THE ORIGIN AND DEVELOPMENT OF THE KANSAS BENEFIT DISTRICT ROAD LAW.

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A. B., University of Kansas, 1927.

Submitted to the Department of Political Science and the Faculty of the Graduate School of the University of Kansas in partial fulfillment of the requirements for the degree of Master of Arts.

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September 26, 1928

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Chapter I

History of Highway Financing.

Historically, public roads and commerce and government have gone hand in hand. "Civilization," says Jensen, "has depended on and developed along with these roads."[1] Almost always beginning as local projects under local control, roads have been extended as the state grew in size, and as communication over large areas became desirable and necessary, but sooner or later the control has become centralized.

One of the best early examples of service of public roads to a state is the highway system of the Roman Empire. It has been estimated that this system at its best contained some fifty thousand miles of roads built almost exclusively by contract at public expense. With the fall of the empire the system decayed, since the need for it and the interest in its maintenance largely disappeared. No other comparable system appeared until centralized government again developed in France. During the seventeenth century the "hateful corvee", a system of oppressive and inefficient forced labor, was extended to the construction of highways and there was developed an elaborate system which is still the ground work of the excellent roads to be found in that country. This corvee was swept away by the Revolution and in its

place a permanent national policy of construction and maintenance on a contractual basis was established, which endures to this day.

We find the same process of development in England. In the beginning the manors were in charge of the highways down to 1555, after which, the parish had charge until 1835. Down to this time the work was done chiefly by means of forced or statutory labor, the abutting property owners being charged with the task, paying their road tax in this manner. A policy of central control, to develop a national highway system, was initiated in 1835 and since 1850 local control and statutory labor have in effect been abolished, although centralization has not been carried as far as in France.[2]

In the same manner that we borrowed many of our ideas of law and government from England we were clearly influenced by English practices in our methods of highway construction. We find the same localized control and the work done by forced or statutory labor. Many of these old practices which predominated in England five hundred years ago are still held to by some localities in our country and progress is barred thereby.

Since the beginning of the nineteenth century, however, other schemes for highway financing have been tried out. Some of the states granted corporate

charters to turnpike companies to construct and operate toll roads as private commercial enterprises. While in the early years of the nineteenth century turnpike companies were the most numerous form of private corporations, they did not finally prove successful commercially, the manner of collecting the revenue and operating the roads being too annoying and costly. Later some of the states constructed crude highway systems with no clear relation of the state work to the activities of the federal government on the one hand and the local divisions on the other.[3] Money was spent injudiciously and heavy debts were incurred, many of which were subsequently repudiated. As a result of this experience clauses were inserted in many of the later state constitutions prohibiting participation by the states in any form of public improvement. This restriction was placed in the Kansas constitution and we shall see later that this clause is a handicap which persists down to the present time.

"The federal government confined its early activities to a few projects, of which the Cumberland Road is the most conspicuous example. These federal roads were toll-free and were for the most part paid for out of current revenues, (principally from the sale of public land), to the extent of about $7,000,000."[4] This direct construction proved very costly and was violently opposed

on the ground that it was unconstitutional. With the rapid development of the railroads the pressing need for these roads subsided and further construction was not undertaken. These projects were then turned over to the respective states in which they were located. For some fifty years little change was made in the system of local control.

"The first movement of any importance toward state highway control was inaugurated by New Jersey in 1892, when the first state highway commission was created. This movement spread rapidly until every state now exercises some degree of control of the highway policy, either directly by means of laws regulating the construction, or indirectly by a system of state aid (in those states whose constitutions forbid actual participation in construction).

"The federal government again began to take part in highway construction in 1916, when Congress appropriated $75,000,000 to be distributed by the Secretary of Agriculture in cooperation with the state highway departments. The law was amended in 1919, when $200,000,000 additional was appropriated for distribution among the states, the apportionment being made on the basis of the three factors, population, area, and mileage of rural and star delivery routes, each factor to count one-third." While the federal government

does not actually construct roads, it lays down such conditions as it sees fit which must be complied with before the aid is forthcoming, and thus determines to a large extent what roads are to be improved and the type of construction to be used.

The proper allocation of costs in road building has long been a perplexing question. The popularization of the automobile has not only resulted in the demand for more roads, but has increased both the original expenditure and maintenance cost enormously.

Much of our population has been transferred into gypsies, as it were. Traffic has increased many-fold, and roads which were formerly of local importance only are traveled daily by cars from many states. In 1928, in an hour's drive from Topeka to Lawrence over the Victory Highway, the writer identified cars from 21 out of the 48 states of the union. By actual count it has been found that on some days more than twenty-five hundred cars pass over this particular route. Roads which were perfectly satisfactory for the slow moving horse and ox drawn vehicles are entirely inadequate now. We demand speed, and more speed. Everything that interferes with speed and comfort must be eliminated. We must explore the highways and byways of Kansas today, Colorado tomorrow, and California next week. Not only more roads, but paved roads, hard-surfaced roads good every one of

the three hundred sixty-five days in the year, are demanded. With this increased demand and ever increasing cost of construction and maintenance, the problem, who shall build, and who shall pay for these roads, has become more and more complex.

Chapter II

Origin of Special Assessments for Benefits.

The idea of benefit, the basic principle in the Kansas Road Law, was at one time the controlling factor in the imposition of all public charges. Only very slowly and gradually did legislatures begin to adopt other bases for taxation.

As early as 1250 we find a record in England of the Romney Marsh case involving the question of the repair of a sea-wall. An ordinance provided that the officials should "measure by acres all the lands and tenements which are subject to danger within said marsh" and then "having respect to the quantity of the walls, lands, and tenements which are subject to peril----shall ordain how much appertaineth to every one to uphold and repair the same walls.[5]" A second case on record is an act for the improving of the rivers Lea and Thames in 1601. This law provides "for cleaning the passage by water from London to Oxford" and says: "For that it is reasonable, just and equal that those who partake in the benefit of any good work should in fit proportion contribute to the costs and charges thereof----the commissioners--shall have power---to tax and assess--- such of the inhabitances---as shall in their opinion be likely to receive ease or benefit by the said passage."[6]

One of the earliest provisions for road improvement by this method was an act passed by Parliament in 1662, authorizing the widening of certain streets in Westminster and providing for the defrayal of the cost by voluntary subscriptions. In case these should not suffice, the commissioners chosen to lay out the streets were empowered to charge the owners of the property in proportion to the benefits received.[7]

Five years later a more far-reaching act was passed, to provide for the rebuilding of the city of London after the great fire. The significant section of the act reads:

> "For the better effecting thereof, it shall * * * be lawful * * * to impose any reasonable tax upon all houses within the said city or liberties thereof, in proportion to the benefits they shall receive thereby, for and towards the new making, cutting, altering, enlarging, amending, cleansing, and scouring all and singular the said vaults, drains, sewers, pavements and pitching aforesaid."

Similar cases of benefit assessment are found in France as early as 1672 and at a later date in Belgium and Germany.[8] But these cases are not of special interest since American law is based almost exclusively on English law.

According to Rosewater, the underlying principle of special assessments for benefit first appeared in this country in the provision of a province law of New York in the year of 1691.[9] The effective clause of this

statute was copied almost literally from the twentieth section of the English act of 1667. It provided that a tax be imposed upon all houses within the city in proportion to the benefit they shall receive thereby. This New York law remained unrepealed though practically inoperative until 1787, when it was adapted more closely to the existing necessities. Assessments were no longer to be laid upon all houses within the city, but only upon such of them as were "intended to be benefited." This method of raising revenue for local improvements remained peculiar to New York until after the war of 1812 except to a limited extent in Massachusetts and Pennsylvania.[10]

The first general development of the system corresponds roughly with the movement for the construction of internal improvements covering the years just before and after 1830, when Michigan, Ohio, Illinois, Kentucky, Louisiana, Pennsylvania, and New Jersey adopted the plan.

Another period of extension occurred in the later forties and early fifties, coinciding rather definitely with the period of railroad building, at which time Maryland, Wisconsin, California, Connecticut, Rhode Island, Mississippi, Missouri, and Iowa adopted the system. The final movement which has extended to all the states began immediately after the civil war and continues down to the present time. The courts of four

states, Tennessee, Arkansas, Colorado, and South Carolina refused for a time to give judicial approval to the doctrine of special assessments on the ground that this was not a uniform levy upon all property according to a just valuation and was therefore unconstitutional. But when this question arose in Kansas, the courts interpreted that section of the constitution which reads, "The legislature shall provide for a uniform and equal rate of assessment and taxation, etc." to mean that the rate must be uniform in the district in which the tax is levied.[11] This is the conventional view.

During all these years this system of finance was limited almost exclusively to municipalities where it was widely used for financing the improvement of streets, construction of sewers and drains, building of wells and cisterns, erection of pumps, construction of sidewalks, laying of water pipes, clearing and repairing of docks, repairing of bridges, etc.

Various limitations have been enacted in the different states as to the per cent of the costs that may be assessed against the benefited property. Some states require that the assessment shall not exceed twenty-five per cent of the value of the benefited property, and others set the limit at fifty per cent of the value. The general rule, however, and the rule which is followed by Kansas, permits the assessment for the full cost of the improvement to fall upon property abutting

upon the improved street and extending to the center of the block on either side thereof, the cost of intersection to be borne by the city at large.

Rural road building by this method was a later development. It was only natural that this system, which was the result of a long evolutionary process and which had proven to be highly satisfactory in cities should be resorted to when the demand came for similar improvements in the rural districts. The first move in this direction was perhaps the one made to apply it to the incorporated road districts of New Jersey. But the first genuine benefit district road law which we have been able to locate was passed by Ohio in 1867.[12] Indiana passed a similar law in 1877[13] and Kansas made a move in that direction in 1887[14] but the act was declared unconstitutional, as noted later.

Although these early attempts had been made, the proposition had gained very little headway down to 1912, when the Good Roads Associations were organized in the various states. The question of road financing became of major importance and led to much discussion in these association meetings. E. B. Gaston, in a paper at one of these meetings in the state of Alabama in 1913, advocated the adoption of the benefit district plan for rural road building. The proposition was so ably presented that it met with considerable favor and was reproduced in the American City Magazine along with other

articles criticising and endorsing the plan.[15] Notwithstanding the fact that laws whereby roads could be initiated and financed in this manner had been upon the statute books of some of the states for almost forty years, the plan had certainly not been extensively used and was considered a new idea, new, not because of the benefit assessment, but because of the application of this system to rural roads.

Property located upon a paved street is more valuable than property facing an unpaved street. This fact is so obvious that the owners of city property have long been willing to stand the entire cost of the improvement. This is not because they are the only ones benefited by the improvement, but because the property owners on the other half of the block have a similar street to pave and they are expected to take care of that when society makes the demand. Altho, in a manner, privately built, these streets are open to public use free of charge to city dweller and rural folk alike. Consequently, when paved roads began to be demanded in the rural districts the same principle was applied and the property abutting upon the road was unjustly charged with the entire cost. The burden in many instances was more than could be borne. Great hardships resulted where large tracts of only medium or low productivity abutted upon these roads and as a result much prejudice grew up against the system.

Since the advent of the automobile, conditions have changed markedly also. Thru highways are demanded for the benefit of the ever increasing transient traffic. Truck and bus lines have been licensed to use these main arteries, largely for the benefit of the cities. Due to the speed and congestion, many of the farmers along these trunk roads have come to look upon the improvement, not as a benefit but as a detriment. But certainly if a city property owner is benefited to the extent of the value of the improvement, the rural property owner is also benefited in some appreciable amount by a paved road which links his property with that of the city property owner. Certainly an all-weather road which connects his farm with the city markets is of special value to the owner. This is evidenced by the many truck loads of livestock and grain which are always encountered upon these roads. Certainly the extension of the subdivisions of the cities far into the rural districts along these highways is increasing the price of the land.

Of course, the landowner is not the only party benefited, neither is the city property owner the only one benefited in his case. These special benefits must not be confused with the general benefits to the community at large. Therefore, in the light of these facts, surely we must admit that there are special benefits derived from either a paved street or a paved highway, accruing

to the abutting property. The problem is, to what extent is it benefited. Many cities are striving to reach an equitable solution and are now charging the cost of construction of boulevards and heavy trafficways to the city at large. Federal-aid, State-aid, and the gasolene tax are greatly relieving the situation in the rural districts. Some states have issued bonds and have constructed their entire state road system at the expense of the state at large with no charge upon the abutting property. This latter plan has not met with much favor in Kansas.

However, Kansas has been one of the pioneers in the attempt to solve this problem. Here also, we shall see, originally the abutting property was made to bear almost the full cost and in some cases the full cost of the improvement. This amount has been gradually reduced until now a very small per cent of the total cost will ultimately be charged to the land in the benefit district. By a system of trial and error, every step of which has been contested in the courts, an equitable basis has been sought for the allocation of the costs, and the law has been amended and rewritten into its present form. Many more changes will be made, no doubt, before it is entirely satisfactory to all concerned.

On account of this complex process of development, it is impossible to separate the legislative and judi-

cial history of the Kansas law. For this reason the two phases will be treated together in the following chapters.

Chapter III

Legislative and Judicial History.

Act of 1887.

The first attempt to enact a Benefit District Road Law in Kansas was made by the legislature in 1887.[16] This Act, which was known as "The Buchan Law" provided that a majority of the resident landholders within one-half mile of any road might petition the county commissioners for the improvement of the road and it thereupon became the duty of the commissioners to cause the improvement to be made. The petitioners named the road, located it, specified the kind of improvements, and the time for which assessments were to be made, not to exceed five years.

After the road was mapped and surveyed by the county surveyor and an estimate of costs of construction made, the county commissioners were required to appoint three resident land owners who were to be known as road commissioners and whose duty it was to take charge of and conduct the improvement in conformity with the profile and specifications furnished by the county surveyor.

Upon completion, the costs were to be prorated by the county commissioners; two-thirds among the several tracts of land in the benefit district, according to the

benefits to real and personal property derived from the improvement; and one-third to the county, to be paid from the general fund.

There is no available record as to the extent of the roads built under this law, except such as might be found in the counties, but it is fairly certain that no extensive use was made of it.

This act followed very closely the plan used by cities in that two-thirds of the costs were to be charged to the abutting property owners and the district extended only to the center of the section, or one-half mile on either side of the road.

The constitutionality of this law was attacked in a case filed in the Wyandotte County court sometime prior to March, 1893, on the ground that no discretion, exercise of judgment, revisory or supervisory control was vested by this law in the board of county commissioners.[17] Since it became the duty of the county commissioners to cause the road to be improved and to cause one-third of the costs to be paid from the general fund of the county, this was held to be a delegation of legislative power to the petitioners which is beyond the constitutional authority of the legislature. The law was also declared unconstitutional in so far as it included personal property in the special assessments. The court said that "under this law a majority of the landowners in a district created by themselves, can impose taxes or special assessments on other taxing districts and the whole

county, without any right of such others to vote, or the county as a whole to have any voice in the proceedings."

After deciding the case before them, the court did as courts often do, and gave advice as to future procedure in the form of "obiter dicta." For more than twenty years the effect of this dicta can be clearly seen when legislation on the subject was attempted. The court said, "If the legislature had established the road and cast the cost and expense thereof upon the county, the statute might have been constitutional under a former decision of this court.[18] If the legislature had conferred upon the board of county commissioners of Wyandotte county, discretion to order the improvement, the control thereof, and the amount of expenditure therefor, the statute might be valid under the constitution. Art. 2. Sec. 21."

Act of 1901.

The next attempt at a general law of this nature was made in 1901.[19] The dicta in the "Abbott Case" was followed carefully and as a result the procedure was so complicated that the law was almost worthless. Each county in the state was declared to be a separate road district. If the commissioners in any particular county desired to improve any roads they must first submit a proposition to the voters at any general election to determine whether a two mill levy could be made on all the taxable

property in the county for that purpose. If this levy carried, the commissioners were to have full and exclusive control of the construction of such roads as were built.

After this preliminary procedure had been complied with, a majority of the resident property owners of property abutting on any public highway might petition for the improvement of such highway and if the commissioners found the improvement sought to be of sufficient public character as to come within the act they could cause the improvement to be made.

The money raised by the levy in any township could be used only in that township. Tax collected under the levy from incorporated cities and from railroads must be credited to the general county road fund to be used: First, in the purchase of all machinery necessary for the economical construction of any contemplated work; second, for the surveying, mapping, and estimates as provided by law; and third, the balance was to be prorated annually between the several townships according to the value of roads constructed or being constructed under the act.

The benefit district was to be composed of the real estate situated within one-half mile on either side of the highway and was to be assessed, irrespective of improvements, for only fifteen per cent of the cost of

the road. The balance of the costs must come from the fund created by the two mill levy and the improvements which could be made in any one year were limited to the amount raised by this levy.

Thus all the people who were to be called upon to pay for any part of the improvement were given a voice in the matter, the commissioners were given complete control of construction and discretion as to whether the improvement should be made, the legislature designating the county as the road district, and personal property was excluded from special assessments. The constitutionality of the law apparently was never questioned. In fact there is no evidence that any roads were ever built under it.

Special Acts.

The roads which were improved in this period apparently were constructed under special laws enacted for that purpose. It is necessary that we bring some of these into our study, although the majority of them were not, strictly speaking, benefit district laws; because some of the important features of the later laws were developed in this manner.

The receipt of private donations by the township board to be applied toward the construction of highways was first authorized in 1897 in a special act for Johnson

county. The township board was authorized by the same act to macadamize certain roads upon receipt of a petition signed by a majority of the legal voters of the township and to pay for same out of the general fund of the townships.[20]

The two mill levy and the provision allowing the county commissioners to either buy the material and build roads by day labor or by contract as they saw fit seems to have been first introduced in a special act for Wyandotte and Bourbon counties passed in 1899.[21]

As additional evidence that the 1901 law did not meet the needs of the counties we find additional special acts passed at each succeeding session of the legislature. For instance, in 1903 three supplements to the Wyandotte County act were passed, three more in 1905, and seventeen in 1907.[22]

The extension of the benefit district to include all territory within one and one-half miles on either side of the road and the creation of zones were first provided for in a special act for Johnson county in 1903.[23] When improvements were completed under this act the commissioners were instructed to apportion the costs among the several tracts of land in the benefit district according to the benefits to real and personal property at the rate of $1.75 per acre for the first half mile of land, $1.25 per acre for the second half mile, and 75

cents per acre for the third half mile on either side of the road. These assessments were to be in lieu of all other road tax assessments upon this land for the time such assessments were made, which could not exceed ten years. The costs of all bridges, surveying and mapping were to be paid out of the general fund of the county.

Here we have several new features emerging for the first time; first, the benefit district widened from one to three miles; second, zones created and an attempt made to establish the proportional benefit by fixing the ratio for each zone; third, the entire cost of the road charged against the benefit district; and fourth, all bridges and the cost of mapping and surveying charged to the general fund of the county.

While this law was still visibly limited by the dicta in the "Abbott Case" it eliminated the necessity for submitting the proposition to a vote of the county. But the benefit district bore the entire cost except such as the county commissioners had a right to charge to the county at large under the general road laws. The law was impracticable in that it placed too heavy a burden on the benefit district.

Bourbon county appears to have been one of the first to launch out upon a definite program of road improvement. Under a special act passed in 1903 and an amendment to it passed in 1907, the foundation for an

excellent county system of rock roads was laid.[24] H. A. Russell, acting Secretary of the Chamber of Commerce of Fort Scott, in an article which appeared in the American City Magazine for April, 1917, said:

> "A system of rock road building began some twelve years ago. By an act of the legislature a special road district was created and a one mill tax levied which produced $16,000 annually. With this amount four or five miles of macadam roads were constructed each year. In ten years fifty miles were built out of Fort Scott." [25]

Wyandotte and Johnson counties and perhaps one or two others also built some hard surfaced roads during this period under these special acts. Other special laws were passed but we deem this sufficient to set forth the chaotic condition of the Kansas Benefit District law when the Legislature came together in 1909.

Acts of 1909.

Up to this time no steps had been taken to provide each county with a competent engineer. Heretofore such work had been done by the county surveyor, who was elected by the people and who was often a better politician than mathematician; or an outside engineer had been hired to do the work. At this session of the legislature a very definite step forward was taken and the office of County Engineer created. [26] In order to insure a competent man the engineer was to be appointed by the

county commissioners.

In addition to the creation of the office of county engineer two general benefit district road laws were passed. One of these merely revamped the 1901 law and was evidently passed for the purpose of having something to fall back on should the other be found unconstitutional.[27] Past results clearly demonstrated that a new type of law was necessary but apparently the legislature was not sure that the new one about to be passed would receive the approval of the court.

Under the first plan any proposition to improve the roads of a county must first be submitted to a vote of the county. If it passed, a one mill levy could be made on the taxable property of the county and the fund thus created could be used on any road in the county regardless of township lines. When a majority of the property owners within one-half mile of any road petitioned the county commissioners to improve their road and the commissioners found the road to be of such public character as to come within the purpose of the act the law read "they shall determine that the highway be constructed." Twenty per cent of the cost was to be assessed against the land within one-half mile of the road. Each mile was to be a separate improvement district and the cost was to be prorated against this land in proportion to the value of each tract, regardless of improvements,

as established by three disinterested appraisers. The balance of the cost was to be paid by the commissioners from the fund created by the one mill levy.

This law was an improvement over the former one in that the fund could be used anywhere in the county. The benefit district share was increased to twenty per cent. More funds were available for any one particular project but one insurmountable obstacle remained. It is almost impossible to get a majority of the voters of a county to vote a tax upon themselves for the purpose of improving a road which is far removed from them and which they seldom use. Realizing this fact the legislature passed a second law which was the first genuine benefit district road law since the act of 1887.[28] In many respects it was so much like the former act that it was doubtful whether it would stand. On the other hand it was made to conform to the former court decision as nearly as possible and yet be a workable, practical law.

It provided that whenever sixty per cent of the land owners along the line of any regularly laid out road, who owned at least fifty per cent of the land to be taxed in the district specified, shall petition the county commissioners for the improvement of the road, the commissioners shall order the improvement made, providing they first find the improvement prayed for to be of public utility. The petitioners were allowed to

name the road, locate the district, specify the kind of improvements and the number of annual payments not exceedint ten. The commissioners were to have full charge of the construction and upon completion were to apportion three-fourths of the cost of the road among the several tracts of land in the district according to the benefits accruing to the real property and the improvements thereon. This tax was to be in lieu of all other road tax assessments on the property within the benefit district for the time such assessments were levied. The remaining one-fourth of the cost was to be charged to the township or townships in which the road was located. The county was to pay for all bridges costing over $200 and in case of some unusual conditions such as sand, creeks, etc., the commissioners might pay for that part of the road from the general fund of the county, on the theory, no doubt, that the county was obligated to make such improvements regardless of contemplation of special improvements to the road.

This latter law was known as the "Hodge" or "The Rock Road Law." Neither of these acts purported to repeal the other and it was evident the legislature intended to provide two separate and distinct methods for improving roads, either one or both of which might be used in the same county at the same time. The Supreme Court also ruled to that effect when the question was brought before it.[29]

Law Held Constitutional.

The constitutionality of the "Hodge" law was attacked almost immediately under the doctrine of the Abbott case.[30] It was argued that this act also attempted to delegate legislative power to the petitioners; first, to determine absolutely the location, extent and boundaries of the taxing districts within which three-fourths of the cost was to be raised by special assessments; second, to determine the kind, character, extent and cost of the improvement; third, to determine the time over which the special assessments were to extend and payments to be made; and fourth, to levy one-fourth of the costs of the improvement upon the townships through which the road passed without their consent.

The decision of the court in this case is an excellent example of the force of public opinion. After calling attention to the dicta in the Abbott case, as follows: "If the legislature had conferred upon the board of county commissioners of Wyandotte county, discretion to order the improvements, the control thereof, and the amount of expenditure therefor, the statute might have been valid", the court continued:

> "During the seventeen years since the 'Abbott case' was decided there has been a steady and constant growth of sentiment everywhere in favor of good roads; and of apportioning their cost of construction between the public and those whose property is especially benefitted thereby. This sentiment has

> gradually crystallized into a popular demand, in response to which the legislature at its last session enacted the 'Rock Road Law'. It is the duty of the court to uphold the statute unless it is apparent that it conflicts with some provision of the constitution. It is presumed to be valid. In its enactment the legislature evidently sought to avoid the defects in the 'Buchan Law' and doubtless for that reason expressly provided that before the improvement prayed for should be ordered by the board, and before any tax could be imposed, the board should first make an order finding and declaring the road to be of public utility."

The act of 1887 left no discretion whatever in the board as to whether the improvement should be made under that law. If the petition was in due form the board was required to order the improvement made and the tax levied. Under the act in question if in the judgment of the board of commissioners the taxing district was not a proper one they could reject the proposition and refuse to find and declare the improvement to be of public utility. The court said, "The law does not delegate to the petitioners the power to order or direct anything to be done. Nothing that the petitioners do can be regarded as the exercise of legislative power. They merely initiate the proceedings."

The law was therefore held to be constitutional and marks the beginning of actual progress in road financing under the benefit district plan. The law was not perfect by any means but with the constitutional question settled there was a reasonably secure foundation to build upon.

Amendments of 1911.

The section which provided for the exemption of the land in the road district from all other road tax was stricken out in 1911 and a provision inserted empowering the county commissioners to set a time forhearing grievances and correcting appraisements where they saw fit. A provision was also added permitting payment as work progressed and another requiring the county clerk to give notice to land owners of the amount of the assessments and giving them an opportunity to pay the full amount within thirty days, in which event no further assessments were made against their land. Township boards were made responsible for the maintenance of such roads constructed within their townships. In this manner several weak points were strengthened.[31]

Commissioners' Findings Conclusive.

The law was attacked from a somewhat different angle in 1915 by a group of taxpayers in Shawnee County.[32] It was alleged that the petition in question did not contain the requisite number of signers; was signed by persons who were not bona fide land owners at the time; that some of the signatures were obtained through false and fraudulent representations; that limits of the district were irregular, illogical, and unjust and did

not comply with the spirit or letter of the law; that the cost of the improvements were excessive and out of proportion to any benefit that could accrue to the adjoining land and in many cases the taxes would exceed the revenues from the land and would result in virtual confiscation; that the law was unconstitutional; and that the commissioners made no investigation as to the sufficiency of the petitions.

The defense questioned the right of taxpayers who did not live in the district but who did live in the township, to bring this action.

The court ruled that any property owner and taxpayer affected by any tax levied under the law may prosecute an action to enjoin the county commissioners, but the law was upheld at every point of attack. The court ruled that: "In the absence of fraud, corruption, or other misconduct, the substantial equivalent of fraud, the findings of the board of county commissioners on the sufficiency of a petition under chapter 201 Sess. L. 1909 is final and conclusive on the property owners and taxpayers affected by any improvement ordered under that section. This rule applies to the legality and authenticity of the signatures to the petition; to the determination of the board concerning the boundaries of the district, as set forth in the petition; and as to the cost of the proposed improvement."

It was argued by the plaintiffs that the law was unconstitutional: first, in that the mandatory provisions of the constitution were not observed in the passage of the act; second, that it imposed a tax on the township without giving it a voice, hearing, or representation regarding the tax; third, that the board of county commissioners had no discretion with respect to improvements ordered; fourth, that the act conferred legislative powers upon the petitioners; and fifth, that it made no provision for notice to the land owners of the proceedings for the contemplated improvement of a road. But the court ruled that these points had been settled in the previous case and that the law was constitutional.[30]

"Although this law was much better than anything which had heretofore been enacted," W. S. Gearhart, State Highway Engineer for Kansas, writing in the American City in 1917 says: "it had serious defects. In the first place it did not confine the petitioners to resident land owners. The requirement that the petition must be signed by sixty per cent of the land owners owning fifty per cent of the land in the district was too rigid. The language defining the boundaries was not clear. Seventy five per cent of the cost of improvements was too large a proportion to be charged against the benefit district on main traveled highways except possibly near large cities. It was practically impossible to form districts including land within two or more counties."[33]

Chapter IV

Legislative and Judicial History Continued.

Acts of 1917.

The "good roads" movement had reached the boiling point when the 1917 legislature met. The feeling was general that the time was ripe for action. The world war was in progress and it was becoming more and more apparent that the United States would become involved. Prices were high and it seemed as though everyone had money and consequently owned an automobile. Federal Aid had been advocated for some time and had become a reality the year before. The courts had been very favorable toward the "Hodge" road law. Its constitutionality had been upheld upon all its principal points. To take advantage of the federal aid offered, a Highway Commission would have to be appointed.

State Aid in road building was also being urged, but a clause in the constitution apparently barred the way. To make certain, however, a small appropriation was put through the Legislature.[34] This act was immediately declared to be in violation of Section 8, Article 11 of the constitution, forbidding the state to be a party in carrying on any works of internal improvement.[35]

The general road law was again rewritten, a Highway

Commission was created, and provision was made for the acceptance of Federal aid.[36] Since that year Kansas has received about $2,000,000 per year from the government at Washington to be applied toward the cost of certain approved roads at the rate of fifty per cent of the cost of construction but not exceeding $15,000 per mile. This has been a great boon to road building but there is danger at the present writing that this aid will be discontinued after July 1, 1929 unless immediate action is taken. The federal government demands that there must be centralized control of road building in the state before further aid is granted. Up to date Kansas has insisted in keeping the control of road building largely in the hands of the board of county commissioners in the separate counties. To meet the federal requirement, the constitution will have to be amended. Western Kansas has been opposed to centralized control and they have succeeded thus far in blocking any movement to change the constitution. However, at a special session of the legislature, called by the governor for that purpose July 19th, 1928, two amendments have been submitted to the voters, one to insure the constitutionality of the gasolene tax law and the other to remove the constitutional restriction against state participation in road building, to meet the Federal requirement.

And finally, the Benefit District Road law was rewritten so as to overcome the difficulties of the old

law but retain the benefit of the supreme court decisions.[37]

This new law required that the signers of petitions be resident land owners and defined resident land owners to mean any person residing in the county and owning land in the district. Three options were given as to the number of signers necessary; either fifty-one per cent of the resident land owners owning thirty-five per cent of the land in the district; or thirty-five per cent of the resident owners owning fifty-one per cent of the land; or the owners of at least sixty per cent of the land must petition. The law specified that boundaries could be fixed in any manner the petitioners might determine, that is, they might include as nearly as practical all of the land benefited, except property within incorporated cities which could not be included. The petitions must designate the road to be improved, lands to be included in benefit district, the kind of material to be used, the width of surface to be paved, and the number of assessments to be made, not more than twenty nor less than ten.

Any Federal aid or other donations were first to be deducted from the total cost and the remainder was to be apportioned, fifty per cent to the county, twenty-five per cent to the townships divided according to the area of the benefit district in each, and twenty-five per

cent among the several tracts of land within the benefit district according to the benefit accruing to the real property and improvements thereon.

The county commissioners were required to hold a special session to hear complaints and were allowed to alter or change any apportionment for good cause. The county clerk was required to notify each land owner as to when the hearing would be held and as to the amount of his assessment at least two weeks before the date of the hearing. The land owner was permitted to pay the total amount of his assessment any time within thirty days in which event no further assessment was to be made.

In special cases where the cost of construction was unusually heavy the commissioners might charge sixty per cent of the cost to the county after donations were deducted and reduce the benefit district share to fifteen per cent. If the cost was not paid by the land owner within thirty days, bonds were to be issued and annual levies made on the land sufficient to cover the principal and the interest. All bridges and culverts costing less than $2000 or having spans of not more than twenty feet were to be charged against the improvement, but longer bridges were to be paid for by the county. Petitions might call for improvement of roads in more than one county and in that event the costs were to be apportioned according to the area of the benefit dis-

trict in each county. All roads so improved were to be maintained by the county.

A provision was also incorporated in this law whereby twenty per cent of the resident land owners of any county might petition the county commissioners to call a special election and submit to the voters any proposition for the permanent improvement of thirty miles or more of road within the county. If a majority of the votes cast were in favor of the project, the commissioners were to proceed with the improvement and the entire cost after deducting Federal aid or other donations was to be charged upon the taxable property of the county at large. If payment was to be made by levy only such amount could be built each year as could be paid for, that year.

Results.

The good roads germ which had been struggling for existence for almost thirty years now began to multiply rapidly. Under the act of 1901 nothing was accomplished and even under the acts of 1909 only a few counties were able to make any headway. Bourbon county, as previously states, was one of the pioneers, due largely to the persistence of a few men who believed in good roads. There the idea of building roads on the pay as you go plan was given a thorough test. As a result of ten years of sys-

tematic work fifty miles of rock roads were built radiating out of Fort Scott. It was demonstrated that under this system it would take a lifetime to build up the roads of a county and by that time the roads first built would be worn out and the next generation would have the same thing to do over again. Under that plan it would be impossible to have a system of good roads but only a good spot here and there.

Mr. Russell, in the article referred to on a preceding page, says: "In the winter of 1915 a movement was started under the 'Hodge' road law to extend the system (referring to the fifty miles which had been built in the ten years previous to that time) and in spite of the fact that this law compelled the farmers in the benefit district to pay seventy-five per cent of the cost of the road, petitions were circulated for over fifty miles more of macadam road. In 1916 contracts were let for twenty-seven miles, and in 1917 at the time the article was written petitions were being circulated for thirty additional miles."[25] He also states that the twenty-seven miles contracted for in 1916 exceeds the amount contracted for during the same time in all the balance of the state.

No doubt much of this movement was due to the belief that a new law would be passed at the coming ses-

sion of the legislature which would readjust the burden of the cost. At any rate a provision was included in the 1917 law which made it retroactive. A case involving this question came up later and the courts held that roads, theretofore petitioned but uncompleted and upon which costs had not been finally apportioned, might benefit from the new law.[38]

When the new law was passed in 1917 Kansas had only a total of 390 miles of hard surfaced roads and the majority of that was macadam.[39] This law provided for three plans of financing such roads: first, by voting county wide bonds; second, by voting an annual tax of not over three mills; and third, the benefit district plan. In the period from May, 1917 to the date of Mr. Smith's article, August, 1918, he says, "The people of Kansas had financed over seven hundred and fifty miles on the Benefit District Plan alone." This plan appears to have been much the most popular of the three. The seven hundred and fifty miles referred to was widely distributed throughout the state and called for various types of construction, brick, concrete, gravel, macadam, and chat.

While a few of these counties failed to carry on and complete their projects the greater majority of them did and this is the real beginning of a state-wide system of hard roads. Thus just thirty years after the

first attempt to establish a Benefit District plan for County road building a fairly satisfactory system was hit upon. At any rate it appealed to the people and produced results. As we shall see later on, the plan had its faults and has been amended from time to time. Sometimes the amendments have proven beneficial and sometimes hindrances. Progress has also been contested in the courts at every step. The American plan is to pass a law and put it into operation. Sooner or later those who do not favor the law will attack it in every point which appears to be vulnerable. When a weak point develops, it is patched up with an amendment at the next session of the legislature. If the patches become too numerous, the law is rewritten so as to conform to the court decisions. Thus to know correctly what the law is, one must not only read the statute books but he must know what interpretation has been placed upon each point by the courts and he must also be able to predict what the courts will do on other points which may not have been contested.

This law was no exception to that rule. Although the constitutionality of all the principal points of the old law had been pretty definitely settled, and the new law had been drafted, so as to comply, as nearly as possible, with these decisions, no one knew exactly what the courts would do. And as the law began to be

applied, different interpretations were given to many sections by lawyers of equal ability. The injunction was the favorite weapon of the opposition. Long delays resulted. There was no limit to the time when technical questions could be raised.

Amendments of 1919 and 1920.

As a result, several important amendments were made in 1919.[40] A provision was added which was later interpreted by the courts to bar any restraining action to prevent the making of the improvement, or payment therefor, or levying of taxes, unless such action was brought within thirty days of the date such cause of action arose. Another provision stated that changes in ownership of land after the petition was signed were not to affect the petition and the filing of supplemental petitions at any time before the contract for improvement was let was provided for. State lands were made liable for their share of any such assessments and the governor was authorized to sign petitions as reprssentative of the state and the state treasurer was commanded to pay such assessments from any fund not otherwise appropriated.

More than one type of road and different widths might be specified by the petitions, thus giving the commissioners some option, subject to the approval of

the State Highway Commission, but if the petition specified one certain type of road, only that type could be built. The project must be acceptable for federal aid and not more than the maximum number of assessments allowed. The commissioners were allowed to change the routing when unsurmountable difficulties were met up with or when public safety demanded such change. The county commissioners were also permitted to either contract for the improvement or they could furnish the material and cause the work to be done by day labor.

The amount which could be advanced prior to the completion of the contract was reduced from ninety to seventy per cent. If a contractor forfeited his contract the commissioners were authorized to collect the surety bond and complete the work. They were also authorized to purchase gravel pits, stone quarries, etc., and to construct roads leading to them when the cost of each pit or quarry did not exceed five thousand dollars.

Third class cities were to be included as a part of the township in which they were located and any road constructed thru such city, of the same type as the road under construction was to be paid for, fifty per cent by the city and fifty per cent by the county. But if a different type of construction was used all additional cost must be borne by the city. When a hard suffaced

road was to be constructed alongside the corporate limits of a city, the city at large must pay fifty per cent of the cost of construction and the issuance of bonds in payment thereof was authorized. Any land within one mile of such city which had not been included within the benefit district might also be included by the county commissioners.

Provision was also made for the issuance of bonds as the work progressed, not in excess of the estimated cost to be assessed against the county and township. Either the county or township might pay its share or any part thereof from the general or road fund and in that event its levy for such bonds was to be reduced proportionately.

Joint projects between two or more counties were made possible by another amendment passed at the special session of 1920.[41] A provision was added at that session also allowing the commissioners to pay for material purchased up to ninety per cent of its value when such material had been delivered and accepted by the engineer. These acts were also made retroactive to apply to all uncompleted projects which had been started under former acts.

The object of these amendments can be plainly seen. Obscure passages had to be cleared up and difficulties which developed in the application of the law had to be removed. This is the patching process whereby weak

places in the law are reinforced, referred to above.

Court Decisions.

Numerous cases continued to be brought into the courts which are of interest to us now.

Validity of New Law Established.

The first one of major importance which was carried to the supreme court was that of the State vs. Raub, which was a mandamus to eompel the clerk of Shawnee County to join in the execution of certain bonds authorized by vote of the electors, to pay for permanent improvement of a highway.[42] The defendant questioned the validity of the law, method of payment of bonds, and claimed the bonds issued were in excess of the expenditures.

Petitions had been presented to the county commissioners in compliance with chapter 265, Laws of 1917, with more than thirty-five per cent of the resident land owners owning more than fifty-one per cent of the land in a district on the road known as the Lawrence-Topeka road. The commissioners found and declared the road to be a public utility and the surveying had been done, plans drawn, and an estimate made which was approved by the State Highway Commission. Contracts had been let and work had proceeded to the amount of $161,804.15 when the action was begun. Donations including federal aid

amounting to $147,150 had been received and the balance of the costs had been apportioned to county, township, and benefit district.

No contention was made that the steps taken by the county commissioners were not in conformity with the statute but the constitutionality of the statute was attacked; first, in that it contravened the uniformity section of the constitution;[43] second, that the legislature had attempted to delegate legislative power; third, that it infringed upon the constitutional limitation, preventing the state's carrying on internal improvements; [44] fourth, that it violated that section of the constituion which provided that "No tax shall be levied except in pursuance of a law which shall distinctly state the object of same etc.";[45] fifth, that this chapter was in conflict with another act passed by the same legislature regarding the construction of bridges; [46] sixth, the interpretation of of chapter 246, Laws of 1919, was questioned; and seventh, that the law authorized unwarranted expenditures of money which would result in the insolvency of the municipality.

The court ruled against the plaintiffs on every count. The county is the taxing district for that part which is imposed upon the county and likewise the township for that part of the burden which is imposed upon it. In each separate district the tax will be uniform

and that is all that is required according to former decisions of this court.[47] This limitation, as has also been determined, has no application to special assessments. [48] And there is nothing which approaches legislative power in the hands of the petitioners. They simply initiate the proceedings and the determination as to whether the road is a public utility or should be built is left to the discretion of the county board. They can refuse to build the road until one of proper type is proposed. Former cases were again cited to bear out this decision.[49] The court ruled further that there was no valid ground for the contention that the state was engaging in internal improvements under this act. This limitation does not apply to counties, townships, and cities of the state and the legislature has the same right to provide for a highway commission to supervise and regulate construction as to provide public utility commissions, oil inspectors, and such like. The fact that state funds are expended for inspection and regulation does not make the state a party to the business or work carried on.

The fourth contention was aimed at that section of the act of 1919 which permitted the county or township's paying their respective shares in any project from the general or road fund if such funds were sufficient after deducting all proper charges. The court held that since

the exact amount which any tax will raise cannot be definitely ascertained in advance, surpluses must necessarily arise and the legislature has power to provide for these surpluses.

On the fifth point the court found that the road law was not in conflict with the bridge law but supplemental to it. The provision that bonds may be issued from time to time as they may be required upon approved estimates makes clear that the legislature intended that bonds were to be issued before the work was completed.

Lastly the court held that the question of unreasonable expenditure was one for the legislature and not for the court. Thus the constitutionality of the new law was established and many obscure points interpreted.

Withdrawal of Names from Petitions.

An interesting case camp up from Geary county, involving the question of withdrawal of names from a petition.[50] A paragraph in section one of the original act reads as follows:[36] "After the filing of a petition with the board of commissioners no signer thereon shall be permitted to withdraw his name therefrom." But in 1919 this section was amended to read, "Thirty days after the filing of a petition with the board of commissioners no signer thereon shall be permitted to

withdraw his name therefrom." Another section provided that upon receipt of petition the commissioners were to give at least ten days notice of a meeting where interested parties might meet to discuss the petition before its acceptance by the board.

The statute was construed not to give the petitioners the absolute right for thirty days after the petition is filed to withdraw their names except in the event the board has not taken final action. After a ten days notice and a hearing is held, the board has authority to act, unless in the meantime a sufficient number of signers have withdrawn their names from the petition. Objections to and arguments against the petition are not sufficient. Petitioners have no right to withdraw their names from a petition after final action has been taken thereon by the board of commissioners.

The court also ruled that the provision in the statute for additional or supplemental petitions is for the purpose of adding to the road district; but, this does not affect the finality of the resolution establishing the benefit district as originally petitioned for.

Conditional Petitions.

The right of petitioners to insert conditions in a petition was questioned in Barton county. A petition was

filed which contained the condition:

> "And all on condition that no award for the improvements herein prayed for shall be made upon any bid which will make the average cost of the same per mile, more than thirty thousand dollars and then only in case federal aid is secured for at least fifty per cent of the cost thereof."

The county commissioners regarded this condition as mere surplusage and not binding and were preparing to disregard it when an action was brought to restrain them.[51] The supreme court held that if the petition is received and acted upon by the board, the force and effect intended by the subscribers must be given to the condition, and that the petitioners conferred no authority upon the board to construct a road costing more than the amount stated in the limitation.

The right of the plaintiff in this case, who had not signed the petition, to bring this action, was also questioned but the court held that any property owner in the district whose lands would be charged with a part of the cost of the improvement is entitled to insist upon the fulfillment of the conditions even though he did not sign the petition. And such a limitation placed in a petition, altho it is not authorized by law, does not render the petition null and void, according to this decision.

Effect of a Second Petition.

This same Barton county project was divided into sections A, B, C, and D, but all were included in the same petition originally. After the above mentioned restraining order was granted the people in section D presented a new petition without this condition and the road was built. The question later arose as to whether the balance of the road or section C could be built under the first petition provided the cost did not exceed the limitation set. A case involving the question came up to the supreme court, and a decision was rendered to the effect that the former petition was rendered null and void by the new petition which carved a new benefit district out of a part of the old one.[52] The thirty day limitation was held not to apply in this case since the commissioners had no petition of any sort before them.

Reasonableness of Charges Upon a District.

Still another interesting case grew out of the Barton county controversy.[53] The original project was 29 miles long and the commissioners proposed to buy machinery and construct the improvement by day labor. Prior to the issuance of the injunction they purchased machinery and equipment to the value of $168,000,00. This was left on their hands with no means of raising

funds to pay for it. Later when section D, which consisted of only about five miles, was being constructed, the commissioners prepared to issue bonds against this project for the full $168,000 until some disposition could be made of the equipment. The county clerk refused to issue the bonds and the State Highway Engineer refused to sanction this proposition. A mandamus was sought to compel these officials to perform.

The supreme court held that a mandamus will not issue in such cases. The court said an expenditure of a sum of money for road building machinery to construct a proposed highway of twenty-nine miles may be altogether unreasonable in amount when only five and a fraction miles of such highway must carry the entire burden. The commissioners were allowed to charge only the prorata share of this total amount to this section. The right of the commissioners to purchase the equipment was recognized, but the method of handling the proposition was held to be illegal.

Issuance of Bonds.

A slightly different angle of the bond question came up to the supreme court from Reno county. Work had been started on a project in that county in 1918 under the act of 1917, which provided for no bond issue until the

work was completed. Work on this project was still in progress when the amendment was passed in 1919 which provided for the issuance of bonds as the work progressed. Altho this amendment specifically stated that it was retroactive and applied to all uncompleted projects begun under the former law the county clerk refused to enter any levy upon the tax rolls to meet the first payment on bonds and interest on the ground that the bonds were not authorized by law. He contended that taxes can not be levied for the payment of bonds until the improvement for which they are issued is completed.

An action was brought against him to compel the extension of the levy and the supreme court held that under the provision of the law as amended in 1919 it is not necessary that an improvement shall be completed before general county and township taxes can be levied to provide a fund to meet at maturity the first installment of the bonded debt created therefor, notwithstanding that local assessments upon the land specially benefited cannot be made until completion.[54]

The Effect of Misrepresentation or Fraud.

The effect of misrepresentation or fraud upon a petition was involved in another case from Reno county.[55] The petitioners asked to have their names stricken from

the petition on account of alleged misrepresentation on the part of those who circulated them. The specific charge was that the cost of the proposed road would not be to exceed $25,000 per mile when it would be much greater. No action was taken by the plaintiff until some eighteen months after the road had been declared to be a public utility by the county commissioners.

The court held that such statements were mere expressions of opinions rather than fraud and that ordinarily no one has a right to rely upon such expressions.[56] A representation as to what may occur in the future or as to future values, prices, or profits is mere matter of opinion.[57] The signers of the petition had the same means of information as those who circulated them. Neither knew of what material the road would be constructed. The commissioners had the authority to determine that. Even though there had been misrepresentation in securing the petition the limitation prescribed in the statute which bars the removal of names after the petition has been filed with county commissioners would not have been removed. [58]

Action Barred After Thirty Days.

A petition was filed in Montgomery county June 23, 1919 and was granted July 9 of the same year. Notice to the land owners was published immediately as required

by law. A request was made for federal aid but the work was delayed until April 6, 1921. An action was begun May 18, 1921 on the ground that there was not the required number of signers and that the signers did not represent the requisite proportion of land, etc. But the court held that the action could not be maintained since it was not commenced within thirty days after the making of the order directing the improvements.[59] This point was also involved in the Barton county case referred to above.[60] In that case the court ruled that even tho the clause cuts off all controversy touching the matters had and done prior to thirty days before the suit was filed, since the case was filed within less than thirty days of the day cause of action was given the act of 1919 was complied with. Thus it is pretty well settled that no action can be brought unless it is commenced within thirty days of the time cause of action arises.

Conditional Approval by Commissioners.

A petition was filed in Brown county for the improvement of six miles of road from Sabetha north to the State line on May 5, 1919. On June 26, 1919 the county commissioners found the improvements as prayed for to be of public utility and ordered that the road be improved upon three conditions: First, that federal aid to the

extent of fifty per cent of the cost up to thirty thousand dollars per mile be secured; second, that the proposed capital highway from Topeka to Omaha connect therewith at both ends; and third, that Brown county commissioners pass a similar order for improvement of the road in Brown county from Netawaka to Sabetha via Fairview. An action was brought in mandamus to force the commissioners to proceed and they protested it was not their duty to proceed until the conditions were fulfilled. The plaintiffs contended that after the commissioners found the improvement to be of public utility the act of 1919 made it their imperative duty from which they could not escape by inserting conditions. The court held the contention of the plaintiff to be unsound as it treated the action of the board as two independent steps, the finding andthe order. The condition applied to the finding as well as to the order and such a conditional finding is not sufficient to authorize an order for the construction of the proposed improvement.[61]

Chapter V

Legislative and Judicial History Continued

Amendments of 1921.

In order to prevent a repetition of the Barton county equipment tangle the act of 1919 was amended in 1921 so as to authorize the county commissioners to buy such equipment as deemed necessary, according to the estimate proposed by the county engineer which must also be approved by the State Highway engineer, and to pay for same by the issuance and sale of county bonds which shall mature in not more than twenty years. Upon the completion of any road in any benefit district on which the machinery was used an estimation of depreciation to the equipment must be made and approved by the State Highway engineer and this amount with interest on bonds issued therefore charged to that particular project. A special levy was provided for the retirement of the equipment bonds for such equipment as might be retained by the county for general road work.[62]

The method of apportionment of the townships share of the cost was changed so that twelve and one-half per cent was to be apportioned to each township according to the area of the benefit district in each township in which the road is located and twelve and one-half per cent according to the length of the road in each township. If the road is upon the line between two townships or within eighty rods thereof it is to be considered as located one-half in each township for the purpose of dividing the apportion-

ment. The county commissioners were also authorized to begin issuing bonds and levying assessments against the land in the benefit district in the same manner that the county and township share had been handled, as soon as the contract was let or work begun by the county forces, based upon the estimate of engineer, but in no event could bonds be issued in excess of the estimated cost of the road. A provision was made whereby both the county and township might, if they saw fit, levy a special tax of not exceeding one mill each in order to pay their respective shares of the cost of any benefit district road without the issuance of bonds.

Effect of Supplemental Petitions.

A provision was made for the filing of supplemental petitions for the purpose of rerouting a road which has already been petitioned and ordered improved. In such cases the original section which is to be abandoned must not be built and no taxes can be levied for the construction of it. This act was made retroactive also.

A case in the court of Allen county almost immediately involved this question of rerouting a road which had already been petitioned for. The commissioners had found it to be of public utility and three thousand dollars had been expended for preliminary work. Bids had been advertised for and all rejected on account of their being too high. A new petition was presented to the county commissioners which contained ninety-five per cent of those who signed the first petition and ninety-one per cent of the property owners in the new district, asking for a different

kind of pavement and a slightly changed route and a slightly different benefit district. The commissioners agreed to the change. A mandamus was instituted to compel the commissioners to build the road as originally ordered by them. The supreme court ruled that the law clearly anticipated such emergencies; in the first place, when it provided for filing of additional or supplemental petitions at any time before the contract had been let; second, when the commissioners were permitted to re-route a road to eliminate a sharp curve or avoid dangerous places; and finally, when provision was made specifically that land could not be taxed for the original route under the first petition when a second had been accepted changing the route.[63]

State-Aid-Road-Fund Created.

Altho the state could not directly engage in making internal improvement without amending the constitution, a way was devised to get around this restriction. The legislature of 1921 created a State-aid road fund and provided for the depositing in such fund of a certain portion of the motor-vehicle registration fee.[64]

The fund was to be used to aid in the construction of roads and highways and to reimburse the counties a certain per cent of that which had been expended for permanent improvement since March 1, 1919, in no case to exceed twenty-five per cent of the cost of the road or a maximum of ten thousand dollars per mile. The county, townships and benefit districts were to each be reimbursed in proportion to payments already made. Reimbursements on complete roads were to be made only on condition that they were being properly maintained. A controversy apparently arose

over the interpretation of this law. Section eight as it was originally passed, read: "The board of county commissioners are hereby authorized to apply the state-aid road fund, etc.----" and "the board of county commissioners shall reimburse the county, etc.----" The next session of the legislature amended this section making it read "The board of county commissioners may apply -- may reimburse----" thus making plain that reimbursement was optional rather than obligatory.[65] This question of reimbursement will be taken up later on.

Statutes Revised.

The 1923 legislature provided for the revision of the Kansas laws and the benefit district road law which originally was chapter 201 of the Laws of 1909, as amended by the succeeding legislatures became article seven, sections 68-701 to 68-719 in the Kansas Revised Statute of 1923.

The Assessment of Railroads.

Quite often the railroads were extensive property owners in these benefit districts and came in for a heavy share of the taxation. Various methods of arriving at the amount assessed against them were used by different county boards and consequently considerable litigation resulted. In fact it is hardly to be expected that railroads in general will favor extensive hard road systems, especially the trunk lines. It is true on the one hand that good roads develop a county and a well developed county brings additional business for the railroads. But on the other hand when truck and stage lines are allowed to use these roads almost free of charge and operate in direct com-

it is perfectly natural that the railroads should not favor a proposition which operates directly to decrease their revenues, it is obvious in the majority of the cases that they are asking only for a square deal. In a case which originated in Mitchell county the railroad land was actually taxed at the rate of more than $57 per acre while the farm land on either side was taxed only $3.50 to $4.00 per acre. The chairman of the board of county commissioners testified that in making the apportionment they took into consideration the fact that the railroad company had received several thousand dollars for hauling material used in the construction of the road and that in past years many thousands of tons of alfalfa had been raised in the community which could not be marketed on account of the condition of the roads and that they believed the railroad would derive an additional revenue from this improvement. In figuring taxes the valuation placed upon the railroad property of $19,000 per mile by the state tax commission was used, while the commissioners placed the value on all the other land.

The supreme court affirmed the judgment of the lower court which held that the tax was discriminately unjust, and unlawful and the county was enjoined from making the assessment.[66]

A similar case, from Labette county, involved two questions; First, is railroad right-of-way "lands or real property" within the meaning of the law;[67] second, may the county commissioners adopt the valuation of railroad property made by the state tax commission?

The supreme court held that the right of way of a railroad company may be assessed as other"real property and the improvements thereon" for its proportionate share of the costs of constructing a hard surfaced road.[68] "The word 'land' and the phrases 'real estate' and 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein, equitable as well as legal."[69] "An interest in land, however small, is sufficient."[70] -------- But in making the assessment under this law, the county board should follow the same general method in respect to railroad property as is followed with reference to other property which is liable for its proportionate share of such costs.

On the second point the court ruled that since all railroad property, real, personal and mixed is classed as personal property for the purpose of general taxation, the State Tax commission valuation is not a proper basis for fixing the valuation of a railway company's "real property and improvements" actually within such road benefit district, for the purpose of assessment to pay the cost of constructing a hard surfaced road. That valuation includes items such as franchises, rolling stock, material on hands, supplies and tools, and moneys and credits. The chapter in question does not authorize the levying of assessments on personal property. This question came up anew in 1926 in Anderson county and the courts again ruled the same way.[71]

The Supreme court of the United States in an Arkansas case appears to have held a contrary opinion in 1919.[72] In that

case the plaintiff road sought to enjoin the levying of taxes on its improvements, rolling stock, material, etc. The law in that state simply specified that the cost of the improved road was to be made a charge upon all real property, railroads, and tramroads in the district. The court ruled that, "the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. It may well be doubted whether any better mode of determining the value of that portion of the track within any county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole".

In another Arkansas case, however, the board assessed the benefit to the railroad as $7,000 per mile or a total of $67,900 for the district wherein 11.2 miles of gravel road was being constructed and in which the railroad had 9.7 miles of track and a right of way of one hundred thirty acres. The farm land in the same district was divided into five zones and assessed without regard to improvements at twelve dollars per acre in the first zone, ten dollars per acre in the second, eight dollars in the third, six dollars in the fourth, and five dollars in the fifth. A pipe line and a telephone line in the district were assessed three hundred dollars per mile each without any designated basis. In this case the same court ruled that "obviously the railroad company has not been treated like individual owners and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal pro-

tection of the law.[73] Benefits from local improvements must be estimated upon contiguous property according to the same standards which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquoit part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road seems wholly improbable if not impossible.

"It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvement, and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

Apparently taking notice of the fact that all the cases had been decided in favor of the railroads and perhaps desirous of finding out just where the limit was an action was brought in the courts of Jefferson county to enjoin the county commissioners from levying on the property of the plaintiff railroad to pay for a paved road. The commissioners in this county had been very fair and altho all of the railroad property was in the first zone (A)

it was placed in zone (F) for the purpose of assessment. Zone A was assessed thirty-four per cent of the amount assessed against the district, zone B twenty-five per cent and so on down to F which was assessed only three per cent of the total. The plaintiff's property consisted of approximately eighty acres of right of way with 6.10 miles of double tracked main line and 1.42 miles of side track and certain station buildings. Altho they owned only about 1/100 of the land in the district the great value of their improvements forced them to pay about one-tenth of the districts share of the tax.

The railroad company contended: first, that grading, ballast, rails, ties, culverts, signal posts, fences, and the like were not improvements within the meaning of the law;[67] and second, that the paved road was not a benefit to them, but rather a detriment to their interests.

The supreme court held that such improvements are properly included in determining the value of the railway's "real property and improvements thereon" and that there was no discrimination or injustice in the method used for assessing the plaintiff's property.[74] As to the claim of no benefit the court said: "Either as a matter of law, or as a showing of evidence, it may be determined that a paved road is a benefit to railway property, for which it may be taxed like other property, so long as there is neither discrimination or injustice in subjecting the railway property to such taxation.

"The fact that a paved road parallels a railroad for a few miles and because of a possibility that motor trucks and omnibuses may use the road as competitors of the railroad is no evidence that the latter can derive no special benefit from the construction of the road. A horse-ranchman with a thousand acres in zone A might claim that the road was no benefit to him on the same ground but he would receive no serious consideration. Both a horse-ranch and a railroad located in a community with paved roads and corresponding public improvements is worth more than one in an undeveloped, unimproved county."

In a similar case the United States Supreme court ruled: "Anything that developes the territory which a railroad serves must necessarily be of benefit to it, and no agency for such development equals that of good roads."[72]

Thus it seems to be pretty well settled, in the minds of the courts at least, that railroads are benefited by improved roads. And that they must pay their proportionate share of the taxes. But it is equally well settled that they must be treated like individual owners. An unjust, discriminating tax based upon some fanciful or unreasonable notion of future benefits will not be tolerated.

Time of Levying Assessments.

A part of Section 2 of the Act of 1921 reads as follows:

"Upon completion of a section of road which forms a part of the improvement of a road petitioned for under the provisions of

this act, or the grading, draining and culverts forming a part of the improvement under a petition specifying that the road shall be hard surfaced, the board of county commissioners may levy assessments against the lands benefitted thereby for eighty per cent of the benefit district's share of the cost of the completed work and shall levy additional assessments for the remainder of the costs, equitably adjusting the apportionment when the entire improvement is completed." Taken in connection with other passages in this section the meaning was obscure and as a result a case arose in Jefferson county involving the question:[75]

The commissioners, after the grading, draining and culverts forming a part of the improvements under the petition in question were complete, proceeded to levy an assessment against the lands in the benefit district for eighty per cent of the benefit districts share of the cost. Certain taxpayers sought to enjoin the levy at that stage on the ground that the commissioners had no authority to make it and that the assessments were unwarranted and unjust. But the court interpreted the law as containing two conditions under which assessments could be made: first, "upon the completion of a section", and second," upon completion of the grading, draining and culverts forming a part of the improvement, etc." Since the second condition had been fulfilled this gave the board justification to make the levy.

The court said, "An assessment levied on the several tracts of land in a road benefit district according to the benefits

accruing to the real property and improvements thereon made by the county commissioners using their best judgment, which resulted from honest and intelligent consideration, will not be set aside by injunction.

Completion of Project Once Begun.

According to a series of decisions of the supreme court a project once begun must be completed. The first case involving this question came to the supreme court from Linn county.

A petition was presented to the board of county commissioners of Linn county in 1922 praying for the improvement of a certain road. The commissioners found the road to be of public utility and granted the petition. Federal aid was also granted for this project. A contract was entered into for the construction of three bridges which were a part of the project and a part of the work completed.

In January 1923, a change having taken place in the membership of the county board, a resolution was passed declaring the contracts previously made for the construction of the bridges were not binding and undertaking to revoke such orders and contracts. An action was brought by the Attorney General of Kansas seeking by mandamus to require the carrying out of the contracts. The supreme court ruled that when a highway is being improved, federal aid having been granted for the purpose, and a contract entered into by the county for the construction of bridges thereon costing over $2,000 each and therefore required to be constructed under the bridge law, the county commissioners are duty bound to carry out such contract which they cannot escape by undertaking to re-

voke it, providing the necessary steps were taken to give it validity.[76]

The county attorney apparently refused to pass on the legality of the proceeding because he was not in favor of the improvement. The court ruled on this point that the county attorney must rule upon the legality of the proceedings involved and not upon any question of business expediency and that he may be required by mandamus to make such indorsements if the court determined it to be his duty, notwithstanding his own judgment to the contrary. If his term of office has expired his successor may be required to perform the duty. The court also ruled that the state was the proper plaintiff in such cases.

The Recall Petition.

Neither can the recall petition be used to terminate a project which has been partially completed. In a case which came up from Franklin county, a petition had been filed with the county clerk in 1917 asking for the improvement of a certain road of some twenty-three miles in length. The petition was found regular and was accepted by the county commissioners and the road was found to be of public utility. An order was made creating Franklin County federal aid road district No. 1 and federal aid was granted for the projects. A contract was let in 1921 for one and two-thirds miles and the section completed, Federal aid to the extent of $25,000 was received and $16,666.66 from the state-aid fund was applied. The balance was apportioned to the county, township, and benefit district. Bonds were issued and taxes levied

and collected for the 1923 installment due on bonds. On July 28, 1923 a petition was filed with the county commissioners asking for the recall of the first petition which created the district and for the dissolution of the district. In compliance therewith the commissioners recalled the first petition and held it for naught.

The court ruled that the legislature did not contemplate doing more than cancelling or recalling a petition which had not yet fully served its purpose. After a petition has been acted upon as this one had an attempt to recall it is abortive.[77]

This same subject came up again in Jefferson county from a slightly different angle. Benefit district number two was organized in that county in 1919 by the commissioners under a petition filed that year. The district created lies a few miles east of Topeka and north of the Kansas river. For some 12.4 miles the road parallels the Union Pacific railway tracks. The construction of the road was divided into projects and a large amount of the work had been done and paid for. The Highway Commissioners ordered the elimination of certain dangerous crossings in the railroad and there was considerable delay on this account. Federal aid had been received and dispensed for the work already done. On March 4, 1924 a recall petition was filed. The commissioners refused to consider it and an action was filed by certain taxpayers seeking to enjoin the commissioners to prevent them from constructing the road.

The court ruled as it did in the Franklin county case, that when a petition to organize a benefit district has served its purpose, and the district is regularly organized and substantial and orderly progress in the improvement of the road petitioned for has been accomplished pursuant thereto, it is too late for a recall petition authorized by the act of 1921, as amended by act of 1923 to be effective in nullifying the original petition under which the district was organized and the work begun. The petition of 1919 which the petition of 1924 sought to recall had served its purpose; it was "functus officio" several years before the recall petition was presented to the county commissioners. The recall petition could not restore life to the petition of 1919 for the mere purpose of nullifying it.[78]

This provision of the Law of 1923[65] which permitted the filing of recall petitions and which had proven so troublesome, was repealed in 1925.[83]

Use of State-Aid Funds.

The attempted recall of the road petition in Franklin County and their misinterpretation of the statute, involved the county commissioners in further difficulties. After the petition had been recalled, some $5,000 was taken from the state-aid fund and expended upon county roads not in connection with any permanent improvement. The entire cost was paid from this fund. About $23,000 remained in the State-aid fund and a contract had been let for a bridge which was not a part of any permanent improvement project. The entire cost of $8,000 was proposed to be

paid from this fund, also.

Proceedings in quo warranto were instituted by the Attorney General, challenging the authority of the commissioners of Franklin County to use State-aid road funds for building of bridges unconnected with the construction of a highway and incidentally questioning the action of the board in dissolving a federal aid road district which had been organized and partially built as above stated.

The commissioners contended that they were authorized to dissolve such district and use the funds under section 68-601 Revised Statute 1923 which reads as follows:

> "When the state road fund has accumulated or may hereafter accumulate to such an amount more than sufficient to care for any federal aid road project under construction or for which petitions have been filed and have been declared a road of public utility; Provided, that a majority of the land owners in any benefit district may by petition recall such petition in said county, the board of county commissioners may from time to time, by resolution apply such portion of said fund as in their judgment is deemed proper, to the construction, maintenance, and improvement of county roads in such county and thereupon said state-aid fund shall become county money to be used within the limitation of this act, etc."

But the court ruled that, this road district was still in existence and the project which was an entirety must be regarded as still under construction to be completed as soon as practicable. Before the state-aid road fund can be used on county roads the board must adopt a resolution declaring that the conditions exist which warrant such use. One of these conditions is that when the fund is more than sufficient to care for any federal aid

road under construction or for which petitions have been filed it may be used for other roads. The application of this fund for the building of bridges is contrary to the terms of the act and against the general policy of the state and is unwarranted. The county board was ousted for the exercising of usurped authority as to the disposition of state road funds.

Evasion Of Law.

The county commissioners of Rice county were more cautious, however. They had some $54,000 in the state-aid fund, and had no federal aid project under construction nor petitions on file for such a project which had been declared a public utility under the benefit district road improvement act. The commissioners conceived the plan of constructing some hard surfaced roads by using the federal aid and this state-aid fund to pay for the entire cost of construction. They were confronted with the restriction in section 68-608 Revised Statute 1923 limiting the amount that may be expended from the state-aid road fund, when federal aid is used, to twenty-five per cent of the cost of the improvement and not exceeding $10,000 per mile. In order to avoid this restriction they proposed to transfer a portion of the $54,000 to the general road fund and a portion to the general bridge fund with the intention of using these funds to supplement the twenty-five per cent allowed by section 68-608. A friendly suit was brought by the County Attorney of Rice county to restrain the commissioners from making the transfer in order to get a ruling on the statute.

The court ruled that this could not be done since it was only an attempt to do indirectly that which could not be done directly. Under the laws of 1923 not more than twenty-five per cent of the cost of construction or a minimum of $10,000 per mile may be paid by any county on any federal aid project from the state-aid road fund.[65]

Obligation of Cities.

Section two of the law of 1921 provides that, "When a benefit district road is constructed alongside the corporate limits of any city, the city shall pay fifty per cent of the cost of construction, thereof, apportioned on an equitable ratio among the taxpayers as prescribed by the council or other governing bodies, etc."[62] This section was tested in a case coming from Mitchell county. The county commissioners brought an action against the city of Beloit to recover one-half the costs of a quarter mile of road and a bridge built thereon along the boundary of that city. Beloit is a city of the second class and the corporate limits of the city extend to the middle of the road in question. The road was a part of a project of eleven miles extending from the east line of Mitchell county to Beloit. The city opposed the improvement of the road and notified the commissioners that it would not be liable for any part of the costs.

The defense argued that this quarter mile of road was partly within and partly without the city, since the corporate limits extended to the middle of it, and therefore was not alongside the

corporate limits of the city. It was also argued that this passage refers to third class cities only.

The court ruled that the legislature did not intend to except cities whose corporate limits happened to extend to the middle of the road adjoining it and that, "along the corporate limits of any city," was meant to include any city of first, second or third class.[80] That since the proceedings appears to have been regular the city is liable under the statute for fifty per cent of the cost of the construction of the road but not including the cost of the bridge which cost $5,447.84. Upon a former occasion this court ruled that bridges costing more than $2,000 and having a span of over twenty feet must be built at the expense of the county at large under the general bridge law.[42]

Chapter VI

Legislative and Judicial History Continued.

Increase of State Aid Fund.

Under the former law the amount of money available for the state-aid fund was very limited. This handicapped the highway commission because few counties care to go ahead and build roads unless the state's share is forthcoming. In an attempt to remedy this situation the 1925 Legislature imposed a tax of two cents per gallon on the sale and use of all motor-vehicle fuel used in the state.[81] The fund thus created is to be added to the state-aid fund provided for by the act of 1921 mentioned in a preceeding paragraph, and in order to insure that the money will be used as intended upon a state system of highways and not squandered on disconnected county roads, as had been attempted heretofore, the entire amount is to be placed in a state highway fund. Three hundred thousand dollars per quarter (a total of one million two hundred thousand dollars per year) is to be transferred to a state-aid fund to be used under the direction of the State Highway department to aid in highway building. After the cost of maintainance of the Highway Commission, not in excess of $75,000 per annum, is deducted from the balance left in the state highway fund,

the remainder is to be prorated among the counties, forty per cent equally and sixty per cent on the basis of valuation. This money is to be placed in a fund called the county and state road fund to be used by the county commissioners for construction, reconstruction, and maintenance of state roads in the county. Not more than twenty per cent of this fund may be expended on county or township roads or bridges at the option of the county commissioners. By this act a greater part of this fund is taken out of the hands of the county commissioners and placed under the control of the highway commission. This is clearly a step toward centralization.

Creation of County Free Fund.

Further evidence of the tendency toward centralized control appears in the act of 1927. The federal government refused to accept or rather accredit a highway department which was so meagerly supported and threatened to discontinue federal aid unless certain requirements were met. As a result the amount permitted for maintenance of the department was increased from $75,000 to $150,000 per annum. Provision was also made for the payment of $100,000 per quarter or a total of $400,000 per year, from the state highway fund into the county free fund before distribution of the balance to the counties. The free fund to constitute an emergency fund to be used to close up gaps or complete the state highway mileage in those counties where the funds otherwise available for such purposes are insufficient.[96] Thus under this act an additional $10,000 per mile is available

in such emergencies, upon application of the board of county commissioners. There is some question as to the power of the highway commission to force the closing of gaps under this law, however. This point will no doubt be decided by the courts at an early date as a case involving the question has been started in Dickinson county.

Reimbursement.

The idea of reimbursement was incorporated in the 1921 law, apparently for the purpose of enabling the county commissioners to extend state-aid to those projects which had been started after the 1919 act was passed but before state-aid was available.[64] This act clearly stated that the reimbursements were to be made to county, township, and benefit district in proportion to the amount originally paid by each and in no event to exceed twenty-five per cent of the cost of the road or a maximum of $10,000 per mile. This law proved to be ambiguous in that it did not state clearly whether reimbursement was to be compulsory or optional with the county commissioners. Therefore, the legislature amended section seven of the act of 1921 so as to make it plain that reimbursement was optional.[65]

Apparently the county commissioners in the more progressive counties were anxious to build new roads and not many of them chose to reimburse these former projects. Some of the counties also appear to have used this fund to pay the full amount of the benefit district share and failed to make any assessments against the new districts whatever.

Some of the projects which were built during the war period placed exceedingly heavy burdens upon the districts created during that time. These districts insisted that they should at least be reimbursed in an equal proportion with new districts which were being created. This practice of paying the entire benefit district share was very questionable also because the law plainly stated that the county, township, and benefit district were to be reimbursed proportionately.

This led to a new attempt in 1925 to remedy the situation. In the first place an act was passed to legalize the practice of paying the entire benefit district share from the county and state-aid road fund.[82] Another act was also passed at the same session which amended the act of 1923 so that the county commissioners in any county in which a state highway has been built or may be built in the future, under the benefit district plan, "may" apply the county and state-aid road fund to the reimbursement in full of all assessments made and collected from any land-owners whose land lies more than one mile from the road for which the taxes were assessed, and they "may" reimburse all land-owners whose land lies within the first mile in the amount which has been collected over and above two per cent of the appraised value of the land.[83] Both of these acts purported to amend and repeal sections 68-607 of the Revised Statute of 1923. For this reason the meaning was more obscure than ever. The Attorney General of Kansas now took the stand that this provision was mandatory, that the statute meant that the county commissioners "must" reimburse all land-owners.

However, when a case involving this question arose the Supreme Court held "may" in this case means "may" and not "must". "If the legislature had intended to compel the commissioners to reimburse the land-owners it could have done so in language which could not have been doubted" said the court.[84] This was apparently not a satisfactory interpretation of the acts to all concerned for both of these acts were repealed by the legislature of 1927 and the entire reimbursement proposition restated.[85]

As it now stands the county commissioners "shall," after provision has been made for the proper maintenance of the state highway in their county and when the county state-aid fund is not needed to construct a state highway in accordance with some federal aid specification to connect with such highway constructed across an adjoining county, apply the fund to the payment of installments of any benefit district tax assessed prior to the completion of the state highway system in that county.

Such reimbursements are ultimately to equal the full amount of the assessments on all land located more than one mile from the road, and all in excess of two per cent of the appraised value of the land and improvements thereon which is located within the one mile zone. The refunds are to be made in installments of one-tenth or one-twentieth of the full amount of the assessment, according to the plan under which they were paid.

Some counties have improved all their roads and are ready to begin refunding these assessments, but an obstacle has appeared in the way. When the roads were built the property was not assessed but the property owners were taxed according to

acreage instead of valuation. A case is now before the court from Sedgwick county to settle this point. Shawnee county is refunding the assessments to all land-owners beyond the one mile zone but is awaiting this decision before reimbursing those within the first mile.

There is also some dispute as to whether reimbursement is obligatory or optional. So far we have no decision of the court on this section of the present law. The apparent intent of the legislature was to make reimbursement obligatory upon the county commissioners after all necessary state roads have been improved and are being properly maintained.

Time Limit On Petitions.

Previous to 1925 there was no limit to the life of a petition. Once the petition was granted and the road declared to be a public utility, the road could be delayed indefinitely and then could be built regardless of whether the petitioners were still willing or not.[59] In order to remedy this condition the recall petition was provided for in 1923 but this provision was so badly interpreted and misused that it was repealed and an act passed which provides that where a petition is approved and no contract for improvement is let within three years from the date of approval the approval becomes null and void and no construction or improvement can be made under such petition or approval.[86] However, according to a recent decision of the court, if work is once begun and then delayed this condition does not apply. And also if the county commissioners intentionally delay action toward

construction of a highway after it has once been approved and found to be a public utility, such unwarrented delay is sufficient ground to support an action in mandamus to require the board to proceed.[97]

Amendments of 1927.

In addition to the changes already mentioned, the 1927 legislature provided that any damages awarded owners of land along roads being improved are to be paid from the special fund provided for the construction of the road in the benefit district and not from the general fund of the county as heretofore.[87]

A change was also made in the percentage of the costs to be borne by the county and the benefit district. The county's share was increased from fifty to sixty per cent of the total cost after federal and state aid have been deducted and the benefit district share reduced from twenty-five to fifteen per cent.[88] And section 68-709 R.S. 1923 was restated so as to clear up an ambiguous statement and make it clear that payments in question included interest, etc.[89]

A provision was also made whereby, in counties of over 20,000 population, fifty-one percent of the property owners on any street or road may petition the county commissioners to improve their street by curbing, guttering, paving, or grading and charge same to the abutting property to the center of the block following the plan used within the corporate limits of a city.[90]

Legality of Private Contributions

An interesting case arose in Neosho county.[91] A number of land owners living along a certain road petitioned the county commissioners to construct a gravel road of certain general specifications on a designated portion of it and each agreed to contribute the amount set opposite his name, the amount to be paid when work was started.

The commissioners caused the road to be graveled but the petitioner and defendant in the case in question refused to pay his part on the ground that the commissioners were duty bound to improve the road and pay the cost by tax levy, thus there was no consideration for the promise; and second, the county commissioners were not authorized to accept subscriptions for the improvement of county roads except in benefit district roads only.

The court ruled that while a county is required to improve a county road it is not required to surface it with gravel. One who petitions a board of county commissioners to improve a road by his land by surfacing it with gravel, and agrees to pay a definite sum to aid in paying the cost of such improvement, cannot be relieved from paying his subscription after the improvement is made, on the ground that the agreement was ultra vires on the part of the county. Unless such subscription are prohibited by statute, or are in controvention of public policy, there is no reason why they should not be enforced.

Definition Of Regularly Laid Out Roads.

A petition in due form and signed by the requisite number

of property owners was presented to the board of commissioners of Wyandotte county praying for the improvement of the Golden Belt road from Muncie to Bonner Springs.

The petition was approved and the necessary steps were being taken when a suit was brought to enjoin the commissioners from improving the road on the ground that for some three miles the route of the road is upon the Union Pacific right of way. It was contended that this was not a regularly laid out road and could not be improved under the statute. (Revised Statute 68-703).

The court ruled that ordinarily a road could not be located longitudinally upon the right of way of a railroad but in this case Wyandotte county is lessee for highway purposes from the Union Pacific under a long term lease at a nominal rent, which lease contains a provision that it may be terminated by lessee by giving notice for a stated time and if so terminated by lessee it shall provide the county with other right of way and put it in as good condition as the present highway is at the time of termination. We regard the arrangement which the county commissioners have made as a substantial compliance with the statute. 92

Summary.

As a result of this evolutionary process, extending over a period of more than forty years our present law provides: That, when a petition is presented to the county commissioners of any county praying for the permanent improvement of a specified road, and having the names of fifty-one per cent of the resident land owners located within that county, owning at least thirty-five

per cent of the land; or thirty-five per cent of the resident owners of fifty-one per cent of the land; or signed by the owners of sixty per cent of the land within the district; these commissioners shall cause the improvement to be made, providing they first find the road to be of public utility. The county clerk is then required to publish the order of the commissioners finding the road to be of public utility in one issue of the county paper at once, and any action to restrain the improvement of the road, levying of taxes or issuance of bonds therefore on the ground of any irregularity in the petition or in the proceedings prior to the issuance of the order must be commenced within thirty days from the date of such publication. (The courts have interpreted this section to mean that any action to restrain the improvements must be commenced within thirty days from date cause of action arises.)[60]

Petitioners must be notified at least ten days prior to the date upon which the petition will be considered by the county commissioners, by a notice published in some paper of general circulation in that territory. No name can be withdrawn from any petition unless it is withdrawn within thirty days of date of filing and prior to acceptance by county commissioners. After any petition has been signed by the legal owners of any land within the benefit district the change of ownership of the land does not effect the petition. The owner of a life estate and each co-tenant where land is held by tenants in common are deemed legal owners and may sign for their undivided interest. Guardians of minors or of insane persons may

petition for their wards when authorized by the probate court so to do and the governor of the state is authorized to sign a petition for land owned by the state, located within any benefit district. State lands are made liable for their share of any costs for such road improvements and the state treasurer is authorized to pay all assessments against such land. A resident owner is defined as any land owner residing in the county, and owning land in the benefit district.[93]

The construction of the road is entirely in the hands of the county commissioners subject to the approval of the State Highway engineer and may be built by contract or by day labor as they see fit. Bonds may be issued from time to time as the work progresses and taxes may be levied and collected as soon as the bonds are issued.[94] When no contract is let within three years following the date of approval by county commissioners the petition becomes null and void and cannot be used thereafter.[95]

Upon completion of the improvement the county commissioners shall meet and apportion the costs as follows: Any state or federal aid is first deducted from the total cost and the remainder is apportioned: sixty per cent to the county; twelve and one-half per cent to the taxable property within the townships, divided according to the area of the benefit district in each township; twelve and one-half per cent to the taxable property within the townships in which the road is located divided according to the length of the road in each township; and fifteen per cent among the several tracts of land within the benefit district according to the benefits accruing to the real property

and improvements thereon.

A written notice must be mailed to each land owner in the benefit district setting forth the amount of the assessment against him and giving notice of a special session of the commissioners at which time complaints will be heard. Any land owner may pay the full amount of his assessment within thirty days of date of notice or may pay the assessment annually with his taxes.[88]

The state-aid is derived from a fund created from seventy-five per cent of the motor-vehicle registration fees and the motor-vehicle fuel tax. This is apportioned among the counties to be used for construction and maintenance of state-highways. When no project is under construction and there is no demand for additional highways to connect up with a project in an adjoining county and when these highways already constructed are properly maintained the county commissioners must reimburse, to the full amount of the assessments, those land owners owning land within any benefit district which is located more than one mile from the road improved. All those land owners within the one mile zone are entitled to a reimbursement of all assessments in excess of two per cent of the appraised value of their land and improvements. Assessments were not made on the basis of value of land in all cases but upon an acreage basis. A case has been carried up from Sedgwick county to secure the interpretation of the courts on this point. The refunds are to be made one-tenth or one-twentieth per year as the case may be, depending upon how assessments were originally made.[96]

Conclusion.

Thus as the law stands today the petitioners initiate the project, lay out the district, specify the kind of improvement and the time for payment not less than ten nor more than twenty years. If the county commissioners find the road to be of public utility they proceed with the improvement under the supervision of the highway engineer. When the project is completed the federal and state aid, if any has been granted and in no case more than fifty per cent of the cost not exceeding fifteen thousand dollars per mile and twenty-five per cent of cost not exceeding ten thousand dollars per mile respectively, are deducted. The balance is prorated, sixty per cent to the county, twenty-five per cent to townships, and fifteen per cent to the several tracts of land within the benefit district according to the benefits accruing to the real property and improvements thereon. It is understood, however, that as soon as all state highways within the county are constructed and properly maintained the state and county fund shall be used to reimburse all land owners in the benefit district outside of the one mile zone in full and all those within the one mile zone up to two per cent of the value of their land. In this way the ultimate additional cost to the benefit district is reduced to two per cent of the appraised value of the land and improvements.

Some forty counties have made use of this plan for road financing to a greater or lesser degree. Some few of them have completed the permanent improvement of their entire state road system and are now preparing to reimburse the land owners in the

benefit district. Petitions for roads are pouring in to the highway department faster than aid can be supplied from the present limited funds. The total amount available for state aid is $1,200,000 per year plus the free fund of $400,000 provided for in the act of 1927. By January 1, 1928 enough petitions had been received to take up more than three times the amount of state aid available. Aid was granted for grading and constructing culverts on five hundred forty miles, for light top surfacing eight hundred two miles, hard surfacing ninety miles, for building culverts only on one hundred ten miles, and grading only twenty-seven miles.

The highway commission has recently been stressing the completion of certain cross state highways rather than so many disconnected projects, but since its powers are limited its work has been much hampered. If the commission wins its case in Dickinson county it will have definitely established its power to designate what highways shall be improved, its authority to specify the type of road to be constructed, and authority to designate from which funds the cost of the improvements shall be paid. But if the case is decided against the commission as most people including the federal authorities think it will be, this will set forth more forcibly the necessity for early action by the legislature. However, by the end of 1928 one route, No.40 and 40N will be permanently improved entirely across the state from east to west with the exception of a short stretch in Pottawatomie county. Also one route, No. 73, 73E and 73W, will

be improved entirely across the state from north to south through the eastern part of the state, and another, north to south highway, No. 81, which is more centrally located, will have been completed with the exception of the section across Cloud county. An increase from a total of three hundred ninety miles of permanently improved roads located in isolated sections of the state in 1917 to more than thirty-five hundred miles fairly well connected by the end of 1928 is about as much as could be expected under the circumstances.

Three outstanding defects appear which should be promptly remedied, however; First, the state-aid fund is not nearly adequate to meet the demands made upon it; second, the initiative is entirely in the hands of the land owners in the benefit district or in the county commissioners of the county, there is no way to force the closing of gaps. A few contrary land owners or two unsympathetic county commissioners can block improvements across a county to the inconvenience of the citizens of the balance of the state and of the United States; and third, failure of counties to cooperate with the highway commission. In many cases the roads are built out of inferior material without the approval of the highway commission having been sought until the work is done. Of course it is then too late to remedy the difficulty. The federal government has laid down the ultimatum that "if Kansas is to secure any more federal aid after July 1, 1929 the constitution must be amended." The state must have an unlimited right to supervise and control its road building program. The

governor and the legislature have acted. Amendments have been submitted to the vote of the people at the November election. This amendment must be carried or Kansas will occupy the ridiculous position of paying something like $1,000,000 per year into the federal treasury to be used in constructing roads in the other forty-seven states and itself receiving nothing in return. Kansas is the only state which has failed to meet the federal requirements. (This is an unusual position for Kansas to occupy.) We may as well acknowledge it, centralized control of road building in America is an actuality.

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