1956

HIGHWAY RESEARCH BOARD

Highway Laws

BULLETIN 145

National Academy of Sciences—
National Research Council

publication 432

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1957

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2101 Constitution Avenue Washington 25, D. C.

HIGHWAY RESEARCH BOARD
Bulletin 145

Highway Laws

A Symposium

PRESENTED AT THE
Thirty-Fifth Annual Meeting
January 17–20, 1956

1957
Washington, D. C.

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Preface

Great progress is being made today in the United States in the study of highway laws — an area relatively untouched until a few years ago. Focal point of this inquiry is the Highway Laws Committee of the Highway Research Board. This committee was established following a request by the American Association of State Highway Officials for a comprehensive study of the highway law in all the states. After much preliminary work, a staff was employed and a three-year study project got under way in July 1955.

Progress of this project was thoroughly reviewed in January 1956 at committee sessions held in Washington, D. C., during the annual meeting of the Highway Research Board.

This monograph, in reporting the proceedings of those sessions, documents not only the work of the committee and its staff, but reviews other notable activity in the highway law field.

Much of the material presented here has not previously appeared in print. It is the hope of the committee that this bulletin will preserve permanently the record of developments and, further, will have continuing value as an informational source for those interested in the subjects with which it deals.

Contents

Remarks at Opening Session of Highway Laws Committee

LOUIS R. MORONY, Chairman, Highway Laws Committee
Director, Laws Division, Automotive Safety Foundation

● THIS being a new subject in the Highway Research Board, it is gratifying that so much interest is being shown in it. The session program brings together for the first time, — to your chairman's memory, at least — representatives of the federal government, state highway departments, counties and cities to discuss this vexing problem of highway law.

In the evolution of road development in this country, laws have been passed establishing authorities, creating highway systems, authorizing the taking of land, and so on. But never before has the country paused to take stock of these laws as they have developed. No one has stopped to consider their adequacy on a national basis.

The purpose of this symposium is to present information concerning what the Laws Committee of the Highway Research Board intends to do to carry forward this work. The Board has a national committee comprising a fine cross-section of men of experience, men who have intimate knowledge of the subject and who are sincerely interested in making a timely contribution toward the development of this research project.

There is also a staff in whom the Board and the committee take pride. Not only have the staff members been carefully selected, but they have shown an aptitude for this work. With the facilities the Board has provided, it is felt that the work can be completed on schedule.

This project is a joint enterprise financed by the states and the U. S. Bureau of Public Roads, with the active cooperation of the states and counties and other interested peop . The states are contributing to the law library. Under review are the constitutions and statutes of all the states and Hawaii, Alaska, and Puerto Rico, and all the pertinent case law dealing with the 28 subjects that have been outlined as a basis for the study. A detailed report of the committee's activities is included in this report of the symposium.

We are particularly honored by having the Chairman of the Highway Research Board with us. No man has been more interested in helping us get this work started.

It is with a great deal of pleasure that I introduce G. Donald Kennedy, President of the Portland Cement Association and Chairman of the Highway Research Board.

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REMARKS BY G. DONALD KENNEDY

Chairman, Highway Research Board

Kennedy, speaking briefly and informally, declared the work of the committee is an example of the activity of the Highway Research Board "which will have broad significance in the years ahead."

"The importance of good basic law to effective highway management cannot be overstated," Kennedy asserted, "for the highway official can only function within the authority delegated to him by the legislature."

Kennedy voiced the hope that eventually steps will be taken to embody the principal findings of the laws study project in a document "written expressly for the layman, to create wider public understanding of the close relationship between adequate law and sound highway development."

* * * * *

It was mentioned earlier that speakers at the symposium represent the four responsible agencies of government in the United States.

As already indicated, the original group which inspired the highway law project is the American Association of State Highway Officials. Because of their interest it was felt only proper that their Executive Secretary present something of the background of the project and the great concern the state highway officials have in upgrading the whole legal structure which supports the highway enterprise.

Finally, there is the federal viewpoint to consider in connection with an effort to review and evaluate highway laws. Pursuant to Congressional mandate, the Bureau of Public Roads recently has prepared and presented to the Congress a factual report that seeks to revise and consolidate all federal-aid highway laws into a single streamlined package, so they can be more easily understood and interpreted. The federal viewpoint is presented by the Solicitor of the Bureau of Public Roads.

The next speaker is the Executive Director of the American Municipal Association. The cities represented by this gentleman realize the substantial stake they have in the future development of the highway system and they are well aware of the potential values which will result from the development of this law study.

The last speaker will discuss this highway law project from the county point of view. He is a man well versed in the subject. He is a lawyer and has been interested in this project from its inception. No one is more aware of the important role that the counties play in the future of highways in this country than the General Counsel for the National Association of County Officials.

These viewpoints will then be developed further in panel discussion and a report of the Committee on Highway Laws.

State Highway Officials and the Laws Project

A. E. JOHNSON, Executive Secretary
American Association of State Highway Officials

● THE American Association of State Highway Officials, being fully aware of the growing highway problem and that the nation's pattern of heterogeneous and outmoded highway laws is a serious deterrent to proper highway modernization, in 1952 requested the Highway Research Board to undertake a study of such existing laws.

The study was not to be for the purpose of writing or dictating policy or a uniform highway code, but to conduct a comprehensive research review of all State constitutions, highway statutes, highway policy procedures and pertinent court decisions and to prepare an analysis and an inventory in an orderly form presenting those essential features encouraging and supporting proper and adequate highway practices.

Much of the basic road law predates the use of the automobile and is predicated upon the prime purpose of a public thoroughfare being to serve the needs of the adjacent property with access being allowed anywhere the owner might select.

The rights-of-way requirements for the majority of the nation's primary trunkline highways were acquired three decades ago when there were only about one-third the motor vehicles in use as now, traveling at approximately half the current average speeds, and when the improved property involved in right-of-way taking was only a fraction of what would be encountered at this time. In fact, a great majority of the expensive property development complicating a highway modernization program was encouraged and enhanced by the existing arterial highway routes. Property values enhanced by the highway itself precludes the economical modernization of the existing route in the majority of cases.

Since the development of the trunkline primary network some thirty years ago, except for all too few instances, the courts have not been involved in major right-of-way acquisition programs and especially the kind geared to modern and future motor needs. Most highway work, because of the effects of the great depression of the 1930's and World War II and the Korean conflict, has necessarily been reconstruction upon existing locations and rights-of-way, and such improvements have not kept pace with motor-vehicle use or needs.

Consequently, the legislator and the lawyer generally has neither had opportunity nor necessity to consider highway statutes in light of changing needs and concepts.

In the past, two types of public roads have sufficed; first, the land-service road, generally now referred to as the secondary or feeder road in our classification procedures; and, secondly, the arterial or primary highway, which usually serves through travel and adjacent property and thereby is a dual purpose facility.

With changing and increasing motor transportation demands and desires, however, after certain traffic densities are reached, a facility cannot efficiently nor safely serve a dual purpose for the two types of traffic characteristics are not compatible.

The need for a third class of highway has developed, a highway located, designed, constructed and operated especially to safely and economically accommodate the long haul, high density, high speed, express travel. The need for and the acceptance of this third class of modern highway has been demonstrated by the construction and popularity of the toll turnpike.

This third class of highway represents a minor, but very important, portion of the total public road and street mileage, and supplying such facilities is not something for the future, but is now overdue. An analysis of the economic cost of time lost, personal injuries and fatalities, excess operating costs and property damage due to inadequate highways eliminates the subject of the immediate need for modern highways being a matter of conjecture or argument.

Because of the present traffic densities involved and trends indicating ever-increasing future demands, design geometrics for modern expressways in most cases preclude the adaptation of present rights-of-way and road locations. The multilane, divided, controlled access facility is the most efficient, the safest highway devised by the highway

engineer. It is extremely expensive to construct, and, in some instances, will utilize the last logical and desirable location remaining between major route control points.

Because of the expense involved and the need to serve not only present, but also future needs, it is evident that every provision must be made to preserve the investment, the location, the capacity and the safety features of the highway, as well as to have sufficient right-of-way available at a later date to add to the facility to serve reasonable future needs. If future needs are not considered during the initial right-of-way acquisition, in all probability, future property developments would make it impossible to acquire the necessary land at a later date when it becomes necessary to provide additional traffic capacity.

These aspects raise the three foremost indicated changes that should be considered in highway law from the modern viewpoint. One, the expeditious acquisition of necessary highway right-of-way at a fair and reasonable cost, coupled with immediate possession to accelerate the construction. Secondly, the authority to acquire rights-of-way for future needs and use. Thirdly, the authority to acquire the rights and be granted the power to control egress and ingress.

It has been demonstrated that random access and ribbon development along a heavily traveled trunkline can decrease traffic capacity by one-half and increase the accident frequency as much as five-fold. Access control is progress in motor transportation and is necessary for the public welfare. The main commodities that the toll road patron gets for the payment of the premium toll are the safety and economic advantages of the access control features of the toll turnpike.

As to the matter of right-of-way acquisition, the purpose of law is to give the public the right to take property needed for the good of the public, yet compensate the property owner for the property taken and damages sustained. At present, so many laws exist and the interpretations are so varied and complex that expeditious right-of-way acquisition at favorable prices to the public is sometimes difficult and time consuming, especially when new locations involving wide rights-of-way and access control features are involved.

The condition is aggravated by our out-dated laws and the courts' lack of comprehension of present and future highway needs and the economics of motor transportation.

Access control will be opposed by those living along the expressway route who want direct access, or by the property owner who wants the road location to result in a financial windfall to him, in addition to receiving fair and just payment for the property taken by the road, or by the enterprising commercial interests wanting to exploit the business potentials of the dense stream of traffic.

The lack of access control can create a ribbon development and traffic friction that in turn works as a malignancy to destroy the efficiency of and the investment in an expensive major highway.

Five states are currently without some legal provision to control access, unless the respective general highway laws may be construed as broad and comprehensive enough to permit the construction of freeways. All the states having access control statutes do not have all the essential elements of an effective statute, and some states having authority show some hesitancy to exercise such rights because of what they feel is adverse public opinion.

It is generally conceded, however, that to construct a national network of modern defense highways without the application of access control would be disastrous and all bills proposing enlarged highway programs that were considered by the Congress in 1955 recognized the inadequacies of at least many state highway laws and provided for the Federal Government to exercise eminent domain and acquire access rights where the state laws were inadequate and when requested by the state in order to insure access control on, and the expeditious construction of, the Interstate System of Highways. Such a provision, however, is not a substitute for proper state highway laws, but only a necessary expedient until the time that the horse and buggy laws of yesteryear may be brought up to the 300 horsepower requirements of today and tomorrow.

After the Highway Research Board started the highway study at the request of the highway officials, it became apparent that a sizeable budget and a special staff would be required for the undertaking involves many ramifications and a tremendous mass of

research work.

The Research Board estimated that three years and $150,000 would be needed to make the study. The Bureau of Public Roads and the Automotive Safety Foundation provided the funds for the first year, and the Executive Committee of the American Association recommended the several states contribute $500 each annually for the second and third years, to match a like amount of funds to be provided by the Bureau of Public Roads, and ordered a ballot to be sent to the states whereby the states would make such a financial commitment. Within recent days, balloting has been completed, assuring the full financing, and the project is fully activated. A staff of carefully screened recent law school graduates have been employed by the Research Board, and the study is well under way. In fact, the project has already given assistance in furnishing special data on particular legal problems confronting some of the individual state highway departments.

When the final study report is completed, it might be that the Highway Officials would use the results to develop a basic model highway code, embracing the authority and best practices for efficient highway management and operation geared to current and future needs. Such a code could be considered by any state involved in the process of developing adequate highway laws. In any event, the study will clearly show those laws that are outstanding and promote efficient highway administration and development. Out of the thousands of laws used by the some 35,000 road and street agencies of the various levels of government in this nation, the best and needed features will become known to legislators, to highway officials and to lawyers. We shall see legislation and legal interpretation catch up with the long-range planning of the highway official and the pressing motor transportation needs of the public.

Until there is universal understanding, the highway official hesitates to press for highway law changes for fear the result may be even less adequate than at present. The legislators and the courts should have representation in administering and steering the highway laws study, for by such connections will all involved interests become interested in the subject and the project serve the best interests of our country and yield the maximum returns.

The Bill to Revise Federal Aid Highway Laws

HENRY J. KALTENBACH, Solicitor, Bureau of Public Roads

● THE discussions being held here today have a very significant characteristic. They reflect the increased recognition of the importance of the many varied legal aspects of highway development. The need for adequate organic laws is so essential to the future of highway programs at all levels of government that this phase of the subject cannot receive too much emphasis. It is inspiring, therefore, to witness by these discussions today the increased attention being given and the federal-state cooperative efforts being made towards spearheading thinking, exchange of ideas, and action on these legal aspects.

Among the problems facing some of the states is the problem of modernizing their highway laws. The Federal Government has a similar problem. The federal-aid laws, under which the Bureau of Public Roads has been operating over the past forty years, consist of a series of amendments and supplements to the original law enacted in 1916. In fact, the present laws relating to federal aid for highways are contained in no less than 37 separate enactments which modify the first Federal-Aid Road Act. It was inevitable that such an accumulation of enactments would give rise to obsolete provisions, inconsistencies, and overlappings. The fact that federal-aid highway authorizations are increasing in amount, with the prospect of very considerable increases in the authorizations for the interstate system, makes it extremely important that an up-to-date version of the federal-aid laws be restated in one act. This brings to mind a statement that has been made that "Sound government depends upon legislation that says the right thing in the right way, in language that is as clear, simple, and accessible as possible."

The purpose of this paper is to provide a brief discussion of the efforts and techniques on the part of the Bureau toward the accomplishment of a restated, one-package, federal-aid law. The material in this paper was covered in somewhat lesser detail in a paper recently presented before the AASHO Legal Affairs Committee at New Orleans. It is believed the subject may be of interest to anyone who has occasion to refer to or use the federal-aid laws, and may be of particular interest to any state which contemplates a similar undertaking with respect to its own highway laws.

It perhaps should be mentioned at this point that the proposed restatement and revision of the federal-aid highway laws into one enactment is a matter entirely separate and apart from any of the present proposals relating to the President's highway programs, which are concerned primarily with the additional authority and funds needed to provide a modern interstate highway system.

The current undertaking toward obtaining an up-to-date version of the federal-aid highway laws has been backed by a mandate of Congress which was contained in Section 12 of the Federal-Aid Highway Act of 1954. This section directed the Bureau to transmit by December 31, 1954, "a suggested draft of a bill or bills for a Federal Highway Act, which will include such provisions of existing law, and such changed or new provisions as the Secretary deems advisable." This assignment goes further than a mere codification, for it provides for changed or new provisions which would be beyond the scope of a codification. It has been determined, however, that in drafting the bill pursuant to Section 12 of the 1954 Act, the draft would include only such changes as were considered technically necessary and noncontroversial in nature, and would not include major substantive changes which would alter any of the basic provisions of existing law or that would possibly be of a controversial nature. Any recommendations for such major substantive changes are, therefore, to be treated as a separate subject which has no bearing on this paper.

Detailed discussion of the revision bill is beyond the scope of this paper, but it is felt that a brief discussion of the techniques used in drafting the bill may be of particular interest.

The first task was to determine the scope of the work. The first Federal-Aid Act was approved on July 11, 1916. Since that date, Congress has enacted many laws for the purpose of amending or supplementing the original act. There were also appropria-

tion acts for every year since 1916, and many of these contained permanent substantive provisions which amended or otherwise became a part of the federal-aid law. In addition, there were a number of other acts that had been passed from time to time which related to other federal agencies and which also affected the administration of Bureau activities in one way or another, but which have not been considered a part of the federal-aid law. After considerable thought, it was determined to limit the scope of the revision bill to only those acts, including appropriation acts, which in fact amended or supplemented the original Federal-Aid Road Act.

Having limited the scope of the effort there was next prepared an exhaustive topical index with references, under appropriate headings, to every section or sentence of the law which dealt in any way with the particular topic indexed. A code of colors was then developed with which to mark up a pamphlet copy of the various federal-aid laws. Each color was used as a symbol to indicate what had happened to the particular section or sentence marked. For example, yellow was used to indicate the repeal of the sections or sentences marked in yellow. Green was used to show that a particular section had been executed or had lapsed by passage of time.

It had been the original intention to include in the report, as Part V, a copy of each of the laws with the various colors overprinted thereon. However, it was found to be too expensive a printing job, so a series of five different overlays, all of which could be printed in black, was selected as a compromise. These overlays were used to indicate, in five general categories, the provisions which have been eliminated and the reasons for their elimination. By use of this system of overlays, a reader can quickly ascertain what has happened to each section of all prior laws.

The first type of overlay, a series of small dots, indicates a section that has been amended, repealed, or re-enacted.

Marginal notations opposite this overlay indicate where the particular provision covered by the overlay has been amended, repealed, or re-enacted.

The second overlay pattern used was a series of widely-spaced horizontal lines. This overlay indicates portions of the law which may still be technically in force and effect, but which are believed to be obsolete or for other reasons inappropriate for inclusion in an over-all highway bill. The specific reason for each omission is contained in a series of notes at the end of Part V, keyed to marginal notes opposite the appropriate overlay.

The third overlay consisted of a series of diagonal lines used to indicate that a section has been executed. Marginal notes are considered unnecessary in this case since no explanation or further references are required. For instance, lines 7 through 9 of Section 1 of the 1916 Act, overlaid with diagonal lines, permitted the assent of the Governor to the Act until final adjournment of the first regular session of the legislature after passage of the Act. Of course, there is no need for retention of this clause.

The tenth through the twelfth lines on Page 1 of the 1916 Act contain a clause reading: "The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction...." These lines were overlaid with the fourth pattern, a series of vertical lines, indicating implied repeal, and are keyed by a marginal note to Section 6 of the 1921 Act. Turning again to the section, it is found that it does not call for an agreement upon the roads to be built, and the character and method of construction, but rather requires system designation and leaves the initiative entirely to the states, with power of approval in the Secretary.

This latter provision indicates some of the difficulties encountered. It was often difficult to determine whether there was an implied repeal or merely a somewhat different way of stating the same provision. There was also difficulty in determining whether there was a re-enactment or amendment, or merely an implied repeal. Undoubtedly there could be, and in fact were, honest differences of opinion concerning the correct category in which to place some of the provisions. However, from the point of view of the end product — that is, the new bill — the category is not so important as the decision as to whether the section or sentence in question should or should not be carried forward into the new bill.

A simple example of surplusage is contained on Page 5, Part V of the report in the first few lines of Section 5 of the Post Office Appropriation Act of February 28, 1919, which read:

> Sec. 5. That the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, is hereby amended to provide that

These lines are covered by a fifth overlay of closely-spaced horizontal lines indicating surplusage. This is perhaps the simplest, since it is used to indicate that the language in question is no longer necessary.

No overlay was placed upon the remaining sections. They form the basis for the revision bill, because presumably they constitute the provisions of the law still in full force and effect.

At this point a table of contents was made for the revision bill. In this connection the arrangement was made insofar as federal aid was concerned, on a chronological basis to the extent possible. Then all existing law provisions were assembled under the appropriate heading and either the law was retained in its original language, if possible, or editorial changes were made in language so that the language of the entire bill would be uniform. If it was not possible to use the original or merely make editorial changes, the language was rewritten and consolidated with as few changes as possible. To make it clear to Congress exactly what changes were made in the language, there was included in the report another part, designated as Part IV, which ran in two columns. The proposed bill was placed in the left-hand column, and the sources from prior laws in the right-hand column. Part IV was keyed to Part V so that a person interested in any particular section of the law could trace it through and see just what disposition was made of it.

For example, the definition of the term "highway" is contained in the Federal Highway Act (1921). On the right-hand margin opposite this definition in Part V the number "324" appears. Turning to Part IV, Section 324, "Definitions," the left-hand column under subparagraph (g) gives a definition of the term "highway" proposed to be included in the revision bill. The right-hand column indicates that this definition is based on four different sections of the law which are regarded in Part V as still in existence. These definitions were consolidated into subparagraph (g).

In addition, certain changes were made in this definition. The word "footpaths" was added in line 5 and the word "tunnel" in line 7. Whenever changes of this nature were made the change was indicated in a footnote.

This illustrates the technique used. It was found to be a rather long and arduous task. However, it is believed that a bill was produced which, if enacted by Congress, would be beneficial to all those persons who deal with federal highway legislation.

The United States Code contains a consolidation and codification of the general permanent laws of the United States, arranged according to subject matter under fifty title headings. Some of these titles have recently been revised and enacted to positive law. The Federal highway laws are now purportedly set forth under Title 23 of the United States Code. In the event the draft bill is enacted, it will serve to produce a clear, unified, up-to-date version of the federal-aid laws codified in one act so that those having occasion to refer to Title 23 of the United States Code will have the actual positive law in front of them, which is not now the case with respect to Title 23.

It has been said that bill drafting must have the accuracy of engineering, for it is law engineering, and that it must have the detail and consistency of architecture, for it is law architecture. It has also been said that the perfect statute, like perfect justice, is "God's idea, man's ideal." While the ideal may never be achieved, an attempt should be made to come as close to it as possible, for it is most essential that the provisions of law be stated with such clarity as would eliminate any possible ambiguities as to their meaning. An attempt has been made to keep these principles of draftsmanship in mind, which accounts for the many instances wherein the language of the existing law was restated for purposes of clarity.

In the preparation of the draft bill, suggestions were solicited from the Washington office and the entire field organization of the Bureau. These were considered at Bureau

staff meetings. The draft bill, therefore, takes into account the experience and thinking of the men who have been actually administering the federal-aid laws over a period of many years. As a result of the exhaustive study of all the federal-aid highway laws in connection with this undertaking, the Bureau is convinced more than ever as to the pressing necessity for early action by Congress in enacting the substance of the draft bill.

Based on the Bureau's draft bill, there were introduced in the House of Representatives identical bills, H.R. 234, 235, and 2127. In the Senate, S. 1072 has been introduced, which is identical to the House bills. While brief hearings have already been held before the House Committee on Public Works, no action was taken by that committee, nor have there been any hearings held or action taken by the Senate Public Works Committee. These bills are still alive and now awaiting action by the current session of Congress.

Municipalities and Highway Laws

PATRICK HEALY, JR., Executive Director
American Municipal Association

● FIFTY million automobiles placed bumper to bumper could not all fit at the same time on four lanes of a 40,000-mile highway. This interesting statistic was worked out on the basis of an average length of 17½ ft for each automobile. It is even more amazing when you consider that there are actually 61 million motor vehicles in the United States today and that there will be an estimated 85 million nine years from now.

The urgent need for a greatly expanded highway improvement program has been generally recognized and accepted. Studies by state and federal agencies have indicated that more than half of the construction needs of the Interstate Highway System are within the cities, and yet it is a sad fact that the true extent of the urban needs cannot be appraised with any degree of accuracy because of the lack of basic factual data. A good job is being done by the highway planning surveys of the various state highway departments in determining rural needs. If an equally good job were being done in the urban field, it would probably demonstrate that considerably more than 50 percent of the nation's total highway deficiencies are within the cities.

This lack of basic urban data is not entirely the fault of the state highway officials. It was easier to build rural roads, and during the 1920's and 1930's the pressure was on to build roads between cities and to "get the farmers out of the mud." Then the war came along and stopped highway progress. Now the pressure is on to "get the motorists out of the muddle," and the big traffic muddle is in and around the cities. There is now the further pressure of the urgent need to provide adequate evacuation routes for defense purposes.

Meanwhile, cities could have been developing their own basic data, but because of the complexities of urban transportation involved in streets and terminal facilities as contrasted to rural transportation and because of the lack of leadership, no standards were established. Therefore, there has been no yardstick for measuring the quality of service provided by the existing street system in urban areas which could be used as a guide in developing adequate improvement programs. Fortunately, we are now witnessing the establishment in many state highway departments of urban planning divisions. Another significant development has been the creation by representatives of cities themselves of a National Committee on Urban Transportation, whose purpose is to develop uniform procedures which will show municipalities of all sizes how to carry out fact-gathering programs in an economical and efficient manner, within the normal framework of municipal administration. These procedures will show how to collect and analyze information about such matters as:

1. The number of trips made between certain points.
2. The hours they occur, and the mode of travel used.
3. The mileage of arterials and freeways needed.
4. The justification for express transit service.
5. The time it takes to get from one point to another by cars, trucks and transit.
6. The effect of traffic congestion on transit schedules and truck operations.
7. The capacity of a street system to accommodate various types of vehicles.
8. The demand for parking and loading facilities.
9. The need for state enabling legislation and local ordinances in coping with street transportation.
10. The deficiencies of administrative authority in meeting requirements of planning, financing, constructing and operating transportation facilities in metropolitan areas.
11. Sources of revenue for transportation programs.

These and the hundreds of other basic facts obtained through use of the procedures will aid:

1. The municipal governing body — in establishing the policy for the level of transportation services.
2. The chief administrator — in determining how transportation improvements can be integrated with other city services.
3. The city planner — in developing plans and preparing capital improvement programs.
4. The traffic engineer — in operating the street system with maximum efficiency.
5. The transit operator — in providing more effective service.
6. The director of public works and the city engineer — in designing street improvements and directing the street maintenance program.
7. The financial official — in the preparation of annual budgets and financing long-range improvement programs.
8. The city attorney — in the drafting of laws and ordinances.

Representatives of six national organizations and the U. S. Bureau of Public Roads comprise the membership of this committee, established in May, 1954, the organizations being the American Municipal Association, American Public Works Association, American Society of Planning Officials, International City Managers' Association, Municipal Finance Officers Association, and National Institute of Municipal Law Officers.

In addition to developing standards and procedures for surveying and evaluating the engineering, technological, financial, and other aspects of urban highways and transportation, the committee is also preparing a manual on the legal aspects of urban transportation. The purpose of this is to furnish a guide for a survey of all the legal tools which are now available in a particular city and to record the substantive elements of each, so that they may be evaluated in terms of adequacy to meet the transportation needs of that city. In the words of the special sub-committee preparing this manual:

> Such a survey and evaluation of all legal tools relating directly or indirectly to urban transportation, will serve two objectives: (1) it will assist a particular municipality in measuring the adequacy of its own legal equipment in light of present-day needs, and (2) it will assist in the accumulation of legal data on a regional, state and national basis, leading eventually to the formulation of state, regional and national policies designed to further help municipalities resolve their transportation difficulties.

The tentative draft of this manual divides the legal aspects of urban transportation into three broad parts: I. Land Use and Density Control, II. Control over Provision of Facilities, and III. Authority Governing use of Facilities. Each part lists the essential elements of law for specific legal tools or objectives. For example, under Part I, Land Use and Density Control, the first legal tool listed is "Master Plan (or Official Plan)," the objective of which is described as "To control the development of various land uses in order to minimize future traffic problems; to integrate transportation facilities with urban improvements and to assure that future public and private structures and use will be consistent with sound community development." Under this are listed the essential elements of law on this subject with references to various model laws. Opposite each such "essential element" are spaces for listing references to existing legal authority in the city being surveyed and space for noting "legislative needs."

The next legal tool under this part is "zoning," the objective of which is "To assure appropriate location and density control of traffic generators and thereby lessen traffic congestion; facilitate the provision of an adequate transportation system; reduce the cost of future improvements and assure an integrated plan of development; and provide for changes in the plan as new needs may require." Listed as essential elements of a zoning law are "Authority of city planning agency and city governing body to develop a zoning plan (in conformance with the Master Plan), (to include authority either to zone within defined areas outside of city limits or to establish cooperative zoning programs with surrounding jurisdictions in the metropolitan area), such authority to include: (a) Control of land use development (building heights, bulk regulations and population density controls), (b) Requirements for front, side and rear yards, (c) Provisions for

the development of transportation facilities (streets, bridges, airports, etc.), (d) Requirements for off-street truck loading and for off-street parking facilities," etc.

Another legal tool is "Subdivision Regulations," the objective being "To control traffic generators indirectly, assure conformity with existing and planned street patterns and provide transportation facilities according to acceptable standards."

Four more legal tools are specified under this first part, including "Mapped Streets — To facilitate construction of planned streets and widening of existing streets and reduce cost of future right-of-way acquisition;" "Slum Clearance, Urban Redevelopment, Urban Renewal — To give proper consideration to transportation needs in plans providing for the rehabilitation of blighted or slum areas;" "Civil Defense — To ensure that civil defense and urban transportation planning will be properly integrated," and "Regional Planning — To provide for coordinated planning on a regional basis where such planning is feasible and desirable."

Part II deals with legal control over providing of facilities, with a detailed listing of essential elements of laws dealing with financing, land acquisition (including "authority to acquire land for future use"), construction and maintenance, urban redevelopment, civil defense, and miscellaneous matters.

The third part covers authority governing the use of facilities. The essential elements of law are listed under four legal tools, namely, traffic control, interdepartmental-intergovernmental relations, licenses and permits, and enforcement. Under "traffic control" are included such essentials as authority to provide for municipally owned off-street parking, to designate one-way streets, to designate truck routes, etc. Under "licenses and permits" are listed the essentials relating to transit lines, taxicabs, commercial parking facilities, etc.

The important work of this National Committee on Urban Transportation should go far toward analyzing and improving the highway laws of this country as they relate to municipalities. Procedures developed will be field-tested through pilot studies in selected cities early this year. The methods will be reviewed and revised in the light of pilot study experience. The manual then will be made available to all interested governmental agencies, departments, and jurisdictions.

Any discussion of municipalities and highway laws should most certainly include reference to national municipal policy on the subject of a national program of interstate highways. I would like to conclude this paper by reading to you the following policy statement adopted unanimously by the American Municipal Association at its 32nd Annual Municipal Congress in Miami, November 30, 1955:

> "The American Municipal Association calls upon the 84th Congress to take immediate action on passage of legislation that will permit the earliest possible start on an expanded federal-aid highway program. The objectives of such a program must be the earliest possible completion of a 40,000-mile interstate highway system and the highest possible level of construction on the federal-aid primary, secondary and urban systems. The need of this program has heretofore been conclusively demonstrated and the Congress must recognize that failure to act or further delay constitutes a real threat to the nation's safety and economic welfare.
>
> "To accomplish these objectives the American Municipal Association believes that:
>
> 1. Highway legislation must be given top priority for congressional consideration in the forthcoming session.
> 2. Bi-partisan leadership in both Houses of Congress should formulate and expedite new highway legislation.
> 3. Financing the federal share of the program should be considered in separate legislation by appropriate committees of Congress in keeping with traditional congressional procedure.
> 4. A financing plan must provide for 90 percent federal sharing for a ten-year completion of the interstate system, including urban feeders and that such matching funds be made available to the several states in such amounts and at such times to meet all rights-of-way costs including relocating publicly owned utilities.
> 5. That new highway legislation also recognizes fairly the needs of the urban and rural highways "

Highway Laws from the County Point of View

KEITH L. SEEGMILLER, General Counsel
National Association of County Officials

●CLEARLY visible in the county court houses of the country is a forward-looking change in the concept of the purpose and function of the law and of the lawyer. This is responsive in no small part to pressures incident to rapidly expanding highway transportation. Historically, law has been largely a compilation of prohibitions, a statement of things that may not be done. And, historically, the function of the lawyer has been primarily that of determining whether specific courses of conduct came within or without the legal prohibitions. It is understandable that, confronted with predicting what a court may later decide and under heavy pressure to play safe both for his own reputation as well as in the interest of his client, he usually said "No." Indeed, within my own lifetime it has been widely claimed in very reputable legal circles that the chief function of a lawyer to keep his clients out of trouble is to say: "No. It can't be done."

But law is coming rapidly to be used as a positive force to provide ways for doing things that need to be done, and its negative or prohibitory characteristics are receding into the background. There is an accompanying change in the function of the lawyer. Less and less is he called upon to determine whether a course of action is permitted by law. More and more he is being called upon to discover or, if necessary, devise the legal structure to support the desired course of action. In short, the initial word in legal questions is less often "whether" and more often "how."

I am told that one newly designated legal adviser to a county board undertook at his first meeting with the board to state his concept of his duties. "Gentlemen," he said, "as I understand my duties, they fall into two general categories. On one side, if you determine that a particular course of action should be pursued for the public good, it is my job to find law to support it. On the other side, if you determine that any particular course of action would not be in the public interest, it is my job to find legal reasons why it cannot be taken." That is not presented as an all-inclusive statement of the duties of a county attorney. But it does indicate a point of view somewhat novel. It is a good point of view, progressive and fairly well suited to rapidly changing social needs.

It is well that law should lag somewhat behind social thinking, but, in the field of highways at least, the gap has become too wide. To narrow the gap and to keep pace with the dynamic demands of highway transportation, the law too must be dynamic, and the traditional conservatism of lawyers must be goaded a little, perhaps considerably, toward an attitude less fearful of change. I look to the nationwide highway laws study now in progress to lend strong impetus in this direction. Indeed, I regard this, a by-product of the study itself, as one of its important contributions. It will serve to focus needed attention on re-examination of the function of the law in a highly complex and rapidly changing society. The view will be highlighted by marked contrast with progress made in the highway field in engineering, economics and finance. The need is not for a single revision of the law, but for adjustment to the idea of a process of continuing revision at a pace more rapid than heretofore allowed by the predominant philosophy of the law. County officials are among those who need such a modified attitude toward the function of law. I believe they will accept it.

However, the current laws study is geared not to advocate a change in philosophy, but to find and organize the facts. This is a matter of vast concern to counties, of course. That defects in the legal structure hamper county participation in the highway program is plain. There has been evidence of this both general and specific.

General areas of the law's inadequacy at the county level emerged rapidly after enactment of the Federal Aid Highway Act of 1944. This was the first act authorizing and providing federal funds for a secondary system of highways. The funds were available on a matching basis, but many counties, indeed at the outset most of them, lacked legal authority to raise funds for this purpose. There was widespread doubt that the federal funds authorized could be matched, and even after more than a decade the problem remains serious in many localities. There were limitations on county taxing authority, as well as on borrowing authority. Equally serious were statutory limitations on

administrative authority, often reaching to matters of a detailed and routine nature. These hampered and, in some instances, prevented effective participation in the new scheme even if money for the purpose could be raised.

A characteristic of federal highway legislation is its tendency toward uniformity. Our highways must constitute a system, crossing many different highway jurisdictions. This requires coordinated action, nationwide, and to a large extent uniform action. In the face of this situation, we soon learned that the laws applicable to counties within states varied so widely that the required coordination of action was rigidly retarded, if not prevented. Within states, county powers, authority and responsibilities varied widely. Those most fortunately situated promptly gobbled up all funds allocated to them and applied for more. Frequently, these applications were granted from funds initially allocated to those less fortunate counties under the burden of outmoded legal restrictions.

As to the need for uniform laws in the interest of highway safety, only a passing remark is justified. Every motorist has become keenly aware of this need without aid of legal training or advice.

The almost total absence of legal machinery for participation by counties in intergovernmental relations became conspicuous soon after the Highway Act of 1944. Rarely were there any fixed avenues whatever for cooperation between counties and the state highway departments, although the Federal law expressly required such cooperation in establishing the secondary system and clearly implied it in other respects. For lack of machinery for cooperative effort, misunderstandings begat ill will and even anger and personal animosity to a serious extent. For these reasons, there was temporary disruption of the entire program in some instances, and long-time burdens on the program in many others. One response was an amendment to the federal law providing for secondary highway divisions in the various state highway departments. But more is needed in the form of revision of state laws. The federal law cannot do the entire job, and county officials are among the first to object to federal control of matters of state and local government housekeeping. We can avoid it best by putting our own houses in order promptly.

The foregoing is an outline of general impressions coming to the National Association of County Officials from the counties across the country. Isolated studies have identified some of the details, but only enough to demonstrate that further study is needed. Thus, a study in Maryland disclosed specific shortcomings in the laws of that state as to intergovernmental relationships in that state. (Highway Relationships in Maryland — Highway Research Board Special Report 6, 1952) For example, this report especially noted widespread differences among special and local highway laws and recommended enactment of general legislation in substitution for them. It also pointed out a lack of clear definition of authority and responsibility and an almost total absence of legislation designed to encourage development of good working relationships among those having highway authority.

We are all aware also of the laws study in North Dakota. (A Study of the State Highway Laws of North Dakota prepared for the North Dakota Legislative Research Committee by the Automotive Safety Foundation — 1953) Here also specific defects were identified. As an example of a different kind, this study revealed inadequacies in legal authority for acquiring rights-of-way. This report also deals with highway nomenclature, pointing out that many terms used in the field need, but do not have, legal definition. This is especially true of terms describing new concepts, such as access control. Indeed, the latter requires more than definition. It requires a complete policy foundation.

These and some other similar studies of particular localities or phases of the problem need not be detailed here. They are available and probably are well known to all of you. They serve to illustrate the need for a complete study. County officials aware of the highway laws study now being made by the Committee on Highway Laws approve it enthusiastically. I am confident that all others will welcome the reports of this Committee as they are made from time to time. We believe strongly that the county is an essential unit of government and that belief impels us to exert every effort to keep county governing procedure abreast of the times. In this respect, we attribute vast importance to a careful study of all of the highway laws of the various states. When the study is completed and the analyses are available county officials will go forward, I believe, to seek necessary revision of the laws. In accord with what I have said before,

however, we do not regard a laws study as a single task to be completed and left as a task finished. Conceivably one study and one revision may close the present gap between the legal machinery and the highway needs. Only continuing study and continuing revision will prevent the gap from widening again.

State Highway Laws Studies: Panel Discussion

Opening Remarks

ROY E. JORGENSEN, Moderator
Engineering Counsel, National Highway Users Conference

● I HAVE a tremendous interest on two counts in the Laws Studies being conducted by the Highway Research Board, and the work that is being done in the individual states. First, in my present capacity as a representative of the Highway Users, I know that any research project which can contribute to the efficiency of our highway operations will pay dividends to the highway users in accelerating the rate at which we obtain an adequate road system. As many of you know, the groups with which the National Highway Users Conference is associated have become more and more concerned with the inability of our public highway agencies to keep abreast of the demands and the urgent needs for highway improvements.

As a former highway official, I can recall most vividly problems made more difficult of solution — and, the solution frequently unsatisfactory — because of the inadequacy, or the absence, of laws. Looking back, I can recall that it was the engineer-administrator's inclination to accept the difficulties and grapple with them, charging it off to the capricious design of the lawyers who, it was frequently said, controlled the legislature and encouraged interpretations and court decisions aimed at confounding and confusing the hard working engineer. I can see now, however, as these efforts for laws studies have taken shape and as I visualize the great source of material that will evolve from the Highway Research Board laws study, that there can be much accomplished in simplifying and clarifying those problems with which the highway administrator must deal.

There are two problems with which we dealt in the highway department that I recall as being particularly difficult and unsatisfactory because of the lack of adequate legal guideposts. I never have recovered from the surprise which I experienced upon becoming the Chief Engineer, to find how much time was taken up with the problems of drainage, involving what the state could do, what it was legally obligated to do, and how the various involved problems could be fitted into the pattern. Unfortunately, the pattern was not clear and that, I think, is where our primary difficulties arose and why topside decisions continually had to be made on matters of relatively small magnitude and, as I recall, of a very aggravating nature.

The other problem I recall, and which I know is faced by all the states, involves the question as to what roads the state is and will be responsible for, and their degree of responsibility.

There are academic discussions about the things which should determine whether a road properly should be a state or a local road. But this is not what concerns me.

The big difficulty with regard to highway systems, is their flexibility. Ordinarily, I think we are inclined to consider flexibility a virtue, but it certainly is not true with regard to highway systems. In the State of Connecticut, additions to the State Highway System have continually been made through action of the Legislature. To a degree, the Highway Department was able to control this, by refraining from performing any construction on designated additions and taking them over for maintenance, the provisions of law being such that legal designation did not impose mandatory obligation upon the Department. There was, however, continuous pressure imposed for improving and taking over the designated roads. Furthermore, there were occasions on which the Legislature enacted a special law requiring the Department to construct a road within a limited period of time and thereafter maintain. The great difficulty created is not involved in whether particular roads are appropriate parts of the State Highway System or the local road system, but rather the uncertainty under which the public agencies must operate. It is impossible to plan and organize a long-range highway program with any assurance that the system will not be drastically changed through action of the Legislature. There is an obvious need for the Legislature to impose as nearly rigid defini-

tions of the respective highway systems as is possible. Only thus can they then expect the highway administrators to develop logical continuing programs for highway improvements.

There is a further problem associated with the highway systems. This involves the manner in which responsibility is fixed, or in some cases undefined, with regard to state responsibility for parts of the highway system in municipalities or in other urban areas. We operated in Connecticut for some time on the assumption that certain state highways which had been included in the original state trunk line designation about 40 years ago, had been designated continuously through the cities and the state properly could undertake construction and maintenance thereon. In other cases, it was concluded that there was no authority for the state to accept financial obligation for the urban extensions of state highways. In Connecticut, there are sizable urban communities that are not incorporated as cities. Within these areas, state responsibility has been accepted. When it came to maintenance of these latter, however, we had developed a variety of practices which illustrated the need for Legislative definition. For example, in some places state maintenance had been limited to the traffic lanes with the local government retaining the responsibility for maintaining the parking and gutter areas. When it came to street cleaning, the state accepted no responsiblity, but when it came to snow removal, we would plow snow but not load it and cart it away. Most of the foregoing apparently had been established not on the basis of any legislative policy, but on the basis of agreements between local communities and the state.

The panel members today are representing states which have taken the initiative in attempting to resolve some of the problems in their highway activities that have been associated with the lack or inadequacy of legal provisions. The men represent states with considerable variation in their geographic locations and the manner in which the highway functions of government are handled. We have a New England state in which the counties have no highway responsibilities, these being assumed fully by the town governments. We have the State of Louisiana in which the local rural road responsibilities are handled by the parishes. We have Nebraska, which I assume is somewhat typical of the middle Western states, in which the counties are the dominant local or rural road agencies. And then we have Michigan — again a middle western state — in this case, one in which the relationships between county highway departments and the state highway department are much closer than is general in other states.

The states represented on this panel provide demonstration of the urgency of the problem and the support in some states for getting on with the job. Although, the Highway Research Board study on its completion in three years, will provide a great fund of data for guidance, these states have already gone ahead with what help they could get from the project in operation, to provide answers now to some of their problems.

I am sure we will all have a better idea of the situation after we hear how these studies developed and what is being accomplished.

A Survey on Louisiana Highway Laws

W. CROSBY PEGUES, JR., General Counsel
Louisiana Department of Highways

● THE history of highway laws in my state, like in all states I suppose is quite interesting. Although I have been directly associated with the Louisiana Department of Highways about six years, I feel that I have been in highway work practically all of my adult life, as well as a part of my minority. Only recently we completed paving US 84 East and West across my home Parish of DeSoto. It extends from deep in the heart of Texas eastward across Louisiana and is considered one of our better East-West routes in the state. I earned my first real money pulling a surveyor's chain on this road during the vacation periods of my grammar school days when it was known as the "Old Naborton Road." As a small boy I recall ex-governor J. Y. Sanders coming to my home town advocating more gravel roads, and particularly a road from Mansfield to Shreveport,

which in those days, with the exception of six miles of gravel, was only a dirt model road. Also in those days the state was operating under Act 49 of 1910 which was the first semblance of a statewide Highway Act in Louisiana. It created the office of State Highway Engineer and defined his powers and duties.

The first complete Highway Commission or Department was created for the purpose of administering the construction, maintenance, etc., of highways, bridges and ferries in 1921. At an Extra Session that year Act 95, creating the Louisiana Highway Commission, was enacted into law. It was authorized by and followed the Constitutional Convention of 1921 under the administration of the late Governor John M. Parker, who had solicited the aid and assistance of the Honorable L. E. Boykin, past Solicitor for the Bureau of Public Roads, in order to draft the necessary legislation. Judge Boykin must have done a splendid job, for the Commission operated under the Act which he had prepared until 1942 when Act 4 was passed creating the Louisiana Department of Highways. The administration in office in 1940 had sought to establish a new department to supersede the old Louisiana Highway Commission but had failed in properly wording its legislation, so it was not until 1942 that the Act creating the Department of Highways was actually passed. This Act followed rather hectic days in Louisiana, and I refer to the Louisiana scandals in which some of the leading state officials, including the Governor, were prosecuted and sent to prison. It stands to reason, therefore, that our Highway Acts at such a time would be rather strict, and they were. I think this is well pointed out by Sections 55 and 56 of Act 4 of 1942, which are included in Title 48, Sections 421 and 422, of the present Louisiana Revised Statutes. Under these provisions of the law neither the Director, officers or employees of the Department, and corporations or firms in which the Director or any officer or employee of the Department in any way financially interested can bid on or become in any way interested in any contract having to do with the Department of Highways.

Likewise, no member of the Legislature or officer of the Executive Department of State can in any way be interested in any contract for the building or improving of any highway or other public work and anyone violating these provisions of the law are subject to heavy fine and imprisonment or both.

The law has been somewhat relaxed in cases of duly recognized road contractors who make public bids, but the statutes still cover most individuals, this gives some idea of just how strict these laws really are, for of course, it is not unusual that such offenses as these are covered by the State Law, but the unusual side of the picture is that they are much stronger than even the state's general fraud statute in that in the general statute, bad faith must be proved while in the Highway Acts the fact that an officer, legislator or employee has a personal interest within itself makes him guilty of the penalty provision of the Act.

The Department operated fairly successfully under the provisions of this basic law, Act 4 of 1942 until 1950 and when the Louisiana Revised Statutes were written in that year, this Act was included with very few minor changes or omissions. In 1944 Louisiana passed its first limited-access Act, and this too was incorporated in the Revised Statutes of 1950.

Under the 1942 Acts a three man Board was created and in 1944 this was increased to five (5) and in 1948 to nine (9) members. However, the Director of Highways was under all of these amendments the appointee of the Governor, and through him the Department was completely controlled by the executive branch of our State.

Prior to our regular Legislative Session of 1954, I realized as the newly appointed General Counsel of the Louisiana Department of Highways that many new provisions needed to be included in our Highway Act in order to bring it abreast of the times. For two years I had been accumulating data including the recommendations and suggestions of our new Director, Mr. George S. Covert, our Engineers and our Board Members; and so when the Legislature met in Regular Session in the Spring of 1954, my office sponsored some sixteen changes in the then existing Acts. This included an altogether new expropriation statute which enables us to gain title to our rights-of-way on ex parte order. (Act 107 of 1954.) We are especially proud of this Act and apparently it is working out fine.

In 1952, Governor Robert F. Kennon advocated the creation of a Board of Highways,

to whom was given complete charge of all of the Highway's functions, and all of the powers, duties, and authority of the Director were transferred to such a Board. This was written into the Constitution of the State by Constitutional Amendment duly approved by the people in November, 1952. Under this drastic change, the Louisiana Department of Highways began operating in August, 1952, a Legislative Act having been passed transferring all powers and authority to the Board during the interim between August and November when the Constitutional Amendment was submitted to the people. The principal differences in the composition of the Board are that there is now a member from each Congressional District, (8) and under the present law the terms are staggered. Also, the Governor is Ex-Officio Member of the Board, and he holds the right to appoint all the members or fill any vacancies.

It has been said that such a large board is too cumbersome and unwieldly and ordinarily this might be so as an 8 or 9 man board is pretty large, but in our case, we have had a splendid Board with the members working and cooperating to the fullest extent and never have we had one minute's trouble.

The Louisiana Highway Statutes provide for the Department to operate independently of other State Agencies, it having its own Purchasing Section, Auditing Section, and Legal Section.

In 1955, under authority of the Legislature, a Legislative Highway Committee composed of sixteen members, eight members from the Senate and eight members from the House of Representatives, was created to work in connection with the Highway Committee of the Legislative Council, which had been created by the 1952 Session of the Legislature. The subcommittee of the Legislative Council had previously recommended a complete study of Louisiana's highway problems and the task had been assigned to the Automotive Safety Foundation, a nonprofit organization dedicated to education and research for safe, efficient highway transportation, and the Department of Commerce of the Louisiana State University. The division of work was to be an engineering analysis made by the Automotive Safety Foundation in cooperation with the Department of Highways and the Bureau of Public Roads on the one hand, and a financial study to be made by the Department of Commerce at the Louisiana State University covering highway finances on the other. It was after the completion of these studies, which necessarily included recommendations for some additional changes in the Highway Laws, that the Legislative Highway Committee was appointed and undertook to write a Long Range Highway Program around the engineering analysis and financial study prepared for its consideration.

I was appointed as attorney for the Committee, together with Mr. George M. Wallace, who was to serve as my consultant, and after some twenty meetings we prepared and the Committee caused to be introduced legislative acts; (1) re-establishing the State Highway System, (2) bringing limited access laws up to date, (3) providing for the establishment of a Parish Road System, (4) providing for other worthwhile legislative authorizations necessary in the acquisition of rights-of-ways and (5) other matters important to the program as a whole, including last but certainly not least, financing. At this time I again want to point out how very much it was worth to us to have somewhere to turn for help. I will subsequently show how this came from the Research Board.

The program has been, therefore, definitely set up by the Acts and Constitutional Amendments referred to. However, in order that all of them might be more clearly understood, I respectfully submit a very brief explanation of same which has been worked out not only by the Special Highway Committee, but by and with the very valuable help of the Louisiana Legislative Council as a whole.

At this point I would like to pause to recommend such a Legislative Council to all the States for ours has proved invaluable, not only on highway matters but on everything that might pertain to legislation.

The explanation of the Acts is substantially set forth as follows:

Act 40 of 1955 establishes and spells out three classes of highway identified as A, B and C, and also provides for the responsibility of the Department of Highways on all urban extensions. This is a very thorough Act on highway composition and we believe makes our system one of the most up to date, insofar as its laws are concerned.

Act 128 of 1955 creates a Parish Road System and sets up a Parish Road Section

within the Highway Department itself; and through financial aid and other inducements this Act encourages a much closer working arrangement between the Parishes and the Department of Highways. It also encourages and offers special inducements for getting all of our Parishes on a Unit System rather than a Ward System, which we believe is vitally necessary in order to have a good highway system throughout the State. Under this Act also, the Department has set up a complete manual for the operation of the provisions of the Act and we believe that something really worthwhile will be forthcoming from this particular legislation. In a great many of the states you depend on your counties to a large extent, but in Louisiana we maintain about 37 percent of all of the highways and the relationship in the past between Parish (County) and State has not really been close enough. Where in most states the counties handle acquisition of Rights-of-Ways, we in the Department handle all of ours.

Act 129 of 1955 brings our limited-access law up to date. In preparing these Acts we found we needed and luckily we had the very able assistance of the entire Legal Staff of the Automotive Safety Foundation through the Highway Research Board. I am especially indebted to Mr. Lou Morony, Mr. David Levin and Mr. Mason Mahin for their help in this legislation. Their connections with the Highway Research Board is of course readily recognized.

Act 130 of 1955 authorizes the Department to go upon lands in order to make surveys and appraisals and to a large extent it tracks the Federal Laws in this regard.

Since no system is any good without money for financing, Acts 141 and 142 of 1955 are Constitutional Amendments which provide for adequate financing for at least a five year period and will be the life-blood of our Long Range Program as adopted in April. In one of these Constitutional Amendments we have completely rewritten the provisions of the bonding authority of the Louisiana Department of Highways, all in accordance with the recommendations of our bonding attorney, Mr. Dave Wood of New York City. These provisions will provide putting our bonds all on a parity basis and will mean that after 1965, at which time practically all of our old bonds will be retired, instead of having several series of Highway Bonds which might be considered to be valued on priority of issue, we will have one over-all bond. Since we have enacted this statute and apprised the rating house of New York City of what we are doing about our bond situation, we have already obtained the recommendation for a rerating of our Highway Bonds by the leading rating service of New York City. We feel that this is one of the most important steps that we have taken in connection with highway financing and highway legislation. We feel that it will be worth virtually millions of dollars to us in the future and are happy to know that we are not without precedence for this undertaking, as it is exactly the same system as is being presently used by the New York Port Authority and by the City of New Orleans where it has been most successful since it was inaugurated several years ago.

The above Acts were all adopted by the Louisiana Legislature in its Regular 1955 Fiscal Session, it being necessary to introduce the legislation under a Suspension of the Rules authorized by three-fourths of the membership of both Houses. These were the only exceptions made in this Fiscal Session and our program, with only one slight exception, that of substituting bid bonds for case, was adopted and enacted into law.

From the above, therefore, we believe that we presently do have Louisiana's laws pretty well up to date, and it is our hope that by working with the Highway Research Board, our Regional Association and the American Association of State Highway Officials we can and will continue to keep abreast of the times, and it is for this reason that I am extremely happy to have a part in our present program.

I do not think it would be fair for me to close without mentioning particularly the splendid cooperation that I have received at all times from the Legal Section of the Bureau of Public Roads and our mutual friend, David Levin, whose untiring efforts as a representative of both the Bureau and the Research Board is greatly appreciated by us in Louisiana.

If I had any particular "initial" recommendation to make to or through this panel, I believe it would be twofold; first, that every state in the Union arrange to have its attorneys employed as a part of the Department itself rather than through the Attorney General's office. Where the assignments are on a rather permanent basis with no part

time conditions such assignments from the Attorney General usually work out pretty good, but it is so much better if you have the attorneys as a part of the regular highway staff.

Secondly, I would recommend a closer contact and association with the Highway Research Board, together with furtherance of plans such as those presently being advocated and manifested by such Board and particularly by this particular committee.

We in Louisiana, up to a certain point, worked out our problems grabbing a little information "here" and a little "there" so to speak, but without the assistance of a well rounded out organization such as the Highway Research Board. This naturally cost us many delays, etc., which we probably would have been spared had we had the proper sources from which to draw for both help and advice.

I say this last advisedly for after we got into the utility controversies and into our Long Range Highway Program we did get the benefit of some of the Research Board's work through Messrs. Levin, Morony and Mahin and their staffs, and it made our going much easier, I assure you. Especially was this true on the utility problems and in bringing our limited and controlled access laws to date.

Therefore, my friends, I hope that from this meeting our work and accomplishments can continue to forge ahead and with the keen interest clearly being manifested at this particular hearing and throughout the whole session I am sure that it will.

I will be glad to answer any questions and would like to submit examples of some of our compilations and work in connection with bringing our laws up to date and putting our Long Range Highway Program into law.

Nebraska State Highway Law Studies

L. N. RESS, State Engineer
Nebraska Department of Roads and Irrigation

● IT would be impossible, in the short time allotted, to cover all of the details in connection with the highway law recodification recently accomplished in Nebraska. I will cover only the more important details in connection with the problems encountered and the procedures followed.

Nebraska's highway laws were the result of many years of enactment and repeal, amendment and revision of statutes which had their origin before the turn of the century and originally pertained to county roads only. The resulting statutes contained many ambiguities, state highway laws and county road laws were intermingled, and duties and responsibilities were not clearly outlined and established. An effort was made in the 1953 legislative session to correct some of the most critical defects, but without success.

One amendatory measure adopted in the 1953 session, by the omission of two words, deleted 1,986 miles of the most important highways in Nebraska from the state highway system. This threatened the necessity of calling a special session of the Legislature, until an Attorney General's opinion alleviated the situation. This definitely pointed up the need for recodification of our highway laws.

In June of 1954, the Nebraska Department of Roads and Irrigation in co-operation with the Bureau of Public Roads, initiated a Federal Aid Project to rewrite Nebraska's highway laws.

The passage of LB 187 and six companion bills by the Nebraska Unicameral Legislature in June of 1955 and which became effective law on September 18, 1955, marked the first step in the complete modernization of existing highway laws. The laws pertaining to county roads and rules of the road must be rewritten in order to accomplish the complete objective.

The staff assigned to the recodification task consisted of three attorneys employed by the Department to supplement the Department Attorney and the Assistant Attorney General assigned to the Department. This staff proceeded to make a preliminary analysis of existing statutes, classifying them into their proper grouping and sequence. A detailed card index and a card catalogue were set up for the 600 Nebraska Statutes re-

lating to State Highways, county roads and motor vehicles. Such a card reference system is almost imperative in handling the mass of material that the job of rewriting the laws involves. From the card index a general outline of the new law was adopted, fashioned from administrative experience and studies of similar classifications in other states. This outline contained the following classifications of the subject matter of the new law:

Legislative Intent	Control of Access
Words and Phrases	Construction and Maintenance
Highway Administration	Contracts
Inter-Governmental Relations	Equipment and Materials
Designation of State Highway System	Finances
Planning and Research	Miscellaneous
Land Acquisition	

With this preliminary phase of the study completed the staff began the actual drafting of a bill in accordance with the outline. As each section was completed, conferences were held with the Revisor of Statutes, and the Legislative Bill Drafter to resolve any technicalities in these areas. Close coordination was necessary in order to preserve the interests of both the engineering and legal aspects of the new law. During these conferences Attorney General's opinions and court decisions were carefully reviewed in order that proper provisions could be included in the new law.

When the initial draft of the proposed bill was completed, a series of conferences were begun with the Legislative Council Committee on Highway Laws. This Committee, consisting of five State Senators, reviewed each section of the proposed bill. To assist this Committee in their review, the legal staff prepared an outline of each section of the new law, explaining in detail how it differed from existing statutes, the reasons for the proposed changes, and if entirely new material, why the proposed provisions were necessary or desirable. As these conferences progressed, changes were made in the proposed draft whenever such changes seemed feasible. Review and revision continued until the final draft of the bill was completed and approved.

The Legislative Bill Drafter then prepared the proposed laws in proper form for introduction on the floor of the Legislature. The bill was introduced in January 1955 with three of the five Senators of the Legislative Council Committee as sponsors. The bill was referred to the Public Works Committee for review. A series of public hearings were held by this committee. Certain special interest groups and lobbyists appeared and proposed amendments or deletion of portions of the bill. It was necessary for the staff to review these proposed amendments and endeavor to minimize any adverse effects that might result to the over-all objective. When the Public Works Committee finally reported the bill out on the floor, it had been altered considerably and contained many undesirable features.

Then the battle for passage began. By this time fourteen of the forty-three Senators comprising the Unicameral Legislature were thoroughly familiar with the bill, — the five Senators on the Legislative Council Committee which drafted the bill as originally introduced and the nine Senators on the Public Works Committee who held the hearings and reported the revised bill out on the floor. Although all fourteen Senators were not in entire accord with the bill, most of these Senators were enthusiastic supporters of certain parts of the bill and furnished the working forces that are a must when unforeseen crises develop during the passage of a new law.

Two of the legal staff were present on the floor of the Legislature at all times during the passage of the bill. They consulted and advised the individual Senators on all matters that were brought up in the debate. This team was well trained in advance and was an integral part of the plan to ensure the ultimate passage of the bill in as nearly the desired form as possible. Without such procedure and the support of the fourteen Senators, the passage of the bill would have been virtually impossible in the face of special interest lobbies who were opposing certain features of the bill.

All that goes into the passage of a new highway law is not entirely engineering and legal research. The minimum formula for success appears to include technical assistance, proper organization and plenty of human relations.

Rhode Island State Highway Law Study

ARCHIE SMITH, Assistant Attorney General
Department of the Attorney General, Rhode Island

● IT is axiomatic that if the citizens of any state want their highway officials to meet today's demands for safe and efficient roads, they must provide those officials with efficient tools — legal as well as mechanical — with which to build and manage such roads. You can no more expect to build or effectively manage a high-speed super highway under laws designed to meet the requirements of an age that thought of automobiles in terms of "horseless carriages" than you can effectively fly a jet plane with a 1913 Ford motor.

My own state of Rhode Island in the last few years began extensive construction of new highways. Although our legislature defined a freeway as long ago as 1937 we did not undertake actual building of a controlled access highway until about four years ago. When we did we quickly realized that not only did our freeway law not contain all the essential elements of an effective statute but our acquisition statutes were wholly inadequate to overcome the obstacles which were constantly cropping up. Our Division of Roads and Bridges has no counsel assigned to it, and I as Assistant Attorney General was designated to draft a new acquisition law. I had had no contact with the engineering or fiscal aspects of road-building. The laws of eminent domain were only one of the many fields in which I was daily called upon to practice. Those fields run the gamut from prosecuting murderers to interpreting election laws.

I had some ideas of my own as to what might be desirable in a land acquisition law, but I wanted to utilize the experience of the other states. What did I find? About as many methods as there are states! Was there some central agency from which I could learn what experience had taught the other states? I found none. Consequently I had to present the proposed law to our legislators and ask them to adopt it without being able to give them any factual data. It was virtually asking them to launch a ship with nothing more than a hope and a prayer that it would stay afloat.

It was comparatively easy to get the legislature to permit the state in its exercise of the power of eminent domain to take immediate possession of land required for present road construction without even making a deposit of funds to pay for the right-of-way because that was in our old law. But since I could not present any factual data or quote the experience of sister states I could not convince the members of our General Assembly to authorize the acquisition of land by purchase for future use. This lack of authority can be costly because the price of real estate in a particular area might skyrocket between the time the road is first planned and the time the state is ready to take it by condemnation. Moreover land can often be acquired more economically by fair direct negotiation than by the assessment of a jury some members of which perhaps misconstrue the true meaning of the constitutional prescription of "just compensation."

The frustration I experienced due to the lack of availability of factual legal data to be used as a basis for improving the law together with the realization that even under the new state land acquisition law I was going to have to render opinions and try cases against a background of a hodgepodge of confusing, inconsistent statutes with forty different methods for exercising eminent domain by the state and by the 39 municipalities made me look with immediate favor upon the proposal of a survey of all Rhode Island's highway laws and particularly on the broad Highway Research Board study.

Although the Rhode Island state highway law survey was only recently undertaken and has not yet been completed, it has already brought pointedly to our attention several areas in which our highway statutes are completely obsolete and many areas in which they are inadequate to the highway technology of our Public Works Department and our traffic engineer's modern concept of effective road management. Among other things the survey has also revealed that our legislature has never declared its policy as to highway goals and purposes. How can we expect the chief of our Division of Roads and Bridges to plan a highway program with confidence if the legislature has never indicated to him what it expects him to strive to achieve? If his accomplishments have pleased the legislature it is only because of happy coincidence.

Gathering all the highway law together has revealed the confusion that exists in

jurisdictional responsibility and power between the Director of Public Works, the Motor Vehicle Registrar and the Traffic Commission. Some of these revelations could make our faces very red. The question of who may exercise traffic control on so-called "state roads" passing through municipalities is one that will be answerable only after our court of last resort has spoken. Utter confusion exists as to whether the state or the municipality has the responsibility for drainage and sidewalks. Our Registrar could, if he desired, set speed limits without regard to engineering details. Who controls roadside development in a particular area is anybody's guess. Great confusion in the posting of roads is absent only because the Superintendent of State Police, the Director of Public Works, the Registrar and the Traffic Commission are cooperative in personality and nature. There is no provision by which the state can abandon highways, and thus the state cannot get rid of its responsibility for a road it no longer intends to utilize. If there is anything that prevents public utilities from placing their installations in the center of the travelled portion of a highway, it is not to be found in the statute law.

Roads should be so designed and constructed of such materials as will best serve the types and volumes of traffic which will use them. Fundamental to the accomplishment of these objectives is the classification of roads into at least the three broad categories of arterial or trunk highways, secondary highways, and access roads. With such classification in mind it is a comparatively simple task to determine the most economical design and construction required for each road, the order in which roads should be improved, the assignment of responsibility for the construction, maintenance, management and patrol of roads as between the state and a municipality, and the best method and source of financing the costs.

To the obvious requirement of proper classification Rhode Island seems to have been oblivious. Now, however, the law survey has made so patently clear the serious consequences of our lack of a logical and complete road classification system that we may reasonably expect the legislature to want to remedy the defect without delay. Enactment of a law best suited to Rhode Island will now be possible because we can draw upon the reservoir of factual data and legal experience developed by the Highway Research Board's study on a nation-wide basis.

I previously mentioned my attempt to induce our legislature to authorize purchase of real estate for future use. If the information now compiled by the Highway Research Board had at that time been available to me I could have pointed out the favorable experience of California with its rotating fund for purchase for future use. I feel certain that had I shown California's huge savings I would have "clinched the sale."

I think I have said enough now to indicate that judging by what has already been accomplished, we in Rhode Island may confidently expect our state highway law study to expose the deficiencies in our existing law and to point the way to overcome those deficiencies. By utilizing the results of the Highway Research Board study, we can then expect to achieve a revision of our highway law that will bring it in line with our highway technology and present concepts of efficient management.

The Condition of Highway Laws in Michigan

JOSEPH A. SULLIVAN, Counsel for the Michigan State Highway Department and Assistant Attorney General for the State of Michigan

● WHEN I consider the tenure in highway legal departments attained by many of the attorneys here today, it is a real understatement to say that I am new in the field of highway laws.

When I assumed the duties of counsel for the Michigan State Highway Department a relatively short time ago, it was with a great deal of misgivings and concern. I was concerned because on a great many of the legal questions that arose, there seemed to be at least two schools of thought and two statutes covering the situation, and from even a cursory reading of the statutes it was obvious that they couldn't both be right.

I was somewhat relieved to find, after I became settled in the job, that most of the experienced attorneys expressed at least uncertainty as to what the law might be in any of these situations, and one attorney after the other commented that the "law was not clear."

Recently the State of Michigan decided to look into its Highway laws, including the entire body of laws relating to highways and roads. There was a study made of the statutes, the supreme court decisions and the opinions of the Attorney General — an amazing number of opinions of the Attorney General, compared with the opinions covering other state agencies, but not so amazing when the results of the study were revealed.

The study revealed that at present, the highway statutes of Michigan comprise over 100 separate public acts containing some 1,000 provisions of law, a number of which date as far back as 1883. As a result, many sections are obsolete, inconsistent, or in direct conflict with subsequent enactments.

Recent legislation, while designed to improve highway management, has only aggravated this condition by adding new law without removing existing confusion and ambiguities.

For example, within the past few years, basic changes have been made in the statutes governing county and township roads. Responsibility for maintenance of trunk lines by counties under the state reward system has been superseded, and the responsibility is now assigned to the state highway department. Yet the old law is still on the books.

The laws relating to township roads, and the duties and responsibilities of township highway officials over such roads are still a part of the statutes notwithstanding the fact that subsequent legislation has abolished township roads and the responsibilities of township highway officials. The financing procedures under the Covert Act, which dated from 1915, by reason of recent legislation is now obsolete and is another example of surplus law. Multiply this by the numerous acts and amendments enacted over the years and it readily can be seen that the Michigan law today is a complex accumulation of uncorrelated statutes.

In addition, it was noted that the Michigan law does not define certain necessary words and phrases, nor do the acts of the legislature carry any statement of legislative intent.

It was discovered that roughly one-third of the laws relating to highways and roads which are still carried in the compiled laws of the state are inconsistent with later legislative enactments.

No wonder, I might say at this time, that I had misgivings and was puzzled by the question "what is the law?".

No wonder, too, that even the experienced attorneys who have worked with the highway and road legal offices confessed uncertainty, and no wonder, too, that so many attorney generals' opinions were requested. If the lawyers themselves were puzzled as to "what is the law," what must the engineer's reaction have been when he flipped open the books to get a quick look at a highway law?

We in Michigan, though, are rather proud of our reaction to this discovery, because we propose to do something about the situation. We propose, in general terms, to codify those laws now on the books which are current and usable, and throw out those laws which are inconsistent and were inadvertently not specifically repealed. We believe, too, that the legislature will preface this code with a statement or declaration of legislative intent which, of course, will be invaluable not only in carrying out the intent of the legislature, but will be very helpful in answering the age old question of "What did the legislature intend when they enacted this law?".

It has also been suggested that such a declaration by the legislature would provide a broad framework for the guidance of future legislatures; it would serve as a valuable yardstick to administrative officials charged with responsibilities under the laws of the state; and it would aid the courts in litigation on highway matters; and, finally, and perhaps from a rather personal and selfish standpoint, it would be a real boon to the attorney general when he is asked to answer the question: "What did the legislature intend by this statute?".

Of course, we realize that the proposed codification is not a complete answer to many of Michigan's highway law problems. There are such perrenial problems as

encroachments, protecting clear vision areas, controlling access, and so on which can ultimately only be remedied by new legislation to meet these situations.

But the point is that it is a job primarily for the legislature. There is, of course, always going to be a need for an ultimate test of a question by litigation, and review by courts of last resort. There will always be questions which will be submitted to the Attorney General for his opinion.

But I don't think anyone would seriously dispute the statement that the courts and the Attorney General ought to have the benefit of this necessary legal surgery which will cut out about one-third of the laws which are now useless and serve only to confuse the researchers and becloud the issue.

When the codification is complete, the time will then have arrived for the various highway, road and street officials, commissioners and engineers to sit down, together with their respective legal advisers, and decide which new laws are desirable; which amendments must be made; and which types of legislation will best serve the purposes of a state bent on building new and better roads and highways.

I might insert here, parenthetically, that I believe one of the by-products of such a consolidation and eventual revision will be a better understanding and more harmonious working relationship between the engineer who builds the roads and the lawyer who tells him how he must proceed legally to do so.

Someone once suggested that the reason there are no lawyers on mediation committees assigned to break deadlocks between management and labor is that when you have a lawyer on the commission he always comes up with a valid, legal objection to every solution proposed.

Now even in my brief experience in this field I have observed that there are many engineers who feel that lawyers serve just that purpose, that is, they are sitting there just daring the engineer to propose a solution, and they will come up with a valid legal objection every time.

Some lawyers, on the other hand, perhaps look upon the builders of the roads, the engineers, as people who go ahead and do the work and then come in and ask the lawyer to figure out a way to justify what they have done.

Maybe this relationship will never become perfectly harmonious, but certainly the uncertainty engendered by the condition of the laws as we have found them in Michigan does not make for harmonious relations between the two professions.

If nothing else, the codification should prevent situations where the engineer comes down with a lawbook in his hand pointing to one statute which gives him authority to do what he has done or wants to do, while the lawyer points to another statute on the same subject explicitly forbidding the project.

Many times the answer to a question depends upon the definition of a single word or phrase peculiar to highways or roads. I have mentioned previously that the proposed codification contemplates definitions of terminology used in the statutes. Frequently, the engineer and the lawyer find themselves poles apart on what a given term means.

The engineer bases his position upon what the term has meant to the highway or road department in the past; the lawyer, having no legislative source to turn to in his own state laws, goes outside his state's jurisdiction to see how other states have interpreted the word or phrase.

Regardless of who is right in any given case, the legislature ought to speak out on these matters. It is, after all, what the legislature understands the term to embody that is important, and being important should be included in any recodification. We are pleased, therefore, that Michigan's plan contemplates including these definitions.

I have attempted to give you a very brief insight into the problems, as I view them, of trying to provide the necessary legal guidance for the people who build the roads and highways with an antiquated body of laws. I don't think a case has to be made out for getting rid of an antiquated body of laws, though there may be differences of opinion on the method employed.

It would appear, however, that there have been several obvious, direct results of attempting to work within this old legal framework, and they are briefly:

> Confusion in the minds of legal researchers, highway and road department legal advisers, opinion writers for the attorney

general's department, and certainly in the minds of the builders of the roads and highways themselves, who have no legal training;

A plethora of opinions of the Attorney General attempting to answer questions arising out of this confusion, and, in many instances, leaving to the Attorney General and the courts the task of spelling out what it was the legislature had in mind when certain acts were passed;

Misunderstanding between the engineering and legal divisions of the state, county, township or city's highway or road building agency, resulting from having laws which appear to permit a given project and others which appear to prohibit it.

If these conditions can be alleviated by the adoption of a code, that, in itself, would appear to be sufficient justification for adopting a highway code. Then, as substantive changes in the law are made to keep pace with the modern requirements of our modern highways, the new statutes will be based upon a solid foundation — and that is just as important in the laws that deal with roads as it is in the roads themselves.

Report of the Committee on Highway Laws

DAVID R. LEVIN, Chief, Land Studies Section
Financial and Administrative Research Branch, Bureau of Public Roads

● IN 1952, the American Association of State Highway Officials requested the Highway Research Board to make a comprehensive study of the highway laws of the several states.

Prior to the time when a technical study staff became available, much work was accomplished by the Board's Steering Committee on Highway Laws (now Committee on Highway Laws). In July, 1955, a technical staff of five attorneys and three secretaries was employed and located in offices in the DuPont Circle Building, Washington, D.C. The study, planned as a three-year operation, got under way at that time.

In January, 1956, the Committee held an all-day session in Washington during the annual meeting of the Highway Research Board. At the session, Committee Chairman Louis R. Morony reported that continued financing of the project had been assured, and G. Donald Kennedy, Highway Research Board Chairman, expressed his deep interest in the work.

The Committee Secretary and the technical staff reported to the session on the progress of the study project.

The task of gathering all of the constitutional provisions, statutes and judicial decisions is a tremendous one. For practical reasons, the field of highway law was broken down into 28 component parts such as system classification, land acquisition, construction, maintenance, etc.

Research was begun in the following areas of prime current interest:

(1) Constitutional provisions. Since the constitution is the basic law of a democratic government, a study of all the constitutional provisions which relate to highways was one of the first projects undertaken. Some of the more common provisions directly relating to highways which were found in the state constitutions pertain to the authority and responsibility for highways, the creation of highway departments, prohibitions against special and local laws, antidiversion amendments and federal-aid. In addition, such provisions as the taking of property, prohibitions against internal improvements, taxation, and indebtedness, pertain to highways indirectly, as well as to other governmental operations.

To briefly indicate some of the findings: Only four states (Arkansas, Louisiana, Missouri and New Mexico) provide for an administrative agency to exercise authority over state highways in their constitutions. Thirty-two states have constitutional provisions that prohibit the passage of special or private laws concerning highways. Six states have constitutional provisions which relate directly to federal aid for highways. One state constitution, Minnesota, creates a "trunk highway system" to be constructed and forever maintained by the state.

All the material has been compiled for this study and a monograph containing the findings will be published shortly.

(2) Acquisition of land for future highway use. One of the subjects given top priority by the Committee for study, especially in view of an expanded highway program, was the acquisition of land for future highway use. Advanced acquisition of right-of-way is desirable for several reasons. A few of the more important reasons are: (a) Right-of-way costs will be minimized by forestalling the development of the land ultimately required for highway purposes. (b) The orderly development of communities will be facilitated. (c) Private property owners will be able to plan their private land uses and development consistent with the ultimate highway plan.

The function of this study was to find out to what extent the law of the various states permitted the acquisition of land for future highway use. To date, only fourteen states[1] have statutes specifically authorizing the highway authorities to acquire right-of-way for future use. In addition, six other states[2] have legislation which seems, by implication, to authorize advanced acquisition.

[1] Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma and Wisconsin.
[2] North Carolina, Oregon, Tennessee, Texas, Virginia and Washington.

In addition to examining the pertinent statutes, court decisions relating to land acquisition, not only for highway purposes, but for other public purposes as well, were studied in order to determine the attitude of the courts toward the acquisition of property for future use. In general, the courts will uphold future use acquisition if it is reasonably certain that the lands so acquired will be used for the purposes for which they are acquired. In other words, it is the degree of certainty, demonstrated by a well defined plan, and not the number of years in the future, that the land will be put to a public use, which determines the necessity, and therefore legality of the acquisition. A well-defined statute on future use acquisition would not only clarify the matter for highway administrators and the public, but would be a declaration of the elected representatives of the people on a matter of important public policy.

A first draft of a report on this study has been completed. After a review by all the state highway departments, many local officials, national groups and organizations, judges, lawyers, engineers, economists, administrators, and others, a monograph incorporating changes and additions found desirable in light of this review will be published. Incidentally, all the reports of the Laws Project will have the benefit of extensive review and criticism by experienced people in the highway field before publication.

(3) Control of access and expressway law. Another subject of great current interest is that of controlling access. It has been increasingly recognized that the conventional highway cannot adequately provide for both land service and efficient through traffic. Unlimited-access heavy-traffic highways are extremely hazardous as well as aggravating to the motorist.

With the tremendous increase in the number and speed of motor vehicles, this problem has become particularly acute in recent times. Consequently, most of the expressway legislation is of comparatively recent origin — twelve states[3] passed new or revised expressway laws in 1955 and the early part of 1956.

To date, although there is considerable variation in scope and detail, 45 states have some legislation relating to expressways.[4] The statutes of Arizona and New Mexico contain no authorizing provision, but have definitions of the facility and traffic provisions. The Delaware statute applies only to approaches to the Delaware Memorial Bridge. Although North Carolina has no statute, facilities of expressway design are constructed under general authorizing provisions. This is true of Arizona also.

It was necessary to inquire into the common law rights of access, air, light and view and the authority of the state to control these rights prior to modern expressway legislation in order to determine the necessity for and effectiveness of the statutes. Consequently, a thorough study of the common law cases as well as court decisions interpreting the current statutes was made. The procedure of investigation in this study was substantially geared to answer the following three questions:

> (a) What were the rights and duties of abutting land owners and the state (including its political subdivisions) prior to the enactment of modern expressway legislation?
> (b) How have the states attempted to clarify, affirm, or change this previously existing law by the enactment of expressway statutes?
> (c) What factors should be considered by the legislature in enacting an adequate expressway statute?

A first draft of a report on expressway law has been completed. The Laws Committee will review both the future use and expressway reports and offer suggestions for other current and future studies. The structure and approach of these first two docu-

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[3] Alabama, Florida, Georgia, Iowa, Louisiana, Montana, Nebraska, Nevada, South Carolina, Tennessee, Vermont, and West Virginia.

[4] In addition to these 45 states which have legislation, Minnesota, by a judicial decision (Burnquist v. Cook, 220 Minn. 48, 19 N.W. 2d 394 (1945)) and Missouri, by a constitutional provision (Missouri Constitution, Art. IV, Sec. 29. See State v. James, 356 Mo. 1161, 205 S.W. 2d 534 (1947)) authorize the highway departments to control access.

ments will serve as a model or guide for future reports.

(4) System classification. A fourth subject under consideration by the Laws Project staff is that of highway system classification. All the statutes pertaining to the primary, secondary, county, township, municipal and miscellaneous systems of the 48 states, the District of Columbia, the territories of Alaska and Hawaii and the Government of Puerto Rico, have been compiled. Basic elements commonly found in these statutory provisions have been isolated and a factual analysis in tabular form has been prepared. These charts or tables indicate such things as who has the authority to designate the particular system, definition or description of the system, additions, deletions, or relocations, intergovernmental relations provided and municipal connecting links. There is a series of tables for each type of system.

In addition, pertinent court decisions have been gathered. The remaining work of analyzing the materials and writing a report will be completed in late 1956.

(5) Declarations of legislative purpose. An official statement of legislative intent or purpose made a part of the statute may prove very helpful both to the courts, in interpreting the statute, and to the highway officials to whom the legislature has delegated the responsibility of administering the act.

What should be considered in drafting a good declaration of legislative purpose? Does such a declaration have substantive effect? Should it be made a part of the statute proper? Is a declaration of purpose really as important as many jurisprudents believe? These are some of the questions which prompted the study of declarations of legislative purpose in the highway statutes. Since the question of legislative intent arises in all areas of highway legislation, it was thought that an over-all study of declarations of legislative purpose should be one of the early projects of the staff.

Legislative intent has been a subject of much discussion by courts and legal philosophers. In addition to the statutory provisions, many cases and law review articles have been reviewed. A preliminary report is currently being written.

(6) Federal aid. The statutory material is now being gathered for an analysis of state legislation designed to obtain the benefit of federal aid to highways. These include assent provisions; provisions relating to finance, such as antidiversion provisions, matching provisions and provisions authorizing the allocation of federal money to political subdivisions; provisions relating to construction, maintenance and regulation of federal-aid highways; bridge and special turnpike construction acts; and miscellaneous provisions such as research and experimental projects, roads in (and roads connecting) national parks, and military and naval access roads.

(7) Methods of acquiring land for highway purposes. An examination of the various methods employed by the several states and their political subdivisions to acquire land for highway purposes is under way. Many highway officials believe that the legal tools at their disposal to acquire the needed land for right-of-way and related purposes are archaic. The procedures followed are time consuming, complex and in many areas the alternative methods available to the same official confuse the picture. The Committee believes that before anything of value can be accomplished in this area the present status of the law must be fully reached. In this manner there will be at the disposal of the states a ready reference of how the many facets of land acquisition are dealt with by the several states.

As a means of accomplishing the goal the condemnation procedure has been divided into 19 general subdivisions. Each state's law is in the process of being analyzed to determine what provisions there exist concerning each subdivision. Tabular summaries are being prepared for each state. The same procedure is being followed in the case of counties, cities, townships and other political subdivisions involved in the highway field.

(8) Intergovernmental relations. The statutes which involve the inter-relationship of the various units of government in all phases of highway planning, construction, maintenance and use are being compiled for a study of intergovernmental relationships in the highway field. Statutory provisions in this area have been found relating to planning and programming, systems, construction and maintenance standards, traffic control devices, taxation and finance, auditing and accounting, personnel and management, and authority and responsibility in the creation and use of the highway plant, including

acquisition of right-of-way, construction, improvements, maintenance, drainage, public utilities, bridges, traffic regulations and policing.

The role of each unit of government — federal, state, county, city, and other local units — is, of course, considered in each laws project study. The need for a good legal framework, which will permit each governmental unit alone or in cooperation with others governmental agencies to carry out its responsibility to the public by providing an adequate system of highways and streets and well-planned communities, was clearly shown in several significant reports made at the Committee sessions in January. These reports are printed in full in this monograph.

Municipalities. Patrick Healy, Jr., Executive Director of the American Municipal Association, stated that there is a great lack of basic factual data necessary to determine the needs of urban transportation. To remedy this situation, many state highway departments are establishing urban planning divisions. Also, a National Committee on Urban Transportation has been created to assist municipalities in carrying out fact-gathering programs. Part of the work of this committee is to prepare a manual on all phases of urban transportation, including the legal aspects, such as land use and density control, control over provision of facilities, and authority governing the use of facilities. This study should prove invaluable not only to municipalities, but to legislators and administrators as well, in dealing with urban transportation problems.

Counties. Keith L. Seegmiller, General Counsel for the National Association of County Officials, pointed out that the law has failed to keep abreast with the times. Continuing study and revision is necessary to keep the legal machinery in harmony with highway needs. To illustrate the inadequacy of the present law in some areas, Seegmiller pointed out that many counties lack legal authority to raise funds to match federal aid, that county authority and responsibility within states is not uniform, and there is insufficient legal machinery for intergovernmental cooperation.

States. A. E. Johnson, Executive Secretary of the American Association of State Highway Officials, pointed out the continuing great need for the study. In brief, Johnson declared the three foremost aspects of highway law which should be considered are (a) the expeditious and equitable acquisition of highway rights-of-way, (b) the authority to acquire land for future highway use, and (c) the authority to acquire and regulate access rights. All of these currently are under study by the laws study project staff.

Federal-aid highway law revision. Since the first federal-aid act of 1916, Congress has passed numerous acts repealing, impliedly repealing or nullifying, adding to, amending, or otherwise affecting the original act and its amendments. At the request of Congress, the Legal Division of the Bureau of Public Roads made a compilation of the federal-aid laws showing the effect of the amendments on prior laws. The end result was a revision bill incorporating the 1916 act and its amendments in a more clear and organized form. Henry J. Kaltenbach, Solicitor of the Bureau of Public Roads, explained the recommended revision bill and described the manner in which the revision was made.

State highway law studies. Several states have taken the initiative and made laws studies of their own — notably Louisiana, Michigan, Nebraska and Rhode Island. The work of these states which was done in some cases with the assistance of the Automotive Safety Foundation and the Bureau of Public Roads, was explained at a panel discussion moderated by Roy E. Jorgensen, Engineering Counsel, National Highway Users Conference, at the January Highway Research Board meeting. The reports of W. Crosby Pegues, Jr., General Counsel, Louisiana Department of Highways, Joseph Sullivan, Assistant Attorney General, Michigan State Highway Department, L. N. Ress, State Engineer, Nebraska Department of Roads and Irrigation, Archie Smith, Assistant Attorney General, Rhode Island, and the remarks of Jorgensen also appear in full in this monograph.

In 1955, there was considerable litigation on highway matters in the courts of the several states, particularly in the area of financing, weight restrictions and public utility relocation. Many of the significant opinions were reported in the Highway Research Correlation Service memoranda of the Committee on Highway Laws. Summaries of most of the cases reported are included in this bulletin under the appropriate subject headings:

FINANCING

Validity of Bond Issues and Other Financing Measures

Cases concerning the validity of bond issues and other financing measures were tested in the highest courts of five states. The constitutions of these states all have provision limiting indebtedness.

Revenue bond issues for financing roads and bridges in Florida and West Virginia were held not to violate constitutional debt limitations. A bond issue in Kentucky was found unconstitutional.

Florida. An appeal was taken upon a final decree which validated certain revenue bonds to be issued by the Florida State Improvement Commission to finance the construction of a bridge system in Broward County. The Board of County Commissioners of Broward County by resolution, had authorized and requested the Florida State Improvement Commission to enter into a lease-purchase agreement under which title to the bridge system was to be taken by the county and then leased to the state road department. Proceeds of bonds to be issued by the improvement commission were to be used for construction. Surplus gasoline tax funds accruing to the road department for expenditure in Broward County were pledged as rentals to pay the principal and interest on the bonds.

In addition the department agreed, as a further consideration for the lease, to pay all the cost of current operation of the system and all maintenance and repair each year as long as the agreement was in effect. The department also covenanted with the bond holders, that if there should be insufficient money in the System Construction Trust Fund, it would complete the construction of the bridges of said system. The question on appeal was whether the covenants by the state road department represented a general pledge of state credit for debt service which would render the bond issue invalid as violating the constitutional provision.

The Supreme Court of Florida affirmed the decision of the lower court, holding that the state road department by its covenants with the bondholders did not pledge the taxing powers of the state to service the bonds. State v. Florida State Improvement Commission, 71 So. 2d 146 (1954)

West Virginia. The State Road Commission of West Virginia asked the state supreme court to order the Secretary of State to approve bridge revenue bonds issued by the petitioner. The Secretary of State had refused to do so on the ground that the statutory provision authorizing and directing the state road commission to allocate from the state road fund sufficient funds to pay the principal and interest on bridge revenue bonds, if there were insufficient funds in the state sinking fund to pay the principal and interest on such bonds, was violative of Article X, Section 4 of the State Constitution.

Article X, Section 4 of the State Constitution provided that "No debt shall be contracted by this state, except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war; but the payment of any liability other than that for the ordinary expenses of the state, shall be equally distributed over a period of at least 20 years." Article VI, Section 52 of the State Constitution, provided that all revenues derived from motor vehicles and motor fuels shall be appropriated and used solely for the construction, maintenance, and repair of public highways, and also for the payment of principal and interest of all road bonds heretofore or hereafter issued.

The resolution authorizing the issuance and sale of toll-bridge revenue bonds adopted by the state road commission stated that such bonds would not constitute a debt of the state, and provided further that as additional security for payment of interest and principal, the petitioner would allocate and transfer to the state sinking fund any sums of money needed to pay the principal and interest on such bonds from the state road fund.

The court issued a writ of mandamus directing the Secretary of State to approve the bonds in question.

After reviewing the many decisions of the several states, the high court said: "In most of the cases approving the constitutional fund doctrine, the liability was primary and direct. Here it is only secondary and contingent. If revenue is not provided by the tolls from the bridge to pay the principal of, and interest on, these bonds, the only other security for such payment is the state road fund. Neither the general revenues, nor any

other revenues of this state are committed to the payment of such principal and interest, and therefore, the bonds are not, and cannot be, general obligation of this state. It follows, therefore, that no debt is created as inhibited by Article X, Section 4, of the constitution."

The court further pointed out that the pledging of constitutional funds did not bind any future legislature to impose or continue present taxes, which by the amendment must go into such fund. The legislature could abolish all taxes that were directed into this fund, because there was no contractual assurance that sufficient funds would be available in the state road fund. The only practical assurance that remained was that the automobile was here to stay and so were taxes.

Judge Lovins dissented, and held that the writ should be denied because the law (Chapter 117, Laws of 1949) which authorized the petitioner to allocate money from the state road fund to be placed in the state sinking fund violated Section 4 of the Constitution, and that it was another attack upon the pay-as-you-go theory which had been adopted by this state to protect its solvency.

Judge Lovins points out that this court had approved one phase of the "special fund doctrine" which permitted the use of a specific fund derived from specific revenues derived from the project or structure for which the debt was contracted. However, this case went beyond that and allowed the pledging of a special fund created and allegedly earmarked by a constitutional provision. This opened the door for unlimited pledging of the constitutional state road fund to secure specific road projects all over this state. This fund could become so depleted that it would be practically nonexistent. The dissenting justice posed a question as to what funds could be turned to for the general construction, repair and maintenance of much needed road improvements. The practical answer, he concluded, was general taxation, to take the place of funds taken from the special road fund established by the state constitution. State v. O'Brien, 82 S.E.2d 903 (1954).

Kentucky. The Kentucky Legislature passed a law (K.R.S. Secs. 175.005 to 175.320) creating a new state agency, the Kentucky Highway Authority. The Kentucky Department of Highways would transfer certain State highways to the new authority and the authority would issue bonds to secure funds to improve these highways. The highway department would then lease back these highways and pay rent to the authority at a sufficient rate to pay off the bonds in a maximum of 40 years. The department was bound to pay the rent out of its current revenue from gasoline and motor-vehicle taxes.

The Constitution of Kentucky prohibited creating obligations against future revenues (Ky. Const., Secs. 49 & 50) and provided that gasoline and motor vehicle taxes must be used for road purposes. (Ky. Const., Sec. 230) The governor refused to carry out the act because he believed it violated the Kentucky Constitution.

The court agreed with the governor that the act was an unconstitutional creation of a debt binding future revenue. The purpose of this constitutional provision was to prevent tying the hands of future government officials so that they might allocate the revenue for purposes they thought best in the public interest. The statute in question here could tie the hands of the highway department for the next 40 years, since they were obligated to first pay the rent to the highway authority.

Supporters of the new law contended that no debt was created because the Kentucky Department of Highways would not have to pay rent to the authority if the state discontinued the levying of taxes and the appropriating of funds to the department. The court dismissed this argument, however, since the state could hardly discontinue the construction and maintenance of its highways, a major governmental function. So as a practical matter, the state must appropriate funds to the department and the department would be bound to pay the rent.

A further argument of supporters of the act was that since the constitution required that gasoline and motor vehicle tax funds be spent for road purposes, (Ky. Const., Section 230) the intent was to create a special road fund. The constitutional prohibition against creation of obligations against future revenues applied only to revenues for "general state purposes." Therefore, they argued, the constitution did not prohibit the binding of future gasoline and motor vehicle revenue.

However, the court pointed out that gasoline and other motor-vehicle taxes were

collected from the public generally, and were used for a general governmental purpose — the maintenance of a state highway system. Since these taxes were used in the construction and maintenance of the public roads generally and not merely for a particular facility, they could not be designated as a special fund. Therefore, the constitution prohibited the creation of obligations against future revenues derived from gasoline and other motor-vehicle taxes. Curlin v. Wetherby, 275 S. W. 2d 934 (1955)

In Maryland, Pennsylvania, and West Virginia, the validity of municipal financing measures was tested.

Maryland. A taxpayer and property owner of the City of Cumberland brought an action to have declared void an agreement between the city and the State Roads Commission of Maryland for the construction of a crosstown expressway or viaduct and other highways in the city. The expressway was to be constructed by the state with the aid of $490,000 from the federal government and a like amount from the city.

Under the terms of the agreement in question, the State Roads Commission was to construct the project and the city agreed to pay $490,000 ($70,000 per year for seven years) out of its share of the gasoline tax and motor vehicle revenue funds" or from any other source that may be legally available to it." The city also agreed to undertake the expense of relocation of public utilities, except those customarily paid for by the owners, traffic lights and signals, the adjustment of curbs, and the maintenance of all intersecting streets or service roads part of the project.

The taxpayer contended that the agreement was in violation of the city charter. The city charter limited the city's borrowing power to the following: (1) to borrow against anticipated revenue for the current year; (2) to borrow not more than $50,000 to meet an emergency; (3) to borrow through the issuance of bonds if the loan is approved by referendum vote. The charter also restricted the amount which could be appropriated for capital expenditures to not more than 4 percent of the total appropriations for any year. The $70,000 obligation of the city to the State Roads Commission would exceed 4 percent of the total appropriations.

Since the charter did not specifically authorize the pledging of revenue to such an extent as the city had done in its agreement with the State Roads Commission, the city had to look elsewhere for its authority. The state legislature had, by statute, authorized cities to allocate their share of the gasoline tax and motor vehicle revenue funds to meet federal expenditures in federal-aid projects.

The court said that the gasoline tax and motor vehicle revenue funds were the creatures of the state and not part of the regular city tax funds and therefore the proposed commitment of $70,000 per year was not a proposal which would necessitate borrowing in excess of the charter limitations on the city's borrowing power.

The taxpayer also objected to the other commitments the city made under the agreement. The court dismissed the argument against the provisions that the city would maintain the streets and provide lighting on the ground that if such were held invalid, it would be difficult to see how the street system of a city could ever be extended. The obligation to pay for relocation of public utility facilities would not burden the city, said the court, since most of the public utilities customarily paid for their own relocation, thus coming under the exception in the agreement. McKaig v. Mayor and City Council of Cumberland, Md., 116 A. 2d 384 (1955).

Pennsylvania. Philadelphia enacted an ordinance dated September 24, 1954, which authorized the mayor, city comptroller and city solicitor, or a majority of them to borrow, on the faith and credit of the city money not to exceed $2,000,000 for highway purposes. The ordinance provided:

> That the authority to increase the City's indebtedness as herein contained shall not be effective unless the electors shall give their consent thereto at a public election to be held on Tuesday, November 2, 1954; and provided further, that notwithstanding the consent of the electors at said election, the authority to increase the City's indebtedness as herein contained shall not be valid and effective nor constitute an increase of the indebtedness of the City until January 3, 1955, and then only if, as shown by a certificate of the City Controller to be made as of January 3, 1955,

> the amount of the indebtedness of the City existing on that date, plus the loan thereby authorized, less deductions from such indebtedness allowed by law, shall not exceed 13½ percent of the average of the annual assessed value of the taxable realty in the City during the ten years immediately preceding the year 1955.

The ordinance was approved at the 1954 election.

On the date of enactment of the ordinance, on the date of the election, and the date of the filing of the certificate certifying the result of the election, the net constitutional borrowing capacity of the defendant was not sufficient to support the loan, but on January 3, 1955, there did exist a sufficient borrowing margin to sustain it.

One William Fisher brought this action in the role of a taxpayer to declare the ordinance invalid on the ground that when the debt was authorized it exceeded the constitutional limit of 13½ percent of the value of taxable realty. In support of his argument plaintiff cited (1) Brooks v. City of Philadelphia, 162 Pa. 123, 29 A. 387 (1894) in which it is stated that "the real debt of the city is the authorized debt;" (2) McGuire v. City of Philadelphia, 245 Pa. 287, 91 A. 622 (1914) that the amount of the city's authorized debt constitutes its debt within the meaning of the constitution without any deduction for authorized loans for which bonds were not yet issued; and (3) Duane v. City of Philadelphia, 322 Pa. 33, 185 A. 401 (1936) that a loan which is legal when authorized becomes immediately integrated as part of the city's debt, and that the actual issuance of the bonds pursuant thereto is not rendered illegal by reason of the fact that at the time the assessed value of the taxable property has decreased to such an extent that the proposed bond issue, together with the other funded debt of the city is in excess of the constitutional limit.

The state supreme court agreed with the propositions ennunciated by these cases, but said the issue presented by the instant case was whether the authorization must go into effect simultaneously with the date of the enactment of the ordinance or whether the authorization became effective on a date specified by the ordinance. The court believed that there was no departure from accepted practice by making the authorization effective other than on the date of the enactment of the ordinance.

For practical reasons, it was felt that such a procedure was a desirable one to follow. Due to the budgetary systems employed by the city, it was highly desirable to obtain prompt consent of the electors to an increase in the debt which could be utilized immediately after the beginning of the ensuing year, whereas, if plaintiff's view were to prevail, it would be impossible to obtain such consent until the year in which the loan was to be made, and then only when a primary election was scheduled or a special election could be held.

The court concluded that the ordinance was valid and dismissed the taxpayer's complaint. Fisher v. City of Philadelphia, 116 A. 2d June 28, (1955)

West Virginia. The City Council of Wheeling, West Virginia, adopted an ordinance authorizing the construction of a toll bridge and tunnel facility which would provide a direct connection with the Ohio River Bridge which was being constructed. The Ohio River Bridge would cause increased traffic in downtown Wheeling, and it was felt that the construction of another bridge and tunnel facility by the city would relieve possible traffic congestion. The ordinance provided for financing the project by means of revenue bonds. Payment of the principal and interest on these bonds was to be solely from the revenues derived from the project.

The city then proceeded to enter into a contract with the North American Construction Corporation for the construction of the bridge and tunnel facility. However, the city clerk refused to sign the revenue bonds as required by law because he believed the financing provision of the ordinance violated a West Virginia constitutional provision (Art. X, Sec. 8) limiting bonded "indebtedness."

The court, however, compelled the city clerk to sign the bonds stating that the revenue bonds did not constitute an "indebtedness" within the meaning of the constitutional limitation, in line with the court's decision in Knight v. Hanway, Mayor of the City of Fairmont, 136 W. Va. 219, 67 S.E. 2d 1 (1951).

The West Virginia Legislature by statute, (Michie's Code, Annot., 1949, Secs. 17-17-30, 32 & 33) had given city councils authority to construct and maintain toll bridges and

approaches thereto and finance the cost by issuing bonds to be paid off from the revenues derived from the project. This, said the court, was a valid delegation of the state's police power to a municipal corporation and the bridge and tunnel facility in this case constituted an "approach" to the Ohio River Bridge. State v. Dailer, 85 S.E. 2d 656 (1955).

Two cases relating to bond issue elections were decided in Kansas and Texas. The Kansas court held the location of a bridge was not determined at a bond issue election. The Texas court held that an election to approve a bond issue for the purpose of constructing and maintaining roads was not subject to judicial control during its program.

Kansas. This is an action in which the state asked the Supreme Court of Kansas to oust the boards of county commissioners of two counties separated by a stream, from building a bridge at a designated location. At a meeting of the two boards, it had originally been decided to build the bridge at a certain location and to ask for federal assistance in its construction. Voters in the two counties subsequently approved a bond issue in the amount of $250,000 for each county. The election notice, ballots and the subsequent bond issue all described the location of the proposed bridge to be approximately 2½ mi east of Belvue.

Subsequent to the bond issue, the two boards met again and decided on another bridge site so that its new location would be only 1½ mi east of Belvue. The state of Kansas argues that since the location of the bridge appeared on the election notices, ballots and bonds themselves, the two boards no longer had any authority or discretion to further determine the location of the bridge, and their action in changing the location was illegal and of no effect. State ex rel. Fatzer, Att'y Gen. v. Bd. of County Com'rs. of Wabaunsee County et al., 270 P. 2d 224 (1954)

The court upheld the action of the two boards of county commissioners, and pointed out that the law made no provision for submitting the location of the bridge to a vote. In the absence of fraud or bad faith on the part of any public official, the court felt that there was no need to place a strict interpretation on the language used in the notice of election and ballots as did the state.

The new bridge location would result in substantial savings as indicated in a letter addressed to the county boards by the state highway commission recommending the new location. The court said: "An election with a notice, such as we have here, does not deprive the governing bodies of the municipalities, such as the county boards in this case, from the right to exercise any due discretion whatever. The county boards in this case were charged with the duty of locating this bridge at the most feasible and economical point under all the surrounding facts and circumstances. The decision to locate it a mile further up the river than the approximate location mentioned in the election was not such a departure as to warrant the exercise of a writ of quo warranto against the county boards to oust them from proceeding to build the bridge at the location finally agreed on. Such is a substantial compliance."

The counties' action in selecting a new location for the bridge was consequently upheld by the court.

Texas. The plaintiffs, Rădcliffe Killam and seven other taxpayers of Webb County, Texas, brought this suit for a declaratory judgment against the County of Webb, the county judge, county commissioners and county clerk. They asked that an order of the commissioners' court, calling for an election to determine whether or not the county should issue road bonds, be declared invalid.

The plaintiffs claimed that although the election order referred to the bond issue for the purpose of constructing and maintaining certain roads within the county, because of a prior understanding among the members of the commissioners' court, a substantial part of the bond issue funds was intended to be used for purposes not specified in the election order. The 111th District Court of Webb County dismissed the suit and plaintiffs appealed the question of whether the court had authority to stop an election proceeding.

On appeal, the Court of Civil Appeals of Texas held that even though this suit was brought under the Uniform Declaratory Judgments Act, it did not extend the court's authority over matters of a political nature. As the court put it, "An election is essentially the exercise of political power, and during its progress, is not subject to judicial control. This comprehends the whole election, including every step and proceeding

necessary to its completion." Radcliffe Killam et al. v. Webb County et al., 270 S.W. 2d 628 (1954)

The order of dismissal of the trial court was affirmed.

Taxes

The application of user tax laws to motor carriers of another state and to an operator transporting U.S. mail was tested in Michigan and Virginia, respectively.

Michigan. The States of Michigan and Ohio entered into a reciprocity agreement in 1937 whereby each agreed to waive mileage fees on motor carriers operating on each other's highways. At that time, Ohio did not have a mileage tax on out-of-state motor carriers. In 1953, however, the Ohio legislature passed the Highway Use Tax Act levying a mileage tax on commercial vehicles with three or more axles.

This action was brought by Michigan motor carriers for a refund of taxes paid under the Ohio Highway Use Tax Act, on the theory that they were exempt because of the reciprocity agreement of 1937. The tax commissioner refused to refund the taxes and the plaintiffs appealed to the board of tax appeals, which affirmed the decision of the tax commissioner on the theory that the Tax Act was controlling over any existing reciprocal agreements. The plaintiffs then appealed to the Ohio Supreme Court.

The issue in the case was whether the tax act superseded the reciprocity agreement or whether the reciprocity agreement exempted Michigan commercial carriers operating in Ohio from the highway use tax. The court held that the reciprocity agreement was still in effect, since Ohio had never given notice to Michigan that it was to terminate. Thus the State of Ohio could not impose a mileage tax on Michigan carriers, since Ohio had specifically agreed to exempt them.

The validity of the act was not considered by the court since it was not necessary to the determination of the case; the court merely interpreted the Ohio Tax Act as not applying to Michigan carriers because of the previous reciprocal agreement. Interstate Motor Freight System v. Bowers, 128 N.E. 2d 97 (1955)

Virginia. In this case, the applicability of the Virginia gross receipts road tax to an operator transporting U.S. mail was challenged.

Crowder, a resident of Virginia, operated ten motor vehicles over the highways of Virginia, exclusively in the transportation of United States mail from and to points in Virginia and North Carolina. He owned the vehicles, selected and employed their drivers. He fixed the employees' wages, hours, duties, and controlled their time of employment. He purchased the necessary fuel, lubricants and license tags for his vehicles. Neither he nor any of his employees were covered by the United States civil service or retirement system. Duties were performed by the taxpayer under written contract with the United States which provided compensation in an annual sum, payable monthly. Routes to be traveled, schedules to be followed, and the termini to be served were specifically set out. Provisions for cancellation, renegotiation, and extra compensation, should additional services be necessary, were prescribed. Crowder held no certificate of necessity and convenience as a common carrier.

Crowder contended that since under the Federal Constitution Congress had exclusive jurisdiction over post roads and post routes and had provided for carrying the mail, the transportation of mail was exclusively a federal government function and could not be burdened with taxation by the several states. He claimed that since he was engaged solely in the carriage of mail upon terms and conditions fixed by the Postmaster General of the United States, he was engaged in a purely governmental function and therefore not subject to the imposition of the tax. He argued that the burden of a gross receipts road tax would fall, in fact, upon the federal government.

The Supreme Court of Appeals of Virginia affirmed the order of the State Corporation Commission adverse to the taxpayer.

The trend of decisions, the court found, had been not to extend governmental immunity from state taxation and regulations beyond the national government itself and governmental functions performed by its officers and agents. The tax imposed was a road use tax, levied only upon that percentage of the interstate carriers' receipts that the number of miles operated over Virginia highways bore to the total number of miles

traveled in interstate operations. It was collected and credited to the highway maintenance and construction fund and its validity had been settled by numerous previous cases.

Even though the appellant carried the mail under written contracts with the Postmaster General of the United States acting under the authority and conditions imposed by Congress, he was not an officer or employee of the federal government. He was an independent contractor doing certain prescribed work for the government at a fixed compensation and as such the usual rules governing the construction of contracts applied. The terms and conditions of the contract were merely specifications indicative of the service to be performed and not of the character of the agency by which they were performed. However extensively the government reserved the right to specify and control the actions of the contractor in carrying the mail, neither the reservation nor exercise of that power gave to the contractor the status of a representative or agent of the government. He was merely obligated to do certain specified work at a fixed compensation and enjoyed no official capacity. Crowder v. Commonwealth 87 S. E. 2d 745 (1955)

Toll Charges

New York. The Jones Beach State Parkway Authority pursuant to law undertook to improve 13 mi of the Southern State Parkway. Having completed 5 mi of the parkway, the authority placed a toll charge of 10 cents for its use. Whereupon one Love applied to the court for an order to have the toll charge discontinued until the authority completed the parkway.

The court held that there was no law requiring the authority to charge tolls only when the parkway was completed. In fact, the court pointed out, the authority had full discretion to determine when the toll charges were to be applied. The improvement of five miles of parkway was substantial enough to base a toll charge. If, however, the improvement was of a trivial nature and tolls were charged, it could be considered an arbitrary act of the authority and evidence of such bad faith as to amount to a fraud upon the public.

The court dismissed the petition on its merits. Application of Love, 133 N. Y. S. 2d 86 (1954)

Constitutionality of Toll Facility Laws

The validity of the Georgia Toll Bridge Authority and the Texas Turnpike Law was challenged on several grounds indicated below. Both laws were held not to violate the respective state constitutions.

Georgia. On January 5, 1954, the plaintiffs (State Highway Department, State Highway Board and Governor of Georgia), filed an action in Fulton Superior Court against the defendant (State Toll Bridge Authority), challenging the constitutionality of the act creating the State Toll Bridge Authority. The superior court held for the authority and the plaintiffs appealed. Twelve issues were included.

1. Plaintiffs contended that the Toll Bridge Authority Act violated several provisions of the state constitution, in that the state is prohibited, except in emergency situations, from contracting a debt, from increasing the bonded indebtedness, from pledging the state's credit, and from assuming any part of the debt of any county, municipal corporation or political subdivision thereof otherwise than in specified situations not applicable here.

In dealing with this contention, the court referred to the case of McLucas v. State Bridge Building Authority, (210 Ga. 1, 77 S. E. 2d 531), where the question of the constitutionality of the Act of 1953 creating this authority was considered. The court pointed out:

"The legislative scheme as to the creation, powers and authority of the bridge building authority is practically identical with that followed in the act creating the toll bridge authority. Both authorities are declared to be bodies corporate and politic, and instrumentalities of the state, with express provision that the revenue bonds to be issued shall not constitute debts of the state directly or indirectly, or obligate the state to levy or pledge any form of taxation, or to levy any appropriation for their payment."

In the McLucas case, it was held that the bridge building authority was not violative of the state constitution. For the reasons stated in that case, the court held that the toll bridge authority act did not violate any of the provisions of the constitution of Georgia.

2. Plaintiffs contend that collection of tolls by the authority is in effect a special tax upon those who use the bridge.

On this point the court did not agree. It pointed out that tolls collected by the authority are reasonable charges to reimburse it for building and maintaining the bridge, and that the universal rule is that such charges of tolls do not constitute payment of taxes. Bridge tolls are analogous to tuition charges by some public educational institutions, or fees charged by a public charity hospital, that is compensation for the use of a public facility.

3. Plaintiffs claim that Article III, Sec. VII, Paragraph XVII, of the state constitution, specifically prohibits the state from establishing bridges, but only confers upon the assembly the power to confer this authority upon the judges of the superior courts and to prescribe by law the manner in which such powers shall be exercised by said courts.

Prior to 1854, it was the practice to confer power on the judges of the superior courts to establish specific bridges and ferries. This provision in no way prohibited the general assembly from constructing bridges through its public agencies, because Section II of Article VII of the state constitution grants the general assembly the power to levy taxes for the construction and maintenance of "a system of highways," and sections 102, and 103 of the highway code define a "highway" as including a bridge thereon, the court pointed out. "The contention that the general assembly is unauthorized to empower a public agency such as the toll bridge authority to construct bridges as part of its highway system is without merit. The power to construct and maintain public highways may be exercised by the legislature in such manner directly or through duly constituted public authorities, as it deems best."

4. It is next contended that the act is unconstitutional because it empowers the state authorities to convey the state's right-of-way including the approaches to the Turtle River Bridge—in effect, it constitutes a donation by the state.

The court held that such a conveyance permitted the carrying out of the legislative plan for bridge construction by public authority for use by the public as a part of a state system of highways. When the indebtedness is retired, the bridge with the rights-of-way will be returned to the state. The court referred to the McLucas case, where it held: "It is a conveyance of property in aid of a public purpose from which great benefit to the state and its citizens is reasonably expected."

5. It was also argued that the legislative declaration in the act violates the state constitution, in that it declares the creation of the authority "is in all respects for the benefit of the people of this state. and that the authority is an institution of purely public charity and will be performing an essential governmental function...." The declaration also exempted from taxation the authority's property and income received by the bondholders. It is claimed that the legislature had no power to do so and that such exemptions from taxation operated as a donation or gratuity in favor of the authority and bondholders.

The court pointed out that a similar attack was made in the McLucas case. The only real difference was the manner in which the authorities paid the indebtedness. In one case, payment was made with money collected from toll charges (this case). In the other case (McLucas case), payment was made by the public at large through taxation, regardless of whether all who paid taxes used or had not used the bridge. The authority is not in business to make a profit or receive private income. The fact that a reasonable charge is made, does not prevent it from being a charitable institution and an instrument of public charity. The court held that the section of the act, declaring the authority to be an institution of public charity and exempting its property from taxation, is not invalid for any reason assigned by the plaintiffs.

6. The proposed action by the authority to take over the half-completed Turtle River Bridge upon which several million dollars had been expended by the State of Georgia, and to pledge its completionby payment of tolls, is claimed by the plaintiffs to violate the several provisions of the state constitution relating to state debts, pledging of its credit, and the granting of donations.

The court here pointed out that the authority proposes only to issue a sufficient amount of revenue bonds to finance the completion of the bridge and liquidate the indebtedness by charging tolls. "It cannot be said that the state thereby increases its debt, pledges its credit, or donates its property. Though the title to the bridge is in the authority until the cost of construction is paid by collection of tolls, the sole benefit of the bridge is in the public who use it."

7. It is claimed that the governor did not have the power to convey a partly completed bridge to the authority because the act specifically forbids the governor from conveying an existing bridge or any bridge constructed by the state highway board to the authority.

The court noted that the completed bridge work consisted of piers and 987 ft of bridge superstructure. There remained to be completed 3,483 ft of superstructure and the entire bridge decking including the draw span. The court held: "The word 'exist' means to be in present force, activity, or effect at a given time. To the average mind the word 'bridge' means a passageway over water or land by which persons traveling on foot or in vehicles can safely travel. The Turtle River Bridge, under the evidence in this case, in its present stage of construction could not afford passageway by anyone except a tightrope walker. The present structure has no more existence as a 'bridge' than when it was in the blueprint stage, and does not 'exist' as a bridge within the meaning of the act."

8. Claiming that the right-of-way of a portion of the bridge which lies within the city of Brunswick, and which had been dedicated to public use before the state acquired it, would revert back to the property owners if the state conveyed it to the authority, the court held that such right-of-way would not revert to any former owners, so long as it was used for the purposes contemplated by the act.

9. It is claimed that the caption of the act does not make reference to the governor's authority to convey partly completed bridges—but only makes reference to his power to convey to the authority so much of the state's highways and rights-of-way necessary for the accomplishment of the purposes of the act—this being clearly contrary to the general provisions of the state constitution.

It was pointed out by the court that one of the purposes declared in the caption was "to authorize and empower the governor to convey state right-of-way for such projects." This covers the provision of the act and provides for the erection of toll bridges by an instrumentality of the state. Section 7 "provides one of the means necessary to the accomplishment of one of the purposes of the act, that is, the conveyance by the governor of the state's right-of-way upon which the bridge is to be built."

10. Section 31 of the act is claimed to violate several constitutional provisions because no reference is made in the caption of the act, and it attempts to restrict the legislature's powers and to prevent future general assemblies from permitting construction of bridges within 10 mi of the bridge contemplated under this act. Section 31 in substance authorizes the state to covenant with the bondholder not to erect or permit any state subdivision to erect any crossing structures within 10 mi of any bridge constructed pursuant to this act; and provides, that after the issuance of the bonds, the provisions of the act shall constitute an irrevocable contract with the bondholders.

The court pointed out that one of the references in the caption of the act is "to authorize the execution of trust indentures, to secure the payment of such bonds, and to define the rights of the holders of such bonds," and "for other purposes." The court declared that the state's covenant with the bondholders to not erect another bridge within a prescribed area, and that the provisions of the act "shall constitute an irrevocable contract" with the bondholders, does not of itself limit or restrict future legislatures from enacting similar legislation "Any act of the legislature," the court continued, "is subject to repeal by a future legislature, so long as the repealing act does not violate the provisions of the state and federal constitutions against laws which impair the obligation of contracts." Until bonds are issued, or vested rights of third persons have intervened, the act creating the authority can be repealed by subsequent legislatures. Once the bonds are issued and bought, the contract between the state and bondholders comes into existence, and the limitation on future legislatures is by virtue of the bondholders' acquired vested contract rights, and not because of any restrictions placed by the legis-

lature in enacting the act. "The act in question being in the exercise of its constitutional power by the general assembly, was equivalent to a contract, and when performed is a contract executed, and whatever rights are thereby created a subsequent legislature cannot impair."

11. It is claimed that the act limits the amount of compensation the authority might expend in any one year. The evidence showed that the maintenance and operation cost for the Turtle River Bridge for one year exceeded $25,000. The court pointed out that this limitation applied only to administrative agents or employees not actually engaged in the operation or maintenance of the bridges. "To hold that the general assembly by this act meant to place a limit as to the total compensation to be paid per year to all employees, administrative and operative, on all bridges, would virtually destroy the purpose the legislature had in mind, that is, the maintenance and operation of toll bridges for public use."

12. The last point of this appeal is that the contract between the authority and the state highway department is unauthorized, wherein the department agrees to do certain things and to refrain from doing certain things with respect to the Turtle River Bridge and US 17.

The court held this attack to be without merit and pointed out the necessity for such a contract in order to promote the use of the bridge and protect it from competition. The agreement is in the public interest and for the benefit of the state as declared by the act, and is binding on both parties.

In its concluding statement the court agreed with the findings of the trial court and affirmed the decision on all 12 counts of the appeal. State v. State Toll Bridge Authority, 82 S.E.2d 626 (1954)

Texas. This case stems from the refusal of the Attorney General of the State of Texas to approve Dallas—Fort Worth Turnpike Revenue Bonds issued by the Texas turnpike authority pursuant to Vernon's Annotated Statutes, Art. 6674v. The turnpike authority asked the state supreme court for a writ of mandamus directing the attorney general to approve the bonds. The attorney general refused approval for the following reasons:

1. The powers granted to the Texas turnpike authority are so broad, unlimited and undefined that the result is an unlawful delegation by the legislature of its authority in violation of Sec. 1 of Art. II and Sec. 1 of Art. III of the constitution of Texas.

2. Said Texas Turnpike Act authorizes the issuance of bonds which constitute the creation and assumption of debt on behalf of the state and the giving or lending and a pledge of the credit of the state in violation of Art. III Sec. 49, 50 and 52-B.

3. The Texas Turnpike Act does not give the authority the unlimited right to condemn any property located within cities, towns, villages or other political subdivisions and does not grant the unlimited power to condemn property already devoted to public use

The first objection raised by the attorney general was summarily disposed of by the supreme court on the authority of previous decisions. Defendant admitted that Texas National Guard Army Board v. McGraw, 126 S.W.2d 627 (1939) and Lower Colorado River Authority v. McGraw, 83 S.W.2d 629 (1935) were controlling, unless the fact that the Lower Colorado River Authority was created pursuant to a specific direction of the state consitution distinguishing that case from the instant case. The court answered defendant's contention by citing Jones v. Alexander, 59 S.W.2d 1080 (1933). The Jones case held that there is no provision of the constitution which prohibits the legislature from creating a governmental agency and body politic as in the act under consideration and granting to it the powers possessed by the plaintiff. Since the plaintiff is a body politic and agency of the state, Art. 2 of the constitution which deals with private corporations has no relevancy to defendant's argument.

The Texas National Guard Army Board and Lower Colorado River Authority cases are also dispositve of point two of defendant's argument, the court held. The act under consideration specifies and states that the bonds are not debts of the state but are payable out of the revenue collected from the tolls.

Point three was emphasized by the defendant but was decided adversely to him. Reading the act under consideration as a whole, the court concluded that the legislature

granted to the plaintiff full powers of condemnation of public and private property, whether located within or without the boundaries of any city or other subdivision of the state.

Section 8 of the act reads in part as follows:

> Whenever a reasonable price cannot be agreed upon, or whenever the owner is legally incapacitated, or is absent, unknown or unable to convey valid title, the Authority is hereby authorized, and empowered to acquire, by the exercise of the power of condemnation and in accordance with and subject to the provisions of any and all existing laws and statutes applicable to the exercise of the power of condemnation of property for public use, any land, property rights, rights-of-way, franchises, easements or other property deemed necessary or appropriate for the construction or the efficient operation of any Turnpike Project....

Defendant argued that "subject to all existing laws and statutes relating to the power of condemnation" prevented the power to condemn from being exercised in any home-rule city by the plaintiff.

The court acknowledged the fact that a county could not condemn land situated within a city. However, continued the court, it did not necessarily follow that the legislature intended to limit the powers of the plaintiff. Taking the act as a whole the aforementioned language does not limit the power of condemnation but only refers to the applicable rules of procedure. Reference was made to the broad language used by the legislature in granting the power of condemnation in answer to defendant's contention in point three.

Other arguments against approval of the bonds were (1) the plaintiff was not authorized to build the toll road from a point within Fort Worth to a point within Dallas because the statute authorized the construction of the road between the two cities, and (2) the fact that the three highway commissioners be named as ex-officio directors of the plaintiff violated the constitution, which prohibits a public official from holding more than one civil office of emolument at the same time. The court answered the second point raised by stating that the job of director of the plaintiff was without compensation and furthermore the legislature could impose extra duties on statutory officials.

The court refused to interpret the word "between" narrowly but stated:

> If the construction of the road was limited to begin at the boundary line of one city to the boundary of the other the value of the road and the purpose for which it is designed, namely: To facilitate vehicular traffic, to effect traffic safety, to construct modern expressways, to provide better connections between highways of this and adjoining cities, would be largely lost and rendered ineffectual. If traffic is to be facilitated the congestion and hazards within the city must be to some extent eliminated.

The attorney general was directed to approve the revenue bonds. Texas Turnpike Authority v. Shepperd, 279 S.W. 2d 302 (1955)

WEIGHT RESTRICTION LAWS

In December 1954, the United States Supreme Court held that the State of Illinois could not suspend an interstate carrier's right to use the highways because of state violations.

This action was brought in an Illinois court by the Hayes Freight Lines, Inc., to restrain Illinois officials from prosecuting them for repeated violations of a state statute, (Ill. Rev. Stat., 1953, Ch. 95½) which limited the weight of freight that could be carried in commercial trucks over Illinois highways and provided for a balanced distribution of freight loads in relation to the truck axles. Repeated violations of these provisions by trucks of a carrier were made punishable by total suspension of the carrier's right to use Illinois state highways for periods of ninety days and one year.

Hayes Freight Lines, Inc., transported goods to and from many points in Illinois and seven other states. The interstate business was done under a certificate of convenience and necessity issued by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act (49 Stat. 543) whereas the intrastate business was done under a certificate issued by the state authorities.

The Supreme Court of the United States affirmed the state supreme court which held that the punishment of suspension provided by the state statute could not be imposed on the interstate operations of the Hayes Lines because it would conflict with the Federal Motor Carrier Act.

The United States Supreme Court pointed out that the Federal Motor Carrier Act was a comprehensive plan for regulating the carriage of goods by motor trucks in interstate commerce and no power at all was left in states to determine what carriers could or could not operate in interstate commerce. The act provided specific conditions under which the Interstate Commerce Commission issued certificates of convenience and necessity and also provided that all certificates, permits or licenses issued by the commission "shall remain in effect until suspended or terminated as herein provided." In order to provide stability for operating rights of carriers, Congress placed within very narrow limits the commission's power to suspend or revoke an outstanding certificate. The court said "it cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate. The highways of Illinois are not only used by Hayes to transport interstate goods to and from that state but are also used as connecting links to points in other states which the commission has authorized Hayes to serve." Consequently, if the suspension should become effective the carriage of interstate goods into Illinois and other states would be seriously disrupted.

A state's regulation of weight and distribution of loads carried in interstate trucks, according to the court, did not in itself conflict with the federal act. The state argued that without power to impose punishment by suspension, it would be without adequate remedies to enforce its laws against recalcitrant motor carriers. The court, however, considered that conventional forms of punishment were adequate. The Interstate Commerce Commission could either on its own initiative or on complaint of the state, protect a state's interest by revoking "in whole or in part certificates of motor carriers which willfully refuse to comply with any lawful regulation of the commission." Castle v. Hayes Freight Lines, 348 US 61 (1954)

Weight limitation laws in Arkansas, Massachusetts and Nebraska were also tested by the courts of these states. The laws involved in Arkansas and Massachusetts were local ordinances.

Arkansas. The city of Texarkana, Arkansas, enacted an ordinance by which the city intended to regulate heavy traffic on certain streets. The pertinent provision states: "Section I. Hereafter it shall be unlawful for any person, firm or corporation, or its agents, officers, or employees, to operate any motor truck, truck-tractor with semi-trailer or any full trailer, either of which is of more than one-half ton capacity, upon East 24th Street or Jefferson Street in the city of Texarkana, Arkansas."

One Joe House operated a wholesale and retail butane gas business adjoining his home and required the use of trucks of more than one-half ton capacity upon East 24th Street. He contended that the enforcement of the ordinance would cause him irreparable harm in prohibiting the use of more than one-half ton trucks on the named streets and that the ordinance violated the Fourteenth Amendment to the Constitution of the United States and the Arkansas Constitution in that it is discriminatory, provides unreasonable and inequitable class legislation, is confiscatory of his personal and property rights and deprives him of his property without due process of law. He asked that the city be enjoined from enforcing the ordinance. A lower court denied the injunction and the case was appealed to the state supreme court.

After setting forth testimony on the various routes available to plaintiff's trucks in order to comply with the ordinance, the court came to grips with the validity of the ordinance. On the authority of previous Arkansas cases, it was held that the defendant city had authority to enact the ordinance.

Either directly or by inference, the court stated, cities had been authorized by

statute to enact legislation of the kind in question. For example: Arkansas Statutes Section 19-2303 gives cities the right to "regulate the transportation of articles throughout the streets, and to prevent injury to the streets from overloaded vehicles." Section 19-3801 gives cities "supervision and control of all the public highways, bridges, streets.... within the city." Section 19-2401 gives cities the general power to pass ordinances, but inconsistent with the laws of the state, as seen necessary, and provide for the safety, preserve the health, and promote prosperity and convenience of the inhabitants."

Appellant in his argument conceded that prior to 1937, cities had the power to pass ordinances such as the one under consideration, but contended that Act 300 of 1937 dealing with regulation of the size of trucks, repealed and superseded the statute above quoted. The court saw no merit in this argument and stated the general proposition that repeal of a statute by implication is frowned upon. Section 26 of Act 300 reads in part that the act "shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from.... restricting the use of highways as authorized in Art. XVI of this act." Art. XVI regulates the maximum weight of trucks allowed on the highways and in no way takes away the right of cities to reasonably regulate the use of all heavy trucks on certain streets.

The first point in issue was whether the ordinance is unreasonable or arbitrary. As the court pointed out, there is a presumption in favor of the validity of the ordinance, since it is within the grant of power conferred upon the city. Concededly, the appellant will be inconvenienced, yet the court felt that alone was not sufficient to overturn the ordinance. The court concluded that under the facts and circumstances in this case, the ordinance was valid. (House v. City of Texarkana, 279 S. W. 2d 831 (1955))

Massachusetts. This was a bill by the M and M Transportation Company, a corporation engaged in the business of transporting property over the highways, to enjoin the town of Wellesley from enforcing a traffic regulation adopted by the town selectmen, and for a declaration that the regulation was invalid.

The regulation read "The use and operation of heavy commercial vehicles, having a carrying capacity of more than three tons are hereby restricted on the following named streets, during the time set forth.

"Washington Street—between Worcester Street and the Wellesley Newton lines during the twenty-four hour period of each day."

There was agreement on the following material facts: Plaintiff was required to use the main highways for its motor vehicles. It was necessary for the efficient and commercial conduct of the business to use vehicles with a carrying capacity of more than three tons. Washington Street was the main highway between Wellesley, Newton and Natick, a part of Route 16 as designated and numbered by the department of public works. No heavy commercial vehicles with a carrying capacity of more than three tons, other than motor vehicles, had used the restricted street or did use it when the regulation was adopted At the request of the town, the department of public works had posted signs directing the use of alternate routes. The alternate route was 1.8 mi longer than Route 16. The department of public works had not certified the regulation as "consistent with the public policy."

Two statutes were determinative of the case, the court believed. The material statutory words were (1) "Except as otherwise provided in section eighteen of chapter ninety... the board of... selectmen may make rules and orders, for the regulation of carriages and vehicles used (in the town)...." (2)"... the selectmen... may make special regulations as to the... use of... (motor vehicles) upon particular ways... provided, that no such special regulation shall be effective... until after the department... (of public works) shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests; and no regulation shall be valid which excludes motor vehicles from any... main highway leading from any town to another...."

The question in the case was whether the regulation was of such a nature that it should come under the latter statute.

The regulation was not in terms confined to motor vehicles. However, in effect it was, since the parties had agreed that no vehicles of the kind to which it related, other

than motor vehicles, used the restricted section. Therefore the regulation must have been aimed at motor vehicles. The use of motor vehicles for heavy work had so increased, the court found, that for a carrying capacity of more than three tons, only motor vehicles have been used on the section in question.

Motor truck transportation, continued the court, should be subjected to some control by some authority representing the interests of the general public and able to balance the interests. The statute should be given a practical construction in the light of present conditions.

For those reasons the court was of the opinion that the regulation was invalid as it should have been certified by the department of public works that it was "consistent with the public interests." Whether the regulation was invalid for the further reason that it excluded motor vehicles from a main highway leading from one town to another was not decided. M & M Transportation Co. v. Town of Wellesley, 127 N. E. 2d 794 (1955)

Nebraska. One Henry Luttrell, who operated a freight-carrying tractor and semi-trailer in Nebraska, was charged with operating an overloaded vehicle on the highways. The statute in question contained two sections of interest here. (Nebraska Revised Statutes, Supp. 1953, Section 39-722) Subsection 4 applied where the distance between extreme axles of any group of two or more consecutive axles was 22 ft or less. It contained a schedule of maximum weights which could be carried on any group of two or more consecutive axles according to the distance in feet between extremes of axles.

Subsection 5 applied where the distance between extremes of axles of any group of two or more consecutive axles was more than 22 feet. It contained a schedule of maximum weights which could be carried by any vehicle or combination of vehicles. In both subsections the weight allowance increased with the distance between axles.

The problem in this case was whether the distance between the extreme axles of any group of Luttrell's axles was 22 ft or less, as he was charged with violating Subsection 4. The dispute arose over the question of whether the distance to be measured was the distance between the tractor axle and the rear axle of the trailer or the front axle of the trailer and the rear axle of the trailer. If the former measurement was the correct one, Luttrell had not exceeded the weight allotted and was not guilty. If the latter measurement was the correct one, Luttrell was guilty of violating Subsection 4.

In following the latter formula and finding Luttrell guilty, the court reasoned as follows: The statute used the words "any group of two or more consecutive axles." The word "group" means "an assemblage of persons or things regarded as a unit because of their comparative segregation from others." Therefore, the word "group" did not include all four of Luttrell's axles, but only the three axles supporting the trailer.

Luttrell then claimed that these two subsections of the statute were so vague and ambiguous that people would not know they were violating the law and the statute was therefore unconstitutional. The court said, however, that the two provisions clearly applied to two different situations; Subsection 4 was concerned with the maximum weight on consecutive axles where the extreme axles were not more than 22 feet. Subsection 5 was concerned with maximum weight on vehicles where the extreme axles were more than 22 feet. The statute was neither vague nor ambiguous and therefore it was not unconstitutional. State v. Luttrell, 68 N. W. 2d 332 (1955)

PUBLIC UTILITIES

Cases relating to the relocation of utility facilities were adjudicated in Florida and Virginia. The Florida court held that a telephone company must pay the cost of removal and relocation of facilities necessitated by the construction of a new expressway. Similarly, the Virginia court held that the state highway department could compel a water company to move its pipes at its own expense to accommodate highway improvement.

Florida. The State Road Department of Florida embarked on a multimillion dollar federal-aid highway project known as the Jacksonville expressway system. The new expressway embraced portions of existing state roads along which the Southern Bell Telephone Co., had located its facilities. A dispute necessitated the removal and relocation of these facilities. A dispute arose as to who was to pay the cost of moving and relocating the telephone facilities—the telephone company or the taxpayers of Florida.

Telephone and telegraph companies were granted permission by statute (Section

362.01, F.S. 1951, F.S.A.) to locate their lines, wires, posts, or other fixtures on or beside any public road or highway as long as they did not "obstruct or interfere with the common uses of said roads or highways." Thus the privilege granted was a limited one. The telephone company admitted that under this law, it must pay for the relocation of facilities when a highway was merely widened or otherwise improved for local uses, but claimed that the construction of the Jacksonville expressway did not constitute a "common use" of the highway because it involved more than merely widening or improving the highway. In short, the company claimed that this was a new kind of high-speed highway, that the statutory limitation on their privilege to locate their facilities, along the public highway did not apply here and therefore the state must pay for the removal and relocation of facilities.

The court, however, did not agree and stated that the same rules of law which apply to ordinary improvements applied here. The court pointed out that the building of the expressway was the "natural result of progress and we should so construe the statute as to give our forefathers credit for knowing that progress and improvement would never cease." The streets were built primarily for the traveling public and the telephone companies' rights to use them were subservient to the rights of the public.

The telephone company also argued, (as they did in Southern Bell Telephone and Telegraph Company v. Commonwealth, Ky., 266 S.W. 2d 308 (1954) that since this was a federal-aid project, the state was an agent of the federal government and it might not use its police power in compelling the telephone company to relocate its facilities to further the works of the federal government. The court dismissed this contention by pointing out that the federal-aid legislation was designed merely to assist the states and did not assume the state's control over its highways Thus, the state in requiring relocation of facilities was acting for itself and not in behalf of the federal government.

The company further contended that since railroads by federal-aid legislation were relieved from paying the cost of relocating their facilities, to require telephone companies to pay was a violation of their constitutional rights. But the court held that this special provision the federal government had made for railroads in no way limited the rights of the State of Florida. Southern Bell Telephone and Telegraph Co. v. State, 75 So. 2d 796 (1954)

Virginia. The State Highway Commissioner brought proceedings to adjudicate his rights with respect to lowering the grade of a road as against the rights of the village water company to occupy the subsurface of the road with its pipe line.

The highway department planned to improve state Route 608 which ran through the village of Stuarts Draft. The plans called for a lowering of the present grade in places below the level of the pipe line. The water pipes had been installed under easements granted by owners of the underlying fee in the road, to the water company's predecessor in title. The issue in the case was whether the pipe line had to be removed or relocated at the expense of the highway department or of the water company.

The trial court was of the opinion that the easement of the water company constituted property which could not be taken without the just compensation requirement of the Constitution being satisfied. The Supreme Court of Appeals of Virginia here held that the right of the state department of highways to change the grade in order to make it safer and more convenient for public travel was superior and reversed the lower court.

The court reviewed several cases and stated that they were of the opinion that upon acquiring a right-of-way for a road the public right was not narrowly limited to passing over the surface as then made. The public easement was coextensive with the limits of the highway and the public right was not limited to the surface of the highway but extended both upward and downward for a distance sufficient to accommodate as well as to protect all proper uses to which the way was subjected. The owner of land who had dedicated it to the public for a road impliedly granted the attendant or incidental right to make such use of it as should suitably fit for travel as circumstances changed. The rights of the owner of the underlying fee are always subordinate to the rights of the public and may grow less as the public needs increase. With this exception the owner retains all that is not needed for public use. He could convey to another the right to

lay a pipe line under the bed of the road, provided he did not thereby obstruct the road. However, the court stated, a change in the highway which tended to make it more useful for public travel and burdened the fee in the manner contemplated when the road was laid out but to a greater degree was not an additional servitude upon the fee.

It was not contended that the proposed change of grade was either unreasonable or unnecessary and it was to be made wholly within the original right-of-way. No question of damage to abutting owners was involved.

Whether rights-of-way had been acquired in fee simple or as easements, nothing indicated that the grades shown on the map were limited to the depth or the height to which title was taken. The grade line is usually shown for the purpose of fixing damages to the adjacent property owner and for the information of those concerned with the construction of the road. To construe the provisions of the enabling legislation as limiting the depth of the right-of-way, said the court, would be to say that a grade shown on a map used in acquiring the right-of-way firmly fixed the right-of-way so that any deviation up or down, either in the original construction or in a subsequent improvement, would require the obtaining of additional depth or height, whether inches or feet, and result in intolerable delay and confusion and open the flood gates of litigation. Thus, the court held that the Virginia department of highways had the right to change the grade of the road in question, which right was superior to the right of the water company to maintain its pipe line where it would obstruct the alteration, and that the pipe line had to be relocated at the expense of the water company so as not to obstruct the superior right of the State Highway Commissioner to make the proposed improvement. Anderson v. Stuarts Draft Water Company, 87 S. E. 2d 756 (1955)

In a second Virginia case relating to public utility facilities, the court held that the rights of the State Highway Commission in a highway were sufficient to require the relocation of utility facilities.

The State Highway Commissioner sought a declaratory judgment adjudicating his rights as opposed to those of the Northern Virginia Power Company concerning the width of the right-of-way of Virginia Route 522 leading from Front Royal to Winchester.

About 100 years ago, the Front Royal Turnpike Company, pursuant to its charter to clear a 40 ft road having an 18 ft travel width, constructed and operated a turnpike over this route. The 11 ft strips on either side were for ditches, slopes, culverts and other necessary adjuncts. Evidence was absent as to how the easements for this purpose were acquired. It was assumed that the rights were created by dedication. Evidence did show however that a fence about 20 ft from the center of the highway for almost the entire distance had been erected, thus, the full 40 ft had been utilized.

In 1848 the turnpike company ran into financial difficulty. The county court declared the portion in contention here "an abandoned road" and directed that the road commissioners should "take charge of and work said road as required by law." Subsequently the state highway system was initiated and the state continued to operate and maintain the road.

In 1915 the Board of Supervisors of Warren County had granted the power company the right to locate and maintain its transmission poles and lines along the road. These were erected and were still present on the outer portion of the roadway.

The power company claimed that since the turnpike was abandoned under legislation which limited the width of county roads to 30 ft unless ordered otherwise, 5 ft on either side of the road was abandoned. Therefore they claimed to have acquired the rights to this 5 ft stretch.

Because of the evidence, which tended to show that the turnpike corporation was in fact more nearly like a state agency than a private corporation, the court was of the opinion that a public easement was present, as the turnpike had been actually dedicated for the benefit of the public.

When the dedication to the public was once made and accepted, as the court found to be the case, it continued until it had been obviously abandoned by non-user by the public itself or by some formal judicial or legislative procedure.

The Circuit Court of Warren County therefore held that there had not been any abandonment by the public as the section had been used constantly without interruption. The court also held that there had not been an abandonment by proper authority. It was true

that the turnpike company gave up its rights after running into financial difficulties but the public never did, and there was no evidence that the use of the full width of the road as laid out was altered. All evidence pointed to this conclusion, even the actions of the power company in locating the poles in question wherein nothing indicated that the road was anything less than the full 40 ft. Therefore the power company erected and maintained their equipment as gratuitous licensees subject to control by legislative determination.

The court stated that the county board had the power to refuse consent to the location of the power lines, and such power by necessary implication, carried with it the power to repeal the consent. However, after the State Highway Commissioner succeeded to the powers and authorities of the Board of Supervisors in 1926, the legislature passed a law limiting the power of the commission to require the removal of poles which had previously been located on public highways with the consent of the county supervisors. The new law provided that the commission could not require their removal without permitting the utility company to occupy some other part of the right-of-way, whether existing or acquired for such street or road.

The court concluded that the highway commission had the power to determine whether or not the requirements of public travel necessitated the removal of the poles in question from the highway. The commission might require their relocation or removal but it must consent to their relocation at some other place on the old or the new highway right-of-way. James Anderson, State Highway Commissioner v. Northern Virginia Power Company, Circuit Court of Warren County, Virginia (May 20, 1955)

Ohio. The Ohio Supreme Court held that the Ohio power company was required to obtain the consent of the county commissioners before constructing facilities inconsistent with the regional plan.

The Ohio legislature provided for the creation of regional planning commissions (Ohio General Code, 713-23, 713-25, Revised Code) to make plans in relations to systems of transportation, highways, park and recreation facilities, etc. Such a plan was made in Franklin County, but the Ohio power company began constructing its power lines and facilities in a manner inconsistent with the plan and without the consent of the board of county commissioners. The statute provided that consent of the board was necessary before doing any construction inconsistent with the plan. This suit was brought to test the company's authority to construct their facilities in contravention of the plan.

The power company claimed that the board of county commissioners could not prevent its location and construction of facilities. It was a public utility having broad powers of eminent domain and designed to serve the citizens of other areas of the state and in other states, not just in the region with which the plan was concerned. The court, however, held that consent of the board was necessary; that although the company was granted broad powers of eminent domain by the legislature, the legislature had also limited those powers by providing for regional planning commissions. The court interrupted the phrase "systems of transportation" to include the transportation of electricity, thus making the power company subject to the regional plans.

A dissenting judge disagreed with this latter interpretation. His view was that the ordinary meaning of "transportation" did not include the transporting of intangibles such as electricity and therefore the planning commission was not authorized to make plans in regard to the power company. He also pointed out that most of the categories for which the commissions were authorized to make plans—parks, water supply, sewerage, garbage disposal, etc. were of a regional character. He concluded that the legislature intended that such plans were to cover only items of a regional flavor, whereas the power company operated in a much larger area.

The dissenting judge said that if the statute were interpreted otherwise, there could be no statewide or interstate highways, turnpikes, railroads, telephone and telegraph lines, or oil and gas lines in areas which had regional plans, without obtaining the unanimous consent of the various county commissioners. State v. Ohio Power Co., 127 N. E. 2d 394 (1955)

ESTABLISHMENT AND IMPROVEMENT OF HIGHWAYS AND STREETS

In addition to cases relating to financing, weight restrictions and public utilities,

several cases relating to other phases of the establishment and improvement of highway systems were reported in the Correlation Service:

Authority to Construct

The Florida court upheld the authority of the state road department to determine when and how a certain state highway is to be constructed.

Florida. A Florida taxpayer sought to enjoin the state road department from acting on any bids for the construction of a section of state road in Wakulla County on the ground that the department had no authority to construct the road. The circuit court granted a temporary injunction and officials of the state road department appealed. The Florida Supreme Court reversed the restraining order, allowing the state road department to proceed with the construction.

The contentions of the taxpayer and the holdings of the supreme court were as follows:

1. Taxpayer: The department's authority to expend funds extended only to roads which had been designated by the legislature as part of the state road system. This road had never been so designated.

The Court: The legislature had properly designated the road as part of the state system in 1937 (Laws, chapter 18268).

2. Taxpayer: If the road had been properly designated, the department was not authorized to construct it in sections.

The Court: There is no law requiring that the whole road be constructed under one contract. As a practical matter, it would often times be difficult to find a contractor with the financial means and equipment to handle a whole project if of substantial length. The court gave as an example the state road from Pensacola to Jacksonville, which was built in sections by different contractors.

3. Taxpayer: The road would not run in a beeline.

The Court: This was not necessary. The fixing of lines and location of roads is left to the discretion of the department (Florida Statutes, Sec. 341.47, 341.81).

4. Taxpayer: The construction project was not properly included in the preliminary work budget of the department. In each fiscal year the department is by law required to make a preliminary budget and hold a hearing so that the public has an opportunity to offer complaints and suggestions (Florida Statutes, Sec. 341.20, F.S.A.). This particular road project was not included in the preliminary budget and the public never had an opportunity to be heard on the matter.

The Court: Failure to include the project in the preliminary budget did not preclude the department from including it in their final budget. The statute also requires the department to make up a final budget after the hearing. To require that all items must be included in the preliminary budget and open to hearing would nullify this latter provision relating to the final budget. In order to give both parts of the statute effect, the court interpreted the requirement that all work for the year had to be included in the budget to mean the final, and not the preliminary, budget.

Other minor arguments were also offered by the taxpayer:

5. Taxpayer: The work should not have been included in the budget without a request or demand for it by the officials of two counties or the citizens of one of the counties.

The Court: Nothing in the law limits the road department's actions to only such projects as are demanded or requested.

6. Taxpayer: Some private property owners would be especially benefited by the construction of the road.

The Court: Certain private owners are always incidentally benefited by the construction of a public road. To enjoin construction because some private property owners incidentally benefited by it would mean that no more roads could be constructed in Florida.

7. Taxpayer: The road was to be constructed to fulfill a political promise made by Acting Governor Johns.

The Court: The project was included in the budget prior to the campaign. Also, the fact that a politician promised to have a road constructed is no basis for enjoining its construction. Much of the construction of bridges and roads has been the result of

fulfillment of campaign promises.

8. Taxpayer: The federal bureau of roads refused federal-aid for the project and it should therefore be enjoined.

The Court: The approval of the federal bureau of roads is not necessary. If such were required, all power over road construction would be surrendered to the federal government. Webb v. Hill, 75 So. 2d 596 (1954)

Authority to Widen

The Supreme Court of Kansas refused to enjoin a municipality from widening streets on county owned land.

Kansas. This was an action by the State of Kansas to enjoin the city of Garnett and its agents from proceeding to widen the street surrounding the court house square.

Garnett is a city of the second class and the county seat. Anderson County owned Block 46 in the city on which a courthouse and jail were situated. This block had been used as a unit by the county, as the seat of the government. The board of county commissioners, by a resolution, declared it conducive to the interests of the inhabitants of the county that certain streets abutting the courtyard, belonging to the county, be utilized for a public street and parking area, and that an easement for this purpose be granted to the city, the cost of constructing and maintaining said street for a parking area to be at the expense of the city.

On the same day in regular session, a legal document denominated "easement" was signed by two of the county commissioners purporting to give, consent, grant, and convey to the city of Garnett an easement granting the right to enter, construct and maintain a public street and parking area on the described portion of the courthouse square, the construction and maintenance of the street to be done at the city's expense. This document was attested by the County Clerk.

The petition filed by the state alleged, in addition to the foregoing, that the value of the section of courthouse square in question was in excess of $10,000, and that the county received no consideration for the purported easement. It further alleged that the purported easement did not vest any right, title, interest, or estate in or to the courthouse block, in the city because the board of county commissioners had no legal authority to grant the easement or right to the city, nor was the same first submitted to a vote of the electors of the county; that the proceedings of the board of county commissioners were without authority in law, and that the city had no right, title, or interest in or upon the courtyard.

The trial court overruled the city's demurrer to the state's petition. The question now was whether the trial court erred in failing to sustain the city's demurrer to the petition on the ground that it failed to state a cause of action against the city for injunctive relief. The Supreme Court of Kansas answered the question in the affirmative, thereby reversing the order of the trial court and remanding the case with instructions to sustain the demurrer. The court said that, by statute, fee title to property within the county intended for public use vested in the county, in trust for the whole public, while the authority to improve the streets and use them for street purposes vested in the city. It was also apparent, the court said, that the legislature, by statute, had granted to cities of the second class the right to widen their streets for public travel and parking purpose, for which improvements they could take property by eminent domain, purchase or gift. Therefore, irrespective of the authority of the county commissioners to grant this permission, the statutes fixed the authority and jurisdiction of the city to widen the street, and there was no allegation that any statute had been violated, or not fully followed by the city.

The only allegation in the petition in which the state sought injunctive relief against the city, continued the court, was that the board of county commissioners had no authority to grant the easement to the city on the property in question for the purpose of widening the street. The court held that inasmuch as the county commissioners were not made parties to this action, the allegation afforded no ground for injunctive relief against the city of Garnett. State v. City of Garnett, 281 P. 2d 1084 (1955)

Authority to Establish

The authority to open a road from private property to a public highway was strictly construed by the Kansas Supreme Court. The New York Supreme Court, Appellate Division, held that a restrictive covenant did not prevent the construction of a public highway on the affected property. In Texas, an order for opening a public road was held invalid, since there was no public necessity for it.

Kansas. The petitioner (McCluggage) acquired about 110 acres of land in 1936, and also an easement, or right-of-way, one rod wide, running from the highway and located between a hedgerow and the Whitewater River. The right-of-way was used to get from the highway to the petitioner's tract of 7 acres which lay north of the river. The petitioner used the right-of-way for about 5 years, but made no attempt to keep it in repair or from washing out. The high water of the river had completely washed away the road so that the steep river bank was next to the hedgerow, with no space available for use of the easement as a travel way.

The petitioner asked the county commissioners to lay out a road over and across respondent's (Loomis) land, under a law providing in effect that a person might petition the board of county commissioners to open a road not exceeding 25 ft wide, when such person's land was so surrounded by lands of others that he had no access to any public highway.

The county commissioners established the road and allowed damages to respondent of $209. This action was upheld by the district court, over the objections of the respondent who claimed that the county commissioners had no authority to establish the road, but if said roadway be legally established, then he was entitled to damages in the sum of $3,000.

Loomis appealed to the Supreme Court of Kansas which reversed the decision of the lower court holding that the petitioner's land was not so completely surrounded as contemplated by statute.

The statute did not make any provision for laying out a road over the land of another to a portion of a petitioner's land which was separated from the remainder of his land by a stream or some other natural obstruction. The court emphasized that the statute declared the conditions under which a person was permitted to petition for a road. The commissioners and courts, according to the court, were without power to substitute their own condition or to read exceptions into the statute.

The court continued: "... if it be assumed that the statute contemplates the opening of a road over another's land in order that a petitioner may have access to a public highway from each and every portion of his land, the facts in this case clearly disclose the statute nevertheless is inapplicable. The 7 acre tract of land, even if it could be considered separately is surrounded on the south, west and east by petitioner's own land and by a stream across his own land. Only on the north is it bordered by the land of another, the respondent.

"The state supreme court held that under the statute authorizing the county commissioners to create a road to provide access to land completely surrounded by adjoining land, the property of other persons, the commissioners had no power to lay out and open a road over the land of protesting landowners to enable McCluggage, whose tract had access to the highway but was divided by a stream, to reach a portion of her land from the highway without crossing the stream...." (McCluggage v. Loomis, 270 P. 2d 248 (1954)

New York. This was an action for a declaratory judgment as to the right of a landowner to establish a public road over plots in a subdivision affected by restrictive covenants. The covenants provided that the property should be known and described as a residential plot, restricted the character and use of buildings to be erected thereon and provided that no noxious or offensive trade should be carried on thereon, nor should anything be done thereon which could be or become an annoyance or nuisance to the neighborhood.

The New York Supreme Court, Appellate Division, affirmed the judgment of the lower court holding that the covenants did not prevent the construction on the plaintiff's property of a road, nor would the plaintiff's grant of the use of the road violate the covenant against

offensive trades, nor would it constitute an annoyance or nuisance to the neighborhood.

The court said that the Baxendales had the right to use their property for any lawful purpose and to decide for themselves how many persons should be permitted to use it, except insofar as the use of the property was restricted by covenants. Nothing was found in the covenants which purported to prevent the construction, on their property, or the road to be used by their invitees or grantees as a means of ingress to or egress from adjacent property, or by the public, for similar purposes. The road in question would not be a building within the meaning of the language employed in restricting the use of the property, nor would the grant of the use of the road violate the covenant against offensive trades, nor could it be determined that such a use would constitute an "annoyance or nuisance of the neighborhood."

A dissenting memorandum was filed. The dissenting justices pointed out that the Baxendales lived in a house on a 7 acre parcel which abutted a high class private development of 85 homes known as "North Shore Acres" at Glen Head, Long Island. In 1950, they purchased a lot in the development and proceeded to build a road thereon for private use. Thereafter the Property Owners Association of North Shore Acres, Inc., learned that the Baxendales planned to rebuild the private road into a public road. The Baxendales were informed that while the association has no serious objection to a private way they would strenuously oppose the establishment of a public road across the aforesaid lot as it would violate the restrictive covenants contained in all deeds to parcels in the North Shore Acres development.

The dissenting justices believed that reading the restrictive covenants together the spirit, interest and context clearly prohibited the use of the lot for a public highway. Any other interpretation, it was believed, would defeat the basic purpose and intent of the restrictive covenants. Baxendale v. Property Owners Association of North Shore Acres, Inc., 140 N.Y.S.2d 176 (1955)

Texas. A Texas statute provided that any lines between different persons or owners of land, any section line, or any practicable route might be declared a public highway by the commissioners' court in order to avoid hills, mountains, or streams, (Article 6711, Vernon's Annotated Civil Statutes of Texas, 1930). The following conditions had to be met, however:

Ten freeholders, or one or more persons living within an inclosure had to apply to the commissioners' court for the establishing of such a road. All land owners who would be affected by the road were to be notified. Then, after hearing, if the commissioners' court determined that the road was necessary and would be of sufficient public importance, it could declare the designated lines to be a public highway.

In this case one W.H. Naumann had petitioned the court for an order opening a public road across W.L. Phillip's land. Naumann formerly had access to the Kingsland-Marble Falls public road via a road leading from his land. Because of the construction of the Granite Shoals Dam, the water from the lake inundated part of this road, so Naumann no longer could use it. Phillips, however, had given Naumann permission to use a road across his land to get to the public highway. The commissioners' court ordered the opening of a public road across Phillip's land and Phillips brought a suit to enjoin the enforcement of this order.

The Texas Supreme Court held that the commissioners' court could not order the opening of a public road in this case because Naumann already had a means of getting to and from his residence, since Phillips had granted him permission to use his private road. Thus, there was no necessity for a new public road. Also, the road proposed by Naumann would not be of sufficient public importance, but would be primarily for the private benefit of Naumann, who was entertaining the idea of opening up a commercial development on the lake. The court said that to permit the opening of a public road in this case would violate the fundamental principle that private property cannot be taken for a private use. Phillips v. Naumann, 275 S.W.2d 464 (1955)

Condemnation

Oklahoma. The Oklahoma court held that a landowner cannot recover damages by way of reverse condemnation where no land was actually taken.

Plaintiffs, one Chandler and wife, owned a 160 acre homestead near the Turner Turnpike. Before the turnpike was constructed, a county road, which served as a mail and school bus route, extended along the south side of plaintiffs' land, connecting with US 66. When the turnpike was constructed, it crossed this county road south of plaintiffs' land but no crossing was constructed at this intersection, thus isolating the plaintiffs upon a dead end road.

Plaintiffs sought to recover damages and compensation by way of reverse condemnation. Plaintiffs claimed that the turnpike authority did not institute condemnation proceedings as required by law for determining the amount of damages and compensation to which they were entitled; and that they had suffered direct and consequential damages and were entitled to recover compensation under both the constitution and statutory provisions relating to eminent domain. Condemnation commissioners appointed in the eminent domain proceedings fixed the plaintiffs' compensation at $9,000, to which the turnpike authority excepted. The trial court sustained the authority's exception upon the ground that the Chandlers could not maintain an action in reverse condemnation.

On appeal, the Supreme Court of Oklahoma stated that only one issue was involved, namely: Can a landowner maintain an action in reverse condemnation when no condemnation proceeding was brought, and when no part of the landowner's property was taken for public use?

In handing down the decision the court reviewed several of the cases previously decided by this court and, on one of which, the plaintiffs placed a great deal of reliance:

In Oklahoma City v. Wells 185 Oklahoma 369, 91 P. 2d 1077 (1939) the case involved an actual taking of property without owner's consent and relief was sought by way of reverse condemnation. This court held:

"From the above constitutional and statutory provision it is clear that the legislative intent is that the remedy afforded by condemnation proceedings shall be exclusive where any part of an owner's land has been taken and occupied for public use without having been purchased or condemned. But when the statutory remedy, however broad it may be, cannot be initiated by the owner of the land, and the condemnor alone can put it into operation and fails to do so, the statutory remedy is not exclusive and the owner may resort to his action at common law."

Again, in Chicago, R.I. & P.Ry. Co. v. Jennings, 175 Okl. 524, 53 P. 2d 691, this court held:

"...where no part of the owner's land is taken and occupied for public use, but some consequential damage is occasioned by the construction and operation of a public utility, the owner may not avail himself of the remedy of condemnation proceedings, but may resort only to a common law action... such owner may sue for damages, but the measure of damages and rules of evidence are the same as though a condemnation proceeding had been brought."

The court held that a landowner could not maintain an action in reverse condemnation, and affirmed the judgment of the trial court. Chandler v. Oklahoma Turnpike Authority, 271 P. 2d 374, Supreme Court of Oklahoma (1954)

Authority over State Highways within Cities

Cases relating to the authority and responsibility over state highways in municipalities were decided in Montana and Washington.

Montana. Taxpayers brought this action to restrain the city and others from selling bonds, letting any contract, or doing any act necessary to make Main Street in the city of Deer Lodge a part of a federal-aid highway.

The trial court dismissed the complaint, on a general demurrer. The taxpayers appealed in view of their allegations: (1) pertaining to the legality of the assessments made to pay for the improvements and (2) with respect to an alleged unauthorized attempt by the city to relinquish and abandon its governmental powers and duties with respect to its streets.

The Supreme Court of Montana affirmed the lower court. The court said that of the two special assessments in question which the taxpayers claimed amounted in fact to double taxation, one was to raise money to defray the cost of proposed intersections

and the other to defray the cost of the street where it abutted on privately-owned property; thus they were for different purposes and in no sense was there double taxation.

As to the delegation by the city of its police power and duties, the court said the general rule was that the police power of a municipal corporation could not be divested, surrendered or delegated. However, the source of the police power of municipalities is the state and the state having delegated authority over the city streets to the cities, the cities have exclusive control over them but the state may take away or revoke a part or all of the delegated authority. The municipality, in exercising the police power granted to it by the legislature, acts as the agent of the state.

The court quoted 25 Am. Jurs., Highways, Section 254, p. 545, which said: "Subject to constitutional limitation, the state has absolute control of the highways, including streets, within its borders, even though the fee is in the municipality." The resolution in question was adopted by statutory authority.

If by its adoption some of the city's police power were surrendered, ample authority sustained the right to do so where the state authorizes the highway commission to enter into all contracts and agreements with the United States government relative to the construction and maintenance of highways, and where the commission assents to the conditions prescribed by the United States government for the right of the state to participate in the federal aid.

The court felt the resolution did not surrender the police power of the city completely but merely placed a limitation upon the method and means by which it could be exercised.

A dissenting justice believed that the taxpayers real properties had been wrongfully and illegally levied upon, assessed and taxed, and doubly so, in order to pay for the paving of Main Street, and that such taxes were a lien on their property, not uniform, and therefore in violation of the Montana constitution. He also believed the taxpayers' complaint was sufficient as to the delegation of police power.

"...the source of the police power of a municipality is the state. The extent of it must be ascertained from the law creating the municipality and from the laws of the state bearing upon the same subject. The power cannot be surrendered, alienated, or abridged by contract nor can it be delegated even with the consent of the legislature. Its exercise is a governmental function. Without it neither the state nor the municipality could protect the public welfare." Bidlingmeyer v. City of Deer Lodge, 274 P. 2d 821 (1954)

Washington. The city of Tacoma sought to condemn certain land within the city limits for street purposes. Cavanaugh, whose property was to be taken, claimed that only the state director of highways, and not the city, had authority to condemn the land in this case. His argument was that although the proposed street was in the city, it would be used as a junction of two state highways.

There were two statutes which related to the authority to construct streets. The first, R.C.W. 8.12.030, authorized the city to condemn land for city streets. The other, Laws of 1949, chapter 220, authorized the state director of highways to condemn land for streets used as state highways. Cavanaugh contended that this later statute implied that if a city street was to become part of the state highway system, the exclusive authority to condemn land for it was vested in the state director of highways.

The court, however, did not so interpret the law, but held that the city did have authority to condemn Cavanaugh's land. It reasoned that the proposed street had not yet been designated a part of the state road system and was at present to be considered a city street only.

The court also said that even if it were to be assumed that the street would become part of the state highway system, the city had authority to condemn the land. Cavanaugh's contention was that the 1949 law (giving authority to the state director of highways) repealed by implication the city's authority to condemn land for city streets which were part of the state highway system. But the court construed the 1949 law as not limiting the authority previously granted to the city, but as extending the authority over such streets to the state director as well as the city. After pointing out that repeals by implication are not favored by law, the court said: "It is our duty to construe two statutes dealing with the same subject so that the integrity of both will be maintained." City of Tacoma v. Cavanaugh, 275 P. 2d 933 (1954)

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The HIGHWAY RESEARCH BOARD was organized November 11, 1920, as an agency of the Division of Engineering and Industrial Research, one of the eight functional divisions of the NATIONAL RESEARCH COUNCIL. The BOARD is a cooperative organization of the highway technologists of America operating under the auspices of the ACADEMY–COUNCIL and with the support of the several highway departments, the Bureau of Public Roads, and many other organizations interested in the development of highway transportation. The purposes of the BOARD are to encourage research and to provide a national clearinghouse and correlation service for research activities and information on highway administration and technology.