IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

E. A. PAGE AND OTHERS

vs.

COMMONWEALTH OF VIRGINIA,
EX REL., ET ALS.

MOTION TO DISMISS AND BRIEF OF APPELLEE.

JOHN N. SEBRELL,
Attorney for the City of Norfolk.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

E. A. PAGE AND OTHERS

vs.

COMMONWEALTH OF VIRGINIA,
EX REL., ET ALS.

MOTION TO DISMISS AND BRIEF OF APPELLEE.

The City of Norfolk, appellee, moves the Court to dismiss the appeal in this case on the ground that the appellants have no such interest in the controversy as entitles them to become parties or to appeal from the order of the State Corporation Commission.

The appellants have no interest in the land sought to be condemned, and the only interest they assert or claim of right to intervene or appeal is that they are citizens, taxpayers and owners of property in the vicinity of the land to be condemned. No status as to the property to be taken is affected, and such interest as they may have as taxpayers and citizens, and owners of other property, is too remote, as has been clearly declared by this Court, to entitled them to be admitted as parties or to appeal.

The identical question was before this Court in Supervisors v. Gorrell, 61 Va. (20 Grat.) 484, in which this

Court held that such interest as one had as a citizen, taxpayer or owner of land in the vicinity which would be affected by the condemnation was not such an interest as entitled them to be parties in any proceeding with reference to the condemnation.

The Gorrell case involved the identical question involved here. In that case the Board of Supervisors of Culpepper County proceed to condemn two acres of land of Eliza Johnson for the purpose of erecting thereon Court house, clerk's office and jail. Gorrell and others sought to intervene and appeal on the ground that they were "citizens of the County, owners of real estate and taxpayers therein, but not having any interest in the land to be condemned." The County Court sustained the condemnation proceeding, denied the right of the exceptants to intervene, and confirmed the report, but, on motion of Gorrell and others, suspended the judgment for thirty days to allow them to apply for an appeal and supersedeas. A writ of error and supersedeas was awarded to these intervenors by the Circuit Court, and the Board of Supervisos applied to the Supreme Court of Appeals for a writ of prohibition to prohibit further action on the writ of error, on the ground that the intervenors had no such interests as entitled them to be made parties, or to be awarded a writ of error. The Supreme Court of Appeals awarded the writ of prohibition, holding that "any indirect interest they may have had in the subject as citizens, taxpayers and land owners of the County was not sufficient to make them proper parties."

It is true that the statute then existing provided an appeal to "any person who is a party to any case." The present statute, Section 3833 of the Code, provides that

in a proceeding of this kind "an appeal will lie from any order or decision of the State Corporation Commission to the Supreme Court of Appeals at the instance of the *applicant or any party in interest.*" (Italics supplied). The revisors interpreted this to give an appeal to "any person interested." But it is clear that the "interest" must be direct and not remote. Jones v. Rhea, 130 Va. 345. In the case of Jones v. Rhea, supra, minority members of the Westmoreland Club were held to have an interest in a merger controversy because such membership entitled them "to certain social opportunities and enjoyments and affords an interest, though not a transmissable interest, in the club property." Their status and interest in the very property involved gave them a material right in the controversy. The Court, citing and approving the decision in the Gorrell case, makes plain the difference in the interests involved in the two cases, saying, on page 364:

> "In the Gorrell case, the persons claiming to be aggrieved were not aggrieved in the contemplation of the law. *The interest they claimed was too remote.* In the instant case the interest of the petitioners was immediate and direct." (Italics supplied).

It will be noted that the interest of the appellants in the Gorrell case was identical with that of the appellants in the present case, namely, they were citizens, taxpayers and owners of *other* property in the vicinity, but having no interest in the property to be condemned and no status to be affected.

In County Court v. Armstrong, Judge, (W. Va.) 12 S. E. Rep. 488, a similar question arose and the decision, granting a writ of prohibition to the Circuit Court pro-

hibiting further action on writ of error awarded certain petitioners, is reflected in the syllabus by the Court, as follows:

> "1. Citizens and tax-payers merely as such, having no special property or interest to be affected, save in common with all other citizens and tax-payers, cannot become parties to a proceeding by a county court to alter the location of and rebuild a county bridge, and cannot sustain an appeal to review such proceeding under section 47, c. 39, Code 1887.
>
> "2. A circuit court cannot entertain an appeal obtained in such case by such citizens and tax-payers, and a writ of prohibition will go to prohibit such court from entertaining such an appeal.
>
> "3. To prosecute an appeal under said section 47, a person must have such interest to be affected as will enable it to be said that he is aggrieved by the proceeding complained of."

THE APPEAL ON ITS MERITS.

The facts are fully set out in the opinion of Commissioner Hooker on page 110 of the Record. The law and the correctness of the order of the State Corporation Commission are so clearly and sufficiently set forth in the opinion that we make reference to it and rely thereupon.

Complaint is made in appellants' petition that the opinion ignores the evidence of the petitioners. Most of such evidence appertains to matters not within the jurisdiction of the Commission and not involved in the controversy, as stated in the opinion. Such evidence, insofar as it relates to the question of public necessity and convenience strongly establishes the public necessity. It shows with no uncertain emphasis that if no provision is made

for the colored people and they should exercise their legal right to use the public beach at Ocean View intended for white citizens, the result would be disastrous.

Mr. Page, the chief opponent, testifies as follows:

> "Q. You are aware, are you not, that Norfolk City owns the park and beach in the very heart of Ocean View known as Chesapeake Lawn?
>
> A. Yes, sir.
>
> Q. You are also aware that being public property, that it is available to white and colored alike?
>
> A. I am, sir.
>
> Q. What, in your judgment, would be the effect upon Ocean View as a white resort if the colored people should avail themselves of their legitimate right to use that property?
>
> A. If they did so I think they would ruin that part of Ocean View." (Ev. p. 84).

Mr. C. J. Mays, another witness for the opposition, testified:

> "Q. Suppose the colored people went to Chesapeake Lawn, how would you handle them?
>
> A. Well, I think that is a proposition that would be taken care of.
>
> Q. How would you take care of it?
>
> A. It would create a condition I don't think you would want created or any member of the City Council.
>
> Q. Your view is if we don't find another place and the colored people avail themselves of their lawful privilege of going down to Chesa--

peake Lawn a condition would prevail nobody would want to see prevail around Norfolk?

A. Absolutely.

Q. You mean by that what?

A. Well, it would create a riot."

Could there be any stronger evidence of the necessity for the establishment of this colored resort? A necessity so great that upon it depends the salvation of Ocean View and the prevention of a race riot.

The appellants raise much objection that no plans for the development of the property nor avenues of transportation thereto have been adopted. Such things, of course, cannot be done until the property is acquired.

Respectfully submitted,

JOHN N. SEBRELL,
Attorney for the City of Norfolk.