

Report of Committee on Highway Laws

J. H. BEUSCHER, Chairman, Professor, School of Law, University of Wisconsin; and **DAVID R. LEVIN**, Secretary, Chief, Division of Highway and Land Administration, Bureau of Public Roads

● **EARLY** in 1960, the chairman of the Special Committee on Highway Laws, Louis R. Morony, submitted his resignation and the Board appointed Jacob H. Beuscher of the University of Wisconsin Law School to succeed to the chairmanship of the committee. Both Mr. Morony and Professor Beuscher have been members of the committee since its inception in 1953.

Under Mr. Morony's chairmanship, the committee achieved its present status and organization, and attained many of its original objectives. The committee acknowledges a great debt to Mr. Morony for the dedication and leadership he has provided over the past years, and sincerely appreciates the fact that his lasting and valuable contribution to highway laws research will be extended through his continued membership on the committee.

In July 1960, efforts to provide a foundation for further expansion of research in highway laws resulted in approval by the Executive Committee of the Highway Research Board of special committee status for the Highway Laws Project. This special committee will deal with research in the legal aspects of matters coming within the jurisdiction of all Highway Research Board departments, and its separate status will provide a better basis for performing this service than was possible previously.

MEETINGS

A review of the committee's past accomplishments, present activities, and areas of needed future research was carried on at a business meeting held on January 10, 1961, in Washington, D. C. Subsequently, the views of members expressed at this meeting were refined into a more detailed statement and circulated to the full membership of the committee and the Directors of the Highway Research Board on March 29, 1961. This statement of the general research objectives of the committee in the immediate future, and the consensus of the members of the committee regarding methods of approaching these objectives, will provide guidance for those working on committee projects (See Appendix).

The committee also held its usual public session as part of the HRB Annual Meeting in January 1961, at which time four papers were presented.

PAPERS PRESENTED

The following are summaries of papers presented at the 1961 Annual Meeting:

"Unsolved Problems in Condemnation and Transportation," by Miss Anne X. Alpern, Attorney General of Pennsylvania. Miss Alpern pointed out that the greatly accelerated programs for providing transportation facilities throughout the United States are not meeting all the needs they should and, in addition, are actually creating many new problems. She proposed that a Federal department be set up to develop and promote nationwide transportation policies which would minimize such deficiencies and difficulties.

"Condemnation From a Judicial Viewpoint," by Judge Robert M. Draper, of the Court of Common Pleas, Franklin County, Ohio. Judge Draper emphasized thoughtful preparation and presentation of appraisal evidence as a means of arriving at true market value in condemnation cases.

"A Uniform Expert Valuation Testimony Act," by John T. Bonner, Jr., Associate Professor of Real Estate, The Ohio State University. Professor Bonner suggested that

legislation providing for the appointment of experts by the court would be an effective way to reduce appraisal discrepancies due to bias and incompetence on the part of appraisers hired by the parties to a condemnation action.

"Pretrial Practice in State Condemnation Cases for Highway Purposes," by Micah H. Naftalin, Legal Assistant, Right-of-Way Research Branch, Highway and Land Administration Division, Bureau of Public Roads. Mr. Naftalin proposed the use of judicial proceedings before the actual trial as another way to attack some of the many problems surrounding condemnation cases.

REPORTS PUBLISHED PRIOR TO 1960

Special Report

21	Relocation of Public Utilities Due to Highway Improvement: An Analysis of Legal Aspects
26	Expressway Law: An Analysis
27	Acquisition of Land for Future Use: A Legal Analysis
32	Condemnation of Property for Highway Purposes: A Legal Analysis, Part I
33	Condemnation of Property for Highway Purposes: A Legal Analysis, Part II
39	Legislative Purpose in Highway Law: An Analysis
41	Outdoor Advertising Along Highways: A Legal Analysis
42	Highway System Classification: A Legal Analysis — Part I
48	Federal-Aid Provisions in State Highway Laws: An Analysis
49	Intergovernmental Relations in State Highway Legislation: An Analysis
50	State Constitutional Provisions Concerning Highways: A Legal Analysis

Bulletin

88	Better Laws for Better Highways
145	Highway Laws — 1956
205	Highway Laws — 1958

REPORTS PUBLISHED DURING PERIOD COVERED BY THIS REPORT

Highway Contracts — A Legal Analysis (Special Report 57)

Contracts entered into by public agencies are like private contracts in that they are subject to all general principles of contract law. In addition, however, there is a great deal of statutory law relating specifically to public contracts. This report is concerned primarily with these statutes, but does go into the general law where appropriate, and seeks to answer the following questions concerning highway contracts:

1. Does the State or its political subdivisions have express, implied or inherent authority to enter such agreements?
2. Does the board, commission or agency entering an agreement have the authority to do so?
3. What statutory requirements (advertisement, bid and bond provisions and formal approval requirements) must be met before the contract is awarded?
4. What labor standards and product and labor preferences must be complied with?
5. What controls and safeguards are provided to insure satisfactory performance?

Condemnation of Property for Highway Purposes — A Legal Analysis, Part III (Special Report 59)

This is the last of a series of three reports on condemnation. The previous ones covered delegation of authority, interests which may be taken, designation of procedure (all in Part I, Special Report 32), court preference, time of possession, and possession pending appeal (in Part II, Special Report 33). This third report is for the most part

concerned with the determination of compensation due the condemnee. It goes into detail on the tribunals which make the determination, the time at which value is determined, applicable constitutional rules, benefits and damage to property not taken, setoff of benefits, interest, and assessment of costs and expenses. In addition, the report covers the following miscellaneous topics: determination of necessity for taking, right of entry prior to any taking, taking of property already devoted to a public use, dismissal or abandonment of proceedings, and scope of appeal.

Highway Laws — 1960 (HRB Bulletin 278)

This bulletin contains the last annual report of the Highway Laws Committee and also the papers presented at the 1960 Highway Research Board Annual Meeting.

REPORTS IN PROGRESS

Reports covering the legal aspects of the following subjects are being prepared at the present time:

Traffic Engineering

The report is written and has been reviewed by the States. It is now being readied for printing.

Highway Programing; Toll Facilities

The research and writing on both reports are finished and drafts to be submitted to the States for review are being prepared.

Highway System Classification — Part II

Work on this study, which covers State secondary and local road systems, is progressing well and it should be ready for committee and State review shortly.

Maintenance and Drainage Law

A first draft of this report has been prepared and it should be completed early in the summer of 1961.

Highway Finance

At the last minute it was decided that certain additional aspects of finance should be covered and the information for this expansion is now being organized.

Administration

Work on this study has been resumed, after a considerable delay, and it should be finished during the summer.

Planning, Location, and Design

Work on this study was recently begun and is still in the early research stages.

Highway Definitions, Highway Construction, and Grade Crossing Elimination

These are three more subjects which should be reported on, but no work on them has been started yet. In addition, there are several subjects which, apparently, are not extensive enough to warrant a full-scale report but which did not fit in with other reports. They are: public relations, landscaping, regulatory power, law enforcement authority, and general grants of power and authority. The possibility of treating these as several individual reports under one cover is being considered.

ASSISTANCE TO STATES

During the period covered by this report, the Highway Laws Project received many

requests for information from State highway departments and other governmental agencies. Most of these asked whether there was any law in other States on various specialized problems, and could be answered by fairly brief examinations of material developed in previous law studies.

LITIGATION

The Highway Laws Committee reviews current court decisions as they are reported and selects those which are of interest to highway officials. During the period covered by this report, summaries of these cases were published in two Committee on Highway Laws Correlation Service Memoranda. Brief abstracts of the principles of the more important cases are as follows:

Public Utilities

North Dakota: Reimbursement Statute Constitutional. — In ruling that a statute providing that utility companies should be reimbursed for costs of moving facilities in connection with Interstate highway construction was constitutional, the Supreme Court made the following two specific holdings:

The constitutional prohibition against giving credit, loans or aid to individuals or corporations did not apply where the State was engaged in making internal improvements such as highways; and the relocation of utilities is a part of construction costs for which highway funds can lawfully be expended. *Northwestern Bell Telephone Co. v. Wentz*, 103 N. W. 2d 245 (N. D., 1960).

Texas: Reimbursement Statute Constitutional. — A statute providing for reimbursement of utility relocation expenses on the Interstate System to the extent that it would be eligible for Federal aid was held constitutional. The State Supreme Court, among other things, ruled that the relocation was part of the highway construction, that it served a public purpose and that, since the payment would only relieve the company of an expense and not result in a net gain, it was not a gift or gratuity of State funds. *State v. City of Austin*, 331 S. W. 2d 737 (Tex., 1960).

Utah: Reimbursement Statute Constitutional. — The Supreme Court upheld a statute providing for State reimbursement of utility relocation costs required by highway work. The court decided that such reimbursement was not a release of indebtedness of a corporation to the State, that the accommodation of utility facilities was an indispensable highway use, and that since such payment was limited to the extent of expenses incurred, and was for the benefit of all the people, it was not a loan of State credit to a corporate enterprise. *State Road Commission of Utah v. Utah Power and Light Company*, 353 P. 2d 171 (Utah, 1960).

Arkansas: Removal Requires Compensation Whereas Relocation Would Not. — A utility company whose poles occupied city streets pursuant to a franchise would have to relocate them at its own expense so as not to obstruct traffic, but where the company was ordered to remove rather than relocate the poles, the company must be compensated. *Arkansas State Highway Commission v. Arkansas Power and Light Co.*, 330 S. W. 2d 77 (Ark. 1959).

Contracts

Arkansas: Bid Revocation Allowed. — After the State Highway Commission had announced that a contractor was low bidder, but before it had accepted or rejected bids, the contractor tried to withdraw his bid on the ground that he had made a \$300,000 mistake in figuring it. The court held that since contractor had exercised reasonable care and the State had not changed its position because of the mistake, the contractor was entitled to rescind his bid and would not forfeit his bid bond by so doing. *State Highway Commission v. Ottinger*, 334 S. W. 694. (Ark., 1960).

Kansas: "Specified Methods" Contract Requires Payment for Extra Work. — Under a contract which specified methods of construction rather than the end result to be obtained, a contractor finished part of an embankment. Before final acceptance the completed portion was weakened by rain and had to be reworked. The U. S. Court of

Appeals held that, under such a contract, the contractor would be liable only for defects in workmanship, not defects in the end product, and that the contractor was entitled to extra compensation for the reworking. *Kansas Turnpike Authority v. Abramson*, 275 F. 2d 711 (10th Cir. 1960).

New Jersey: Engineers Not Liable for Exercise of Judgment. — Contractor, on orders from State engineers, drove piles 10 feet further than it contends the contract provided for. The Supreme Court of New Jersey held that even though the Highway Department might be liable to the contractor for the cost of the extra work, the engineers, whose order for additional work was a matter of professional judgment exercised in good faith, were immune from personal liability. *Bedrock Foundations, Inc. v. Brewster*, 155 A. 2d 536 (N.J., 1959).

Alabama: Officials Not Liable for Failure to Advertise for Bids. — Where county commissioners had the general power to construct roads but awarded a contract without advertising for bids, as required by statute, the county could not recover the contract price from them where there was no showing of fraud, collusion, improper construction, or any financial injury to the county resulting from the failure to advertise. *Alabama v. Fourth National Bank of Columbus*, 117 So. 2d 145 (Ala., 1959).

Other Cases

Colorado: City Tax Applied to Special District Streets. — Part of the cost of construction of roads within a special improvement district was to be paid by imposing a citywide property tax. The Supreme Court of Colorado ruled that such tax was different from an assessment and, therefore, the facts that no public hearing on it was held, and that plaintiff had to pay even though he lived outside the district, did not invalidate it. *Bradford v. City of Pueblo*, 354 P. 2d 612 (Colo. 1960).

Washington: Payment of Tort Judgment is Diversion of Funds. — Where, under the State constitution, highway funds could only be expended for "highway purposes," they could not be used to pay a death and bodily injury judgment against a city resulting from city employees' negligent operation of a movable bridge. *Automobile Club of Washington v. City of Seattle*, 346 P. 2d 695 (Wash., 1959).

Ohio: Prohibition of Trucks Unreasonable. — A village ordinance prohibiting truck traffic on a limited access boulevard passing through it was struck down as not being reasonable and nondiscriminatory. One important factor was that the congestion which prompted the ordinance existed in one direction during the evening rush, but the ordinance prohibited all trucks in both directions at all times.

Federal: Removal of Pipeline Not Compensable. — The United States agreed to pay the cost of relocating a railroad bridge, but was found to be under no obligation to pay for the removal of an oil company's pipeline which was attached to the bridge pursuant to a contract which the railroad had the right to terminate. *Richfield Oil Co., v. United States*, 178 F. Supp. 799 (Ct. Cl., 1959).

Texas: Maintenance Contract With State Relieves City of Liability. — Where the State contracted to maintain a State highway within a city. The Court of Civil Appeals held that a city could not ordinarily contract away the burdens of its duty to maintain streets, but that here the contract amounted to a revocation of the original grant of authority from the State to the city and did relieve the city of liability to motorists injured as a result of improper maintenance. *Hale v. City of Dallas*, 335 S.W. 2d (Tex., 1960).

Appendix

MARCH 1961

A PROGRAM FOR THE COMMITTEE ON HIGHWAY LAWS HIGHWAY RESEARCH BOARD

GENERAL. The purpose of the Special Committee on Highway Laws is to serve the needs of legal counsel, highway engineers, and others, representing both public and private interests in highways and highway transportation, for research and dissemination of information relating to legislation, court decisions, and administrative regulations and practices in the major aspects of highway construction and management. The committee's interest is broadly based, including such fields of inquiry as the basic authority to build and maintain highway systems adequate for modern needs, the melding of the highway into adjacent environment with a minimum of disruption and a maximum of facility, the reconciliation of the uses of highways and adjacent lands, advance acquisition of R/W and the planning for means to assure expansion and improvement of the highway system as future needs require it. On the other hand, the committee is not primarily interested in laws which have to do with the regulation of traffic, or regulation of the activities of highway carriers and public utilities. In connection with all appropriate activities cooperation with other Highway Research Board committees is contemplated.

Within this general purpose, there will be five major activities:

1. Encouragement of research in highway law problems by qualified researchers.
2. Maintenance of currently published highway law studies of the Highway Research Board in up-to-date status and publication of a composite index.
3. Continuation of current highway law reporting in the Board's correlation memoranda and the development of new or special reports on current developments in highway laws as may be deemed desirable.
4. Assistance in training programs for highway lawyers. To assist in the development of model highway legislation or administrative regulations as requested by various public agencies, or professional or national organizations.
5. Maintenance of liaison with other groups whose interest and activities in highway laws research may be of significance to the Board.

SPECIFIC RECOMMENDATIONS. With respect to the five major activities which are suggested above, the following specifics are proposed.

1. Encouragement of research. The success of the research conducted lately by the Highway Laws Project and recurring recommendations for further research on various aspects of highway law require the committee to encourage legal research as a continuing matter. The committee can make a substantial and valuable contribution to the achievement of the Highway Research Board's objectives by advising with regard to the needs for legal research on highway matters and encouraging qualified individuals and organizations to meet these needs. The committee has a unique opportunity to provide for lawyers, engineers, and others throughout the United States, and perhaps also in other countries of the world, a perspective in the conduct and correlation of highway law research which heretofore has been lacking.

Guidance by committee advice. Because of the many problems involved in the evaluation of research suggestions, the qualifications of researchers and adequacy of

facilities, plus the need for careful evaluation of the results of research, it is advisable to have the personnel of the committee include a wider range of viewpoints, particularly from highway administrative groups, whose activities implement and enforce highway laws and from law schools of major universities which are the principal centers where legal research is done.

Encouragement of legal research. Consideration will be given to the creation, within the committee, of a special subcommittee or task force to function as a "Research Advisory Group." Such a group could undertake to provide advice and guidance in connection with proposals for encouragement of research, and assist in preparing various of the preliminary steps necessary before such proposals are presented to the committee for consideration.

Such an "advisory group" would also render assistance to the work of the committee by calling attention to publications or current research with which they have contact, and by advising with respect to the periodic compilation of lists of articles and reports having special interest to highway lawyers and engineers.

A Tentative Listing of Important Areas for Needed Legal Research:

The following were suggested to the Committee on Highway Laws at its meeting in Washington, January 10, 1961 as deserving consideration in future legal research:

"Organization of Intergovernmental Responsibilities for Highways"

Transportation Planning and Highway Location
 Intergovernmental Cooperation in Right-of-Way Acquisition and Reservation
 Highway Law Administration and Enforcement: Jurisdictional and Operating Problems
 Highway Impact and Land Use Control Studies

"Legal Problems of Urban Transportation"

Inventory of present powers of urban areas to meet transportation problems
 Legal implications of various proposed urban transportation programs

"Land-Use Control in Highway Interchange Areas"

Intergovernmental Responsibilities for Land-Use Control Around Interchanges
 Criteria for Use of Various Legal Devices of Land-Use Control
 Use of Economic Data in Planning Land-Use Controls

"Evaluation of Highway Right-of-Way Practices"

Use of Condemnation and Negotiated Purchase Powers
 Methods of Valuation
 Coordination of Rules of Legal Counsel and Right-of-Way Agent in Acquisition Practice

"Review of the Concept of Fair Compensation"

Implications of recent economic benefit studies for future condemnation practice
 Use of economic benefit data in revision of current doctrine of fair compensation under eminent domain law

"Legal Problems in the Operation of Controlled-Access Highways"

Evaluation of present legal devices and powers relating to problems of:

- Vehicular traffic
- Public Utilities
- Railroads, waterways and pipelines adjacent to highway right-of-way
- Emergency services rendered by local governments
- Pedestrians

Coordination and consolidation of intergovernmental administrative and enforcement agencies in servicing controlled-access highways

"Relation of Highway Law to Laws of Water and Drainage"

Criteria for determining relevance of drainage and water problems in planning and constructing highways

Use of engineering and economic data in revision of laws relating to highways, drainage and water

Finding Researchers

In addition to broadening committee membership as a means of challenging and discovering researchers, the committee may arrange special conferences, symposiums and workshops, especially in connection with national meetings of highway-interested, and law school, groups.

2. Maintenance of current highway law studies. The studies prepared by the Highway Laws Project during the period 1955 to 1960 are listed in an attached appendix. Dates of publication or anticipated completion are shown.

Form of publication. At present each of these studies is in separate pamphlet form. The uncompleted studies and comparable future studies not yet in process will also be published in this "separate" form. For convenient use of this substantial body of material, a composite index for all of these monographs is proposed.

Up-dating of information. Since certain of these studies are now several years old, and all will become "dated" in the near future, it is proposed that supplementary memoranda be prepared on the various studies now completed. Such memoranda would also be fitted for inclusion in the hard-cover binders, or for separate distribution, as might be desired by the user.

Timing of the preparation of supplementary memoranda will be according to the need, in the judgment of the committee, for such new material. Events in some fields of law move more rapidly than in others.

3. Continuation of current highway law reports. At present, reports of current developments in highway law are carried in the Highway Research Correlation Service, published by the Highway Research Board. During 1960 three issues of this bulletin were devoted to highway laws.

This series of bulletins has been well received, and every effort should be made to continue its present high standards.

Expanded coverage of reports. The committee proposes to expand the coverage of the memoranda on current developments in highway laws to include comment that would correlate the reported event with other data that would explain its significance. The present method of random reporting of several new developments under various topical headings, while valuable as current information, may not furnish sufficient basis for evaluating the significance of the information. Correlation of new data with other legal, economic or engineering trends is one of the most important functions of the highway lawyer, and assistance along this line would enhance the value of the Board's bulletins. Reference to, and brief abstracts of, law review and other articles on significant highway laws and related topics might also be included. Such expansions of the scope of the reports on highway law matters would, if deemed desirable, be undertaken gradually, taking into account the experience of other similar types of reports, such as, for example, the bulletin of the American Society of Planning Officials.

4. Training programs and development of model legislation and administrative rules. There is need for the training of lawyers freshly hired by highway agencies and of refresher work for more experienced hands. Building on research reports and special studies, national level training and study workshops are proposed. Cooperation with

other interested groups will be solicited. Obviously it will take time to develop this function in appropriate strength, but the need is great and commencement of this work should not be unduly delayed.

During 1960 the committee reported that it received and responded to requests from various state highway agencies for assistance in connection with legislative proposals.

Since many requests for assistance, particularly in a year of "heavy" legislative activity in the states, deal with proposed legislation, and since it is highly desirable in certain matters to have uniform legislative approaches to highway matters, it may be desirable for the committee to be prepared to advise as to the existence of model bills. Further, when, in the judgment of the committee, there is need for uniform or model legislation on a certain matter, the committee may wish to consider assisting in the drafting of such material or encouraging other interested groups in so doing.

5. Liaison. The very existence of a committee on Highway Laws within the Board is a form of liaison among representatives of various groups interested in highway legal problems. Moreover, all of the activities suggested above will, because they are of interest to a wide circle of others, create opportunities for further, wider liaison. Some attention should be given, however, to organizing and promoting this liaison, and maintaining particularly close liaison with certain other national organizations. Organized liaison of this sort would not only enhance the exchange of views on an informal basis, but would permit closer coordination of the committee's activities with those of other groups closely related. Duplication of effort and mutual assistance are both advantages that would result.

Among groups with which liaison should be maintained on a close basis are: U. S. Bureau of Public Roads, American Association of State Highway Officials, American Municipal Association, National Institute of Municipal Law Officers, American Bar Association, American Right-of-Way Association, American Society of Planning Officials, National Association of County Officials, Association of American Law Schools, and others.

PROGRAM OF THE COMMITTEE FOR 1961-1962. At the 1961 meeting of the committee, in Washington on the occasion of the Highway Research Board's annual meeting, various topics were discussed from the standpoint of priority of action. Based on this discussion, the following order of activities is suggested:

1. Publication of monographs on highway law topics now in process. It is expected that monographs commenced by the Highway Laws Project will all be completed by the end of 1961. Publication of this material will be undertaken as soon as possible.
2. Highway Research Correlation Service memoranda. Reports of current legal developments, as now presented in the Highway Research Correlation Service, should be continued, but with an effort from now on to develop the means of expanding the scope of these reports with collateral and interpretive material, and bibliographical data.
3. Development of an integrated compilation of highway laws reference material. Using the studies already completed by the Highway Laws Project, and supplementing them with additional information available since publication, the material already in existence should be compiled and indexed, and "packaged" in a form suitable for permanent use.
4. Evaluation of highway research needs. After a review of the urgency of research on various aspects of highway law and practice, and an evaluation of the problems to be anticipated in such research, it is suggested that the committee prepare a statement, article or pamphlet on this subject identifying the topics which merit research effort. The list of topics in (1) above was presented to the committee for comment.
5. Encouragement of specific research projects. An effort should be made to instigate research on at least one or two of the topics deemed most urgent. Also, it may be possible to encourage certain states to undertake studies of their highway laws, applying principles set forth as desirable in the various highway laws monographs.

6. Assistance to other Highway Research Board Departments and other agencies. When requested, assistance should be given to organizations or other departments of the Highway Research Board on highway law matters.

7. Expansion of the committee and liaison activities. By the time of the 1962 meeting, plans for expansion of the committee should be under way, or in process of execution. Also, efforts should be made to establish liaison with the major groups having common interests and activities with the committee.