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Table of Contents

INTRODUCTION

The Federal Highway Program

J. E. SHERIDAN

We are extremely grateful to Norman A. Erbe, Attorney General of the State of Iowa, for permission to reprint his splendid brief embracing the highway laws of various states relating to the control in access roads. Mr. Erbe originally presented this in narrative form before the convention of the Iowa Title Association in May of this year. As is readily ascertainable, this is the result of a comprehensive study of various laws touching on the incidents of highway regulations. Additionally, we are privileged to carry the panel discussion of the American Right of Way Association Convention held in Chicago, May 16 and 17, dealing with "Title Companies and the Expanded Right of Way Problems".

Mailed with this June issue of TITLE NEWS are copies of procedural memoranda issued through the United States Department of Commerce, Bureau of Public Roads (21-4. 1, issued December 31, 1956; 21-4. 2, issued March 25, 1957). These Federal Policy and Procedure Instructions should be read in conjunction with the material in this issue of TITLE NEWS. Attention is called to Item 3 (5) of Policy and Procedure Memorandum 21-4. 2 dated March 25, 1957. From it, by way of emphasis, we quote:

"(5) Three copies of title evidence covering each property involved prepared in a form acceptable to the Department of Justice. Acceptable forms are described in Department of Justice Pamphlet, 'Regulations for the Preparation of Title Evidence in Land Acquisitions by the United States', copies of which may be obtained from any United States Attorney. Title evidence need not accompany the original submission but should be furnished as soon as practicable.

"b. Federal acquisition will not be undertaken until the State has developed its planning sufficiently to show to the satisfaction of the district engineer the effect of the proposed construction upon adjacent property, the treatment of access control in the area of Federal acquisition, and that appropriate arrangements have been made for maintenance and supervision over the land to be acquired and held in the name of the United States pending transfer of title and jurisdiction to the State or the proper subdivision thereof."

It is suggested that our members bring this quoted portion to the attention of officers of the Highway Department and the office of its legal division, plus the Office of the Attorney General within the members' jurisdiction. For mechanical reasons, these bulletins are not included within the covers of this issue of TITLE NEWS but are sent along as supplementary material.

There have been many times I have been inordinately proud of our membership. During the war years I was —and still am—thrilled over the fact that of over 300,000 land acquisitions by the Federal Government, we of the American Title Assocation handled a tremendously high percent—all with honor to ourselves, none with disgrace or dishonor.

I enjoyed a resurgence of that feeling at a convention held in Chicago, May 16-17. It was the Convention of the American Right of Way Association, their third annual national seminar. Attending were Right of Way men employed by the State Highway Department from all sections of the country, representatives from the Office of the Attorney General and/or attorneys employed directly in the Highway Department to handle land acquisitions, utility men interested in locations and relocations of public utilities in segments of the new highway. There were oil and gas men, electric utilities and other public utili-

ties men by the dozens at the convention. And there were about 15 or 20 title men in attendance.

The conference was called to discuss a myriad of problems posed by the 41,000 miles of highway construction which will tie in practically every city of the country with other metropolitan centers. As was stated many times by many speakers, never has there been such a program conceived and authorized; never, as one contemplates collateral projects, has there been such a vast series of projects which will embrace and include tens of thousands of new industrial, residential and community enterprises caused by and resulting from the new highway program.

There was one theme used by all speakers, including among others the following:

Honorable Bertram W. Tallamy,
Federal Highway Administrator
Washington, D.C.

Honorable C. W. Enfield, Chief Counsel
Bureau of Public Roads
Washington, D.C.

Dexter D. MacBride, National Secretary
Division of Highways
Sacramento, California

and scores of other speakers of national standing.

The one theme on which speaker after speaker dealt is covered by the word "trustee"; that we are all trustees of the funds of the public; that this definition applies beginning with the Planning Division of the State Highway Department, extends down to field engineers, to employees of the Legal Department of the State, and definitely includes the abstract and title company which renders its services in connection with the Acquisition Program.

Dexter MacBride went so far as to describe all of us as being, so to speak, Sir Galahads in pursuit of the Holy Grail. Could be. But my own observation (as a parenthetical side observation) is that probably we are more to be described as a bunch of Sir Galahads in hot pursuit of a bunch of Lady Guineveres. But to get back to the business in hand.

The American Title Assocation was represented, and well represented, at the Convention by a panel of four distinguished title men: (see page 39).

"Title Companies and the Expanded Right of Way Problems"
Panel:
William A. Thuma, Chief Title Officer,
Chicago Title & Trust Company
Chicago, Illinois
Arthur A. Anderson, President,
Snohomish County Title Company
Everett, Washington
Samuel J. Some, Counsel,
Title Guarantee and Trust Company
New York, New York
Moderator:
Daniel W. Rosencrans, Vice Pres.
Title Insurance and Trust Company
Los Angeles, California

This writer was privileged to sit with the panel.

Each speaker, to a greater or less degree, adopted the same general theme—trusteeship of the funds of the public in both the furnishing of evidencing of titles and in the handling of moneys of the public in cases where the transaction is closed in escrow by the title company.

Each speaker supported the statements made by many others during the Convention that the word, "adequacy" should be used by all having anything to do with the program—adequacy of everything, adequacy beginning with planning and adequacy extending right down through the work of the title man including sufficiency of evidencing of titles. Or stated another way, that the evidences of title be they in the form of an abstract or a title policy, should cover the waterfront completely—going sufficiently back into old titles to cover such things as outstanding mortgages, reverters, outstanding rights of way, outstanding easements, living trusts, etc.—these and the thousand and one other points in land titles which can encumber titles to the point there could be a defective action.

From the convention I came home thrilled about the entire program and

I now submit to our members the following:

A. That either direct or through your state title assocation, if one exists, you present to the Highway Program a proposal of adequacy of title evidencing. Perhaps where we have a state title association this can best be done by a committee of the state organization.

B. That each of us considers his own title company and/or law office as being quasi public in character on this particular Highway Program to the extent we have a public duty to render service of adequacy and promptness to the Highway Department.

C. "The laborer is worthy of his hire."

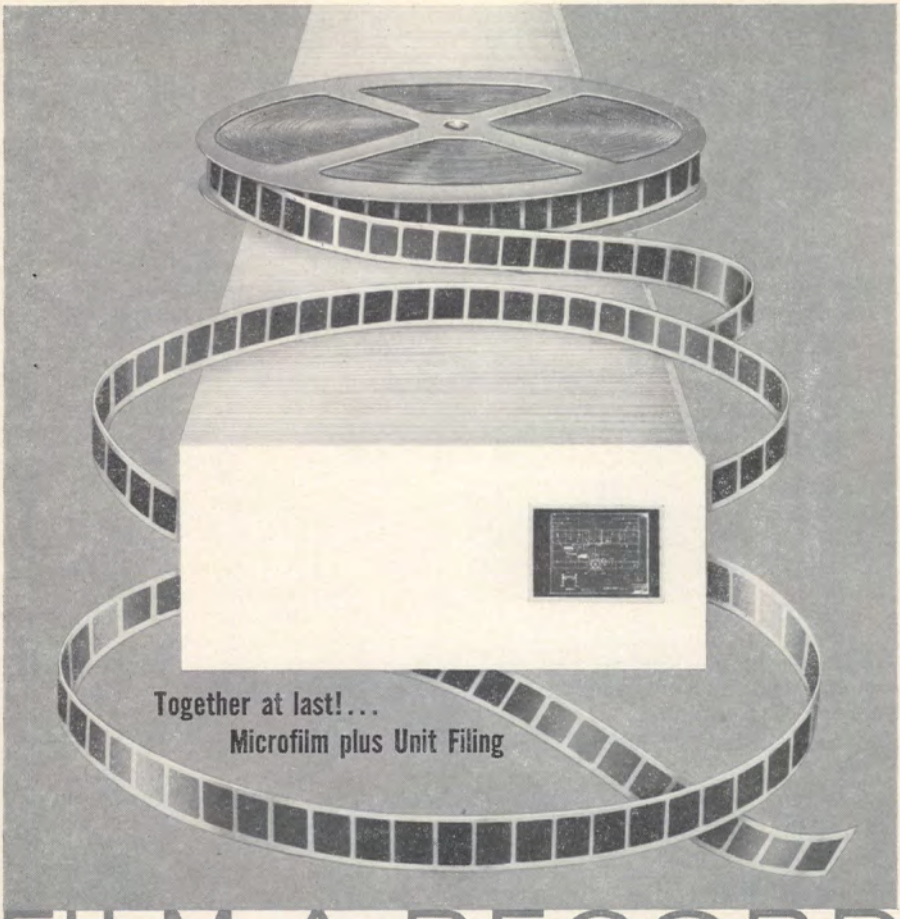
Which is another way of stating there be cooperation between the Highway Department and the title company looking to reasonable fees which will yield a profit to the member company; and that there be an orderly flow of orders from the Highway Department to the title company, followed by an orderly delivery of preliminary reports or preliminary abstracts or both to the Highway Department; and by the word "orderly" I mean that the Highway Department should endeavor to map a continuing flow of titles contiguous along the new highway, both sides.

D. A number of title men have interested themselves in this Highway Program to the extent of aiding in the organization of local chapters of the American Right of Way Association, and almost daily we hear of more associating themselves with local chapters.

Additional copies of this issue of TITLE NEWS, together with the supplementary material, are obtainable from National Headquarters. In anticipation of demand for such extra copies, we have printed a thousand in excess of our regular mailing list. You may order them for $1.00 each, delivered. Extra copies may be distributed to your State Highway Department, the Office of the Attorney General, Right-of-Way men, and any and all other agencies working on this vast highway program.

I am as enthusiastic as can be about our participation in this Highway Program; I am equally enthusiastic in my belief that, following the Chicago Convention of the American Right of Way Association, the Highway Department of the several states will wish to have the active support and cooperative work which we of the title profession can deliver.

Very truly yours,
J. E. Sheridan
Executive Vice President



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HIGHWAY LAWS RELATING TO CONTROLLED ACCESS ROADS

NORMAN A. ERBE, *Attorney General,*
State of Iowa, Des Moines, Iowa

I. Nature and Origin of the Right of Access.

"The courts have recognized that abutting property owners have certain private rights in existing streets and highways in addition to their right in common with the general public to use the street.[1] By far the most important of these private rights is the right of access to and from the highway. It has been described as an easement appurtenant to the abutting land,[2] which includes not merely the ability of the abutting landowner to enter and leave his premises by way of the highway, but also the right to have the premises accessible to patrons, clients, and customers.[3]" (February, 1951 Stanford Law Review, page 299.)

The United State Supreme Court described the condition, relative to the right of access, existent in the State court as follows:

"The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decision, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.[4]"

In the Stanford Law Review, supra, the problem is further discussed:

"The American courts have also shed little light on the origin of the right of access. They usually say, as did the California Supreme Court, 'The precise origin of that property right is somewhat obscure but it may be said generally to have arisen by court decision declaring that such right existed and recognizing it.'[5] This is certainly a frank and convenient statement, but hardly informative. Looking behind the cases, the right of access actually appears to have evolved from the courts' recognition of: (1) the *purpose* of a road, and (2) the *legal obligation* of the public to preserve the road for that purpose.

"*The purpose: a land service road.* — From earliest times, through the days of the horse and wagon and model-T Ford, highways were built and utilized primarily for the purpose of giving access to farms and homes and business establishments. This is the concept of the 'land service road.' Usually the landowner dedicated a portion of his land for the roadway and helped build it either through direct labor or assessments. Under such a state of affairs, each of the abutting landowners was considered to have the right of access to this road which was, after all, built to give him access. To deny this access would defeat the very purpose of the road. This land service road notion is reflected in those cases which give dam-

1. Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943); People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); 10 *McQuillin, Municipal Corporations* 647 (3d ed. 1950).
2. Rose v. California, 19 Cal.2d 713, 105 P.2d 302 (1942); Story v. New York Elevated R.R., 90 N.Y. 122 (1882).
3. Longnecker v. Witchita Ry. & Light Co., 80 Kan. 413, 102 Pac. 492 (1909); 10 *McQuillin, Muncpial Corporations* 671 (3d ed., Smith, 1950).
4. Sauer v. New York, 206 U.S. 536, 548 (1906).
5. Bacich v. Board of Control, 23 Cal.2d 343, 350, 144 P.2d 818, 823 (1943).

ages when a street is improved in a manner inconsistent with its use as a thoroughfare for abutting owners, but deny damages when access is not interfered with.[6]

"Recognition of the legal obligation. — Courts have recognized in a variety of ways, a legal obligation to protect 'land service.' Sometimes this recognition is found by recourse to the 'natural rights' theory that access is just one of the ownership and enjoyment of land.[7] In other cases the courts' explanations are based on the transaction by which the street is established.[8] Streets are generally opened by government subdivision of plats of land into streets and lots or by acquisition where no prior streets had been provided for.[9] Where a city subdivides and sells a lot to a private party, *Story v. New York Elevated R.R.*[10] held that the grantee acquires, as part of his grant, a private right that the street abutting the lot be kept as a public street. The court felt that since the value of the lot depended greatly on its relation to the street, any other holding would enable the city to derogate from its own grant. Courts also have felt that where a city acquires a street right of way, as by condemnation under authority of a statute, the municipality is bound by the statute to hold the land thus acquired for street purposes alone.[11]" (February, 1951 Stanford Law Review, pages 299-301.)

39 C.J.S., Highways, pp. 1080 and 1081:

"Regulation and restriction of rights. The rights of abutting owners are subordinate to the right of the public to proper use of the highway. Thus the exercise of the rights of abutting owners is subject to reasonable regulation and restriction for the purpose of providing reasonably safe passage for the public; but regulations or limitations cannot be sustained which unduly delimit or unreasonably intermeddle with the rights of the abutting owners. The mere disturbance of the rights of the abutting owners by the imposition of new uses on the highway consistent with highway purposes must be tolerated.

"Right of access. As stated in Corpus Juris, an abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. While entire access may not be cut off, an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway; if he has free and convenient access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint."

Wegner v. Kelly, 182 Iowa 259, 165 N.W. 449, was an action for damages against a telephone company based on their alleged negligent failure to have a telephone line strung high enough to clear the plaintiff and a team at a spot where plaintiff had opened a fence and was attempting to drive through. The spot was not an existing or previously used place of ingress and egress.

"This, according to our decisions, imposed no additional burden

6. Compare Eachus v. Los Angeles Ry., 103 Cal. 614, 37 Pac. 750 (1894), with Bigbey v. Nunan, 53 Cal. 403 (1879).
7. In re Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1943); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883); Rigney v. City of Chicago, 102 Ill. 64 (1882).
8. Eachus v. Los Angeles Ry, 103 Cal 614, 37 Pac 750 (1894)
9. It was also common for a private owner to subdivide a tract of land into lots and streets and then donate the streets to the public authorities. Such method produces no different results.
10. 90 N.Y. 122 (1882).
11. Lahr v. Metropolitan Elevated R.R., 104 N.Y. 268, 10 N.E. 528 (1887).

on the estate servient to the highway easement, but might not be done without in a measure interfering with access to the land where the poles are set, and, as the owner's title extends from the center of the earth to the dome of the skies, the wires are obstructions in a lesser degree. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, though entire access may not cut off. *McCann v. Clarke County,* 149 Iowa 13, 127 N.W. 1011, 36 L.R.A. (N.S.) 1115. If he has free and convenient access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint. *Ridgeway vs. Osceola,* 139 Iowa 590, 117 N.W. 947, See *Louden vs. Starr,* 171 Iowa 528, 154 N.W. 336."

Randall v. Christensen, 76 Iowa 169, 40 N.W. 703, was an action for an injunction to restrain supervisors from making a grade change and for damages for any injury sustained thereby. The action of trial court in refusing an injunction was affirmed. There was in effect a statute preventing the road supervisors from destroying or injuring the ingress or egress to any property, etc. The court said:

"The law was designated to protect the owner in the use and enjoyment of his property, and to prevent interference on the part of road supervisors, but it was not intended to prevent necessary improvements in the highways, where they can be made without material injury to adjacent property, even though some inconvenience might result to the owners of such property. It is evident in this case that no substantial right of the plaintiff is threatened. The inconvenience which can be caused by a ditch six inches in depth, furnished with proper approaches or coverings, is too insignificant to justify a court of equity in interfering. We cannot presume that the defendant will not use due care in providing a proper crossing, and, if such crossing is made, the purpose of the law will be accomplished, and the plaintiff will have no cause for complaint. The fact that plaintiff has for many years kept the street in front of his property in such condition as he desired it to be in is not material."

In *Breinig v. Allegheny County,* 2 A.2d 842, 848, 332 Pa. 474, the Court said:

"The abutter cannot make a business of his right of access in derogation of the rights of the traveling public. He is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform."

II. Regulation.

The rights of abutting owners are subordinate to the right of the public to proper use of the highway. Thus the exercise of the rights of abutting owners is subject to reasonable regulation and restriction for the purpose of providing reasonably safe passage for the public; but regulations or limitations cannot be sustained which unduly delimit or unreasonably intermeddle with the rights of the abutting owners. The mere disturbance of the rights of the abutting owners by the imposition of new uses on the highway consistent with highway purposes must be tolerated.

It may first be noted that traffic laws and laws pertaining to the construction and use of streets are uniformly upheld although they may indirectly affect access. Thus police power may be used to establish one-way

streets,[1] divided highways,[2] ordinances prohibiting U-turns or left turns,[3] and vehicle and weight laws.[4] Such interference with access as is caused by parking meters has also been held to be within the police power.[5] The "circuity of travel"[6] and "diversion of traffic"[7] cases would seem to cover, in principle, the establishment of service or frontage roads and the limitation of access to such roads from property that previously abutted upon and had access to a main highway under police power. But in at least one case this has been held to involve compensable damage in an action of eminent domain.[8]

The police power is adequate to support reasonable denial of a request for a new means of access to a street where alternate access exists to that street or some other street.[9] In one of the best documented cases clarifying this proposition, the Court said:

> "The absolute prohibition of driveways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained. But the public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will accord some measure of access and yet permit public travel with a minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interest. The abutter cannot make a business of his right of access in derogation of the rights of the traveling public. He is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform."[10]

It should be noted that in most of the "driveway cases," requests to cut curbs for driveways were denied under ordinances authorizing only the "regulation" of new driveways.[11]

The case of *Alexander Co. v. City of Owatonna*[12] represents at least one instance of record wherein the denial of a request for a driveway has been upheld under an ordinance authorizing regulation only. In going beyond the traditional limits of the "driveway cases," the Court referred to evidence in the record that the requested access would be dangerous to pedestrians using the sidewalk and then emphasized the fact that the state "can never relieve itself of the duty of providing for the safety of its citizens."[13] The Court further pointed out that the abutting property could be used without vehicular access and that the driveway was merely an incident to one of many possible business uses. Since zoning laws have the same effect and are upheld so long as some use remains, the Court rea-

1. Chissel v. Baltimore, 193 Md. 535, 69 Atl.2d 53 (1949); Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51 (1926).
2. People v. Thompson, 260 P.2d 658 (Cal. Dist. Ct. 1953); People v. Sayig, 101 Cal. App.2d 895, 226 P.2d 702 (1951); Fort Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187 (1938).
3. Jones Beach Blvd. Estate v. Moses, 268 N.Y. 362, 197 N.E. 313, 100 A.L.R. 487 (1935).
4. Wilbur v. City of Newton, 301 Mass. 97, 16 N.E.2d 86, 121 A.L.R. 570 (1938).
5. Morris v. City of Salem, 179 Ore. 666, 174 P.2d 192 (1946).
6. Hoyne v. Wurstner (Ohio) 63 N.E.2d 229; Andrews v. City of Marion (Ind.) 47 N.E.2d 968; Section IV of this paper.
7. Section V of this paper.
8. People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).
9. Farmers-Kissinger Market House Co. v. Reading, 310 Pa. 493, 165 Atl. 398 (1933); Town of Tilton v. Sharpe, 85 N.H. 138, 155 Atl. 44 (1931). See Breingi v. Allegheny County, 232 Pa. 474, 2 Atl.2d 842 (1938); State ex rel Gebelin v. Dept. of Highway, 200 La. 409, 8 So.2d 71. *Contra:* Brownlow v. O'Donoghue Bros., 276 Fed. 636, 22 A.L.R. 939 (App.D.C. 1921).
10. Breinig v. Allegheny County, 232 Pa. 474, 482, 2 Atl.2d 842, 847 (1938).
11. Metropolitan Dist. Comm'n v. Cataldo, 257 Mass. 38, 153 N.E. 328 (1926); *In re* Singer-Kaufman Realty Co., 196 N.Y. Supp. 480 (1922); Goodfellow Tire Co. V. Comm'r, 163 Mich. 249, 128 N.W. 410 (1910).
12. 222 Minn. 312, 24 N.W. 2d 244 (1946) (4-3 decision).
13. *Ibid.*, at 322, 24 N.W. 2d at 251.

soned that the police power should apply to both cases alike. Reliance was also placed on a broad analogy to cases upholding the validity of ordinances declaring certain businesses to be public nuisances within city limits. This was put forth by way of illustrating the point that police power often restricts the use of property rather than to suggest the possibility of vehicular access amounting to a nuisance.[14] In any event, the Court made it clear that regulating the use of ordinary property does not constitute a taking per se and left it to other courts to say why the right of access should be unique.

> "It is is well settled that the state may prevent access to the road at certain places where public safety requires it and thus may interfere with or even prevent access at a specific point and shut it off entirely. But this is not the damage to private property prohibited by the Constitution. Access at another point must be allowed even though it may be less convenient."[15]

As is well recognized today, the use of property may be regulated to a considerable extent under the police power. Zoning regulations are everywhere upheld so long as they are reasonable.[16] But when an attempt is made to apply the zoning principle to highways, most courts say this is going too far.[17] The reasons given are usually mere declarations that such action is arbitrary and unreasonable, and hence not a proper exercise of the police power. Roadside zoning has been allowed to a certain extent in some cases,[18] however, and it may well be that the prevailing judicial attitude will change as the novelty of the practice wears off. Access use restriction is not as severe a regulation of property as roadside zoning. Where only the access is restricted to residental purposes, there is nothing to prevent commercial use of the property if other access is available or if a frontage road is provided. For this reason, direct regulation of access use might be received more favorably by the courts than roadside zoning.

Closely akin to the ordinary zoning cases are those upholding building height restrictions[19] and billboard regulations.[20] Building and set-back lines may now be imposed under the police power[21] although in an earlier day eminent domain was required.[22] Sub-division regulations affecting, amongst other things, the number, location and manner of construction of approaches to a highway are also proper under the police power.[23] In all of such instances, as in zoning cases, only the regulation of restriction of future uses of property is permitted.

Ordinarily a presently existing property use cannot be directly cut

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14. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926), wherein Southerland, J., declared "the law of nuisance, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the (police) power."
15. King v. Stark County, 66 N.D. 467, 266 N.W. 654.
16. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); 8 McQUILLAN, MUNICIPAL CORPORATIONS sec. 25.05 (3rd ed. 1950); YOKELY, ZONING LAW AND PRACTICE sec. 20 (2d ed. 1953).
17. City of St. Louis v. Dorr, 145 Mo. 466, 41 S.W. 1094 (1897); *aff'd*, 46 S.W. 976 (1898); People v. Roberts, 90 Misc. 439, 153 N.Y. Supp. 143 (1915); *aff'd*. 171 App. Div. 890, 155 N.Y. Supp. 1133 (1915); State v. Fowler, 90 Fla. 155, 105 So. 733 (1925).
18. Jefferson County v. Timmel, 261 Wis. 39, 51 N.W. 2d 518 (1952); Kansas City v. Liebi, 298 Mo. 569, 252 S.W. 404 (1923); See Howden v. City of Savanah, 172 Ga. 838, 159 S.E. 401 (1931); Civllio v. New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923).
19. Welch v. Swassey, 214 U.S. 91 (1908). See Note, 8 A.L.R.2d 963 (1949).
20. Murphy v. Town of Westport, 131 Conn. 292, 40 Atl.2d 177, 156 A.L.R. 568 (1944); General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309, 72 A.L.R. 453 (1930).
21. Goreib v. Fox, 274 U.S. 603 (1927); Town of Windsor v. Whitney, 95 Conn. 357, 111 Atl. 354 (1920); McQUILLAN, MUNICIPAL CORPORATIONS secs. 24.541, 25.138 (3rd ed. 1950).
22. Appeal of White, 287 Pa. 259, 134 Atl. 409, 53 A.L.R. 1215 (1926); St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893).
23. Ayres v. Los Angeles, 34 Cal.2d 31, 207 P.2d 1, 11 A.L.R. 2d 503 (1949).

down under the police power unless it constitutes a nuisance,[24] where an existing use not prohibited at common law is declared to be a nuisance by ordinance or statute, the courts will determine for themselves whether it is a nuisance in fact.[25] This is largely a matter of deciding whether the use partakes sufficiently of the attributes of recognized nuisances, due regard being paid to precedent on the one hand and the legislative declaration on the other. It should be remembered, however, that to the extent a court holds to the proposition that access rights are subordinate to the rights of the traveling public, an existing use of access can be restricted whenever it impinges on those rights—and this without regard to whether or not the use constitutes a nuisance.

III. Land Use: Regulation and Damages.

It is necessary and desirable that the regulation of access to a highway vary according to the land use of the territory serviced by the road. This, the Iowa Highway Commission has done by providing four types of entrances. (See Section I of this paper.) The Commission has also provided in its regulations that the type of entrance having been established it cannot be changed without the approval of the Commission. There is case support for this position. It has been held that an easement of way limited to dwelling house purposes could not be used for commercial access to a hotel on the same property.[1] Similar results have been reached in the "farm crossing" cases where a way across railroad tracks has been reserved for farm purposes only.[2]

In the case of *Anderlik v. Iowa State Highway Commission,* the Court said:

> "It is true the abutting property in the Liddick case was in a city's corporate limits. But this does not afford a sound basis for distinguishing the cited case. The constitutional provision is of course equally applicable to property within and without corporate limits of a municipality and the above quoted decision is equally so applicable."

In *People v. LaMacchia* (1953) 41 Cal.2d 738; 264 P.2d 15, the State condemned certain land bordering an existing highway which was to be widended. Along each side of the freeway was to be constructed "cutting off access" except at limited openings. The Court held that any damages to abutting property must be measured by the market value of the land at the time it was taken. The test is not the value for a special purpose, but the fair market value of the land in view of all purposes to which it is naturally adapted. Evidence of what the owner intended to do with the land cannot be considered, for there can be no allowance for enhanced damage which an owner would suffer by reason of being prevented from carrying out a particular scheme of improvement, existing only in contemplation when the property was condemned.

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24. The leading American case holding retroactive zoning unconstitutional is Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930). For a discussion of the theroretical and practical limitations of the police power in the elmination of nonconforming uses see Comment, 39 Yale L.J. 735 (1930) and Comment, Wis. L. Rev. 685 (1951). The latter source, at page 689, quotes with approval from BASSETT, ZONING 112 (1936) as follows: "Theoretically the police power is broad enough to warrant the ousting of every nonconforming use, but the courts would rightly and sensibly find a method of preventing such a catastrophe."

25. *In re* Wilshire, 103 Fed. 620 (C.C.S.D. Cal. 1900); 39 Am. Jur., Nuisances sec. 13.

1. Nan v. Vockroth, 94 N.J. Eq. 511, 121 A.599 (1923).

2. Cornell-Andrews Smelting Co. v. Boston & P.R.R., 215 Mass. 381, 102 N.E. 625 (1913); See note 139 A.L.R 462

IV. Diversion of Traffic Doctrine

Claims of damages have been made to various courts based on the principal that the relocation of a highway so that the main traffic is diverted away from the abutting owner's place of business or premises due to the natural public desire to use a better or new road but in each instance the court has held that any damage to the premises or reduction in value of sale price resulting from the diversion of traffic is *damnum absque injuria.*

In the case of *State v. Linzell,* 126 N.E.2d 53, the plaintiffs in mandamus to require the director of highways to commence condemnation proceedings were the owners of the premises on which a gas station, store and restaurant had been constructed. Most of the plaintiff's business was from persons travelling on the highway and after the construction of a new highway in order to reach plaintiff's premises it was necessary to travel two lanes leading from the new highway across lands of persons other than the plaintiff to the old highway but the main flow of traffic by-passed plaintiff's premises. The Court held that mere circuity of travel does not of itself result in legal impairment of the right of ingress and egress to and from property where the result is but an inconvenience shared in common with the general public. The Court said,

> "It is now an established doctrine in most jurisdictions that such an owner has no right to the continuation or maintenance of the flow of traffic past his property. The diminution in the value of land occasioned by a public improvement that diverts the main flow of traffic from in front of one's premises is noncompensable. (Citing authorities). The change in the traffic flow in such a case is the result of the exercise of the police power or the incidental result of a lawful act, and is not the taking or damaging of a property right."

In the case of *Board of County Commissioners v. Slaughter,* 158 P.2d 859, there was a condemnation proceedings involving the taking of a strip of property for the purpose of relocating and straightening Highway U.S. 85. The abutting owner's property had been located on old U.S. 85 and was improved by a store, restaurant, residence, filling station and tourist cabin business. The relocation placed the new route on the rear of the abutting owner Slaughter's property approximately three-eighths of a mile from the improvements. It was agreed by the parties that the actual value of land taken is $10.00 per acre or the total sum of $136.32. However, the owner Slaughter contended that by reason of the rerouting of the highway, most of the vehicular traffic would be taken away from the old road and onto the new highway which was shorter and better improved, whereby her property will be damaged in the amount of $11,000. On trial in the court below the award to the owner Slaughter was $11,000.00 from which the board appealed. The point involved as stated by the Court was,

> "In an eminent domain proceeding may a reduction in market value of land not condemned (where the actual taking for the new right-of-way from a portion of such land has not disturbed or effected the value of the part remaining), which is caused solely by a diversion of traffic formerly passing in front of a place of business, be considered in determining the amount to be paid for the portion actually taken?

The Court came to the conclusion that inconvenience or circuity of travel or reduction in value of premises or loss of business caused by re-

routing or relocating a highway does not give rise to a legal damage and entitles the abutting owner to no damages. The Court also held that there is no distinction between cases of relocating a highway in which no property of the particular claimant is taken and cases in which a portion of the claimant's property is taken for relocation purposes. The Court said,

> "Obviously the land owner's claim must rest or fall upon a decision whether she has a vested right in the flow of public travel, which once came by her door, but for which now, for the convenience of the general public, a shorter and more convenient route has been opened and is being employed. We hold she has no such right.
>
> "The trial court erred in allowing damages claimed based upon diversion of traffic to the new highway."

In the case of *People v. Schultz Co.*, 268 P.2d 117, (Cal.), there was condemnation proceedings for construction of a freeway with service road to be constructed. The appellant landowner objected to an instruction on the basis that it failed to award damages for lack of access to the freeway. The Court said,

> "Appellant will not lose, but will keep its present access right until the improvement is constructed, at which time it will gain a new access right as good or better than the one it now possesses * * *. The jury's finding that such loss did not create any severance damages is amply supported by the evidence that the completion of the proposed outer highway would afford an adequate substitute for the present roadway."

Pruett v. Las Vegas Inc., 74 So.2d 807 (Ala.) was a suit to enjoin the relocation of a highway which would by-pass the complainant's motel business and property. The Court held that no grounds for injunction were presented for the reason that economic loss and business impairment of the plaintiff or economic or tax loss of the City of Montgomery, Alabama, were not grounds for preventing the relocation of a highway.

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1. See also:
Gardner v. Bailey (W.V.) 36 S.E.2d 215.
Nelson v. State Highway Board (Vt.) 1 A.2d 689.
Wilson v. Greenville County, South Carolina, 96 S.E. 301.
State v. Hoblitt (Montana), 288 P. 181.
Petition of Johnson (Pa.) 23 A.2d 880.
Greer v. City of Texarkana (Ark.) 147 S.W.2d 1004.
Attorney General v. Carrow (Arizona) 114 P.2d 896.
People v. Gianni, (Calif.) 20 P.2d 87.
City of Chicago v. Spoor (Ill.), 60 N.E. 540.
El Paso v. Sanfleder (Texas) 118 S.W.2d 950.
Robinette v. Price (Uath) 280 P. 736.
Richmond v. City of Hinton (W. Va.) 185 S.E. 411.
Heil v. Allegheny County (Pa.) 199 A. 341.
McMinn, et al. v. Anderson, et al. (Va.) 52 S.E.2d 67.

V. Circuity of Travel Doctrine.

Construction of a divided highway abutting a property does not legally damage the property even though the abutter may be required to travel an additional distance in his use of the highway in the same manner as any other user of the highway.[1]

In *Beckman v. State of California.* (1943) 64 C.A.2d 487, 149 P.2d 296, the property in question did not abut on the street on which an under-pass had been constructed, but on a connecting street. The Court ruled that the necessity for circuity of travel by reason of the construction on the street intersecting the street on which complainant's property fronts, in absence of anything barring access to said intersecting street, does not furnish a basis for recovery of damages. The Court pointed out that this was not a cul-de-sac situation.

> "Not every depreciation in the value of property by reason of a public improvement can be made the basis of an award of damages, (Citing authorities). For instance, diversion of traffic is not a proper element to be considered in computing damages. (Citing authorities). Regulations such as the prescribing of one-way traffic or the prohibiting of the left-hand turns may interfere to some extent with right of access without furnishing a basis for recovery of damages even by an abutting owner. See Note 100 A.L.R. 487, 491-493."

In the case of *Holman v. State,* 217 P.2d 448 (Calif.) the state constructed a dividing strip in the highway. The dividing strip was eight inches high and six feet wide down the center of the highway and its effect is described in the Court's opinion as follows:

> "That the building located on the premises of plaintiffs is especially designed for carrying on the business of servicing and repairing heavy highway trucks and equipment; but prior to the erection of said dividing strip, plaintiff's property was easily accessible by heavy truck traffic proceeding northerly on said highway but as a proximate result of the construction of such dividing strip, all reasonable access to plaintiff's property by such northbound traffic has been prevented and likewise, vehicles leaving plaintiff's make a left-hand turn and proceed in a northerly direction, resulting in the depreciation of the reasonable market value of plaintiff's property."

The Court then reviewed its earlier cases involving street constructions preventing access from abutting property because of change of grade, obstructions placed in the street or placing the abutting property on a dead-end street and noted that in such cases where,

> "it was held that compensation must be paid there was either physical injury to an owner's property itself or a physical impairment of access from the property to the street."
>
> "None of these cases involve the division of a highway into separate roadways by concrete island or division strips and are all factually different from the case at bar."

The Court states:

> "Damages resulting from the exercise of police power are not compensable. *Simpson v. City of Los Angeles,* 4 Cal. 2d 60, 47 P. 2d 474. It seems quite clear that the division of a highway is an

1. Lindley v. Oklahoma Turnpike Authority (Okla) 262 P.2d 159 City of Fort Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187 Annotation, 100 A.L.R. 491.
State v. Burk (Or.) 265 P.2d 789..
Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51. But see: People v. Ricciardi, (1943) 23 Cal.2d 390, 144 P.2d 799.

exercise of the police power being directly intended for public safety."

"The facts pleaded herein show that the highway upon which plaintiff's property abuts is not closed and that plaintiffs, once upon the highway to which they have free access, are in the same position and subject to the same police power regulations as every other member of the traveling public. Because of a police power regulation for the safety of traffic, they are, like all other travelers, subject to traffic regulations. They are liable to some circuity of travel in going from their property in a northerly direction. They are not inconvenienced whatever when traveling in a southerly direction from their property. The rerouting or diversion of traffic is a police power regulation and the incidental result of a lawful act and not the taking or damaging of a property right. *People vs. Ricciardi,* supra, 23 Cal.2d at page 399, 144 P.2d 799."

In *People v. Sayig,* 266 P.2d 702 (Calif.) the highway was a divided highway and the property owners in question upon entering the highway were required to proceed as on a one-way street in their particular cases from 500 to 1,000 feet to a point where there was cross-over where they could make a "U" turn and proceed in the opposite direction. The California court discussed two earlier cases which recognized damages deprivation of access but stated that those cases recognized that diversion of traffic or mere circuity of travel

"even where they result in impairment of value, are not compensable." * * *

"We also know that the state, under its police power, may regulate traffic without becoming liable for damages for impairment to business that may be adversely affected."

The Court in this case cites with approval and follows the rule of *Holman v. State,* supra, the Court said:

"We also know that mere relocation of a highway thus diverting traffic from the property does not legally damage the property. *Holloway vs. Purcell,* supra. We also know that the consideration of a divided highway in front of the property does not legally damage it. Holman case."

In *Brady v. Smith,* 79 S.E.2d 851 (W. Va.) the plaintiff sought an injunction restraining the defendant State Road Commission from building a center concrete island or median strip in front of plaintiff's property on highway U.S. 60 on which he conducted a motor vehicle repair garage, sales and service business. The construction of the proposed center strip nine inches high and twenty-four inches wide would require all east-bound traffic on U.S. 60 to proceed about three hundred feet beyond plaintiff alleged would greatly damage plaintiff's business. The temporary injunction granted by the trial court was dissolved and the bill of complaint dismissed. The Court said,

"Nor does the bill of complaint expressly or inferentially allege that the plaintiff has suffered, or will suffer, injury from the proposed construction of the center concrete island or median strip different in kind from that suffered by other property owners similarly situated."

In *Rose v. State,* 123 P.2d 505 (Calif.) there was involved a case of a construction of a viaduct which substantially impaired the adjoining landowner's right of access which the California court considered in the same light as the Iowa court decided the case of *Liddick vs. Council Bluffs.* But the Court said that depreciation in value of the plaintiff's property result-

ing from diversion of traffic was not a proper element of damage. The Court cited *People v. Gianni,* 20 P.2d 87 (Calif.) in which a small portion of land was taken for public highway purposes and the landowner contended that he was entitled to recover for not only that injury but the damages to his remaining land should be based upon the total depreciation in the value even though that depreciation was caused primarily by an admittedly noncompensable element of damage; that is, diversion of traffic. The Court, however, held that the test of damages must be limited to those which accrue by reason of the legal injury for which compensation was due. The Court said,

> "Many courts have indicated that the diminution of value in such cases cannot be based upon elements of damage for which the landowner is not entitled to recover. (Citing cases). This is particularly true insofar as diversion of traffic is concerned, even in states where the applicable rules do not correspond to those in this state and in situations where a taking of property is also involved. (Citing authorities.) While a few cases have permitted a consideration of the depreciation caused by diversion of traffic, they are contrary to the weight of authority. See 118 A.L.R. 921 et seq."

In the case of *Holloway v. Purcell,* 217 P.2d 665, the plaintiffs as taxpayers sought to enjoin the proposed relocation of a section of highway in the state of California. The Court recognized the necessity of payment in cases where access rights were destroyed but the Court stated with reference to relocation as follows:

> "The relocation of Route 3 and the construction of the Freeway may as plaintiffs assert, injure their business. They are not, however, deprived of rights of access as abutting owners, and the construction of the highway past their places of business gives them no vested right to insist that it remain there. 'Though appellants for the ensuing twenty-five years have enjoyed the benefits of a greater volume of traffic by their lands and business establishments, than may travel thereby after the new road is opened * * * they now insist upon an extention and perpetuation of those rights and advantages so that they may have a changeless road in a changing world. In our opinion, the * * * in a changing world. In our opinion, the * * * statute (does not) prevent the construction and inclusion in the state highway system of another nearby road deemed by appellees to be in the interest of state * * * though * * * the traffic to appellants' property may be diverted and incidental loss thereby occasioned.' (Citing authorities)."

None of the cases specified generally how long a circuity of travel is permitted under the police power without requiring the payment of damages but one case holds that five miles is not unreasonable. In the case of *Jones Beach Boulevard Estate v. Moses,* 197 N.E. 313, 100 A.L.R. 487, the abutting owner complained because a center dividing strip was placed on a heavily trafficked highway for the purpose of eliminating grade crossings and traffic lights and on which highway complete or "U" turns, except around designated plazas were prohibited and also left-turns were prohibited except in response to traffic direction signs. In order to proceed toward the left from his property the abutting owner was first required to travel five miles in the opposite direction in order to reach a turning place. The abutting owners' petition for an injunction preventing enforcement of such regulations was denied. The Court said,

> "The plaintiff once upon the highway, is treated no differently than is any other member of the traveling public."

The Court held that the right of access to the highway means a right to enter upon it but not to use it differently or in violation of the driving regulations imposed upon other users of the highway, adopted for the purpose of speeding up traffic and eliminating danger.

However in *Nichols v. the Commonwealth of Massachusetts* (1954) 331 Mass. 581; 121 N.E.2d 56, the Massachusetts Court found it necessary to award damages for injury to one's access even though it was shown that a circuitous means of travel was available to the petitioner in reaching the new highway. A Massachusetts statute was so worded and interpreted as to require payment for damages for loss of access, even when, evidently, an indirect means of access was present.

VI. Cul-de-sac Doctrine.

Stanford Law Review, February, 1951, Volume 3, Number 2, page 307, states the problems in this area as follows:

> "The states are sharply divided on the question of whether the owner of property abutting on a street turned into a cul-de-sac is entitled to compensation.[1] Some courts hold that the right of access extends in both directions to the next intersecting street.[2] This view only rejects the possibility of police power action, but redefines the historical extent of the right of access in order to accord with a feeling that the property owner should be compensated. The states taking this position limit compensation to owners on the first block. Owners of property in the next block are not entitled to compensation although their loss in dollars and cents is substantially the same. There is, however, considerable authority that even the owners on the first block are not entitled to compensation, either because the right of access has not been impaired, or because impairment has been accomplished through exercise of police power.[3] The latter view is more consistent with the underlying rationale of right of access."

In *New York, C. & St. L. R. Company v. Bucsi,* (1934) 128 Ohio State 134, 190 N.E. 562, the owner of property abutting on a certain street was held to suffer no damage when the City of Cleveland and the defendant railroad vacated one termini of this street for the purpose of constructing additional tracks, because he still had access to the system of streets via the remaining terminus. It should be noted that in this case as well as the other cul-de-sac cases to be mentioned, the property claimed to have been damaged did not abut on that part of the street which was vacated. The Court held that the legal status of the property owner fell within the category of *damnum absque injuria.*

A similar holding under somewhat parallel facts may be found in *Krebs et al v. Uhl et al* (1931) 160 Md. 584, 154 A. 131. A road on which complainant's property abutted was vacated at a dangerous railroad crossing thus cutting off complainant's prior route of travel to a village only a matter of a few hundred feet to the east. The present new road branches off from its former position at a point to the southwest of complainant's property, passes south of his property, crosses the railroad tracks by means of an overhead crossing, and rejoins the old road at a point east of the tracks and beyond much of the village. Complainant's property is now (by road travel) one-half to three-quarters of a mile distant. He attempts to recover inter alia

1. See cases cited in Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 (1943).
2. Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).
3. New York, C. & St. L.R.R. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562 (1934); Freeman v. City of Centralia 67 Wash. 142, 120 Pac. 886 (1912).

for the resulting cul-de-sac and loss of convenient access. In the words of the Court,

> "Owners of property along the highway near the crossing probably all suffer from the surrender of the public easement at that site. And it seems a loss which many who have customarily traveled that way must suffer in some degree. The surrender is made by officials empowered to act on behalf of all public, including those who, like the complainants, depend more or less upon the use of the crossing in their daily occupations. It could not be said that the property of any of these users, at least property not actually deprived of all access, is to be taken, unless it can be said that the the location of the public easement at that site gave them superimposed property rights against the public as a whole, and this we think it did not do. . . . their right has been only that secured to the public as a whole, even though by reason of the location of their properties it is of greater usefulness to them than to others of the public. The question under the Constitution is not one of comparative usefulness, or loss, to one property or the other from the shifting of the crossing, but one of taking private properties in doing it. And in the opinion of this Court, the mere surrender of the easement of crossing at the former site, whatever may be the inconvenience or loss resulting to owners of the nearby properties, cannot be regarded as a taking of these properties."

There seems to be no question but that, by means of its police power, a city may create one-way streets. Such action definitely restricts the direction of ingress to and egress from property abutting on such streets. Yet, it is generally held that there has been no compensable injury to abutting property owners. It has been urged that no distinction should be drawn in the resulting effects in creating a one-way street or a cul-de-sac. (It is realized that one-way streets are generally the result of the exercise of the police power where compensation need not be paid.)

In the City of *Lynchburg v. Peters* (1926) 145 Va. 1; 133 S.E. 674, it was held that the right of ingress and egress from and to his lot by an abutting landowner by way of the street is a private right, the taking of which must be compensated *only* if no other way of ingress and egress is left open.

The cases[4] cited so far were not involved with the creation of cul-de-sacs as a result of limited access facilities. However, since generally no reasonable basis can be offered to show why distinctions should be drawn between the factual situations giving rise to any cul-de-sacs (as a means of determining when damages should be paid), these cases may be considered of a comparable nature to the following examples.

A widely discussed cul-de-sac case is *Bacich v. The Board of Control of State of California* (1943) 23 C.2d 343; 144 P.2d 818 (also see 128 P.2d 191). Plaintiff brought action to recover damages to his property arising from, inter alia, the creation of a cul-de-sac. One of the two entrances to the street upon which plaintiff's property abutted was closed when a next-intersecting street was lowered fifty feet in the construction of a limited access way. The Court held that plaintiff's easement of access permitted him not only to get onto the street immediately in front of his property, but also to have access to the next-intersecting street in both directions. The Court said,

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4. See also: Buhl v. Port of St. Union Company (894), 98 Mich. 596, 57 N.W. 829; Glasgow v. City of St. Louis (1891), 107 Mo. 198, 17 S.W. 733.

"There is more than merely a diversion of traffic when a cul-de-sac is created. The ability to travel to and from property to the general system of streets in one direction is lost. One might imagine that many circumstances . . . in which recovery should not be logically applied, but we are here concerned with the particular facts of this case and do not purport to declare the law for all cases under all circumstances."

California had, prior to this case made an addition in the eminent domain clause in its constitution, (Article I, Section 14) of "or damaged" to the word "taken" indicating an intent to extend that clause to embrace additional situations. (The dissenting opinion of this case is often cited.)

See also *Schnider et al v. State of California* (1952) 38 C.2d 439, 241 P.2d 1, 43 A.L.R.2d 1068, wherein plaintiffs obtained a judgment for damages due for loss of access to a next-intersecting street.

VII. The Right to Light, Air and View.

An early Iowa case dealing with these problems is *Callahan v. City of Nevada,* 170 Iowa 719, 153 N.W. 188. In this case Court said:

"As the doctrine of ancient lights does not obtain in this state, and no property owner is compelled, when erecting his building, to afford an abutter either light or air, there is nothing in plaintiff's proposition that the areaway in question should not be closed because it deprives him of light in his basement. It is admitted, both in testimony and in argument, that plaintiff has ample ingress and egress to and from his lot by the other stairway, which also extends into a public street, and no reason exists for preserving to him the use of the other."

This case has often been cited and approved by the Court for the proposition that licenses or permits to use portions of a public street for private purposes are revocable; however, the above quoted section no longer reflects the law in the State of Iowa.[1] Both by statute and judicial decision these rights are now recognized.

Since the problem in regard to the rights of air, light, and view would be substantially similar to those discussed under right of access, no further discussion is necessary or given here but the reader is referred to the other sections of this paper.

VIII. Eminent Domain versus Police Power.

Is the control of access a compensable taking or is it a non compensable proper exercise of the police power of the State?

Two powers have been employed to restrict and limit access rights: one, the police power and the second, the power of eminent domain. The police power is the power of government to act in the furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, without incurring liability for the resulting injury to private individuals. Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation. Police power is the power to restrict a property right because it is *necessary.* Eminent domain is the power to appropriate a property right because it is *useful.* Whether it is the police power or eminent domain that is being exercised in a particular case is sometimes difficult to determine. This is in part due to the fact that it is extremely difficult to tell

1. Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267, and Chapter 148 Acts of the 56th G.A.

where the police power ends and the power of eminent domain begins. Some courts have suggested that the police power ends when the injury to the property owner in not being paid for his property is greater than the injury to the public in having to pay for the property. It is only by weighing and balancing the need for the property, the injury to the property owner, and the burden of compensation upon the public that it can be decided in any case whether a right ought to be taken without paying for it. Wherever the line be drawn, it is generally agreed that the answer does not depend on legal concepts, but rather upon economic and social considerations.

A. Where property abuts on Highway Prior to Construction or Reconstruction.

This is one facet of the case of *Iowa State Highway Commission v. Smith* recently submitted to the Iowa Supreme Court. Without attempting to anticipate the decision, I will outline the case and the position of each of the parties.

The action has been brought by the Commission against a property owner within the City of Des Moines, Iowa, asking for a declaratory judgment to establish and determine the following:

(1) That the limitations and restrictions placed upon the access to defendant's property by the Highway Commission and the City of Des Moines is not a "taking" and not compensable under the laws of Iowa.

(2) That the prohibition against crossings, left turns, and U turns across the center dividing line of said highway is not a "taking" and not compensable under the laws of Iowa.

The trial court found that the limitation placed on existing access is a "taking" which may be condemned under Chapter 148 of the Acts of the 56th General Assembly, and which must be compensated for, while the prohibition against crossings, left turns, and U turns does not infringe upon the rights of the property owners and are not the subject matter of condemnation. Both parties have appealed from the findings adverse to them.

The defendants are owners of property in the City of Des Moines which has frontage on Highway U.S. 6 and U.S. 65. They own a garage, a cafe, and a service station on the northwest corner of the intersection of the said streets. This station has a frontage of 216 feet on the highway, has for years had unlimited access to all of its facilities, and has catered primarily to heavy truck traffic. The same defendants own residential property across the highway and to the southwest of the commercial property.

In June of 1955 these defendants were approached by a representative of the Highway Commission with regard to the proposal for the widening of Hubbell Avenue. No mention was made of access, driveways or dividing strips and the representative stated that the road was to be widened two feet on each side. At that time a "contract" was signed by defendants, but no compensation has ever been paid under these instruments and no claim is made by the Highway Commission that they have at any time purchased any rights of access. By stipulation the defendant would have testified to the fact that he received no notice of any of the actions of the Commission or the City of Des Moines and was never consulted about the proposed location of the driveways. Prior to the action of the Commission he could cross directly from his residence to his place of business, a matter of 500 to 600 feet, but following the improvement he will have to

travel a mile and a quarter to get from his home to his place of business and return. That prior to the action of the Highway Commission the trucks and other vehicles could enter the defendant's property from either direction at any point along the entire frontage, but after this action only westbound traffic can enter the station, limited to two 34 foot entrance ways, and eastbound traffic will be required to proceed past the station to 42nd Street, make a U turn, and enter the station.

The case for the defendants.

(1) The first theory of the case advanced by the defendants is that the legislature of the State of Iowa has by statute specifically outlined the authority and method of obtaining controlled-access facilities.

(a) The State Highway Commission has only such powers as are conferred by statute.[1]

(b) Right of access is a property right.

In the case of *Liddick v. Council Bluffs,* 232 Iowa 197, 5 N.W. 2d 361, the City of Council Bluffs and the Iowa State Highway Commission claimed to have the right to build an overhead viaduct crossing in front of plaintiff's place of business and provide only limited access at grade level along the side of the viaduct. The Highway Commission took the position that they were only limiting the right of access to a small degree and therefore there was no injury to a property right for which plaintiff should be compensated.

> "This court has many times recognized these special property rights of the abutting owner, distinct and different from those of the general public. These special rights are property having a value as certainly as the tangible property itself, and increasing the worth of the latter. (case citations)."
>
> "The abutting owner has a proprietary right, or easement, of access in the street along his property which is subordinate to the right of the state or of a city or town in and to said street, so that the municipality may destroy the right by vacating the street, or the state may substantially impair or interfere with that access or right of access by improving the street for the better service or safety of the public, but in either event compensation must be made to the abutting property owner for the injury sustained by him."

The opinion in this case was again affirmed in the case of *Anderlik v. Iowa Highway Commission,* 240 Iowa 919. This case dealt with a somewhat similar situation, except that the property was outside of a municipal corporation. A viaduct was built by the Highway Commission, and the plaintiff, Anderlik, put upon a side road so that his right of access to the highway was limited. The Court in that case unanimously found that the right of access was impaired and that there was "at least a partial taking of the property in the constitutional sense". The Court therefore affirmed the opinion of the district court that condemnation proceedings must be instituted to determine the value of these property rights.

A more recent case dealing with rights of access as property is the case of *Gates v. City of Bloomfield,* 243 Iowa 671. In that case right of ingress and egress was impeded by an ordinance of the City permitting busses to load and unload in front of plaintiff's place of business. The

1. Huxley v. Conway, 226 Iowa 268, 284 N.W. 136; Reed v. Highway Commission, 221 Iowa 500, 26 N.W.2d 47.

Court found in that case that there was material interference with rights of access, and the following language was used:

> "Real property consists not alone of the tangible thing but also of certain rights therein sanctioned by law, such as rights to access, etc., of owners of property abutting on streets and highways is a taking of the property of such owners."

(2) The defendants' second main theory of the case is that the Constitution of the State of Iowa provides that existing rights of access cannot be taken without just compensation being paid therefor.[2]

The Supreme Court of Iowa in the case of *Nalon v. Sioux City,* 216 Iowa 1041, 250 N.W. 166 said:

> "Appellant's brief and argument is devoted to this one proposition, that there was no taking of plaintiff's property within the meaning of the constitutional provision against taking property without compensation, and that any and all damages claimed by the appellee resulted indirectly from the construction of the ditch adjacent to the appellee's property and are incidental and consequential. Article I, Section 18, of the Constitution of the State of Iowa, provides as follows:
>
> "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof.'
>
> "Appellant cites authorities in support of its contention that there can be no taking of private property within the contemplation of this provision of the Constitution unless there is a physical appropriation of the property itself, and that, where the property is not physically taken, any damages resulting to such property because of a public improvement are indirect and consequential and, in the absence of statutory provision authorizing payment thereof, cannot be collected against a city when acting in its governmental capacity. It may be conceded that, in construing provisions such as that in our Constitution, which merely provide for compensation for the taking of property, the authorities quoted by appellant are in conformity with appellant's contention. It does not necessarily follow that there may not be, in any case, a *taking* of property without the actual invasion of the physical property itself. On the contrary, there is ample authority in support of the rule that, even where the provision is only for compensation for the *taking* of property, there may be a taking of the property by preventing or substantially interfering with the owner's access to his property from a public street.
>
> "Prior to the case of Long v. Wilson, 119 Iowa 267, 93 N.W. 282, 60 L.R.A. 720, 97 Am.St.Rep. 315, there may have been some confusion in our decisions. Since the decision in that case, this court has become firmly committed to the doctrine that a substantial interference with a property owner's right of access to his property from a public street amounts to a taking of property and that damages can be recovered therefor."
>
> "Under the rule that a substantial interference with access to property by means of a public street does amount to a taking

2. Article I, Section 18, Constitution of Iowa; Nalon v. Sioux City, 216 Iowa 1041, 250 N.W. 166; Long v. Wilson, 119 Iowa 267, 93 N.W. 282; Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361; Anderlik v. Iowa State Highway Commission, 240 Iowa 919, 38 N.W.2d 565; Chapter 306A, I.C.A.; Petition of Burnquist, 220 Minn. 48, 19 N.W.2d 394; Rose v. State, 19 Cal.2d 713, 123 Pacific 2d 505; People v. Ricciardi, 23 Cal.2d 390, 144 Pac. 2d 799; People v. Russell, 229 Pac. 2d 920; Rothwell v. Inzell, 163 Ohio St. 517, 127 N.E.2d 524; Hedrik v. Graham, 96 S.E.2d 129.

of property for which damages may be collected, there was evidence to carry this case to the jury, and the trial court did not err in overruling the appellant's motion for a directed verdict."

In the case of *Long v. Wilson,* 119 Iowa 267, 93 N.W. 282, the Court said:

"It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value,—and it is of value if it increase the worth of his abutting premises,—then it is property, regardless of the extent of such value. Surely no argument is required to demonstrate that the deprivation of the use of property is to that extent the destruction of its value.

" * * * * * * *

"Title to the streets of a city or town is acquired by grant with the implied right of ingress and egress in the abutting lot owner; the grantor or the party making the dedication of the city or town saying to him, 'This right of ingress and egress you shall have.' *Bradbury v. Walton,* 94 Ky. 163 (21 S. W. Rep. 869). By accepting the street, the obligation to keep it open and afford the dedicator or his grantees, near or remote, access to abutting lots is clearly implied; and though, under the plenary powers of the legislature over all streets and highways, it may be vacated, the damages occasioned thereby cannot be said to be those shared with the public generally, as in the case of a country road, but are in large part peculiar to himself."

In *Borghart v. Cedar Rapids,* 126 Iowa 313, 101 N.W. 1120, the Court said:

"But here the injury complained of is peculiar to plaintiff's property, and not such as is shared by the public generally. In so far as the street or public ground was necessary to the free and convenient way for travel to and from the lot, her right to its use for that purpose was appurtenant to her premises, and essential to their enjoyment. The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but, in addition to this common right, he has an individual property right, appendant to his premises in that part of the street which is necessary to free and convenient egress and ingress to his property. That this latter right is private and personal and unshared by the community, and cannot be taken away without answering in damages, is held by substantially all the authorities." in *Liddick v. Council Bluffs,* supra, the Court said:

"We now hold that the destruction of the rights of access, light, air, or view, or the substantial impairment or interference with these rights of an abutting property owner in the highways or streets adjacent to his property, by any work or structure upon such highways or streets, intended for the improvement thereof, done by the state or any governmental subdivision thereof, is a 'taking' of the private property of said owner within the purview and provisions of section 18, Article I of the Iowa Constitution."

" . . . . an abutting owner's easement for the passage of light and air over a public highway cannot be taken or damaged without just compensation. So, also, an owner's right of access to his premises is a valuable property right. The construction of an impassable barrier around property, by which the owner's access to it would be destroyed, would be no less a taking of it in the sense of the Constitution than would be the owner's expulsion from the premises.' 18 Am. Jur., Eminent Domain, 789, section 158."

The holding in *Liddick v. Council Bluffs was* affirmed by the court in *Anderlik v. Iowa State Highway Commission,* 240 Iowa 919, 38 N.W. 2d 605, where the Court stated:

"Upon the evidence above summarized the trial court held there had been a taking of plaintiff's properties under our decision in Liddick v. City of Council Bluffs, 232 Iowa 197, 232, 233, 5 N.W. 2d 361, 379:

" 'We now hold that the destruction of the rights of access, light, air, or view, *or the substantial impairment or interference with these rights of* an abutting property owner in the highways and streets adjacent to his property, by any work or structure upon such highways or streets, intended for the improvement thereof, done by the state or any governmental subdivision thereof, is a 'taking' of the private property of said owner within the purview and provisions of section 18, Article I of the Iowa Constitution.' (Italics ours.)

" * * * * * * *

"The basis of the Liddick decision is that real property consists not alone of the tangible thing but also of certain rights therein sanctioned by law, such as rights to access (ingress and egress), light, air and view, and when such rights are destroyed or substantially impaired by such a structure in the highway as was here made, there is at least a partial taking of the property in the constitutional sense. The record here shows such an impairment of these rights of plaintiffs."

(3) The defendants' theory is that the vested rights of access cannot be taken without just compensation being paid therefor. This theory is based on an analogy to the rights arising under existing zoning regulations.[3]

(4) Defendant's fourth proposition is that the substantial impairment or interference with existing access in connection with highway improvements is a "taking" under the power of eminent domain and not mere regulation under the police power.[4]

In the case of *People v. Ricciardi,* 144 P.2d 799, the Supreme Court of California stated:

"The contention that the disputed elements of damage—the taking or impairment of the right of direct access to the through highways and the taking or impairment of the right of visibility to and from the one highway (Rosemead Boulevard) in relation to the remaining property—are noncompensable as being the result of police power regulation, cannot be sustained under the facts and law applicable here. We recognize that the defendants have no property right in any particular flow of traffic over the highway

3. Granger v. City of Des Moines, 241 Iowa 356, 44 N.W.2d 362; Brackett v. City of Des Moines 246 Iowa 249, 67 N.W.2d 542; City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 188 N.W.921; Crow v. Board of Adjustment, 227 Iowa 324, 288 N.W. 145; Keller v. Council Bluffs, 246 Iowa 202, 66 N.W.2d 113; Stoner McCray v. City of Des Moines, 78 N.W.2d 843.

4. Sweet v. Reche, 159 U.S. 380 on page 398; Rothwell v. Linzell, 127 N.E.2d 524, Rose v. State, 123 P.2d 505.

adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway. If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right. But here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i.e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' private property rights in and to that highway are to be taken and damaged. It is only for such private property rights that compensation has been assessed. The court allowed no damages to be predicated on any diversion of traffic from the highway but it did properly allow damages to be based on diversion of the highway from direct access to defendants' property."

The case for the plaintiff.

(1) The question is not whether the abutting owners of property suffer injury or depreciation in value thereof but whether or not the ordinance designating the places where the highway may be entered and left is in the exercise of the police power of the State.

The general distinction between police power and eminent domain is set forth in *29 C. J. S., Eminent Domain, Section 6, p. 784,* as follows:

> "Eminent domain takes property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to public interest; in the exercise of eminent domain private property is taken for public use and the owner is compensated, while the police power regulates an owner's use and enjoyment of property, or deprives him of it by destruction, for the public welfare, without compensation other than the sharing of the resulting general benefits. Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power."

In *18 Am. Jur., Eminent Domain, Section 11, p. 639,* the rule is stated as follows:

> "'Police power' is the power of the state to regulate, restrict or prevent the use of property in the interest of public health, morals or safety; while 'eminent domain' is the power of the State to take private property for public use."

The position of the plaintiff is well illustrated by the case of *Carazalla v. State,* 70 N.W.2d 208 and 71 N.W.2d 276. The case was first considered by the Court in 70 N.W.2d 208, at which time the appellant, State, urged that it was error for the trial court to refuse to instruct the jury that it should disregard evidence as a result of the highway involved in the condemnation proceedings being made a "controlled-access" highway. On the first hearing, the Supreme Court of Wisconsin affirmed the trial court but on re-hearing the Supreme Court reversed its previous opinion as set forth in 71 N.W.2d 276, in which the Court recognized the rule that damage result-

ing to property through the exercise of the police power is not compensable and the Court also pointed out that what constitutes a taking under eminent domain is often interwoven with the question of an exercise of the police power. The Court said:

"However, in our original opinion we failed to perceive that any damages to the remaining lands due to the exercise by the State of its police power in making the relocated highway a controlled-access highway are not recoverable. The reason for such lack of perception was that the institution of the condemnation proceedings and the designation of the relocated highway as a controlled-access highway were so interwoven that we considered the two to be an inseparable whole when actually they constituted two separate and distinct acts.

"If relocated United States Highway 51 had not been designated as a controlled-access highway, but instead that part thereof located upon the parcel taken from the plaintiffs had been constructed on such a high embankment as to make it impracticable for passing traffic to reach plaintiffs' remaining abutting lands from such highway, the rule announced in our former opinion would be applicable. Such rule, however, is not applicable to a situation where moving traffic would have suitable ingress to, and egress from, plaintiff's abutting lands from the relocated highway except for the fact the state's police power has been exercised to prohibit the same."

In *Brienig v. County Allegheny,* (Pa.) 2 A.2d 842, the Court said:

"But the public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will afford some measure of access and yet permit public travel with the minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interests. The abutter can not make a business of his right of access in derogation of the rights of the travelling public. He is entitled to make only such use of his right of access as is consonate with traffic conditions and police requirements that are reasonable and uniform.

" * * * * * *

"And highways may be so regulated by them as to limit the rights of abutting owners: see Walnut and Quintz Street Corp. v. Mills, 303 Pa. 25, 31, 154 A. 29; see also Brooks v. Buckley & Banks, 291 P. 1, 3, 139 A. 379."

In *Anderson v. Jester,* 206 Iowa 452, 211 N.W. 345, the Court said:

"Reasonableness of a law or regulation depends on conditions existing when it is put into effect, not on conditions existing when the constitution was adopted or when interpretations having reference to formerly existing conditions were made. Classification or regulation will not be held arbitrary, or unreasonable, or discriminatory, unless clearly so. Id.; Des Moines v. Manhattan Oil Company, 193 Iowa 1096, 184 N.W. 823."

The case of *Pillings v. Pottawattamie County,* 188 Iowa 567, 176 N.W. 314, involved an existing highway which passed through plaintiff's farm and which was on high ground at the location of the plaintiff's building, and then passed down to lower ground and crossed a creek to the east of the plaintiff's buildings. The County improved the road by making a cut along the elevated part of its course and placing fill in constructing a grade across the bottom lands adjacent to the creek. The plaintiff sued to recover for encroachment due to the widening, and for the weakening of lateral support, and because the making of the cut in front of a gate, allowing access to one of his fields, destroyed all means of convenient access

between the buildings and improvements. Defendant's demurrer was overruled as to the claim for encroachment outside of the road limits but sustained as to all other items of alleged injury. Plaintiff appealed. The Court noted that the case involved improvement of an existing road, and stated:

> "The right so acquired by the public was not simply to travel over or upon the natural surface of the land within the limits of the road. It acquired, as well, the right to improve such way; and, in the very nature of things, this included improvement of the grades, so far as is reasonably practicable, by cuts upon the elevations and fills upon the low lands. All these things must be presumed to have been contemplated, and their effect, if any, upon the value of the land over and along which the road was laid, taken into due consideration in assessing the damages for the original taking."

This case involved a statute relating to secondary roads prohibiting the officials in charge of the work from destroying or injury the ingress or egress to any property as a result of the construction of the highway.

With reference to the right of the public to improve a highway, the Court said:

> "This being true, it seems quite clear that, in the absence of statutory regulation, no right of action for damages will accrue to the adjacent owner from the mere fact that an improvement of the grade of an established highway has rendered the use of his land less convenient than it was before."

With respect to the statute forbidding destruction or injury to ingress or egress, the Court said:

> "This, we have held, is not to be construed as prohibiting all changes which may cause some inconvenience in the use of adjacent property, because such strict rule would often make improvement of the highway practically impossible, even when greatly needed, and the general public would suffer accordingly.
>
> " 'The law was designed to protect the owner in the use and enjoyment of his property, and to prevent interference on the part of road supervisors; but it was not intended to prevent necessary improvements in the highways, when they can be made without material injury to adjacent property, even though some inconvenience might result to the owners of such property.' *Randall v. Christiansen*, 76 Iowa 169.
>
> " * * * * * * *
>
> " . . . the liability of the state or municipality for injury to land by the improvement of a public way does not extend to or include indirect or purely consequential damages, but is confined, in judicial application, to the case of property actually taken and appropriated . . . But roads are not provided for the sole benefit of the property over or along which they are laid. They are for the use of the general public, and the law providing for their improvement has in view their general public convenience and usefulness. When first established, under pioneer conditions, they are given comparatively slight attention; but, with the increase of population and traffic, there comes a correspondingly increased demand and necessity for road improvements. The necessity and propriety of the improvements, their kind, character, and extent, and the matter of their execution or construction, are confided to such boards, officers, or agencies as the legislature has provided for that purpose; and, in the absence of any provision for the review of their action upon appeal or otherwise, their finding and decision

are final, so long, at least, as they act in good faith, and within the scope of the authority conferred upon them.

" * * * * * * *

"The argument most forcibly and plausibly urged upon our attention is that plaintiff has a vested right of passage between his premises and the highway; that this right is property, and, as such, is protected by the constitutional guaranty against subjection to public use without compensation."

The Court then stated that the demurrer to the petition must be affirmed, but stated:

"We hold, however, that, under the statute before referred to, plaintiff is not without right to equitable relief, if it shall appear that the grading, cutting, or filling of the road has the effect to destroy or materially impair the means of egress and ingress which are essential to the convenient use and enjoyment of his property; and, as the cause must be remanded for further proceedings upon those items of plaintiff's claim the demurrer to which was overruled, the trial court is directed to permit him, if he so elects, to amend his petition by asking for appropriate relief which shall preserve and enforce his statutory right to convenient passage between the highway and his lands bordering thereon, in such manner as will be reasonably sufficient for the purposes of ingress and egress."

In *Lingo v. Page County,* 201 Iowa 906, 208 N.W. 327, the plaintiffs sought an injunction against maintenance of a highway embankment and to prevent the County from depriving plaintiff of the right of ingress and egress of his premises. Before the improvement complained of, plaintiff's access to a roadway was to the north from his farm residence over a driveway which crossed a railroad track and then entered a public highway curved to the northwest. The improvement took the curve out of the highway and constructed an over-pass over the railroad tracks so that the plaintiff's driveway goes over-pass and through the trestle work of the overhead crossing after which plaintiff had the same facilities as the rest of the public residing in that vicinity insofar as getting onto the highway is concerned. The elevation of the grade at the highest point is twenty-six (26) feet. The width of the grade at some points is one hundred (100) feet and extended onto the plaintiff's premises, for which encroachment he had been paid damages and which was not an issue in the case. In order to travel east on the improved highway, plaintiff must now go about a block further, and if he desires to go west, about two blocks further than formerly. Of this situation the Court said:

"It is apparent from the foregoing statement of the facts, none of which are in dispute, that ingress and egress to and from appellant's premises were neither destroyed nor substantially interfered with by location and improvement of the new highway. The inconvenience of being compelled to travel one block farther in one direction and two blocks in another, to reach the highway, is not an unreasonable interference by the public authorities with the right of ingress and egress to and from his premises. The right of way of the railroad company to the southeast from the section line crosses a portion of appellant's premises through a comparatively deep cut, and much greater safety is secured to the public generally by the overhead crossing than was possible the way the highway formerly ran.

" * * * * * * *

"Naturally, appellant would rather have a convenient road to

town that did not pass under the viaduct. The road shows, however, that it was practically impossible to construct the improvement in the highway so as to give immediate access from appellant's premises thereto, and at the same time accomplish the public purpose.

"Thus situated, we do not perceive in what way appellant has been deprived of any of his constitutional rights. The county condemned the land occupied for public use, and thereby acquired the right to build whatever grade or embankment was necessary for the reasonable improvement and use of it as a public highway. The exact question here presented was before us in *Pillings v. Pottawattamie County,* 188 Iowa 567, except that, in that case, the interference with the plaintiff's ingress to and egress from his premises was the result of a deep cut in the highway."

The plaintiff then reconciles these cases and the cases of *Liddick,* supra, and *Anderlik,* supra, relied upon by the defendant in the following way:

The *Pillings* and *Lingo* cases set forth the rule of law that construction of a highway which has the effect of altering the means of access of the abutting owner in the one instance by limiting such access to specific driveways because of construction and in the other case by slightly lengthening the distance to be traveled to reach the highway, not being unreasonable interference or a destruction of the right of access, do not give rise to damages or compensation to the abutting owner.

On the other hand, the *Liddick* and *Anderlik* cases hold that when construction of a highway does amount to a destruction of the abutting owner's right of access and destruction of his easement for light and air that there has been the destruction or taking of a property right for which compensation must be made.

There is no conflict between these rules of law or cases, the distinction being on the facts.

In the *Liddick case* the Court said that insofar as the pronouncements of law in the *Lingo case* and the *Pillings* case are contrary to the questions of law decided in the *Liddick case* such earlier cases are overruled. However, the Court also says in the *Liddick case* opinion with respect to the *Pillings* and *Lingo* cases:

"We have no fault to find with the result reached."

In other words, the Supreme Court of Iowa does not apply the rules of law of the *Liddick* and *Anderlik cases* until, as a matter of fact, it appears that there has been a destruction of the right of access as opposed to mere regulation thereof and until it appears that easements for light and air have been destroyed. The *Pillings* and *Lingo cases* were decided adversely to the claimants for damages on the basis that there was not shown a substantial interference with the abutting owner's access nor was the abutting owner's right to access destroyed. In the *Pillings case* the matter was referred back to the trial court for a determination as to whether or not the interference with the abutting owners' access was of such an extent to be a material interference or a destruction thereof. The *Liddick case* was an appeal from an action in equity seeking an injunction and therefore triable *de novo* and on the appeal in addition to the rules of law contained in the opinion, it amounts to a finding by the Supreme Court on the evidence in the record that the over-pass constructed in the *Liddick case* as a matter of fact amounted to a destruction or material in-

terference with the abutting owner's right of access. Short of such a finding of fact by the Supreme Court, the rules of the *Pillings* and *Lingo cases* would have applied and no compensation awarded.

Likewise, the *Anderlik case* was decided on the question of fact as to whether or not there was a destruction of the right of access. That action was in the nature of mandamus to compel the defendant Highway Commission to commence condemnation proceedings to assess the damages for the taking of the abutting owner's right of access. The trial court granted the relief asked and held that there was such a destruction or material interference with the rights of access as to constitute a taking. Therefore, it appears that in all of these cases it is a question of fact as to whether or not the method of construction of a highway constitutes a total destruction or substantial impairment or interference with the right of access of an abutting owner. The above cases relate only to the method of construction of the highway and not the regulation of traffic on the highway itself.

In the case of *Stoessel v. City of Ottumwa,* 227 Iowa 1021, 289 N.W. 718, in which the plaintiff sought to enjoin the City of Ottumwa from vacating an alley along the north side of plaintiff's property. Plaintiff's property was bounded on the east by a city street and on the west by a twelve-foot alley. The vacated alley was eight feet in width to the north of plaintiff's property. The vacation and sale of the alley by the City was upheld as not being unreasonable, and the Court said:

> "The appellant still has ingress and egress to his property at both front and rear, which are reasonably convenient. He improved lot 5 after the alley was closed. In our judgment the vacation of the alley does not deprive the appellant of the convenient and reasonable access to or from his property, or its use, in any substantial degree. (Cases cited.)"

(2) The regulation of the use and enjoyment of property in the interest of public safety and welfare, without depriving the owner of possession, use, or ownership is an exercise of the police power of the State and not a taking of property requiring compensation or damages.[5]

(3) The declaration by the State Legislature of its policy and regulations in the exercise of the police power of the State are not subject to review by the Courts.[6]

B. Where Property Did Not Abut on Highway Prior to Construction or Reconstruction.

It seems reasonably clear that where the landowner had no pre-existing right of access, because his property did not abut upon any highway, the mere fact that a limited-access highway is brought adjacent to his property either by totally new construction or by the re-routing or widening of an existing highway will not be sufficient to create in him a right of access which the State must then condemn.[7]

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5. Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N.W. 823; Hubbell v. City of Des Moines, 173 Iowa 55, 154 N.W. 337; Ridgeway v. Osceola, 139 Iowa 590, 117 N.W. 974; Walker v. City of Des Moines, 161 Iowa 215, 142 N.W. 51; Bryan v. Petty, 162 Iowa 62, 143 N.W. 987; Higgens v. Board of Supervisors, 188 Iowa 448, 176 N.W. 268; Cecil v. Toenjes, 210 Iowa 406, 228 N.W. 874; Shenandoah v. Replogle, 198 Iowa 423, 119 N.W. 418; Boardman v. Davis, 231 Iowa 1226, 3 N.W.2d 608.

6. Section 306A.1, I.C.A.; Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N.W. 823; Iowa Farm Serum Co. v. Board of Pharmacy Examiners, 240 Iowa 734, 35 N.W.2d 848; Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66; Mays Drug Stores v. State Tax Commission, 242 Iowa 319, 45 N.W. 2d 245; State v. Town of Riverdale, 244 Iowa 423, 57 N.W.2d 63; Keller v. Council Bluffs, 66 N.W.2d 113; Craven v. Bierring, 222 Iowa 613, 269 N.W. 801; Burlington & Summit Apartments v. Manolato, 233 Iowa 15; 7 N.W.2d 26; 16 Corpus Juris Secundum, Constitutional Law, Section 209; Anderson v. Jester, 206 Iowa 452, 221 N.W. 354.

7. State v. Burk, 220 Ore. 211, 265 P.2d 783, (1954); People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914, (1952).

The rationale of this position may be best explained by an examination of the following situation:

> "Suppose A's land abuts against B's land. The State purchases a right of way for a highway from B, extending along the boundary of his property with A, but leaving a one-foot wide strip of land along the boundary line. At this point there is no change in A's legal position. Now suppose the State took B's land right up to A's boundary. Should A's rights suddenly change giving him a right of access?

The answer is clearly NO. The result must be that, since A never had a right of access across his property line before, and since no such right was even impliedly given to him by the State, he does not now have a right of access across his property line to the freeway.

So in *Schnider v. State of California,* (1952), 38 Cal.2d 439, 421 P.2d 1, 43 A.L.R. 1068, a property owner who, before the widening of a highway as an incident of its conversion into a freeway, had no right of direct access to the highway, since it was separated from his property by other lots, was held not to acquire any such right when the intervening property was acquired by the State for the express purpose of constructing a freeway, because nothing was taken from him.

In *People v. Botiller,* (1952), 108 C.A.2d 832; 239 P.2d 914, it was held that where no highway to which the landowner had any right of access existed prior to the construction of the freeway, there could be no compensation for loss of any right of access to such freeway. There can be no detriment to a right which never existed and no compensation for a loss not sustained.

See also, *Smick v. Commonwealth,* (1954), 268 S.W.2d 424, where a new highway for which part of the landowner's property was condemned, did not replace any street to which the property formerly had access. Consequently no recovery for loss of access was allowed even though the street upon which the house faced was closed at the north line of his property as an incident of the construction, the Court saying that the closing of that street was a matter entirely separate and apart from the condemnation proceedings. (The facts of this case seem to indicate that a cul-de-sac has not resulted from the construction because the new highway does not replace any street to which the landowner formerly had access.)

See also, *Los Angeles v. Geiger,* (1949), 94 C.A.2d 180, 210 P.2d 717, holding that compensation was improperly allowed where, prior to the construction of a freeway parallel to defendant's land, he had had no direct access to a parallel highway now separated from his land by the freeway, since previously a railroad right of way and other property owned by third persons had separated his land from that highway. The landowner contended that because he could have obtained an easement from the railroad and the other landowner, and so have obtained direct access from his land to the parellel highway, he should be entitled to access to the new freeway. The Court held that in the absence of an actual preexisting right of access there could be no recovery.

IX. Proposed Definitions and Regulations of Iowa State Highway Commission

Chapter 148, Acts of the 56th General Assembly was entitled "An Act to provide for highways to be known as controlled-access facilities." Application of the authority therein given to the State Highway Commission has currently given rise to several law suits and, if the history of similar legislation in other states is used as a criterion, the application and interpretation of this act will be the source of much more litigation.

The exact language of this act is so important to an understanding of the problems in this area, that the first six sections and section 8 are set out in full.

"Section 1. Declaration of policy. The legislature hereby finds, determines and declares that this act is necessary for the immediate preservation of the public peace, health, and safety, and for the promotion of the general welfare.

"Sec. 2. Definition of a controlled-access facility. For the purposes of this act, a controlled-access facility is defined as a highway or street especially designed for through traffic, and over, from or to which owners or occupants of abutting land or other persons have no right or easement or only a controlled right or easement of access, light, air, or view by reason of the fact that their property abuts upon such controlled-access facilities or for any other reason. Such highways or streets may be freeways open to use by all customary forms of street and highway traffic or they may be parkways from which trucks, busses, and other commercial vehicles shall be excluded.

"Sec. 3. Authority to establish controlled-access facilities. Cities, towns, and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, Code 1954, acting alone or in co-operation with each other or with any Federal, State, or local agency or any other state having authority to participate in the construction and maintenance of highways, are hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled-access facilities for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities; provided, that within cities and towns such authority shall be subject to such municipal consent as may be provided by law. Said cities, towns, and highway authorities, in addition to the specific powers granted in this act, shall also have and may exercise, relative to controlled-access facilities, any and all additional authority now or hereafter vested in them relative to highways or streets within their respective jurisdictions. Said cities, towns and highway authorities may regulate, restrict, or prohibit the use of such controlled-access facilities by the various classes of vehicles or traffic in a manner consistent with section 2 of this act.

"Sec. 4. Design of controlled-access facility. Cities, towns, and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, Code 1954, are authorized to so design any controlled-access facility and to so regulate, restrict, or prohibit access as to best serve the traffic for which such facility is intended. In this connection such cities, towns, and highway authorities are authorized to divide and separate any controlled-access facility into separate roadways by the construction of raised curbings, central dividing sections, or other physical separations, or by designating such separate roadways by signs, markers, stripes, and other devices. No person shall have any

right of ingress or egress to, form, or across controlled-access facilities to or from abutting lands, except at such designated points at which access may be permitted, upon such terms and conditions as may be specified from time to time.

"Sec. 5. Acquisition of property and property rights. For the purposes of this Act, cities, towns, and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, Code 1954, may acquire private or public property rights for controlled-access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation in the same manner as such units are now or hereafter may be authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdictions. All property rights acquired under the provisions of this act shall be in fee simple. In connection with the acquisition of property or property rights for any controlled-access facility or portion thereof, or service road in connection therewith, the said cities, towns and highway authorities, in its discretion, acquire an entire lot, block, or tract of land, if, by so doing, the interests of the public will be best served, even though said entire lot, block, or tract is not immediately needed for the right-of-way proper.

"Sec. 6. New and existing facilities; grade-crossing eliminations. Cities, towns and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, Code 1954, may designate and establish an existing street or highway as included within a controlled-access facility. The state or any of its subdivisions shall have authority to provide for the elmination of intersections at grade of controlled-access facilities with existing state and county roads, and city or town or village streets, by grade separation or service road, or by closing off such roads and streets at the right-of-way boundary line of such controlled-access facility; and after the establishment of any controlled-access facility, no highway or street which is not part of said facility shall intersect the same at grade. No city, town, or village street, county or state highway, or other public way shall be opened into or connected with any such controlled-access facility without the consent and previous approval of the highway authority in the state, county, city, town or village having jurisdiction over such controlled-access facility. Such consent and approval shall be given only if the public interest shall be served thereby.

" * * * * * * *

"Sec. 8. Local service roads. In connection with the development of any controlled-access facility cities, towns and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, Code 1954, are authorized to plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service roads and streets or to designate as local service roads and streets any existing road or street, and to exercise jurisdiction over service roads in the same manner as is authorized over controlled-access facilities under the terms of this act, if, in their opinion, such local service roads and streets are necessary or desirable. Such local service roads or streets shall be of appropriate design, and shall be separated from the controlled-access facility proper by means of all devices designated as necessary or desirable by the proper authority.

" * * * * * * *

The constitutionality of substantially similar acts has been attacked

on many occassions.[1] The writers attention has not been called to any case wherein an act of this type has been held unconstitutional; therefore, this paper is not further extended by a discussion of these cases. The United States Supreme Court has held that nothing in the Federal Constitution obliges the States to recognize any particular interests of an abutting landowner in access to the highway.[2] The matter of defining the landowner's interest has therefore been left to the courts of each State.

Pursuant to the authority granted in the act, the Iowa State Highway Commission proposes to adopt two concepts of controlled-access. Fully controlled-access will be wherein access is controlled to give preference to through traffic by providing access connections with selected public roads only, and by prohibiting crossings at grade or direct private driveway connections. Planned controlled-access will be wherein access is controlled to give preference to through traffic to a degree that, in addition to access connections with selected public roads, there may be some crossings at grade and some private driveway connections. The Iowa State Highway Commission is considering the adoption of four types of entrances to planned controlled-access facilities. There four types are listed and defined as follows:

(1) Agricultural Entrances.

(a) Farm entrance is an entrance to a farm yard area.

(b) Field entrance is an entrance to a field area.

(2) Residential entrance is an entrance to property used primarily for residential purposes and incidental uses pertinent thereto.

(3) Commercial entrance is an entrance to any establishment where buying and selling of commodities, entertainment, or services are carried on with the public.

(4) Industrial entrance is an entrance to any establishment that manufactures or processes any article or product.

The Iowa State Highway Commission also proposes to adopt, in substance, the following regulations:

I. Control of Access.

A. Fully Controlled-access.

Access shall be be completely controlled either (1) by extinguishing all rights of direct access of abutting property owners to and from the highway by purchase or condemnation and eliminating all existing means of direct access, or

(2) by constructing local frontage roads of appropriate design adjacent or parallel to the highway and/or designating existing roads or streets as local frontage roads to provide access from adjacent areas via the frontage road to the highway at selected roads to interchanges provided for that purpose by the Commission.

B. Planned Controlled-access.

(1) Where planned control is established over a previously existing public highway open and used for travel, the highways and entrances existing at the date said control is established, and which the Commission deems are reasonably located and not likely to create undue hazard, are

1. Neuweiler v. Kaver, 62 Ohio L. Abs. 536, 107 N.E.2d 799; Department of Public Works and Buildings v. Lanter et al, Ill. 581, 110 N.E.2d 179.
2. Sauer v. New York, 206 U.S. 536 (1906).

or will generally be authorized and approved for access to and from said planned controlled access facility, provided, however, that the continuous and future use of such authorized entrances shall be subject to the statutes governing controlled access highways and regulations of the Commission generally applicable thereto.

(2) Where planned control is established over a highway located on new alignment and said highway has not been marked, maintained, opened and used for travel as a public road previous to the effective date of the establishment of such control, entrances or special crossings may, on the written consent and approval of the Commission, be opened into and connected with said highway only to existing tracts of land abutting said highway which the Commission determines are not reasonably served by other public highways. Existing public highways which intersect or cross the new location of said highway will be authorized and approved as places of entrance upon and departure from said highway subject to alteration in layout or separation of grades or other modification made necessary by the design of said controlled-access highway.

(3) After the effective date of the establishment of access control, no street or highway or entrance shall be opened into or connected with the controlled-access highway without a permit approved by the Commission, which shall be given only if the public interest shall be served thereby, and shall specify the terms and conditions on which such permit is given.

(4) Access to new divisions or parcels of land bordering the controlled-access highway, created subsequent to the effective date of the establishment of such control, shall be via the access facilities which served the original tract or property, unless otherwise approved by the Commission in writing.

(5) No person shall have the right of entrance upon or departure from or travel across any portion of a controlled-access facility except in places designated and provided for such purposes and on such terms and conditions as may be specified from time to time by the Commission.

(6) Whenever an agricultural property held under one ownership is divided by a controlled-access highway, the Commission may permit a crossing for agricultural use at a designated location to be used solely for travel between the separated parcels and such use shall cease if the separated parcels pass into separate ownership unless the commission determines that either or both separate parcels can not be reasonably served by existing or alternate access to and from another public highway.

(7) When and where a frontage road is established and opened to public travel, the right of direct access from the abutting property to the through travel lanes of a controlled-access highway shall cease, and in lieu thereof there shall be the right of direct access from the abutting property and the frontage road, thence via the frontage road to the nearest through traffic lane of the highway at the junction of the frontage road and the through traffic lanes. The access from the abutting property to the frontage road shall be the usual right of access that prevails for highways not designated as controlled-access highways.

(8) Access openings granted or authorized in (2) above shall be limited to one opening per parcel, except in the case of large holdings with extended highway frontage and except when the property is divided by a stream of other natural barrier. A joint opening may be used to serve two parcels.

(9) No access opening will be granted within 500 feet of the intersection of two primary roads. No access opening will be granted within 300 feet of the intersection of a primary road and a country road. In the event that natural barriers make it impossible to enforce this rule, the Commission may elect to acquire the access rights or adjust the distances.

(10) Whenever a stream, railroad, cliff, bluff or other natural barrier is considered to be a deciding factor by the Commission in the exercise of access control, frontage road reservation and set back requirements may be either waived or subjected when a refusal of the permit would result in a complete denial of access to an existing parcel which was platted prior to the declaration of access control on the highway, and when a complete safety and economic study of the area indicated that the purchase or condemnation of the access rights to be of greater expense than the benefits which would accrue to the highway by such denial of access.

(11) Frontage roads may be constructed and connected to the highway or intersecting roads by the Commission in order to eliminate existing entrances when such action is considered necessary to protect the highway investment and for the safety and welfare of the traveling public. Such action will generally be taken only when multiple access to the through lanes of travel existed prior to the declaration of said highway as a controlled-access facility.

(12) Frontage roads shall be constructed and maintained by others when abutting tracts are platted and/or developed for residential, commercial or industrial purposes subsequent to the declaration of said highway as a controlled-access facility.

(13) Frontage roads shall be maintained by the Commission when such frontage roads are constructed by the State under (11) above unless by agreement with cities or counties such roads are added to or become a part of the city street system or county secondary road system.

(14) No additional residential, commercial, industrial or agricultural entrance or entrances shall be authorized on a planned controlled-access highway from lands abutting said highway except on a temporary basis under a written agreement in which the owner or developer agrees to reserve right of way for a frontage road for public travel without expense to the State, and to comply with building and permanent improvement set back distances and other requirements which shall be in effect by regulation adopted by the Commission from time to time to implement the exercise of access control on primary roads. The improvement of adjacent areas shall be sufficient cause for the termination of the right of direct access to the highway and the requirement of a frontage road for public travel to serve as access from abutting property to the controlled-access highway.

(15) The Type of use specified in an authorized or existing entrance or service crossing shall not be changed without the written approval of the Commission.

(16) If and when any access opening granted under these regulations generates traffic volumes and/or traffic conditions which cause undue interference with the safe and normal flow of traffic on the highway, measures to control traffic may be required at the discretion of the Commission to correct such interference.

II. Acquisition of Rights of Access

A. Fully Controlled-access.

(1) When lands are being acquired as rights of way and frontage roads

are to be constructed or designated, access rights shall also be acquired with the agreement or stipulation that grantors' means of access to the highway shall be via the frontage road and other public roads through an interchange.

(2) When no frontage road is to be constructed or designated, all rights of direct access to the highway shall be completely extinguished by purchase or condemnation.

B. Planned Controlled-access.

(1) Relocation - When lands are being acquired for highways to be built on new location where no road is established or constructed, all rights of access to the proposed highway shall be extinguished by purchase or condemnation, with the following exceptions:

(a) Crossings at grade may be permitted for present land use when the complete denial of access would result in a landlocked parcel.

(b) Entrances may be permitted when the acquisition of the highway right of way results in a substantial impairment of present access to grantors' remaining lands.

(2) Present roads - When lands are being acquired for the improvement of existing highways all rights of direct access to grantors' remaining lands shall be extinguished by purchase or condemnation with the following exceptions:

(a) Present entrances for present use may be permitted.

(b) Additional entrances may be permitted for present land use providing the acquisition of the right of way area results in a substantial impairment of present access to grantor's remaining lands.

(3) With frontage roads—When frontage roads are to be constructed or designated, all entrances permitted shall be to the frontage road only and owner's access to the main traveled lanes of the highway shall be via the frontage road.

(4) Without frontage roads—When frontage roads are not proposed for immediate construction, all entrances permitted shall be with the stipulation and agreement that when and if a frontage road is constructed the right of access to the highway shall be via the frontage road.

X. Oregon Access Provisions

Through the process of trial and error, Oregon has developed standard access provisions that are used in options and deeds and, with minor modification, in condemnation proceedings, as follow:

> "As a part of the consideration hereinabove stated, there is also bargained, sold, conveyed and relinquished to the Grantee all existing, future, or potential common law or statutory easements of access between the right of way of the public way identified as the ..... Highway ..... and all of the Grantor's remaining real property consisting of all parcels contiguous one to another, whether acquired by seperate conveyances or otherwise, all of which parcels either adjoin the real property conveyed by this instrument, or are connected thereto by other parcels owned by Grantors."

Crossing for Farm Purposes:

> "Reserving, so long as any portions of the said remaining property on both sides of the said highway and served by such crossing

are held by a single ownership, the right to establish, maintain and use a crossing of a width of .....feet at Highway Engineer's Station ..... for farm purposes only. The construction of a frontage road or roads shall not defeat the right of crossing."

Right of Access:

"Reserving, for service of the said remaining property right of access from Grantor's remaining property to said highway of a width of twenty-five (25) .....feet at each of the following places and for the following purposes only:

Hwy. Engr's Sta. *Side of Hwy.* *Purpose*"

Suspension of Access

"If, after written notice to desist, the Grantors, or any person holding under them, shall use any of said rights of access, including crossings, for any purpose not stated for that particular place, or shall permit or suffer any person to do so, such right of access shall automatically be suspended. The Grantee shall thereupon have the right to close such place of access for all purposes. The suspension shall terminate when satisfactory assurance has been furnished the Grantee that the place of access will be used only for the purpose hereinabove stated; provided, however, that the Grantee may first require a bond with sureties satisfactory to the Grantee in an amount not in excess of $1,000.00 conditioned upon faithful compliance with the above provisions concerning the use of access at said place.

The Grantee's rights to close such place of access and require a bond shall be continuing as to each succeeding use for a purpose not herein stated."

Future Frontage Road:

"Grantee has the right to build at any future time a frontage road or roads within the boundaries of any present or hereafter acquired right of way; whereupon, all rights of access hereinabove reserved to and from the highway that are on or adjacent to any such frontage road or roads shall cease, but the Grantors, their heirs and assigns, shall have access to the frontage road or roads. Said frontage road or roads shall be connected to the main highway, or to other public ways, only at such places as the Grantee may select."

Present Frontage Road:

"Grantee shall build a frontage road within the boundaries of any present or hereafter acquired right of way on the..... ..... side ..... of the highway, and the Grantors, their heirs and assigns, shall have access to the frontage road or roads. Said frontage road or roads shall be connected to the main highway, or to other public ways, only at such places as the Grantee may select."

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1. The purposes for which reserved rights of access may be used are set forth in language that is standard in form and consists of one or more of the following purposes: (1) Private residential use only. (2) Production and transportation to market of farm products of the grantor's remaining land only. (3) Development, harvesting and transportation to market of forest products of the grantor's remaining land only. (4). Operation of existing..... activity on the grantor's remaining land only. (5) Operation of future..... activity on the grantor's remaining land only. (6) Unrestricted.

TITLE COMPANIES AND THE EXPANDED RIGHT OF WAY PROBLEMS

(A Panel Discussion Before the Third Annual Seminar of American Right of Way Association)

MEMBERS OF PANEL:

Arthur A. Anderson, *Vice President,* Washington Title Insurance Company, Seattle, Washington.

Samuel J. Some, *Counsel,* Title Guarantee and Trust Co., New York, New York.

William A. Thuma, *Title Officer,* Chicago Title and Trust Co., Chicago, Illinois.

Daniel W. Rosencrans, *Vice President; Manager, Customer Relations Division,* Title Insurance and Trust Co., Los Angeles, California, Moderator

DANIEL W. ROSENCRANS, Moderator

This panel should serve several useful purposes. It is our object to examine the consequences of the new Federal Highway Program from a title point of view. We want to assess the impact of the accelerated demand for title services; to determine, if possible, what this demand will require in the way of additional manpower; to discuss with you the extent to which the title companies of the country can offer services which will enable the various state highway departments to meet these expanded requirements with the greatest safety, speed, and economy.

The men who will participate with me in this discussion are from various sections of the country each of whom, I assure you, is fully qualified to explain to us the title practices and services available in those areas. It is my pleasure at this time to introduce these men:

Mr. William A. Thuma, Chief Title Officer, Chicago Title and Trust Company, Chicago, Illinois, who is our Midwest and Central area representative;

Mr. Samuel J. Some, Counsel, Title Guarantee and Trust Company, New York City, who is our East Coast representative; and

Mr. Arthur A. Anderson, Director and Vice President of Washington Title Insurance Company, Seattle, Washington; President and Manager of Snohomish County Title Company in Everett, Washington; also Vice President of the American Right of Way Association, Seattle Chapter No. 4. Art will tell us how things are done on the West Coast and in the great Pacific-Northwest area.

We have already had the benefit of the excellent discussion on the Federal Highway Program which Frank Balfour presided over yesterday afternoon. At the risk of repeating some of the facts so ably presented that time, let me cover briefly the bare facts which indicate the title work that will be required in order to achieve the anticipated results under this program within the next 13 years. We all know the magnitude of the undertaking and I am sure that we are familiar with the fact that this is the greatest public works program ever undertaken in the history of mankind. The right of way acquisitions, and the utility relocations, which must be accomplished promptly and precisely in order to

facilitiate this tremendous work are, necessarily, so tremendous in their scope as to require the most efficient utilization of people and facilities that all of us—title companies, state highway departments, and utilities—can contrive.

Within the next 13 or 14 years the new law contemplates completion of a 41,000 mile National System of Interstate and Defense Highways. Of this total about 28,000 miles will be four lane divided highways; 5,000 miles will be six and eight lane highways, and the remaining 8,000 miles will be two lane highways. This highway will link all but ten per cent of the 232 cities in the country having a population of over 50,000.

It appears a conservative estimate to say that the work of right of way men for the highway departments will be doubled within the next few years, and the increased work of right of way men for utilities and pipe line companies will also be significant. Indeed, it has been estimated by Mr. C. W. Enfield, Chief Counsel, Bureau of Public Roads, Washington, D.C., who recently talked before the members of the American Title Association at their 50th annual convention, that the right of way requirements will increase from 100% to 600%. Right of way costs alone for the 13-year period are estimated at nearly 5 billion dollars. The implications of this are obvious. This means that even assuming the wisest and most efficient use of skilled personnel, substantial increases in the number of working right of way men will be absolutely essential.

In my own state, California, it is estimated that four years from now we will be spending annually 170 or 180 million dollars to acquire 17 or 18 thousand parcels as compared to last year's expenditure of 118 million for 9 thousand parcels.

It is clear that anything that will permit the right of way men to devote their full time to problems other than those of a technical title nature will ease the burdens imposed by the accelerated program. This points, I believe, to a mutual interest between those of us in the title business, the state highway departments, and the utilities.

The difficulty in obtaining skilled, experienced and r e l i a b l e men to search and e x a m i n e titles is well known to anyone who has had any connection with this activity in recent years. Speaking for a moment as the executive of a title company, I know from painful personal experience that the problem is nearly insoluble unless it is anticipated years in advance. A title man cannot be trained overnight. And in order to have a reservoir of trained people on hand to meet an anticipated rise in demand, a sizeable investment must be made annually during the preceding years, to recruit, train, and give experience to the people needed. Indeed, it may be concluded that this foresight, while wise in theory, cannot be fully employed in practice because it is too expensive. Nevertheless, the point I wish to make is that (barring a depression) it will be next to impossible to obtain the services of substantial numbers of experienced men in the next few years.

These observations apply equally to right of way men, or perhaps I may say even more strongly to right of way men. Seldom—if ever—in the history of this country has a single piece of legislation b e e n enacted which will so increase the demand for the services performed by members of a professional group. Think again of the estimate by Mr. Enfield that I quoted earlier—an increase of from 100% to 600% in right of way requirements in the various states. The problem will, of course, be considerably different in the different states. Right of way personnel presently available range from 300 or 400 in the largest states down to 1 or 2 in the smallest. In some states, where the Right of Way Division has had practically no land taking, appraisal, or negotiating experience, the problem will be most acute.

I suppose at this point one could almost take the position that there just cannot be enough experienced right of way men to be found. However, we know that is not going to be the case. We know that the right of

way profession will rise to this challenge and that, by diligence, imagination, hard work, and the most efficient use of available resources, this immense task will be performed. And it will be performed in the tradition of our profession, with competence and fairness.

One way that I have indicated that I feel this challenge must be met is by the most efficient utilization of resources. This means, I take it, that each right of way man will be engaged in those activities which are most directly productive, and that all work that can be diverted away from him must be so diverted, to leave him free to use his time to maximum advantage in those areas where he **must** do the work because there is no one else capable of doing it. I must admit, the remaining area—the one that cannot be delegated or distributed elsewhere—is very large. But this serves only to emphasize the importance of stripping the right of way man of every ounce of unnecessary burden.

I imagine that you can guess where that brings me. Title companies—both insurers and abstractors — are prepared to serve you. The services available will vary, necessarily, depending upon the customary forms of organization and practice, as they vary in different parts of the country. The range of variation is wide, of course, from abstracts to title insurance policies. But in any area, and under any traditions, I am confident the title man will cooperate with you to the fullest extent, and make every effort to meet your demands, both as to the type of service you want and the speed with which you must have it.

At this point you may well ask: If the demand for right of way work and the title work incident thereto is to be so great, how will it help to turn to the title company? Is it not true, in other words, that the title business will be just as overloaded, and find it just as difficult to give accurate and prompt service as will the right of way men for the highway departments and the utilities? I suppose the wise answer to that is to concede that there may be some delays, unavoidable in particular counties or on particular titles.

The real reason, however, why you can expect the title companies to be in better condition to handle this flood of work is very simple. Assume, as I have indicated above, that right of way work at least doubles for the Highway Departments. The increased title work from this program will, of course, also be felt by the title industry, but much less acutely. Consider for a moment these figures. The amount to be expended for right of way acquisitions over the next 13 years will probably not exceed 5 billion dollars. In 1954 (the last year for which figures are available) title insurance companies examined and insured titles of a total valuation of nearly 100 billion dollars. These figures do not, of course, tell the whole story. Title companies will feel the results of the program in many indirect ways. People and businesses forced to move to new locations will be title customers. Utilities must be relocated. New subdivisions will arise as the new roads provide easy access for outlying areas. And, while it is difficult to measure or determine, there can be no doubt that the general economic effect of the huge expenditures for construction and materials will raise the level of activity in the communities affected, increase payrolls of both those directly engaged in construction and of service trades, which may all tend to increase the percentage of home ownership, purchase of new houses and other like matters which increase title business.

All of which means that—all other things being equal—title companies will be busier because of the highway program. But the percentage of increase will be very slight compared to the increase for the highway departments. So you can reasonably expect to get real help from your title companies.

What kind of help can or should the title business give? I know there are too many divergent practices around the country, many of which are well adapted to the areas involved, to suggest any one procedure as a national model. However, I

would like to refer to some of the services offered by one California title insurance company, most of which are, I believe, available elsewhere in our state.

First, I should point out that California is, of course, a title insurance state. The only generally accepted evidence of title is the title insurance policy.

When this title evidence is required, the accepted standard procedure is to first open a title order. Ordinarily this is done by telling the company what land is to be searched and reported on. We have developed, in cooperation with the state, a procedure whereby the state can open the order by supplying us with a map, delineating in color the areas which it desires to acquire. We do not require a complete legal description.

The order is opened on the basis of this map; our specialists work out the report. We also show on our report the ownership of contiguous property, to facilitate computation of severance damages. The correctness of the report is backed by our guarantee in the sum of $3,000.

Here is what the report provides:

The Company reports that according to an examination of those public records which under the recording laws impart constructive notice of matters affecting the title to the land hereinafter described, the vesting and condition of said title and the necessary parties defendant in an action to condemn said land are, at the date hereof, as hereinafter shown.

The Company guarantees..... in a sum not to exceed $3,000 that the information in this report is correct.

Signed.....

This covers acquisition deed; shows date, book and page, party who acquired, revenue stamps, consideration, and mailing address of grantee.

Vesting of title:.....

Free from all incumbrances except:

.....

Necessary parties defendant (other than those parties having an interest or claim not disclosed by said public records and other than those parties having an interest or claim by reason of the matters shown in exceptions).

The California Division of Highways makes full use of this service. As a general rule, they require title reports in all cases where the appraised value of the land to be acquired is over $100 per parcel, and in all cases—regardless of value—where access rights are being taken.

The California Land Title Association—a trade association of title companies—has cooperated with Frank Balfour's office in the preparation of certain standard indorsement forms, which are now used by companies all over the state. There are 6 of these forms, designed to be attached to our Standard Coverage Policy. They insure the state in various situations involving the acquisition of access rights, whether the acquisition is by condemnation or by executed instrument releasing such rights.

I note that the "Right of Way Manual" of the California Division of Highways (a comprehensive work of nearly 400 pages, published in 1955 and with which most of you are, I am sure, familiar) states in several places that particular problems should be resolved by consultations with the title company. Some of these problems are:

(1) The circumstances under which a deed from a married woman alone may be regarded as conclusive under our community property law;

(2) Whether or not particular liens may be disregarded because a declaration of homestead is prior to the attachment of said liens;

(3) Problems incident to getting title out of a dissolved or suspended corporation;

(4) Whether or not the title company will agree to elimination of blanket easements upon proof of location.

When condemnation proceedings are commenced, right after the recording of the lis pendens, the company issues a supplemental report, which is done by letter in the following form:

In accordance with your request and as an accommodation to you and without liability on the part of this company, an examination has been made of the record title to the land described in our report dated.....

at 7:00 a.m., between said date and .....at 7:00 a.m.

No change has occurred except: Here we list the changes, if any.

* * * *

This supplemental letter shows whether or not any change in the status of title in the intervening period necessitates, in our opinion, the naming of additional defendants and —if this is the case—we specifically designate those defendants who should be added.

In conclusion, it is certain that in every state and region their local title associations—or at the national level, the American Title Association members will be happy to discuss and formulate coverages that might better meet your needs.

I will dispense with any further detailed explanation of California practice so that we can obtain the full benefit of the broad background of experience represented by our panel members. Let us see what they, for their part, foresee in their sections of the country in the way of increased demand, and how they anticipate the title work can be most expeditiously handled.

ARTHUR A. ANDERSON

It would seem only natural that my presentation on this panel should be of Scandinavian persuasion. This by reason of the fact that these influences are found in such great abundance among our people in the State of Washington. Heading our State Highway System is our Director of Highways, William Bugge, who stems from Viking ancestry. Throughout the Department is a heavy assortment of the Carlsons, the Johnsons, the Nelsons, Peterson, and others. In my community some 60% of the population is of Scandinavian descent. I am sure you will pardon my accent, for under these circumstances, I am not sure that I am the right one to make this presentation. I feel like the Swedish farmer who was the proud father of eleven children and when the twelfth child came, his wife had a most difficult time and the old family doctor who had waited on them for so many years, noted the difficulty. He called the Swede into another room, explained the situation and told him that if he had any more kids, he should go hang himself. Well, a year rolled by and then the thirteenth child showed up. Remembering the advice of his good doctor, the farmer with some deliberation and melancholy made his way to the barn. He found the rope in the box, put the noose around his neck and threw the end of the rope over the rafter and was just about to pull the rope, when he got to thinking the matter over and then said to himself, "I wonder if I am hanging the right man."

I do not want to find fault or appear critical of the introduction of me by Dan Rosencrans, but frankly, I have had better introductions than that in pool halls. For me there is a prevailing uncertainty as to whether I might be heard or understood over these ostrich neck microphones which prevail in Chicago. In the northwest, we are accustomed to a mike which possesses a much larger speaking area and I have come to realize more and more, that a mike is just like a spittoon. It is no damn good unless you hit it.

Yesterday noon, Dexter MacBride so effectively took us down the endless corridor of time with his most graphic picture of the history of the Right-of-way. With him, we crossed the Appian Way of the Caesars, the uncertain Suez and the Silk Route to the Orient. From Alaska through Canada to the United States we traversed the Alcan Highway, thence south through the states, through Mexico and South America to its southern most extremity. It was a most interesting and illuminating ride.

I can take you on no such fabulous journey, for all I shall offer is an imaginary ride on a Merry-Go-Round. Picture if you will, in your mind's eye, the typical merry-go-round with all of its music and atmosphere. On this merry-go-round, place 48 horses. On each horse will be riding a Director of State Highways from each state. Wistfully and hopefully, looking on alongside the merry-go-round are the Directors of Highways from

Alaska, Hawaii, and Puerto Rico, all trying to get aboard. In the center of the merry-go-round, we find the machinery under the supervision of an engineer from the District of Columbia, and over the top of the entire scene is a vast protecting canopy, the Federal Government, from whence comes aid to these intrepid horsemen. Now each of these horsemen rides with a different technique, for the training and background of each differs widely. Each follows different customs and rules and different laws prevail for each. One will ride with reckless abandon (shades of Hi Ho Silver). Others ride with uncertainty by reason of the newness of their experience. Some fall by the wayside by reason of human frailties, while others are unseated by a fickle voting public which seems willing to swap horses in the middle of the stream. Others ride like masters with the assurance of the English tally ho artist (emulating possibly the Lady Godiva who put everything she had on a horse. She did not win, but she sure showed.)

In the pleasant atmosphere of their own individual surroundings, these directors of Highways ride with complacency. Then came the Federal Highway Act of 1956. The merry-go-round squeaked and groaned and came to a halting stop. The vast canopy dropped upon the 48 horsemen and considerable confusion reigned. The engineer had presence of mind to shut off the engine.

Now a little background on that engineer might be interesting. He was one of considerable persistence and courage. For six years he had been an engine wiper for the Illinois Central Railway Company in Chicago, wiping off the engines with loving care; talking to them as though they were human beings, but always hoping that one day he might be permitted to run one of the engines, even if it would be only across the round table into the engine house. Well, one day after six years of faithful service, the engineer came in late and asked him if he could run the engine into the engine house. Of course he could and with a great joy and much enthusiasm he jumped into the cab, pulled the throttle and in it went a scooting. He could see, however, that he was going too far and too fast, so he pulled the throttle and came out. He was one possessed of qualities of persistence and so he tried again. He went too far and too fast and he came out the second time. With the same courage of his forefathers, he made his third and final effort with the same result and when he came out the third time, the engineer came to him and jumped him, shouting, "I thought you said you could run the engine into the engine house." To this he replied, "Well, I had the damn thing in there three times, why in hell didn't you slam the door?"

In such times as the present, the door must not be slammed against reality. As in all crises, men rise to the emergency. Carefully those entangled directors worked their way out of the canopy, realizing the vastness of the responsibility and the importance of the great public trust placed upon them by virtue of the creation of the greatest of all public works program in the world's history. All realized the need of orderly procedure, the need of documentation, and the urgency of meeting the requirements of the law under the Federal Highway Act.

One of the many problems in this vast program will be the acquisition of land and property rights and incident to this, will be the need for adequate title evidence.

What is the problem with respect to title evidence requirements by the Highway Departments of the several states in connection with acquisitions for rights of way, maintenance sites, gravel pits and building sites? Admittedly, there is wide variation in practice in the different states, both as to the procedures followed and the type of title evidence available. Many of the departments do much of their own title searching. Others have been satisfied with an ownership, reflected by the last deed. Some search back for ten years and others require a complete abstract of title accompanied with the opinion of an attorney, or a policy of title insurance.

The west coast states are primarily title insurance states where title plants are maintained on a current basis. This involves the creation of a land account for each tract of land in the county in which the title company operates. Daily the recordings affecting land title are taken, either in abbreviated form or by photography. Each day these recorded documents, court cases, and probate matters are charged against the land which they affect. Each day the name indexes are currently charged with matters such as judgments, incompetency, divorces, probates, affidavits, matters affecting corporations, and other data. These entries are charged against the names of individuals or corporations affected. Then when the necessary title evidence is required, all of the title facts are assembled relating to the land under search and reports made available showing the ownership or (vesting), unpaid taxes, special assessments, mortgages, leases, labor and material liens, attachments, judgments, easements, restrictions, and such other rights outstanding as well as defects in the title examined.

This is an age where the Joneses seek to keep up with the Smiths, and they feel that they are just not in the run unless they have a mortgage on their home. Mortgages for 20, 30 and even 40 years are found on farm and home. These will not be disclosed by a simple name run on the indexes in the county court house. Questions of title relating to court jurisdiction, probate matters, incompetents, divorce problems, forgery, boundary line and party wall agreements often lie dormant in the ancient record, but each representing a valid property right or weakness of a title.

The public trust placed on all alike in this great undertaking, compels a documentation which will clearly show that so far as property rights to be required, either by purchase or by condemnation are concerned, those entitled to compensation for such property rights, shall receive just compensation.

Title companies in the larger centers are well equipped to escrow necessary funds and disburse these funds with responsibility, to the end that the state be safeguarded against a premature or improper payment.

There is more than ordinary need to move carefully and with certainty in this phase of the program. The title industry desires to carry its full load of the responsibility involved and will use every effort to cooperate in the program.

SAMUEL J. SOME, Counsel

In coming to Chicago, and to your conference, from the canyons of New York, I have been instructed—

(a) to present myself, that I may be seen

(b) to speak up, that I may be heard

(c) to say but little, that I may be believed

I shall, accordingly, be very brief.

There is aught to add to the full and comprehensive presentation of our Moderator, and that of Mr. Thuma, but to echo and emphasize some of their sentiments and hopes. For the Title Guarantee and Trust Company, of New York, which I serve as Counsel, and generally for the title companies of the Eastern states, I may say that we, too, are ready to supplement your effort in implementing the Highway Act of 1956. Our services are available to you and we are eager, as a matter of public duty and good business, to give your program a high priority in our work, whether it may be in the form of certifications of parties in interest with respect to particular parcels or tracts — or condemnation certificates furnished to facilitate early acquisition of needed sites — or assignment of award policies to aid owners of land and premises from which they have been uprooted in financing relocation of homes or businesses.

Moreover, we are anxious to cooperate by hand tailoring our end product to whatever the needs may be, the better to serve you. We have in the past been engaged, and are presently engaged in working closely with the Highway Departments of the States, and as well with the office of the Attorney General, to speed, on its way, the work necessary to be done. We expect to continue to do

this, and to add extra effort to the end that the present program now started, will progress rhythmically to successful accomplishment.

We know that your work will open up enormous new areas of development, almost beyond present contemplation, or even comprehension. We know that such activities will be the wellspring of new communities, new shopping centers, new homes, new industrial plants and commercial enterprises. The incidence of these and their creation, whole born of your basic work, will require skills and talents of a specialized sort in most every field of endeavor. We in the title field represent but a fragment of the whole—but in it we offer you the Highest skills available anywhere for the technical work involved, plus title assurance free from loss or litigation. You must remember that in theexamination of the there are two classes of risks—those which are disclosed and those which are undisclosed. In the first category our certificate or report will show the deficiencies in title or objections to title and they will be cleared in course, before closing. In the second category lurk risks which no title examiner, no matter his competence, can discern. Our policy of title insurance furnishes complete title assurance against such formidable undisclosed risks as forgeries in the chain of title or disabilities by reason of infancy or incompetency. There are a host of others too numerous to catalogue here. Without title insurance, on a program of this magnitude, the risk of litigation or loss is real and must realistically be budgeted for.

While, as our Moderator has already stated, there is not an abundance of new talent in our field, our staffs of title men have an average experience of over two decades. We have learned to keep pace with a changing world and have acquired the know-how to accommodate our methods and procedures to the needs of changing times. In the program at hand you will not find us wanting. We shall play our part with efficiency, and will ever maintain the high technical standards and integrity for which, as an industry, we have gained renown.

WILLIAM A. THUMA

There is no doubt we shall have an increased demand for title service in the Midwest and Central Area States because of the Federal Aid Highway Program.

Within that area I include the eight States of Illinois, Indiana, Iowa, Mich igan, Minnesota, Missouri, Ohio, Wisconsin.

And I have little doubt that the heaviest concentration of right of way acquisition, and need for quick and efficient title service will probably be in the earlier part of the program.

The formula of apportionment under the Act, which will be followed for the first three years ending June 30, 1959, and which gives Federal funds to each state on the basis of population, area and miles of interstate highway, allocates almost one-quarter of the total funds to the eight states that I named.

So that, with 1.5844 billion to spend, there can be no question but what the right of way men in this area are going to be busy.

Along with the highway acquisitions will be the utility relocations, housing moves, subdivision developments, and other influences of the highway program, — all requiring title searching.

That the right of way men should not be burdened with title searching seems to me to be obvious, particularly in this area where the services of title companies and abstractors are readily available.

This area is pretty generally a "title plant" area.

By that I mean the title companies and the abstractors,—many of whom are agents or representatives of the title companies in their respective states for the issuance of title policies — maintain their own independent records of all matters affecting titles in their counties.

They are, in the main, able to examine and insure titles, or to make complete abstracts of title, from their own plant.

Will the title companies and abstractors be able to handle the increased demand for title service expeditiously and reasonably?

I feel sure they will.

In Illinois, particularly in the Cook County and Greater Metropolitan Chicago area, we have been under increased pressure for some time now, what with the several expressways, good parts of which fall in the Interstate System, that have been and are now under construction, and the 200-mile Toll Road that will extend across the state is now in process in Northern Illinois.

A title company whose operations I happen to know something about,—but which modesty forbids my naming,—and which operates state-wide, has been meeting that increased pressure in stride.

Typical of the way that company will meet the demands stemming from the Interstate Highway Program (1,600 miles of which will be in Illinois, including 185 miles in Cook County) is the manner in which it is handling the Toll Road job.

That job started a year ago. It runs through seven counties, and involves several thousand parcels. A five-man unit, created specially to handle that work, has stayed current with the Toll Road Commission's demands. The entire Road will be covered by title policies.

The procedure has become a routine operation.

Escrows have been created with the title company for all voluntary purchases.

Other project jobs have been and are now being handled in orderly fashion, without disturbing the everyday run of business.

I'm convinced that the answer to meeting a heavy demand, at any particular time, for title service is not the doubling or tripling of the title company's manpower; but is the availability of plant records in the company's home office, in its branch and regional offices, and in the offices of the abstractors, and a staff of competent and experienced personnel to examine and report from those records.

I'm also satisfied that what can be done in Illinois, the title companies of several of the other states in the Midwest and Central Area can likewise do.

Indiana, Michigan, Missouri, Ohio and Wisconsin all have title insurance companies that maintain their own records in the counties in which the home offices are located; and that have branch offices and abstractor agents and representatives with title plants that make it possible for the companies to render title service statewide.

In Minnesota, service through a title plant company is available in the larger Metropolitan areas.

Elsewhere in the state the abstracting is done by the Recorder of Deeds and the abstracts submitted either to the title company for issuance of policies or to attorneys for their opinions.

As to Iowa, although it does not have title insurance companies it is an "abstract state," with the abstracting done by attorneys, many of whom maintain plants.

One of them — an officer of the American Title Association—assures me that emphasis is constantly being placed by the abstractors on the need for giving priority to highway and utility searches.

So we don't look for any trouble there.

All in all, I would say the Midwest and Central Area states are ready for the "big push."

DATES TO REMEMBER:—

OCTOBER 13 - 17, 1957

51st Annual Convention

AMERICAN TITLE ASSOCIATION

JOHN MARSHALL HOTEL

RICHMOND, VIRGINIA

A Visit to the Heart of Historyland