

General Discussion of 43rd Annual Meeting

Papers

J. H. BEUSCHER, School of Law, University of Wisconsin

• THIS is an occasion when we can appropriately say, "The King is dying, long live the King." With this meeting the Special Committee on Highway Laws will terminate its activities which now go back more than a decade. At the same time, however, there is being born in the Highway Research Board a new department which promises to give long-term continuity to our research in the general field of highway law. Therefore, it seems to me that this session is especially significant. Here we are launching a new venture, or at least taking a new grip on an old venture, and at the same time our meeting this afternoon is devoted to a discussion of some of the frontiers of research in four major fields of highway law.

We have had four excellent papers on, in one sense, quite diverse subjects. But there is a common thread that runs through them all. It seems to me that as we look back over them we can justify grouping these particular people and their ideas together on a single program in terms of research ideas that have been presented here this afternoon—research ideas that are going to become clearer in their detail and helpful as we look at these papers in their entirety and read them with care.

For example, Professor Ratcliff's paper very ably presented the urgent need for getting some researching lawyers and researching economists who know something about the appraisal process together in a joint effort to make better sense out of our court rules with respect to admissibility of evidence in this field.

In the paper presented by Justice Fatzer, one point that stood out clearly was the need to begin to pay much more attention than we have been to the vital job of getting together the facts that justify particular police power action in the highway field, such as the elimination of access, and then preserving those facts in a record that is readily available to those who are interested or when there is subsequent litigation. Research into the various processes by which this is being done in the various states might teach us much. Also, research into the way this problem is handled in the general field of land-use control in American cities and local units generally would be significant. In addition, we might want to be concerned in our research activities with what I believe as an American is an extremely important problem that emerges when we consider this vague, indefinite boundary that cannot be drawn with preciseness between the police power and the eminent domain. Granting that this will forever be true, nevertheless it seems we should investigate to see whether in practice a given state agency is sometimes taking private property and paying compensation, and at other times taking the very same interest through the police power and not paying compensation. Where this happens I think we are in danger of weakening respect for government and the law in our country, and if I had time I could cite you some chapter and verse from my own state.

Turning to our third paper—Saul Corwin's excellent analysis of some of the major problems of contract administration—I found a number of challenges for the researcher. For example, what do we know about the courts of claims that have been set up in a number of states, and what they are doing in the important field of highway contract claims? What are the diverse practices, and what can be learned from this reservoir of experience? This, in addition to the specific things that he identified as challenges, for example, that problem of perfecting the techniques of delegating responsibility for contract supervision to the engineer in charge of a highway project.

Turning finally to Dennis O'Harrow's stimulating presentation, we obviously have a man-size job trying to find out and keep abreast of what is going on all over the country in connection with implementation of the planning requirements of Sec. 134 of the Federal-Aid Highway Act of 1962, trying to report the more successful of these efforts,

and perhaps also the least successful—trying to demonstrate what works and what does not work. There is some accumulating experience, and I think it is vital that we bring it out and make it available to those who are going to have to live with this law for the generation ahead. As to Mr. O'Harrow's formal arbitration idea, I believe that some research into other analogous state-level arbitration procedures may help shape procedures and some arrangements that will make this device more successful in the field of highway transportation planning. For instance, in my state we have had a subdivision plat approval control procedure, and this is now accepted as a successful program. We should try to find out what happened here to make it successful, and how local units of government were persuaded to put up with this kind of state-level control. Also, we have a procedure used in connection with construction of major dams on navigable rivers which requires that the proposed builder of the dam, be he a private individual or be it a local unit of government, must apply to a state agency for a permit. This agency normally holds a formal hearing, and frequently another state agency, the Conservation Commission, appears and offers a very carefully prepared and energetically presented case—usually opposed to the dam. And the state agency which is to make the adjudication is not satisfied to rely on the record made by the partisan groups, but makes its own investigation in connection with applications presented to it. It is quite possible that experiences such as these suggest better ways of solving the problems of devising procedure for intergovernmental harmony and efficiency in carrying on the various phases of the highway program.

Suffice to say that I, at least, am going away from this meeting with a headful of ideas, raw as they may be, for the Board's new Department of Legal Studies. We are indebted to our speakers of this afternoon for their interesting and significant contributions. Within the areas they have highlighted for us are immensely important jobs for the highway lawyer in his role as a professional craftsman and a social engineer, working with other disciplines that participate in the process of public policy making.