improvement of environment for living and for work and for the elimination, within our lifetime, of the hazards which we are all facing in making correct use of this presently lethal weapon, the automobile.

RESTRICTED DEDICATION OF RIGHTS-OF-WAY FOR NEW EXPRESSWAYS OR OTHER LIMITED ACCESS FACILITIES

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RÉSUMÉ OF ARGUMENT

There is no uncertainty as to whether a highway may be established in which an easement of access in favor of abutting landowners does not exist: the laws of 31 of the United States and of England permit establishment of highways to which abutters may have no access.

The point in issue in this argument is whether payment is required for not giving access rights to abutters at the time a limited access facility is dedicated, whether abutters' access rights necessarily exist or must be granted when a highway of limited access type is established on new location, and so must be extinguished, and paid for, as property rights in the new highway facility appurtenant to the adjoining land.

To clear the point in issue, authorities are presented which prove:

I

By definition, an easement is a right in the land of another: it is not a natural property right inhering in ownership of land *per se*.

Easements are created by grant, since they are not inherent property rights.

Easements of new kinds may be created if not against public policy.

II

Abutters' rights of access to highways are easements, are derived from grant, express or implied, and hence by the conditions of grants new modes of access or no modes of access may be created, which vary from the usual types, as by denying all direct access from abutting land and permitting access only at established junctions *via* such local, service roads as exist or may be created for the purpose.

Payment of damages to abutting landowners is not required for not creating or giving access rights to highways in the grant or dedication which establishes such highways, because

where no right is created there can be no liability for taking away something which is not a legal right.

A restricted dedication of land for use for expressways or other limited access facility affords the needed legal instrumentality to control or deny access to such facility without laying the State liable in damages for not permitting access to such facilities restrictively dedicated on new locations.

Since an economy of mass production of goods requires mass distribution, and since highways are of great importance in mass distribution of commodities and also in the movement of persons to work and to centers of social life, it is self-evident that a healthy economic and social life in those countries having mass production depends upon adequate highways; [1] and, in turn, adequate highways depend, among other things, upon the legal power of the proper authorities to design highways adequate for the daily needs of the people, and to control access [2] to expressways and other limited access facilities on which traffic must move swiftly and safely if the paralyzing congestion of large cities is to be overcome.

However, the control of access to expressways and similar facilities has been attended with liability to pay damages to owners of land adjacent to expressways on new locations because of an omission of the highway statutes to stipulate that upon dedication of new expressways or limited access facilities owners of adjoining lands should not have a legal right of access as a property right, or easement appurtenant to their land. [3] Because of this omission courts have held that under statutes relating to dedication of new highways a vested right of access to the highways from adjoining land was given at the time of dedicating the highways to public use, and hence that before such right may be taken away payment must be made to the owners of adjoining lands. Consequently, the costs of expressways and like facilities have been increased by the value to adjoining property of access rights which must be extinguished and paid for before the expressway may function as a facility for free flowing traffic. In many cases the value of such access rights are appraised as practically equal to the value of the land itself fronting on expressways or major highways and having in consequence of such frontage a high value as commercial or industrial property. (Burnquist v. Cook (1945) Sup. Ct. Minn., 19 N W. 2d 394, at page 405, paragraph

[1] See: "Causes of Industrial Growth of the United States," Vol. VII, pp. 700-717, "Cambridge Modern History", "Railroad and Highway," J.H. Parmelee, and E.R. Feldman, pp. 231-233, "Highways in Our National Life" (1950), "Influence of Highways and Transportation on the Structure and Growth of Cities, and Urban Land Values," Homer Hoyt, pp. 204-207, ib., "Freight Transportation and Highways," W. A. Bresnahan, p. 253, ib.; "The Highway and Social Problems," F. E Merrill, pp. 136-137, ib.; "History of the Modern Highway in the United States," Spencer Miller, Jr., pp. 95-97, 111, ib.

[2] This is known to those who observe heavy traffic, and is recognized by specialists in this field. See the remarks of Mr. Wilkie Cunnyngham, Assistant Attorney, Missouri State Highway Department, in "The Limited Access Highway from a Lawyer's Viewpoint," (1948), 13 Mo. L. Rev. 19, 22-23, stating that limited access highways can carry three times the amount of traffic carried by unlimited access highways, may avoid 50 percent of the vehicle accidents which occur on unlimited access highways, and can save many millions of man-hours lost in retarded traffic, and see the remarks of Mr. Joseph Barnett, of the Bureau of Public Roads, at page 149, "Highways in Our National Life", and also see pages 34, 52, 76, 87-88, 115, and 147 "Highway Capacity Manual" (1950), by the Committee on Highway Capacity, Highway Research Board.

[3] For cases in point, see Burnquist v. Cook, discussed on p. 40 below, and State v. James (1947) Sup Ct. Mo., 205 S. W. 2nd 534, 537, in which Mr. Wilkie Cunnyngham appeared as counsel for the State.

16(3).) It is clear that the owner of land adjoining a new expressway or a limited access roadway receives a windfall when access rights are donated and then bought back in this situation and that the payment of the unearned increment is prejudicial to the general public because increasing the expense of providing expressways and adequate highway service.

To avoid the unreasonable expense of granting a right of access to a new expressway and of buying it back outright or as a component of land value as enhanced by right of access to the new expressway, it is suggested that amendments to highway statutes be enacted by the States which authorize restriction of access at the time a new expressway or like facility is opened and dedicated for general use, thereby preventing the vesting of access rights in favor of abutting landowners at the creation of the highway. Unless such reservation is made explicitly, highway departments may continue to be required to pay the value of access rights to the highways from abutting property when land is secured for new expressways.

In heavy traffic-duty sections of main highways in the vicinity of large cities, on dangerous curves, on bridge approaches, and other areas in which large volumes of traffic are to be served, control or prohibition of access from abutting property would alleviate congestion. While the police power may be used to accomplish this purpose to a limited extent on existing highways and streets, strict control is legally possible at new locations by withholding the right of access at the time a portion of a highway right-of-way is dedicated to public travel. Hence, wherever in the reconstruction of a segment of an existing highway a new location is used a restricted dedication of said right-of-way would enable the public authorities in control to shut off cross currents of traffic from abutting land. In city planning on new locations for streets, the same greatly needed power may be secured, and exercised without liability to pay damages for not granting access rights to highways and streets on said new locations. If the restriction is not imposed at the time of dedication, an implied grant of access rights in favor of abutters by reason of the analogy of unrestricted streets may result. (Cf. State v. Hoffman (1939) St. Louis Ct. App., Mo., 132 S.W. 2d 27, a case in which access rights to a new superhighway from adjoining land were recognized.)

In those cases in which Federally owned roads are constructed for service as segments of expressways, especially in the area of Washington, D.C., administrative problems in controlling access likewise would be simplified by enactment of a clause expressly permitting a restricted dedication of the right-of-way so as to exclude access rights, although legal opinion (30 Op. Atty. Gen., U.S. 470; 16 Op. Atty. Gen., U.S. 152; 22 Op. Atty. Gen., U.S. 240) exists to the effect that in the absence of an act of Congress authorizing grants of easements only revocable licenses may be granted to cross or use land of the United States. However, it has been contended that abutters acquire access rights to roadways opened up on Federally owned land. To put the point beyond necessity of proving the Congress does not by implication grant abutters right of entry onto bridge approaches or other facilities for free-flowing traffic merely by the act of dedicating the land to such use, enactment of the suggested restriction is needed, as declaratory and explicative of existing law, not as an innovation in such cases.

The need for amendments to statutes dealing with such restrictions appears from the result in Burnquist v. Cook below, and from a review of existing statutes cited on pages 56-58 of this brief.

An important case in Minnesota serves as an example of conferring and buying back an unearned increment of value, in the form of access rights from abutting land to a new highway. In the case of Burnquist v. Cook (1945) Sup. Ct. Minn., 19 N.W. 2d 394 a new right-of-way was secured for an expressway. The right-of-way coincided

with the southern boundary of a tract of land but did not include any part of the tract. Nothing was done to restrict access from said tract north of the expressway when the expressway was opened, although access from the tract on which the right-of-way was located was expressly extinguished. An action was begun by the State to extinguish rights of access from the tract north of the expressway. Also, the action related to thirty-three other parcels north of the expressway. A decision of the lower court extinguishing access rights without paying the abutting landowner damages therefor was reversed and the case was ordered to be retried on the issue of damages held to be due the abutting landowner. The Court said, in reference to the establishment of the new highway along the boundary line of the property north of the expressway, ". . . Easements of access which were then created and became appurtenant to such land were not involved or extinguished in the original proceeding." (Underscoring added.) And the court held that the verdict of no damages was contrary to the weight of the evidence in the case. This means that the State gave a right of access by implication in opening the new road without a legal restriction on access, and hence the State had to pay the value of the access right to the property when it took away the legal right it had given, in consideration of nothing.

The Court said, "While it is true that the creation of a public highway at the same time subordinates the land on which it is established to the easement of access insofar as abutting landowners are concerned, there is nothing in this fact which prevents the sovereign State from later extinguishing such easements in subsequent condemnation proceedings." The Court then held that extinguishment of the easement of access is an incidental power given the Commissioner of Highways to acquire "all necessary right-of-way needed in laying out and constructing the trunk highway system." (Sec. 161.03, sub. 1, Minn. Stat. Ann.) This power was said to be analagous to the power to condemn land for purposes of visability at intersections.

In this case land was acquired in 1937 for a highway on a new location. The Court pointed out that when the land was acquired nothing was done to extinguish rights of access from the property north of the new highway. No part of the land north of the right-of-way involved was taken. Properly considered, no access rights existed until (1) a highway was dedicated and (2) access rights to the highway were granted by express language or by implication based on an unrestricted dedication. Nothing was needed to be done or could be done to extinguish access rights from the property north of said right-of-way until access rights therefrom had been created. Since the highway was designed as an expressway from the beginning, the highway should not have been dedicated in such a way as to vest rights of access. By restricting the dedication so as to withhold access rights the necessity of extinguishing access rights could have been avoided, for no such rights would have existed and would not have to be extinguished if the State had not conferred the same at the dedication of the new highway.

See also Breinig v. County of Allegheny (1938) Sup. Ct. Pa., 2 Atl. 2d 842-47, holding exercise of vested rights of access to highways from abutting land cannot be prohibited absolutely under the police power.

Such result requiring indemnification for valuable property rights given as a windfall to owners of land beside new roads compels us to consider whether this is a reasonable precedent to follow in serving the public by providing expressways as economically as possible to relieve chronic traffic congestion in the big cities.

PROPOSITION OF LAW

States Owe No Duty to Give Access to Owners of Land Fronting on New Expressways or Similar Facilities Provided the States Restrict Access at the Time the Expressways or Limited Access Facilities are Dedicated to the Public, Thereby Preventing Vesting of Easement of Access as a Property Right, and

Neither is Payment of Damage Due for Not Granting Access Rights to New Expressways or Limited Access Facilities.

Have the owners of land adjoining land acquired by the State and on which the State constructs a new highway for free-flowing traffic a legal or constitutional right of access from the abutting land directly onto the new expressway if at the time the new highway is dedicated to the public a total or partial restriction is imposed by law against access by abutters, and, have such landowners a right to payment if unlimited access is not given?

It is argued that a restriction imposed by law prior to dedication of State land for highway uses prevents the vesting of access rights as a property right, in the nature of an easement appurtenant to the abutting land over the highway right-of-way as the servient tenement, and, therefore, since no access right, as a property right, ever vested in the owner of abutting land, no payment is required as for taking a property right, and due process requiring payment for taking private property is not violated. If this is correct, the values of land fronting on a new expressway or limited access facility will not be increased by the value of access rights to the expressway, and the State will not have to buy up the access rights in order to have an expressway, or other limited access facility.

If the State does not thus restrict access rights to new expressways, but confers rights of unlimited access to the new expressways as a property right, then the State will have to buy up the access rights to avoid cross-currents of traffic on the expressway from driveways to roadside shops, stores, filling stations, and eating places; and the State will be in the position of giving abutters access rights for nothing and then buying back at a high price the same access rights that were given away free by the State. Land actually taken under such restriction of access as proposed would be valued as it existed before the new expressway was opened and would not have its value increased by the value of access rights from such property to a new expressway. The prices of land in cities for new expressways are almost prohibitive. The question presently discussed affects the price of land needed for expressways and limited access facilities and is hence of major importance in the urban highway program. No injustice results to owners of land by declining to give them for the benefit of their land access rights to new expressways, or sections of limited access roads on new locations, a right their land did not enjoy before the expenditure of the millions of dollars required for expressways and similar roadways into the heart of the great cities; and it is evident that the value of all city property will be preserved or increased by opening adequate highways into the centers of the cities and ending the traffic strangulation which is slowly killing the downtown areas.

Numerous court decisions and standard legal treatises present official acts establishing highways and restricting or denying in various ways rights of access thereto from adjoining land, and show that a State may limit the access to a highway at the time it is created, thereby preventing the owners of adjoining property from having a legal right of direct access from their land onto the highway. In some of the instances referred to below the private person donating land originated the restriction, and in others the State originated it. In numerous instances the State adopted the restriction and established the highway as a public highway subject to said restriction. It follows that the type of restriction needed today for the safety and convenience of the public in using expressways by excluding unlimited access from adjoining land may be imposed when the modern expressway is dedicated to public use, and that no property rights of access will vest and no such property rights will have to be divested to eliminate interference with fast traffic on the expressways. The following pages contain summaries and quotations from the decisions and treatises which hold that limited use of a new highway may be made the condition

upon which such highway as a new highway is established and dedicated to the public, and that the rights of abutting landowners as well as of the general public to use a highway arise when the highway is established. Therefore, where a prohibition against access from abutting land to a highway facility on new location owned in fee by the State, or over which the State has acquired a right of exclusive possession, is imposed at the dedication of the facility, the abutting landowner may not recover damages as for taking a right of unlimited access, simply because no right of unlimited access to such facility was ever given him by the law.

ORIGIN OF RIGHTS IN HIGHWAYS

"In England all highways, except such as have been created by or in pursuance of statute, and possibly also such as are immemorial, have had their origin actually or theoretically in dedication." (12 English Ruling Cases 518; Reg. v. Inhabitants of East Mark (1948) 11 Q. B. 877.) "It appears from the first of the principal cases that a highway may be dedicated by the crown, and that dedication by the crown may be presumed from user." (Ib. p. 520.)

"A dedication is an appropriation of land to some public use, made by the owner of the fee and accepted for such use by or on behalf of the public. . . . It is purely of common law origin. But it is only in very modern times that the subject has assumed much importance." (27 American Decisions 559, citing as the first modern decisions Rex v. Hudson (5 Geo. 2) 2 Str. 909, 93 Eng. Rep. 935, Lade v. Shepherd (8 Geo. 2) 2 Str. 1004, 93 Eng. Rep. 997, and Trustees of Rugby Charity v. Merryweather (1790) 11 East 375; 8 R. C. L. 881.) "Most highways have or are deemed to have originated from the owner's dedication of his land to the public for the purposes of passage and acceptance by the public of his gift, evidenced by their user of the way. There being no obligation on an owner to dedicate, or on the public to accept, the public cannot complain that the owner has dedicated to them an unsatisfactory or dangerous highway, or has imposed restrictions upon his dedication; and, if they accept his land as a highway, they must use it for such purposes and subject to such restrictions as he has indicated and imposed." (16 Halsbury's Laws of England 187.) "A highway may be dedicated only for one or more of the recognized kinds of traffic." (Ib. p. 234, referring to p. 184 which states a highway may be established as a carriageway, a horseway, or a footpath.) "A road may apparently be dedicated as a public carriageway subject to a prohibition against a particular class of wheeled traffic, . . ." (Ib. p. 234.) In the case of Lade v. Shephard (8 Geo. 2) 2 Str. 1004, 93 Eng. Rep. 997, it was held by Chief Justice Hardwicke that property formerly belonging to the plaintiff became a highway by act of dedication and continued user by the public, that the public had a right of passage, but that an abutting landowner had no right to place one end of a bridge in the street in order to get over a ditch and enter the street.

"It was well settled in the 16th Century that easements, like other incorporeal things, if created expressly, must be created by deed. (Co. Litt. 9a.)" "It was also settled that they could be created by implication. This implication will arise if an intention is shown, by the words used in the conveyance of the property, to revive an easement which had been formerly annexed to the property, but which had since been extinguished by unity of seisin; or if the easement so arising is a right which is both continuous and apparent, e.g. if a man sold a house with a gutter running on to land retained by the vendor, or conveyed by the vendor to another; or, as we shall see, in case of ways of necessity." (Holdsworth, "Hist. Eng. Law," VII, p. 334.)

". . . English law . . . has therefore gone on the principle of treating the extent of any given right of way as a question to be determined by the facts and circumstances of each individual case; and as in other cases of rights appurtenant to a dominant tenement, the character of that tenement,

and the character of the road itself, are the most important circumstances to be taken into account in considering the extent of the easement. 'Prima facie the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both these circumstances may be legitimately called into aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen, or cattle, which is generally called a driftway, or a general right of way for carts, horses, carriages, and everything else,' per Jessel, M.R., Cannon v. Villars (1878) 8 C.D. at p. 421." (Holdsworth, "Hist. Eng. Law," VII, p. 337.) See also Holdsworth, "Hist. Eng. Law," VII, pp. 321-336.

In Dyce v. Hay (1852) English House of Lords, 1 Macq. 305, Lord St. Leonards said, "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles." The principle is quoted and approved in the case of the Attorney General of S. Nigeria v. Jno. Holt and Co. (1915) English Privy Council, Law. Rep., Appeal Cases, at 617.

"If an interest is to be an easement it must possess the four following characteristics:

"(1) There must be a dominant and a servient tenement.

"(2) An easement must accommodate the dominant tenement.

"(3) Dominant and servient owners must be different persons.

"(4) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant."

"Since as we have seen, an owner of land is at liberty to create an easement in favor of a third person of a kind which has never been heard of before, provided that it possesses all the essential characteristics, it is impossible to give an exhaustive list of easements. The following list, which begins with the most important kinds, will afford some idea of how great their variety is:

"(a) Rights of way, whether for general or special purposes, and whether exercisable in all modes or limited to a carriage way, bridle way, footpath, or a way for cattle." Etc., etc., etc.

"Natural rights. Lastly, easements must be distinguished from what are generally called 'natural rights.' These, though they connote the imposition of duties upon third parties, are ordinary and inseparable incidents of the ownership of land, and are given the epithet 'natural' to distinguish them from rights, such as easements, which do not necessarily accompany ownership but must be acquired by grant, prescription, or the like. Thus:

> 'An owner has a right to so much support from his neighbor's land as will support his own land, unincumbered by buildings at the natural level'; and
>
> 'A riparian owner can insist ex jure naturae that other riparian owners shall not divert the natural course of the stream.'

"Without such rights as these it would be impossible for an owner to enjoy his land in the condition in which it was given for the enjoyment of man by nature."

"Such rights, since they impose restrictions upon other landowners, have a superficial resemblance to easements, but in fact they are fundamentally different, for they arise automatically as a natural adjunct to the ownership of land and do not require to be deliverately acquired." (G. C. Chesire, D.C.L., F.B.A., "The Modern Law of Real Property" (6th ed., 1949). pp. 216, 219, 231.)

This distinction between inherent property rights and those acquired by special act is observed in Higgins v. Betts (1905) Chancery Division, Sup. Ct. Jud., Eng., 2 Ch. 214, 215, which held that access of light from adjoining land is an easement to be acquired by prescription, or statute, or express contract or grant, and is not a natural

property right.

"The Methods by Which Easements May Be Created"

"The principle which governs this matter is that every easement must have had its origin in grant." Angus v. Dalton (1877) 3 Q.B.D. 102, per Cockburn, C.J. (Chesire, ib., p. 231).

". . . the one exception, namely Statute, is not of frequent occurrence."

"Acquisition by statute. Little need be said of this matter. It is obvious that a statute can create an easement and, what is more, can give the name easement to a right which lacks the essential elements of one." (Chesire, ib., p. 231.)

"Every easement has its origin in a grant express or implied," said Lord Cairns, in Rangley v. Midland Railway Co. (1868) Ct. Appeal in Chancery, 3 Chan App Cases at p. 310, a case in which a railway company was held to have an option to buy land and dedicate it for use as a footpath leading to a railway line.

"Our legal theory has always been - at any rate within the last century or two - that the sole origin of a public highway was dedication to the public use by the owner of the land over which it ran, and in consequence that in a case of dispute the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated." And it was held that under the Right of Way Act of 1932, 20 years user of a footpath raises a presumption of dedication, in an action for an injunction against using a footpath across the plaintiff's farm. The court said that the effect of the said Act was to alter the former rule that long user was evidence of a dedication, but raised no presumption, Jones v. Bates (1938) Ct. of App., (Eng.) 158 Law Times 507. The former rule was given in Folkstone Corp. v. Brockman (1914) House of Lords, (Eng.) A.C. 338, which held" ' . . . it has always been held that where there has been evidence of user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and had taken no step to disabuse them of that belief. It is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.' " "'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate - there must be an animus dedicandi of which the user by the public is evidence and no more . . . . The uninterrupted user of a road justifies a presumption in favor of the original animus dedicandi even against the Crown.' " (p. 368.)

Likewise, in the United States, rights in highways are derived from dedication of land by the owners and acceptance of the dedication by the public, and rights in highways are derived also from dedication for highway use, as fixed by statute, of land condemned, bought, or owned by the State. The principle of establishing highways by dedication was a part of the English common law, and as such was introduced and followed in the United States. Tyler v. Sturdy (1871) Sup. Jud. Ct. Mass. 108 Mass. 196; Hobbs v. Lowell (1837) 36 Mass. 405. In accord: (Alabama). Sultzner v. State (1869) 43 Ala. 24; Steele v. Sullivan (1881) 70 Ala. 589; Webb v. Demopolis (1891) 95 Ala. 116, 13 So. 289; (California). Stone v. Brooks (1868) 35 Cal. 489; (Connecticut). Noyes v. Ward (1848) 19 Conn. 250; N.Y., N.H. and H. Ry. Co. v. New Haven (1878) 46 Conn. 257; Paulsen v. Town of Wilton (1905) 78 Conn. 58, 61 Atl. 61 (Delaware). State v. Brown (1916) 6 Boyce 179, 97 Atl. 590; District of Columbia). Compton v. Rudolph (1926) 12 Fed. 2nd 152, 56 App. D.C. 211; (Florida). Daugherty v. Latham (1939) 139 Fla. 477, 190 So. 742; (Georgia). Johnson v. State (1907) 1 Ga. App. 195, 58 S.E. 265; Davis v. State (1911) 9 Ga. App. 430, 71 S.E. 603; Dunaway v. Windsor (1944) 197 Ga. 705, 30 S.E. 2nd 627; (Illinois). Daniels v. People (1859) 21 Ill. (11

Peck) 439; Grube v. Nichols (1864) 36 Ill. 92; (Idaho). Hanson v. Proffer (1913) 23 Id. 705, 132 Pac. 573; (Indiana). Greer v. Elliott (1882) 86 Ind. 53, 68; (Iowa). Wilson v. Sexon (1869) 27 Iowa 15; Baldwin v. Herbst (1880) 54 Iowa 168, 6 N.W. 257; Keokuk and H. Bridge Co. v. C.I.R. (1950) 180 Fed. 2nd 58; (Kansas). Cementery Assn. v. Meninger (1875) 14 Kan. 312, 316; (Kentucky). Rowan's Exr's v. Portland (1847) 8 B. Mon. 232; Congleton and Co. v. Roberts (1927) 221 Ky. 712, 299 S.W. 579; (Maine). Browne v. Boudoinham (1880) 71 Me. 144; (Maryland). Harlan v. Town of Belair (1940) 178 Md. 260, 13 Atl. 2nd 370; Louis Sachs and Sons. v. Ward (1944) 182 Md. 385, 35 Atl. 2nd 161; (Massachusetts) Hobbs v. Lowell (1837) 36 Mass. 405; Valentine v. Boston (1839) 39 Mass. (22 Pick.) 75, 33 Am. Dec. 711; Tyler v. Sturdy (1889) 108 Mass. 196; Guild v. Shedd (1889) 150 Mass. 255, 22 N.E. 896, noting statutory change in mode of establishment; (Minnesota). Keiter v. Berge (1945) 219 Minn. 374, 18 N.W. 2nd 35; (Mississippi). Kinnaire v. Gregory (1878) 55 Miss. 612; Rylee v. State (1913) 106 Miss. 123, 63 So. 342; Armstrong v. Itawamba County (1944) 195 Miss. 802, 16 So. 2nd 752; (Missouri). Bailey v. Culver (1882) 12 Mo. App. 175, 183; Garnett v. City of Slater (1894) 56 Mo. App. 207, 211; State v. Muir (1909) 136 Mo. App. 118, 117 S.W. 620; Kennard v. Eyerman (1916), 267 Mo. 1, 182 S.W. 737; School Dist. etc. v. Tooloose (1917) 195 S.W. 1023; Cochran v. Wise (1921) 297 Mo. 210, 229 S.W. 1050; (Nebraska). State v. Otoe County Com'rs (1877) 6 Neb. 129; (New Hampshire). State v. Atherton (1844) 16 N.H. 203; (New Jersey). Smith v. State (1852) 23 N.J.L. (3 Zab.) 712; Holmes v. Jersey City (1857) 12 N.J. Eq. (1 Beasl) 299, 308; City of Atlantic City v. Atlantic City Steel Pier Co. (1901) 62 N.J. Eq. 139, 49 Atl. 822; Parsippany-Troy H.T., Morris County v. Bowman (1950) 3 N.J. 97, 69 Atl 2nd 199; (New Mexico). Lovelace v. Hightower (1946) 50 N.M. 50, 168 Pac. 2nd 864; (New York). Appleton v. City of N.Y. (1916) 219 N.Y. 150, 114 N.E. 73, 7 A.L.R. 629, 115 N.E. 1033, citing 2 Pollock and Maitland, "Hist. Eng. L.", p. 144; Post v. Pearsall 22 Wend 425, 433; 16 "Halsbury's Laws of Eng.", p. 12; Mayor etc. New Orleans v. U.S., 10 Pet. 662, 712-717; The Queen v. Inhabitants of Hornfey (1713) 10 Modern 150; Rex v. Hudson (1732) 2 Str. 909; Lade v. Shepherd (1732) 2 Str. 1004; (North Carolina). Sexton v. Corp. of Elizabeth City (1915) 169 N.C. 385, 86 S.E. 344; Stevens Co. v. Myers Park Homes (1921) 181 N.C. 335, 107 S.E. 233; (Ohio). City of Steubenville v. King (1873) 23 Ohio St. 610; (Oklahoma). Ruminer v. Quantilty (1947) 179 Pac. 2nd 164; (Oregon). Douglas County Rd. Co. v. Abraham (1874) 5 Ore. 318; Bakke v. Johnson (1922) 102 Ore. 496, 202 Pac. 1091; (Pennsylvania). Pittsburg Ft. W. and Co. v. Dunn (1867) 56 Pa. St. (6 P. Smith) 280; (South Carolina). Edgefield County v. Georgia-Carolina Power Co. (1916) 104 S.C. 311, 88 S.E. 801; (Tennessee). Nashville Tr. Co. v. Evans (1948) 206 S.W. 2nd 911; (Texas). Heilbron v. St. Louis S.W. Ry Co. (1908) 52 Tex Civ App. 575, 113 S.W. 610, 579; (Vermont). Judd v. Challoux (1944) 114 Vt. 1, 39 Atl. 2nd 357; Town of Springfield v. Newton (1947) 50 Atl. 2nd 605; (Wisconsin). Yates v. Judd (1864) 18 Wis. 126.

Acceptance of such dedication is essential. N.Y.H. and H. Ry. Co. v. New Haven (1878) 46 Conn. 257; Compton v. Rudolph (1926) 12 Fed. 2nd 152, 56 App. D.C. 211; Dunaway v. Windsor (1944) 197 Ga. 705, 30 S.E. 2nd 627; Congleton and Co. v. Roberts (1927) 221 Ky. 712, 299 S.W. 579; Harlan v. Town of Belair (1940) 178 Md. 260, 13 Atl. 2nd 370.

The foregoing section on the "Origin of Rights in Highways" shows that the legal foundation of such rights rests on a grant or dedication either by a private landowner, or by the Crown or State, that restricted dedications were known at common law, and that reasonable variations in restrictions imposed on highway use were quite familiar.

Since an abutter's right of access to a highway is an easement, and since easements are created by grants, if the dedication or grant by which a highway or street is established withholds such

right of access, then of course no such right of access is vested in abutting landowners and no taking of a property right has been committed by not permitting access and no damages therefor can be due in such case. The section following, on "Restricted Use Highways and Streets," presents authorities showing the power to impose restrictions when highways are dedicated. It follows that whenever the State wishes to restrict the dedication of land over which the State has right of exclusive possession, all that is required is for the State to authorize the highway officials to make a limited dedication of such land for highways so that abutters shall have no right of access. If private landowners may impose restrictions on the uses to which land may be put by the traveling public, and if railway companies may acquire rights to exclusive possession of land needed for railway tracks and may exclude abutting landowners from railway rights of way, then likewise in complete accord with the established principles of highway dedication the State may acquire exclusive possession of rights of way for limited access highways and may restrict the dedication so that no easement of access vests in abutters and so that no damages are due abutters for denial of access to the highway.

RESTRICTED USE HIGHWAYS AND STREETS

A dedication of land for a highway may be made subject to reservations in favor of the dedicator or to restrictions upon the freedom of the use of the land by the public, as a condition that a highway shall be used only at certain seasons of the year or shall be subject to certain use by the dedicator, or for the use only of certain classes of vehicles or pedestrians only. Tiffany, Real Property, Section 1111, 3rd ed.

"Land may be dedicated for a special and limited use, and use for any other purpose is unauthorized." (8 R. C. L. 908) "The dedicator may prescribe the terms, restrictions and limitations on which the land is given . . . ." (8 R. C. L. 909, citing notes in 52 Am. Dec. 479, 29 A. S. R. 299, 25 L. R. A. (N. S.) 980; 11 Ann Cas. 468.) "The dedication of land for a street or highway may be subject to limitations or conditions. So, a highway may be dedicated subject to limitations as to the time, extent and mode of its enjoyment, or subject to the right to use or dedicate a portion of it to a railroad." (13 R. C. L. 32. In accord: 12 Eng. Rul. Cases 581.)

"Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the public use, etc." (Underscoring added.) 2 Dillion, Municipal Corporations, 4th ed., Sec. 656.

Restrictions on Access - In the case of Home Laundry Co. v. City of Louisville (1916) Ct. App. of Ky., 182 S. W. 645, it was held that a laundry company as an abutting owner on a street, known as Court Place, dedicated as a pedestrian street had no right of access for carts and wagons on such street. The street in question was dedicated as a way limited to pedestrian travel only, and its use as such was begun in 1853. Subsequently, the laundry company acquired a lot fronting on the pedestrian street, and combined the said lot with another lot fronting on another street, erected a plant on the two lots, and began making deliveries of coal from wagons on the pedestrian street. Such use by the laundry continued for a number of years, but it was held no rights were acquired by adverse use and possession because no notice of the adverse claim was given the public authorities in the manner required by a statute. Hence, the actual user of the street to make deliveries to the abutting property from vehicles did not operate to extinguish the original restriction. Complaint was made by a judge that noise from automobiles and other vehicles on the pedestrian street interfered with the trial of cases in a courtroom which was adjacent to the pedestrian street. Policemen were placed at the intersections of the pedestrian street with other streets and stopped all vehicles from entering the pedestrian street. The laundry company sued for an injunction, and the injunction was

denied by the trial and appellate courts. It appeared at trial that the street was established on land dedicated by abutting landowners, that the City of Louisville dedicated 8 feet, and the landowners on the opposite side of the street dedicated 8 feet. The ordinance of the said City authorized a grant of 8 feet "for public use," "provided the said street is only to be used by foot passengers, and not for wagons, carts, or drays." By an omission in drafting the deed, the proviso of the ordinance, restricting use to pedestrians only, was omitted; but for a period of over 15 years the use of the street was actually restricted to pedestrians only, and the court held that this cured the omission of the deed to contain the restriction imposed by said ordinance. The Court held, further, that the pedestrian street "had its origin in a deed of dedication executed by the abutting property owners, of which the city, as a private owner of property was one . . . ." "The dedicators of a public way may impose any conditions as to its use, which they may desire, and there is no doubt that a street may, by its dedication be limited to the use of pedestrians. Trenton Water Power Co. v. Donnelly 77 N.J. Law 659, 73 Atl. 597; Poole v. Huskinson 11 M and W 827; Hughes v. Bingham 135 N.Y. 347, 32 N.E. 78, 17 L.R.A. 454. It is within the authority of a city, if beneficial to the public, to control by reasonable regulations the use which may be made of certain streets, as by limiting the weight of loads which may be hauled over them . . . ." "When the municipality accepted the dedication of Court Place, which it did by causing it to be improved as a sidewalk, in the year 1853, the dedicators were still the abutting owners, and it appears that they not only did not interpose any objections to its acceptance as a way limited to pedestrian travel only, but were assessed, and, we presume, paid the costs of construction of the street as then constructed." "A public way is however, nevertheless a street, though its use is confined to travel by pedestrians only. Atlanta and W.P. Ry. Co. v. Atlanta B. and A. Ry. Co. 125 Ga. 529, 54 S.E. 736."

This decision, relating to the power of a city to effect a restricted dedication of a street and to deny vehicular access to all property abutting thereon, is in public law, relates to public rights in streets, and is not one in a case involving merely private acts relating to a private street. The court reasoned that dedicators of land for use as streets may impose any conditions they desire as to its use, that the city dedicated a part of the land as a private owner of property subject to certain restrictions, and that the restrictions are valid. Logically, the decision supports the proposition that the State may impose restrictions, at the time it creates streets on land under State control as to the uses to which the streets may be put. In its proprietary capacity as an owner of real property with requisite dominion thereover, the State may impose restrictions on the use of land dedicated for a highway location. In its governmental capacity with responsibility to promote public safety on the highways, in conjunction with its ownership of lands to be dedicated as highways, the State may impose reasonable restrictions at the time streets and highways are created which limit or deny access by abutters, although such restriction may vary the common-law easements of access enjoyed by abutting landowners. In this aspect of the matter, the State not only has all the power to restrict at dedication rights of abutters in highways which private dedicators have, but the State has greater power in this regard than private persons have. Hence, the pertinency of all decisions which hold valid restrictions on highway use imposed by private dedicators. Further, in every case in which a restriction is imposed by private dedicators and has been upheld as applied to a public street, it was necessary for public officials to accept the dedications, thereby ratifying it by official action. Hence, again, the decisions cited herein are pertinent as showing official action ratifying and adopting restrictions on lands dedicated for highway uses. It should be noted, also, in considering the precedents reviewed in this brief, that the dedication of highways and streets restricted to a specified and

special use which of necessity prohibited all vehicular access from abutting lands constitutes a precedent for restricted dedications today of lands for use as expressways from which all vehicular access from abutting land is prohibited, in order to permit a free flow of traffic unsnarled with cross-currents of cars from roadside filling stations, eating places, and other commercial places.

In accord: Stegman v. City of Fort Thomas (1938) Ct. App. Ky., 116 S. W. 2nd 649, in which the Court, referring to a reservation in a deed, held, "The city under the provisions of the reservation has the right to open the street for pedestrians only, and when it does so, the street becomes a public highway."; Sherington Urban District Council v. Holsey (1904) Chan. Div., High Ct. Justice, England, 91 L. T. R. 225, holding valid a dedication of a street for pedestrians only. "It has not been shown that there has been any dedication as a public highway for all purposes."

In Attorney General and Newton Abbott Rural District Council v. Dyer (1947) Chan. Div. High Ct. Justice (Eng.) 1 Chancery 67, an action was begun to establish a public right of way on foot in a lane over defendant's land to the bank of a river. Judgment was rendered for the plaintiff. The Court held, "It must now be taken as clearly settled not to be a requisite of a public right of way that it must lead from one public highway to another. Thus, there may be a public right of way to a viewpoint or beauty spot . . . . The high water mark of the sea at ordinary tides may, I conceive, be a good terminus for a public right of footway even though its proved use were confined to walking to the sea's margin and thence returning. In accord: Huey v. Whitley (1929) Chan. Div., Sup. Ct. Jud., (Eng.) 1 Ch. 440, in which evidence of user for 60 years of a footway was given and the Court said, "I should be bound to hold that there had been at some time a dedication to the public of this path as a public footpath."

In Tyler v. Sturdy (1871) Sup. Jud. Ct. Mass., 108 Mass. 196, an action for tort was begun and the defense was that the defendant had not trespassed because he had used a footpath established by dedication and use. A case was made for appeal upon the question whether a public footpath could exist in Massachusetts by dedication or prescription. The Court held, "By the common law of England, footways for the use of the public were one of the kinds of public ways, and might be created by dedication or prescription. Co. Lit. 56a. Thrower's Case, 1 Ventr. 208, The Queen v. Saintiff, Holt, 129; S. C. 6 Mod 255, 1 Salk 359; Holt, 339. Rex v. Burgess, 2 Burr. 908. Mercer v. Woodgate, Law Rep. 5 Q. B. D. 26. This part of the English law, being manifestly adapted to the condition of our ancestors upon their settlement of this country, was part of the common law which they brought with them, claiming it as their birthright, Pawlet v. Clark, 9 Cranch 292, 333. Storer v. Freeman, 6 Mass. 435, 438, Hobbs v. Lowell 19 Pick 405. Commonwealth v. Churchill 2 Met. 118. As it required no legislation to give it effect, we should not expect to find many traces of it upon the statute books; but it is recognized by clear implication in the ordinances of the Colony of Plymouth, and its adoption is reasonably to be inferred from the early records of Massachusetts, the acts of the Province after the union of the two colonies under the one charter, and the statutes of the Commonwealth.

"It was assumed in Hemphill v. Boston 8 Cush 195 and Danforth v. Durell, 8 Allen 242, that public footways might be created by dedication in this commonwealth. And the existence of such ways by dedication or prescription has been recognized in other States. Chadwick v. McCausland 47 Maine 342, Nudd v. Hobbs 17 N. H. 524, Gowen v. Philadelphia Exchange Co. 5 W. and S. 141, 3 Kent Com. (6th ed.) 451. note."

In Abrey v. Livingstone et. al, Park Com'rs (1893) Sup. Ct. Mich., 95 Mich. 181, 54 N. W. 714, it was held that a city had power under an act authorizing purchase of land for suitable approaches to a bridge leading to a park to dedicate a strip of land for a bridge approach and to leave a strip

varying from 25 to 50 feet on each side of the said approach road for ornamental or other use and to exclude abutting landowners therefrom who demanded access rights over said strip to the roadway or street.

In Ferguson Seed Farms v. Fort Worth etc. Ry. Co. (1934) Ct. Civil App. Tex., 69 S.W. 2nd 223, an action for damages was brought for cutting off access to property abutting on a street by construction of spur tracks on the street, and for injunction requiring the removal of the tracks. Land was platted into lots, blocks, and streets by the owner and the streets were dedicated to public use for foot and vehicular travel, reserving the right to operate utilities and railways through said streets as though not dedicated to public use as limited by the dedication. The town accepted the dedication. Later the owner of the property granted a railway the right of way to erect tracks in the street. The tracks were placed on the sides of the street and interfered with and made access difficult to abutting property, and the abutters brought this action. It was held: "A dedicator may impose such restrictions and reservations as he may see fit when dedicating his property to the use of the public, subject to the limitation that the restriction or reservation be not repugnant to the dedication or contrary to public policy. (Roaring Springs Townsite v. Paducah Tel. Co. 109 Tex. 452, 212 S.W. 147; Gibson v. Carroll, Tex. Civ. App., 180 S.W. 630; 18 C.J. 70; Oklahoma City and T.R. Co. v. Dunham 39 Tex. Civ. App. 575, 88 S.W. 849, 851; Ayres v. Penn. Ry. 48 N.J. Law 44, 3 Atl. 885; Tallon v. Mayor of City of Hoboken 59 N.J. Law 383, 36 Atl. 693; 1 Elliott, 'Roads and Streets,' 3rd ed., Sec. 163; State v. Society etc., 44 N.J. Law 502; Village of Bradley v. N.Y. Cent. R. Co. 296 Ill. 383, 129 N.E. 744; Arn v. C and O Ry. Co. 171 Ky. 157, 188 S.W. 340; City of Noblesville v. Lake Erie and W. Ry. Co. 130 Ind. 1, 29 N.E. 484; Brunswick etc. v. Mayor of Waycross 91 Ga. 573, 17 S.E. 674; Lynchburg T. and L. Co. v. City of Lynchburg 142 Va. 255, 128, S.E. 606, 43 A.L.R. 752, Ann., 766; Cane Belt Ry. Co. v. Ridgeway, 38 Tex. Civ. App. 108, 85 S.W. 496)."

"Dedication of a highway is a mere gift to the public, and the donor may annex thereto any restriction or condition he pleases, not inconsistent with or repugnant to the gift. Otherwise there would be no gift. The donee cannot dictate the terms of the gift. He can accept it or not, as he pleases. If he accepts unconditionally, he thereby agrees to perform the conditions annexed to the gift." In accord: Lynchburg T and L Co..v. Lynchburg, (1925) Sup. Ct. App. of Va., 128 S.E. 606, 43 A.L.R. 752, 131 A.L.R. 1472, annotation citing Ga., Ill., Ind., Kans., Ky., N.J., Pa., Tex., Va., and Wash. decisions; 1 Elliott, Roads and Streets 3rd Ed., Sec. 163. Cf. Gwin v. Greenwood (1928) Sup Ct. Miss., 115 So. 890, 58 A.L.R. 849, and Tallon v. Hoboken (1897) 60 N.J.L. 212, 37 Atl. 895, upholding reservation of right in dedicator to place utility lines in streets platted by him. For cases contra see58 A.L.R. 854, on ground the reservation is against public policy.

In an action to enjoin obstruction of an alley, judgment was given for the defendant, and the Court of Appeals of Virginia held in affirming the judgment, "The owner of land to which there is a right of way appurtenant may convey the land without the appurtenance if he chooses; and where the way is not a way of necessity, and the appurtenance is excluded by the grant, it will not pass by a grant of the land." In this case the rule was applied to conveyances of adjoining lots fronting on a street and having an alley across the back of the lots, and it was found that the conveyances gave the fee to the space in the alley to the owners of the two lots under the conveyances without a right of passage through the entire length of the alley across both lots. Harris v. Thomas (1927) Sup. Ct. App. of Va., 138 S.E. 728.

In Woodyer v. Hadden (1813) Ct. Common Pleas, 5 Taunt 125, 128 Eng. Rep. 634, per Gibbs, Chambre, Heath, and Mansfield, C.J., an action for damages was brought against an abutter for trespass on a private, cul de sac street. Judgment for the plaintiff was

affirmed. Per Gibbs: "The owners of the land had a right to say that this should not be used as a common highway, but only as an occupation way." Per Mansfield: "I therefore think this street never was dedicated to the public, and I do not know that if it were a public street perfected, that it is therefore a public way for all purposes: all that persons can require is a right of passing and as at present advised I do not know that persons coming with horses and carriages to exercise for their recreation round a square, and breaking up the pavement, have a right to do it, or that they would not be trespassers, after notice to abstain." In this case the private, cul de sac street was opened for the plaintiff's tenants and the defendant's property was separated from the street by a fence at the end of the street. The defendant tore down this fence to develop his property, desiring to use the private street; but the plaintiff put up a wall. The defendant tore down the wall and used the street. The plaintiff sued for trespass, and recovered against the abutter on the private street which had not been dedicated to the public without qualification.

In City of Atlanta v. West (1939) Ct. App. Ga., 3 S.E. 2nd 755, an action was brought to recover the value of land. Judgment for the plaintiff was affirmed. "The contention that the person who gave the land for the street could not reserve a strip along one side of the street, and thus cut off the public from access to the street from the property adjoining this strip, cannot be sustained. It is not the law that the dedicator of a street must so extend the width of the street which he gave to the public as to accommodate landowners on the other side of the street and give them access to the street." The plaintiff's grantor dedicated the street, reserving the one-foot strip. The city took this strip de facto. The plaintiff recovered its value in this action.

In Cityco Realty Co. v. Slaysman (1931) Md. Ct. App., 160 Md. 357, 153 Atl. 278, 76 A.L.R. 296, the court held valid a reservation by a private dedicator of a one-foot strip between the defendant's property and a public road which the dedicator granted to the county after reserving said one-foot strip, and the court granted an injunction to keep the defendant from crossing the said one-foot strip and entering the road. The Court said, "Nor did the reservation of such a strip between the appellee's land and a public highway violate any requirement of public policy . . . ." (Citing a statute permitting the widening of roads if required by public convenience.)

In Berridge v. Ward (1860) Nisi Prius, England, 2 F and F 208, 175 Eng. Rep. 1026 per Cockburn, C. J. an abutting landowner was excluded from the highway by a wall, and access was given only at a gateway. Cockburn, C. J., said that if the highway were dedicated beyond living memory it is an ancient highway and the abutter has a right of access at any point, and temporary obstruction would not divest it of that character; but if it was not an ancient highway, then the question for the jury was whether the owner dedicated it as a highway without qualification, and the obstruction by the wall is material as showing the owner never dedicated the highway without qualification; if once dedicated without qualifications the owner cannot divest it as a highway without qualification. On these instructions the case was submitted to the jury which found for the abutter.

It was held in Poole v. Huskinson (1843) Exch. of Pleas, 11 M and W 827, 152 Eng. Rep. 1039, per Abinger: A new trial must be granted the plaintiff for error in instructing that a dedication of a street to inhabitants of a parish is a dedication to the public, for use of which this action of trespass was brought. Per Parke: "I agree. There may be a dedication to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public. In this case a private way had gates across it, and signs had been put up prohibiting use as a public carriage road, and the defendant had broken down the gates and used the road.

In Lightbound v. Higher Bebington Local Board, Court of Appeal, England,

(1885) 16 Q. B. D. 577, the appellant was assessed for the paving of a street on which he was alleged to have property "fronting, adjoining, or abutting." A wall and a narrow strip of land separated the appellant's land from the street which was paved, and a footpath running at right angles to the wall and to the street connected the appellant's property with the street. It was held that the location of the wall and the narrow strip of land between the street and the appellant's property took the appellant's property out of the class of abutting property, that no benefit from the paving was conferred on appellant's property and that hence no tax for the paving assessment was due.

Conversely, it was held in Williams v. Wandsworth Board of Public Works (1884) (England) 13 Q. B. D. 211 that an owner of a strip of land 4 inches wide and 265 feet long which bounded a new street on the north side and on which the owner was obligated to maintain a boundary line fence between his land and land of his grantor was liable for a tax on the strip of land for the paving of the street. The court reasoned that the owner could rent the land to property owners on the north side of the new road to give them access to the road, and hence the owner held valuable land abutting the street, within the English court decisions construing "owner" of abutting land on streets, for tax purposes.

The foregoing English decisions show the opinions of the English judges to be that special restrictions may be imposed upon streets and highways at the time land is dedicated to public use, as a highway or street, and similarly, private streets may be subject to restricted use.

Restrictions on Mode of Use of Highways- In Jones Beach Blvd. Est. v. Moses (1935) N. Y. Ct. App. 197 N. E. 313, land was granted in fee simple, reserving 18 rights of way over and across the said property, on which a highway was to be built, the said rights of way to be private roadways 1,000 feet apart, location, construction, maintenance and use to be approved by a park commission in charge of the highway. An ordinance was passed forbidding left turns except at regular crossings or plazas. The ordinance as applied to the plaintiff required him to go 5 miles before making a left turn, after certain outlets had been released. It was held that the ordinance is valid and does not infringe the terms of the deed. This case is pertinent to the present problem of limited dedication in this that the deed of dedication as construed by the court withheld from abutters the privilege of making a left turn, and hence limited use may be imposed by the deed of dedication which thus serves to prevent the vesting of unlimited rights of access and unlimited user of the new highway.

In Hughes v. Bingham (1892) N. Y. Ct. of App. 32 N. E. 78, 17 L. R. A. 454, it was held that a town which has power to accept land for streets may accept a deed to a strip of land for a street to be kept open only from December to May each year. The general power included power to take an interest in land less than a fee or upon conditions such as were inserted in this deed, said the court.

It was held in Atlantic City v. Associated Realties Corporation (1908) 73 N. J. E. 721, 70 Atl. 345, that Atlantic City, under an act giving it power to accept land for improving streets and sidewalks has the right to accept a deed for a grant to the public of a right of way over lands on the ocean front for a board walk, subject to reservation to donors of the privilege of placing certain structures thereon.

In Illinois Malleable Iron Co. v. Commissioners of Lincoln Park (1914) Sup. Ct. Illinois, 105 N. E. 336, 51 L. R. A. N. S. 1203, the court held valid an ordinance denying an abutting landowner the use of the parkway beyond the first intersection for loaded vehicles. The abutting landowner claimed an easement throughout the length of the street. The Court said, "The power of the legislature over public streets, so far as the public interest is concerned, is absolute, and it may change their control at its pleasure, giving jurisdic-

tion over them to the city, to park commissioners, or such other authority as it may see fit." Hence, it was held that the use of the parkway was subject to limitation by ordinance. In accord: Barnes v. Essex County Park Commission (1914) Ct. of Errors and Appeals of N. J., 91 Atl. 1019. ". . . the legislature may impair the public easement in a public highway by prohibiting business traffic thereon . . . and such power may be delegated."

The decisions cited in the preceding paragraph are pertinent not only as showing that limitations may be imposed upon the use of existing highways but also a fortiori that limitations upon the use of new highways may be imposed prior to the establishment thereof, and consequently that condemnation of access rights would be unnecessary if unlimited access rights were never granted.

In the case of Marquis of Stafford v. Coyney (1827) Ct. of Kings Bench, (England) 7 B and C 257, 108 Eng. Rep. 719, per Bayley, it appeared that Lord Stafford agreed by agent to the opening of a road across his property if no coal were carried over the road, (in competition with his mines), and the road was opened. The defendant moved coal across the Stafford land over objection and this action of trespass was brought. It was held in reversing a dedication for error in instruction that the public must take subject to the restricted dedication or not at all. The court believed a partial dedication valid, but one judge doubted this.

In Mercer v. Woodgate (1869) Ct. of Queen's Bench, (England) L. R., 5 Q. B. 26, it was held in reversing a conviction for ploughing up a public highway, per Cockburn, "I am of opinion that this conviction was wrong. There is no doubt that as far as living memory goes back, while on the one hand, the public has enjoyed this right of way, on the other hand, the owner or occupier of the field during the same period has from time to time ploughed up the whole of his field without regard to the particular track over which the footpath passes. The only proper inference to be drawn is, that the exercise of this right of the owner has been coeval with the exercise of the right of way of the public, and again the only proper inference from that is, that the right of the public was granted, or the original dedication of the way was made, subject to this right in the owner periodically to plough up the soil." "I am clearly of the opinion that there may be, in law, a partial dedication like that contended for by the appellant in the present case . . . ."

Per Blackburn, J., "If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred."

Per Mellor, J., "I am of the same opinion. The owner might have dedicated this pathway in express terms, with a condition attached of ploughing it periodically; and we all know many such paths which the occupiers are constantly in the habit of ploughing up from time to time."

Per Hanner, J., "It follows that the evidence in the present case shows a partial dedication only, and that either the right of the public is subject to the reservation or there is no dedication at all; in either case the appellant was wrongly convicted."

In Arnold v. Blaker (1871) Exchequer Chamber, (England) 6 Q. B. D. 433, it was held per Kelly, that a footpath across a field may be dedicated as a right of way subject to a restriction by which the owner of the soil might plough up the path from time to time and for a short time interfere with the free use of it. "The question is whether a restriction which derogates so much from the benefit conferred upon the public can be attached to the dedication of a highway." ". . . the reservation is quite consistent with the dedication . . . ." And hence it was held that the surveyors of highways had no right to pave the same with hard material preventing its being ploughed up.

In the case of Atlantic City v. Atlantic City Steel Pier Co. (1901) Ct. Chan. N. J., 49 Atl. 822, it was held that a

covenant in a deed to a city dedicating a right of way along a beach at Atlantic City and providing that the city shall not grant a right of way over the same to any railway company is a legitimate limitation of the dedicatory purpose in creating easements for the mutual advantage of the parties.

In the case of Judd v. Challoux (1944) Sup. Ct. Vt., 114 Vt. 1, 39 Atl. 2nd 357, an action of trespass was begun for removing a gate from a pent road which was established by dedication by private landowners and public acceptance. Judgment for the plaintiff was affirmed. The pent road was established by dedication, and acceptance by the town, and the town had maintained the road and had repaired the gate for 50 years. A statute, P. L. 4838, authorized imposition of penalties for wilfully removing any gate on pent roads. The Court held, "A pent road is deemed to be a public highway. P. L. 4741; Town of Whitingham v. Bowen 22 Vt. 317, 318; Wolcott v. Whitcomb 40 Vt. 40, 41; French v. Barre, 58 Vt. 567, 573, 5 Atl. 568. It is not an open highway, but one that may be enclosed by gates, bars, or stiles. P. L. 4836. Bridgman v. Hardwick, 67 Vt. 132, 134, 31 Atl. 33. The term 'pent', which means 'penned, shut up, confined, or closed', is used to distinguish such road from an open highway." The selectmen may designate the location of the gates, and if the selectmen make no designation the landowner may put them up where reasonably necessary. Such roads may be established by the selectmen by following a statutory procedure.

". . . There is no reason why it cannot be established by dedication and adoption, as an open highway may be, and as is shown to have been done here. The legality of its establishment is not affected by the absence of a record. French v. Holt, supra, 53 Vt. at p. 368."

MODE OF CREATING ACCESS RIGHTS

The right of access to an ordinary highway from adjoining land is created when the State establishes a highway for the use of the general public and abutters, Kane v. New York Elevated Ry. Co. (1891) N. Y. Ct. Appeals, 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Lewis, Eminent Domain, 3rd Ed., Sec. 121.

In Gleason v. Metropolitan District Commission (1930) Sup. Jud. Ct. Mass., 170 N. E. 395, the Court held, "A taking of land for purposes of public travel or as a public way, in the absence of special restrictions and limitations, imports that abutters thereon have reasonable right of access thereto"; and that in the instant case power to deny access was not given in the statute authorizing construction of a roadway and hence did not exist. (underscoring added.)

In the case of Story v. New York Elevated Railway Co. (1882) 90 N. Y. 122, a deed to land granted by a city provided that the streets on which the land fronted should be for free and common passage forever as public streets in like manner as other streets of the city are or ought to be. The Court held: "Where an individual conveys village or city lots designated upon a map as abutting upon a public street, the map being referred to in the deed, it is well settled that the grantee acquires as against the grantor a right of way over the strip referred to as a street . . . ."

"The same rule applies to the State or a municipal corporation when it deals with its lands as owner or proprietor."

"The street thus became what is known to the common law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street, attached to the lots abutting thereon and passed to the plaintiff as the owner of such lots. That an easement is property, within the meaning of the constitution, cannot be doubted." (Ib. p. 150.) The Court held that to permit a railway corporation to take the street for an elevated railway infringes the abutter's property right and requires compensation, (Ib. p. 158), under statutes giving the railway company power of eminent domain, (Ib. p. 160.)

In Sauer v. New York (1907) Sup. Ct. U. S. 206 U. S. 536, 51 L. Ed. 1177, the

Court held, an owner of land abutting on a city street does not have an absolute easement of access, light and air to the street as a right appurtenant to his land; and consequently no property right is taken when the State constructs an elevated roadway in the street which limits access and light and air to the land abutting on said street. "Upon the ground, then, that under the law of New York the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th amendment is shown." "The Court of appeals denied the plaintiff the relief which he sought, upon the ground that, under the law of New York, he had no easement of access, light or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist." "The reasons upon which the decision of that court proceeded will appear by quotations from the opinion of the court delivered by Judge Haight. Judge Haight said, 'The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. . . . But as to changes made from the natural contour of the surface, rendered necessary to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets.'" "The same law which declares the easements defined, qualifies and limits them."

Similarly it has been held a State and its agencies are not liable in damages to abutting owners for injuries resulting from construction of bridges and their approaches in public highways and streets because in law access rights are held subject to the paramount public rights in highways and streets, in absence of statute or constitutional provision imposing such liability. Willis v. Winona City 60 N. W. 814, 26 L. R. A. 142; Barrett v. Union Bridge Co., Sup. Ct. Ore. 243 Pac. 93, citing Lewis "Eminent Domain," 3rd Ed., Sec. 120; Brand v. Multnomah County 38 Ore. 79, 60 Pac. 390; Transportation Co. v. Chicago 99 U. S. 635; cases pro and con are cited in Elliott "Roads and Streets," 4th ed., Sec. 889, p. 1167, notes 86 and 87; 8 Am. Jur. Sec. 23, p. 925; L. R. A. 65; 21 L. R. A. (N. S.) 209; 45 A. L. R. 534.

In Muhlker v. N. Y. etc. Ry. Co. (1904) 197 U. S. 544, 572, Holmes, J., said in discussing the origin of access rights of abutters: "The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purpose of public streets. They were never granted to him or his predecessors in express words, or, probably by any conscious implication."

See Section 474, Thompson, "Real Property," (Permanent Edition), to the effect that the grant of the easement of access to abutters on streets platted by the grantor is an implied covenant of the grantor.

In Wagner v. Bristol Belt L. etc. Co. (1908) Sup. Ct. of App. of Va., 62 S. E. 391, it was held that an abutter is not entitled to damages for a servitude added to a street, fee to which was in the State, which interfered with his parking automobile in front of his property. This case illustrates the liability of the abutter to have his use of the street reduced when public convenience so requires. In this case a street railway was placed in the street and prevented the abutter's parking in front of his property.

Since access to existing streets from adjoining land is at present subject to being greatly reduced whenever the public authorities decide to construct a facility in the street to improve travel, because the law implies that such condition was understood, by so much

the more it follows that an express condition may be imposed when the street is first dedicated restricting access thereto from adjoining property in the interest of the safety and convenience of the traveling public. It follows that if at the time the uses of a new highway are declared by law access is expressly restricted, then no property right of access vests and due process does not require payment for not recognizing it. A statute applicable to expressways on new locations which forbids giving legal rights of access to owners of adjoining land and which is construed as precluding liability for denying such access would be consistent with the Constitutional prohibition against taking private property without compensation because under such statute no property right in the form of an easement of access is created, and since no such property right has been given nothing has been taken away and no payment is required by due process of law.

STATUTES RELATING TO ACCESS RIGHTS AND NEW EXPRESSWAYS

The reading of the following statutes relating to easements of access to expressways shows that the statutes should be made clear by amendment or judicial construction to avoid a windfall to owners of property abutting new expressways.

Laws of New York, McKinney's Consolidated Laws of Art. XII-A, Sec. 346, Bk. 24, 5th paragraph: "The superintendent of public works is authorized to classify any part of a state thruway as a controlled access highway pursuant to this chapter, when the construction thereof is done on a location where no public highway theretofore existed."

Ib., Sec. 346 (14): "If the work of constructing, reconstructing and maintaining such state thruways and bridges thereon causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute." (Underscoring added.) See also Public Acts 1913, Ch. 174, 1927, Ch. 282, Gen. Stat. 1930, Sections 1473, 1475, 1513, 1528; 21 Sp. Acts 1931, Nos. 314, 408, Sec. 3, 498; 21 Sp. Acts 1933, No. 379; Gen. St. Supp. 1935, Sec. 537 C., establishing the Merritt Parkway, which is restricted to noncommercial vehicles. Virginia Code of 1942, title 18, ch. 83, Sec. 1975 yy(3): "The State highway commission may designate an existing highway as or included within a limited-access highway and existing easements of access, light, or air may be extinguished by purchase, eminent domain, or grant, in accordance with the methods of obtaining rights-of-way for highway purposes." (Underscoring added.)

Ib., (4): "The State highway commission is authorized and empowered to regulate and restrict access to any limited-access highway established under the provisions of the preceding sections, from any existing highway, road, street, or abutting property owner in such manner as it is authorized to regulate and restrict traffic upon highways, and access to any such limited-access highways from any new highway, road or street, which shall be established by and with the consent of the State highway commission."

See also statutes similar to the Virginia Statute in: Connecticut, Sec. 351 h(b), Gen. Stat. 1945, Sup., Title XI, Ch. 80, Pt. II; Illinois, Sec. 336, Ch. 121, Smith-Hurd Ann. Stat. 1945, pocket part; Massachusetts, Sec. 7 C, Ch. 81, Vol. II, Ann. Laws recompiled 1945; New Jersey, Sec. 27:7 A-5, Tit. 27, Ch. 7 A, Ann. Stat.; Ohio, Sec. 7464-2, Title III, Ch. 18, Vol. 1, 1945 Cum. Supp., Page's Gen. Code Ann.; Rhode Island, Sec. 3, Title X, Ch. 75, General Laws 1938, Ann.

Under the English Trunk Roads Act of 1946 (9 and 10 Geo. 6, Ch. 30), Section 4, trunk roads may be established, and the Minister of Transport may restrict travel so as to permit movement only in one direction, Sec. 3, and may stop up entirely side roads between junctions with the trunk road approved by him, Sec. 4. Under the Special Roads Act of 1949 (12 and 13

Geo. 6, Ch. 32), providing for roads restricted to special classes of traffic, and amending the Trunk Roads Act, authority is given "to stop up any private means of access to premises abutting on or adjacent to land comprised in the route of the special road" and "to provide new means of access to any such premises as aforesaid: Provided that no order authorizing the stopping-up of any private means of access to premises shall be made or confirmed by the Minister by virtue of paragraph (a) of this subsection unless the Minister is satisfied either that no access to the premises is reasonably required or that other reasonably convenient means of access to the premises are available or will be provided in pursuance of an order made by virtue of paragraph (b) of this subsection."

"Where access to any premises has been stopped up in pursuance of an order made by virtue of this section or is limited by virtue of the restriction imposed under this Act on the use of the special road, and any person has suffered damage in consequence thereof by the depreciation of any interest in the premises to which he is entitled, or by being disturbed in his enjoyment of the premises, he shall be entitled to recover from the special road authority compensation in respect of that damage: Provided that in assessing such compensation regard shall be had to any new means of access provided by the special road authority." (Sec. 7., op. cit.) (Underscoring added.)

For purposes of the present discussion the significant thing about the English statute is its silence. It makes provision as to stopping up private means of access to premises abutting on or adjacent to land comprised in the route of a special road. This relates to existing roads and to existing means of access, which are held as vested property rights under English law. The act is silent as to access to highways on new locations for special purposes, private means of access to which are non-existent since the proposed new roads are non-existent prior to dedication. If the dedication were restricted, no such rights of access would be created. The silence of the act may be provided for by an amendment withholding access rights from special roads on new location, or by judicial construction interpreting the dedication of a special road as impliedly withholding access rights. Otherwise, the dedication would imply access rights, although the purpose of special roads is to control access.

The statute in Texas provides: "No existing public street shall be converted into a freeway except with the consent of the owners of abutting lands or the purchase or condemnation of their right of access thereto: Provided, however, nothing herein shall be construed as requiring the consent of the owners of the abutting lands where a street is constructed, established or located for the first time as a new way for the use of vehicular or pedestrian traffic."

Sec. 3., Vernon's Ann. Rev. Civil Stat. of Tex. 1942, Vol. 2, Title 28, Art. 1085a, 1946 Cumulative Pocket Part.

The New York, Texas and Virginia statutes quoted above are broad enough to be construed judicially to authorize payment for existing easements of access owned by abutting landowners, but not to require payment where such easement was not in existence when the limited access road was laid out and established as a new highway. Of course, as in every problem of statutory construction, the cited statutory provisions would have to be construed in the light of other statutes of the States relating to the legal incidents of establishment of new highways; and, since judicial conservatism tends to construe statutes as implying common-law conditions, it would be desirable for the limited access legislation to be amended so as to provide that where a new highway is designed and laid out as an expressway no easement of access is retained by or conferred upon abutters, that no payment for extinguishing such easement shall be paid, and that only damages for the land taken shall be paid without including in said damages the loss of access to the new road, and the resulting enhancement of land values, especially in urban areas, that

would result if unlimited access to the new expressway were given. The Texas statute quoted above explicitly declares that it shall not be construed as giving an abutting landowner a right to object when access is denied him to a new expressway, or freeway. This construction should be followed even without an explicit legislative construction of the limited-access highway statutes which require payment for extinguishment of existing easements of access, for the whole point of the limited-access highway statutes in creating new highways is to deny access rights to abutters, and therefore such highway is never encumbered with a use in favor of the abutter, and there should be no legal necessity of buying up such alleged use, or right of access. However, since very frequently court decisions are unpredictable, it is considered advisable that legislation be drawn so that no possible doubt may remain on the question.

The form of the restriction as drafted in the conclusion to this argument and brief declines to give a property right or easement of access to new expressways from abutting land. It is an appropriate amendment to the types of statutes referred to above, negativing by legislative action the grant of access rights to expressways on new locations. By appropriate changes in language such provision might be applied to any new highway facility, whether an expressway, or simply a dangerous or congested section of a road. The legal means of accomplishing this needed result is thus quite simple in its terms, but far-reaching in its effects on highway transport.

CONCLUSION

The foregoing decisions recognize the power of private persons and of cities and States to dedicate land for highways under the conditions restricting the use of the new highway which were stipulated when the highway was established. Some of the conditions deny access by abutters on foot and by vehicle, some exclude access by abutters and others using vehicles and permit pedestrian use only. Other conditions exclude loaded vehicles, permit winter travel only, forbid turning to the left except at designated places, etc.

The point of interest is that the abutter receives or reserves no grant of unlimited access, and the cases have held he is entitled neither to damages nor an injunction, when access is restricted by the conditions of the original dedication of the highway. We repeat, this power to restrict access at the dedication of a highway, approved by public officers and courts accepting for the public the restricted dedication, affords a legal instrumentality for controlling access to expressways and limited access facilities without liability in damages to owners of abutting land; and the use of the power to restrict abutter's access to expressways and limited access facilities is in harmony with the long-established doctrines of easements exemplified in precedents heretofore presented. Traffic engineers and administrators may be interested in the decisions and authorities relied on to prove access to expressways and other limited access facilities on new locations may be restricted at dedication of the facilities without liability in damages.

In Delaware River Joint Toll Bridge Commission v. Colburn (1940), 310 U.S. 419, the Supreme Court of the United States held that the erection of a bridge embankment, on land purchased by the Commission adjoining the rear of property owned by respondents whose front extended to a public street, which embankment crossed and required the closing of certain streets in the neighborhood not immediately adjacent to the respondents' land, gave the abutters, the respondents, no cause of action in absence of a statute imposing liability for consequential damages inflicted by erection of structures wholly on land of the bridge commission acquired by purchase or condemnation. The same doctrine by permitting free use of land acquired for a special purpose without liability for inconvenience to abutters unless the law by positive enactment imposes such liability, would

exclude a claim of damages by an abutter for being denied access to an expressway. An expressway shuts off access by abutters, and so does an elevated bridge approach. To give a cause of action because access is not given, although consequential, economic loss occurs, a special legislative act would be required, under this doctrine.

To establish a highway whose use is restricted (so as to prevent giving to abutters the right of unlimited access to the new road, and to avoid having to pay when no right of access is given), an express provision limiting the use of a highway may be inserted in the deed of land purchased, or in the statutes authorizing the opening of new highways and condemnation therefor. The statutes of such States as New York and Virginia upon the establishment of limited access roads authorize payment for existing easements, and the law of New York expressly forbids creation of liability not already existing by law. These statutes may be applied to the case of a new highway dedicated from the beginning as a limited access highway, and payment would not be required for taking the abutter's right of access, since no such right was ever given, under such construction. To avoid the labor of explaining the analysis of abutter's easements in existing highways and the legal basis thereof, it would be advisable to amend the limited access statutes by adding a clause that the new highways established thereunder shall not be subject to access by abutters, except at points designated by the highway authorities, and damages shall not be allowed because unlimited access is not given, but only damage for land actually taken shall be paid, and the basis of value for such payment shall not include the enhanced value of land having access to the new highway but only the value of the land with such access rights and economic utility as existed prior to establishment of the new highway.

Where existing statutes do not protect the public from liability for not giving access to the owners of land that abuts on new expressways on lands upon which no highway previously existed such statutes should be appropriately amended to safeguard the interests of the public in this respect. It is suggested, therefore, that the State highway departments take cognizance of this important matter so that their legal advisers may consider and determine whether the existing statutes of their States should be amended. Also, it is suggested that any new legislation to authorize the construction of expressways in any State not now having such legislation should include appropriate provision for the protection of the public from liability for not giving access to the owners of land that abuts on such new expressways on lands upon which no highway previously existed. Such provision, whether for an amendment of existing legislation or as part of new legislation, with appropriate changes in language to insure consistency of terminology and purpose, should be, in substance, about as follows:

No easement of access to or from expressways (or like limited access facilities) constructed on locations to which access rights have not existed previously shall be created for the benefit of abutting land by the dedication of such expressways (or other like facilities) pursuant to the statutes applicable thereto except at such controlled points as shall be approved in writing or established for access by the agency having administrative control of such expressways (or other facilities), and the owners of such abutting land shall not be entitled to receive any compensation for not being given access to or from such expressways (or other like facilities) at other than such controlled points.[4] In determining the compensa-

[4]In consequence of not creating a property right of access no damages are due when enjoyment of access is denied. Sauer v. N.Y., supra p. 44, Cf. Purdon's Pa. Stat. Ann., 1942, (Perm. Ed.), Tit. 36, Ch. 1A, Sections 670-206--670-208, providing, "No person shall be entitled to recover any damages for any buildings or improvements . . . placed . . . within the ultimate widths" of pre-empted areas. Under the Pennsylvania act no damages are due because a property right at the specified location was not created, and could not be under the said legislation.

tion to be paid for taking any land or interest therein for such expressways (or other like facilities) the value of the land or interest therein taken and the diminished value of land from which land taken has been severed, if any, shall constitute full compensation, without any allowance for not having access to or from such expressways (or other like facilities) at other than such controlled points.

In States wherein only easements are acquired for highways, courts having jurisdiction over eminent domain proceedings should be empowered to take and award such an estate, or interest less than the fee, as will give the State the right of possession and use of lands condemned for expressways, or other limited access facilities, and exclude access thereto from abutting land except at controlled points approved in writing or established by the agency of the State in control of such expressways, or other like facilities. [5]

The central point of this argument relates to the dedication and establishment of highways subject to restriction of access by abutters to controlled points provided for that purpose. Such restricted dedication requires that the State have, through its agencies or political subdivisions, a right to possession and use of the land on which expressways are to be constructed. Likewise, voluntary conveyances should include the right of possession and use of the land conveyed together with a limitation of access by the abutter to such controlled points as may be provided for that purpose. To enable the State to dedicate a highway of any kind at a new location subject to a prohibition of access from abutting land, the State must have a right to the exclusive possession of the land to be dedicated, and the officers of the State who are authorized to dedicate a new highway must be given power to impose the restriction and must impose it in fact. The process will be clear from doubt if the restriction is imposed in explicit language, and is not left to implication. In States in which unrestricted highways are located on lands owned in fee simple by abutting landowners subject to rights of way in the general public in the nature of easements, in order for the State to have the ownership of an interest in the land which would enable it to impose a restriction against abutters' access thereto the State would have to acquire a right of exclusive possession. When such interest is acquired, then the State in dedicating the highway facility constructed on such land may reserve and restrict the expressway or other facility so that abutters have no access rights, and may dedicate the facility for free flowing traffic without interference from cross-currents of traffic. The purpose of the suggested statutory amendment, above, is to secure the requisite dominion over the land which would entitle the State to specify the uses to which it may be put when opened to the public.

The effect of the foregoing statutory amendments would be to prevent the vesting of the easement of access from abutting lands to expressways located on new routes or segments of routes. This is considered preferable to the procedure of vesting such rights and then extinguishing the same. It has been suggested that only nominal damages need be paid where the right is vested and then extinguished, but no assurance may be had that vested property rights of access to a highway have generally only nominal value. The contrary appears to be the case. (U. S. v. Welch (1909) U. S. Sup. Ct. 217 U. S. 332, 54 L. Ed. 787, per Holmes; Re West Tenth St., Borough of Brooklyn v. West Tenth Street Realty Corp. (1935) N. Y. Ct. App., 196 N. E. 30, 98 A. L. R. 634; Town of Stamford v. Vuono (1928) Sup. Ct. of Errors of Conn., 143 Atl. 245.) If there exists an easement of access to a highway to be constructed in future and if such easement is a

[5] See Troy and B. R. R. Co. v. Potter (1896) 42 Vt. 265, 1 Am. Rep. 325; Atlanta and W. P. R. Co. v. Atlanta B. and A. R. Co. (1906) Sup. Ct. Ga., 54 S. E. 736; Midland Valley R. Co. v. Sutter (1928) C. C. A. 8th, 28 Fed. 2d 163, certiorari dismissed 280 U. S. 521; 155 A. L. R. 393, ann., holding the type of easement held by a railway company in its right of way gives exclusive possession as against abutting landowners.

property right which must be extinguished before an expressway can be established, then such easement would have to be paid for according to its value to the dominant tenement, just as other vested property rights whose actual enjoyment is in the future must be paid for. (See Sec. 233, Vol. 18, p. 867, "Eminent Domain," and "Life Tenants and Remaindermen," American Jurisprudence; Simes "Law of Future Interests" Sections 612, 613, 616 (d).) However, it is not believed that in law any easement of access exists prior to the dedication of a highway.[6] All that exists is the right of a landowner to go from one part of his land to another on which no highway has been constructed. All that is necessary in buying or condemning the land on which a limited access highway is to be placed is to secure a right to exclusive possession of the land. In no accurate use of language can this last be said to be an extinguishment of access rights to a highway, for such rights are created only when the highway is dedicated. All easements are the effects of grants, and the abutter's easement of access to a highway is no exception, since the effect has no existence prior to its cause. Questions relating to adverse use and possession of highways as expressways are outside the scope of this essay, but such adverse user would imply the rights in expressways as established and defined in the statutes and decisions of a State in which such expressway may be located.

Unless by judicial construction of statutes of the type set out above from Virginia, New York or Texas, or by express amendment of statutes authorizing establishment of expressways, access by abutters may be restricted so that there is given the abutter no vested legal right of access to new expressways, millions of dollars of highway funds will have to be paid to buy back the unearned increments accruing to owners of lands abutting on new expressways. Such a result is unconscionable. But recognition by judicial decision of the legal power of restricting the dedication of expressways so as to prevent the vesting of unlimited access rights in abutters, or the enactment of statutes expressly conferring such power of restricting access to expressways at dedication, and the reasonable use of this legal power will reduce the expense of building expressways to relieve traffic congestion and will promote all the economic and social interests which depend upon adequate highway systems. Thus the exercise of this legal power of restricting the dedication of rights of way for expressways is essential to the economical construction of adequate expressways and will promote a healthy economic and social life in all heavily populated parts of the United States.

[6] See pages 54-56 of the brief for decisions supporting this statement. See also the opinion of Mr. Wilkie Cunnyngham to the same effect, "The Limited Access Highway from a Lawyer's Viewpoint," (1948), 13 Mo. L. Rev. 19, 37-40.