
No. 2651.

IN THE

Supreme Court of Appeals

OF

WEST VIRGINIA.

CHARLESTON.

W. A. EGERTON, Plaintiff Below, Defendant in
Error.

Vs.

B. T. FLESHER et al, Defendants Below, Plain-
tiffs in Error.

FROM THE CIRCUIT COURT OF CABELL
COUNTY, WEST VIRGINIA.

PETITION FOR REHEARING.

No. 2651.

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FROM THE CIRCUIT COURT OF CABELL
COUNTY, WEST VIRGINIA.

TO THE HONORABLE, THE JUDGES OF THE
SUPREME COURT OF APPEALS:

The undersigned, your Petitioner, respect-
fully represents unto your Honors that he is ag-

grieved by a judgment made by your Honors in the above entitled cause on the 15th day of June, 1915, whereby it was considered by your Honors that the judgment of the Circuit Court of Cabell County be reversed and your Honors proceeded to enter judgment dismissing the application of this Petitioner to establish the proposed ferry as set out in his Petition, and your Petitioner submits that said judgment is erroneous, because your Petitioner believes that the record in this cause shows that there is an imperative public demand and need for the ferry at the place and as prayed for by the Petitioner.

Your Petitioner further showeth unto your Honors that it will readily appear that the said judgment is erroneous in the matters hereinabove complained of, when the evidence in this case and the exhibits filed therewith are examined and considered, which are referred to, exhibited with and made part of this petition.

Your Petitioner, therefore, prays that your Honors will be pleased to vouchsafe a rehearing of this cause by your Honors that the said judgment may be corrected as to the matters at error hereinabove set forth, and that the said judgment may be set aside and annulled and a rehearing allowed and grant unto your Petitioner such other and further relief, etc., and he will ever pray.

W. A. EGERTON,

By WILLIAMS, SCOTT & LOVETT
GEO. S. WALLACE, Counsel.

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FROM THE CIRCUIT COURT OF CABELL
COUNTY, WEST VIRGINIA.

MEMORANDUM OF ARGUMENT IN SUP-
PORT OF THE PETITION FOR REHEARING
FILED BY PETITIONER.

Your Petitioner, as a reason for a rehearing
in this case, respectfully submits to this Honorable

Court that the opinion rendered in this cause is, in the opinion of your Petitioner, not borne out by the record herein, and suggests a reconsideration of the following conclusions drawn by the Court from the record, which conclusions we believe to be erroneous, and if erroneous would warrant this Court in rehearing the case and in reaching a different conclusion.

It is submitted that the record is a voluminous one and with entire respect to this Court, Attorneys for Petitioner believe that the record shows an imperative public demand and need for the proposed ferry, and feel that except for the limited time and their inability to present this case as fully as it should have been done these facts would have been made to appear to the Court.

Attorneys for Petitioner have read carefully opinion rendered by your Honors and ask that the following statements made in the opinion be compared with the record in the case.

1. On page 1 of the opinion the following language is used:

“The record shows that at the time of the plaintiff’s application there were already established and in operation within the corporate limits of said City, besides appellants’ ferry at the foot of Tenth Street, a ferry at Central City, one at Twenty-Sixth Street, and another further up the River and known as the Guyandotte or Proctorville ferry. Also that there are two or three other ferries

at other intermediate points, some, if not all of which are operated for carrying passengers only."

We submit that the record shows a ferry at Guyandotte, one at Twenty-sixth Street which at the date of this application was not in operation, the Tenth Street ferry and a hand ferry for passengers only at Central City, and that the record does not show any other ferries in operation along this river front. The ferry at Central City is a hand ferry and was not taken into consideration by either the applicant or the resistant. A map filed in the case after it was closed showed an old ferry near the American Car & Foundry Company which it was agreed by all parties had not been in operation for years. It was conceded on all hands and indeed the Court so understood that the Guyandotte-Proctorville ferry in no way entered into this question, it not being possible for it to draw and it not as a matter of fact drawing patronage from the said territory. It was likewise shown by the record, too plain for contradiction, and it was not contradicted, that the Twenty-sixth Street ferry was to be and would be abandoned in any event. Accordingly, it is too plain for argument that this record shows that if the Eger-ton ferry is established there will be then only the two ferries serving the territory lying opposite the City of Huntington over a length of river of about five miles.

2. The opinion states that the testimony also

shows that at least 60% of the patrons of the appellants' ferry comes from the Symmes Creek valley.

The only evidence on this point is the evidence of Robert L. Hamilton found on page 457 of the printed record. He testifies that three-fifths of the patronage of the ferry is vehicle traffic and that 60% of the vehicle traffic comes over the Egerton Road from Symmes Creek. Therefore the Court is wrong in the conclusion that 60% of the patronage comes from Symmes Creek, the witness having said that 36% of it came from that source, and if there were any question about the meaning of the witness in making this statement, it is concluded by a statement found on page 88 of the original brief of plaintiffs in error, where counsel for resistant stated it as 36%. It would seem, too, that an unjust importance is attached to any conclusion to be drawn from even this exaggerated statement, for it must be borne in mind that the Flesher ferry is situate midway on the river front of the City of Huntington, and that half of the traffic which lies west of this central point, in both States, is and of necessity must be monopolized by the Flesher ferry and could in no wise be impinged upon by or gathered to the Egerton ferry.

Attention is further invited to the fact that the witness Hamilton does not pretend to have any record showing from where the traffic of the Flesher ferry comes. He admits that he kept no record and this is a mere conjecture on the part

of an interested witness and he absolutely ignores the evidence of Theo. Ferguson and others to the effect that a number of farmers living in the South Point neighborhood have ceased coming to Huntington on account of poor ferry facilities and that they would naturally come back if they could cross the river with less delay.

3. The point at which the Symmes Creek road reaches the river.

It is submitted that the Court misapprehends the record as to the Symmes Creek road. It is conceded that from the point at which it divides and one branch comes over the Egerton Hill to the river, the Symmes Creek road proper is not used. There is a second branch of the Symmes Creek Road farther up the Creek from the Egerton Hill and this branch comes into the River at Twenty-sixth Street. Witness for the resistant showed that the distance by this second branch to the river was shorter than the distance down Symmes Creek Road over the Egerton Road and to the River, yet notwithstanding this fact the Twenty-sixth Street ferry did not attract this business but it continued to go to the Flesher Ferry. It is submitted that there must be a reason for this and if they have as the resistant showed a better grade and a shorter route from the upper Symmes Creek country to the Twenty-sixth Street ferry but declined to use it, the same reasons would take this travel on by the proposed ferry to the Flesher Ferry.

4. On page 3 of the Court opinion the Court

states that the record shows that the principal object of Egerton in seeking the establishment of the additional ferry at Sixteenth Street was to exploit and develop a tract of land owned by him and associates in Ohio.

Petitioner contends that this fact is not established by the record, but conceding that the Court is warranted in reaching this conclusion from the evidence of the witness Wiles, which is contradicted by the evidence of Egerton, and from the cross-examination of Egerton himself, we submit that there is sufficient evidence in the record to show that, notwithstanding the conclusion that the Petitioner had a selfish purpose to serve, there is an imperative demand and public need for this additional ferry. It is hardly conceivable that the President of the Huntington Chamber of Commerce, members of the City Commissioners, leading business men and merchants, who have not one penny's interest in either ferry, fruit growers and farmers from the State of Ohio, and in fact the entire public on both sides of the River, would see and express as emphatically as they have done in this case the imperative public need for an additional ferry unless such need existed. The Court's attention is respectfully invited to the character of the witnesses who testified on behalf of the applicant and to the character of the witnesses who testified on behalf of the resistant. It will be seen that of the witnesses on the Ohio side there was not a single farmer, fruit grower or trucker of any importance and there was not a

business man in the City of Huntington who would say that the Flesher ferry was adequate for the public need. The only business men who testified for the resistants were business men who were anxious to keep the ferry at Twenty-Sixth Street, which is admitted will be abandoned in any event.

The attorneys for the resistants laid stress upon the fact that application to the County Court to fix the rates of a night ferry had been made and counsel for resistants in oral argument made the statement that such a ferry was in actual operation. At the time of the argument of this case this statement was challenged. It was contended then and it is contended now that all we have a right to consider in this case is the record and the record discloses that on the 12th day of June, 1913, while this application for a ferry was being heard before the County Court of Cabell County the resistants made the application to the County Court to fix the rate for a night ferry. We state now that no action has been taken by the County Court to fix rates for a night ferry. We state now that no night ferry is in operation, and that as an evidence of this fact, on the 25th day of May, 1915, after this case had been argued and submitted, counsel for Petitioner was on the Ohio side and reached the Flesher Ferry at 6:30 P. M. and it had stopped for the night, and the witness Hamilton caused the ferry boat to make a special trip to put him over the River. A night ferry which is only a small gasoline boat and cannot carry vehicles or other than foot passengers is not a ferry which

would tend in any respect to accommodate night travel or to relieve the vehicle congestion complained of at the Flesher Ferry.

Attention is also invited to the fact that the argument that people should have greater facilities to cross the river, supported by the voluminous testimony in this record that people were under the present arrangement required to leave their homes from eleven o'clock P. M. in order to cross the ferry for the early morning market and so were obliged to camp on the bank because the boat did not start until five o'clock, A. M., is not met by the establishment of a night ferry, for the only way in which such night ferry, if in fact and honestly run through the night to convey vehicles, would help would be to require people to come during the night and camp on the West Virginia side instead of the Ohio side. What these people are after is the chance to cross the river and reach the early morning market by leaving home only at such times as it takes to drive to the river. Surely this desire on their part is not to be condemned or treated lightly, for they are engaged in legitimate business and their products and their trade are sought by Huntington, and when we say that they leave home during the night to get ahead of their competitors, we say something to their credit rather than to their disadvantage. The question is exactly as if attorneys in great numbers desire to attend the sessions of this Court at Charleston from Huntington, convening at ten o'clock, A. M., and requested the Railway Company to fur-

nish a train which should leave Huntington at six or eight o'clock, A. M., and enough coaches to carry them, instead of being required by the Railway Company to leave Huntington by train at twelve o'clock, P. M., the night before.

6. INADEQUATE FERRY FACILITIES.

Attention is called to the further fact that at present, as shown by this record, there are but two ferries in operation at Huntington, viz. the Proctorville-Guyandotte ferry and the Flesher ferry; both of which have been in operation for forty years, tho the population of Huntington has increased during that time from a village of 1000 people to a city of approximately 50000, and altho the Federal Census may show a decrease in the population of Lawrence County, it shows an increase in the population of the townships tributary to Huntington, and this record shows that fruit and vegetable growers therein and farmers, make in recent years, many more trips to Huntington and return, yearly and daily than in former years.

We respectfully ask that a rehearing be granted.

WILLIAMS, SCOTT & LOVETT
GEO. S. WALLACE
Attorneys for W. A. Egerton, Jr.

