

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.

The supreme court noted that the three suits which were brought involved both privately and publicly-owned bodies. It stated that all the utilities stood on the same footing, however, since the utilities owned by the municipalities were of a proprietary character. It further noted that a statutory provision similar to the one involved in these suits was held unconstitutional in the case of State ex rel. Leech v. Southern Bell Tel. & Tel. Co., 319 S.W. 2d 90 (1958). In that case the supreme court found the statute invalid under Article II, Section 31 of the Tennessee constitution in that it required the expenditure of State funds for other than a public purpose. The statutory provision under review in the present suits required the use of State funds in the relocation of utilities. The question then was whether such funds would be expended for a public purpose. In answering this question, the court stated it had to keep two things in mind. First, that the construction and maintenance of a public highway was for a public purpose and State funds could be expended thereon for that purpose. Second, the relocation of the utilities involved concerned facilities now on or in public rights-of-way, either owned by a municipality in its proprietary capacity or by a private utility company, and that their relocation had been made necessary in order that the public might have and enjoy a better highway system which modern day travel demands. The Congress of the United States recognized the necessity, therefore, when it passed the 1956 Federal-Aid Highway Act, as amended.

The court pointed out that since 1905 Tennessee had been committed to the view that the use of public rights-of-way by utilities for locating their facilities was a proper highway use subject to their principal purpose for travel and transportation of persons and property. The placing of utilities upon a right-of-way was a convenience and an economic advantage to the utility users who were usually in close proximity to highways and streets. The court believed that it would be in the interest of the public welfare to make full and efficient use of the land surface occupied by public streets. To hold otherwise would be to sanction the acquiring of rights-of-way by utilities over private lands at great expense to the utilities. This would result in increased rates (passed on to the consumers) and would also interfere with the normal, practical enjoyment of private property.

Utilities were an integral part of the full use of the public rights-of-way, all serving the public interest, and in their removal and relocation the public had a real and legitimate interest. Such being the case, the relocation of the utilities as contemplated by the statute involved was in furtherance of a public purpose.

The court went on to say that it did not have to determine just what property rights each utility had because the State could, under its police power, require the removal of facilities at the expense of the utility. Such was the rule of the common law and could be preserved by contract. Thus, in the absence of a valid reimbursement statute, under the common law rule, relocation costs must be borne by the utility involved. The legislature, however, in dealing with a subject with which the public had a real and legitimate interest and was in furtherance of a public purpose, had authority to say to what extent the State should exercise its police power, so long as there was not a manifest abuse of such power.

The court recognized that there were economic reasons for the States to amend their laws in view of the invitation extended by the Federal Act to reimburse the State for some of these costs. A crash program of unprecedented scale to construct highways had been inaugurated. In addition, the type of construction changed. The modern multi-lane high-speed traffic ways required rights-of-way of spectacular width, cloverleaves, overpasses and underpasses, and long distances through rural and urban areas. These changes brought about extraordinary expenditures for moving vast amounts of utility facilities at great cost. It would be unfair to make some communities and some utilities pay the entire load of relocating the utilities when most of the communities and utilities, many located just a short distance away, would not pay any of the load but would benefit almost as fully from the construction of the Interstate System.

Under these circumstances the legislature elected to exercise the State's police power by providing that the State pay the non-betterment cost of the relocation of the facilities to be relocated under the 1956 Federal Highway Act. Such was not an abuse on the part of the legislature in its exercise of the police power of the State.

The court further held that since the relocation was in furtherance of a public purpose, it followed that it did not matter whether some private interest might derive an incidental benefit. The true test of public purpose as regards the expenditure of public funds is the total result achieved. However, since the statute before the court limited the amount of reimbursement to "the entire amount paid properly attributable to such relocation, after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility," the court stated that the utilities involved would stand in no better position than that in which they stood before the relocation. (Pack v. Southern Bell Tel. & Tel. Co., 387 S.W.2d 789, March 1965)

The West Virginia Supreme Court of Appeals upheld the constitutionality of a similar statute and ordered the State auditor to reimburse two public utilities for the costs incurred in moving their facilities that were located on highway rights-of-way. The court stated that such expenditures could reasonably be considered as essential to the highway program and, therefore, did not violate a State statute which provided that gasoline and motoring taxes could only be appropriated for construction and maintenance of public highways. It cited the Tennessee case above in declaring that reimbursement to public utilities for relocation of their facilities was in the public interest and for a public purpose.

The court further held that although public utilities could only be reimbursed for removing their facilities in connection with a Federal-aid Interstate project, but municipally-owned utility facilities and water or sanitary districts could be reimbursed in connection with highways which were not a part of the Interstate System, the law was a general, and not a special, one. It stated that so long as a law operated on all persons and property similarly situated, it was not subject to the objections of special or class legislation. All public utilities were placed in a single category, and municipally-owned utility facilities were in another. The court stated that legislation might properly operate differently upon railroads, bus companies,

motor carriers or upon gas or electric utilities, if classifications had reasonable basis and were not made unreasonably or arbitrarily. It held that the classifications in the subject statute could not be said to irrational, arbitrary, or unreasonable. (State ex rel. Appalachian Power Co. v. Gainer, 143, S.E.2d 351, July 1965)

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