

No. 30402 - **Ralph E. “Gene” Butler, Plaintiff Below, Appellant, v. John E. Price, an individual, and CSX Transportation, Inc., a foreign utility corporation licensed to do business in West Virginia, Defendants Below, Appellees**

FILED

October 18, 2002

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

RELEASED

October 18, 2002

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McGraw, Justice, concurring:

I concur in the decision of this Court that appellant Butler lacks standing to appeal the ruling of the Circuit Court concerning whether he had an implied right to cross the right-of-way of CSX for commercial purposes. Butler is no longer on the property. However, as pointed out, he may pursue his claim against Price for misrepresentation. In fact, the implied crossing issue is but one aspect of this complex action. Nevertheless, having considered the arguments and briefs of counsel, which included a discussion of the crossing issue, I find it appropriate to set forth a few concerns with regard to the continuing question of railroad right-of-ways and private land ownership.

The determination of a private landowner’s express or implied right to cross a railroad right-of-way involves special considerations in this State. As well known, the topography of West Virginia, with limited exceptions, is mountainous, resulting in any number of narrow valleys and complex water sheds. Consequently, a railroad right-of-way extending through a rural or small urban community in this State necessarily becomes a significant feature of daily life in that area. Thus, while private landowners in this State have, historically, been very accommodating toward the railroad business, it is reasonable to assume that, in many

instances, a retained right to cross the railroad right-of-way was the landowner's only option to access his property.

That is indicated with regard to the property in this action. Here, the railroad was granted a right-of-way through the 50-acre tract of John Fischer in 1882. As a result, although the property could have been entered, in theory, by way of the Ohio River, no access was possible from the public highway without crossing the railroad right-of-way. Importantly, the 1882 grant to the railroad was by agreement, rather than by deed, which can only be interpreted to mean that Fischer retained a right to cross the tracks in some fashion in order to make use of his property. Even had a deed been utilized, its purpose would have been limited to the establishing of the railroad right-of-way, and, in my view, Fischer would have retained a right to cross the tracks. Moreover, the 1882 agreement indicated that part of the consideration for the right-of-way was the "advantage" that it would bring to Fischer, which tends to negate any inference that Fischer was giving up access to the highway. The circumstances surrounding the 1882 agreement may be typical in this State with regard to the granting of railroad right-of-ways by private landowners.

Finally, W.Va. Const. Art. XI, sec. 9, provides that railroads in West Virginia "are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law [.]". That provision predates the 1882 agreement in this action. *See, Hart v. Baltimore & O. R. R. Co.,*

6 W.Va. 336, 357-58 (1873). In syllabus point 5 of *A & M Properties v. Norfolk Southern Corporation*, 203 W.Va. 189, 506 S.E.2d 632 (1998), this Court held that, under W.Va. Const. Art. XI, sec. 9, no interest in a railroad trackway can be established by way of adverse possession, prescriptive easement or equitable estoppel, so long as the trackway continues to be used for railroad purposes. The opinion in *A & M Properties*, however, did not address the issue of a retained interest by a private landowner to cross a railroad right-of-way. Such an interest would be an important factor in cases where the landowner's attempt to make appropriate use of his property becomes involved in a crossing dispute.

I, therefore, concur in the decision of this Court.