Highway Laws from the County Point of View

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

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

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

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

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

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

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

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

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

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

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

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

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

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