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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 8121

COMMONWEALTH OF VIRGINIA,
MARINE RESOURCES COMMISSION,

Appellant,

v.

WILLIAM R. FORBES
AND
HAZEL W. FORBES

Appellees.

APPENDIX

ANDREW P. MILLER
ATTORNEY GENERAL OF VIRGINIA

GERALD L. BALILES
DEPUTY ATTORNEY GENERAL

DANIEL E. ROGERS, II
JAMES E. MOORE
ASSISTANT ATTORNEYS GENERAL

SUPREME COURT BUILDING
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BILL OF COMPLAINT, AS AMENDED, FILED MARCH 3, 1971.

To the Honorable Judges of the Circuit Court of the City of Norfolk:

Now comes the Complainant, the Commonwealth of Virginia at the relation of the Marine Resources Commission, by its attorney, Andrew P. Miller, Attorney General of Virginia, and represents the following:

1. The Marine Resources Commission is an agency of the Commonwealth of Virginia with its main offices located at 2401 West Avenue, Newport News, Virginia 23607. By virtue of Chapter 1 of Title 62.1 of the Code of Virginia (1950), as amended, the Marine Resources Commission is vested with the authority and control over the use of the subaqueous beds of the bays and ocean, rivers, streams and creeks which are the property of the Commonwealth.

2. Defendant, Forbes-Peabody Construction Corporation, is a corporation chartered under the laws of the State of Virginia for the purpose of carrying on and conducting a general constructing, excavating and contracting business. The principal office of Defendant corporation is located at 4875 Bonney Road, Virginia Beach, Virginia 23462.

Its registered office is located at 309 West Bute Street, Norfolk, Virginia 23510.

3. Defendant, William R. Forbes, who resides at 1451 Alfred Lane, Norfolk, Virginia 23503, is a director, President and Treasurer of Defendant corporation.

4. Defendant Hazel W. Forbes, who resides at 1451 Alfred Lane, Norfolk, Virginia 23503, is also a director and Vice-President of Defendant corporation.

5. Defendant, Fred E. Martin, who resides at 1544 Cloncurry Road, Norfolk, Virginia 23505, is a director and Secretary of and Registered Agent for Defendant corporation. The office address of Defendant, Fred E. Martin, being the same address as that of the registered office of Defendant corporation, is 309 West Bute Street, Norfolk, Virginia 23510.

6. Jurisdiction is founded upon Chapter 1 of Title 62.1 of the Code of Virginia (1950), as amended.

(a) Dominion over, and ownership of, all the beds of the bays, rivers, creeks and shores of the sea of the Commonwealth is vested in the Commonwealth pursuant to the provisions of § 62.1-1 of the Code of Virginia (1950), as amended.

(b) Section 62.1-3 of the Code of Virginia (1950), as amended, declares, in part, that:

> "It shall be unlawful ... for anyone to build, dump, or otherwise trespass upon or over or encroach upon ... the beds of the ... rivers ... which are the property of the

Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission." (Emphasis supplied.)

7. Section 62.1-3.1 of the Code of Virginia (1950), as amended, provides:

> "Upon application of the Marine Resources Commission to a court of record of the city or county wherein any act is done or facility or project is found, which is unlawful under the provision of § 62.1-3 of the Code and upon reasonable notice and after hearing, the court shall have the authority to enjoin any further unlawful act and to direct the person guilty thereof or the Marine Resources Commission, at the costs of the person found to have acted unlawfully, to remove, tear down or otherwise take such steps as are necessary to protect and preserve the subject property of the Commonwealth."

8. Since the summer of 1968 Defendants have conducted unlawful fill operations in the waters of the Eastern Branch of the Elizabeth River in the City of Norfolk, Virginia, in that they, and each of them, have trespassed or encroached upon the bed of the Eastern Branch of the Elizabeth River which is the property of the Commonwealth of Virginia.

9. Said fill has been placed unlawfully upon the subaqueous bottom of the Eastern Branch of the Elizabeth River as it borders the Campostella Heights Subdivision, between Campostella Bridge and Steamboat Creek, in the City of Norfolk, Virginia as is more clearly shown on

"Plat Showing Location of Fill Material On The South Side of the Eastern Branch of Elizabeth River In The City of Norfolk, Virginia", made by James R. Gray, C.I.S., and dated December 5, 1970, a copy of which plat is attached hereto as Exhibit "A".

10. Said fill has been placed unlawfully upon the bed of the Eastern Branch of the Elizabeth River between Campostella Bridge and Steamboat Creek beyond mean low water, which bed is the property of the Commonwealth of Virginia, as follows: in front of Lots 44 and 51, Block H, Campostella Heights; in front of that property lying between Block H and Block V north of the intersection of Arlington Avenue and Waltham Street, Campostella Heights; and in front of that portion of Arlington Avenue east of Waltham Street (at this point a "paper" street) beginning at the intersection of the low water mark and the southeastern corner of Lot 1, Block V, Campostella Heights, and running along the low water mark as shown on Exhibit "A" to the point of intersection of said low water mark with the northern lot line of Lot 20, Block S, Campostella Heights; and from said point of intersection easterly in front of the eastern portion of Lot 20, and those lots designated as Lots A and B, and Lots 30, 32, 33 and a portion of Lot 34, all in Block V [S], Campostella Heights, all of which is more clearly shown on Exhibit

"A"; none of which said lots or property is owned by Defendants.

. . . .

19. WHEREFORE, the Marine Resources Commission, Complainant, prays that the said Defendants, their agents, servants, employees and all other persons in active participation with them, be:

(a) permanently enjoined and restrained from conducting illegal land-fill operations of any type or nature, or from procuring or consenting to land-fill activities by persons, known or unknown, below the mean low water mark in the Campostella Heights section of the Eastern Branch of the Elizabeth River between the Campostella Bridge and Steamboat Creek in the City of Norfolk, Virginia;

(b) enjoined to remove all illegally deposited refuse, trade wastes, flotable material, debris and other land-fill material presently located on the southern bank and in the waters and on the bed of the Eastern Branch of the Elizabeth River between the Campostella Bridge and Steamboat Creek in the City of Norfolk, Virginia;

(c) enjoined to restore the said portion of the Eastern Branch of the Elizabeth River between Campostella Bridge and Steamboat Creek to the atmosphere, appearance and quality of environment as existed prior to the initiation of the illegal activities;

20. Complainant further prays that this Honorable Court grant to the Marine Resources Commission such other, further and general relief as to equity shall seem meet, including judgment for costs expended in this matter.

DECREE, DATED DECEMBER 21, 1971

This cause, which has been regularly matured, set for hearing and docketed, came on to be heard on November 1, 1971, upon the bill of complaint and exhibit filed therewith; upon the individual answer of FRED E. MARTIN; upon the answer of defendants FORBES-PEABODY CONSTRUCTION CORPORATION, WILLIAM R. FORBES and HAZEL W. FORBES; upon the motion to dismiss of defendants FORBES-PEABODY CONSTRUCTION CORPORATION, WILLIAM R. FORBES and HAZEL W. FORBES: upon the motion to dismiss of defendant FRED E. MARTIN supported by affidavit filed herein; upon the agreement of counsel to dismiss defendants FORBES-PEABODY CONSTRUCTION CORPORATION and FRED E. MARTIN: upon the request of the parties to limit the hearing of November 1, 1971, to the question of whether the defendants have any right to fill; upon the stipulations of evidence; and upon the papers formerly read; and was argued by counsel.

Under consideration whereof, the Court having maturely considered the pleadings and evidence heard ore tenus and the Arguments and briefs of Counsel, it is hereby

ADJUDGED, ORDERED and DECREED, for the reasons set forth in the Opinion Letter of the Court dated November 19, 1971, and filed herein, that:

1. Defendants FRED E. MARTIN and FORBES-PEABODY CONSTRUCTION CORPORATION be and the same are hereby discharged and dismissed as defendants in this cause.

2. Complainant's application for injunctive relief contained in the prayer of its bill of complaint be and the same is hereby denied.

3. Complainant's bill of complaint be and the same is hereby dismissed.

There remaining nothing further to be done in this cause, it is Ordered that this cause be stricken from the docket and the papers placed among the ended causes, properly indexed.

OPINION LETTER, DATED NOVEMBER 19, 1971.

Gentlemen:

The Commonwealth's bill of complaint in this matter alleges that the defendants have trespassed upon its property by unlawfully placing fill upon the subaqueous bottom of the Eastern Branch of the Elizabeth River in certain areas bordering Campostella Heights Subdivision in the City of Norfolk. Jurisdiction is founded upon Chapter 1 of Title 62.1 of the Code of Virginia (1950) as amended. The complainant seeks permanently to enjoin the defendants from conducting further land fill operations, and also requests issuance of a mandatory injunction requiring the defendants to remove fill material previously deposited and to restore the shoreline to its original appearance and quality. In the proper case, this relief may be granted under the provisions of Section 62.1-3.1 of the Code.

At the request of all parties, the Court limited the hearing of November 1, 1971, to the question of whether the defendants have actually committed such a trespass (Tr. p.3). It should be noted that, by agreement, Fred E. Martin was released as a defendant (Tr. p. 4); at the conclusion of the complainant's evidence, counsel also agreed that Forbes-Peabody Construction Corporation should be discharged as a defendant (Tr. p.p. 126-127).

The Commonwealth's claim to ownership of the river bottom below the low water mark is based upon Section 62.1-1 of the Virginia Code; the language of this Section (as expressed in previous statutes) has been held to be declaratory of the common law and not an arbitrary assumption of power by the State. Meredith vs. Triple Island Club 113 Va. 80, 83, 84; Taylor vs. Commonwealth 102 Va. 759, 766, 767. The Section reads in part as follows:

> "62.1-1. Ungranted beds of bays, rivers creeks and shores of the sea to remain in common.--All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain

the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish...."

The facts of the case are these. In 1920 (and even prior to that time) Campostella Heights was owned and developed by the Campostella Realty Corporation. By plat duly recorded on July 6, 1920 (Defendants' Ex. No. 2), the blocks, lots, and streets of the development were clearly defined. At that time (and even to this day), some of the streets and lots shown on the plat were under water (Plaintiff's Exs. Nos. 1-A and 9). Arlington Avenue was never developed west of its intersection with Waltham Street; Waltham Street was never developed north of Arlington Avenue; the northernmost portions of Sycamore and Light Streets were never developed. Similarly, parts of Blocks H, S, V, and Y exist only on the plat and are actually under water. The lots comprising the northern portion of Block S actually front on the water, although the plat of the subdivision shows them as separated from the Elizabeth River by the non-developed portion of Arlington Avenue and the under-water lots of Block V. It is important to note that, on the face of the 1920 plat, Campostella Realty Corporation expressly reserved "to istelf and its assigns the fee in all Streets, Avenues, and Alleys of its land, as shown and designated" on the map. It further reserved "to itself <u>all riparian rights to its said land</u>."

Subsequently, numerous lots were conveyed by reference to the 1920 plat to various different purchasers. On July 18, 1967, Forbes (William R. and Hazel W. Forbes) purchased all of the lots in Blocks V and Y, and Lots 45, 46, 52, and 53 of Block H, <u>together with the riparian rights to all of the lots in Blocks V and Y and the riparian rights to Lots 45 through 53 of Block H</u>. By a separate deed of July 18, 1967, (and a deed of correction dated January 14, 1969), Forbes also acquired all right title and interest of the corporate owner in and to the undeveloped portions of Arlington Avenue and Waltham and Sycamore Streets which had not been accepted by the City of Norfolk or its citizens as public way (Plaintiff's Ex. No. 1).

After his purchase, Forbes conferred with engineers whom he employed to survey the property and obtained a "plan" of the development of property which he proposed to fill. He conferred with representatives of the Corps of Engineers, the Marine Resources Commission, and the City of Norfolk and, on March 16, 1970, obtained a permit to proceed with the fill operation (Plaintiff's Ex. No. 1-B; Tr. p.p. 153-155). For reasons unrelated to this part of the litigation, the permit was subsequently revoked in December of 1970. Meanwhile, however, fill had been placed in some of the areas involved. The interesting part about these negotiations leading to the issuance of a permit is Forbes' uncontradicted statement that a representative of the Virginia Marine Resources Commission approved the filling of the area without charge but stated that, if Forbes built a bulkhead and filled behind it by dredging from the river bottom, a charge of five cents per yard would be made for such fill. Other than that, Forbes was given the "green light" to fill the property (Tr. p.p. 153-154).

There can be no question under the law of this State that riparian rights may be separated from the ownership of land to which they are appurtenant and dealth with separately provided the conveyance by which they are severed evidences a clear intention to exclude such rights from the conveyance. Thurston vs. Portsmouth 205 Va. 909, 911-915; Waverly & Co. vs. White 97 Va. 176, 180. In our case, the Commonwealth takes the position that all riparian rights were validly severed and reserved to the Campostella Realty Corporation; it contends, therefore, that none of the purchasers who acquired their property prior to Forbes received riparian rights (Tr. of Argument p.p. 21, 24). Obviously, the other owners of lots in Campostella Heights are not parties to the litigation and their rights cannot be determined in this proceeding. As to Forbes, it is contended that his purchases, with several exceptions, did not include riparian rights and, in any event, did not give him the right to fill the areas in dispute.

This case turns upon the issue of whether Forbes has been granted statutory authority by the terms of Section 62.1-3 of the Code to place the fill in question. The pertinent parts of this Section read:

> "62.1-3. Authority required for use of subaqueous beds.--It shall be unlawful and constitute a misdemeanor for anyone to build,

dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission. Statutory authority is hereby conferred for the doing of such acts as are necessary for...(6) fills by riparian owners opposite their property to any lawfully established bulkhead line...."

"The Marine Resources Commission is hereby authorized and empowered, but not in conflict with the United State Corps of Army Engineers, to establish bulkhead lines and lawful private pier lines on or over bays, rivers, creeks, streams and the shores of the ocean, to the extent owned by or subject to the jurisdiction of the Commonwealth for that purpose, and to issue and publish maps and plats showing such lines."

Pursuant to the authority of this Section, the Marine Resources Commission established a private pier line and bulkhead line adjacent to the Campostella Heights property. Its plat, prepared by James R. Gray (Plaintiff's Exs. Nos. 1-A and 9), shows the location of these lines. All fill placed in the area is well within the lines lawfully established by the Commission.

In my opinion, the term "low water mark," as used in Section 62.1-2 of the Code, is synonymous with the "mean low water mark" for any given area. I accept the mean low water line established by the Virginia Institute of Marine Science in 1971 as the low water mark in the Campostella Heights area. In the filled area through which the V.I.M.S. line did not extend, I am prepared to accept the line projected by Mr. James Gray as the approximate low water mark. As I view the case, however, all this is beside the point.

Nothwithstanding its ownership of all bottom land below the low water mark, the State could have raised no valid objection if Campostella Realty Corporation, owning the shore property, had filled to the bulkhead line. The

deeds by which Forbes acquired his property evidence a clear and unequivocal intent on the part of the grantor to convey to Forbes all rights which the Corporation had in this respect (Plaintiff's Exs. Nos. 1, Paragraph 7, 2, 3; Tr. p.p. 128-146). I cannot accept the complainant's argument that Forbes has no right to fill opposite the platted (but undeveloped and unaccepted) streets which he has purchased. Except in a very limited area (Lots A, B, and 30 of Block S), Forbes actually owns parts of Arlington Avenue above the low water mark.

Basically, the situation is this. The Legislature has given statutory authority to all riparian owners to fill opposite their property to a lawfully established bulkhead line. In so doing (assuming that the fill material is proper and is kept within the boundaries outlined by the statute), the Commonwealth has relinquished the right to claim that Forbes has unlawfully trespassed upon its property.

Counsel should prepare and submit sketch of an appropriate decree.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
FILED FEBRUARY 15, 1972.

Complainant herein, COMMONWEALTH OF VIRGINIA, ex rel, MARINE RESOURCES COMMISSION, hereby gives notice of its appeal pursuant to § 4, Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia, from the decree entered in the above-styled cause on the 21st day of December, 1971, in which it was adjudged, ordered and decreed that complainant's application for injunctive relief contained in the prayer of its bill of complaint be denied and that its bill of complaint be dismissed. Further, in accordance with said Rule, the following are assigned as error:

(1) The Circuit Court erred as a matter of law and of fact in failing to hold that defendants Forbes had unlawfully encroached upon certain State-owned bottom land by placing fill materials upon the bed of the Eastern Branch of the Elizabeth River beyond mean low water at Campostella Heights, Norfolk, Virginia, in contravention of the provisions of §§ 62.1-1 and 62.1-3(6) of the Code of Virginia (1950), as amended;

(2) The Circuit Court erred as a matter of law in denying complainant's prayer for injunctive relief and dismissing its bill of complaint.

PLAINTIFF'S EXHIBIT 1, STIPULATION OF AGREED FACTS, PARAGRAPHS 2, 7 AND 8 THEREOF, ADMITTED AT TRIAL NOVEMBER 1, 1971.

It is hereby stipulated by and between the parties, the Commonwealth of Virginia, ex rel Marine Resources Commission, Complainant, and Forbes-Peabody Construction Corporation, William R. Forbes and Hazel W. Forbes, Defendants, that the following facts are true and shall be taken as agreed without further formal proof for the purposes of this litigation only, each party, however, reserving any and all objections to the materiality or relevance of same.

. . . .

2. Said plat is a true and accurate survey of the following as of the 5th day of December, 1970:

a. Those portions of Campostella Heights delineated, including all streets shown;

b. The bulkhead and pierhead lines in the vicinity of the area in question; and

c. All physical structures shown thereon.

. . . .

7. Merrick I. Campbell, a qualified real estate attorney practicing in the City of Norfolk, has examined the appropriate records and, in his opinion, a good and

sufficient title of record is vested in William R. Forbes and Hazel W. Forbes, husband and wife, to the following property:

> ALL those certain lots, pieces or parcels of land situate in the City of Norfolk, State of Virginia, being more particularly described as follows:
>
> PARCEL 1: Being known, numbered and designated as Lots 2 and 4, Block S, on the Amended Plat of Campostella Heights, which plat is recorded in the Clerk's Office of the Circuit Court of Norfolk County, Virginia, in Map Book 17, at pages 7 and 8:
>
> BEING the same property conveyed to William R. Forbes and Hazel W. Forbes, husband and wife, with right of survivorship, by Deed of Seth F. Squires and Jane E. Squires, husband and wife, dated April 15, 1970, and recorded in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in Deed Book 1161, at page 495.
>
> PARCEL 2: Being all right, title and interest in and to Arlington Avenue, Waltham Street (formerly Walnut Street) north of Arlington Avenue, Sycamore Street north of Arlington Avenue and Light Street (formerly Laurel Street) north of Arlington Avenue as shown on said plat:
>
> BEING the same property conveyed to said William R. Forbes and Hazel W. Forbes, with right of survivorship, by deed of Campostella Yacht Basin, Incorporated and Pembroke Holding Corporation, dated July 18, 1967, recorded in last mentioned Clerk's Office in Deed Book 1124, at page 290, and by Deed of Correction, dated January 14, 1969, recorded in last mentioned Clerk's Office in Deed Book 1129, at page 521.
>
> PARCEL 3: Being known, numbered and designated as Lots 1 through 20, both inclusive, Block V, Lots 1 through 8, both inclusive, Block Y, (Lots 5 and 6,

Block V being known as #1910 Arlington Avenue) on said plat, TOGETHER WITH riparian rights to said Lots in Blocks V and Y, and riparian rights to Lots 45 through 53, Block H:

BEING part of the same property conveyed to said William R. Forbes and Hazel W. Forbes, husband and wife, with right of survivorship, by Deed of Campostella Yacht Basin, Incorporated and Pembroke Holding Corporation, dated July 18, 1967, recorded in last mentioned Clerk's Office in Deed Book 1124, at page 290.

PARCEL 4: Being known, numbered and designated as Lots 45, 46, 52 and 53, Block H, on said plat:

BEING part of the same property conveyed to said William R. Forbes and Hazel W. Forbes, husband and wife, with right of survivorship, by Deed of Campostella Yacht Basin, Incorporated and Pembroke Holding Corporation, dated July 18, 1967, and recorded in last mentioned Clerk's Office in Deed Book 1124, at page 290.

8. The above title is subject to the following exceptions:

Item 1. Affects Parcels 1, 2, 3, and 4:

Legend on plat recorded in first mentioned Clerk's Office in Map Book 17, at page 7, 8:

"The Campostella Realty Corporation hereby reserves to itself and its assigns the fee in all the streets, avenues, and alleys of its land as shown and designated on this map of subdivision thereof, with the right to lay railway tracks, conduits, sewer, gas and water pipes and erect telephone, telegraph and electric light poles and wires and for such other and reasonable purposes, as it or its assigns may from time to time desire. The said corporation further reserves to itself all riparian rights to its said land."

Item 2. Affects Parcel 1:

The title examination shows that the property

is situated on tidal waters. Exception is made to all land lying beyond the low water mark. This is a standard exception in title certificates and title policies on land fronting on tidal waters.

Item 3. Affects Parcel 2:

By Deed dated October 2, 1924, recorded in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in Deed Book 283C, at page 284, Campostella Realty Corporation granted to City Gas Company of Norfolk "..The right and privilege to lay, construct, reconstruct, operate and maintain its lines of gas mains and pipes and to connect therewith its service mains and pipes, fixtures and conduits in, along, above, under, over and across the roads, streets, avenues and alleys of said tract of land for the purpose of distributing gas for all purposes for which gas may now or hereafter be adapted for use, the same to be located as shown in red upon said blueprint and to construct, erect and maintain all appliances and adjuncts which may be or become reasonably necessary to the enjoyment of the easement hereby granted." (Said blueprint shows red lines as being in streets.)

Item 4. Affects Parcel 2:

The following rights have been granted in the streets by Deed dated May 1, 1903, recorded in first mentioned Clerk's Office in Deed Book 277, at page 502.

Campostella Heights Company agreed with Portsmouth, Berkley, & Suffolk Water Company that water mains may be laid in such streets as the Campostella Heights Company may in writing designate. By Deed dated May 17, 1904, recorded in first mentioned Clerk's Office in Deed Book 281, at page 177, Campostella Heights Company granted to Portsmouth, Berkley, & Suffolk Water Company the right to lay water mains in the streets on the plat of Campostella Heights recorded in first mentioned Clerk's Office in Map Book 5, at pages 86 and 87.

Item 5. Affects Parcels 2, 3, and 4:

Except as to riparian rights, title is not certified to the land lying beyond the low water mark. This is standard exception in title

certificates and title policies on land fronting on tidal waters.

Item 6. Affects Lots 1, 2, Block V, plus riparian rights appurtenant to Lots 1 to 20, Block V, Parcel 3:

Per Petition and Orders recorded in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in Deed Book 1175, at page 405 et seq., Virginia Electric and Power Company condemned a 35-foot right of way for a "12" H. P. Gas main" across Lots 1 and 2, Block V, thence in a northerly direction into river. (Survey recorded in last mentioned Clerk's Office in Deed Book 1175, at pages 410, 411.)

Item 6. (a) Affects Parcel 2:

The rights of the public in and to the streets as shown on the plat.

Item 7. Parcel 1:

Taxes are paid through the third quarter of the fiscal year 1969/70. Due for the first, second, third and fourth quarters of the fiscal year 1970/71, the fourth quarter of the fiscal year 1969/70, and the first quarter of the fiscal year 1971/72.

Parcel 2:

Not assessed for taxation for the fiscal year 1971/72.

Parcel 3:

Taxes are paid through the first quarter of the fiscal year 1969/70. Due for the second, third and fourth quarters of the fiscal year 1969/70, the first, second, third and fourth quarters of the fiscal year 1970/71, and the first quarter of the fiscal year 1971/72.

Parcel 4:

Taxes are paid through the first quarter of the fiscal year 1969/70. Due for the second, third and fourth quarters of the fiscal year 1969/70, the first, second, third and fourth quarters of the fiscal year 1970/71, and the first quarter of the fiscal year 1971/72.

. . . .

PLAINTIFF"S EXHIBIT 2, DEED OF
JULY 18, 1967, ADMITTED AT
TRIAL NOVEMBER 1, 1971.

THIS DEED, made this 18th day of July, 1967, between Campostella Yacht Basin, Incorporated and Pembroke Holding Corporation, parties of the first part and William R. Forbes and Hazel W. Forbes, husband and wife, parties of the second part.

WITNESSETH: that for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, said parties of the first part do hereby grant and convey with general warranty, unto said parties of the second part, as tenants by the entirety with right of survivorship as at common law, the following property, to-wit:

All those certain lots, pieces or parcels of land, situate in the City of Norfolk, State of Virginia, more particularly described as follows:

PARCEL #1: Lots 1 through 20, both inclusive, in Block V, on the Amended Plat of Campostella Heights, which plat is recorded in the Clerk's Office of the Circuit Court of Norfolk County, Virginia, in Map Book 17, at pages 7 and 8, Lots 1 through 8, both inclusive, in Block Y, on said plat, TOGETHER WITH riparian rights appurtenant to said lots

in Blocks V and Y, and riparian rights appurtenant to Lots 45 through 53, in Block H, on said plat; it being the intention to convey the riparian rights appurtenant to said last eight lots which have not been conveyed by Campostella Yacht Basin, Incorporated, by deeds of record; being the same property conveyed to said Campostella Yacht Basin, Incorporated, by deed of Pembroke Holding Corporation, dated May 24th, 1954, and recorded in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in Deed Book 671, at page 195.

PARCEL #2: Lots 45, 46, 52 and 53, in Block H, on said above mentioned plat, WITH the riparian rights, if any, appurtenant thereto; being the same property conveyed to said Pembroke Holding Corporation by deed of W. W. Starke, trustee, et als., dated October 7th, 1932, and recorded in said last mentioned clerk's office in Deed Book 325-D, at page 282.

. . . .

PLAINTIFF'S EXHIBIT 3, DEED OF CORRECTION,
ADMITTED AT TRIAL NOVEMBER 1, 1971.

THIS DEED OF CORRECTION, made this 14th day of January, 1969, between Campostella Yacht Basin, Incorporated and Pembroke Holding Corporation, parties of the first part; and William R. Forbes and Hazel W. Forbes, husband and wife, parties of the second part.

WITNESSETH that for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, said parties of the first part do hereby grant and convey unto said parties of the second part, as tenants by the entirety with right of survivorship as a common law, the following property, to-wit:

All those certain pieces or parcels of land, situate in the City of Norfolk, State of Virginia, being all the right, title and interest of the parties of the first part in and to all of the avenues, streets, roads and lanes shown on the amended Plat of Campostella Heights, which plat is recorded in the Clerk's Office of the Circuit Court of Norfolk County, Virginia, in Map Book 17, at pages 7 and 8;

. . . .

COLLOQUY:

[Tr. p. 128]

MR. ROWE: Mr. Campbell's qualifications as a practicing real estate attorney and expert in that field, I think are stipulated by the Commonwealth and I'm sure are well known to the Court. I would like some agreement to that on the record.

MR. ROGERS: We will so stipulate.

MERRICK I. CAMPBELL:

[Tr. p. 128-146]

BY MR. ROWE:

Q You are Merrick I. Campbell?

A I am.

Q At my request, and the request of William R. Forbes, did you make an examination of the title to certain property which Mr. Forbes believed that he owned?

A I did.

Q Your report on that examination constitutes paragraphs 7 and 8 of this Stipulation?

A That is everything but the report on the taxes, which I do not think are germane to the issues here.

Q I hand you a plat which purports to be a photostatic copy of the "Amended Plat of Campostella Heights" Property of the Campostella Realty Corporation, recorded in Map Book 17, Pages 7 and 8. That would be the Circuit Court of the

City of Chesapeake, formerly Norfolk County, and I ask you if you can identify that as a plat to which your report refers?

A That appears to be it. Yes.

Q Specifically, I refer to the writing.

THE COURT: Map Book 17, Pages 7 and 8?

MR. ROWE: Yes, your Honor.

Q Specifically, I refer you to the language in the upper righthand corner of that plat and ask you if you are familiar with that?

A Yes. That is in my title certificate.

Q Is that the subject of Item 1 of your exceptions?

A That's right.

MR. ROWE: We will offer that, if your Honor please.

THE COURT: Any objection?

MR. ROGERS: None, your Honor.

THE COURT: This will be Defendant's Exhibit 2.

Q Referring to Item 1 of your exceptions, would you state the significance of that to Mr. Forbes' ownership of this property and rights in this area?

A Well, when lots were conveyed on the plat, those rights were reserved in the company, and later, through mean conveyances, Mr. Forbes acquired title to the fee in the streets and the riparian rights.

Q Separately from the land?

A Yes.

Q Are you familiar with the term, severed riparian rights?

A Yes.

Q Were those rights then severed - riparian rights severed from the land, in this instance?

A Yes.

Q They were separately conveyed to Mr. Forbes?

A Yes.

Q He is the onwer of record at this time?

A He is.

Q Are severed riparian rights a recognized property interest in this state?

A Yes, they are.

Q From your examination of the title, the deeds, the plats, et cetera, with reference to the land in this area - referring to the plat which is on the board and is Plaintiff's Exhibit 1-A - can you show the Court the area in which Mr. Forbes has acquired these severed riparian rights?

A I have only had time to examine that casually, but I think I can from here -

THE COURT: Are you going to point to it on the board?

A If you wish. Let's take the two odd ones first. You have got 2 and 4 here, in this block.

Q Block S.

A You have got, starting with 45, - over here to the street. You have the street. You have all of this block, the street and all of this block and the street. In other words, it is all the way over from 45.

Q From the Western edge of Lot 45?

A That's right, plus these two over here.

Q All the way to what point?

A To the water on this end of the street.

Q He owns riparian rights in front of that entire area?

A Yes, sir. He does.

THE COURT: Mr. Campbell, what about these lots 47 through 51, Is that Block O?

MR. ROWE: That is Block H, if your Honor please, that you are pointing to. It is written down there to the left, further toward Campostella Road up toward the top.

THE COURT: I see. That is lots 47 through 51, Block H.

A Well, he acquired title, the certificate you are referring to, this gap here between 46 and 52.

THE COURT: That is Parcel 4?

A That's right.

THE COURT: I was inquiring about the ones in between.

A If you go back to Parcel 3, he acquires title

to other property, together with riparian rights of lots in Block V, Y and 45 through 53.

THE COURT: I see. Lots 1 through 20 in Block V. Yes. All right.

A One through eight in Block Y, lots 5 and 6, Block V, riparian rights to lots in Block V and Y and riparian rights to lots 45 - 53, Block H.

THE COURT: In other words, it's not a question of his owning the fee, but the purchase of the riparian rights was what was purchased here?

A Right.

BY MR. ROWE:

Q On the Southern or shore side, along that stretch, where do his riparian rights begin?

A At low water.

Q And they extend out to what point?

A Well, he owns - they extend out as far as the middle of the stream, I would say.

Q At least to the bulkhead line of navigability?

A Oh, yes.

Q Would you refer to Item 2 of your exceptions, please? Would you explain that to the Court?

A Title insurance companies and title examiners following their lead, as a matter of policy will not insure beyond the high water mark. They just as a matter of policy won't do it, period.

Q Mr. Campbell, as we have that in the Stipulation it reads "low water mark" which I thought you had instructed us to correct that. Is it low water mark or high water mark?

A I believe high would be correct for insurance. They will insure title, under certain conditions, to low water mark, but I have never seen one issued in my experience. They say they will, buy I have never seen one. The low water mark is the one that title examiners will take a risk on under the Code which now gives you title to the low water. The title insurance companies will not touch it, unless you give a chain of title back to the original grant, and show where the original grant was from and so many were to high, and some to low, and most of them said neither. That is why they hedge on where they are going to fix their insurability.

Q Has there been any alienation of riparian rights in the area in which Mr. Forbes has been involved and which he owns, other than to Mr. Forbes?

A Not to my knowledge.

Q You have checked the title to that?

A That is correct.

Q The chain of title to him on those riparian rights is by mean conveyances, originating out of that and the fact the riparian rights were reserved on the plat, which we have introduced as Defense Exhibit 2. Is that correct?

A That is correct.

Q Thank you. Answer Mr. Rogers and Mr. Baliles.

* * * *

CROSS EXAMINATION

BY MR. BALILES:

Q Mr. Campbell, when were you requested to render an opinion to the defendant, Mr. Forbes, with respect to this property in question?

A I have no record when the original request was made, but I completed my examination originally on September 3rd, so I would guess it's within four weeks, maybe eight weeks before then.

Q September 3rd of what year?

A This year.

Q So until some time later this year, you had not done or completed a title search on this property in question at the request of the defendant?

A No, I had not.

Q You did not handle the title search when Mr. Forbes purchased this property. Is that what you are saying?

A I handled a part of the closing, but I did not search the title. I drew a deed for some of the sellers, but I did nothing but draw deeds. I did not do title.

Q In respect to this opinion you have rendered subsequent to the purchase of this property in question, let me ask you a few questions. Specifically, you stated in response to a question from counsel, that the riparian rights ran from Block H in front of all the property over through Block Y on

the Eastern end of this property. Is that correct?

A That is correct.

Q Let's be a little more specific. In your opinion -

THE COURT: That is Block H?

MR. BALILES: That is correct. On the Western end. His statement is that the riparian rights are severed and belong to the defendant, all the way across, through Block Y.

Q Mr. Campbell, let's look at your opinion with respect to Parcel 1. You have stated that those property lots there are Lots 2 and 4, Block S. Is that correct?

A That is correct.

Q Those are these two lots on the Western edge of Block S?

A Right.

Q I ask you, are there riparian rights, in your opinion, with respect to those two lots?

A No, there are not.

Q Let's look at Parcel 2. In that case, you are giving an opinion with respect to the title to Arlington Avenue, Waltham Street, North of Arlington, Sycamore Street, North of Arlington, and Light Street. These streets here. You are saying here that he has fee in these streets. Is that correct?

A That is correct.

Q Fee simple title to these areas in question?

A Right.

Q Do you say that he has riparian rights with respect to those streets?

A Yes, I do.

Q Would you point that out with respect to your opinion?

A I'm reading from the case of Thurston against the City.

Q I'm talking on your opinion.

A Yes, but my opinion is based on the statement there. The general rule that ordinarily a conveyance of riparian lands carries with it as appurtenant thereto, riparian rights.

Q In your opinion, enclosed in this Stipulation, do you certify to him that when he picked out the fee simple interest in these areas of the street, is it stated in this opinion that he also acquired severed riparian rights? Does that language appear?

A No, it does not appear in the certificate.

THE COURT: Wait a minute. You say that is not a part of the certificate?

A It is not. He asked if it's in Parcel 2 of the certificate. That is the right, title and interest in those streets.

Q You certified with respect to Parcel 1 - I'm sorry. I'll withdraw that and get back to that in a moment. Let's turn to Parcel 3. In that case, Mr. Campbell, according

to your certificate, Mr. Forbes acquired title to Block V, Lots 1 - 20; Block Y, Lots 5 & 6; together with riparian rights to those lots in Block V and Block Y, and riparian rights to Lots 45 - 53 of Block H. Is that correct?

A That is correct.

Q Do you say in there that riparian rights were acquired by the defendant with respect to these three streets we have just mentioned: Light, Sycamore, and Waltham?

A I do not.

Q Is there any other statement with respect to Parcel 3 as to severed riparian rights being acquired by the defendant?

A No, there are not.

Q Let's review Parcel 4. According to your certificate here, we are concerned with lots, 45, 46, 52, and 53 of Block H. Is that correct?

A That is correct.

Q To summarize your certificate, you are saying with respect to Block H, the defendant, Mr. Forbes, has severed riparian rights running opposite those lots?

A Right.

Q You have so stated in your certificate?

A I did.

Q With respect to Block V, you have stated that he has severed riparian rights or riparian rights running appurtenant to that property?

A I did.

Q The same with respect to Block Y?

A Right.

Q Do you say anywhere in this certificate, Mr. Campbell, that Mr. Forbes has acquired any riparian rights with respect to this street in question - Arlington Avenue?

A That seems to have been omitted from the description.

Q You do not say it in your certificate of opinion to Mr. Forbes?

A I do not.

Q You have also stated in this --

THE COURT: Excuse me a minute. Is it your testimony, Mr. Campbell, that the acquisition of those streets also included the acquisition of the riparian rights instant thereto?

A That is my testimony, but as he pointed out, it is not in the description in this. If necessary, I will amend this, or if you want to question me on it, I will so certify.

Q Have you personally observed the deed books in the Clerk's Office of the Circuit Court of the City of Norfolk?

A I have.

Q Did you find anywhere in those deeds that Mr. Forbes acquired riparian rights with respect to Arlington Avenue?

A No, I did not. Other than when he acquired fee

to the streets, which carried the riparian rights with them.

Q You have excepted in your title certificate opinion, any land lying below the low water mark. Is that correct?

A That is correct.

Q If Block V were to lie below the water, you would not be giving your opinion as to title of ownership by Mr. Forbes, are you?

A As to which one?

Q Block V.

A Item 5 effects Parcels 2, 3, and 4. Except as to riparian rights, title is not certified beyond the high water mark.

Q I'm asking you also, though, you do not certify title to any lands lying below low water mark, is that correct?

A Yes, I do in Item 5. Except as to riparian rights, title is not certified, so I leave riparian rights in there.

Q With respect to fee simple title to a block of land lying below low water mark, my question is can you certify title to something lying under water?

A Oh, yes. You can certify title to land covered by water.

MR. BALILES: Your Honor, I think that completes our cross examination.

THE COURT: With regard to the last question,

Item 5 of Paragraph 8, of the Stipulation. I don't know how you identify that on what you have there, but it is Item 5 and Item 5 effects Parcels 2, 3, and 4. You say except as to riparian rights, title is not certified to the land lying beyond the low water mark. This is a standard exception in title certificates and title policies on lands fronting on tidal waters. I understood the last question he asked you was with regard to Block V. Were you certifying title to Mr. Forbes as to Block V?

A Right.

THE COURT: I'm not sure I understand. I can't correlate your statement which you said a moment ago, that you could certify title to lands under water, and then the exception which is Item 5. Can you explain that for me?

A You can, but I didn't. That is nothing in the world but a title examiner protecting himself from the insurance company. If they won't insure it and he certifies it, you are liable if the insurance company later comes along and won't insure it. That is just a protection, but as I said --

THE COURT: You can certify riparian rights, but you can't certify the title.

A They won't certify anything under water. The

title examiner, to protect himself, has to make the same exception.

* * * *

REDIRECT EXAMINATION

BY MR. ROWE:

Q You are satisfied Mr. Forbes owns all the riparian rights across the front of this land, from the Western boundary of Lot 45 to the Eastern edge of Light Street?

A Yes, he got it two ways. The first thing is it is reserved on the plat, so any owners buying on that plat takes without riparian rights; and through mean conveyances, all those riparian rights were conveyed to him. If there is a question on the streets, which the Commonwealth seems to be concerned with, when you convey on tidal lands it would apply to rivers and such, but we are involved in tidal lands. The riparian rights go with it unless expressly excepted.

Q You are speaking in relation to the streets?

A That's right.

Q And he is the fee owner of the unused portions of Waltham, Arlington, Sycamore and Light Street. Is that right?

A That's right.

Q Thank you. Did you encounter any recordation which would indicate an acceptance of those streets: Arlington between Waltham and Light, Light, North of Arlington, and Wyckle, North of Arlington?

A There is nothing, and I made inquiry and the

City Engineer's Office said they had no record of the acceptance of the street. It was a verbal statement on their part.

Q Nothing on record?

A Nothing on record.

* * * *

RECROSS EXAMINATION

BY MR. BALILES:

Q Mr. Campbell, this plat that has been introduced reflects the reservation and the original owner of the fee in all the streets?

A That's right.

Q It reflects a separate reservation of the riparian rights?

A Right.

Q Are you saying that when Mr. Forbes acquired Arlington Avenue, that he also acquired severed riparian rights?

A Not Arlington Avenue - well, here where Arlington and Light meet.

Q Let's talk about the area in question before the Court. Between Waltham and Sycamore.

A There are no riparian rights to that.

Q No riparian rights appurtenant to the streets?

A No.

* * * *

REDIRECT EXAMINATION

BY MR. ROWE:

Q Why is that?

A Because the plat show lots on the other side. Let's go back a little. You sprung a plat here on me that shows a low water mark much different than the recorded plat. All I can go by is by the recorded plat. I have never seen that before and the recorded plat shows the line of the lots in Block V as being the water's edge. So I assume, as a matter of record, that the engineer that made that plat knew where the water's edge was. Whether factually that is true, I will not argue, but that is all the record shows. When you start with that low water mark shown on the recorded plat, anyone in these two blocks here acquiring title, are the ones that adjoin the water, but still they do not get riparian rights, because those have been reserved. Once the riparian rights are acquired, of course, he was asking about lands covered with water. You can subdivide the land covered with water, if you have riparian rights, just as in the other land, as often happens - lakes, creeks and things.

* * * *

RECROSS EXAMINATION

BY MR. BALILES:

Q You have just stated that when Mr. Forbes acquired Arlington Avenue in question, he acquired no riparian rights appurtenant to that street.

A No, sir.

Q Block V is under water and he acquired no title to that.

THE COURT: Just a minute. What is your answer to that? That Block V is under water and he acquired no title?

A No, I didn't, or I misunderstood your question.

Q Would you certify title to lands under water, completely submerged?

A I can.

Q As being in the person who has requested the title opinion?

A Yes, you can do it, but I didn't have to do it, in this case, because your recorded plat shows the water line along the Northern side of those lots. You introduce and ask me if they are under water. If they are under water, they are in the area covered by his acquisition of riparian rights. At that time, it was a company, and a company can subdivide its area, that it has retained the riparian rights in, just like it can subdivide any other area.

Q Let's assume all of Block V is above water.

A Right.

Q You are saying that from here out, you can subdivide these riparian rights into square foot parcels, if you want?

A You sure can. That's what happened in the Portsmouth case.

Q No further questions.

THE COURT: Gentlemen, I don't know whether this witness will be able to answer this question or not. You have certified lots 2 and 4 in Block S?

A Yes.

THE COURT: As I understood your testimony, the William Forbes' purchase of those two properties did not include riparian rights, because it specifically excluded riparian rights?

A That's right as to all lots.

THE COURT: Is this true of the rest of the lots in Block S?

A Yes.

THE COURT: And to the Reid lots, the Turner lots, Graves, and so on?

A I don't know which lots they were. I was absent during that testimony, but I assume they are the ones Mr. Forbes does not own.

THE COURT: This is what I'm asking, whether the lots Mr. Forbes does not own in Block S, whether as to those lots, the riparian rights were reserved in the corporation?

A Actually, your Honor, as to all lots he acquired. V and everything else. All platted lots reserve the riparian rights. He gets the riparian rights through -

THE COURT: Defendant's Exhibit 2, which is a recorded plat.

A All riparian rights were acquired by a separate conveyance, as a severed right.

CERTIFICATE

I hereby certify that on the 4th day of December, 1972, a true copy of the foregoing appendix was mailed, postage prepaid, to Peter W. Rowe, Esquire, Stackhouse, Weinberg and Stewart, 1400 Virginia National Bank Building, Norfolk, Virginia 23510, of Counsel, for Appellees William R. Forbes and Hazel W. Forbes.

Daniel E. Rogers, II
Of Counsel