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The Meaning of Highway Purpose

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by J. P. Holloway for John C. Vance, TRB Counsel for Legal Research, principal investigator, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control, as well as highway law in general. This report deals with the legal questions surrounding "antidiversion" provisions that preserve and limit the expenditure of specific funds to a "highway purpose." It includes legal authority relative thereto.

RESEARCH FINDINGS

Research findings are not to be confused with findings of the law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the statement above concerning loans of uncorrected draft copies of agency reports does not apply.*

The Meaning of Highway Purpose

By John P. Holloway

INTRODUCTION

Prior to the decade of the 1930's, highways that connected major cities on an interstate basis were either nonexistent or a connection of county roads, mostly unpaved, poorly graded, and ill-equipped for motor vehicle travel.

To remedy this situation, the several States enacted legislation im-

posing a tax on gasoline or other liquid motor fuel and a further tax on any license, registration fee, or other charge with respect to the operation of motor vehicles on the public highways. The revenue raised by the imposition of such taxes was then set aside for highway construction and maintenance. To insure that this revenue was not diverted to other uses, legislation was enacted, and frequently constitutional amendments adopted that earmarked such funds for the sole or exclusive purpose of construction. maintenance, and supervision of the public highways of the State. The language employed in these so-called "antidiversion" constitutional amendments differs somewhat from State to State, but their purpose is uniform—to preserve and limit expenditure of the funds for a "highway purpose."

Typical of the short form of these constitutional amendments is the one from Colorado which simply provides:

> Section 18. *License fees and excise taxes—use of.*—On and after July 1, 1935, the proceeds from the imposition of any license, registration fee or other charge with respect to the operation of any motor vehicle upon any public highway in this state and the proceeds from the imposition of any excise tax on gasoline or other liquid motor fuel shall, except costs of administration, be used exclusively for the construction, maintenance, and supervision of the public highways of this state.[1]

Where short, general type constitutional amendments such as this one are in effect, it is customary to enact enabling legislation to specify the specific sources of revenue, appropriate same for the designated use, and provide for apportionment between the State, counties, and municipalities. In Colorado, for example, the net revenue is defined by statute as being the amount derived from the specific taxes ". . . after paying refunds, costs of collection and expenses of administration."[2]

An appropriation is then made in the following language:

> 120–12–4. *Appropriation.*—All moneys now or hereafter in the highway users tax fund are appropriated for the acquisition of rights-of-way for, and the construction, engineering, safety, reconstruction, improvement, repair, maintenance, and administration of the state highway systems, the county highway systems, the city street systems, and other public roads and highways of the state in accordance with the provisions of this article.[3]

Frequently the constitutional amendment itself contains the specifics, thereby obviating the necessity for legislation and. incidentally, causing the expenditure thereof to be more rigidly delineated. Typical of such precise amendments is the one from the State of Washington which provides:

> § 40. All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:
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> (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
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> (b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;
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> (c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;
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> (d) Refunds authorized by law for taxes paid on motor vehicle fuels;
>
> (e) The cost of collection of any revenues described in this section:

> Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.[4]

Antidiversion clauses exist in the constitutions of 25 other states.[5] The purpose of this paper is to review all relevant case law from the decade of the 1920's to date to ascertain if the courts have remained consistent in their interpretation of the "highway purpose" concept. Cases involving definitions of "public purpose" or "public use," where a changing concept is, indeed, very evident, are outside the scope of this paper.[6]

USE OF FUNDS FOR PURPOSES DIRECTLY RELATED

The first group of cases are those which can be identified as involving an expenditure of highway funds for uses and purposes directly related to highway construction. These do not, however, involve use of funds for construction of the highways as such, but are closely related.

Distinction Between Expenditures Within the Highway System

In the early 1930's, the Supreme Court of Iowa was called upon on three separate occasions to determine *where* newly raised revenue could be expended—i.e., on what portion of the State's yet to be created highway system.[7] Thus, in *Harding v. Board of Supervisors of Osceola County,*[8] the Court held that the use of funds derived from the sale of a bond issue must be devoted to improvement of the "primary roads of the county" and that this, in turn, restricted the expenditure to those roads that were, in fact, so designated at the time of the bond election. In other words, the County Commissioners had to improve existing primary roads—they could not establish a primary road at a new location, even though they were authorized to make "changes in course." The Iowa Supreme Court then affirmed this ruling the following year in a case involving an identical fact situation.[9] The Oklahoma Supreme Court made a similar finding in *Wentz v. Dawson,*[10] except that the dispute arose between the County Commissioners and the newly created State Highway Commission. A number of similar cases were found wherein various political subdivisions of government (i.e., counties and municipalities) litigated the right of the newly created State departments of highways to expend gasoline tax revenues on so-called State highways.[11] In *Wallace v. Foster,*[12] which may be the "first" county versus municipality dispute over earmarked road funds, the Court precluded expenditure of funds raised for improvement of primary roads within cities and towns.

Expenditure for Purchase of Right-of-Way

One would think that one of the clearest cases of a legitimate expenditure of highway funds would be for the acquisition of right-of-way on which to construct the new highways. However, in *Waller v. Union County,*[13] a Kentucky Appeals Court held that right-of-way costs could not be paid out of the proceeds of a bond issue, thereby restricting the use of such proceeds to actual construction costs only. The Court noted that the legislature had wisely provided that no portion of the cost of acquiring any permanent right-of-way should be paid out of the State road fund, ". . . having the view, no doubt, probable extravagant judgments against the state in condemnation proceedings."[14] It should be noted in passing that in 1928, when the *Waller* case was decided, it was common practice to have the local unit of government, i.e., the city or county, acquire the right-of-way—it being assumed that they could do so cheaper. The court recognized this practice with obvious approval. The Montana Supreme Court, however, upheld the use of "state highway fund money" for purchasing right-of-way, notwithstanding the fact that federal legislation specifically precluded the use of federal funds for purchase of right-of-way.[15]

The absence of reported cases indicates that highway authorities, and their opponents, apparently conceded the validity of expenditure of highway funds for the acquisition of right-of-way, but in 1960, the question was resurrected with reference to acquisition of right-of-way in advance of its actual need. In one of the strongest cases upholding the validity of acquisition for future use, the Ohio Supreme Court in *State v. Ferguson* said:

> The planning and construction of highways is a long-term procedure. It is not an undertaking which can be planned and consummated on the spur of the moment. The development and construction of the superhighway system essential to the movement of modern traffic necessitate the planning of highways and the acquisition of rights of way far in advance of actual construction. To wait until there is a present actual need for construction purposes before acquiring the right of way is neither economical nor practical. With the mushrooming of metropolitan areas and the expansion of suburban living, it is not only necessary but essential that plans be developed and rights of way acquired far in advance of actual construction, not only to obviate the increase in costs due to the development of areas through which highways must pass but also to afford an opportunity for the planned development of the communities themselves.[16]

Expenditure for Roadside Rest and Vista Sites

Assuming that highways may be constructed on right-of-way acquired with highway funds, can incidental use be made of such right-of-way for such purposes as vista-points or roadside rest areas? A California Appellate Court has upheld such use,[17] but a Missouri Appellate Court has ruled to the contrary.[18] The land involved in the California case fronted Lake Tahoe and the California Court restricted the use for roadside rest purposes with this observation:

> The trial court did not hold, and we do not hold, that a highway purpose embraces use of the property for a campground or bathing beach. From observation, if not as a matter of judicial notice, roadside rest areas are signed, and no doubt should be policed to some extent, to forbid public use for camping and bathing. Any conversion of the area by the state into a campground or a public beach or any other extension of the public use beyond the limits of the roadside rest as defined by statute would, as we see it, constitute a taking by the state in the exercise of its power of eminent domain.[19]

In other words, the court *limited* the use to which the right-of-way could be put, under the specific language of the grant, to include a "vista-point" and "roadside rest," but precluded any extension beyond such use without requiring payment of additional compensation.

Expenditure to Pay Salaries and Expenses of Highway Personnel

A number of cases have been found wherein attacks were made upon the use of highway funds to pay the salaries and expenses of persons employed to carry out highway construction and maintenance duties.[20] Generally speaking, the courts have upheld as valid expenditures for such purposes.[21] Typical of the reasoning employed by the courts is the following from *Johnson v. Robinson:* [22]

> Where, however, the legislature by law confers authority and imposes duties on such body to be performed for the public good in the construction, maintenance, and supervision of public roads and bridges, a moral obligation arises, which clearly justifies the legislature, in the absence of constitutional restrictions, to provide for the payment for such service out of funds set apart by the legislature itself for the construction and maintenance of public roads and bridges. The services of such administrative personnel are as essential to the general scheme of constructing, maintaining and supervising public highways and bridges as is the material that goes into the work or the labor and machinery that applies it.[23]

Cases have been found, however, where travel and subsistence were

upheld to be payable only from general county accounts and could not be appropriated from county road funds.[24] A fee or salary for a consulting engineer to advise a committee has been upheld as constituting a valid expenditure of highway funds.[25]

Expenditure to Construct Buildings

As might be anticipated, challenges have been leveled against the expenditure of highway funds for construction of office buildings—usually headquarters for State Highway Departments. Without exception, the courts have upheld the expenditure of highway funds for such purposes.[26]

Expenditure for Purchase of Machinery

Although it would appear self-evident that the purchase of road-building machinery would constitute a valid expenditure of highway funds, the question was squarely presented for decision to the Supreme Court of Arkansas in 1928.[27] In upholding the expenditure, the Court said:

> It would be impossible to construct and maintain highways without machinery. And the evident purpose of the act appropriating funds to roads and highways in the county was that the roads and highways might be constructed and maintained, and this could not be done without the purchase of certain machinery. If this fund could not be used in buying machinery, it could not be used in buying material nor employing labor. It therefore appears to us that it was the intention of the legislature to authorize the expenditure of this fund in the construction and maintenance of roads of the county, and that to do this they might purchase whatever material or machinery was necessary to accomplish the purpose.[28]

Expenditure for Safety

Equally self-evident would appear to be expenditures to improve highway safety, but this too has been litigated in two Kentucky Appellate cases, one in 1941 [29] and the other in 1966.[30] In *Grauman v. Department of Highways*,[31] the Court held that the expenditures by the State Department of Highways for warning signals, danger signals, and road markers to promote the safety and convenience of the traveling public, was a legitimate expense properly chargeable to "construction and maintenance," as those words were used in the Kentucky anti-diversion constitutional provision.[32] In *Ward v. Louisville and Nashville Railroad Co.*,[33] it was argued that safety devices at railroad crossings were the responsibility of the railroad, and that any attempt to use highway funds for such purposes would be an unlawful diversion. In rejecting this argument, the Appellate Court said:

> To say that the law, whether statutory or common law, requires that the railroad give reasonable and timely warning of the approach of its trains to a public crossing is not to say that an electric signal and a safety gate are required. Neither is it to say that the Department, charged with responsibility for promoting highway safety, may not provide additional safeguards for the public at railroad crossings. The Departments' efforts are for the protection of the public in use of the highways. The fact that fewer accidents at grade crossings may diminish the exposure of the railroads to liability suits is merely a by-product, not the objective of this activity.
>
> In our view increased traffic safety is definitely a public project for which public funds may be expended. Incidental or collateral benefits which may accrue to the Railroad do not constitute a donation or a loan of credit to the Railroad by the Department within the purview of Section 177, Kentucky Constitution.[34]

Expenditure for Lighting and Structures

Illumination or lighting of highways (i.e., expenditure of highway funds for purchase of electrical energy therefor) has been upheld as a

valid expenditure,[35] as has the expenditure of such funds for construction of a bridge or culvert necessitated by a drainage district.[36] In responding to the argument that the culvert was not required by virtue of existing terrain or a natural watercourse, the Court simply stated:

> The mere fact that bridges or culverts are necessary and required because of the construction of a drain, rather than because of the presence of a regular water-course or rough spot in the terrain, would not, in our opinion, alter the fact that such bridges or culverts would be a part of the highway.[37]

USE OF FUNDS FOR PURPOSES INDIRECTLY RELATED

A few cases have been found where the use of highway funds was for a more indirect or remote highway purpose.

Expenditure for Purchase of Insurance

For example, use of such funds to pay premiums on a workman's compensation policy for highway department employees was held an improper charge upon such highway funds in a 1929 Oklahoma Supreme Court decision,[38] but the Washington Supreme Court upheld the validity of expenditure of highway funds to purchase marine insurance on ferry boats operated by the county.[39] The justification for the latter expenditure was the special hazard incidental to operation of a ferry boat service that would enable repair or replacement of the vessels in the event of loss through fire or hazards of navigation.

Expenditure for Advertising

Somewhat more remote, but still related, is the question of expenditure of highway funds for advertising purposes. An Appellate Court in Kentucky upheld the validity of expenditure by the highway department for publication and distribution of road maps, booklets, photographs, and advertisements of State highways in national magazines,[40] but the Idaho Supreme Court reached a different result when the Legislature sought to appropriate money from the highway fund ". . . for the purpose of advertising the highways of the State of Idaho and encouraging travel thereon. . . ."[41] It was argued that advertising the State highways by publication and distribution of road maps, booklets, photographs, or other means falls within the terms "maintenance and administration" and that such advertising would increase the revenue of the highway fund and, therefore, should be permitted. The Idaho Constitution, Section 17, Article VII, stated that the funds shall be used exclusively for the construction, repair, maintenance, and traffic supervision of the public highways of this State. It further permitted necessary costs of collection and administration. The Court held that advertising the State highways and performing other duties of the Department of Commerce and Development did not come within the meaning of the words "administration" or "maintenance," stating that "administration" and "maintenance" cannot be construed to warrant an appropriation from the highway fund wholly foreign to the purpose and wording of the Constitution.

USE OF FUNDS TO DEFRAY COST OF ADMINISTRATION

A significant body of case law has developed over the availability of highway funds to pay the costs and expenses incident to the collection of gasoline taxes and motor vehicle licensing.

The first case arose in 1929 when county authorities sought to use money from a road fund to pay current governmental expenses of the county for other county offices and functions. In *Ramage v. Folmar*,[42] the Alabama Supreme Court held that such expenses are obligations against the *general* fund of the county only, and that the road fund could not be charged with such expenses.

The State of Minnesota has generated four Supreme Court cases on this subject. In 1931, the Court held that an appropriation of monies

derived from the motor vehicle tax to defray the expenses of the motor vehicle division of the Secretary of State's office did not contravene and hence was not in violation of the constitutional antidiversion amendment.[43] Ten years later, however, the Minnesota Legislature sought to impose a flat administrative charge of 5 percent on all departments of government to help defray the expense of maintaining the offices of the Governor, the Secretary of State, the State Treasurer, the State Auditor, the Attorney General, the Department of Administration, the Public Examiner, the judiciary, and the legislature. The Court promptly held this act to be unconstitutional.[44] An identical conclusion was reached by the Supreme Court of Arkansas with reference to a 3 percent service charge enacted by the Arkansas Legislature in a 1954 case entitled *Young v. Clayton.*[45] However in 1943, and again in 1949, the Minnesota Supreme Court upheld transfers of highway funds to the general revenue fund to reimburse a division of State government for collecting gasoline taxes which, in turn, were used solely for the construction and maintenance of the public highways of the State.[46] The test employed was, did the amount transferred accurately reflect the actual expenditure for such purpose, or did it exceed the amount of expense properly attributable to highway matters? In a recent Idaho case, the Court held that even where a constitutional provision specifically authorized deduction for necessary costs of collection and administration, a county which may be performing the licensing function for the State cannot deduct its administrative expenses incident thereto unless specifically authorized by the legislature.[47]

USE OF FUNDS FOR REFUNDING BONDS

Recognizing the conservative nature of bond counsel (i.e., lawyers who specialize in advising financial institutions which broker and underwrite bond issues of the states and their political subdivisions and agencies) it is not surprising that a number of cases have reached the appellate level involving the right of highway authorities to borrow money, issue bonds or other certificates of indebtedness, and repay same from highway funds devoted to the exclusive use of the construction and maintenance of public highways. In other words, is the expenditure or pledge of these revenues an expenditure for a proper and valid "highway purpose"? Without exception, the courts have answered in the affirmative,[48] and have likewise upheld the use of such funds for the refunding of existing or current bond issues.[49] The courts have recognized that the funds must be used first to repay outstanding road and bridge bonds before they can be applied to a floating indebtedness against a county road fund.[50] The courts, however, are not unanimous as to the validity of expenditure of these funds for costs incident to the issuance of bonds. The Arkansas Supreme Court has approved the expenditure of highway funds for such purpose,[51] and so has the Oklahoma Supreme Court.[52] However, the Supreme Court of Ohio held that the words "other statutory highway purposes," appearing in the constitutional anti-diversion amendment, cannot be extended to comprehend payment of fees to the attorneys of a taxpayer who successfully blocked disbursement of monies appropriated by the General Assembly from the highway fund for costs of a preliminary study in connection with the contemplated construction of a parking garage.[53]

USE OF FUNDS FOR TURNPIKE CONSTRUCTION

A few cases have been decided (three in the early 1950's)[54] which involved the creation of turnpike authorities. Various attacks were leveled—all of which ultimately went to the question of use of earmarked highway funds for turnpike construction. The Supreme Court of Ohio, in *Kauer v. Defenbacher,*[55] upheld the use of highway funds for the study of a turnpike project. The Colorado Supreme Court upheld the use of highway funds as a back-up pledge to the tolls collected on the Boulder–Denver Turnpike, which was a State highway to be constructed and operated by the State Highway Department.[56] A different

result was reached, however, in Maine and Missouri,[57] but in both cases the Turnpike Authority was not a department of State government; in Missouri, the highway in question was not a State highway or even a part of the State highway system.

USE OF FUNDS TO REIMBURSE PRIVATE THIRD PERSONS

A separate and distinct category of cases has been decided that involve the use of highway funds to reimburse third persons in the private sectors. This category, in turn, can be further subdivided into those cases involving payment to third persons for breach of contract, payment to third persons for personal injuries sustained as the result of the alleged negligence of highway department employees, and payment to utility companies for the cost of relocating their utilities located within the right-of-way.

Expenditure for Breach of Contract

The oldest case decided in the "highway purpose" area was a breach of contract case. In *Sigwald v. State*,[58] a 1926 decision by the Supreme Court of South Dakota, a contractor sued for breach of contract claiming that he had sustained certain damages by virtue of being precluded by the State from surfacing certain roads; i.e., he was permitted to grade but was not allowed to surface. Legislation had created a fund that could be expended only in the laying out, marking, construction, or reconstruction of the public highways. The Constitution contained a prohibition against an appropriation of money except in pursuance of a "specific purpose" first made. The Court held that the monies available in the road and bridge fund had not been "specifically" appropriated for the purpose of paying damages arising from the breach of contract. Thus, although the Court did not have to construe the specific words "highway purpose," it arrived at the same result.

Another interesting case arose in 1933 when an employee of a highway contractor sought to attach money due and owing the contractor in the hands of the State.[59] The Court held that the warrants were not subject to attachment and that public funds raised for the construction of highways cannot be used to pay highway contractors' private debts. The case, incidentally, involved a wage claim.

A case that is difficult to reconcile, but consistent with *Sigwald v. State*,[60] is a 1943 decision of the Supreme Court of North Dakota, entitled *Griffis v. State*.[61] This was a typical contractor's overrun claim. The contractor claimed that he laid larger rock than the contract required, at the request of the field engineer, and that he was entitled to recover his extra costs. The Supreme Court denied his claim, pointing out that a constitutional provision limited appropriations to a "specific purpose first made," and stating that the statutory language limiting the use of the State highway expenditures to the "laying out, marking, construction or reconstruction of public highways forming the trunk highway system," was not broad enough to allow payment of damages for breach of contract. One might inquire if such funds would be unlawfully expended if the highway department had agreed with the contractor.

Expenditure for Personal Injuries and Other Damages

Personal injury lawyers representing persons injured as a result of the negligence of highway department employees have met with a uniformly negative judicial attitude when they sought to satisfy personal injury judgments from highway funds. The decisions are unanimous that such earmarked funds cannot be used for such purposes.[62] These cases recognize, however, that funds from other nonrestricted sources may be used to pay such personal injury judgments. The issue was settled as early as 1930 wherein the Supreme Court of Minnesota in *State ex rel. Wharton v. Babcock* [63] held:

> The people of the state desired better highways. They created a fund

> for the purpose of locating, building, improving and maintaining such highways. To protect and preserve that fund and make certain that it should be used only for the purposes stated, they placed in the article a specific limitation that the fund should be used solely for the purposes stated. The language is clear and limits the power of the legislature, as well as all other persons, in the use of the fund.
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> * * *
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> With the present trunk highway system and the rapid extension of state aid roads, the state will soon be in control of the major portion of all highways within its borders. If compensation is to be made, on moral grounds, for this class of damages, the trunk highway fund may soon be seriously depleted. With the extraordinary increase in motor traffic and accidents on highways, the increase of damages resulting from or ascribed to slight or serious defects of highways, or negligence of employees of the highway department, is readily foreseen. On moral grounds, there appears to be no valid reason why the state may not compensate also those suffering damage by reason of defects in or negligence in maintaining, county and township roads.[64]

The courts have likewise rejected use of such funds to pay claims for death of highway department employees [65] and to pay compensation, in the form of a special relief bill, to an automobile dealer for loss of business and business interruption through alleged trespass and negligence of agents in the service of the State during construction of a bridge.[66] Loss of business and business interruption are, of course, generally regarded as noncompensable. In this case, to wit, *Opinion of the Justices*,[67] the Supreme Judicial Court of Maine said:

> The constitution does not prohibit the legislature from doing in behalf of the state what a fine sense of justice and equity would dictate to an honorable individual. It does prohibit the legislature from doing in behalf of the state what only a sense of gratitude or charity might impel a generous individual to do.[68]

In observing that the automobile dealer might recover some, or all, of these damages in a proper condemnation proceeding, either initiated by the State or by the automobile dealer against the State, as an inverse condemnation, the Court stated:

> It is not within the bounds of legitimate legislation for the legislature to enact a special law or pass a resolve dispensing with the general law in a particular case and granting what must be deemed a privilege and indulgence to one person or corporation by way of exemption from the general law, statutory or common, leaving all other legal persons under the operation of such general law.[69]

Expenditure for Utility Relocation

Clearly the largest number of cases to be decided involving a construction of the words "highway purpose" concerns the validity of highway funds expenditure to utility companies, both public and private, required to relocate their utilities placed within highway rights-of-way when, or as, the highways are widened or otherwise improved.

Although a detailed discussion of utility relocation is a subject unto itself, and one which has already received extensive attention in recognized highway literature,[70] some background is essential to understand the rulings in the vast majority of jurisdictions that have passed on this issue.

In virtually every State of the union utility companies are authorized to locate their lines within public rights-of-way of streets and highways. In effect, they receive a free right-of-way for their particular utility, whether it be for water, sewer, electricity, gas, telephone, or liquid petroleum. However, it was uniformly recognized at common law, and often by statute, that the utilities' use of the right-of-way was subordinate to the main or paramount use for vehicular travel, and, if the street or highway were widened or otherwise improved, the cost of the attendant relocation of the utility must be borne by the utility.

Typical of such pre-1956 Federal-Aid Highway Act decisions is

Southern Bell Tel. and Tel. Co. v. Commonwealth,[71] wherein utilities had a legislative franchise to use public rights-of-way which contained a clause that such use was not to be such "so as to obstruct the same" [the highway]. The Court held that this language clearly recognized that the removal and relocation of poles and lines should be at the expense of the Telephone Company. The Court went on to note that aside from such express provisions of the grant, it thought there was a *clearly implied condition* that the utilities are required to remove and relocate their facilities when such removal and relocation are in the interest of public convenience or safety. Expressed another way, the New York Court of Appeals stated in *N.Y.C. Tunnel Authority v. Consolidated Edison:* [72]

> The "fundamental common law right applicable to franchises in streets" is that a utility company must relocate its facilities in the public streets when chanegs are required by public necessity. [Citations omitted.] "Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge." [Citations omitted.] All these cases are to the point that these public service corporations maintain their rights in the streets, subject to reasonable regulation and control, and are bound to relocate their structures at their own expense whenever the public health, safety, or convenience requires the change to be made.[73]

The expression "pre-1956 Federal-Aid Highway Act" is used advisedly, because after adoption of 1958 amendments to that Act by Congress, the vast majority of State courts passing on the question of reimbursement to utility companies departed from the established common law rule.

The pertinent portion of the Federal-Aid Highway Act of 1956, relating to relocation of utility facilities, namely, § 123, Title 23, U.S.C.A., with the 1958 amendments, provides:

> § 123. Relocation of utility facilities
> (a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. *Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.* Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.
> (b) The term "utility," for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.
> (c) The term "cost of relocation," for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility. (Emphasis added.)

The italicized language, of course, is at the heart of the problem. The Congress authorized use of federal funds for utility relocation—90 percent on the Interstate System—*only if* such payment did not violate the "law of the state." The words "law of the state" obviously include the common law, so the utility companies, anxious to be reimbursed for something they formerly had to pay themselves, were successful in securing legislation in a number of State legislatures which required highway departments to reimburse them for relocation on the Interstate System, at least to the extent that federal funds were available. Of the sixteen reported appellate cases decided after passage of the 1956 Federal-Aid Highway Act, thirteen have found such state acts

constitutional and thus not in violation of anti-diversion provisions,[74] and only three have held such acts to be invalid.[75]

The central reasoning employed by the courts upholding the validity of State legislation providing for relocation reimbursement to utilities is that the legislature may modify the common law, and in these cases provide compensation, even though same may not have been required at common law, and even though the State may validly use its police power, without payment of compensation, to require relocation. As such relocation is associated with the building of a highway, it is clearly an expenditure for a "public purpose" or "public use" and hence valid and within legislative discretion. Thus far, this reasoning does not do injustice to traditional legal thinking in the field of highway law, but when these courts are called upon to decide whether such expenditures are for "highway purposes," the reasoning employed becomes somewhat less convincing. While most of the decisions labor the point (i.e., engage in lengthy debate to the effect that utilities have a property right in, and to, the right-of-way as a secondary user, and thus are entitled to be compensated—if the legislature so decides—and hence such expenditures are for valid "highway purposes") some are quite candid in their admissions that the existence of federal funds is rather persuasive. For example, in *Pack v. Southern Bell Tel. and Tel.*,[76] the Tennessee Court said:

> This federal legislation offering to pay ninety percent of the cost of relocating utilities has caused a number of our sister states to likewise enact legislation *to take advantage of these funds*.[77] (Emphasis added.)

The Supreme Courts of Washington, Idaho, and Maine [78] have refused to be moved by the existence of federal funds, but the Maine Supreme Court [79] in so doing, observed that if the legislature wanted to use other State revenue to reimburse utility companies for relocation, the expenditure would be valid.

Thus, the minority rule reflects the view that payment of utility relocation costs to private utility companies from highway user funds is an assault upon those funds for nonhighway purposes. Justification can be found to reimburse publicly owned utilities located within rights-of-way, and privately or publicly owned utilities located adjacent to, but not within, public rights-of-way. Colorado, for example, has enacted legislation to reimburse in such limited cases.[80]

USE OF FUNDS TO REIMBURSE PUBLIC THIRD PERSONS—SPECIAL IMPROVEMENT DISTRICTS AND SALES TAX

A few cases have been found where payment of highway user funds was to be made to public third parties. The Supreme Courts of Montana and Kansas recently held that the real property of the State highway departments could be included within special improvement districts and that the assessment thereto could be paid from highway user tax funds and would not constitute an unlawful diversion of such funds.[81] The special benefits that would incur to the highway property fully justified the payments of the assessment from earmarked funds, the courts reasoned.

In the recent case of *Hoene v. Jamieson*,[82] the Minnesota Supreme Court invalidated a state sales tax on direct purchases by the highway department as constituting an unlawful diversion of highway funds, but upheld the tax as to purchases by highway department contractors.

USE OF FUNDS TO SUPPORT OTHER FORMS OF TRANSPORTATION

Can earmarked highway funds be used to underwrite or support other forms of transportation? Cases have been decided where canals have been included within the definition of "highways" and therefore highway funds were properly expended in the repair and maintenance of canals.[83] To like effect, a ferry system maintained by a state has been recognized as an extension of a highway.[84]

However, when one extends the definition of highway to other forms

of *ground transportation,* the courts, in the only two reported cases found, have interpreted highways very literally.[85] Thus, in *In re Opinion of Justices,*[86] interrogatories were submitted by the Massachusetts Senate to the Supreme Judicial Court to inquire if highway revenue funds could be used for the construction of a mass transit system. In rejecting the use of highway funds for such use, the Court held:

> Applying these tests in the present instance, we cannot believe that when the people adopted art. 78 of the Amendments and accepted the words "public highways and bridges" and "highway" contained therein, they understood those words as comprehending subways, tunnels, viaducts, elevated structures and rapid transit extensions which were designed exclusively for the use of a railway for operating its cars, and which had never been laid out, constructed or paid for as in the case of *ordinary highways.* To include these structures within the meaning of the word "public highways and bridges" and "highway" would not give to those words "their natural and obvious sense according to common and approved usage." On the contrary, it would give to them an unusual or more or less figurative meaning which would never occur to a voter in the polling booth.
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> * * *
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> Neither can we think that the fact that the subways, tunnels, viaducts, elevated structures, and rapid transit extensions are for the most part located under or above public ways, and that their use materially contributes to reduce traffic on the surface of the ways, would cause the voting public to regard these structures as in themselves highways or parts of highways upon which the Highway Fund could be expended under art. 78 of the Amendments.
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> * * *
>
> The public, a large proportion of which had contributed to the fund, cannot be thought to have been ignorant of its existence and general purposes. The conclusion is irresistible that the people of the commonwealth in adopting article 78 of the Amendments intended to make sure that the moneys exacted from owners of *motor vehicles* should be used solely for the purpose of highways and bridges for the use of such vehicles and could not have supposed that the highways referred to in the Amendment would include structures which were adopted exclusively for use by the cars in the Metropolitan Transit Authority and *of which motor vehicles could make no use.*[87] (Emphasis added.)

Probably the most significant case involving use of highway funds for other forms of transportation is *State of Washington v. Slavin* [88] wherein a declaratory judgment was sought to determine the constitutionality of a motor vehicle fund appropriation for studies incident to preparation of a public transportation plan for the City of Seattle. The exact language in the appropriation act was as follows:

> Motor Vehicle Fund Appropriation to assist metropolitan municipal corporations to make the planning, engineering, financial and feasibility studies incident to the preparation of a comprehensive public transportation plan; it is the intent of the legislature, in providing for these studies, to promote future savings in the construction, reconstruction, repair and betterment of public highways, county roads, bridges, and city streets.[89]

The Court in a six to three decision held the act unconstitutional with the following observations:

> Applying these principles and rules to the question before us, we find that the constitutional provision in question is free of ambiguity. In words of plain and commonly understood meaning, it provides that the revenues derived from motor vehicle licenses and excise taxes on fuel, as well as other state revenue intended to be used for highway purposes, shall be paid into a special fund to be used exclusively for *highway* purposes. Lest that term be too narrowly construed, the people have defined its scope in the succeeding subparagraphs (a) through (c). If there were any doubt that the funds were intended to be used exclusively for ways open to the public for motor vehicular traffic, these clarifying provisions should remove them. Bridges and ferries, which

> might not ordinarily be considered highways, are expressly included because they are a part of such highways; that is to say, motor vehicular traffic must use them in crossing rivers or bodies of water. Roads and streets are expressly included, thus removing any doubt that they come within the definition of highways. Expenses of administration, of construction, reconstruction, maintenance, repairs and betterment are expressly included. But all of the purposes which are listed pertain to highways, roads and streets, all of which are by nature adapted and dedicated to use by operators of motor vehicles, both public and private, and none of them pertain to other modes of transportation, such as railways, waterways, or airways. Nor is there any authorization for the expenditure of these funds for the purchase or maintenance of any type of vehicle for public transportation purposes.[90]
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> * * *
>
> What is a public transportation system? It is not a "way" at all, but is a number of buses, trains, or other carriers each holding a number of passengers, which may travel upon the highways or may travel upon rails or water, or through the air, and which are owned and operated, either publicly or privately, for the transportation of the public. The mere fact that these vehicles may travel over the highways, or that, as the appellant points out, may relieve the highways of vehicular traffic, does not make their construction, ownership, operation, or planning a highway purpose, within the meaning of the constitutional provision.[91]
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> * * *
>
> Also, taking money from the motor vehicle fund and spending it on public transportation does not benefit the highway system, however much it may benefit the people as a whole or alleviate transportation problems. It may be that the people of this state no longer desire to have the taxes which they pay on motor fuel and licensing spent exclusively on highways and would prefer that some or all of it be spent on public transportation or other purposes. If so, the means of expressing this intent is provided in the constitution and is not so cumbersome that it cannot be utilized with reasonable facility. But courts should never allow a change in public sentiment to influence them in giving a construction to a written constitution not warranted by the intention of the founders.[92]

The three dissenting justices urged a liberal versus a literal interpretation which would permit application of a "standard of benefit to the highway."[93]

If the Massachusetts and Washington rulings are followed, constitutional amendments will be required to enable highway funds to be used to finance other forms of transportation.

USE OF FUNDS FOR OTHER PUBLIC PURPOSES

The only question remaining is whether these earmarked funds may be used for other public purposes, related or unrelated, to highway purpose. The Supreme Court of New Jersey astutely observed that they may not be used to purchase voting machines;[94] the Ohio Supreme Court held that they may not be used to defray the cost of certain preliminary studies relative to the construction of a parking garage under the state house ground in Columbus;[95] and the Montana Supreme Court held that they could not be used to pay rental to a railroad company for use of a railroad bridge in view of the fact that the bridge, even though capable of handling vehicular traffic, was not a part of any public highway system.[96]

CONCLUSION

With the exception of the utility relocation cases, the inescapable conclusion is that the courts have consistently interpreted "highway purpose" in a literal manner, holding same inviolate for use of motor vehicle transportation.

FOOTNOTES

[1] COLO. CONST., art. X, § 18

[2] COLO. REV. STAT., ANN. Ch. 120-12-2 (1963).

[3] COLO. REV. STAT. ANN. 120-12-4 (Supp. 1965).

[4] WASH. CONST., art. II, § 40, 18th Amend.

[5] ALA. CONST., amendt. 93; ARIZ. CONST., art. 9, § 14; CALIF. CONST., art. XXVI; IDAHO CONST., art. VII, § 17; IOWA CONST., art. VII, § 8; KAN. CONST., art. XI, § 10; KY. CONST., § 230; LA. CONST., art. VI, § 22(c); MAINE CONST., art. IX, § 19; MASS. CONST., amend. art. LXXVIII; MICH. CONST., art. IX, § 9; MINN. CONST., art. XVI, §§ 5, 6, 9, 10; MO. CONST., art. IV, § 30(b); MONT. CONST., art. XII, § 1 (b); NEV. CONST., art. IX, § 5; N.H. CONST., P. II, art. 6a; N.D. CONST., art. 56; OHIO CONST., art. XII, § 5a; ORE. CONST., art. IX, § 3; PENN. CONST., art. VIII, § 11; S.D. CONST., art. XI, § 8; TEX. CONST. art. VIII, § 7-a; UTAH CONST., art. XIII, § 13; W. VA. CONST., art. VI, § 52; WYO. CONST., art. XV, § 16.

[6] For a detailed discussion of this subject, see Holloway, *Supplemental Condemnation: A Discussion of the Principles of Excess and Substitute Condemnation,* National Cooperative Highway Research Program, Research Results Digest 42 (1972).

[7] Scharnberg v. Iowa State Highway Comm., 214 Iowa 1041, 243 N.W. 334 (1932); Wallace v. Foster, 213 Iowa 1151, 241 N.W. 9 (1932); Harding v. Board of Sup'rs of Osceola County, 213 Iowa 560, 237 N.W. 625 (1931).

[8] Harding v. Board of Sup'rs of Osceola County, 213 Iowa 560, 237 N.W. 625 (1931).

[9] Scharnberg v. Iowa State Highway Comm., 214 Iowa 1041, 243 N.W. 334 (1932).

[10] Wentz v. Dawson, 149 Okla. 94, 299 P. 493 (1931).

[11] State *ex rel.* McMullen v. State Highway Comm., 139 Kan. 858, 33 P.2d 324 (1934); State *ex rel.* Smith, Attorney General v. State Highway Comm., 132 Kan. 327, 295 P. 986 (1931); State Highway Comm. v. Gulley, 167 Miss. 63, 145 So. 351 (1933); Charleston Transit Co. v. Condry, 140 W. Va. 651, 86 S.E.2d 391 (1955).

[12] Wallace v. Foster, 213 Iowa 1151, 241 N.W. 9 (1932).

[13] Waller v. Union County, 223 Ky. 636, 4 S.W.2d 414 (1928).

[14] *Id.* at 415.

[15] *State ex rel.* McMaster v. District Court, 80 Mont. 228, 260 P. 134 (1927).

[16] State v. Ferguson, 170 Ohio St. 450, 166 N.E. 2d 365, 374 (1960).

[17] Norris v. State, 261 Cal. App. 2d 41, 67 Cal. Rptr. 595 (1968).

[18] State *ex rel.* State Highway Comm. v. Pinkley, 474 S.W.2d 46 (Mo. App. 1971).

[19] 67 Cal. Rptr. at 600.

[20] Johnson v. Robinson, 238 Ala. 568, 192 So. 412 (1939); Lee v. Coleman, 63 Ariz. 45, 159 P.2d 603 (1945); Lawhorn v. Johnson, 196 Ark. 991, 120 S.W.2d 720 (1938); Helm v. Childers, 181 Okla. 535, 75 P.2d 398 (1938); Protest of St. Louis-San Francisco Ry. Company, 149 Okla. 53, 299 P. 190 (1931); Williams v. Cothron, 199 Tenn. 618, 288 S.W.2d 698 (1956); State *ex rel.* Hartley v. Clausen, 150 Wash. 20, 272 P. 22 (1928).

[21] Johnson v. Robinson, 238 Ala. 568, 192 So. 412 (1939); Lawhorn v. Johnson, 196 Ark. 991, 120 S.W.2d 720 (1938); Helm v. Childers, 181 Okla. 535, 75 P.2d 398 (1938); Williams v. Cothron, 199 Tenn. 618, 288 S.W.2d 698 (1956).

[22] Johnson v. Robinson, 338 Ala. 568, 192 So. 412 (1939).

[23] 192 So. at 416.

[24] Lee v. Coleman, 63 Ariz. 45, 159 P.2d 603 (1945); Protest of St. Louis-San Francisco Ry. Company, 149 Okla. 53, 299 P. 190 (1931).

[25] State *ex rel.* Hartley v. Clausen, 150 Wash. 20, 272 P. 22 (1928).

[26] Rich v. Williams, 81 Idaho 311, 341 P.2d 432 (1959); Guillot v. State Highway Comm. of Montana, 102 Mont. 149, 56 P.2d 1072 (1936); State *ex rel.* State Building Comm. v. Moore, 184 S.E.2d 94 (W. Va. 1971).

[27] Anderson v. American State Bank, 178 Ark. 652, 11 S.W.2d 444 (1928).

[28] 11 S.W.2d at 446.

[29] Grauman v. Department of Highways, 286 Ky. 850, 151 S.W.2d 1061 (1941).

[30] Ward v. Louisville and Nashville R.R. Co., 402 S.W.2d 98 (Ky. 1966).

[31] Grauman v. Department of Highways, 286 Ky. 850, 151 S.W.2d 1061 (1941).

[32] KY. CONST., § 179.

[33] Ward v. Louisville and Nashville R.R. Co., 402 S.W.2d 98 (Ky. 1966).

[34] 402 S.W.2d at 100.

[35] State v. Vogel, 108 Ohio App. 294, 161 N.E.2d 449 (1958).

[36] Brenna v. Hjelle, 161 N.W.2d 356 (N.D. 1968).

[37] 161 N.W.2d at 360.

[38] Leininger v. Minter, 139 Okla. 169, 281 P. 801 (1929).

[39] State *ex rel.* King County v. Murrow, 199 Wash. 685, 93 P.2d 304 (1939).

[40] Keck v. Manning, 213 Ky. 433, 231 S.W.2d 604 (1950).

[41] State v. Jonasson, 78 Idaho 205, 299 P.2d 755 (1956).

[42] Ramage, Parks & Co. v. Folmar, 219 Ala. 142, 121 So. 504 (1929).

[43] State *ex rel.* Holm v. King, 184 Minn. 250, 238 N.W. 334 (1931).

[44] Cory v. King, 209 Minn. 431, 296 N.W. 506 (1941).

[45] Young v. Clayton, 233 Ark. 1, 264 S.W.2d 41 (1954).

[46] Cory v. King, 214 Minn. 535, 8 N.W. 2d 614 (1943); Cory v. King, 227 Minn. 551, 35 N.W.2d 807 (1949).

[47] Williams v. Swensen, 93 Idaho 542, 467 P.2d 1 (1970).

[48] Johnson v. McDonald, 97 Colo. 1324, 49 P.2d 1017 (1935); State v. Florida State Improvement Comm., 160 Fla. 230, 34 So. 2d 443 (1948); Weilbrenner v. Commissioners of Baltimore County, 162 Md. 240, 159 A. 600 (1932); Ziegler v. Witherspoon, 331 Mich. 337, 49 N.W.2d 318 (1951); State *ex rel.* Syvertson v. Jones, 74 N.D. 465, 23 N.W.2d 54 (1946); State *ex rel.* Bugge v. Martin, 38 Wash. 2d 834, 232 P.2d 833 (1951); State *ex rel.* State Road Comm. v. O'Brien, 140 W. Va. 114, 82 S.E.2d 903 (1954).

[49] State v. State Board of Administration, 157 Fla. 360, 25 So. 2d 880 (1946); State v. Yelle, 61 Wash. 2d 28, 377 P.2d 466 (1962).

[50] Fiscal Court of Scott County v. Davidson, 259 Ky. 498, 82 S.W.2d 801 (1935).

[51] Page v. Paving Improvement Dist., 203 Ark. 657, 158 S.W.2d 905 (1942).

[52] Carter v. Miley, 187 Okla. 103 P.2d 933 (1940).

[53] Grandle v. Rhodes, 169 Ohio St. 77, 157 N.E.2d 336 (1959).

[54] Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950); Opinion of the Justices, 146 Me. 249, 80 A.2d 417 (1951); State *ex rel.* Kauer v. Defenbacher, 153 Ohio St. 268, 91 N.E.2d 512 (1950).

[55] State *ex rel.* Kauer v. Defenbacher, 153 Ohio St. 268, 91 N.E.2d 512 (1950).

[56] Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950).

[57] Opinion of the Justices, 146 Maine 249, 80 A.2d 417 (1951); Pohl v. State Highway Comm., 431 S.W.2d 99 (Mo. 1968).

[58] Sigwald v. State, 50 S.D. 37, 208 N.W. 162 (1926).

[59] Barker v. Hufty Rock Asphalt Company, 136 Kan. 834, 18 P.2d 568 (1933).

[60] Sigwald v. State, 50 S.D. 37, 208 N.W. 162 (1926).

[61] Griffis v. State, 11 N.W.2d 138 (N.D. 1943).

[62] State *ex rel.* Varnado v. Louisiana Highway Comm., 177 La. 1, 147 So. 361 (1933); Malard v. State, 194 So. 447 (La. App. 1939); State *ex rel.* Wharton v. Babcock, 181 Minn. 409, 232 N.W. 718 (1930); Automobile Club of Washington v. City of Seattle, 55 Wash. 2d 161, 346 P.2d 695 (1959).

[63] State *ex rel.* Wharton v. Babcock, 181 Minn. 409, 232 N.W. 718 (1930).

[64] 232 N.W. at 719.

[65] Hawks v. Bland, 156 Okla. 48, 9 P.2d 720 (1932).

[66] Opinion of the Justices, 157 Maine 104, 170 A.2d 647 (1961).

[67] *Id.*

[68] 170 A.2d at 651.

[69] 170 A.2d at 650.

[70] *Relocation of Public Utilities Due to Highway Improvement—An Analysis of Legal Aspects,* Highway Research Board, Special Report 21 (1955); *Relocation of Public Utilities: 1956-1966,* Highway Research Board, Special Report 91 (1966). See also, Note, *Constitutionality of State Payment to Relocate Utilities,* 38 NEB. L. REV. 553 (1959), and Annot., *Constitutionality of State legislation to reimburse public utilities for cost of relocating their facilities because of highway construction,*

conditioned upon federal reimbursement of the state under the terms of Federal-Aid Highway Act (23 U.S.C. § 123), 75 A.L.R.2d 419.

[71] Southern Bell Tel. & Tel. Co. v. Commonwealth, 266 S.W. 2d 308 (Ky. 1954).

[72] New York City Tunnel Auth. v. Consolidated Edison, 295 N.Y. 467, 68 N.E.2d 445 (1946).

[73] 68 N.E.2d at 448.

[74] State Highway Dept. v. Delaware Power & Light Co., 39 Del. Ch. Rep. 467, 167 A.2d 27 (1961); Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755 (1962); Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958); Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960); Opinion of the Justices, 101 N.H. 527, 132 A.2d 613 (1957); State *ex rel.* City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961); Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960); Dept. of Highways v. Pennsylvania Public Utility Comm., 185 Pa. Super. 1, 136 A.2d 473 (1957); Pack v. Southern Bell Tel. & Tel. Co., 215 Tenn. 503, 387 S.W.2d 789 (1965); State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960); State v. City of Dallas, 319 S.W.2d 767 (Tex. Civ. App. 1958); State Road Comm. of Utah v. Utah Power and Light Co., 10 Utah 2d 333, 353 P.2d 171 (1960); State v. Gainer, 149 W. Va. 740, 143 S.E. 2d 351 (1965). It is difficult to maintain a tabulation of states which permit reimbursement to utilities because of judicial vacillation. Compare, for example, State *ex rel.* City of Albuquerque v. Lavender, *supra,* which overruled State Highway Comm. v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007 (1958), and Pack v. Southern Bell Tel. & Tel. Co., *supra,* which apparently overruled State v. Southern Bell Tel. & Tel. Co., 204 Tenn. 207, 319 S.W.2d 90 (1958). The reasoning employed by these courts cannot, in the opinion of the author, be reconciled upon generally accepted constitutional principles and rules of construction.

[75] State of Idaho v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959); Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957); Washington State Highway Comm. v. Pacific Northwest Bell Tel. Co., 59 Wash. 2d 216, 367 P.2d 605 (1961). *See also* Mulkey v. Quillian, 213 Ga. 507, 100 S.E.2d 268 (1957), which held that the state could not lend money to its political subdivisions to relocate utilities.

[76] Pack v. Southern Bell Tel. & Tel. Co., 215 Tenn. 503, 387 S.W.2d 789 (1965).

[77] 387 S.W.2d at 791

[78] State of Idaho v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959); Opinion of the Justices, 152 Maine 449, 132 A.2d 440 (1957); Washington State Highway Comm. v. Pacific Northwest Bell Tel. Co., 59 Wash. 2d 216, 367 P.2d 605 (1961).

[79] Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957).

[80] COLO. REV. STAT. ANN., § 120-3-25 (Supp. 1965).

[81] State Highway Comm. v. City of Topeka, 193 Kan. 335, 393 P.2d 1008 (1964); State Highway Comm. v. West Great Falls Flood Control and Drainage Dist., 155 Mont. 157, 468 P.2d 753 (1970).

[82] Hoene v. Jamieson, 289 Minn. 1, 182 N.W.2d 834 (1971).

[83] City of Long Beach v. Payne, 3 Cal. 2d 184, 44 P.2d 305 (1935).

[84] *Supra* notes 4 and 39.

[85] *In re* Opinion of the Justices, 324 Mass. 746, 85 N.E.2d 761 (1949); State of Washington *ex rel.* O'Connell v. Slavin, 75 Wash. 2d 554, 452 P.2d 943 (1969).

[86] *In re* Opinion of the Justices, 324 Mass. 746, 85 N.E.2d 761 (1949).

[87] 85 N.E.2d at 763-764.

[88] State of Washington *ex rel.* O'Connell v. Slavin, 75 Wash. 2d 554, 452 P.2d 943 (1969).

[89] 452 P.2d at 944.

[90] 452 P.2d at 946.

[91] 452 P.2d at 947.

[92] 452 P.2d at 948.

[93] 452 P.2d at 949.

[94] Hudson County v. State House Comm., 130 N.J.L. 90, 31 A.2d 780 (1943).

[95] Grandle v. Rhodes, 166 Ohio St. 197, 140 N.E.2d 897 (1957).

[96] Sjostrum v. State Highway Comm., 124 Mont. 562, 228 P.2d 238 (1951).

APPLICATIONS

The foregoing research should prove helpful to highway administrators, their legal counsels, and right-of-way engineers on a subject of great importance, on which there has been little research. The report defines the limitations on expenditure of funds earmarked for highway purposes by state constitutions or provisions of statute law.

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