copy.

(Document shown to the Court for examination.)

The Court: Can you proceed without having this in front of you, Mr. Pollard?

Mr. Pollard: Yes, sir.

The Court: Fine. Is the sense of this Motion for Judgment, now, that there was an obligation on Vepco to maintain the bridge pursuant to the documents of 1926, and that remained viable by the agreement between Vepco and the City in 1972?

Mr. Pollard: 1926 and 1933, the two old agreements.

The Court: And then the liability was perpetuated by the agreement in 1972?

[5] Mr. Pollard: Yes, Your Honor.

The Court: All right.

Mr. Pollard: Your Honor, I have a letter here to the Clerk on Hull Street sending over the Motion for Judgment.

The Court: I am satisfied that it was, but with my having the file, this was kept over there, I am sure. But it is perfectly all right.

Mr. Pollard: I should have seen to it that it was brought over here.

The Court: I will see that it is marked filed on September 24th, so there is no problem on it.

Proceed, Mr. Pollard, or let's see, either the City or Vepco on their demurrers or Motion to Dismiss. Who wants to proceed first?

Mr. Farley: If Your Honor please, the Power Company has filed a Motion for Summary Judgment in connection with the Motion for Judgment, and I don't intend to reiterate everything that has transpired here on two previous arguments before the Court, as well as the legal memoranda.

As I understood Your Honor's ruling on July 17, 1973—and I am referring to [6] pages 37 and 38 of the transcript of all the arguments and hearings—the Court said, "All right. Go ahead, and I will give you—even though you are not entitled to advisory rulings—I will tell you right now that I am going to dismiss that as soon as it comes up, because I think that it belongs in the condemnation case. I won't rule on the merit of it, but it will be knocked out of this one altogether."

Now, the other thing that I wanted to mention, Your Honor, is that as I understand the transcript, Mr. Pollard principally wanted leave to amend and proceed at law on the ground that—well, what he says in the transcript—"Well, the point that I would make and what we would be concerned with here is, Your Honor, that the covenants continued for Old Dominion's benefit because title never vested in the City for the City's failure to recognize a constitutional right which Old Dominion had. And we would amend to allege that in this case."

Well, as I read the Motion for Judgment, it is almost identical with the original Bill of Complaint, and there is nothing in there about any constitutional rights. But even if they were, Your Honor mentioned in this hearing that that would [7] be a matter which should be taken care of in the condemnation case.

The Court: Well, why do you say that Old Dominion can't maintain this action against Vepco in its present form?

Mr. Farley: Well, it would be a repetition of what we have already covered before, Your Honor, but basically the covenants that they rely on cannot run with the land if they no longer have any interest in the land, and in September of 1968, I think it was, when title vested in the City, then that effectively terminated any right that they had in the covenants running with the land, and they couldn't derive any benefit from those covenants.

Now, as far as the agreement between the City and the Power Company is concerned on the purchase of the bridge—and the Motion for Judgment is very clear on this—the only undertaking by the Power Company which they could possibly be a third beneficiary of is that the Power Company said it would maintain the bridge, not repair or replace the bridge when it washed out as a result of an Act of God.

The Court: Well, in order for [8] Vepco to have liability to Old Dominion in a damage suit such as this, Vepco would have to owe some

duty to Old Dominion, would it not, by statute, by common law, or by an agreement of some sort?

Mr. Farley: Exactly, Your Honor. The only two theories that they can come up with to give right to that duty are the covenants running with the land—

The Court: Which you say are extinguished by the City acquiring title to the property in September of 1968.

Mr. Farley: That is correct, as a matter of law. And that was all briefed in our Memorandum.

The Court: Then you say that on the side bet between the City and Vepco that your only duty was to maintain the bridge?

Mr. Farley: That is correct, Your Honor.

The Court: In its present form, and even though Old Dominion would qualify, except that they could qualify as a third party beneficiary, that all they could do was to make you maintain it, and there is nothing there to [9] maintain any more.

Mr. Farley: Yes, sir, that is correct.

The Court: Now, that is Vepco's fixed position?

Mr. Farley: Yes, sir. This all appears right on the face of the Motion for Judgment. That is why we think that as a matter of law we are entitled to summary judgment.

The Court: Where he alleges in his Motion for Judgment that there is a duty on Vepco to maintain the bridge, doesn't that Memorandum as a matter of factual proof?

Mr. Farley: What we contend, Your Honor, and what we argued before is that the word "maintain" in its common and ordinary and readily acceptable meaning can't possibly be extended to embrace replacement. I think in one of our initial memoranda we referred the Court to Section 55-226 of the Code of Virginia which has to do with covenants to keep premises in good repair.

The statute there is clearly that a covenant to keep something in good repair, or in effect to maintain it, does not embrace [10] replacement.

Now, basically what the thrust of Mr. Pollard's contention was

in wanting to amend, over and above the constitutional thing he raises another point. That was that he wanted to amend for alleged bad faith on the part of the City in connection with the initial deposit of moving costs, the fact that they wouldn't deposit it, or if they did deposit it, wouldn't let them withdraw it, and that gives rise to some cause of action.

Well, certainly that cannot give rise to any cause of action as far as the Power Company is concerned, and as I remember the transcript, Your Honor said that was something that we will properly take care of in the condemnation suit. In other words, in the valuation of the machinery, if in effect it ought to be treated as fixtures as distinguished from being treated as personal property, we will take care of that in the condemnation suit.

Well, the condemnation suit has been tried and an award has been entered on the moving costs, so by no stretch of the imagination can I see in law or fact any theory of damages by Old Dominion against the Power Company. This is so clear from the [11] pleadings that are before Your Honor. As I say, this is as I understood your ruling earlier, and I see no reason why the Court should depart from it.

The Court: Was a copy of that agreement between the City and Vepco ever filed in these proceedings?

Mr. Farley: It wasn't attached to this Motion for Judgment. They did mention it in the—

The Court: Did you attach it to your Motion?

Mr. Farley: I think that we attached it to our Memorandum, didn't we?

The Court: Yes, it seems to me.

Mr. Farley: I believe we attached it to our Memorandum of Authority, Your Honor. Yes, on page 2 of our opening memorandum in the footnote.

But the Plaintiff can't rise above paragraph 10 of the Motion for Judgment, which begins on page 4 and goes over to page 5, in which they say that the agreement between the City and Vepco provided that Vepco would maintain the bridge.

Now, the remainder of that paragraph as to the legal conclusions to be derived [12] from that agreement, as I say, is a question of law.

The Court: I understand Vepco's position. Let me hear from the City on that.

Mr. FitzPatrick: All right, Your Honor. I endorse Vepco's comments. With regard to the prior hearing, I do think that the Court on page 31 of the transcript did indicate that they were satisfied when talking about the covenants that they are gone.

I am not entirely clear with respect to what context the Court was talking in view of the fact that it omitted Old Dominion.

The Court: But you attack his Motion for Judgment by demurrer; is that correct?

Mr. FitzPatrick: That is correct, sir.

The Court: What is the legal deficiency in the Motion for Judgment that makes it assailable by demurrer in the case of the City?

Mr. FitzPatrick: All right, sir. Well, I will come to that point immediately, then. I think if we read the Motion for Judgment in its entirety, it states a matter arising out of contracts, sir. The contracts are the contractural rights, being those which were between the predecessors [13] of Old Dominion and Vepco in 1926 and 1933. They alleged that they were a third party beneficiary to a contract of sale between the City and Vepco in which contract the sale as set forth in paragraph 10 of the Motion for Judgment that they alleged that it is further provided that Vepco would continue to maintain the bridge so long as Plaintiff's occupancy on the property on Belle Isle continued.

The Court: But the City says as of September 12, 1968, you took over every right that Old Dominion had?

Mr. FitzPatrick: That's right, and in addition, sir—

The Court: And claim for that bridge; is that correct?

Mr. FitzPatrick: That is correct, sir. In addition, I don't believe that the very pleading itself indicates that the City has no—even under the theory of contract law, there is no contractual obligation on behalf of the City.

The Court: You passed that off to Vepco if there was any duty?

Mr. FitzPatrick: That's right. If there was any there on the City at that point, that [14] is in essence the basis of the demurrer, sir.

The Court: So you say that the way the Motion for Judgment is

formulated that he doesn't even state a recognizable cause of action against you in contract or any other way?

Mr. FitzPatrick: That is correct, sir.

The Court: All right. It is no duty mentioned in there running from the City to Old Dominion that would give rise to a cause of action?

Mr. FitzPatrick: That is exactly right, sir, as set forth in my demurrer.

The Court: I follow your position on it, Mr. FitzPatrick.

Let me hear from counsel from Old Dominion.

Mr. Smith: I think, Your Honor, since Mr. Pollard has just given you the Motion for Judgment, I believe there is one crucial area where different facts are alleged which I believe just on their face would be enough to have both the Motion for Summary Judgment and the Demurrer overruled.

I think, first, it is conceded by Vepco, or it would have to be, that either through [15] the 1926 and 1933 agreement, followed by the agreement with the City in March of 1972 that they had a continuing obligation, if nothing else, to maintain the bridge in its condition through the date of its destruction. Now, without even getting into the question of reading the—

The Court: Not through the date of its destruction, but how did that duty continue on in favor of Old Dominion after September 12, 1968?

Mr. Smith: All right, sir. First of all we allege in paragraph 12 that as a result of Vepco's failure to properly maintain the bridge that it was destroyed by—or the flood waters took it away—which it is our allegation that had they properly maintained the bridge it would not have been destroyed by the flood.

Taken in its simplest form, our allegation, first of all, is that Vepco and the City have entered into an agreement of which we were the third party beneficiary in which Vepco promised us, as third party beneficiary, that they were going to maintain the bridge. Reading that in light of our further allegation that they failed to properly maintain the bridge, therefore we have incurred the [16] damages set out in the Motion for Judgment.

It is our position that we don't even need to get into the other questions regarding our ability to maintain an action under these previous covenants, although as I have pointed out previously, I think that we do have the right to do so.

But merely purely on this theory that we were a third party beneficiary to this agreement. Mr. Farley has by the nature of his pleadings conceded for these purposes here today conceded this, and as a result of their failure to maintain and to breach this contract to us the bridge was destroyed.

It would seem to be, and I think that the pleadings support this, that we are into a factual question as to whether or not they did maintain the bridge properly.

The Court: But as of September 12, where did you get standing to call on anyone to maintain the bridge? Was it under a lease agreement or—

Mr. Smith: First of all, I think, as I have pointed out, we would first have standing as a third party beneficiary to this agreement, where they have agreed in March of 1972—

[17] The Court: No. Your losing out on the property predated the agreement that you are talking about, now, though, didn't it?

Mr. Smith: All right.

The Court: It would be the covenants of 1933 and 1926.

Mr. Smith: All right. In September of 1968, to briefly run through the facts, I think you start with Vepco's continuing obligation to maintain. In September of 1968 the City filed its suit condemning the property. At that point we were left in possession of the property because the question as to the necessity of the taking had not been resolved by the highest court.

Also there was a question as to whether the City had deposited sufficient funds to comply with their code requirements, their charter requirements, regarding just compensation.

These questions were not decided particularly as to the existing questions until January of 1972 by the Supreme Court.

The Court: But even with that delay in the decision, the effective date of those decisions, adverse to you, became September 12, 1968, [18] did it not?

Mr. Smith: But it would be our contention, Your Honor, that the possession of the property, which we contend was rightful in our Motion for Judgment, coupled with the equitable interest in the land which we feel that we had, both on the question of necessity and the City's failure to deposit gave us such an interest in the land that we would have the right through the City to enforce the covenants.

The Court: But doesn't that position collaterally attack the verity of a judgment?

Mr. Smith: No, sir, I don't think so. I think that it would be a defeasible fee in the City which became purely vested upon the decision of the Court regarding the necessity question. Also, as we pointed out, in the agreements there is a second parcel of land out there. At one point Old Dominion or its predecessor in title owned the entire 12 acres, in round numbers. They then sold off a parcel through which conveyances came to the City from Ajax Realty property.

Then in January of 1972 Old Dominion became the lessee under a letter lease from [19] the City of that property. Now, this lease in the sense that the City continued to accept rent was not terminated until, to the best of my recollection, July of this year, which is one year after the bridge was destroyed.

So under the lease agreement we had possession, a right to be there, and we would claim the right as pointed out in the authorities we cited to enforce these covenants as the lessee of the City in posession of the property.

When we were given possession of that property there was access through this bridge. There was an agreement on the part of Vepco to maintain that bridge, and in that instance clearly to replace it if it were washed away.

I would cite to the Court the authorities we have previously cited to show that as the lessee of the City under the lease the benefits of protecting our possession would accrue to us. In other words, we went there with a bridge, there was a covenant allowing the protection of that access, and we as lessee would have the right to enforce it.

Then to carry out the chain you get to the matter of 1972 where Vepco says there is a [20] merger, that the City acquired equitable title to the property. I think the facts also show that they have never acquired the legal title to the bridge. But even assuming they acquired equitable title at that point, our interest would still be preserved because

in the agreement, as we allege, we were the third party beneficiaries. That agreement was tied—

The Court: But if the City couldn't force Vepco to rebuild the bridge as a third party beneficiary, you couldn't either, could you?

Mr. Smith: But here, Your Honor, we are no longer in an action to force them to rebuild the bridge. We have alleged that because of their failure to maintain and their failure to replace. But without even getting into the question of replace, we have alleged that because of their failure to maintain that bridge as required by those agreements that we have been damaged. The bridge was destroyed, and we have suffered these damages.

Now, I would submit that it is a question of fact as to whether or not Vepco properly maintained that bridge.

The Court: To avoid the consequence of a flood?

[21] Mr. Smith: That is correct. In other words, we would submit evidence to show that had Vepco properly maintained the bridge it would still be there today, and I think at that point we are into a question of fact and something that a Motion for Summary Judgment cannot attack.

I believe that tracing the chain of Vepco's obligation and Old Dominion's right to the property and the property interest, there is a clear, continuing obligation on the part of Vepco to maintain that bridge, clearly through the date of its destruction, and again, not even getting into the question of replacing.

The Court: But you suffered no damage from the time of its alleged failure to maintain it up until the time of the flood, did you? You can't show that. You didn't get to utilize it as a means of ingress and egress to the island.

Mr. Smith: But we did suffer the ultimate damage which came out of their failure to maintain.

The Court: But your measure of damages, then, would be dated from the flood to when?

[22] Mr. Smith: Our measure, frankly, we would contend that our measure of damages would date from the date of the flood through the final deposit of funds into the Court in the condemnation case to permit us to move from the island, which I think was in November,

last month. At this point, we would concede as of that deposit in the Court by the City of Richmond that we no longer have the right to claim continuing damages, but we would claim that we would be able to recover damages sustained by reason of Vepco's failure to maintain from June 23 or thereabouts, through November of 1973.

As I say, it is a purely factual question as to whether or not they have maintained the bridge properly, and it is certainly not something which is susceptible to a Motion for Summary Judgment.

The Court: Well, you are saying that the failure to maintain it properly, if that had prevented you from using it before it ever washed out, that you could get damages for that?

Mr. Smith: That is correct, yes, sir.

The Court: And then their failure to maintain the structural integrity of it, that made [23] it vulnerable to the fatuity of a flood can be laid into damages as a failure to maintain?

Mr. Smith: Yes, sir. As I say, we would contend that had the bridge been properly maintained as per Vepco's agreements starting in 1926, that the bridge would still be there today.

The Court: Well, does a failure to maintain ever extend so far as to require anything other than normal, routine use of the facility, as opposed to giving it integrity against an Act of God?

Mr. Smith: I think in that context we are getting into a factual question. It would seem to me that to maintain in and of itself would be to maintain it in such a condition that it would be usable. Now, to go out and perhaps put a board in once every five years is not living up to the sense of the word "maintenance."

I think this would be something that would be developed in evidence as to whether Vepco's maintenance of the bridge as it was was sufficient for the normal use of the bridge, or was sufficient to protect it against a flood. We would submit that "maintenance" means to do what is necessary to keep the bridge in a working condition for our [24] benefit. Their failure to do so—

The Court: Plus preventing it against Acts of God? You expand "maintenance" to include that; do you not?

Mr. Smith: I think our context, given a bridge over a body of water as this was, that "maintain" would have to mean that it would

be in a suitable condition to remain where it is, and in this case that would also mean to be maintained to the point where it would not be susceptible of this type of flood.

The Court: I follow your argument on it, and in paragraph 12 tied into paragraph 10 in your Motion for Judgment?

Mr. Smith: Yes, sir. Without even getting into the other areas, I think those two paragraphs alone create a sufficient factual question that under the rules this would not be susceptible to a Motion for Summary Judgment.

The Court: Thank you.

Mr. Pollard: If Your Honor please, could I just supplement Mr. Smith's comments?

The Court: Yes.

Mr. Pollard: At the previous [25] hearing on the demurrers that were filed to the Bill of Complaint which was filed in equity just about a year ago, the clerk felt very strongly with respect to the equitable relief sought that the title of Old Dominion at the time that the alleged damages occurred was so tenuous that a court of equity would not be impelled to grant the extreme relief of a mandatory injunction. I think that was Your Honor's view at the last hearing, and that therefore, any equitable relief that would arise out of covenants running with the land would not be enforced because Old Dominion had its title taken away by condemnation, and because it was a lessee of another portion of the adjacent property under a lease terminable upon a month's notice.

So the Court said equity is not going to exercise the extreme power that it has and require these defendants to build a bridge. So your dream of a bridge is out the window. I think that is what the Court said.

But time and again at that hearing the Court said you probably have a garden variety law suit for damages, and I think that you should be put over on the law side of the Court [26] where you can make your contention.

The Court: Right. And I continue in that posture, Mr. Pollard. I want you to tell me, though—and that was the question that I was having with Mr. Smith—on the facts that show or allege that show a recognizable duty in law that Old Dominion can assert in this form.

Mr. Pollard: Yes, sir. So in the Motion for Judgment we do not contend that the rights that we have against these defendants arise out of any covenant that runs with the land. We simply say that those contracts were made. First with respect to the 1926 and the 1933 contracts, this plaintiff is a corporation which succeeded to the interest of prior corporations with whom these contracts were made, so in effect they were made with the plaintiff in this case.

As to the 1972 agreement between Vepco and the City, that was specifically provided for the benefit of this plaintiff.

The Court: But accepting that as a fact, Mr. Pollard, don't you have to ripen the word "maintain" into almost what you have alleged in paragraph 12 to avoid the consequence of their preliminary [27] motion?

Mr. Pollard: I think that is true. We rely solely upon the 1972 agreement, but the older agreements didn't restrict the obligation of the Power Company to maintain it, but it had the word replace, in it, and we allege in paragraphs 8 and 9—

The Court: But your position on that is vulnerable, though, to the legal consequence of the condemnation of September 12, 1968, is it not?

Mr. Pollard: I don't think it is, Your Honor, because we don't contend the benefit of those agreements by virtue of ownership of the land.

The Court: But your lease of Ajax—

Mr. Pollard: But by virtue of the fact that we were in a place where we had a right to be on the condemned land, even though the title has been taken away. We had a right under a lease to be where we were on the former Ajax property so that we were occupying two different parcels under two different rights of possession.

[28] The Court: But assume you were occupying that validly. How does that give you standing to have either Vepco or the City owe you a duty to do something that isn't contained in your documents that give you the—

Mr. Pollard: But it is contained in the 1972 agreement, because both parties recognized the rights of Old Dominion and said, now there is a bridge there, and Vepco says we are selling this bridge, but as long

as you have got this company over there we recognize that we have the continuing obligation to maintain this bridge.

Now, if the parties to that contract had felt at that time that we weren't entitled to the benefits of that undertaking, they certainly wouldn't have put it into the agreement. But they did put it in there.

The Court: But your rights were coextensive with the City's to have it maintained, isn't that so, as a third party beneficiary? Isn't your right to have it maintained no more than coextensive with the City's?

Mr. Pollard: Well, I answer that by saying, Your Honor, that that agreement tells [29] Vepco, it said, now, look—

The Court: It commits Vepco contractually to maintain the bridge.

Mr. Pollard: That's right.

The Court: So your right to have it maintained can be no higher than coextensive with the City's? It could be less, couldn't it?

Mr. Pollard: Well—

The Court: A third party beneficiary can have no greater contractual right than a contracting party, can he?

Mr. Pollard: I expect that is right, Your Honor, but we have the full right to enforce that.

The Court: So that would mean if you have the full right, your right to have the bridge maintained would be coextensive with the City's rights, and if the City couldn't demand under that contract to have the bridge rebuilt or collect damages for its destruction by an Act of God or other fatuity, then a third party beneficiary could not?

Mr. Pollard: I expect that is right, Your Honor. I think the City was saying that [30] if we buy this bridge we are taking on an obligation to maintain it as long as Vepco is over there, and we don't want to take that obligation on Vepco, you have got to take it on as long as they are over there, but we will agree to get them off there as soon as we can.

Now, that was in March. Between March and June, I think the evidence will show that negotiations proceeded to settle the condemnation suit, and they didn't come to fruition until Agnes came along. So

that substantially is our position, and we think that we have stated our case.

The Court: All right. I follow it.

Mr. Farley?

Mr. Farley: If Your Honor please, I think that this is all an afterthought on the part of Old Dominion. Your Honor recognized in the hearing on July 17 that the exigencies that arose out of the City either not acting in good faith in depositing the moving costs, or not permitting Old Dominion to withdraw the deposit, or the delay that was occasioned to Old Dominion by having to appeal, and all the rest of it, and finally get this thing [31] determined, are, if anything, damages which the law doesn't provide a remedy for. As Your Honor pointed out, that was a fact of life in the course of pursuing litigation.

Now, in the July hearing Mr. Pollard represented to the Court that he wanted to do two things to stay in Court. He wanted to first of all make the point that the City did not recognize the right of the moving costs when they filed a condemnation petition as the Supreme Court said they should have. "I am not sure that the filing of the petition was effective to vest the title in the City. Now, that is a position that we have not argued yet."

And the Court said, "All right. Don't piggyback it into this one." It is part of the condemnation case. Don't piggyback it into this case.

Then he said, "Well, the point that I would make and what we would be concerned with here is, Your Honor, that the covenants continued for Old Dominion's benefit because title never vested in the City for the City's failure to recognize a constitutional right which Old Dominion [32] had. And we would amend to allege that in this case."

The Court: Now, Mr. Farley, to simplify the matter for yourself, argue only on the basis that all title to this property vested in the City as of September 12, 1968, and that I am accepting that as an absolute, fixed proposition of law, so that it seems to me that if that fact which became a matter of court order in time extinguished the covenants that dated back to 1926 and 1933, then the only thing left is a potential third party beneficiary claim as the result of Vepco's agreement with the City in 1972.

Mr. Farley: Yes, sir.

The Court: Now, go farther and say that a third party beneficiary's rights are coextensive with the contracting party whom he claims through. This has got to be the most favored position that he could ever be in.

Mr. Farley: Exactly, Your Honor.

The Court: If that is so, unless the City could make Vepco rebuild its bridge, or be liable in damages if not rebuild it, and preventing them from the use of that which they [33] now have legal title to, then Old Dominion cannot.

Mr. Farley: Exactly, Your Honor. Now, Mr. Pollard concedes—I mean they vacillate, but he conceded, I thought, and I wrote it down, we do not contend that any of the rights that we are seeking for in this Motion for Judgment arise out of the covenants in this law suit. So you can put all that aside. He now said that the 1972 agreement is it for all practical purposes.

The Court: Well, speak about whether an allegation such as you have in paragraph 12 that "maintaining" means shoring it up and making it structurally so sound that it can't be swept away by a flood. Now, does "maintain" in law mean just keeping it in a condition where you are able to enjoy the use of it as the dictates of your business require, as opposed to some superstructure?

Mr. Farley: That is it, Your Honor. I think the legislature wasn't dealing with this type of situation, but when it enacted Section 55-226 of the Code, talking about how covenants to keep premises in good repair shall be construed, it said "No covenant or promise by a lessee to pay the rent, or that he will keep or leave the premises in [34] good repair, shall have the effect, if the buildings thereon be destroyed by fire or otherwise, in whole or in part, without fault or negligence on his part, or if he be deprived of the possession of the premises by the public enemy of binding him to make such payment or repair or erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound."

That is the construction that we think ought to be placed on the word "maintain" here. Now, the proposition that Vepco would be liable to them for damages from the date of the flood up until the time that the

City makes the deposit of moving costs is ludicrous. Their measure of damages was determined on September 12, 1968. That is what Your Honor found. That is exactly the way the moving costs case was tried, and they have gotten an award.

The Court: I am not going to collaterally attack that ruling. I mean, if it was wrong, it was wrong in the other case.

Mr. Farley: Trying to contend here, as Mr. Smith has said, that the measure of damages in this case would be from the time of the flood until the time of that deposit is the most [35] artificial construction of a rule of damages that I have ever heard of.

So, both on the theory that you can't construe "maintenance" to mean repair or replace, so there can't be any damages, and secondly, that their theory of the measure of damages which the Power Company would be liable for is totally artificial, we submit that the Motion for Summary Judgment ought to be sustained.

The Court: Does the City have any further position on it?

Mr. FitzPatrick: No, sir. I would just like to reiterate briefly. I do endorse Mr. Farley's remarks. I do think with regard to the Motion for Judgment, and in particular paragraphs 10 and 12 thereof, I would like to call attention to the Court that in our Demurrer we indicate that Old Dominion failed to state any legal or contractual obligation owed by the City of Richmond to them.

The Court: Is it your position that the City has no cause of action for damages against Vepco from the date of the flood until now for not being able to use its property there on the island? Or do you have a suit pending?

[36] Mr. FitzPatrick: There is no such suit pending, and I don't know that we would be able to sustain a suit.

The Court: But I don't know what activities the City had going on over there at the date of the flood. But under your contract if the duty was to maintain by Vepco, then you had to use barges, and so forth, to get back and forth, you would have at least the same—

Mr. FitzPatrick: We would have at least the same that Old Dominion is having right now.

The Court: Without having to call it a third party beneficiary. You would be a direct contracting party.

Mr. FitzPatrick: But, as I understand the Court, we have no action against Vepco at this particular moment in time.

The Court: Unless "maintain" is broadened to embrace the concept that is suggested in paragraph 12?

Mr. FitzPatrick: That is correct, Your Honor.

The Court: Is there anything [37] further, gentlemen?

I think that I understand the issues. I want to reread some of these things.

Do counsel desire to submit any further writings on it?

Mr. Pollard: I don't believe that we would.

The Court: I think that you have done a pretty fair job on it. I would want to reread the issues and the briefs more narrowly in the light of the allegation in the Motion for Judgment. I will let you hear from me shortly on it.

Mr. Pollard: Your Honor, I think that the transcript of the last hearing contained some statements by me that Mr. Farley referred to, but we are before the Court on a Motion for Judgment.

The Court: On a totally new matter. I am listening to it as it is today, and not taking it out of context, because we had a different issue there.

Adjourn Court.

Court Adjourned at 9:50 A.M.

LETTER OPINION

Circuit Court of the City of Richmond
Richard L. Williams, Judge

Courts Building
1001 East Broad Street
Richmond, Virginia 23219

December 13, 1973

E. Milton Farley, III, Esquire
Hunton, Williams, Gay & Gibson
700 Building
Richmond, Virginia 23219

Robert N. Pollard, Jr., Esquire
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

Albert J. FitzPatrick, Esquire
Assistant City Attorney
300 City Hall
Richmond, Virginia 23219

Re: Old Dominion Iron and Steel Corp. v. VEPCO and City of Richmond

Gentlemen:

The demurrer filed on behalf of the City of Richmond to Old Dominion's motion for judgment and the motion for summary judgment filed on behalf of VEPCO to Old Dominion's motion for judgment are sustained and Old Dominion's action is dismissed.

The 13.01 acres of Belle Isle occupied by Old Dominion was served primarily by a steel bridge connecting the island with the north shore of the James River. Title to this bridge was in VEPCO but valid covenants running with the property owned by Old Dominion or its predecessors or others imposed upon VEPCO a duty to maintain the bridge or replace it. Old Dominion's direct right to enforcement of these covenants was extinguished by the City of Richmond acquiring by deed 6.81 acres of land from Ajax on or about May 15, 1968, and by acquiring 6.208 acres of land from Old Dominion by condemnation on September 12, 1968. Old Dominion's alternative claim to damages is

foundationed on an agreement entered into by VEPCO and the City of Richmond on 3/27/72 whereby VEPCO was obligated to maintain the bridge during Old Dominion's occupancy under a lease it had with the City.

VEPCO's obligation to maintain the bridge did not impose upon it a duty to replace the bridge if it were destroyed by fortuitous circumstances.

Counsel are requested to present an order carrying out the rulings of the Court and saving Old Dominion's objections thereto.

Very truly yours,

/s/ Richard L. Williams

RLW/jat

* * *

FINAL ORDER SUSTAINING DEMURRER AND MOTION FOR SUMMARY JUDGMENT AND DISMISSING ACTION
Entered January 25, 1974

This action came on for hearing on the 7th day of December, 1973, upon the Motion for Judgment of the Plaintiff filed September 24, 1973, the Demurrer of the Defendant City of Richmond filed October 16, 1973, and the Motion for Summary Judgment of the Defendant Virginia Electric and Power Company also filed October 16, 1973, and was argued by counsel.

And it appearing unto the Court for the reasons stated in its letter opinion of December 13, 1973, addressed to counsel a copy of which letter is attached to this Final Order and made a part of the record, that the said Demurrer and Motion for Summary Judgment should be sustained, the Court doth so Adjudge, Order and Decree; and

It is further Adjudged, Ordered and Decreed that Plaintiff's action as set forth in its Motion for Judgment be, and the same is hereby, accordingly dismissed with prejudice.

To the foregoing action of the Court, Plaintiff, by counsel, objected and excepted upon the grounds fully stated to the Court in oral argument on the said Demurrer and Motion, which said grounds are as follows:

1. Plaintiff's right to enforcement of the agreements made for its use, enjoyment and benefit as alleged in the Motion for Judgment and particularly paragraphs 4, 5, 6, 8 and 12 thereof, have in no wise

been extinguished, and Plaintiff has stated a cause of action sufficient in law for the breach by Defendants of the said agreements.

2. Plaintiff has stated a cause of action sufficient in law for a breach by Defendants of the agreements made for its use, enjoyment and benefit as alleged in paragraphs 10, 11 and 12 of the Motion for Judgment.

3. The occupancy by Plaintiff of the real property consisting of approximately 13 acres on Belle Isle and the conduct of its business thereon at the time of the occurrence given rise to its claim for damages were such as to entitle Plaintiff to the enforcement of the agreements made for its use, enjoyment and benefit as alleged in the Motion for Judgment.

Enter: 1/25/74

/s/ Richard L. Williams
Judge

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
Filed February 15, 1974

Comes now the Plaintiff, Old Dominion Iron & Steel Corporation, by counsel, and files with the Clerk of this Court its Notice of Appeal and Assignments of Error and hereby assigns the following errors in the Final Order Sustaining Demurrer and Motion for Summary Judgment and Dismissing Action entered on the 25th of January, 1974:

1. The Court erred in holding that Plaintiff's right to enforcement of the covenants and agreements alleged in paragraphs 4, 5, 6, 8 and 10 of the Motion for Judgment relating to maintenance, repair and replacement of the steel highway bridge had been extinguished.

2. The Court misconstrued the agreements made for the use, enjoyment and benefit of Plaintiff alleged in paragraphs 10, 11 and 12 of the Motion for Judgment in concluding that the said agreements imposed no duty upon Vepco to replace the bridge if it were destroyed by fortuitous circumstances, whereas Plaintiff alleges in those paragraphs that the loss of the bridge resulted from the failure of Vepco to properly maintain the bridge as required by the said agreements. The Court, therefore, erred in failing to hold that the said agreements

imposed liability upon Vepco for its failure to properly maintain, keep up and repair the steel highway bridge, as a result of which failure the bridge was destroyed.

As required by Rule 5:6 of the Rules of the Supreme Court of Virginia, Plaintiff states that it does not intend to hereafter file any transcript, statement of facts, testimony or other incidents of the case.

* * *