

alternate route was insufficient for their needs, the injury to their steel fabricating plant was far greater and of a kind and nature different from the injury suffered by the general public and, therefore, came within the exception to the rule stated above. In fact, under these exceptional circumstances, the closing of the highway had the effect of depriving the owners of any suitable access to their business.

A judge who concurred in the decision stated that he was of the opinion that recovery of damages should be limited to a case of extreme hardship because any person in business might suffer injury "far greater and of a different kind and nature from the injury suffered by the general public." He was of the opinion that persons suffering such injury were not to be compensated. He thought that in the case at bar, the peculiar circumstances as well as the nature of the owners' business, which necessitated the hauling of extremely heavy loads over what was obviously an inadequate bridge and highway, might be considered to be the exception to the modern rule. (State v. Tolliver, 205 N.E. 2d 672, April 1965)

175-2 NEW YORK COURT HOLDS REVOCABLE LICENSE TO USE CONDEMNED EASEMENT FOR ACCESS TO REMAINING LAND CANNOT BE CONSIDERED IN DETERMINING SEVERANCE DAMAGES BUT STATE SHOULD GRANT UNREVOCABLE PERMIT IN ORDER TO MITIGATE DAMAGES

The claimant owned a 156 plus-acre tract of land which was best suited for residential purposes. The State appropriated for highway purposes 0.9 of an acre in fee and two permanent easements 0.7 plus of an acre in area. It was unquestioned that the State had taken all of the condemnees' access unless it could be found he had access across the area appropriated for the permanent easements. The easement description provided that the owner had the right and privilege of using the easement property providing he did not, in the opinion of the superintendent of public works, interfere with the easements which were taken for drainage purposes. The owner proceeded at the trial under the theory that there was no reasonable means of access left to his property and thus the remainder had only a nominal residual value. The State contended that the claimant had suffered no loss of access since he could build a bridge across the permanent easements and that, therefore, the only damage to the remaining property was the cost of constructing access across the easements.

The trial court upheld the contention of the owner since it awarded him practically 100 percent damage for the remaining land. The State appealed from the judgment of \$71,000, \$69,975 thereof representing severance damages to the remainder.

The appellate court pointed out that although a witness for the State testified that the owner could build a bridge across the easement area, the State did not offer any instrument which would grant him in perpetuity the right of access across that area. The language in the appropriation petition permitting the owner the right to use the easement area unless he interfered with the exercise of the easement was only a license which in no way guaranteed that the remaining land could be utilized for residential purposes and the

possibility of revocation would certainly lessen the desirability of the land in the eyes of potential purchasers.

The appellate court ruled that the award of severance damages was within the range of proof but it thought that there would be an unnecessary expenditure of public funds to affirm the award where the remaining land was no way affected except as to access. It stated that it was entirely possible that under the present reservation the owner could create new access to his property and utilize it to its fullest extent, in which case the award for full value resulting from a loss of the property would be a windfall to which he was not entitled. However, since under the present conditions the owner's rights under the reservation were too questionable, the court did not wish to disturb the judgment.

The court continued by saying: "We are constrained to call to the attention of the State authorities that it is the duty of those exercising the power of condemnation to see to it that no more damage is done to what remains after the appropriation than is necessary. \* \* \*. The same responsibility should be evident in attempting to minimize the damage which results from the terms and conditions of easements or other forms of limitation or reservation."

The case was remitted to the trial court for the purpose of permitting the State the opportunity of stipulating in court that a bridge of suitable size would be authorized and approved, with a right in perpetuity to its use. If the State did agree to so stipulate, the award for severance damages was to be based upon the costs of the bridge and other present damages, if any, and the right would be reserved to the condemnee to make future claims if his access rights were interfered with. However, if the State did not agree to permit the construction of the bridge, the award of the trial court would stand. (Wolfe v. State, 259 N.Y.S.2d 13, May 1965)

#### 175-3 HIGHEST COURTS OF TENNESSEE AND WEST VIRGINIA HOLD STATUTES FOR REIMBURSEMENT OF UTILITY RELOCATION COSTS CONSTITUTIONAL

The Commissioner of Highway and Public Works of Tennessee brought suits to challenge the constitutionality of a statute which provided that the relocation of utility facilities, both above and below ground, now on the public rights-of-way, necessitated by the improvement of highways established as a part of the National System of Interstate and Defense Highways, should be made at the cost and expense of the State of Tennessee, provided the cost and expense was eligible for Federal participation under the 1956 Federal-Aid Highway Act, as amended. The latter act provided that Federal money could not be used for reimbursement purposes when payment to the utility violated either State law or a legal contract between the utility and the State. If the Federal Government was permitted to reimburse the State for payment of relocation costs, the State would get 90 percent of such costs from that Government where the highway involved was to be a part of the Interstate Highway System.