Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1954

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Nebraska State Bar Association

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Shepard's Citations - Colorado Springs, Colorado
The House of Delegates was called to order in Hotel Paxton, Omaha, Nebraska, at 9:30 o'clock a. m. by Chairman Jean B. Cain of Falls City.

JEAN B. CAIN: Gentlemen, this historical first meeting of the House of Delegates will now be in order. As you probably know the constitution of this House of Delegates provides that the Clerk of the Supreme Court is the Secretary of the House of Delegates.

Mr. George H. Turner, the Secretary, will now call the roll.

(Roll call by Secretary George H. Turner.)

JEAN B. CAIN: There being a quorum present we will proceed with the order of business.

The first item of business is a statement of the Executive Council with respect to the organization of the House of Delegates, made by Mr. J. D. Cronin, President of the Nebraska State Bar Association.

PRESIDENT J. D. CRONIN: Mr. Chairman and gentlemen, as Mr. Cain has said this is of course an historic occasion of the history of the Nebraska State Bar Association, since it is the first meeting of the first House of Delegates ever to be elected in this Association.

The idea of a House of Delegates, I take it, comes somewhat from the pattern of the American Bar Association and was suggested to the Association and voted upon of course by the membership during the term of my predecessor Mr. Williams.

The thought as I understand it and the purpose is for the House of Delegates to take up and dispose of the routine work, such as the committee reports and section reports, so that the assembly will not have to devote its time to them, the thought being that a House of Delegates could more nearly reflect the considered judgment of the members of the bar on the questions to be presented.

Now the Secretary, Mr. Turner, has been a member of the House of Delegates of the American Bar Association for thirteen or fourteen years, he understands its working and I do not, so with your permission I will have him explain the working of the House.
SECRETARY GEORGE H. TURNER: Gentlemen of the House, as your President has told you this House of Delegates is organized somewhat after the pattern of the House of Delegates of the American Bar Association. It is the deliberative body of the state bar just as the ABA House of Delegates serves in that capacity for the American Bar Association.

You all have attended annual meetings of our Association under the old form of organization when fewer than half the number that are presently in this room have received very important committee reports, recommending policy, recommending action by the Association, committing the Association to do things or not to do things, and a mere handful of lawyers have determined that policy.

Now some of you are ex-officio members, of course, representing sections or representing the Executive Council, but most of you have been elected by the practicing lawyers of your district to bring here their views, represent them, to vote for them. It is felt that the rather important matters that come before the Association every year will receive much more mature consideration, than it ever has had in the past.

Now you are seated by district, only as a matter of convenience in order that if a matter of interest within your district develops, you are close to each other.

The members of course have the privilege of the floor at any time; non-members of the House do not have the privilege of the floor but will speak through you or by the submission of resolutions.

The rules provide for a Committee on Hearings, which has been appointed by the Chairman Cain, the Chairman of the Committee on Hearings, Mr. Monty Worlock, of Kearney.

The purpose of that committee is to give a non-member of the House of Delegates who has a matter which he wishes considered by way of resolution a forum where he may be heard. It is entirely possible that all during this meeting there may be no occasion for that committee to serve, but should such a matter develop the non-member goes to that committee, states his case, why he wants this done or that done, and then the Committee on Hearings reports it to this House for action.

Another committee that has been created for which there is no provision in the rules, but I think it is a rather important one; the Committee on Rules and Calendar.

Now this year being a first meeting we made up a calendar rather hit and miss and without consulting the chairman, we simply listed the items that come before you.

Don Samson is the Chairman of the Committee on Rules and
Calendar appointed by Mr. Cain, and it is to be his duty to make the formal motions that are needed to transact business, the motion to make a matter a special order, a motion to recess or adjourn, and it is also going to be his responsibility to see to it that the committee chairmen who are to appear before you and make their reports are ready at an appropriate time following the list in the calendar. Each committee chairman has been advised that if for any reason he can not attend at the hour scheduled, he should make arrangements with the Chairman of the Committee on Rules and Calendar and make his matter of special order at some other time when it is convenient. That would be the part of the job of the Rules and Calendar.

It is quite important, I think, that items be calendared, that people know when their matters are to come before the House and I believe it will be the policy of the chairman not to deviate from a formal calendar except in cases of necessity. I do not think there is much need of dwelling at length on your duties and responsibilities, I think you all appreciate them, and I think before this session is over you will come to the conclusion, if you have not already, that this is the way to transact the business of a bar association.

The Chairman has asked that while I am at the microphone I also make the report as Treasurer, which is calendared just a little later on.

The books of the Association have been audited by the firm of Martin and Martin, Certified Public Accountants of Lincoln. The report was submitted to the Executive Council last night and has received it's approval, and of course should be reported to this House.

The report shows cash receipts for a period extending from November 1, 1953 to September 30, 1954, an amount of $31,938.92. Cash disbursements $41,191.56, leaving an excess of disbursements over receipts of $9,252.64.

As a result the cash balance decreased from $9,905.89 as of November 1, 1953 to $653.25 as of September 30, 1954.

The principal reason for the large excess of disbursements over receipts during this period is that active members dues for 1954 in the amount of $10,420.00, and inactive dues for 1954, of $260.00 were included in the prior audit.

Most of you will remember that last year before the dues had been increased we were running substantially behind, so while ordinarily dues statements are sent out in the month during which the annual meeting is held, last year in order to have money enough to hold an annual meeting, the dues went out in October, which was the audit period immediately preceding this one, and
consequently we received a very substantial amount, of over $10,000.00 of this year's dues last year.

The major cash receipts for the current audit period consisted of dues from active members $27,230.00; inactive members $4,447.00.

Principal items of disbursements includes salary and payroll of $9,766.10; office supplies and printing, postage and stationary $1,595.95; publishing the Directory $1,173.35; officers expense $1,264.45; American Bar Association House of Delegates expense $1,019.21; Nebraska Law Review $4,299.41; campaign for judicial selection, $2,231.37; Committee on Public Service $2,430.57; Annual Tax Institute $2,504.55; Institute on Federal Tax Law held last July, $4,501.77; annual meeting expense $4,463.45.

The accountants state that all cash receipts were deposited in the bank, receipts for dues were reconciled by verifying the membership cards issued; bank balances were verified by independent correspondence with the banks; cash disbursements were verified by an examination of the cancelled checks.

They conclude by stating that in their opinion “the funds of the Association have been properly accounted for during the period under review. Any further information falling within the scope of our examination to be desired we will be pleased to supply it on request.”

I made this statement to the Executive Council last night, and I think I would like to repeat it to you so that you would know about what the financial picture of the Association will probably be. No one knew when the dues were fixed at their present rate whether that was the proper amount, too much or too little. Now if you will note these expenditures there were two rather substantial items that will probably not be recurring items, the Federal Tax Institute of July, probably the biggest, and I know the most expensive one we have ever conducted, $4,500.00; I think you should know however that no participants in that program received any money, as an honorarium. They received only their expenses, which is quite remarkable.

But it was a big one. There was a tremendous printing item for the Red Books which were distributed. Probably we will never have an Institute quite as expensive as that.

The campaign for judicial selection will probably not occur this year so there is a total of about six thousand dollars spent during 1954 which probably will not be met again. In my judgment the present revenue of the Association, although spending rather liberally for Institutes, which I think is fixed Association policy, we should run about thirty-five hundred to four thousand dollars in expenses below income, which I hope will some day
enable the Association to build up a cushion for a fund of some kind which may be used for any number of purposes. A number of the larger bar associations over the country, have fifty to a hundred thousand dollars in the treasury, which I think is a mistake. I don't think the Association should accumulate quite that much of a cushion, but it would be well to have some fund to fall back on, and I feel quite sure that under normal expenditures and under our present income we should have that rather safe cushion for the years following.

Jean Cain: If there are no objections the calendar as printed will be followed except that resolutions will be considered at the close of the afternoon's session.

Likewise, if there are no objections the deliberation of this House of Delegates will be governed by Roberts Rules of Order.

The House of Delegates received the following resolution which was referred to the Committee on Hearings for consideration:

Be it resolved that the Nebraska Bar Association sponsor legislation to require county judges in counties of 16,000 population or more to be duly licensed to practice law in this State at the time of taking office, unless prior to the enactment of said legislation they have eight years experience as a county judge in a county in this State whose population exceeds 16,000.

W. G. Whitford
Wendell P. Cheney
J. C. Hranac
Albert Maust
W. E. Garrison
C. L. Stone

REPORT OF COMMITTEES

The House of Delegates received, considered and acted upon the reports of standing and special committees. A full transcript of the discussion of each report is on file in the office of the Secretary as the official record of the proceedings of the House of Delegates. Printed herein are the reports as adopted, including amendments to the original committee reports which were made by the House of Delegates.

The report of the Committee on Legislation was presented by Charles F. Bongardt, chairman of the committee. The report, as amended and approved by the House of Delegates, follows:
REPORT OF THE COMMITTEE ON LEGISLATION

Your Committee on Legislation respectfully submits the following report:

In April of this year the Committee docketed for consideration (1) Proposal for recodification of the Nebraska highway laws; (2) Ebinger Proposal for Amending Article V of the Constitution of the United States; (3) Proposal of the 1952-1953 Committee on Legislation for employment by the Association of a paid legislative representative; (4) Proposal of the 1952-53 Committee on Legislation, approved by the Association, for a bill authorizing payment to the dependent spouse of a deceased employee of the wages owing such deceased employee, not exceeding $200.00; (5) Proposal of the 1952-53 Committee on Legislation, approved by the Association, for a bill providing for contribution by joint tort-feasors; (6) Proposal of previous Committees on Legislation, approved by the Association, for a Tort Claims Act; and (7) Proposal of previous Committees for consideration of the proposed Uniform Commercial Code. To these items were added (8) Proposal of Mr. Albert S. Johnston for a bill extending the presumption of sanity, as now existing in civil cases generally, to cover testamentary capacity in probate proceedings; and (9) Proposals of Mr. Flavel A. Wright, Chairman of the Taxation Section, for changes in the inheritance and estate tax laws of Nebraska. The views and recommendations of the Committee relative to the above proposals are as follows:

1) Proposal for recodification of the Nebraska highway laws. This proposal, as it relates to the construction and maintenance of highways, originated with the Department of Roads and Irrigation, and, as it relates to the use of the highways, originated with this Committee. The Committee and the Department have correlated their efforts in every way, and we gladly express our appreciation for the cooperative attitude shown and substantial assistance given us by Mr. Henry M. Grether, Special Attorney for the Department, and his assistant, Mr. Lawrence L. Wilson. We cite as an example the fact that at the joint instance and request of Mr. Grether, representing the Department, and of Mr. Clarence A. H. Meyer, representing the Committee, the State Legislative Council, on July 24th, appointed a committee of its own to consider both aspects of the proposed recodification, and to serve as a legislative contact group with which the Department and the State Bar Association can handle their respective recommendations. The Committee of the Council so appointed consists of Senator Burney, Chairman, and Senators Anderson, McHenry, Vogel and Fenske, members.
We doubt that any interested public official or lawyer can be found in this state who would dissent from the proposition that the highway laws of Nebraska need revising. The only questions would be How?, When? and Who will do the work? The task is monumental and our recommendations herein made are in large measure based upon the obvious fact that the whole job cannot be done at once and that a division of the labor is called for. We accordingly decided at an early date that the initiative with respect to recodification of the highway laws as they relate to construction and maintenance of the highways (roughly, Articles 1 through 6, Chapter 39, Revised Statutes of Nebraska) should, for the time being at least, be left with the Department of Roads and Irrigation, and that this Committee should confine itself to consideration of the highway laws as they relate to the use of the highways (roughly, Article 7 of Chapter 39 and Chapter 60 of the Revised Statutes of Nebraska). For the latter purpose the Committee concentrated its studies upon a comparative analysis of the applicable Nebraska Statutes as against the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinances as well as against corresponding provisions of other state statutes.

The Uniform Vehicle Code comprises five Acts, as follows:

I. **Uniform Motor-Vehicle Administration, Registration, Certificate of Title, and Antitheft Act** (26 printed pages).

II. **Uniform Motor-Vehicle Operators' and Chauffeurs' License Act** (13 printed pages).

III. **Uniform Motor-Vehicle Civil Liability Act** (6 printed pages).


V. **Uniform Act Regulating Traffic on Highways** (61 printed pages).

There is also a Model Traffic Ordinance for Cities (41 printed pages).

This Code was originally prepared in 1925-26 by the National Conference on Street and Highway Safety in cooperation with the National Conference of Commissioners on Uniform State Laws, and was later revised by the Highway Conference in 1930, 1934, 1938 and 1944, and, as so revised, has been endorsed by the Commissioners on Uniform State Laws. Two of the Acts were again revised in 1952, and the Model Ordinance appeared in 1953. Participating in the Conference were the Public Roads Administration; American Association of Motor Vehicle Administrators; American Automobile Association; American Mutual
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Alliance; American Transit Association; Association of American Railroads; Automobile Manufacturers' Association; Chamber of Commerce of the United States; National Conservation Bureau; and National Safety Council. An earlier (outmoded) version of the Uniform Code (The Uniform Motor Vehicle Act) was enacted by the Legislature of Nebraska in 1931. This act, in its present form, appears as Sections 39-741 to 39-799, R. R. S., 1943.

The Committee's appraisal of the Uniform Vehicle Code and the Model Traffic Ordinance is that they are expertly drafted, are complete and orderly and noticeably the product of exhaustive study and a rarely failing common sense applied to a clear knowledge of both the highways and the uses to which the highways are put. In contrast to which, the corresponding provisions of the Nebraska Statutes, notably the rules of the road (Article 7, Chapter 39), present an unintegrated, disorganized crazy quilt, full of ambiguities, inconsistencies, conflicts and holes, and fringed with an array of tack-ons, some of which are not even germane.

We think that the Uniform Motor Vehicle Code presents to the law makers of Nebraska a challenge measurable in the lives and limbs of yet more potential victims of the highways needlessly laid low because they did not know or could not know what the laws of Nebraska expected of them. The State of Nebraska has done well in the enactment of Uniform Laws in areas of legislation where uniformity is the only thing that makes legislative sense. We submit that there is no situation which calls more logically or urgently for uniform treatment than motor vehicle operation, which, as everyone knows, regularly crosses state lines, and cannot be performed with any semblance of safety except under laws and regulations which are easily understood.

The Committee was confronted, however, with a moral hazard, namely, the hazard that in recommending too much at one time this Association might so clog the legislative machinery that nothing substantial would emerge from the mill in the near or even foreseeable future. We think we have averted this danger by concentrating our attention on the rules of the road (Act V of the Uniform Code and the Model Traffic Ordinance). As it happens, the rules of the road, which in any jurisdiction are the most vital of the rules governing use of the highways, are in Nebraska precisely the rules which are most in need of attention. The subjects covered by Act 1 through 4 (Administration, Registration, Certification, Licensing, Safety Responsibility) of the Uniform Code are sufficiently provided for in the Nebraska Statutes that revision of such statutes can wait. We have been encouraged, too, in our emphasis on Act V by the knowledge that 28 states have already adopted it at least in substance.
We are attaching to this report, a copy of which has been sent to each member of the House of Delegates of the State Bar Association, a complete set of the five Acts of the Uniform Code plus a copy of the Model Ordinance. *The Committee recommends the adoption of Act V, and the repeal of all existing Nebraska Statutes in conflict therewith, by the Nebraska Legislature, but in making such recommendation it is recommending certain revisions and certain other concomitant legislation (which do not, in its judgment, affect the desired uniformity in the rules of the road themselves), as follows and for the reasons stated:*

(a) The entire uniform Code contemplates, and Act 1 thereof specifically provide for, an independent "department of motor vehicles" with a "commissioner of motor vehicles" as its executive officer. The Committee believes that the existing Department of Roads and Irrigation and its executive officer, the State Engineer, have enough to do without being charged with the policing of the highways. *The Committee further thinks that such an independent department as the Uniform Code envisages can and should be promptly and simply created by including such a department and commissioner among the Nebraska Civil Administrative Code departments, commissioners and directors established by Sections 81-101 and 81-102 of the Statutes of Nebraska."

(b) *We recommend the elimination from Act V of the Uniform Code of*

(1) Optional Section 32(b), as an undesirable withdrawal of local authority.

(2) Section 107(b), as impracticable under conditions obtaining in Nebraska.

(3) All of Article XVII, providing for state inspection of vehicles. We think this matter should be left with the Legislature, which has had the problem under consideration for some time.

(4) All of Article XVIII, dealing with size, weight and load. The Legislature has had this problem under consideration for some time and has enacted legislation on the subject as lately as 1953. We think that this matter should also be left with the legislature.

(5) Section 182(a) and (b), providing for deposit in the "highway improvement fund" of all fines and forfeitures, which provisions are in conflict with the Constitution of Nebraska.

(c) *Article VI of Act V of the Uniform Code provides for "prima facie" speed restrictions only. The National Conference
which prepared the Code has itself recommended this year that Article VI be amended to provide for fixed speed limits. We recommend that this Article be amended, as appropriate, to provide for fixed speed limits in conformity with the existing Nebraska practice.

(d) As above indicated the Model Traffic Ordinance comprises 41 printed pages. The basic purpose of the Model Ordinance is to provide municipalities with a ready-made set of local laws to accompany, and to aid in the enforcement of, the Uniform Code if, as and when the latter has been adopted by a state legislature. We recommend the adoption of the Model Ordinance by all Nebraska municipalities if, as and when Act V of the Uniform Code is written into law in Nebraska.

Inasmuch as publication costs incurred in the enactment of the Model Traffic Ordinance might, under existing statutes, be prohibitive, and in order to provide a simple, inexpensive procedure for its enactment in Nebraska, we recommend the adoption by the Nebraska Legislature of a bill (which is based upon Chapter 163 of the Colorado Statutes—under which enactment over seventy Colorado communities have already adopted the Model Traffic Ordinance) reading as follows:

"Section 1. Definitions.—As used in the text of this act, the following terms shall have the meanings indicated, unless the context requires otherwise:

"(a) 'Municipality' shall mean any city of any class, or any town, operating under general or special law of the state of Nebraska, or any home rule city, the charter or ordinances of which contain no provisions inconsistent with provisions of this act.

"(b) 'Adopting municipality' shall mean any specific municipality adopting an ordinance pursuant to the provisions of this act.

"(c) 'Council' shall mean the governing body of a municipality, such as its city council or board of trustees.

"(d) 'City clerk' shall mean city clerk or town clerk.

"(e) 'Code' shall mean any published compilation of statutes, ordinances, rules, regulations, or standards adopted by the federal government or the state of Nebraska, or by any agency of either of them, and any published compilation of any organization or institution of the type or kind hereinafter described. It shall include any codification or compilation of existing ordinances of the adopting municipality. The operation of this act as to published compilations of any organization or institution shall be limited to building codes—which may embrace any of the following subjects: the construction, alteration, repair, removal, demolition, equipment, use and occupancy, location and maintenance, of buildings or other structures heretofore or hereafter erected.

"(f) 'Primary code' shall mean any code which is directly adopted by reference in whole or in part by any ordinance passed pursuant to this act."
“(g) ‘Secondary code’ shall mean any code which is incorporated by reference, directly or indirectly, in whole or in part, in any primary code or in any secondary code.

“(h) ‘Published’ shall mean issued in printed, lithographed, multigraphed, mimeographed, or similar form.

“Section 2. Adoption of codes by reference—Title of ordinance. Provided that all the procedures and requirements of this act are complied with, any municipality is hereby authorized to enact any ordinance which adopts any code by reference, in whole or in part; and such primary code, thus adopted, may in turn adopt by reference, in whole or in part, any secondary codes duly described therein. However, every primary code and every secondary code which is incorporated in any such adopting ordinance, shall be specified in the title of the ordinance.

“Section 3. Notice of hearing—Hearing. After the first reading of the adopting ordinance and of the code to be adopted thereby, and of any secondary codes therein adopted by reference, the council shall schedule a public hearing thereon. Notice of the hearing shall be published twice in a newspaper of general circulation in the adopting municipality: once at least eight days preceding the hearing, and once at least fifteen days preceding it. If there is no such newspaper, the notice shall be posted in the same manner as provided for the posting of a proposed ordinance. The notice shall state the time and place of the hearing. It shall also state, that copies of the primary code and also copies of the secondary codes, if any, being considered for adoption, are on file with the city clerk, and are open to public inspection. The notice shall also contain a description which the council deems sufficient to give notice of interested persons of the purpose of the code, and of any secondary code or codes incorporated therein by reference, the subject matter of such code, the name and address of the agency by which each has been promulgated, and the date of publication of each.

“Section 4. Adopting ordinance—Adoption of penalty clauses by reference prohibited. After the hearing, the council may amend, adopt or reject the adopting ordinance in the same manner in which it is empowered to act in the case of other ordinances; provided, that nothing in this act shall be deemed to permit the adoption by reference of any penalty clauses which may appear in any code which is adopted by reference. Any such penalty clauses may be enacted only if set forth in full, and published, in the adopting ordinance. It is further provided that all changes or additions to any code made by the council shall be published in the manner which is required for ordinances.

“Section 5. Publication of adopting ordinance. Nothing contained in this act shall be deemed to relieve any municipality from the requirement of publishing in full the ordinance which adopts any such code; and all provisions applicable to such publication shall be fully carried out. The adopting ordinance shall contain the same description of the primary adopted code and of each secondary code incorporated therein by reference, as required in the notice of hearing in Section 3.

“Section 6. Filing of code of public record—Sale of copies
of code. Not less than three copies of each primary code adopted by reference, and of each secondary code pertaining thereto, all certified to be true copies by the mayor and the city clerk, shall be filed in the office of the city clerk or town clerk at least fifteen days preceding the hearing, and shall be kept there for public inspection while the ordinance is in force; provided, that after the adoption of the code by reference, one of these copies of the primary code and of each secondary code may be kept in the office of the chief enforcement officer instead of in the office of the city clerk. Following the adoption of any code, the city clerk shall at all times maintain a reasonable supply of copies of the primary code and of any secondary codes incorporated in it by reference, available for purchase by the public at a moderate price not to exceed one cent per page of text plus a handling charge of ten cents per copy.

"Section 7. Amendments.—If at any time any code which any municipality has previously adopted by reference, shall be amended by the agency which originally promulgated or adopted it, then the council may adopt such amendment by reference through the same procedure as required for the adoption of the original code; or an ordinance may be enacted in regular manner, setting forth the entire text of such amendment.

"Section 8. Use as evidence.—Copies of such codes in published form, duly certified by the clerk and mayor of the municipality, shall be received without further proof as prima facie evidence of the provisions of such codes or public records in all courts and administrative tribunals of this state."

2) The Committee has been deeply interested in the proposal made by Mr. John B. Ebinger of the Oregon Bar and sponsored by the "Committee for the Preservation of State and Local Government" of Chicago, Illinois (of which organization Mr. Ebinger is Executive Director), for the amendment of Article V of the United States Constitution to provide a procedure for amending the Constitution by action of the States without the consent of the Congress. The Committee was seriously recommending the adoption by the State Legislature of a resolution memorializing Congress to submit the Ebinger proposal to the States for ratification, when, on July 26, 1954, the Ebinger amendment (Form A-2) was formally introduced in the 83rd Congress by Honorable Chauncey W. Reed (R.) of Illinois, Chairman of the House Judiciary Committee, and by Honorable Francis E. Walter (D.) of Pennsylvania, ranking minority member of the House Judiciary Committee, in identical resolutions, as follows:

"JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to the procedure for amending the Constitution.
Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in lieu of article V of the Constitution of the United States, the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid, to all intents and purposes, as part of the Constitution:

Art. 1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States shall call a convention for proposing amendments; or the legislature of any State, whenever two-thirds of each house shall deem it necessary, may propose amendments to this Constitution by transmitting to the Secretary of State of the United States and to the secretary of state of each of the several States a certified copy of the resolution proposing the amendment, which shall be deemed submitted to the several States for ratification when certified copies of resolutions of the legislatures of any twelve of the several States by two-thirds of each house shall have been so transmitted concurring in the proposal of such amendment; which, in any case, shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States: Provided, That no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Sec. 2. The act of proposal, concurrence in a proposal, or ratification of an amendment, shall not be revocable.

Sec. 3. A proposal of an amendment by a State shall be inoperative unless it shall have been so concurred in within seven years from the date of the proposal. A proposed amendment shall be inoperative unless it shall have been so ratified within fifteen years from the date of its submission, or shorter period as may be prescribed in the resolution proposing the amendment.

Sec. 4. Controversies respecting the validity of an amendment shall be justiciable and shall be determined by the exercise of the judicial power of the United States.

Sec. 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

The Committee recommends that the Nebraska State Bar Association endorse the Reed-Walter Amendment; that its progress in Congress be watched by the Association; and that, if favorable action does not result in that quarter, consideration again be given to recommending to the Nebraska Legislature the adoption of an appropriate supporting resolution.

The Committee invites attention to two articles by Mr. William Logan Martin of the Alabama Bar (Birmingham), entitled "The Amending Power," which appeared in the American Bar
Association Journal of January and February, 1953, and to a third, entitled “The Ebinger Proposal,” by the same author, which is scheduled to appear in the same periodical soon.

3) The Committee has considered the proposal of the 1952-53 Committee on Legislation for employment by the Association of a paid legislative representative to assist in presenting to the Legislature the recommendations for legislation which the Association shall have made. The Committee recommends that the Executive Council be authorized to employ, or authorize the employment of, such a representative, at such times and for such compensation as the Council shall, in its discretion, consider necessary or desirable.

4) The Committee recommends that the recommendation of the 1952-53 Committee on Legislation for a bill authorizing payment to the dependent spouse of a deceased employee of wages owing such deceased employee, not exceeding $200.00, be progressed. The Committee recommends, however, that the maximum amount of wages so to be made payable be increased from $200.00 to $500.00.

5) The Committee recommends that the recommendations of previous committees that the Legislature provide for contribution by joint tort-feasors, such contribution to be enforced by separate action, be progressed.

6) The Committee agrees with its predecessor committees that the Legislature should adopt a Tort Claims Act.

7) The Committee is of the opinion that there is a great need for a modern up-to-date Uniform Commercial Code, and that the Code recommended by the Commissioners on Uniform State Laws exemplifies careful study and splendid draftsmanship. The Committee recommends, however, that until such time as the more important commercial states have adopted commercial codes substantially uniform in content, this Association take no action to secure legislation on the subject.

Recommendation #8 of the Committee on Legislation was on motion referred to the Section on Real Estate, Probate and Trust Law for consideration.

9) Mr. Flavel Wright, Chairman of the Taxation Section, has proposed the following changes in the Statutes of Nebraska relating to estate and inheritance taxes:

(a) Enact the following:

"Whenever any person or corporation shall be given a general or limited power of appointment by virtue of any disposition of property made at any time, either before or after the passage of this act, such power of appointment shall be deemed a taxable transfer of the interest subject to the power made from the donor
of said power to the donee thereof at the date of the donor's death, except that

"(1) If, at the date of the donor's death, the said power of appointment is irrevocably limited in whole or in part to be exercised in favor of any beneficiary not subject to or exempt from the provisions of Sections 77-2001 to 77-2037 and any amendments thereto, then, to the extent that it is so limited, the gift thereof shall not be deemed to be a taxable transfer from the donor to the donee thereof.

"(2) If, prior to the death of the donor of a power of appointment, the donee thereof shall have died, or shall have irrevocably waived and relinquished the power, or the donor shall have revoked the power, the gift of the power shall not be deemed to be a taxable transfer from the donor to the donee thereof, and in such event, the transaction shall be taxed as a transfer of the property subject to the power from the donor to the person or corporation ultimately receiving the property subject to the power."

(b) Amend Section 30-103.01, to read as follows:

"Except as is expressly provided by the provisions of Section 77-2108 R. R. S. 1950, the interest of any surviving spouse in any estate passing under any of the provisions of this Chapter 30 shall be determined prior to the payment of any Federal or State estate taxes, and shall not be subject to or diminished by any debt or charge against such estate by reason of any such Federal or State estate tax."

(c) Amend Section 77-2007, R. R. S. 1950 by deleting all of the present section and incorporating provisions comparable to those contained in Section 2013 of the Revenue Code of 1954.

(d) Amend Section 77-2101, which is keyed to the Federal Revenue Act of 1926, to make the reference to the Internal Revenue Code of 1954.

(e) Amend subdivision (2) of 30-103 to read as follows:

"The surviving spouse, and if no spouse survives, the children constituting the family of the deceased shall have an allowance consisting of 25% of the value of the gross estate but not to exceed $6,000.00, which amount shall be payable to the surviving spouse and to his or her heirs, or to the children constituting the family of the deceased and to their heirs, if no spouse survives, in monthly installments for a period of twelve (12) months from the date administration is granted. Such allowance shall be treated as a debt against the estate to be paid next after claims due the State of Nebraska and before claims of general creditors."

(f) Amend the second sentence of Section 40-117 R. S. 1943 to read as follows:

"In all other cases, the homestead vests on the death of the person from whose property it was selected, in the survivor for
life, and afterwards in the decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will; provided, however, in all cases where the surviving spouse succeeds to the interest of the deceased spouse by will or under the laws of descent of this state, the homestead interest of the surviving spouse shall be subject to the succession interest of the surviving spouse and shall consist of a life estate in the remainder existing after the succession interest of the surviving spouse has been determined."

The Committee is in complete sympathy with the purpose of the legislation proposed by Mr. Wright, and is of the opinion that some such legislation should be enacted without delay, in view, particularly, of the sweeping changes made in the tax situation by the enactment of the Internal Revenue Code of 1954. The Committee believes, however, that the language of these proposed enactments is in need of clarification in certain particulars, and recommends that the same be referred to the newly created Council of the Taxation Section for review and recommendations, the latter to be made to the Executive Council of the Association; and that the Executive Council be empowered to authorize the introduction of legislation, in the form approved by it, in the next session of the Legislature.

HARRY A. SPENCER, Coordinator
BERNARD J. BOYLE
MAX A. DENNEY
EDWARD F. FOGARTY
EARL J. LEE
ROBERT D. McNUTT
JOHN E. MEKOTA
CLARENCE A. H. MEYER
WALTER R. RAECKE
ELMER C. RAKOW
L. J. TePOEL
CHARLES F. BONGARDT, Chairman

SUPPLEMENTAL REPORT OF THE COMMITTEE ON LEGISLATION

After the Committee's Report had been submitted, there was submitted to it a further proposal by Mr. J A. C. Kennedy for the amendment of Section 21-1,159, R. S. Neb. C. S. 1953, relating to the corporate recasting of capital structures, so as to provide for a two-thirds (in lieu of a three-fourths as now provided) ratification vote by each class of stock outstanding.
Sections 21-1,158 through 21-1,164, R. S. Neb. C. S. 1953, were patterned after Paragraphs 36, 37 and 38, Article 4 of the Stock Corporation Law of New York, which provides for a two-thirds ratification vote. The bill, as originally introduced in the Nebraska Legislature, provided for a two-thirds ratification vote.

As Sections 21-1,158 through 21-1,164, R. S. Neb. C. S. 1953, provide ample protection to minority stockholders in respect of notices, court review and requirement for the purchase on appraisal of dissenters' stock; as it is practically impossible to assemble 75% of corporation stockholders at corporate meetings; and as the Statutes of Nebraska do not elsewhere require a 75% ratification vote to accomplish changes in corporate structure (Section 21-183, R. S. Neb. 1943, requires a two-thirds vote for dissolution; Section 21-151, R. S. Neb. 1943, requires a majority vote for amendment of articles; Section 21-1,104, R. S. Neb. 1943, requires a two-thirds vote for merger; Section 21-1,118, R. S. Neb. 1943, requires a majority vote for sale of all or part of the corporate assets), the Committee recommends that the Association sponsor legislation amending Section 21-1,159, R. S. Neb. C. S. 1953, so as to provide for a two-thirds (in lieu of a three-fourths) ratification vote by each class of stock outstanding for corporate recasting of capital structures.

The Report of the Committee on Legal Aid was presented by Martin A. Cannon, Jr. for John W. Delehant, Jr., chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE SPECIAL COMMITTEE ON LEGAL AID

Your Committee has investigated the status of Legal Aid in Nebraska. In general, there has been practically no change in the Legal Aid service (or the lack of it), and therefore this report must, of necessity, be both brief and closely similar to that filed for the previous year.

Omaha and Lincoln

The Omaha Legal Aid Clinic is jointly sponsored by the Creighton University College of Law, the Omaha Bar Association, and the Omaha Barristers Club. Its office is located in the Creighton College of Law Building.

The Lincoln Legal Aid Clinic is jointly sponsored by the Nebraska University College of Law, the Lincoln Bar Association, and the Lincoln Barristers Club. Its office is located in the Nebraska College of Law Building.
The purpose of both Clinics is to provide free legal aid service to those who are financially unable to pay for the services of an attorney, and who are in need of legal services. The Clinics are under the direction of faculty members, are staffed by senior law students and are assisted by volunteer practicing lawyers. The majority of cases handled by both Clinics involve domestic relations problems.

It is the opinion of the Committee that the problem of rendering legal aid service has been adequately met in both the Omaha and Lincoln areas.

Out-State

There still appears to be no organized program of legal aid in existence out-state. Although a Legal Aid Clinic can best be established by use of the facilities of a law school, the lack of a law school does not appear to be a valid excuse for failure to establish an organized program of legal aid. The Committee repeats its prior recommendation that local Bar Associations should designate one or more lawyers to handle legal aid matters on a periodic and rotating basis.

MARTIN A. CANNON, JR.
LAWRENCE S. DUNMIRE
BERNARD GRADWOHL
RALPH S. KRYGER
JAMES MERRIMAN
ROBERT M. SPIRE
JOHN W. STEWART
JOHN W. DELEHANT, JR., Chairman

The Report of the Committee on Administrative Agencies was presented by Daniel Stubbs, chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE AGENCIES

On March 12, 1954, this Committee adopted a resolution recommending to the Governor of Nebraska that he convene a Governor's Conference on Administrative procedure in Nebraska to consider problems concerning procedure before State Administrative Agencies. Many administrative agencies with broad regulatory powers have been created in the past decade without attention to procedural matters. It is hoped that the Governor's Conference will develop solutions to these procedural problems and make recommendations for legislation or other implementation to
the end that procedural matters including judicial review will be made uniform, certain and impartial.

A copy of the resolution of the Committee is attached.

Governor Crosby is in full accord with the purposes of the resolution; is engaged now in organizing the conference and it is expected that the work of the conference will be well underway by the time of the annual meeting of the Bar Association.

It is recommended that this special committee be continued during the ensuing year to assist the Governor’s Conference in any appropriate way.

CHAUNCEY BARNEY
IVAN A. BLEVENS
WALTER P. LOOMIS
ALBERT E. MAY
KEITH MILLER
EDWARD SKLENICKA
RALPH W. SLOCUM
DAVID D. WEINBERG
RICHARD D. WILSON
DANIEL STUBBS, Chairman

RESOLUTION OF COMMITTEE ON ADMINISTRATIVE AGENCIES NEBRASKA STATE BAR ASSOCIATION

BE IT RESOLVED by the Committee on Administrative Agencies of the Nebraska State Bar Association,

For the purpose of promoting improvement in the administrative procedures of the various agencies of the State Government this Committee recommends to the Governor of the State of Nebraska that he convene a Governor’s Conference on Administrative procedure in the State of Nebraska.

The Committee feels that there are a number of problems relating to the procedure used by the various state agencies and departments with respect to the exercise of their powers which need the study and recommendations of a responsible body to the end that procedural matters be made uniform, certain and impartial, insofar as that is possible. In the last decade state agencies have been increased in a substantial number and many of them are given regulatory and rule making powers which vitally affect the business and conduct of citizens of the State. Because regulation by agencies of the government on such a broad scale is relatively new, the administrative procedures utilized by such agencies in exercising their powers and the rights of the ordinary
citizen in dealing with these agencies has received too little attention.

Some of the problem areas in which investigation and study may be productive of beneficial results are the following:

1. Pleadings before Agencies and Departments of the State.
2. Pre-trial Procedure.
3. Evidence.
4. Trial Problems.
5. Hearing Officers.
7. Judicial Review.

Because of the existence of these problems with respect to the Agencies of the Federal Government a President's Conference appointed by the President of the United States is now at work.

In forming such a conference it is suggested that it be composed of not less than twenty members. The state agencies who will be affected should be represented and will be able to give very valuable assistance. In addition, several members of the Bar representing the Bar Association, we believe, will be helpful. It is further recommended that the conference include a few members of the legislature and several responsible citizens representing the general public.

It is further suggested that one of the Supreme Court Justices would make an excellent chairman.

Because the District Court in Lancaster County has the burden of appeals from State Administrative Agencies, it is also recommended that one of the judges of that court be a member of the conference.

The recommendations contained in this Resolution are intended only as suggestions in order to outline clearly what the Committee has in mind.

COMMITTEE ON ADMINISTRATIVE AGENCIES,
NEBRASKA STATE BAR ASSOCIATION
BY DANIEL STUBBS
Chairman

The Report of the Committee on Crime and Delinquency Prevention was presented by Robert A. Nelson, chairman of the committee. The report, which was approved by the House of Delegates, follows:
REPORT OF THE COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Last year your association adopted recommendations made by this committee for the enactment of certain legislation relating to the problems of crime and delinquency prevention. This year your committee has continued the study of these matters with the view of preparing the proper bills for presentation to the legislature. Several of the members of the committee attended the Conference of the Central States Correction Association held in Lincoln, May 23rd through May 26th, 1954. We have also worked in cooperation with other groups such as the District Judges Association, which have committees working on the same problems. Bills will be drafted, covering these adopted recommendations, and presented to the Legislative Committee of your association for their consideration and action.

Consideration was also given to the question of what we as lawyers can do to help solve the problem of juvenile delinquency. It is generally agreed that the attack on delinquency must be made on three fronts: (1) keeping normal children normal, (2) reaching children who are beginning to show signs of delinquency and giving them help, and (3) reaching the already delinquent and providing a rehabilitation service for them. Studies have revealed that only about fifteen per cent of the cases of delinquency are due to more or less normal mischievousness or accidental misbehavior. All other cases can be related to some fundamental defect of family structure: mentally deficient, emotionally unstable, or disinterested parents with children who are deprived of affection, physical necessities and social opportunities. Can the lawyer be of help in solving this problem? We think he can.

First, we believe that the average lawyer is in a peculiarly unique position to foster those moral standards and to support those civic endeavors which are essential in preventing delinquency in the first place. Adequate schools and playgrounds, attractive parks, sponsored youth clubs in churches and civic groups, and a competent welfare service are just a few of the things that we as lawyers can openly encourage. But if the breakdown of the family is the major cause of delinquency, then we can perhaps do our most effective work by keeping the family together. When a lawyer is asked to handle a domestic relations case, we believe he has a duty to consider the future welfare of any children who may be involved with the same seriousness that he considers the legal rights of his client. This may mean taking advantage of whatever resources are available for family counseling. Some
lawyers in our larger cities have reported very satisfactory results after referring clients with family problems to trained marriage counselors. We are rendering a real service if we can help to keep families together, since research indicates that for a child almost any home is better than no home at all.

We believe that in the field of adoptions the lawyer also has responsibilities. Too often the direct placement of children, without knowledge or study of the child itself or the backgrounds of the two sets of parents involved, can result in maladjustments which eventually lead to delinquency. We believe that in most cases lawyers can render their clients a service by suggesting that they obtain children for adoption only through regular licensed child placement agencies.

So far we have talked of how a lawyer can assist in preventing delinquency. But what about the child who is already a partial or fulfilled delinquent? The problem here is largely one of rehabilitation and calls for the combined help of the court, the police, the parents, the church and the school. Lawyers should interest themselves in the work of their juvenile courts, whether administered under the jurisdiction of a county judge, as in our smaller counties, or of a district judge, as in our larger counties. An urgent need in this field is for a state wide probation service with particular emphasis on the hiring of parole officers with some understanding of and experience in handling delinquent children. The passage of legislation to create such a service was recommended by this committee last year, and the need is now more apparent than ever. We believe further that lawyers who appear in juvenile cases should recognize that their first duty is to the child and that much more can be accomplished for the child's benefit if hearings are conducted on a quiet, informal basis with emphasis on rehabilitation rather than punishment.

With respect to the police and delinquency, we believe lawyers should encourage in their communities the training of at least one police officer in the special problems of juveniles. About three years ago a Youth Bureau was set up in the Omaha Police Department and it has been very successful. Children who get into trouble are no longer booked as ordinary criminals, unless there is a major offense involved. The members of the youth bureau try to treat each child as a human being and make every effort to get a child back on the right track by counseling with his parents, his school teacher, and where possible, with his minister. Results have been excellent.

In summary, we believe lawyers should take an active part in the various social agencies, civic groups and community organiza-
tions coping with youth problems; that in their private practice lawyers should be particularly conscious of the future welfare of any children involved and should exert all reasonable means to prevent family breakdowns; that lawyers should support and take an active interest in the work of the juvenile court and the police department of their communities, and should encourage the use of trained and competent personnel in dealing with juvenile offenders.

A study was also made of the Uniform Law of Arrest but time did not permit a complete analysis of all of its various provisions. Your committee feels, however, that this proposed law has considerable merit and recommends that further study of this be made by this committee next year.

ROBERT A. NELSON, Chairman
JOHN BAYLOR
WILLIAM F. COLWELL
HAROLD E. CONNORS
ALFRED G. ELICK
GERALD J. HALLSTEAD
JACK H. HENDRIX
JOHN H. KERIAKEDES
S. W. MOGER
EUGENE D. O’SULLIVAN, JR.
WILLIAM B. RIST
HUGH STUART

The Report of the Committee on Public Service was presented by John J. Wilson, chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE COMMITTEE ON PUBLIC SERVICE

Your Committee on Public Service has been chiefly doing for the members of the Nebraska State Bar Association those things which are designed to bring about a better understanding among the lawyers of this state and between the lawyers and the public generally.

During the year, your committee has been aided by the timely guidance of our President, Julius D. Cronin; Joseph C. Tye, the co-ordinator between the Executive Council and our committee; George H. Turner, Secretary and Donald G. Derry, the Public Service Director. Their suggestions have been a real service to the committee.
The pamphlets on "Wills" and "Joint Tenancy", first published in 1949, have been rewritten and copies of these together with the new pamphlet on "Are You Sure You Want to Sign That" have been mailed to each member of the association, with the suggestion that additional copies, not to exceed twenty-five, could be obtained upon their request. More copies may be purchased at one cent per pamphlet. It is the desire of the committee that these pamphlets will find wide distribution.

A Jurors Manual has been prepared and sufficient copies are in the hands of the Clerks of the District Court and Jury Commissioners so that a copy will be mailed to each person called for jury duty with the summons to appear.

A speakers bureau has been set up by Donald G. Derry, the Public Service Director, with each organized bar association within the state. With the cooperation of the lawyers of Nebraska, the speakers bureau will enable civic, school, religious, and all other groups to have high grade speakers at their gatherings when topics are to be presented or discussed.

The extension department of the University of Nebraska conducts farm study programs throughout the state. Arrangements have been made with the extension department to furnish lawyers for speakers at these group meetings. Every lawyer in the state is a suitable speaker for these meetings and his support when called upon to assist in these meetings will make this program a success.

During the year 766 news items relating to lawyers or bar association activities appeared in the Nebraska newspapers compared to 225 news items for the previous year. These items for the year 1953-1954 covered the annual meeting, judicial selection drive, December 1953 Tax Institutes, Jurors Manual, Institute on Internal Revenue Code of 1954, individual lawyers and local associations, and editorials.

The association purchased the film "Living Under Law" which has been shown thirty-five times. It was shown to school groups, civic groups, and bar associations, and to the boys and girls at Boys State and at Girls State. Conflicts in dates prevented additional showings.

The radio series "You and the Law" was used by radio stations twice during the year.

Four issues of the Nebraska State Bar Journal were printed and mailed to the members of the association. The magazine has been useful in furnishing news of the association and about members, and has had several articles concerning law.

Many banks and trust companies are cooperating with the as-
sociation and wanting to do more. Some banks and trust companies carry suggestions in their advertisements about consulting "your lawyer," and will do more of this type of advertising in the future.

We recommend that the Committee on Public Service consider as part of their program for next year:

1. The preparation and distribution of additional pamphlets.
2. The preparation and furnishing to newspapers and other periodicals having distribution in the state, columns discussing the law of Nebraska on various topics.
3. The continuation of the speakers bureau.
4. The continuation of the support to the extension department of the University of Nebraska by furnishing lawyers for speakers or panel discussions at the farm study program meetings.
5. The purchasing of a new film, if available, portraying the law similar to the film "Living Under Law."
6. The continuation of the radio series, and purchasing a new radio series, if available.
7. The making of arrangements so that copies of committee reports will be made available to the President of the association and the public service director when meetings of a committee are held.
8. The furnishing of a log of Legislative bills, hearing dates on these bills, and other important data in connection with the status of bills while the Legislature is in session.
9. The furnishing of the Jurors Manual to schools for use in the classes in which the principles of our jury system are taught.

We recommend for affirmative action of the Nebraska State Bar Association:

1. At the 1953 annual meeting, the association adopted a recommendation of the Committee on Public Service requiring the committee for this year to prepare and distribute the Code of Ethics to be displayed prominently in court houses throughout the state. We could not find a Code of Ethics, and assume it was the Canons of Ethics that were intended. Your committee was unable to accomplish this requirement because of the length of the Canons of Ethics. The card or plaque would have to be large and the type small in order to carry the entire Canons of Ethics. We recommend that Recommendation number 4 of the Report of the Committee on Public Service adopted at the annual meeting of the association in 1953 be rescinded.
2. That the Committee on American Citizenship has suggested that this committee perform the functions of that committee. Since the Committee on American Citizenship is one of the committees provided for in Article III of the By-Laws of the Nebraska State Bar Association, we recommend that the activities of the Committee on American Citizenship be carried out by that committee.

3. That after a program for the year 1954-1955 has been adopted by the next Committee on Public Service, the committee furnish a report of its suggested activities and estimated expenses to the Executive Council of the Nebraska State Bar Association for approval.

MILTON R. ABRAHAMS
JOHN B. CASSEL
THOMAS F. COLFER
JAMES J. FITZGERALD
JAMES A. LANE
WALTER P. LAURITSEN
THOMAS P. LEARY
WILLIAM H. MEIER
P. M. MOODIE
JOHN J. WILSON, Chairman

The Report of the Committee on Rules Governing Investigation and Disposition of Charges was presented by Clarence A. H. Meyer, chairman of the committee. The report of the committee with respect to amending Article XI was not adopted, but instead, the House of Delegates adopted a motion providing that the Supreme Court of Nebraska be requested to give consideration to amending Article XI of the rules creating, controlling and regulating the Nebraska State Bar Association, to the end that the disciplinary procedure therein set forth be improved. The balance of the committee report recommending an amendment to section 7-114 Revised Statutes of Nebraska, 1948, was approved. The entire report of the committee follows:

REPORT OF THE SPECIAL COMMITTEE ON RULES GOVERNING INVESTIGATION AND DISPOSITION OF CHARGES

The Committee recommends that consideration be given to submitting the following proposals for amendments to Article XI of the Revised Rules of the Supreme Court of the State of Nebraska, 1951. New language which would be added by the proposals is emphasized.
ARTICLE XI.

Investigation and Disposition of Charges.

1. DISTRICT COMMITTEE ON INQUIRY; MEMBERSHIP; TERM: The Supreme Court shall appoint a Committee of Inquiry in each district court judicial district, of not fewer than three (3) members, and two alternates, who shall serve for such term as shall be designated. One member shall be designated as Chairman, and one as Vice-Chairman to serve as Chairman in the event of the disqualification of the Chairman.

2. ADVISORY COMMITTEE; MEMBERSHIP; TERM. (No change).

3. INITIATION OF CHARGES. (a.) All charges of unprofessional conduct on the part of any member of the Association shall be first made to the Committee of Inquiry in the district where such member resides, or to the Secretary-Treasurer of the Association who shall forward them to the District Committee, but in all cases where such Committee has information of conduct appearing to be unprofessional it shall forthwith undertake the investigation provided for in Section 5 of this Article even though charges have not been filed with the committee.

(b.) Where the initial charges are filed with a District Committee, such committee shall forthwith advise the Secretary-Treasurer of such fact.

4. COMMITTEE ON INQUIRY; DISQUALIFICATION OF MEMBERS; POWERS OF ADVISORY COMMITTEE. (a.) In case any member of a Committee of Inquiry is disqualified from acting upon any matter presented to it, or in case a majority of the members request it, the matter shall be referred to the Advisory Committee, and such committee shall have the power to (1) direct that the members of said Committee of Inquiry who are not disqualified shall proceed and determine such matter, or (2) direct that the matter shall be referred to some other Committee of Inquiry in which case the Committee of Inquiry to which it is so referred shall have full power and jurisdiction to the same extent and in like manner as if said matter had arisen in its district and had been originally lodged with it or (3) take jurisdiction of and determine said matter to the same extent and with like power.
as the original Committee of Inquiry might have done if no disqualifications existed as to any of the members thereof, or (4) refer the matter to an investigator, who shall submit his report, as directed by the Advisory Committee, either to a District Committee or to the Advisory Committee, after which such Committee shall proceed with appropriate disposition of the charges. (b.) The investigator referred to in subdivision (4) above shall be selected by the Secretary-Treasurer, with the approval of the President. Investigators shall be paid their expenses and such per diem as may be approved by the President. (c.) When charges are lodged with a District Committee, or with the Advisory Committee, the Committee concerned shall report progress on handling of the charges to the Secretary-Treasurer on the last day of the first full calendar month elapsing after receiving the charges, and each month thereafter, and shall similarly report final disposition of the charges. If such report is not received by the fifth day of the month, the Secretary-Treasurer shall request that the report be forwarded forthwith.

The purpose of the amendment of Section 1 above is to provide for alternates for District Committees to take care of the many situations where one or more of the regular members of the Committee is disqualified or unavailable for other reasons.

Section 3, dealing with the initiation of charges has been amended to make it clear that District Committees have an obligation and responsibility to undertake investigations of unprofessional conduct which come to their attention, even though formal charges have not been filed with the Committee. It has been further amended to provide that where the initial charges are filed with the Committee, the Committee shall notify the Secretary-Treasurer of the Association. This particular part of the amendment is for the purpose of initiating a central reporting system which is more fully developed by the proposed amendment to Section 4.

Section 4 has received extensive amendment. The first amendment permits District Committees to refer matters to the Advisory Committee upon the request of a majority of the members of the District Committee, and not just in those instances where the member of the District Committee is disqualified. Your Commit-
tee feels that there are a number of instances where such a procedure would be desirable, including those cases where it is believed that an investigator should be used. Final determination of whether an investigator should be used has been left to the Advisory Committee. Provision has also been made in the section for selection of an investigator and for his payment from Association funds. Finally, we have suggested that a reporting system be set up in order to overcome certain objections to present procedures involving a delay in handling cases.

Your Committee further recommends that the Association take the necessary action to bring the following bill to the attention of the forthcoming session of the Nebraska legislature.

A Bill for an Act to amend Section 7-114, Revised Statutes of Nebraska, 1943, relating to attorneys at law; to provide for taxing costs in contempt and disbarment proceedings; to define terms; to provide for filing of judgments for costs; to provide that such costs shall become a lien; and to repeal the original section.

Section 1. That section 7-114, Revised Statutes of Nebraska, 1943, be amended to read as follows:

7-114. In all proceedings instituted for the suspension, censure, or disbarment of attorneys at law, and in all contempt proceedings, the court costs shall be taxed to the person suspended or disbarred or found guilty of contempt, as the court shall see fit. When brought by the Attorney General in the Supreme Court, and the charges are not sustained, the costs shall be paid by the State. When commenced on motion of the court or by a member of the bar, or any other person, and the charges are not sustained, the costs shall be paid by the county in which the same is begun unless the court shall find that the informer acted in bad faith, in making the charge, in which case the costs shall be taxed to said informer.

Sec. 2. As used in this act, unless the context otherwise requires, court costs shall be deemed to include, but not be limited to: (1) Costs and fees otherwise authorized by statute; (2) all costs and expenses approved by the Court which are incurred by reason of reference of the matter to a referee for the taking of testimony in accordance with the rules of the Supreme Court; and, (3) all necessary costs and expenses incurred in investigation
and preparation of charges leading to the institution of proceedings for suspension, censure, or disbarment, or, all necessary costs and expenses incurred by the respondent in defending against such proceedings; PROVIDED, the costs and expenses referred to in subdivision (3) shall be claimed by the successful party in the proceeding within thirty days after final disposition of the charges, after which the losing party shall have fifteen days in which to prepare and submit to the Court objections to all or any part of such claim, whereupon the Court without further hearing shall allow or disallow all or any part of such claims as costs, in its discretion.

Sec. 3. Judgments for costs herein provided for may be filed in the district court of any county in this state, and shall thereupon become a lien in such county in the same manner as other money judgments.

Sec. 4. That original section 7-114, Revised Statutes of Nebraska, 1943, is repealed.

The original section 7-114 was first enacted in 1911 at a time when disbarment procedures could be handled by the district courts. Much of the language in the present section is no longer appropriate and should be changed. Provisions of the proposed act would appear to be self-explanatory.

In conclusion we want to call your attention to the fact that the American Bar Association has a Special Committee on Disciplinary Procedures which is now working on a suggested model rule of court intended to cover the same procedures which have been examined by this committee. We recommend that the Association follow the work of the American Bar Association committee in order to be in a position to determine whether or not the model rule they prepare can properly be urged for adoption in this state.

CLARENCE A. H. MEYER, Chairman
WILBER ATEN
RUSH CLARKE
RAYMOND G. YOUNG
VARRO E. TYLER
DANIEL STUBBS
The Report of the Committee on Legal Education was presented by James A. Doyle, chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE COMMITTEE ON LEGAL EDUCATION

In 1953 the Committee on Legal Education recommended a change in the rules relating to admission to practice law in Nebraska, the objective of which was to place graduates of approved schools, admitted to practice in other states without examination, on the same basis as graduates of approved schools in Nebraska.

The Committee proposed that such graduates of approved schools admitted to practice without examination in another state, be admitted to practice in Nebraska either (1) upon satisfactory proof of at least three years of practice, or (2) by passing the Nebraska State Bar Examination.

This Committee endorses and repeats this recommendation.

The Committee considered also the subject of introducing more practical training in legal education. This is a controversial and important subject meriting continuing study by future committees.

E. D. Beech
E. O. Belsheim
Joseph C. Hranac
Warren C. Johnson
H. David Neely
T. H. Neighbors
Lyke E. Strom
Archibald Weaver
James A. Doyle, Chairman

The Report of the Committee on American Citizenship was presented by Joseph J. Vinardi, chairman of the committee. The report, which was not approved by the House of Delegates because of its action taken on the report of the Committee on Public Service, follows:

REPORT OF THE COMMITTEE ON AMERICAN CITIZENSHIP

Your Committee on American Citizenship submits the following report:

Your Committee again expresses its sincere belief that a real need exists for a positive Americanism Program emphasizing a better understanding and appreciation of the Constitution of the
United States, directed primarily to the youth of our State. Such a program was recommended by the last Committee on American Citizenship and was duly adopted by our Association at its last annual meeting.

A thorough study of the means and methods of putting the above mentioned program into effect has been made by your Committee and your Committee recommends that the program adopted at the 54th Annual meeting of the Association be operated from and out of the office of the Public Service Director of the Nebraska State Bar Association.

JOSEPH J. VINARDI, Chairman

The Report of the Committee on the Judiciary was presented by Robert Van Pelt, chairman. The report was approved by the House of Delegates, but later, on motion, the action of the House in approving that portion of the report dealing with the approval of proposed legislation for the retirement of members of the judiciary was reconsidered, and in lieu of full approval of such provision, the House approved the report with the provision that the Executive Council be authorized in its discretion to make such modifications or adaptations of the proposed bill for the retirement of judges as in its judgment is wise. The full report of the Committee on the Judiciary follows:

REPORT OF THE COMMITTEE ON THE JUDICIARY

Your committee on Judiciary has given attention during the year to the matters referred to it by the 1953 committee, namely, judicial salaries and a retirement and pension plan for judges. In addition, early in the year considerable time was devoted to the drafting of the form of petition which was circulated relating to the American Bar Association plan for the selection of judges.

It is the opinion of the committee that judicial salaries in Nebraska are inadequate. They are not only below the salaries paid in states which we believe are comparable, but also in actual purchasing power of the dollar in most instances the incumbent judge receives less than he received when he went on the bench. It is also to be observed that the salaries being paid the judiciary are lower than those of many other officers in the executive branch. (Note that the Governor receives $10,000 per annum, the Chancellor of the University $17,500, and the University Comptroller $12,000)

Your committee recommends that legislation be introduced at the next session of the Legislature fixing the salaries of judges of
the district court at $12,000 per annum, and the salaries of supreme court justices at $15,000 per annum.

The committee further recommends that a retirement and pension plan be provided for judges of the district and supreme courts. We recommend for adoption the substance of the plan adopted in Kansas by its 1953 Legislature. We modify it only as is necessary in order that it will fit into the existing framework of our laws. Under this proposal judges will be required to retire at the age of 70 except in the case of judges who are over when the law goes into effect. They can if they desire then serve out the remainder of their term. The judge who has retired will receive an annual pension based upon his years of service. It cannot exceed 65% of his salary at the time of retirement. To obtain the maximum retirement benefits a judge would have to serve a minimum of approximately 20 years. If he earns more than $1,200 per year, no pension is paid for that year. (See postscript)

The judges will be required to contribute a portion of their salary to the fund, out of which the pensions will be paid. The fund will be derived from three sources—

a) Contribution by the judges of 4% of their annual salaries;

b) A fee or charge of $1 per case, collected as a part of the costs, in all cases filed in the district and supreme courts;

c) Appropriation by the Legislature of the amount necessary over the above the receipts from a) and b) to make the necessary payments.

The plan meets with the approval of the District Judges Association the members of which considered it, at our request, at their June, 1954 meeting.

Copies of the proposed law will be available at our annual meeting and the Kansas law can be read in the Kansas Session Laws 1953 Session, Chapter 182.

We recommend the adoption of this report.

Robert A. Barlow
Frederick S. Cassman
Cloyd E. Clark
Sam C. Ely
William Grodinsky
Hans J. Holtorf
Vance E. Leininger
Jess C. Nielsen
William S. Padley
Harold C. Prichard
P. S. A bare majority of the committee favor a provision to the effect that if the retired judge enters the practice of law in Nebraska he is not to be paid a pension. This portion of the report will be submitted separately for your vote.—RVP.

The Report of the Committee on the Roscoe Pound Lecture-ship was presented by Raymond M. Crossman, a member of the committee appearing for Earl Cline, chairman. The report, which was approved by the House of Delegates, follows:

REPORT OF THE ROSCOE POUND LECTURESHIP COMMITTEE

In the report of this committee to the Nebraska State Bar Association dated June 1, 1953, and submitted to the Nebraska State Bar Association at its annual meeting in 1953, the committee recommended that the Nebraska State Bar Association discontinue paying the expenses of the lectures held at the University of Nebraska in honor of Dean Roscoe Pound, but that the members of the association, individually, continue their support of the Roscoe Pound Fund in every possible way. The report of the committee was adopted.

In the report dated June 1, 1953, the total book value of investments April 1, 1953 was $18,094.26, and the total cash on hand was $1,528.02, or a total value of the fund in the sum of $19,622.28. Under date of September 15, 1954, Perry W. Branch, Director-Secretary of the University of Nebraska Foundation, reported as follows:

"I am pleased to report, in accordance with your request, the status of the Roscoe Pound Lectureship Fund as of September 1, 1954."
May I remind you that at the time of my last report the assets of the fund had not been commingled for investment purposes and that in your letter of April 7, 1953, we were advised that—'it was the unanimous opinion of the committee that the University of Nebraska Foundation had the right to make investments of the Roscoe Pound Lectureship Fund in accordance with its practice as to other investments under its Articles of Incorporation.' Accordingly the portion of the Fund eligible for investment was placed in Commingled Fund #3 for investment purposes.

At this time the Roscoe Pound Lectureship Fund holds a 20.771% interest in Commingled Fund #3 with a book value of $22,302.19. The book value of the investments in the Fund on April 1, 1953, was $18,094.26.

The Fund contains no Principal Cash at the moment as every cent is invested in Commingled Fund #3. There is, however, Income Cash on hand in the amount of $1,801.19.

Gifts to the principal of the fund in the sum of $2,210.00 account for an increase in the book value of the fund in that amount.

The committee recommends as follows:

1. That the members of the association continue their support of the Roscoe Pound Fund by gifts and by recommending the fund to clients who wish to make donations or bequests for educational purposes.

2. That this committee has served its purpose and performed its functions and no occasion exists for its reappointment or for the appointment of any similar committee to perform the same functions.

EARL CLINE, Chairman
E. O. BELSHEIM
RAYMOND M. CROSSMAN
ROBERT W. DEVOE

The Report of the Committee on the State Tort Claims Act was presented by George Healey, chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE COMMITTEE ON TORT CLAIMS ACT

At the last general meeting of the Association this Committee reported concerning the defeat of the Tort Claims Bill in the 1953 Legislature and recommended that a committee be continued in order to effect the ultimate adoption of such an Act. Of course, no legislature will meet until 1955.
This Committee repeats the recommendation contained in its 1953 report, and that is that a further effort be made to obtain the ultimate adoption of some satisfactory tort claims Act for Nebraska, patterned as nearly as may be practical after the provisions of L. B. 334 introduced in the 1953 Legislature.

James H. Anderson
George B. Boland
John E. Dougherty
Frederick H. Deutsch
Daniel J. Gross
Charles Thone
George Healey, Chairman

The Report of the Committee on Medico-Legal Survey was presented by George Healey, appearing for Earl Cline, chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE SPECIAL COMMITTEE ON EXPERT MEDICAL TESTIMONY

Dr. Floyd L. Rogers of Lincoln, Nebraska, as Chairman of the Planning Committee of the Nebraska State Medical Association, wrote the President, Julius D. Cronin, of the Nebraska State Bar Association, suggesting that the Nebraska State Medical Association desired to investigate and consider possible advantages of what was designated as a pre-trial conference in cases where some degree of physical disability was in litigation. Dr. Rogers further stated that his committee would like to consider the matter in conjunction with the Nebraska State Bar Association. President Cronin, believing that the Nebraska State Bar Association had no regular committee whose duty it was to consider such a question, appointed the following special committee on May 17, 1954, to meet with Dr. Rogers and the Planning Committee of the Nebraska State Medical Association:

Earl Cline, Lincoln, Nebraska—Chairman.
George A. Healey, Lincoln, Nebraska
George Boland, Omaha, Nebraska.
Earl J. Moyer, Madison, Nebraska.
Fred S. White, Omaha, Nebraska.
Harold A. Prince, Grand Island, Nebraska.
Frank A. Hebenstreit, Falls City, Nebraska.

It was the opinion of Dr. Rogers and of the Chairman of this
Committee that no useful purpose could be served by holding a meeting of two large committees before material relating to the subject had been collected and digested. Accordingly, with the assistance of George H. Turner, Secretary of the Association, such material has been collected. The material generally consists of:

1. Applicable sections from the Codes of other states relating to this subject.
3. Applicable rules on evidence drafted by the National Conference of Commissioners on Uniform State Laws.
4. Copies of an address by Professor Henry Weihofen on "How Can We Eliminate the Battles of Medical Experts."

After the collection of this material, because of summer vacations and other commitments, sufficient time did not remain to have a meeting of the two committees.

It is recommended that a special committee be appointed to continue this study and to report at the next meeting of the Association.

EARL CLINE, Chairman

The Report of the Joint Conference of Lawyers and Accountants was presented by Hale McCown, chairman. The report, which was approved by the House of Delegates, follows:

REPORT OF JOINT CONFERENCE OF LAWYERS AND ACCOUNTANTS

Your committee has had no complaints as to the relationship between lawyers and accountants during the current year. Arrangements are underway at the present time for a meeting of this conference during the fall term. The President of the State CPA is now arranging the members of the accountants on this joint conference.

The committee recommends that the Committee on Joint Conference of Lawyers and Accountants be continued.

The Report of the Committee on Unauthorized Practice of Law contained no recommendation and was therefore submitted and received by the House of Delegates. The report follows:
REPORT OF THE COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Your committee followed up on a complaint made to the 1953 committee involving the George S. May Co., Chicago. Additional investigation was made, all ending with the following recommendation of the committee to the members of the Executive Council, Nebraska Bar Association:

"Your committee recommends that the members of the George S. May Co. and Robert G. Brice be cited for contempt of the Supreme Court on account of the advice given to Jek Manufacturing Co. and its proprietor with respect to the incorporating its operations, the drafting of articles of incorporation, minutes and by-laws and giving opinions with respect thereto and the effect thereof."

On June 26, 1954, the Executive Council accepted the above recommendation and authorized the citation of the persons involved.

At the request of the Executive Council, your Chairman presented the matter to the Attorney General and, at the writing of this report, the file was having the attention of the Attorney General’s office.

Only one other matter is pending before the Committee but, at this time, the investigation of that matter is not completed. If the investigation is completed before the meeting of the Bar Association, a supplemental report will be filed.

H. L. BLACKLEDGE
DANIEL D. JEWELL
DANIEL E. OWENS
C. M. PIERSON
ABEL V. SHOTWELL
ROBERT G. SIMMONS, JR.
JAMES J. FITZGERALD, JR., Chairman

The Report of the Committee on Cooperation with the American Law Institute was presented by Lyle E. Jackson, chairman of the committee. The report, which was approved by the House of Delegates, follows:

REPORT OF THE COMMITTEE ON COOPERATION WITH THE AMERICAN LAW INSTITUTE

The Thirty-first Annual Meeting of the Institute was held at the Mayflower Hotel in Washington on May 19, 20, 21 and 22, 1954. Members of this committee attending were Laurens Wil-
lams, Barton Kuhns, your secretary George Turner and your chairman.

Those members of the Bar Association who have not attended a session of the Law Institute will be interested in learning the system under which the organization operates, and the consideration given in detail to its different activities. For example, the Uniform Rules of Evidence, approved by the National Conference in August, 1953, after having been drafted by top lawyers, was presented to the Institute and discussed section by section in the presence of more than 300 lawyers practicing in the several states of the union. As each section, phrase by phrase, is read by the reporter, lawyers ask questions, make suggestions, offer amendments and in many cases ask for the elimination of certain provisions. At the close of the session the uniform rules are again submitted to the reporter to be rewritten in accordance with the action of the Institute. As amended and rewritten, the subject is then presented at the next session of the Institute, where it is again discussed and opportunities given every lawyer to make suggestions and offer amendments. In many instances subjects considered by the Institute are on the program for as many as six or eight annual meetings before final approval for submission to the Bar Associations and Legislatures of the several states. As a result, when finally approved by the Institute, the work in its finished form represents a cross-section of the opinions of the best lawyers throughout the nation.

The recent meeting was presided over by the President of the Institute, Harrison Tweed, and Director Judge Herbert F. Goodrich, both of whom, with George Wharton Pepper, Chairman and sparkplug of the Council, have given extensively in the way of talent and financial aid to the Institute. Due to ill-health, Mr. Pepper was unable to be present at this meeting.

The subjects considered were Tentative Draft No. 9 on the Estate and Gift Tax of Federal Income, Estate, and Gift Tax Statute. Due to an extensively heavy program, Mr. Williams alone attended this meeting and took part in its discussion.

Mr. Kuhns and your chairman attended all other sessions of the gathering.

The Uniform Rules of Evidence, approved by the National Conference of Commissioners on Uniform State Laws at its August, 1958, meeting, was submitted and approved by the membership.

The topic “Crime and Punishment—American Style” was presented by Dean Albert Harno. Different topics under this subject were discussed by Dean Albert J. Harno, Professor Herbert Wechsler, James V. Bennet and Judge Gerald F. Flood.
The second edition of Restatement, Material on Conflict of Laws and Agency, was also discussed as was the subject of Trusts.

The Penal Code, of course, is not a uniform code but a model code, intended for any state to be used in whole or in part.

It is impossible, of course, to report all the proceedings in detail, but the foregoing, in the opinion of your committee, gives you some idea of the service of the Institute; and it is our opinion that the same should receive support of the Bar and that, in keeping with the practice in the past several years, the committee be authorized to have a member thereof in attendance at the next annual meeting, the same to be at the expense of the association.

LYLE E. JACKSON, Chairman
L. R. STINER
ROBERT H. BEATTY
JEAN B. CAIN
JOHN W. YEAGER

The Report of the Committee on Organization of Sections was presented by Barton H. Kuhns, chairman of the committee. The report was approved by the House of Delegates, which approval has the effect of amending Article IV of the By-Laws of the association in the manner set forth in the report. The report follows:

REPORT OF COMMITTEE ON ORGANIZATIONS OF SECTIONS

This committee is a committee which was appointed by President Cronin last spring, early last spring. I am not sure whether it is the committee of the Association or just a sub-committee of the Executive Council or just what. The committee consisted of Jim Mothersead, Frank Williams, Phil Aitken, Bob Moodie, Larry Williams and myself.

The way it came about is this, and I think I had better give you the background of it and then submit some proposed by-laws. With the creation of the House of Delegates it became obvious, to all of us, I think, that the part which Sections will play in the annual meeting of the Association becomes increasingly important, and, in other words, during the annual meeting commencing tomorrow and continuing through Friday, the major portion of the program is devoted to Sections, and it is tremendously important therefore to the success of the annual meeting that the Sections function well, thoroughly, throughout the year and that careful consideration is given by the Sections to the planning of
their programs for the annual meeting and their planning of the work throughout the year.

Along with that is also the thought that while heretofore membership in a Section has consisted mainly of deciding what meeting you go to at the annual meeting, the Sections of the State Bar Association could very readily and profitably to the members of the Association perform services throughout the year. There is no reason why Sections throughout the year could not be giving consideration to subject matters of importance within the realm of the Section activity through sub-committees or committees of the Sections who would report at the Section meetings.

Now we come up, with that background, having in mind first the importance of Section meetings at the annual meeting, and, secondly, the somewhat undeveloped field of the possibility of Section activity throughout the year, we come up to a point where at tomorrow's annual meeting if something isn't done before that, there will be good programs because excellent chairmen for this year have given attention to the preparation of programs, and the chances are that unless we do something about it now that at the conclusion of those programs, and this room will be full for one of them, whatever Section is here, somebody will get up, that the chairman will say that the final order of business is the selection of officers for the next year, and somebody over here is going to look around and see the first familiar face and be up on his feet and be recognized by the chairman, and that man who has given the matter no thought at all and perhaps hasn't been in the Section until this year, because he is been more interested in some other Section, he is going to be chosen chairman of the Section. And he will be the man who will be charged with the responsibility of Section activities until our 1955 annual meeting and he will be the man who will be charged with the arrangements for the program at the 1955 annual meeting, and he will be the man who will be sitting in this House of Delegates a year from now as an ex-officio member of the House.

Now please understand that if we could be assured that the present chairmen of the Sections would be continued, there would not be cause for concern, so do not let the present Section Chairmen who are here feel that there is any offense; but I know that those who are here know full well that that is the procedure and that is what happened.

Now realizing that this would be the first meeting of the House and that the House would not be organized, I think that what President Cronin had in mind when he appointed this committee was to ask us to come here with some suggestions which
might be adopted by this House this afternoon and which would control and would become effective in the Sections as they meet tomorrow and as they choose officers tomorrow for their work throughout the ensuing year.

In any event I have with me a set of proposed by-laws. It will take only a few minutes to submit them. Perhaps it would have been better to distribute them, but frankly until the program came I was not sure how this matter was coming up, or that I was going to present it, and I might say that these by-laws have been worked over quite carefully, by this committee that I mentioned to you, and then they were submitted at two different meetings of the Executive Council.

The first meeting of the Executive Council turned back to our committee our suggested by-laws and there are some things about them that represent compromises. You will see as I read them that the by-laws contemplate an Executive Committee of each Section, composed of six members.

I submit them to you and when I get through I am going to recommend that they be adopted. I do not do that with the thought that they are perfect, but with the thought that if we don't have some by-laws in effect, some new procedure which we can say to these Section chairmen, this governs your procedure at the close of your Section meeting this year, we will not have made very much progress at this House, and we will not have done as much as we can to activate the Sections for their work until the 1955 annual meeting and in the preparation of it.

I say that is true unless you perhaps take these by-laws and make some changes in them, they are submitted by way of suggestion but not quick suggestion in any way. Now that is what I propose to read to you, it will not take long and this is really in substitution of Article IV of the present by-laws of the Association which this House of Delegates now has authority to amend, and I am going to propose that these by-laws which I submit to you be adopted in lieu of the provisions of Article IV of the present by-laws.

Section 1. The following Sections are established:

(1) Junior Bar Section.
(2) Insurance Law Section.
(3) Municipal and Public Corporations.
(4) Real Estate, Probate and Trust Law.
(5) Taxation.
(6) Practice and Procedure Section.

Section 2. The House of Delegates may create new or different Sections or may combine or discontinue Sections at any...
time, provided, however, that any such change shall take effect at the succeeding annual meeting.

Notice of any such change affecting any Sections shall be given by the Secretary of the Association to each member of the Executive Committee of the Section.

Section 3. Any member of the Association may enroll as a member of any Section or Sections, except that no member over thirty-five years of age may enroll in the Junior Bar Section. Each Section shall endeavor to keep a roll of its members.

Section 4. Each Section shall meet during the period of the annual meeting at such time as the Executive Council may direct, provided that upon request made by a majority of the Executive Committee of a Section, not less than six months before an annual meeting, the Executive Council may excuse any Section from meeting at not more than one consecutive annual meeting.

Section 5. Each Section shall have an Executive Committee of six members. No member of the Association shall serve on the Executive Committee of more than one Section at the same time. At the annual meeting of the Section following the adoption of these by-laws—that will be tomorrow and the next day if we adopt them today—at the annual meeting of the Section following the adoption of these by-laws, each Section which meets at the annual meeting shall elect six members of an Executive Committee; two for a term of three years, two for a term of two years, and two for a term of one year.

Thereafter, at each annual meeting two members of the Executive Committee who shall serve for a term of three years shall be elected in the manner hereinafter provided.

Members of the Executive Committee shall serve as such until the adjournment of the annual meeting in the year in which their terms expire, and no member of the Executive Committee shall be elected to serve for more than two successive terms.

Section 6. Nominations for members of the Executive Committee shall be made by petition signed by twenty-five members of the Association and filed with the Secretary of the Association at least thirty days prior to the annual meeting.

In the event there are not at least two nominations for each member of the Executive Committee to be elected, the Executive Council may make additional nominations.

The members of the Executive Committee shall be elected at the meeting of the Section at the annual meeting from the candidates nominated in the manner herein provided.

The election may be by voice vote unless any candidate requests a vote by ballot.
Section 7. If any Section fails to meet at an annual meeting the Executive Council shall elect the members of the Executive Committee to succeed those whose terms expire, and the Executive Council shall fill any vacancy among the Executive Committee until the next annual meeting.

Section 8. The organization of any Section which does not meet at the annual meeting following the adoption of these by-laws shall be provided by the Executive Council. If I may interpolate a minute, that Section 8 I just read, there will, for example, not be a meeting at this, at our annual meeting this year of the Practice and Procedure Section, because that Section has never been activated.

Under the Section I just read you therefore the organization of that Section will be activated by the Executive Council for the annual meeting next year.

Section 9. The Executive Committee shall elect from among its members a chairman, a vice-chairman and a secretary, who shall be the officers of the Section until the adjournment of the next annual meeting.

In case any Executive Committee fails to elect any of such officers with reasonable promptness the Executive Council shall designate such officers from the members of the Executive Committee.

Section 10. The chairman of the Section shall be ex-officio a member of the House of Delegates unless the Section shall at its annual meeting elect a delegate other than the chairman to serve for a term of one year.

Section 11. The work of the Section shall be in charge of the Executive Committee of the Section. At least sixty days before the annual meeting of the Association the chairman of the Section shall report to the President of the Association the proposed program to be held at the next annual meeting, and at the annual meeting of the House of Delegates the chairman of the Section shall submit a brief report of the work of the Section.

Section 12. Any action or recommendation of any kind by any Section, whether the same shall be adopted by resolution or otherwise, shall not be construed to represent the views, recommendations or opinions either of the Section or of the Association until the same have been approved by the House of Delegates.

Section 13. A Section may adopt by-laws for the conduct of its affairs, provided that they are in conformity with the rules of integrated bar and the by-laws of the Association; but any such by-laws adopted by Sections shall not be effective as such until approved by the House of Delegates.
Section 14. The Executive Committee of a Section shall conduct such institutes as the Executive Council may authorize or direct.

Section 15. Law student members of the Association may be members of Sections, but shall not be entitled to vote or to be members of the Executive Committee.

Now from that you can see the plan is to have in each Section an Executive Committee of six with staggered terms, so that the membership on the Executive Committee of two will expire each year. That six will elect a chairman, a vice-chairman, and a secretary from among themselves who will serve for a term of one year through the next annual meeting.

The chairman will represent the Section in the House unless the Section chooses to elect another delegate.

And the Sections can go just as far as they want to in organizing themselves in the way of committees of the Sections, committee reports, planning their programs, they are obligated to report to the President well in advance of the annual meeting, their action if any is not binding or representative upon the Association in any way until it comes before this House, this House is the deliberative body.

Now the purpose of these by-laws, if you see fit to adopt them, is to have these by-laws in effect now so that we can inform the Section Chairmen, as their Sections meet tomorrow, "These are now the by-laws under which you are operating." While it is true that this provision for nominating thirty days in advance can not become effective and is not proposed to be effective for this year, the officers, present officers of the Section, will at least be alerted to the fact that it is desirable to have working officers of the Sections during the coming year and then under these by-laws, your officers will be nominated in advance of the annual meeting.

The Report of the Advisory Committee was presented by Raymond G. Young, chairman of the committee. The report, which contains no recommendations, was received by the House of Delegates. The report follows:

REPORT OF ADVISORY COMMITTEE

The death of Mr. Clinton J. Campbell on January 23, 1954, was a distinct loss to our Association. He was appointed to the Advisory Committee at the time of its organization in March
1938 and served continuously and with devotion and outstanding ability until his death. The Court appointed Mr. Frank D. Williams to succeed Mr. Campbell.

The Chairman of the Advisory Committee was appointed a member of the Special Committee of the Association on Rules Governing Investigation and Disposition of Charges. For the use of that Committee he prepared a history and analysis of Disciplinary Procedures in Nebraska, copies of which were furnished to all members of the Special Committee, members of the Advisory Committee, and the President and the Secretary of the Association.

Charges of improper conduct of a judge came to the Advisory Committee for review of a decision of the Committee on Inquiry of the Fourth Judicial District. While the record was being considered by a sub-committee of the Advisory Committee, other matters arose involving the same respondent, whereupon the original charges and the new developments were referred back to the Committee on Inquiry for further handling as an original case. New charges were prepared and filed, formal hearing was had on September 8th which was as soon as a quorum could be had, and the Committee on Inquiry is awaiting the completion of the voluminous transcript by the reporter. Upon receipt of the transcript, the Committee will consider the matter further and make its decision.

In response to requests of members of the Association, the Advisory Committee has on four occasions during the year expressed its opinion on questions involving interpretation and application of the Canons of Professional Ethics. It has directed the disposition of charges in two cases in which members of Committees on Inquiry were disqualified. On Saturday, October 16th, a hearing will be had before the Advisory Committee on review of a record from the Committee on Inquiry of the Sixth District.

During the year the Association provided for each member of the Committee a copy of the recent book by Judges Orie L. Phillips and Philbrick McCoy on “Conduct of Judges and Lawyers.” Last year it supplied the Committee with copies of Henry S. Drinker’s “Legal Ethics.”

At the request of one of the County Judges, the Committee is making a study of Court-Room Publicity, which is the subject of a spirited, if not sensational, controversy. As the American Bar Association is giving serious attention to all phases of the matter, the Advisory Committee has withheld a pronouncement, awaiting a more authoritative expression of professional policy.
In nine of the eighteen Districts no charges were made in 1954 and no matters are pending. These are Districts 1, 8, 9, 10, 11, 14, 15, 17 and 18.

Minor matters were adjusted satisfactorily, without formal hearing, as follows: One in District 7, two in District 16.

In District 3 (Lincoln) one formal hearing was had, and early decision will be made. A charge of violation of the Canon against Advertising was submitted to the American Bar Association Committee on Ethics, and its opinion that the complaint was justified in part was accepted by the parties in interest. There was submitted to the Committee a question of the propriety of a course of business action contemplated by attorneys. After two meetings of the Committee, and extensive correspondence, an opinion was rendered which was accepted by the parties involved.

In District 4 (Omaha) the Committee had four meetings. Five cases came before the Committee. Four of them were minor and were satisfactorily adjusted without hearing. The other required formal hearing, and disposition awaits completion of transcript.

Charges in one case are pending in District 2, in two cases in District 12, and in one case in District 13.

Charges in one matter in District 5 and in one matter in District 6 were referred to the Advisory Committee because of disqualification of the local Committees.

Respectfully submitted,

CHARLES F. ADAMS
RAYMOND M. CROSSMAN
GEORGE B. HASTINGS
JAMES G. MOTHERSEAD
LLOYD L. POSPISHIL
FRANK D. WILLIAMS
RAYMOND G. YOUNG, Chairman

By way of supplement to the foregoing Report, may I direct the attention of this House to the fact that in 1952 the American Bar Association created a Special Committee on Disciplinary Procedures with the duty, among others, of formulating Model Grievance and Disciplinary Procedures to the end that there may be uniform and effective enforcement of the standards of conduct prescribed by the Canons of Professional and Judicial Ethics. That Special Committee was continued by the House of Delegates of the American Bar Association at the 1954 Annual Meeting.

Within the last hour I received a letter from the Hon. Orie
L. Phillips, Chairman of that Special Committee, enclosing a printed copy of the tentative draft of model "Rules of Court for Disciplinary Proceedings." This draft is contained in a pamphlet of seven printed pages. The Special Committee has asked that criticisms and suggestions with respect to such Rules be sent to the Chairman not later than December 1, 1954.

Reference to this matter is made at this time so that this House may, if it deems it appropriate, cause a study to be made of the American Bar Association draft in connection with any consideration which our own Association may give to proposals for changes in our Rules relating to Ethics and Disciplinary Procedures.

October 13, 1954. RAYMOND G. YOUNG, Chairman

The Report of the Committee on Oil and Gas Law was presented by Dan Monen, Jr. for Floyd E. Wright, chairman of the committee. The report of the committee as amended by the House of Delegates follows:

REPORT OF THE SPECIAL COMMITTEE ON OIL AND GAS LAW

The Special Committee on Oil and Gas Law of the Nebraska State Bar Association makes the following recommendations:

1. That the Special Committee on Oil and Gas Law be continued, and that the committee, through any of its members, be authorized with the permission of the Executive Council, to represent the Nebraska State Bar Association before the Nebraska State Legislature or any of its committees in connection with any proposed bills before the Legislature relative to the conservation of oil and gas within the State of Nebraska.

2. That the following changes be made in the existing laws of the state relative to oil and gas:

(a) Section 57-201 of the 1943 Revised Statutes of Nebraska to change the time for lessees to surrender in writing forfeited leases from sixty to thirty days.

(b) To amend Section 57-205, Revised Statutes of Nebraska for 1943, to provide that should the owner of such lease neglect or refuse to execute a surrender as provided in Section 57-201, and the lease having not been cancelled by the method provided in Sections 57-202 to 57-204, inclusive, that then the owner of the lease premises may sue in any court of competent jurisdiction to obtain such surrender, and he may also recover in such action of the
lessee the sum of $100.00 as damages and all costs, together with a
reasonable attorney's fee for preparing and prosecuting the suit,
and any additional damages that the evidence indicates will war-
rant.

(c) That Section 57-210, Revised Statutes of Nebraska,
1943, be amended so that it will apply, in addition to the leasing
of real estate to the entering into of pooling or unitizing contracts
by Executors, Administrators, Guardians and Trustees, and to
also provide that any of the proceedings mentioned in said section
may be brought by the Executors, Administrators, Guardians or
Trustees in the District Court of the County in which the estate
or trust is being administered, or guardianship proceedings is
being had, and that Sections 57-211 to 57-212.01 be likewise amend-
ed to comply with the changes made to 57-210.

(d) That Sections 57-202 to 204, Revised Statutes of Ne-
braska, 1943, be amended so as to provide for forfeiture within
ten days (instead of twenty days) and provide for filing of an
affidavit after completion of service, etc., (instead of twenty days),
and to limit the time for the lessee filing notice of validity of
lease to ten days (instead of thirty days).

(e) To amend Section 52-222, Revised Statutes of Ne-
braska, 1943, so as to provide that the application for the appoint-
ment of the trustee therein provided for may be made by the life
tenant or any other person having a vested or contingent interest
in the real estate, rather than only by the life tenant, and to
amend Section 57-223 by giving the trustee so appointed additional
powers, subject to the approval of the District Court to enter into
pooling and/or unitizing agreements, in addition to the authority
to lease.

(f) To amend the Mechanic's Lien Laws, Section 52-101,
Revised Statutes of Nebraska, 1943, by providing for a lien in
favor of any person who shall, under contract with the owner,
lessee of any interest in real estate, or oil and gas lessee, or the
owner of any mineral lease-hold on land, or the owner of any gas
or oil pipe line, or pipe line right-of-way, perform labor or furnish
materials, machinery or supplies in connection with the moving,
erecting, dismantling, operating, equipping, maintaining or re-
pairing any such oil or gas well, or oil or gas pipe line, shall have
a lien on the interest of said owner, lessee of any interest in real
estate, or oil and gas lessee, or the owner of any mineral lease-
hold on land, or the owner of any gas or oil pipe line or pipe line
right-of-way so contracting or upon the materials or supplies furn-
ished and upon the well for which the same were furnished and
to provide specifically for filing of a statement of the account
within four months of the furnishing of the last item, and to amend Section 57-303 to change the time for the filing of the lien therein mentioned from sixty days to one hundred twenty days.

(g) To amend Section 57-402, Revised Statutes of Nebraska, 1943, to provide that notice of the hearing provided for shall be given by such publication as the court may direct (instead of three consecutive weeks).

3. The Committee recommends that Section 57-206, Revised Statutes of Nebraska, 1943, be repealed.

Comment

Recommendation No. 1: Section 57-226, Revised Statutes of Nebraska provides:

"The waste of oil and gas or either of them in the State of Nebraska, as in Section 57-225 defined, is hereby prohibited"

Section 57-215 provides that the State Geologist is authorized to adopt reasonable rules and regulations relative to the identification of ownership of wells; the making and filing of logs; the drilling, casing and plugging of wells, to prevent the escape of oil or gas or blow-outs, explosions and fires; and to require the keeping of records relative to production of oil and gas.

During the development stages, these laws and the rules and regulations of the State Geologist have served right well, but great progress has been made in Nebraska in the production of oil and gas. At the close of 1953, there were 367 producing oil and gas wells. During that year there was produced in Nebraska over six million barrels of oil and six and a half million thousand cubic feet of gas. Many additional wells have been completed during the present year and the production of both oil and gas in 1954 will be greater than in 1953 and the production will undoubtedly continue at a greater rate in future years.

There will undoubtedly be introduced at the next session of the Legislature bills for the conservation of oil and gas along the line of the statute which has been suggested by the Interstate Oil Compact Commission and along the lines of those which have been adopted in neighboring states. The need for a statute for the conservation of oil and gas is of no more importance to the individual lawyer than it is to the individual in any other business or profession. The Committee did not feel that it was its duty to determine whether or not such a statute should be adopted in Nebraska. The legal profession, however, would be vitally interested in such a law, should one be passed, particularly as to the manner in which the law would be administered, the make-up of a Com-
mission, the rules and regulations before the Commission and the manner of appeal from orders of the Commission. For this reason, the Committee has recommended that the Special Committee be continued and given authority to appear for the Bar Association before the Legislature and the legislative committees with regard to any such proposed legislation.

Recommendation No. 2:

(a) This recommended change in Section 57-201 would merely shorten from sixty to thirty days the time for giving up the oil and gas leases after they have been forfeited.

(b) Section 57-205 provides for the bringing of an action in court to declare a lease void, with provisions for the recovery of damages and attorney fees. The proposed amendment to this law would make it clear that such an action could be brought and such damages and attorney's fees recovered, if such an action were brought before the completion of the statutory proceedings mentioned in Sections 57-202 to 204 for the cancellation of such lease.

(c) Sections 57-211 to 212.01 now apply only to a proceeding by an Executor, Administrator, Guardian or Trustee for authority to lease an interest in real estate, and provides that such a proceeding should be brought in the District Court of the county in which the estate or trust is being administered, or guardian proceedings being had. The proposed amendment would also provide for an Executor, Administrator, Guardian or Trustee to obtain permission for the entering into of a pooling or unitizing agreement with regard to an interest in real estate and would provide that such a proceeding might be had either in the District Court in which the estate or trust or guardianship is being administered, or in the District Court of the County in which the interest in real estate is situated. Without this amendment, an Executor, Administrator, Guardian or Trustee has no authority to enter into any arrangements for the pooling or unitizing, which in some instances might be very beneficial, or make it possible to lease the interest where otherwise it could not be so leased. It is also generally more convenient to have the action brought in the county in which the real estate is situated particularly if it is necessary to produce evidence, and generally the District Judge of the county in which the real estate is situated would have a better idea as to whether or not such leasing, pooling or unitizing was for the best advantage of the estate.

(d) The proposed amendments to Section 57-202 to 204 would merely shorten the time in which the statutory proceedings for obtaining a cancellation of a forfeited oil and gas lease could
be obtained. It would still give ample time for the lessee to protect any rights that he might have.

(e) Under Section 57-222, a life tenant may make application for the appointment of a trustee to enter into an oil and gas lease. The proposed amendments to Sections 57-222 and 223 would give the vested or contingent remaindermen also the right to make application for the appointment of a trustee. The interest of the remaindermen might possibly be greater than that of the life tenant and they should have the same right as a life tenant to make application for the appointment of a trustee. The amendment also would permit the trustee to make application to the court for authority to pool or unitize the real estate in addition to his right to make application to lease the property.

(f) Under the present statute, it is doubtful whether or not a mechanic's lien can be had for labor and materials furnished in connection with the drilling of an oil or gas well or the construction of a pipe line. The proposed amendment would provide for such liens. The amendment to Section 57-303, which section provides for liens for the transporting and hauling of oil equipment, would increase the time for filing of such a lien from sixty to one hundred twenty days. Some hauling such equipment feel that the time for filing a lien is too short.

(g) The proposed amendment to Sections 57-401 and 402 provides for the giving of such notice as the court may require rather than the three weeks notice required under the present statute.

Recommendation No. 3: Section 57-206 provides that any oil or gas lease recorded in the office of the Register of Deeds may be discharged and cancelled on the margin of the record if signed by the lessee. This is similar to the provision for the release of mortgage. The oil and gas lease, however, is an interest in real estate and it is necessary that the spouse of the lessee join in a release. We feel that it would avoid some confusion if this section were repealed.

ARTHUR O. AUSEROD
ROBERT J. BULGER
L. M. CLINTON
DANIEL MONEN, JR.
S. E. TORGESON
IVAN VAN STEENBERG
JOHN H. WILTSE
FLOYD E. WRIGHT, Chairman
The report of the Committee on Hearings was presented by M. H. Worlock, chairman of the committee. The transcript of the proceedings of the House in adopting the report of the Committee on Hearing follows:

M. H. WORLOCK: Mr. President, Mr. Chairman and gentlemen; your Committee on Hearing met this afternoon with some of the members of the County Judges Association to consider the resolution that was handed in this morning and as it was handed in by a non-member of the House of Delegates it was referred to this newly formed Committee on Hearings.

The resolution as amended now reads; "Be it resolved that the Nebraska Bar Association sponsor legislation to require County judges in counties of 16,000 population or more to be duly licensed to practice law in the state at the time of taking office, provided, that present incumbents be excepted."

Now your committee considered this resolution and are in favor of its adoption. I don't know whether it's within our province to move the adoption or whether it should, that action, should come from some other source.

JEAN CAIN: Is there a motion that the resolution be adopted?
E. D. BEECH: I move the adoption.
(Motion duly seconded.)
JEAN CAIN: It has just been moved that the resolutions be adopted.
Are there any remarks?
JEAN CAIN: All in favor say aye.
Opposed, no.
The resolution is adopted.
The opening session of the Fifty-fifth Annual meeting of the Nebraska State Bar Association was called to order at ten o’clock at Hotel Paxton, Omaha, by President Julius D. Cronin, of O’Neill.

PRESIDENT CRONIN: Gentlemen, the Fifty-fifth Annual meeting of the Nebraska State Bar Association will now come to order. The invocation will be pronounced by Rabbi Sidney H. Brooks, of Temple Israel, of Omaha.

(Invocation by Rabbi Brooks)

PRESIDENT J. D. CRONIN: Mr. Donald C. Hosford, President of the Omaha Bar Association will now deliver an address of welcome to the Association.

Mr. Hosford.

DONALD C. HOSFORD: Mr. President, it is my privilege as President of the Omaha Bar Association to extend to the members of the Nebraska Bar Association who are convened at this time in their 55th annual convention a hearty welcome.

The Omaha Bar Association is now seventy-five years old. The Omaha Bar Association last year sponsored a social hour before the dinner and again this year they are going to do the same thing. We invite all members in attendance at this convention to come to the social hour preceding the banquet tonight.

I would as a word of caution advise you that if you are from out of town that Omaha now has one way streets in the downtown area and you might in your driving take that into consideration.

We hope that you, each and every one of you, tonight and all through the annual meeting have a wonderful time, come back again.

PRESIDENT J. D. CRONIN: Thank you, Mr. Hosford.

The response will be made by one of our distinguished lawyers who also enjoys an enviable reputation as a legislator and statesman. Harry Gantz, Alliance.

Mr. Gantz.

HARRY GANTZ: Mr. President, Mr. Hosford, members of the Omaha Bar, distinguished guests; the out state members of the Nebraska Bar Association. On behalf of the out state members of the Nebraska Bar Association and their ladies, I thank you, Mr. Hosford, for your very cordial welcome.
The hospitality of the Omaha Bar is well known to every Nebraska lawyer, especially do we thank you for having arranged a program for the ladies, I know they will enjoy every minute of it. I am equally certain that the members of the bar will enjoy the fellowship, the renewal of friendships and the many things of value which will come out of this 55th Annual Meeting of this Association.

Your welcome, Mr. Hosford, reminds me that many years ago and shortly before I graduated from Creighton Law School with my friend Julius Cronin and started to practice law, the Republicans were having a big celebration at Alliance, and welcome signs were out all over town, welcoming the visitors to their meeting.

We had at that time a sheriff who was a very ardent partisan Democrat, and not to be outdone in his welcome to the visitors he had a big sign printed, painted, and hung in front of his jail windows, which read "All Republicans Welcome Here."

We Democrats got quite a kick out of it. I understood the Republicans didn’t like it too well.

I trust therefore Mr. Hosford in your zeal to properly welcome the bar of this state you have not had your sheriff hang his sign in front of the jail windows welcoming the Nebraska Bar to be his guests.

It has not been my good fortune to attend many meetings of the Nebraska Bar or take a very active part in its activities. We live many miles from here and almost every year it seemed impossible to be present.

When I graduated from law school and started to practice more than thirty-eight years ago I felt like all young lawyers feel, that I should make some speeches and get myself acquainted in the community. I had prepared a lecture based on the two volume work of Walter Chandler entitled *The Trial of Christ*, treating the Hebrew and Roman trials and the crucifixion of our Savior from a legal standpoint.

One of my first appearances was at Hemingford where I was to speak in a Congregational Church. The minister, Reverend Clain, introduced me, and his introduction went something like this.

My friend, Harry Gantz, has come up here tonight to give us a lecture. The subject of his lecture is "The Trial of Christ from a Lawyer’s Standpoint." He said, "I know his address is going to be interesting, but as for me personally, I'd much rather hear a lecture on the ‘Trial of a Lawyer from Christ’s Standpoint’." I have never forgotten that introduction.
It has been often said that lawyers, play a direct part in molding the thought and public opinion in their communities. Lawyers have indeed played a large part in building our country and are constantly defending our form of government. The future standing of the United States of America as I see it among the nations of the world will largely depend upon the alertness and courage of the American bar. Every Nebraska lawyer must feel a sense of great pride that he or she is a member of our Bar.

We owe a solemn duty to, not only to our courts, but to ourselves, our communities and our state.

I had the privilege of serving in the first unicameral legislature in 1937, and I served there eight years. In the first session there were eighteen of the forty-three members who were lawyers. We were criticized because there were so many lawyers in the legislature. But I want to say to you members of the Nebraska Bar some of those lawyers had considerable experience, and it was those eighteen lawyers who were able to set up and put into operation the one house legislative body, and, today, that one house legislature operates as one of the soundest methods of legislative functions that has ever existed.

You may not be satisfied with the non-political aspect of the legislature nor agree as to the number of its members; but the one house legislative system is successful, economical and sound. Personally I see no reason to make it political nor to greatly increase its membership, provided all of the members will at all times realize their joint and several responsibility to represent in that body the people as a whole.

No legislative body, be it state or national, will function any better than the quality of its membership. The laymen who have served and are now serving were and are honest and sincere, but they are not lawyers and it must be remembered that the legislature deals with matters which may or which may not become the laws of the state, and as we all know the laws passed by the legislature must be interpreted and administered by the bench and bar of the states.

The small number of lawyers, can not be expected, my friends, to protect all of the rights and interests of the general public. The pressure from the various groups contacting the legislature for or against certain legislation is sometimes terrific, and I believe that the lawyer because of his schooling, his training and his experience better than almost any other professional business is able to take a fair, impartial and courageous view of any question and to talk and vote his honest convictions openly and publicly.
I pay my sincere personal respects to the members of the Nebraska Bar who have served and are now serving in the Nebraska legislature.

And in closing, I want to suggest, in fact, I want to urge, not only for the good of our own Association and the profession, but for the good of the public generally, some of the older experienced lawyers become members of the unicameral.

I do not mean that we should load the legislature with lawyers nor attempt to control it. It will require some of your time and your energy, and you will sacrifice some of your professional income, gentlemen, but a lawyer owes a duty to his community above and beyond his right to practice law.

I can assure you that it will be a valuable experience and a real public service to the Nebraska bench and bar and the people of this state.

Mr. Hosford, again on behalf of the out state members of the Bar Association, I thank you for your welcome. We know that this will be a most interesting and fruitful session.

PRESIDENT’S ADDRESS

J. D. CRONIN: We now approach the end of another official year in the life and work of our Association. The rules creating, regulating and controlling the Association provide, among many other things, that on this occasion your President shall deliver an address. I appreciate that the demand therefor is not compelling, but the rule will be adhered to.

The preamble to those rules sets out the purposes of our Association in this fashion:—

“For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar, this Association was created and formed.”

It seems to me appropriate to add that the Association should and does assume the further responsibility of undertaking to help advance in every legitimate way the economic status and professional competence of lawyers generally and our membership particularly.

What have we done in the year just past by way of fulfilling the objects and purposes for which we exist? A report setting out what we have done, what we have tried to do, and what we have proposed this past year, seems to me to meet the requirements of
a President's address. This, with some comment and personal observation, shall in the main be such a report.

First, let me say that last year, under the able, inspiring leadership of Laurens Williams, we took substantial strides forward. You voted to create a House of Delegates, establish a public service program, and to increase our dues. No such forward steps have been taken this year. Rather, our general effort has been largely directed to establishing, implementing and digesting that program. The public service program has been put in operation, and while it may need strengthening, I suspect that generally such will be the situation for some years to come. We have set up the machinery and you have elected a House of Delegates, which met for the first time yesterday. Those parts of the program advanced by my predecessor are functioning.

Last year a proposal to submit to the electorate of the State a plan for the selection of the judiciary, termed the Merit or Missouri Plan, was endorsed overwhelmingly by vote of the membership. This year the Committee on Judiciary, under the chairmanship of Robert Van Pelt, prepared a comprehensive proposal for submitting that plan to the electors of Nebraska. To place the proposition on the ballot required the signatures of some 60,000 electors scattered throughout the State. Petitions were prepared and circulated among our membership, but unfortunately the deadline caught us some 8,000 signatures short of the number sufficient to assure the proposal a place on the ballot. The failure of our effort to place this on the ballot pursuant to your mandate has been a major disappointment. Opposition to the proposal among members of the fraternity was encountered in many places. In others we found it impossible to generate sufficient enthusiasm to obtain the requisite number of signers. In Douglas County the members of the Bar cooperated fully and wholeheartedly with an aggressive, energetic committee headed by Keith Miller and Frank Frost, and obtained approximately half of all the signatures secured in the State. Had the members of the Bar elsewhere expended even a portion of the effort put forth by their brothers in Douglas County, the proposal would be on the ballot. I think we may, however, take comfort from the fact that the publicity attendant upon our efforts to place the proposal on the ballot has made people generally conscious of the merit inherent therein, so that a future campaign will meet with success.

Shortly preceding the Annual Meeting last year, Mr. Don Derry was employed as Public Service Director and placed in charge of our public service program, under the officers of the Association and our public service committee. This year we have
published quarterly the *Nebraska State Bar Journal*; we have prepared and published pamphlets on *Joint Tenancy, Wills*, and *Are You Sure You Want To Sign That?* one copy of which has been sent each member of the Association. Additional copies are available, pursuant to rules established by the Executive Council, and I am advised that the demand for at least some of those pamphlets has been so great that a second printing has been required. We have also prepared and distributed to clerks of court for distribution to jurors a *Jurors' Manual*, designed to explain an clarify the functions of the jury, the court and the lawyer in the trial of litigated matters, and to emphasize the importance of the juror in the administration of justice under our system. This manual was submitted to and approved by the District Judges Association prior to its publication. Surveys disclose that a large part of the press and public misunderstand the character and function of courts and lawyers under our system. In an effort to meet and correct that condition, we have also had prepared and circulated among the press newspaper articles designed to inform the public respecting legal matters and procedures, and particularly to call to their attention the significance, place and function of lawyers and courts, and the indispensability of each to the preservation of the American form of society and government.

Public relations in the last analysis, as you know, are what we make them; the ultimate responsibility for good relations and good will rests with the individual lawyer; your public service director and public service committee at best can create a favorable atmosphere by informing the public in general terms what the profession has done, is doing, and is willing and trying to do for the protection and preservation of their rights, their property and their liberty. People like us more for what we are and what we do than for what we say. Your actions and those of the organized bar,—and by that I mean not only this organization but your city, county and district associations, are our loudest voice. Every single lawyer must share some responsibility for the public's impression of lawyers; the sooner we begin to watch and take advantage of our opportunities to make friends for our profession, the sooner we will have improved public relations. They cannot be purchased or delegated to our public service director or committee. They must be earned by us as individuals. They depend largely upon our own conduct and our day to day relations with our clients and the lay public.

The program of continuing legal education, which has been carried on by our Association over a number of years, has been continued. I have had the feeling that our Association not only
has an obligation to keep its membership, insofar as it can, abreast of changes and new developments in all fields of the law in which they practice, but that it also has a responsibility to the public generally to see to it, insofar as it may be able, that the members of the profession are always abreast of statutory changes and the trend of the decisions, so that the public may expect and will always get adequate competent advice and counsel respecting their legal problems.

In the field of tax law it is extremely important that our membership be kept continuously informed and up to date on changes in the regulations and their application, and in the interpretation of specific sections by court decision. As you know, a movement is now underway to change the rule regulating tax practice before the treasury department. One of the arguments advanced in support of the suggested change in that rule is that a great number of lawyers are not competent to advise the public with respect to tax matters. That, also, it seems to me, enters the field of public service and public relations. In other legal fields it is claimed that the law is slow, expensive and uncertain, which has given rise to arbitration organizations and societies whose purpose it is to supplant the courts in the settlement of disputes. Recently I read an article, in part at least devoted to discussing whether or not lawyers were necessary. The writer was inclined to think they were not. This, it seems to me, reflects an attitude, fortunately not too common, that the settlement of disputes through litigation is now uneconomic and outmoded because of delay, uncertainty and expense. It is not possible to eliminate completely the uncertainty attending the settlement of disputes, whether resolved by courts or juries, or by boards of arbitration, but we can and must eliminate unnecessary and prolonged delay and useless and unnecessary expense. Litigants are entitled to that as a matter of right, and it is a necessary and vital part of any public service program.

The regular Fall tax clinic was held at Scottsbluff, Kearney and Omaha. The attendance exceeded 500. The Executive Council authorized your President and Secretary to hold a Spring Institute on such subject or subjects as they might select. This Spring it appeared certain that the Congress would enact a new Revenue Code, completely changing the old concepts. So that our membership might be immediately apprised of the great changes in the new Code, their application and effect, it was thought advisable to hold a tax clinic as soon as possible following its passage. With that in view, an Institute on the Internal Revenue Code of 1954 was held in Omaha from July 22d to July 24th, inclusive.
The panel consisted of nationally famous experts in the tax field. The attendance exceeded 600, representing 109 Nebraska towns. There were 57 visitors from other states, including some from as far away as Dayton, Ohio and Albany, New York.

The House of Delegates will now carry the burden of examining, debating and passing upon committee and section reports, so that more time will be available at annual meetings for Section programs. This year all of the available time, except the morning of the first day and an hour of the last day, will be devoted to Section Programs, enabling our membership to keep abreast of new developments, decisions and practices in those fields. That should and will improve their usefulness and increase the value of their service to their clients and the public.

In connection with the work of the Sections, I should mention that a special committee completely revised the rules regulating the establishment and government of sections, as recommended by my predecessor in his address last year. This was his only recommendation, and is one Presidential recommendation that was followed. The new rules provide the machinery for the government of the sections and for section representation in the House of Delegates. In the future more and more of the responsibility for the success of our annual meetings will fall upon the sections and their officers.

The Committee on Legislation has, among many other things, proposed a recodification of the Nebraska Highway Law. This was a monumental undertaking, made necessary by the uncertain and confusing state of our present law, for which the Committee on Legislation and its Chairman, Charles F. Bongardt, deserve the gratitude of the Association and the public generally.

The Committee on Administrative Agencies arranged with Governor Crosby to call a conference of persons to be designated by him, looking to the establishment of rules regulating administrative hearings and procedures in the State of Nebraska. This is a step that has been long overdue. The Governor has very graciously called such a conference under the chairmanship of Judge Paul W. White of Lancaster County, which conference, I understand, will get underway shortly.

The Special Committee on Rules Governing Investigation and Disposition of Charges has suggested amendments to the rules, the object and purpose of which are to make certain that aggrieved lay people may have their complaints promptly and impartially investigated, and that those investigated will be justly and fairly treated. The prompt investigation and disposition of charges is not only an indispensable part of any sound public re-
lations program, but is something that both the public and the lawyers are entitled to. In connection with this subject may I say that a special committee of the American Bar Association, chairmaned by Judge Orie L. Phillips of the United States Court of Appeals, has completed a tentative draft of a model "Rules of Court for Disciplinary Proceedings," setting out a master plan for hearing and acting upon grievances. It is applicable to all courts having jurisdiction in disciplinary matters, and its purpose is uniform and effective enforcement of disciplinary standards of the legal profession. It is to be presented to the House of Delegates of the American Bar in February. Any one may obtain a copy of the draft upon application to the American Bar. Comment thereon is invited.

At the request of the State Medical Association, a Special Committee was appointed some time ago to meet with a special committee provided by that group for the purpose of attempting to work out a satisfactory procedure for the reception of expert medical testimony in litigated matters. That Committee has collected all of the available data upon which to predicate a study, including applicable sections from the codes of other states and the Model Code of Evidence of the American Law Institute, and the applicable rules on evidence of the National Conference of Commissioners on Uniform State Laws. There was insufficient time after the collection of that data to formulate and agree upon a report. I assume the Committee will be continued, or a similar committee appointed, so that a year hence its recommendations will be available for consideration.

The Committee on Unauthorized Practice of Law investigated a complaint made in 1953 involving the George S. May Company of Chicago, and recommended to the Executive Council that the members of that Company and Robert G. Brice be cited for contempt because of advice given the Jek Manufacturing Co. and its proprietor with respect to incorporating its operations, the drafting of Articles, minutes and by-laws, and giving opinions with respect thereto and the effects thereof. The report was approved by the Executive Council on June 26, 1954, and the matter referred to the Attorney General's Office thereafter. The Attorney General informs me that special counsel has been retained to institute and prosecute such a proceeding.

The Committee on Judiciary has recommended the introduction and enactment of legislation increasing the salaries of the judiciary and providing a retirement and pension plan. Unquestionably present salaries are inadequate and are substantially below those paid other officers in government with comparable or
lesser responsibilities. I am sure that all members of our Association will join hands in this effort to have enacted measures to provide adequate and just compensation for the judiciary.

This report is not complete; all of the other committees of the Association have functioned diligently and have done excellent work, and mention should be made of them specifically, but time does not permit. However, their work was a vital, necessary part of our program and has contributed substantially to whatever progress we have made this year.

Your officers have visited many Bar associations,—city, county and district—throughout the state, and the annual meeting of the Kansas and South Dakota bars. I regret an inability to accept all of the invitations tendered me by Nebraska bar associations and groups. I would have enjoyed all of them, but because of conflicts or previous commitments, I was unable to attend. Contact with members of the bar throughout the state has been a stimulating and rewarding experience. It has been noted that everywhere in the state lawyers have been and are active in civic and community affairs; almost uniformly they are leaders in all movements looking to cultural and material improvement. That is as it should be. Many take an active part in state and national affairs, or at least in their discussion, but I wonder if we ought not be more active in debating and explaining the meaning, purpose and effect of important proposals, state and national.

As you know, we live in an age of unrest and change. Ideologies and philosophies of government which would have been received with contempt and scorn twenty years ago are now supported and advocated in many instances by responsible people. We are forced to watch the control of the national and state governments being extended further and further into the lives and work of our people. State lines are overridden by the national government, and county, city and precinct lines by the state government. Worst of all, the independence and liberty of men and women in their homes and workshops are subjected to a host of obligations and restraints, emanating from a removed government, which they as individuals are helpless to control and, in many instances, do not understand.

This is an era of mass propaganda, making it difficult, even for the astute, to separate fact from fiction, fantasy from reality.

Lawyers, by virtue of their training and experience, as a class are best able to analyze and interpret. Because of that, ought we not take a more active part debating, discussing and explaining all sides of important public measures so that the pub-
lic may intelligently make up its mind respecting the merit of the proposals suggested? So that they may determine the direction our government shall take and how much of it we shall have, and act accordingly? Our liberties and a free America and Nebraska depend upon the vigilance of our people, and they cannot be vigilant unless they understand.

The Wisconsin Bar recently adopted a policy of publishing in their Journal argument pro and con on important state and national issues, with reference to source material, so that their Bar may fully inform themselves so as to be prepared to debate and discuss the same. I commend that policy to you.

In conclusion may I express my appreciation for the honor of serving you. It has been a delightful experience, memory of which I shall always cherish. For the many kindnesses and courtesies extended me by lawyers everywhere, I am and always will be grateful. I am particularly grateful to the Executive Council, the Secretary, the Public Service Director, Committee and Section Chairmen and members, for their help, advice and excellent cooperation. No call to service has been refused. Many have given freely a great deal of time and energy. This devotion to their profession and the willingness of so many to share their talent and experience with their brothers, without reward, has been an inspiration. Because of it our Association will continue to increase its influence as a constructive force for improvement in the administration of justice under law.

PRESIDENT CRONIN: The next item on the program is the report of the Secretary-Treasurer.

REPORT OF THE SECRETARY-TREASURER

GEORGE H. TURNER: The books of the association have been audited by the firm of Martin and Martin, Certified Public Accountants of Lincoln, the audit covering the period from November 1, 1953 to September 30, 1954. The report shows cash receipts for this period in the amount of $31,938.92. Cash disbursements during the period were $41,191.56, leaving an excess of disbursements over receipts of $9,252.64.

As a result the cash balance decreased from $9,905.89 as of November 1, 1953 to $653.25 as of September 30, 1954.

The reason for the large excess of disbursements over receipts during the period of this audit is that active members dues for 1954 in the amount of $10,420, and the inactive dues for 1954 in the amount of $260 were included in a prior audit.
The major cash receipts included within the current audit period consisted of dues from active members, $27,230 and dues of inactive members, $4,447.

Principal items of disbursements include salary and payroll of $9,766.10, office supplies and printing, postage and stationery, $1,595.95, publishing the directory, $1,173.35, officers expense, $1,264.45, expense of delegates to the House of Delegates of the American Bar Association, $1,019.21, publishing the Nebraska Law Review, $4,299.41, campaign for judicial selection plan, $2,321.37, Committee on Public Service, $2,430.57, Institutes, $2,504.55, Institute on Internal Revenue Code of 1954, $4,501.77, expense of 1953 annual meeting, $4,463.45. The accountants state that all cash receipts were deposited in the bank, receipts for dues were reconciled by verifying the membership cards issued, bank balances were verified by independent correspondence with the banks, cash disbursements were verified by an examination of the canceled checks, and wherever feasible by the inspection of the original documents supporting the disbursements.

The audit report concludes by stating that, in the opinion of the examiners, the funds of the association have been properly accounted for during the period of the review.

Detailed auditors’ report will be made a part of the published proceedings of this annual meeting.

PRESIDENT CRONIN: The next item on the program, gentlemen, is the report of our delegates to the American Bar Association, Mr. Clarence A. Davis.

We have with us a former president of the Association and now not only our delegate to the American Bar Association but the distinguished Undersecretary of the Interior, Mr. Davis.

CLARENCE A. DAVIS: Mr. President, ladies and gentlemen, I'd like to congratulate you, Mr. President, I remember two or three years ago, that I occupied your position, I received some very sage advice and by a gentleman by the name of Mr. Mothersead, sitting down here, who told me that the only obligation of a Past President of this Association was the duty to be present and listen to the President’s address.

Now I want to commend you particularly because I can assure you from looking this crowd over that there are many people here who are not Past Presidents of the Association, it is the largest group that I ever saw at an opening session to listen to the President’s address, and I think it’s due in a large part to the friendship and respect that you have from the members of this Association.
Now to undertake to report to this group on the activities of the American Bar Association during the year is of course an impossible thing within the time limits that are proper.

I thought there were two or three things that I might talk about for just a minute. In the first place, membership, because that's the thing on which this bar association and all others have to live. Of course, with an integrated bar and what amounts to a compulsory membership, it's not too vital here, the question being only how much dues shall we pay to keep the Association functioning.

On the national level of course, being a voluntary association, the membership thing is vitally important, and during the last year under the leadership of Archie Mull of Sacramento, California, the membership in the American Bar has been tremendously increased. I think Archie secured something over five thousand additional members this year. The membership is now, is well above fifty thousand. That is above twenty-five percent of the practicing lawyers, or, rather, persons admitted to the bar in the various states of the union.

Now I know perfectly well that in Nebraska a great many of the towns in which you gentlemen live membership in the American Bar Association doesn't seem too vital. The thing exists, living on a lot of problems that are not too highly personal to many of us here in Nebraska, and yet constantly you have thrown in your face the fact that "Who is the American Bar Association? What right have they to speak for the lawyers? After all three-fourths of the lawyers don't even belong to the American Bar Association."

So you see, when you undertake to do something on behalf of the profession that is the thing with which you are confronted. It's vital that the American Bar Association membership continue to climb until it represents a majority of the lawyers of the United States, because on many of these problems it is vital that someone can speak with the voice of authority on behalf of the lawyers.

Now we are subject to this constant sabotage and these snide remarks, that, after all the American Bar doesn't necessarily represent the American lawyer.

Now that becomes vital on the one or two things about which I want to talk for just a minute. It becomes very vital on this question of the practice of law by laymen, which is of course getting more and more acute every year that goes by, particularly so of course in the tax field.

I had the privilege of attending a clinic the other day conducted by the Federal Bar Association, in which three lawyers
participated and three representatives of the accounting profession, including the President of the Association of Certified Public Accountants, and the President of the Association of, simply, Public Accountants, and a lawyer who specializes in the tax field.

Now I want to tell you that the arguments that those people made are very very difficult to refute. They simply say to you, "Can you dispute the fact that a large number of the members of the accounting profession know the tax law forwards and backwards, have probably spent more actual time studying the decisions than have the average lawyer?" And what do you say to that?

Now there's no question that at the top levels many members of the bar who have spent years in the study of the tax practice are more expert than the accountants, but likewise you are almost driven to the admission that there are a large number of accountants, graduates of accounting schools, of the schools of business administration, who are in turn better qualified than are other members of the legal profession.

So you get driven right into that dilemma, that you have to admit that many lawyers are not qualified in certain fields as well as that some laymen are qualified in those fields. So you undertake to say to the public that you ought to prohibit the practice of tax law, by anybody except lawyers, and from the standpoint of the layman this problem bobs up that a lot of them are very very well qualified indeed.

Now the same thing is true in a lot of other specialized fields. The law has grown to the point where none of us can possibly hope to be experts in all of the various fields of the law, and yet in every one of those fields, such as Interstate Commerce, Radio and Communications or Securities issues; people who have worked in that field for years are probably more expert than I would be or you would be coming into it cold simply because we are lawyers.

So it poses a tremendous problem for the whole bar of the United States to solve if it can. That is why I think it is vital that we maintain membership in the American Bar Association and endeavor to work out some sort of system that will not only protect the lawyer as such, because he is a lawyer, but will result in competent service to the public. I'm not too sure the answer is not going to be a little bit contrary to the traditional position of the American Bar.

After all, the public are the people who will insist ultimately on protection, and if the lawyers are not able to render that service as well as somebody else, then somebody else is ultimately going to render the service.
So it may be we end up with some sort of a special qualification in these various specialized fields of law, particularly this one of taxation.

At any rate in my opinion that is one of the hottest subjects with which the American Bar Association has to deal, and with which lawyers all over the United States have to deal, namely, are the lawyers going to be given a continued monopoly on the practice of law, or are they not.

The next thing with which of course I have been living a good deal in the last few months is the good old administrative law question which most of you have heard me rave about in years gone by. We are constantly trying to proceed in that field to eliminate the—I want to say partisanship, but I don't mean political partisanship—the unfairness and prejudiced attitude of the hearing commissioner, or the person who hears these administrative controversies. And I think we are continuing to make a great deal of progress.

The Administrative Procedure Act passed now nearly ten years ago went a long way to separate functions in the agencies and to require independent determination of controversies that arise. We are now at the point where I think we may take the next step, rather shortly. The President has appointed a Committee on Administrative Procedure and on that has put representatives of all of the departments who conduct those various administrative hearings throughout the country. It is headed by Judge Barrett Prettyman of the District of Columbia, who of course has been a District Judge in the district a long time, was a practicing lawyer before that, was in government a while, and knows very well the problems that confront the practitioner in these various hearings that take place by the thousands, and incidentally you remember there are about five matters now determined by administrative decisions as against one determined by the court.

The move is on, the bills are pending in Congress. Some of them, I think, are likely to pass, to provide a complete system of independent hearing examiners, either appointed by the President or by the Civil Service Commission. That's where the political battle rages, as to who is going to do it, but anyhow to appoint those hearing examiners entirely disconnected from the various administrative agencies.

Now it seems to me that the practical effect of that, is to set up a system of junior federal courts, and of course I think personally that is a very excellent thing. It gets away from all of
the bias and all the slant which has characterized far too many administrative decisions in the past.

If we can get a system of independent hearing examiners, whether they are appointed by the President or by the Civil Service Commission, or whoever it is, does not make any difference, appointed on a long tenure, whether it's life or ten years, but long enough at least to afford them some security; then I think we will have established a system of impartial determination of these administrative matters.

It has been very interesting to me to watch the uniform agreement that is growing out of those conferences with reference to the appointment and the conduct of hearing examiners. Finally they are catching up with the position that most Nebraska lawyers took about ten, fifteen years ago, that we were sick and tired of having people pretend to conduct an administrative hearing when we knew very well that they were prejudiced against us in favor of the agency that they represented, we knew what the decision would be in advance.

Now the other thing that I'll discuss for just a moment, is the activity of the American Bar Association with reference to Congressional investigating committees.

The American Bar Association has taken a rather strong position as you would imagine, trying to drive those investigating committees into the realm of due process of law. It involves of course in the first place a clear cut statement of the purpose, the scope of the powers of the committee. That has been weakness number one, in that these resolutions resolve that we investigate the conduct of Joe Doaks, with no limitation, and the committee can do exactly as it pleases, go just so far afield as it wants to go, and all that sort of thing.

So, the first thing, is to get the scope of the committee accurately defined in the resolution creating the committee; and, next, to give the thing some semblance of legal process, so that witnesses have the right to counsel; that witnesses may be cross-examined by independent counsel, that third persons whose names are smeared by the committee have a right to appear and refute the charges with the advice of counsel, all of those things that we normally think ought to go with due process of law.

And the American Bar has put its full weight behind amendments to the Congressional process that will prevent the sort of thing that has been going on for a great many years. Personally I can't help but remember however that there have been some committees in Congress in the past that have been just as far afield as present ones seem to go. The difference was that in
those cases they were picking on the right of property, they were picking on the rights of individuals who happened to be personally unpopular, and there was no hue and cry whatever about the fact that those committees went very very far afield, grabbing records and grabbing people and throwing them on the witness stand without counsel, prohibiting counsel, all of those things, there's nothing new about it, it has been going on for years.

Now those are to my mind a couple of the broad overall things on which the American Bar is spending its time. In the meantime of course its many committees, and sections, are working in all fields of the law to bring matters into more order and to advance the general welfare of the profession. But I again want to impress on you that the American Bar Association or any other association, pretending to represent the members of a great profession can not speak with authority unless it represents a majority of the profession which it purports to represent.

And so while it may look like you are throwing sixteen dollars a year down the drain to belong to the American Bar, remember that that sixteen dollars along with everybody else's sixteen dollars, is going to the general welfare of the profession, to the maintaining of the status of the lawyer as a vital member of society, to the maintaining of the dignity of the profession, and, incidentally, coming back in the form of fees from the practice that sooner or later will disappear unless the Bar Association can maintain the right, exclusive, to practice law by qualified and highly qualified members of the profession.

PRESIDENT CRONIN: Thank you, Mr. Davis.

Now we will have a report from the other delegate from our Association to the American Bar, Barton H. Kuhns.

BARTON H. KUHNS: It was my privilege to attend the House of Delegates this year for the first time as a member of the House. I have sat in the back of the room a number of times before and listened to the proceedings. This year Judge Boslaugh found shortly before the annual meeting that he would be unable to go, and by reason of those circumstances I filled his unexpired term which I believe expires now.

In addition to what Clarence Davis has told you I might mention two or three other matters which impressed me particularly at this year's meeting. The House of Delegates had six sessions, that is, on three different days, morning and afternoon. There were eighty-one items on the agenda, most of those items were of a routine nature, some just committee reports which were filed, some administrative matters pertaining to the functioning of the American Bar Association.
It seemed to me that there were four of the items on the agenda which consumed most of the time in the discussion. One of them was this matter of a code of congressional investigation, and the House of Delegates did actually approve and recommend to the Houses of Congress a proposed code of Congressional investigation.

Secondly, was the matter of the unauthorized practice of law by accountants, and a very strong resolution was adopted tending to discourage and urging the prevention of accountants from practicing law before the Treasury Department and the Tax Court.

Then there was a very interesting proposal presented to the House of Delegates, a proposal to recommend the teaching of communism in the public schools for the purpose of pointing out the benefits of the democratic form of government as against the communistic form of government, and some rather persuasive arguments were presented that it would be better to sponsor the teaching of communism, take charge of the project and know what was being taught in such a way as to point out the disadvantages.

Then of course there were some very strong persuasive arguments the other way which I am sure you can well imagine what they are, and it ended up by that matter being tabled.

Then a good deal of the time of the House was taken up on the question of social security for lawyers. There was about an even division of opinion on that, and I think that after one full session was devoted to a discussion of the subject, it was referred back to the state bar associations.

In addition to the meetings of the House of course there were all of the meetings of committees and particularly the meetings of Sections. The greatest benefit I think to the average lawyer in attending meetings of the American Bar Association comes from membership in the Sections, the material that you receive in advance and after the meetings and the very excellent papers which you hear presented, the panels and the discussion. Those Sections, there are some sixteen or seventeen of them in number, follow the pattern of recognizing divisions in the law and you can always find tremendously interesting meetings on any subject matter you are interested in, probably the greatest trouble is the problem of selection.

Then I think the most outstanding occasion of the whole meeting, not confined to the House of Delegates, was on Thursday afternoon of the week of the American Bar meeting which was the dedication, the formal dedication, of the new American Bar Center out on the campus of the University of Chicago. The
building was just about completed; throughout the week buses ran from the hotel out to the building so that the members of the Association there could go out and look them over, and there was a very large attendance to this dedication ceremony. There were several addresses, including one by the Chief Justice of United States Supreme Court at the beautiful Rockefeller chapel on the campus of the University of Chicago just across the midway from where this American Bar Center is, and then after a few more addresses at the dedication ceremonies itself, that the members of the Association present went through the new building, it was just about completed, the carpet was on the floor, partitions were being placed.

And now since the first of October, in fact, just last week, the headquarters of the American Bar Association has actually been moved from the old address, 1140 North Dearborn Street, over to the American Bar Center, and it is a very fine building. I think that if any of you are in Chicago you should take a little time to go out to the University of Chicago and see the new Bar Center, it in and of itself is a great inspiration.

PRESIDENT CRONIN: Thank you, Mr. Kuhns.

The next item on the program is the report of the Chairman of the House of Delegates, Jean B. Cain.

I understand that Mr. Cain has reduced his report to writing and it will be read for you by the Secretary.

SECRETARY TURNER: Members of the Association, Jean Cain, the Chairman of the House of Delegates, has asked me to read his written report of the actions of the House taken at its meeting yesterday.

REPORT OF THE CHAIRMAN OF THE HOUSE OF DELEGATES

The House of Delegates met on Wednesday, October 13, 1954, to receive and act upon the reports of the various committees of the association.

The Committee on Legislation recommended far reaching changes in the Motor Vehicle laws of this state. The recommendations found on pages 32 and 33 of the advance program were approved by the House of Delegates. The House also approved the recommendation of the Committee on Legislation that the Reed-Walter amendment to the Constitution of the United States be endorsed.

A recommendation of the Committee that the Executive Council be authorized to employ a legislative representative was ap-
proved, as was also its recommendation for the endorsement of a bill to provide that an employer may pay to the dependent spouse of a deceased employee wages due to such employee not in excess of $500.00, together with its recommendation of approval for a proposed legislative act providing for contribution by joint tortfeasors.

The recommendation of the committee for the endorsement of a tort claims act enlarged to include claims against political subdivisions of the state was amended to restrict the approval to an act affecting only claims against the state. The House of Delegates agreed with the suggestion of the Committee on Legislation that no action should be taken by this association at this time with respect to the consideration of a proposed uniform commercial code.

The committee submitted and recommended approval of an act relating to probate procedure but a substitute motion that this proposal be referred to the Council of the Section on Real Estate, Probate and Trust Law prevailed. The House also concurred in the recommendation of the Committee on Legislation that endorsement of a proposed amendment to the Internal Revenue Code of 1954 be referred to the Council of the Section on Taxation.

The House approved a recommendation of the committee that the association sponsor legislation amending Section 21-1,159 R. S. Nebr. C. S. 1953 so as to provide for a 2/3 instead of a 3/4 ratification vote by each class of stock outstanding for corporate recasting of capital structures.

The House approved a recommendation made by the Committee on Legal Aid that local bar associations throughout the state should designate one or more lawyers in each community to handle legal aid matters on a periodic and rotating basis.

The Committee on Administrative Agencies reported progress which had been made during the year looking toward the convening of a Governors Conference on administrative procedure and its recommendation that the committee be continued for another year to assist the Governors Conference in any appropriate way was approved.

The House approved a report of the Committee on Crime and Delinquency Prevention which recommended activity on the part of lawyers in supporting the work of juvenile courts and police departments and further recommended a study of the desirability of adopting in this state the uniform law of arrest.

The Committee on Public Service secured approval of the House for its program of future activity found on pages 42 and
43 of the advance program, as well as its recommendations for affirmative action of the association found on page 43.

The House considered at length the report of the Committee on Rules Governing Investigation and Disposition of Charges of Unprofessional Conduct. The specific recommendations for proposed amendments were not adopted, but instead the House approved a substitute motion providing that the Supreme Court be requested to give consideration to amending Article XI of the Rules Creating, Controlling and Regulating the Nebraska State Bar Association to the end that the disciplinary procedure therein set forth be improved. The recommendation of the committee for a proposed amendment to Section 7-114 R. R. Neb. 1943 providing for the taxation of costs in contempt and disbarment proceedings was approved.

The report of the Committee on American Citizenship recommended a transfer of a portion of its activities to the office of the Public Service Director but this report was not adopted.

The Committee on Legal Education repeated a recommendation made by the same committee during 1953 which proposed an amendment to the rules of the Supreme Court governing admission to the bar in such manner as to provide that attorneys from another state whose original admission was secured without examination be required to take the bar examination of Nebraska unless such attorney had practiced for three years under his foreign license.

The House received and approved the recommendations of the Committee on the Judiciary that legislation be introduced at the next session of the Legislature fixing the salaries of judges of the district court at $12,000 per annum and salaries of Supreme Court judges at $15,000 per annum, and that a judicial retirement bill be introduced.

The Committee on the Roscoe Pound Lectureship reported the financial condition of the fund and recommended that members of the association continue to support the fund by gifts and otherwise, and further recommended that since such special committee had served its purpose it should no longer be continued. This report was approved.

The Committee on the State Tort Claims Act recommended that a bill similar to the one introduced in the 1953 legislature be sponsored. This report was approved.

The Committee on the Medico-Legal Survey reported progress in its project of studying possible legislation dealing with expert testimony. The recommendation of the committee that further study be had was approved.
The report of the Joint Conference of Lawyers and Accountants recommended no action but was received.

The report of the Committee on Unauthorized Practice likewise contained no recommendation.

The Committee on Cooperation with the American Law Institute reported its activity during the year and recommended that the association follow the practice of recent years of sending a representative to the annual meeting of the Institute. This report was approved.

The report of the Advisory Committee contained no recommendation but was received.

The Committee on Organization of Sections recommended the adoption of suitable by-laws relating to the election of Section officers and designating the sections. This amendment to the by-laws was adopted.

The Committee on Oil and Gas Law made the recommendations appearing on pages 26 and 27 of the advance program. The committee's recommendation #1 was amended to provide that a member of the committee representing the association before committees of the Legislature should do so only after obtaining permission of the Executive Council. The committee's recommendations #2a and 2b were adopted without change. Its recommendation #2c was amended to strike the provision for concurrent jurisdiction of the county court and the district court in the matter of leasing real estate by executors, administrators, guardians or trustees. Recommendation #2d was amended by eliminating certain provisions for publication of notice of the forfeiture of a lease. Its recommendation #2e was adopted without change. The committee's recommendation #2f was amended to make it clear that the mechanics lien provided for should apply only to the interest of the owner or lessee as the case might be. All other recommendations of the committee were adopted without amendment.

The Committee on Hearings had referred to it two resolutions. The first was introduced by members of the County Judges Association and is designed to provide that in counties of 16,000 or more population county judges must be members of the bar, an exception being made in the case of present incumbents. The Committee on Hearings recommended the adoption of this resolution and its recommendation was approved. The other resolution was introduced by the chairman of the Committee on Legislation designed to secure from the legislature of Nebraska the passage of a resolution endorsing proposed amendments to Article V of the Constitution of the United States, known as the Reed-Walter amendment. Upon point of order being raised the chair ruled
that the approval of the proposed resolution was out of order in view of previous action of the House in approving the report of the Committee on Legislation.

SECRETARY TURNER: The next item appearing on the program is an announcement by me as Secretary of the new officers of the Association.

The Executive Council met in the latter part of July, made nominations for the officers, notice was sent to each of you as required by the constitution.

No opposing nominations were made, and therefore the nominees of the Executive Council become your officers for 1955.

They are, as President of the Association, Mr. John J. Wilson of Lincoln.

Chairman of the House of Delegates, Mr. Jean B. Cain of Falls City.

For Member at Large of the Executive Council, Mr. Barton H. Kuhns, of Omaha.

For members of the House of Delegates of the American Bar Association, representing the Nebraska State Bar Association, Mr. Clarence A. Davis and Mr. Laurens Williams.

PRESIDENT CRONIN: Now, gentlemen, we will have a report from Don Bell, the President of the Creighton Students Bar Association, with respect to their activities in the year just passed.

Mr. Bell.

DON BELL: Thank you, Mr. Cronin.

REPORT TO THE NEBRASKA BAR ASSOCIATION OF STUDENT BAR ASSOCIATION OF CREIGHTON UNIVERSITY, SCHOOL OF LAW

At the annual American Law Student Convention, which was held last August in Chicago in conjunction with the American Bar Association Convention, the Creighton University Student Bar Association, for the third consecutive year, was given an award as one of the four outstanding Law Student Organizations in the entire United States. The American Law Student Association is comprised of student bar associations from some 115 law schools throughout the country. Of these, the Creighton Student Bar is the only such organization being formally recognized among the four outstanding associations for three straight years. We are very proud of this record and hope that it is indicative of the interest future young lawyers will take in Bar activities.
The speech club division of our association, during the past year, truly branched out into the practical field of public speaking. Letters were sent out to service and social organizations throughout metropolitan Omaha informing the recipients that the members of the Law School Speech Club were available for public speaking engagements and were capable of speaking on a wide variety of subjects. As a result, a number of our members have given “outside” talks before service and social groups. In several cases, students have been asked to repeat their talks before other groups to whom the students had been recommended. This program has almost unlimited potentialities in training the future lawyer on the proper approach to meeting and speaking to the public and in thinking on his feet.

During the past year we again sponsored the Omaha Pre-Legal Club which is designed to acquaint prospective law students generally with the study of law and the legal profession. First year law students, who have participated in the Pre-Legal Club in the past, on the whole seem to gain earlier insight into the law school curriculum than those who have had no legal background.

Our Student Bar is continuing publication of a weekly law school newspaper called “Assault and Flattery.” Included in this newspaper every week are articles on legal ethics, digests of outstanding recent decisions handed down by courts throughout the country, and information on current legal events in the Omaha area in which the students might be interested and participate, such as Nebraska Bar functions.

We have had several fine “outside” speakers talk to our group during the past year on various phases of the legal profession, related fields, and job opportunities for law graduates.

Inauguration of the student membership in the Nebraska Bar during the past year has been very favorably received by the Creighton Law students. In accordance with those memberships, we have been receiving the Nebraska Law Review and the Nebraska Bar Journal regularly. We feel that receipt of these publications has done much to apprise the students of the Nebraska Bar functions and to arouse their interest and sense of professional responsibility. We stand ready to actively cooperate with the Nebraska Bar in any way that we can. Any suggestions that you might have relative to more active student participation in the Nebraska Bar will be most welcome to our group.

I have merely touched on some of the high spots of our Student Bar program. Needless to say, we have sponsored and taken part in a number of activities not mentioned here. We are launch-
ing the current year with the determination to make this the most
profitable to our members and the legal profession. With the
added incentive of maintaining the record which we have estab-
lished heretofore we hope to better prepare the future young law-
ner for the profession.

PRESIDENT CRONIN: Thank you, Mr. Bell, for a very fine
comprehensive report.

The next item on the program is the report of the Judicial
Council by Judge Edward F. Carter, of the Supreme Court of
Nebraska, who is Chairman of the Council, Judge Carter:

REPORT OF THE JUDICIAL COUNCIL

The Judicial Council has held three one-day meetings during
the present calendar year and will undoubtedly hold a fourth be-
fore January 1, 1955. It has had before it many matters per-
taining to procedure during the current year. To date it has
approved certain procedural changes for recommendation to the
legislature by the Supreme Court. I shall attempt to state briefly
what they are.

1. It has recommended the adoption of a small estates bill.
This bill provides that the surviving spouse, if there be one, other-
wise the distributees of the estate, shall have a defeasible right
to the personal property without waiting the appointment of a
personal representative or the probate of a will if (1) the value
of the estate, less liens and encumbrances, does not exceed $700.00,
(2) 40 days have elapsed since the death of the decedent, and
(3) no petition for the appointment of a personal representative
is pending or has been granted. The right accrues upon the exe-
cution of an affidavit of a person having knowledge of the facts,
showing the existence of the defeasible right. Such defeasible
right is subject only to any proceedings to administer the estate
or probate the will or to the superior rights of any other person
to the property. Any person to whom payment, delivery, transfer
or issuance is made shall be answerable and accountable therefor
to any personal representative of the estate or to any other person
having a superior right. In addition thereto, a person seeking the
transfer of title to a motor vehicle is required to furnish a state-
ment of its value made by the county assessor of the county of
the residence of the decedent.

2. A bill to amend sections 30-1102 and 30-1106, R. R. S.
1943, and sections 30-1104 and 30-1105, R. R. S. 1953, has been
recommended to provide that on petition for license to sell real estate for payment of debts, the district court shall find and determine that the real estate is not exempt from sale because it was the family homestead, or for any other reason.

3. A bill to amend the sections of the statute with reference to the selection of jurors has been approved. Briefly these amendments are: (1) To permit the lodging of jurors in certain criminal cases in hotels or other similar places during the course of the trial. (2) To strike the words "members of the state militia" from those exempted from jury service. (3) To add the following to section 25-1626: "If there are no regular employees of the office of jury commissioner, he may appoint a deputy jury commissioner from the regular employees of some other county office, or some other county officer." (4) Add to section 25-1629, the following: "If women may not be called to serve under the provisions of section 1601.01, the jury commissioner shall strike the names of all women from the list." (5) Add the following to section 25-1627.01: "in counties having a population of less than 3,000 inhabitants the jury commissioner shall draw two key numbers or such larger number of key numbers as the district judge or judges may order instead of only one." (6) Delete the following from section 35-101, dealing with the exemption of volunteer firemen from jury service: "And all persons who have been members of such company in good standing for five consecutive years in the state of Nebraska."

4. An amendment to the garnishment statute providing for the removal of a garnishment proceeding to the district court where the amount in the hands of the garnishee exceeds the jurisdictional limit of the court before which it is pending.

5. An amendment to section 25-1315.03 changing the language from "entering judgment" to "rendering judgment" and recommending a supreme court rule for district courts providing in effect the following: "Whenever the court announces its decision of a matter in controversy, and thereby renders judgment, a notation thereof shall be made by the court in the trial docket at the time such judgment is rendered. Where, under the law, the time for taking an appeal commences to run from the date of rendition of a judgment, the notation of such date in the trial docket shall be presumptive evidence of the date of such rendition. The term 'judgment' as used in this rule shall include any decree or final order of the court."

6. An amendment to section 38-605, R. R. S. 1943, to provide that the investment or reinvestment of the proceeds of sale
of real estate of a ward shall be made by the guardian subject to
the approval of the county court having jurisdiction of the guard-
ianship.

7. An amendment relating to the settlement of bills of ex-
ceptions, providing for settlement by the clerk when the judge has
left office for any reason.

The Council has under consideration the following matters
upon which no recommendations have been made:

1. It has assigned to a sub-committee the preparation of
short form legal notices to be submitted to the Supreme Court
for adoption as a rule of that court.

2. The matter of the waiver of counterclaims by failing to
withdraw before moving for a directed verdict. The question is
whether the rule announced in Harbert v. Mueller, 156 Neb. 838,
58 N. W. 2d 221, should be changed by statute.

3. Whether administrators and executors should be author-
ized to bring quiet title actions. If so, whether or not they should
be limited to real estate to be sold to pay debts.

4. Complete investigation of our statutory procedures for
the recovery of void or illegal taxes.

5. Proposed changes with reference to the probate of foreign
wills.

6. Proposed amendments to correct the want of sanction in
the taking of interrogatories.

7. An examination of the adequacy of the rules for serving
and settling bills of exceptions where there are multiple parties
and also where an amicus curiae has appeared in the district court.

8. A complete research into the subject of grand juries and
an investigation of the grand jury system as established by the
statutes of this state.

The Judicial Council was established by court rule on October
5, 1939. Since that time 42 regular meetings of the Council have
been held. Much work has been done and we feel that much good
has been accomplished.

The work of the Council is limited to questions of procedure.
Its recommendations become effective only by Supreme Court
rule or legislative action.
It has been generally recognized that judicial procedure constitutes the mechanism whereby judicial controversies are presented and disposed of by judicial tribunals. Changes should be sought in those areas wherein the machinery constitutes a substantial factor in the litigation. An ideal procedure permits a question to be routed quickly and directly through the various stages of litigation to a decision upon the merits of the controversy. What Dean Pound has so aptly described as the "sporting theory of justice" has so pervaded litigation at the issue-forming and the fact-finding stages that issues are sometimes confused, concealed, and beclouded. Trials before juries are too often permeated with elements of drama, surprise and camouflage. That the public has been critical and sought substitutes for our procedures is well known. There is no feeling that justice is not being administered within the limits of human abilities; the criticism is that it is not efficiently and speedily done. The job of eliminating this criticism is not only that of the Judicial Council, but that of every lawyer. It is better to have the bench and bar offer corrective measures than to have some group undertake it who has a limited understanding of the subject.

I mention this only for the purpose of pointing up the lethargy and indifference of the bar in this most important field. We have had few suggestions from the bar. We have had very few appearances by interested lawyers before the Council. The Council has not been able to advise the bar of its work as it should. We are at fault in this respect. We hope to correct this. But our work is hampered because of the general indifference or want of information on the part of the bar. When the practicing lawyer finds a defect in procedure which ought to be corrected, it would help the Council if he would call it to our attention.

The Judicial Council operates as a public body and its meetings are open to all. We need the help and cooperation of the bar if the work of making our procedure more effective, and keeping it responsive to changing needs, is to meet the challenges of a social order already seething with unrest and change. If institutions based on law and order are to be preserved, there must be an efficient legal system which meets the approval of the conflicting interests composing the social order. If the lawyers do not do it, others will, with questionable results so far as the bar is concerned. It is the job of the lawyers to expeditiously and rationally keep our procedural system modern. We hope you will give us more help in this most important field.

PRESIDENT CRONIN: Thank you, Judge Carter.
The next item of business is the report of the Committee on Memorials, Harry Russell, Chairman.

HARRY RUSSELL: Mr. President and ladies and gentlemen; I crave your indulgence for a moment in this traditional exercise.

REPORT OF COMMITTEE ON MEMORIALS

Since we last met 46 of our number have joined the invisible majority. We shall miss them in the forum and the market place. We think of them, not as Judges, Prosecutors, or of any segments of Society or Government, but as fellow lawyers.

It is a unique and human attribute of our calling, more manifest than in many others, that we keep green in our memory the personal qualities of our colleagues. We will remember them as diligent adversaries, loyal members of a traditional profession. They have left their stamp on their respective communities. Their families enfold them into the intimate affections of the home.

By them the way of the righteous is made plain. They rest from their labors but their works do follow them.

O. A. ABBOTT, Grand Island
RALPH E. ADAMS, Alhambra, Calif., formerly Red Cloud
JAMES E. ADDIE, Hastings
WILLIAM C. BRADEN, Omaha
RICHARD E. BREGA, Callaway
J. H. BROADY, Lincoln
C. J. CAMPBELL, Lincoln
MILLARD F. CLUCK, Jr., Scottsbluff
L. R. DOYLE, Lincoln
ROBERT F. ELLIOTT, Beatrice
MITCHELL R. FERRIS, New York City
W. SPENCER FLINT, Omaha
WILLIAM G. FULLER, Omaha
HARRY W. HANSEN, Great Neck, L. I., New York
J. J. HARRINGTON, O'Neill
ROBERT E. HARRIS, Hemet, Calif., formerly Arnold
FRED G. HAWXBY, Albuquerque, N. M., formerly Lincoln
BEACH HINMAN, Fremont
It is fitting that we pause in our session and stand silent for a moment, in their memory.

PRESIDENT CRONIN: Thank you, Mr. Russell.

We will now recess until the next meeting of the Assembly tomorrow.

Remember that section meetings will be held this afternoon and tomorrow and that our Annual Dinner will be held this evening.
THE DEPARTMENT OF INSURANCE AND THE PRACTICING ATTORNEY

By

Thomas R. Pansing

Ninety years ago the Territorial Legislature approved an act "In Relation To Insurance Companies" (Complete Session Laws of Nebraska, Vol. I. 1855-1865, p. 909). As the earliest regulatory law in this state pertaining to the business of insurance, the measure was relatively brief with emphasis upon the financial and licensing aspects of regulation. Not until 1913 and thereafter did the business of insurance become wedded to broad and sometimes stringent expressions of the police power of the state (Laws 1913, ch. 154, p. 393-482). Although greatly expanded and increased by much legislation in recent years the 1913 Insurance Code continues to be the basic law of this state under which the Director of Insurance and the Department of Insurance presently operate.
The business of insurance is affected with the public interest. (Straud v. Bankers Life Insurance Company, 115 Neb. 357, 213 N.W. 359) The legislature has declared that all those having to do with it shall at all time be actuated by good faith; shall abstain from deceptive or misleading practices; and shall keep, observe and practice the principles of law and equity in all matters pertaining thereto (Section 44-101, Reissue Revised Statutes of Nebraska, 1943). In furtherance of that declaration the general supervision, control and regulation of insurance companies, associations, and societies has been vested in a department of government. (Section 44-103, Reissue Revised Statutes of Nebraska, 1943). Its duties of course are supervisory only (Clark v. Lincoln Liberty Life Insurance Company, 139 Neb. 65, 296 N.W. 449) and are limited to those defined by statute (Royal Highlanders v. Wiseman, 140 Neb. 28, 299 N.W. 459). Nevertheless its functions are varied and its regulatory authority is broad due not to statutory law as such but to factors inherent in the business regulated.

The interstate nature of the insurance business should be well understood by the practicing attorney before approaching any problem which involves the administrative or regulatory aspects thereof. Not until the now famous S.E.U.A case (United States v. South-Eastern Underwriters Association, 322 U.S. 533, 1944) had exclusive regulation of the insurance business by the states been seriously challenged or questioned. However the decision of the Supreme Court of the United States in this case overturned a long line of decisions beginning with Paul v. Virginia, 8 Wall, 168 (U.S. 1869) and held in effect that the business of insurance is interstate in character and therefore being commerce was subject to the Sherman Antitrust Act. The sentiment for federal regulation which existed prior to 1913 had by this time been eliminated or substantially curtailed by uniform state legislation, credit for which is due in a large measure to the activities of the National Association of Insurance Commissioners. The S.E.U.A. decision consequently came as a shock both to the insurance industry and the state regulatory authorities. On March 9, 1945, Congress, through the McCarren Act (Public Law 15, 79th Congress; Chapter 20, 1st Session; 59 Statutes 34; 15 USC Sections 1011-1015) offered the States the alternative of continuing to regulate the insurance business or to regulate in conjunction with the ramifications of the Sherman Antitrust Act, the Federal Trade Commission Act and the Robinson-Patman Act. President Roosevelt issued the following statement in connection with his approval of the McCarran Act which fully explains the purpose of the act as well as the temper of Congress at that time:
"I have given my approval to S 340, the insurance bill, which passed the Congress last week. This bill grants the insurance business a moratorium from the application of the anti-trust laws and certain related statutes, except for agreements to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation, until January 1, 1948.

The purpose of this moratorium period is to permit the States to make necessary readjustments in their laws with respect to insurance in order to bring them into conformity with the decision of the Supreme Court in the South-Eastern Underwriters Association case. After the moratorium period, the anti-trust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved. It is clear from the legislative history and the language of this Act, that the Congress intended no grant of immunity for monopoly or for boycott, coercion, or intimidation. Congress did not intend to permit private rate-fixing, which the Anti-trust Act forbids but was willing to permit actual regulation of rates by affirmative action of the States. The bill is eminently fair to the States. It provides an opportunity for the orderly correction of abuses which have existed in the insurance business and preserves the right of the States to regulate in a manner consonant with the Supreme Court's interpretation of the anti-trust laws."

The authority of the states to impose a premium tax upon foreign insurance companies was upheld in Prudential v. Benjamin, 328 U.S. 408 (1946) the court relying in this case on the provisions of the McCarran Act. The constitutionality of the McCarran Act was questioned and upheld by the U.S. District Court for Arkansas in the case of North Little Rock Transportation Co. v. Casualty Reciprocal Exchange, et al, 85 F. Supp. 961 (1949); affirmed 181 F. 2d 174 (8th Cir. 1950); certioraridened 71 Sup. Ct. 56 (1950). The overall result of the S.E.U.A. decision and the McCarran Act has been to place the states in the position of the tight wire artist. Regulation by the states must be effective but not excessive. To this end the states, principally through the efforts of the National Association of Insurance Commissioners, have attempted to enact more uniform legislation and to eliminate needless duplication of effort.

Perhaps with that background we can explore some of the major functions of the Department of Insurance and permit those towards whom this message is directed to observe wherein their particular services may be of assistance to both their clients and to the system of state regulation.

The function initially imposed upon the Department of Insur-
ance by the Territorial Legislature continues to be its most important. Licensing of companies, agents and brokers carries with it an obligation to ascertain the financial and moral integrity of those licensed. A duty of this nature cannot be rigidly tied down to statutory standards. Recognizing this the legislature has, for example, provided that the obligation to issue licenses to any insurance company must be conditioned upon the department being ".......satisfied by such examination as it may cause to be made, or such evidence as it may require......." that the applicant is duly qualified to conduct an insurance business in this state. (Section 44-105, Reissue Revised Statutes of Nebraska, 1943). Again, no foreign or alien company may obtain a license unless "....it has made at least one satisfactory report, and such report shall have been accepted by the Department of Insurance of the State of Nebraska." (Section 44-306 Reissue Revised Statutes of Nebraska, 1943). Wherever discretion of this type is permitted differences of opinion naturally arise. It is here that the services of the practicing attorney greatly assist in preventing abuses of that discretionary power whether the application for a license is being denied by the Department or is being contested by an interested party. As a rule this problem is confined to foreign or alien insurance companies inasmuch as attorneys are required to prepare and file the incorporation papers and other related documents presented on behalf of prospective domestic insurance companies.

The authority to license carries with it the power of revocation or nonrenewal. As a rule licenses are neither renewed nor canceled except upon due notice and hearing. However they may be summarily canceled under certain conditions. For example, they may be so canceled if it is found that an agent has misrepresented the answers in his application for a license (Section 44-335, Reissue Revised Statutes of Nebraska, 1943). The fact that there are no established rules of conduct in hearings relating to matters of this nature demands the presence of an attorney who, although oftentimes abashed at the nonadherence to rules of evidence, is essential in preserving the rights of the respondent.

A statutory power which is more or less incidental to the power to issue and revoke licenses is the power of examination. This power extends from a detailed audit of the affairs of insurance companies (Sections 44-107 and 44-107.01 Reissue Revised Statutes of Nebraska, 1943) to the inspection of insurance policies held by individuals (Section 44-353 Reissue Revised Statutes of Nebraska, 1943). This function constitutes the bulk of the work performed by the Department of insurance, but being ministerial only, it involves the practicing attorney only when and if the com-
pany examined wishes to contest submission of an unfavorable report.

Another major function of the Insurance Department concerns rate and policy approval. Although the latter function has been on the books since 1913 the former was the immediate outgrowth of the S.E.U.A. decision mentioned above. It may appear that rating problems are matters for actuaries and mathematicians only. However if state regulation is to prosper it must be remembered that any person who is aggrieved by a particular rate filing has an opportunity to be heard (Sections 44-1416 and 44-1459, Reissue Revised Statutes of Nebraska, 1943). With the phenomenal growth of the insurance industry this right will be of increasing importance to all practicing attorneys.

As might be imagined the Insurance Department has fallen heir to many extra-legal duties, not the least among which is the practice of entertaining complaints from the insurance-buying public. As stated by the court in Clark v. Lincoln Liberty Life Insurance Company, 139 Neb. 65, 296 N.W. 449, the insurance code fails, either in direct terms or by language from which such an inference may be drawn, to confer on the Insurance Department quasi-judicial power or original exclusive jurisdiction to determine legal and equitable controversies between insurance companies and their policyholders. This court stated:

"It becomes quite clear from a careful examination of the insurance code that the legislature never intended that the insurance department should invade the judicial field or curb or abridge any of the constitutional, common-law or equity power of the district court, and never intended to do more than to confer upon the department supervision over insurance with power to initiate proper proceedings and to take necessary administrative and executive control to the end that insurance business in Nebraska would receive proper and necessary protection."

Notwithstanding the misunderstanding on the part of the general public and some few attorneys concerning the proper function of the Insurance Department in this regard, it is readily understandable in light of the aforementioned declaration of our court that the Insurance Department may intervene in disputes between companies and their policyholders only insofar as it must satisfy itself that the insured's claim has been properly investigated and he has been advised of the company's position regarding its liability.

As a rule the Insurance Department of this and most states is not in continuous contact with the practicing attorney. How-
ever, the following is a list of further areas in which such contact is generally most common.

1. *Legislation.* Inasmuch as those who administer the law are vitally interested in administering good law, the department stands ready to assist attorneys in drafting legislation which fits not only the local situation but which falls within the scope of national and international operation. Piecemeal legislation is proper only if the entire code is carefully studied. Time usually being of the essence in a legislation period, prior contact with the Insurance Department may eliminate objections and subsequent amendments to the bills prepared and introduced.

2. *Statutory Interpretation.* Whenever the courts are required to resort to extrinsic aids in arriving at the legislative intent, the construction placed upon a statute or statutes by executive or administrative bodies is often important and of ten conclusive (Chicago and N.W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N.W. 256). Many of the insurance laws contain very technical points and others, like most statutes, have required interpretation by the Insurance Department. Oftentimes this interpretation is formal but more often it is not, being implied in various reporting forms, financial statements, etc. Whenever a matter arises wherein executive or administrative interpretation is important the practicing attorney may find his answer in the files of the Insurance Department.

3. *Departmental Rulings.* Like most administrative agencies the Insurance Department of this and all other states has from time to time adopted many rules and regulations which carry the force of law. Should the practicing attorney have reason to believe that such rules touch upon immediate problems or question copies may be obtained from the department.

4. *Financial Status of Insurance Companies.* Each company licensed to do business in the state of Nebraska is required to file a very detailed and complicated annual statement of its financial affairs with the Department of Insurance. These statements may be examined at or copies obtained from the Department of Insurance. Furthermore the reports on examination of all insurance companies licensed to do business in Nebraska are on file in the department. Questions concerning both the annual statement and examination reports will be answered by qualified personnel.

In general the insurance industry is indicative of what many people have long forgotten, that is, that the best regulation is self-regulation. We have come to accept the wivern of federal regulation as an essential and a necessary evil in our political and economic structure. Much has been done by members of the insurance industry to continue a highly competitive business in the surrounding of free enterprise. State supervisory officials through the activities of the National Association of Insurance Commis-
sioners have worked hand in hand with each other and the industry to preserve state regulation. Lawyers by the very nature of their work should be vitally interested in assisting a business whose activities are so akin to theirs to function in an area of originality and continued self-regulation.

LIABILITY INSURANCE: THE INSURED'S DUTY TO COOPERATE

By

John R. Dudgeon

In addressing you, I find myself keenly aware of the probability that I am speaking to a group that includes many individuals more conversant with my subject than I am. I am comforted by the thought however that while not an expert on the subject I perhaps have the advantage of having read what Nebraska cases there are on the subject as well as cases from other jurisdictions and various texts in preparing this paper.

It seems to me that one of the biggest problems facing the automobile liability insurance industry is to get across to its policy holders and the public that an insurance company is not the "big bad wolf" that it is so often pictured to be, but that it is engaged in a legitimate business the same as other corporations with the same rights and privileges. The notion is prevalent that it is "open season" on insurance companies all of the time, and that any means, fair or foul are justified in effecting a recovery from such a company. This attitude prevails as against even the individual’s own insurance carrier, if not more so, for he has paid it a premium. If a guest is injured, his host may assure him that he need not worry as he has insurance. Likewise, a good many people, if not most, don’t bother to look at their policy even to the extent of noting the name of their company. All they frequently know is that they are “covered”. Should they learn that their coverage is not quite as broad as they thought, they may be aggrieved at having paid the insurance companies so much money for so many years without ever a loss or a claim. It seldom occurs to such an assured that his insurance policy is a contract defining the rights and liabilities of both parties. Should the insurance company insist on abiding by the terms of the contract or existing law, the assured and frequently the claimant regard this as simply a device of the company to keep from paying that which it rightfully owes and only strengthens the individual’s belief that
insurance companies are not entitled to any consideration or even a fair hearing on their possible liability.

While the foregoing has no direct connection with my subject it does have a bearing on what the assured may think the company has a right to expect from him in addition to the premium he pays. The fact that he may have to cooperate or assist the company can come as a distinct surprise. As a result you find many cases dealing with the subject of cooperation by the assured. It seems to me that most of these cases deal with the situation where a guest is making claim against his host. This is not astonishing when it is considered that the guest is usually a relative or close personal friend of the host who either feels a moral obligation or is sympathetic toward the guest. As often as not the assured or host in these situations will be more demanding on the company than is the claimant himself.

The company's only protection under such circumstances is the cooperation clause it inserts in its policy. For the most part this clause follows a standard form, which with your indulgence I should like to read:

"The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own costs, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

There are of course other provisions in the standard insurance policy touching on the obligations of the assured, e. q. the requirements that he promptly notify the company of all accidents and suits filed against him, but the question that usually arises is that of the assured's cooperation.

It usually adds to the interest of any paper if the speaker can recite personal experiences. In this case that is next to impossible as I have generally found assureds cooperative, especially after it is explained to them that they do have certain responsibilities. I can think of one case in which the assured had loaned his car to an employee for use on a personal matter. It developed that he was an irresponsible individual who frequently moved from place to place and all efforts to contact him personally or by correspondence were unavailing. He likewise ignored notices of trial dates and since he was our only witness, we withdrew from the defense of the case against him and permitted a default judgment to be entered, thereafter denying liability under the policy.
I had one experience with a company that for some reason was miffed at its insurance carrier and reported to us only that one of its vehicles had been involved in an accident with a pedestrian, the time and place of the accident, the names of its driver and the injured party, all being unknown and a matter for us to determine by appropriate investigation. They were finally persuaded that more information was required. Also, I can recall an assured who resented any questions as to just how the accident occurred, this being a matter for the insurance company to figure out by some obscure means. He too, however, was prevailed upon to give us more information. There have also been a few cases where due to the relation of the parties I felt that the assured was a little too critical of his own driving which resulted in an accident injuring his brother or close friend, but there was nothing obviously wrong with his story that would justify a charge of collusion. On occasion I have also run into an assured who did not feel it was his responsibility to appear in Court in the defense of an action against him.

All in all, however, the assureds that I have had any contact with have for the most part been very cooperative and eager to do what they could to present whatever reasonable defense there was to the action against them. I can’t help but feel that by and large this is the experience of most companies and attorneys dealing with Nebraska assureds. Certainly we don’t have the problem here that they do in the eastern states or others that are notoriously hard on insurance companies and tend toward high verdicts.

As a matter of fact, discussing this subject on the basis of Nebraska cases presents a difficult problem. Actually there appear to be only about three cases that went to the Nebraska Supreme Court, which would further strengthen my belief that the problem isn’t too great in Nebraska—at least as compared with other states. Perhaps the most comprehensive discussion is found in the case of Hawkeye Casualty Company vs. Stoker,* decided in 1951 and arising out of litigation originating in Douglas County. The case itself was an action for a declaratory judgment instituted by the plaintiff insurance company against its assured and the injured parties occupying the other car involved in the accident. The first issue presented was the right of the plaintiff to institute such an action and the Court determined that an appropriate subject for a declaratory judgment was involved. The second issue was whether the action was essentially equitable in character or

* 154 Neb. 466, 48 N. W. 2d 623
were there issues of fact to be determined by a jury. Specifically, there was the issue of whether or not the named assured was the sole owner of the car as represented in the policy. The Court held that a jury question was presented. Third, it was held that the company was precluded from raising the defense of misrepresentation as to the ownership of the car because it had failed to make a proper tender of the unearned premium due the assured. Such a tender was held to be necessary in those cases where the ground or avoidance goes to the root of the whole insurance contract, avoiding it from the very beginning so that no risk ever attached. The fourth issue involved was the assured’s lack of cooperation. The pertinent facts were that following the accident the company had obtained from the assured and her husband a reservation of rights agreement permitting the company to investigate the accident and defend the suits that had been instituted without waiving its right to deny liability under the policy on the question of ownership. The company then during the pendency of the damage suits, and while it was defending these suits, instituted the declaratory judgment action denying it was liable under its policy. The assured then demanded that the company’s attorneys withdraw from the defense of the damage suits, which they did, and thereupon employed their own attorneys. Subsequently, the assureds made settlements of the claims and permitted judgments to be entered against them. The Court recognized the right of the company to defend the damage actions under the reservation of rights agreement so long as doubt is expressed as to its liability. However, once the company makes a flat denial of its liability then the assured has the right to treat this denial as a breach of the insurance policy by the company and may proceed to employ his own counsel and make his own defense. No lack of cooperation on this score was therefore proven. Fifth, it was contended that the settlement effected by the assureds violated the company’s right in this respect. Here again it was determined that the company in repudiating its liability under the policy relieved the assureds of their agreement in the policy not to settle any claim or assume any obligations, it not being shown that there was any bad faith or fraud in effecting the settlements.

Another case involving a somewhat similar situation is that of Thomas Kilpatrick & Co., vs. London Guarantee and Accident Co.*, decided in 1931. A public liability policy instead of an automobile policy was involved, and while there was no specific issue on the cooperation clause, much of what the Court said is

* 121 Neb. 354, 237 N. W. 162
applicable to the cooperation clause. Here the plaintiff company had detained in a third floor room a woman suspected of shoplifting. She was left alone in the room for a few minutes and then was found lying in the street below the window after she apparently had jumped out. The store called a doctor for emergency treatment and he and the dead woman's estate thereafter filed suit against the store, the doctor for his bill and the other action being based on negligence. The insurance company denied liability on both on the theory there was no accident. The doctor recovered a judgment and the store settled the death claim, then seeking reimbursement from the insurance carrier. Notice of the doctor's suit had been given the company, which declined to defend but no notice was sent to the company on the damage suit. Two issues were involved. The first was whether the plaintiff had breached the policy in failing to notify the carrier of the damage action. The Court while apparently recognizing the validity of this provision, held that by denying liability, the carrier had released the plaintiff from the obligation of notifying it in the event of a law suit. Second, the carrier contended the plaintiff had violated the policy provision that the assured shall not settle any claim without the consent of the company. Again it was held that the plaintiff was released of this obligation by its denial of liability. It is also to be noted that the Court will not require the assured to go to Court and defend the action against him when a favorable settlement can be made in good faith. Incidentally, the company also had to pay the doctor bill.

The third case I have found is that of Svitak vs. Sun Indemnity Company.* Here the assured had invited an employee to drive with him from Columbus to Omaha to attend a sales meeting sponsored by an oil company. As might be expected, I think, following the meeting the two men had visited several bars and there is at least the inference that they may have over indulged. In any event they were subsequently involved in an accident and the assured's employee brought suit against him for damages. The insurance carrier insisted that the assured sign an answer alleging that the accident arose out of the claimant's employment and that his action fell under the workmen's compensation act. This the assured refused to do. After all, he had no workmen's compensation insurance. The carrier refused to defend and the claimant took a default judgment. Claimant then brought this suit against the carrier to collect his judgment, and after a trial to a jury a verdict was returned in his favor. This was affirmed by the Supreme Court which said:

* 136 Neb 303, 285 N. W. 604
"It may be added that the duty of the insured in respect of permitting a defense in his name is not susceptible to precise general definition. He is not to be a mere puppet in the hands of the insurer; he is under no obligation to permit a sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility, and hence he is not bound to yield to any demand which would entail violation of any law or ethical principle; but he cannot arbitrarily and unreasonably decline to assist in making any fair and legitimate defense."

Some issue was made of an alleged discrepancy between testimony of the assured and a written statement taken from him after the accident. It would not appear, however, that there was any substantial variance and after explanations by the assured the Court concluded he had not falsely testified and could not be charged with lack of cooperation.

It is interesting to note that the Court held it was proper for the jury to determine whether (1) the assured should have signed the answer, (2) the claimant was a guest or employee, and (3) the truth of the assured’s testimony as compared with previous written statements.

If I were to refer to cases from other jurisdictions on the subject of cooperation, I fear that I would not know where to begin or stop. Other than some general observations, therefore, I would like to confine the further study of this matter to several Federal Circuit Court cases arising in Nebraska, which presumably try to determine what the Nebraska Supreme Court might do if the same situations were presented to it.

In the case of Ohio Casualty Co. vs. Swan,* the assured’s car was involved in an accident when it left the road. Occupying the car were the assured, the girl to whom he was to be married, her mother and several others. Actually, the girl was driving, but all parties made written statements that the assured was driving. These statements also largely absolved him from liability. The mother, however, brought suit against the assured and the company defended. About a year later, all confessed that the girl actually was driving and the petition was amended to name her as the defendant. The company then defended under a reservation of rights agreement. The claimant recovered a judgment and then brought suit against the company, which defended on the grounds of lack of cooperation. It also appears that the parties changed their stories several times to establish gross negligence. The Court concluded that there was little doubt about the collusive

* 89 F. (2d) 719 (Neb)
intent of the parties and held for the company saying that as a matter of law there had been breach of the policy which would release the company from liability. The Court stated:

"It is not to be inferred that cooperation in the policy sense requires that the insured should combine with the insurer to present an aggressive or sham defense; it does mean, however, that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense."

*State Farm Mutual Automobile Insurance Co. v. Bonacci.*

The assured's car left the road and his guest was injured as a result. It appeared that the accident was caused by a tire puncture and in statements obtained from the assured and claimant they indicated that the assured was driving at a reasonable speed, in a careful manner and did not know exactly what had happened. Contradictions developed in the depositions and several trials that followed, each time the stories of the parties growing better to the point where they had the assured traveling at a very high rate of speed, taking his eyes off the road and his hands from the steering wheel to light a cigarette. The Court held these discrepancies and other circumstances established a lack of cooperation, if not fraud, stating:

"If the insured failed actively to cooperate in the defense of the damage actions brought by the Bonaccis, or if he fraudulently conspired with these adverse parties to create the appearance of a valid cause of action against him, then the contractual obligation of the insurer would terminate and the insurance company would be under no obligation to defend the action, nor to pay any judgment that might be recovered.

"It is a condition precedent to the right of recovery under this policy that the insured shall 'actively cooperate with the company' in the defense of damage actions. It has been held that cooperation, in the sense used in such policies, requires that the insured should make a fair and frank disclosure of information reasonably demanded by the insurer, to determine whether there is a genuine defense.

"If the accident in fact occurred in this manner, it was the duty of Serra (the assured) to disclose it at once to the representative of the insurance company. This alleged fact may well have determined whether settlement of the damage claims should be made. On the other hand, if this was not a fact, then Serra was guilty not only of failure actively to cooperate in the defense of the action, but was guilty of fraudulent conspiracy with his friends to enable them to recover against the insurance company."

* 111 F. (2d) 412
"Under the terms of the policy, it was the duty of Serra, if called upon, to make report in writing with reference to the cause of the accident, and that was the purpose of the written statement and the proof of loss which he in fact signed.

"Lack of cooperation may include fraud or collusion or may consist simply of refusal to act * * * The giving by the insured of intentional false testimony, material in its nature and prejudicial in its effect, would be good ground for releasing the insurer from liability."

In general, the following observations may be made with respect to the duty of an assured to cooperate:

(1) The cooperation clause is almost universally held to be valid, and if breached by the assured the company is relieved of liability under its policy. If this were not so, the company would be at the mercy of the parties to an accident. Furthermore, cooperation by the assured is generally recognized as a condition precedent to the company's liability, although the burden may be on the company to establish a breach.

(2) The insured's lack of cooperation must be substantial and material to result in a breach. Furthermore, many courts hold that the insurer must have been substantially prejudiced.

(3) The insured must make a fair, frank and truthful disclosure of information reasonably demanded by the company for the purpose of determining if it has a defense to any claim presented. The assured cannot intentionally omit or conceal facts within his knowledge.

(4) He must cooperate with the company to present any fair and reasonable defense that is available, including the duty of verifying pleadings, although he is not required to cooperate in presenting a sham defense or executing instruments he believes erroneous.

(5) He cannot collude or conspire with the claimant to defraud the company, although the fact that his sympathies may be with the claimant will not avoid the policy so long as he otherwise cooperates. Where there is a family relationship between the claimant and assured the Court will carefully examine the evidence for possible collusion. Cases have held in this connection that there is no breach simply because a father may assist his daughter in the selection of an attorney or giving her such other advice as any father might be expected to do under the circumstances.

(6) He may not voluntarily enter another jurisdiction to permit service of process unless such act is innocent and without collusive intent. Merely entering a voluntary appearance in a case is not a breach.
(7) A false assumption of liability or responsibility for an accident will constitute a breach, although the mere giving of statements to the other party setting forth the facts of an accident even though unfavorable will not.

(8) He will not be permitted to make false statements of fact on a material matter. Thus he cannot misrepresent who was driving and in at least one case it was held that a false statement that he had not been drinking and obtained support from witnesses on this violated the policy.

(9) Material variances between testimony at the trial and previous statements are not condoned, particularly if the testimony is false. Slight or immaterial variations will, of course, not constitute a violation.

(10) The assured must appear at the trial of his case if requested by the company. This is true even though he may not have been a witness to the accident since his absence may have an effect on the amount of damages that be awarded. If he is financially unable to pay the expenses of the trip to a distant place and requests that the company advance him these expenses, the company must do so. In this connection, I believe it is a standard provision of insurance policies that the company will stand such expense except for loss of wages or income.

(11) These duties also apply to additional insureds under the omnibus clause of the policy if they are to receive protection. In situations, however, where the named assured may be liable for the acts of the driver, the company is not relieved of its obligation to defend the named insured because of the lack of cooperation of the driver.

Whether an assured has cooperated is generally a question of fact for the jury to determine, even in the case of a declaratory judgment action, unless the facts are undisputed. Where there is no dispute on the facts and a material matter is involved it would seem that a question of law would be presented, the same as in any other case. The danger of abuse, as far as the company is concerned, is greatest in those states requiring a showing of prejudice, an issue that may be presented to a jury.

The usual rules of waiver also apply so that a company must disclaim liability when it learns of a breach, or at least proceed under a reservations of rights agreement. As we have seen, however, the company "cannot have its cake and eat it too." It cannot deny liability and still require cooperation.
Mr. Chairman, members of the Nebraska Bar Association, I am indeed highly honored to have this opportunity to speak to you.

At my request, several of my friends in Nebraska very kindly suggested topics on which I might talk. Probably the first in order of preference was "The New Tax Code as Related to Life Insurance." Fortunately for me—and, incidentally, for you—an associate of mine, Irving (Steve) Brunstrom, Assistant General Counsel, American Life Convention, whom many of you know, just recently prepared and delivered such a paper at the American Bar Association meeting in Chicago in August. I have therefore brought several copies of his paper entitled "The Life Insurance Annuity and Endowment Features of the Internal Revenue Code of 1954" with me today and you may help yourselves to the copies as you leave the room.

Another subject suggested was "Mysterious Disappearances." Well—there again we had such a paper read by one of our A.L.C. Legal Section members at the ABA meeting—the title being "When Did Ulysses Die? or Mysterious Disappearances and Life Insurance" by Paul M. Roca, Phoenix, Arizona. His paper will appear in the 1954 Insurance Section Proceedings of the ABA as will Mr. Brunstrom's.

Another topic suggested several times was "The Korean Conflict and War Clauses." Strangely enough, my boss, Ralph H. Kastner, General Counsel of the American Life Convention, has spoken to this same august group on several prior occasions, the last being in 1950, and he informs me that he has always used War Clauses as his own individual pet subject.* Since he might be invited to speak here again, I felt it the better part of wisdom to cover that field of the law in which I, too, happen to be an expert.—(you know the definition of an expert—anyone 100 miles from home) by including it under the very broad general subject heading which I chose—namely, "Highlights of Life Insurance Litigation—A Decade in Review."

I think I can fill in a little beginning where Ralph Kastner left off in October, 1950.** At that time, you recall, the Korean conflict had been in progress about four months and the insurance companies and Commissioners of Insurance were attempting to agree on what type of war clause should be used in the new policies. In December 1950, the N.A.I.C. Life Committee adopted a Statement of Principles in which the “result” type of clause was given precedence over the “status” type. Furthermore, it was stated in the report, which was broader than an earlier recommendation, that the understanding of the industry was that claims arising from deaths due to normal cases were to be paid regardless of the fact that the policyholder might be a member of the Armed Forces. It was not clear whether this applied to double indemnity claims also. Quoting from the N.A.I.C. report:

Of course, there were still many World War II war clauses in operation and it was with that type that litigation soon ensued.

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The War Clause in Life Insurance Contracts

War Clauses
—Theo P. Otjen—C.L.U. Journal (Sept. 1952)
The Korean War as a Precedent for the Future
—Donald Q. Taylor—A.B.A. Ins. Law Section 1952, p. 156

Of War Clauses
The Korean War Hazard
—James T. Phillips—Paper presented before Society of Actuaries, March 26, 1953

The Meaning and Effect of Military Service and War Exception Clauses in Life Insurance Policies
A Study in Semantics
—Vincent V.R. Booth, A.L.C. Legal Section Proceedings, 1953
Case Note From Southern California Law Review—Vol. 25, 1953, p. 328
Temple Law Quarterly—Vol. 26, No. 3, p. 336
University of Pittsburgh Law Review—Vol. 14, No. 1, Fall 1952
Korea as “War”—Burleson—Paper presented before International Claim Association, 1953
Annual Reviews of Legislation and Litigation—
“I. Military Exclusions.
Risk of death may be excluded: (a) As a result of war or an act of war or as a result of the special hazards incident to service in the military, naval or air forces of any country, combination of countries or international organization…”
The first case to be decided as a result of the Korean "police action," as the then President Harry S. Truman chose to call it, was Harding v. Pennsylvania Mutual Life Ins. Co., decided by the Court of Common Pleas of Luzerne County, Pennsylvania, on March 20, 1951. In that case, the insured was killed September 11, 1950, after his National Guard unit was inducted into military service when the troop train on which he was riding en route to Camp Atterbury was wrecked. The beneficiary was tendered the face amount of the policy but demanded payment of double indemnity. The insurer defended on the ground that the double indemnity clause contained a termination provision: "If the insured shall at any time, voluntarily or involuntarily, engage in military, air or naval service in time of war.***" The insurer also contended that on September 11, 1950, the United States was still at war with Germany, Italy and Japan because no treaties of peace had yet been ratified. A third argument was that the United States was at war with Korea at the time of the insured's induction into federal service. The trial court denied the beneficiary's motion for judgment on the pleadings and held that the insurer was not liable under the double indemnity clause. The court upheld the arguments of the insurer and further stated that there can be a war without a formal declaration by Congress. Following this decision in favor of the insurance company, another case involving the same company was brought where the insured was killed on the field of battle in Korea on March 7, 1951. In that case, styled Beley v. Pennsylvania Mutual Life Ins. Co., the policy provided that in the event the insured "engages in military or naval service in time of war, the liability of the company shall be limited to the return of the premiums paid hereunder unless the insured shall have previously secured from the company a permit to engage in such service." The beneficiary brought action for payment of both the face amount and double indemnity and the County Court of Allegheny County, Pennsylvania, following the reasoning of the court in the Harding case, rendered judgment in favor of the insurer on March 1, 1952.

Following these decisions, two other cases were decided in June of 1952 in favor of the insurance company. One was the case of Gray v. Southern Aid Life Ins. Co., decided by the Municipal Court, District of Columbia, on June 5, 1952 and the other, Tanner v. Universal Life Ins. Co., decided by the Circuit Court, Norfolk County, Virginia, with no written opinion. No appeal was taken on these two cases.

In the meantime, the Beley and Harding cases were both ap-
pealed to the Superior Court of Pennsylvania which rendered judgment on July 17, 1952 and reversed both lower court decisions.***
The court held that the United States was not technically "at war" in Korea and reasoned that the policy was ambiguous in that the insurer did not make it clear that the term war applied to "undeclared" wars as well as "declared" wars. This distinction, the court said, had been recognized by certain life insurance companies, especially since Pearl Harbor, in drafting their policy language.

Following this double barrelled decision in favor of the beneficiaries, the following cases were decided against the insurance companies: McClintic v. Metropolitan Life Ins. Co., Superior Court, Marion County, Indiana, February 19, 1953, (no appeal); Dean v. Atlantic Life Ins. Co., Circuit Court of Wise County, Virginia, January 31, 1953, (no appeal); Hawkins v. Metropolitan Mutual Assurance Co., Circuit Court, Cook County, Illinois, July 8, 1953 (no appeal; and Sanders v. Independent Life & Accident Ins. Co., Civil Court of Records, Duval County, Florida, (oral opinion, no appeal).

In the meantime, the insurance company appealed both the Beley and Harding decisions to the Supreme Court of Pennsylvania and there again the court rendered judgment in favor of the beneficiaries on February 14, 1953, the citation being 95 A. 2d 202 in the Beley case and 95 A. 2d 221 in the Harding case. Incidentally, writs of certiorari to the Supreme Court of the United States were both denied on October 12, 1953.

Shortly thereafter, the case of Western Reserve Life Ins. Co. v. Meadows, 256 S.W. 2d 674, was decided by the Court of Civil Appeals, Ft. Worth, Texas, March 6, 1953, affirming judgment for the beneficiary on a suit for double indemnity. The insured had been killed in the crash of a military plane on which he was a passenger and travelling under military orders for the purpose of opening bids on army airfield construction in Alaska. The court followed the decisions of the Pennsylvania Supreme Court in the Beley and Harding cases.

Also, on July 27, 1953, the Iowa District Court, Iowa County, rendered judgment for the beneficiaries in the case of Langlas v. Iowa Life Ins. Co. There, the insured was killed on March 25, 1952 during active combat duty while serving with the First Marine Division in Korea and the beneficiaries on two life policies sued for double indemnity benefits.

Harding v. Pennsylvania Mutual Life Ins. Co., 90 A. 2d 589
These last two cases were then appealed to the Supreme Courts of Texas and Iowa respectively and in each case were reversed, the Supreme Courts rejecting the arguments of the Pennsylvania Supreme Court in the Beley and Harding cases. The Western Reserve Life case was decided October 7, 1953 and the decision appears at 261 S.W. 2d 554. The court stated that although it is true that only Congress has power to declare war and that Congress did not declare war against North Korea or China, the Acts of Congress which recognized the existence of war and which were passed in aid or furtherance of existing war were, in effect and meaning, a declaration of war. Furthermore, the court pointed out that many of the Acts of Congress by which provision was made for support of the armed forces in Korea, were referred to in the dissenting opinion of Chief Justice Vinson in the steel mill seizure cases. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579. The court further relied on the many definitions of and decisions construing "war" and stated it was convinced that the accidental death of the insured occurred "in time of war," rejecting the doctrine of the Beley case and declaring that the Supreme Court of Texas did not "affect a technical ignorance of the existence" of the Korean War. Certiorari was denied March 15, 1954.

The Supreme Court of Iowa in its decision of April 7, 1954 in the Langlas case, appearing at 63 N.W. 2d 885, followed the principles laid down by the Texas Supreme Court in the Western Reserve Life case and rejected the contention that the insurance company could have made the language clearer and more definite by specifying that an "undeclared" was as well as a "declared" war was meant. The court stated that the word "war" is to be understood in its ordinary sense and further that the popular connotation of the word is by no means limited to wars formally declared by Congress to be such.

Other decisions which have resulted favorably to the insurance company are: Stanbery v. Aetna Life Ins. Co., 98 A. 2d 134, Superior Court, Bergen County, New Jersey, June 29, 1953 (no appeal); Weissman v. Metropolitan Life, 112 F. Supp. 420, United States District Court for the Southern District of California, May 20, 1953 (no appeal); Silva v. John Hancock Mutual Life Ins. Co., Superior Court, Bristol County, Massachusetts, June 18, 1953 (no appeal); Podos, et al. v. Equitable Life Assurance Society of United States, United States District Court for the Southern District of California, March 16, 1954; Lynch v. National Life and Accident Ins. Co., Circuit Court, City of St. Louis, April 26, 1954; Sobieraj v. Prudential, Court of Common Pleas, Cuyahoga County,

In the case of Weissman v. Metropolitan Life, supra, the United States District Court for the Southern District of California held that the meaning of the words in the double indemnity clause "in the military, naval or air forces of any country at war" relieved the insurer of liability where the insured was killed in the Korean conflict. The court said that the primary issue was one of fact, namely, "Is the conflict now raging in Korea a 'war' within the meaning of the insurance policy?" Here, as in the Texas Supreme Court decision in the Western Reserve Life case and the Iowa Supreme Court decision in the Langlas case, the court reviewed the history of the United States and of the earlier decisions handed down by the Supreme Court of the United States, beginning with the decision in the Prize Cases (December Term 1862) 67 U.S. 635, where Mr. Justice Grier discussed the question whether in 1861 the United States, prior to a declaration, was engaged in war with the Southern states and continuing down through the case of Hamilton v. M'Claughry, 136 Fed. 445, involving the Boxer Uprising in China and on down to the World War II case of New York Life Ins. Co. v. Durham, 166 F. 2d 874, from which authorities Mr. Justice Westover concluded that there may be war (within the meaning of that term employed in an insurance policy) without an official declaration thereof and that unless it is indicated in the contract that the term "war" is to be used in its strict legal sense, the parties have a right to assume it is to be given its common understanding or meaning.

The case of Podos, et al. v. Equitable Life Assurance Society of United States, supra, was also decided by the United States District Court for the Southern District of California and followed the decision in the Weissman case. In the Podos case, the language used was "war, declared or undeclared" and the policy also provided termination of double indemnity if the insured became a member of the military, naval or air forces of any country at war, "declared or undeclared."

Judge Wyzanski of the United States District Court, District of Massachusetts, wrote a very fine opinion in the case of Gagliormella v. Metropolitan Life, supra. Of course, in Massachusetts, the court could rely to a great extent on the famous case of Stankus v. New York Life Ins. Co., 213 Mass. 366, a 1942 decision holding that exclusionary war clauses precluded double indemnity recovery by beneficiaries of an insured American sailor killed at sea in October, 1941 by a German torpedo when Germany was at
war with the United Kingdom, but not with the United States. Mr. Justice Ronan in the Stankus case said that, as used in insurance policies, "the term 'war'... refers to no particular type or kind of war, but applies in general to every situation that ordinary people would commonly regard as 'war'."

One interesting point which might properly be interspersed at this time is that the requirement of accidental means in double indemnity clauses would seem to be a good defense at first blush where the insured has been killed by gunfire while in combat. However, I know of only four cases in which this argument has actually been discussed by the court and in only one of which did the insurance company prevail. That was the case of Martin v. Peoples Mutual Life Ins. Co., 145 Ark. 48, 223 S.W. 389, 11 A.L.R. 1111 (1920). In that case the insured brought suit on an accident policy after he had been injured in combat in Europe while in the army in World War I. The court denied the recovery on the ground there was no accidental injury. Two other cases arising from World War I in which the beneficiary prevailed under double indemnity claims were: State Life Ins. Co. v. Allison, 269 Fed. 93, 14 A.L.R. 412 (C.C.A. 5th, 1920) and Great Southern Life Ins. Co. v. Churchwell, 91 Okla. 157, 216 Pac. 676, 28 A.L.R. 97 (1923). One other case involving double indemnity in which the beneficiary prevailed resulted from the Pearl Harbor attack: Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (D.C. L.A., 1944).

Other cases holding that the existence of war or state of war as that term is used in private and insurance contracts is not dependent on a declaration of Congress are as follows: New York Life v. Bennion, 158 F. 2d 260 (C.A. 10th); Arce v. State, 202 S.W. 951 (Texas); and Lincoln v. Harvey, 191 S.W. 2d 761 (Texas).

Aside from the cases strictly involved with insurance company war clauses, there have been several decisions which have tended to bolster the insurance company argument that the Korean conflict or "police action" did in fact amount to a "war". Douglas Mfg. Co. v. Clayton Bros. Logging Co., Inc., Circuit Court of Oregon, Douglas County, November, 1952 (private contract); United States v. Bancroft,—U.S.C.M.A.—, July 3, 1953 (Court Marital decision by U.S. Court of Military Appeals); State v. Gibson, 64 So. 2d 75, Supreme Court of Alabama, March 19, 1953 (state income tax exemption); and United States v. Anderson, 1 C.M.R. 345, review denied 1 C.M.R. 99, September 10, 1951 (Court Martial proceeding).

Two other opinions handed down May 5, 1954 by the United States Court of Military Appeals were United States v. Ayers, 4
U.S.C.M.A.—, and United States v. Taylor, 4 U.S.C.M.A.— Both of these cases involved the suspension of the Statute of Limitations during the Korean conflict under the Uniform Code of Military Justice. The Ayers case involved a Court Martial proceeding for desertion within the continental United States and the Taylor case dealt with a fraudulent enlistment in the United States Army. The majority opinion in both cases held that the United States was in a state of "war" during the Korean conflict at least for purposes of military criminal law and these decisions were predicated to a large extent on the insurance cases construing war clauses.

In addition, there were two favorable Attorneys General opinions, one by the Attorney General of North Dakota dated December 20, 1951 involving Section 37-1406, North Dakota 1949 Supp., in which the Attorney General held that the Veterans Aid Commission was authorized to make loans to veterans of the Korean campaign since the section authorized loans to members of the armed forces of the United States while the United States was at war. The Attorney General stated there could be no doubt but that the United States was at war in Korea.

In the other opinion, the Attorney General of New York stated on October 1, 1953 that the hostilities in Korea constituting a "time of war" for purposes of preference in the civil service to veterans thereof, were ended on July 27, 1953 when the Armistice Agreement was put into effect according to its terms. (Const. Art. #6; Civil Service Law, #21.) Quoting from the opinion:

"United States forces were committed to Korean combat without a declaration of war by Congress. In the face of this fact, the Legislature amended the definition of 'time of war' in Section 21 of the Civil Service Law to include 'Hostilities participated in by the military forces of the United States subsequent to June twenty-fifth, nineteen hundred fifty' (subd. 1, par. (e)(5)). As I pointed out in an opinion to the Adjutant General with respect to Military Law, Section 120, providing an annuity for veterans disabled by loss of sight who served 'during any war.' the magnitude and actuality of the Korean conflict and its demands upon the nation as a whole required the conclusion that it constituted a war (1951 Atty. Gen. 112).

"When the Legislature acted to amend the Civil Service Law, fighting was in progress and the manner of its end could not be known. Hence, no termination date was fixed. Your present question comes down, therefore, to whether the end of the fighting, pursuant to the Armistice Agreement, constitutes an end of the 'hostilities' in terms of which the war period of the Korean conflict was defined by the Legislature."
"I cannot but conclude that hostilities constituting a 'time of war' under the Constitution and statute are over. The fighting has, in fact, ceased. The end did not come about as a mere temporary operational lull, nor as a battlefield truce of limited duration. It was the effectuation of a formal armistice, comparable to that ending World War I, made at command level. The preamble of the written agreement recites that it is to establish an armistice 'which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved.' The agreement provides for no contingency in which fighting may be resumed thereunder. Article IV is a recommendation by the signatory commanders to the governments of the countries concerned on both sides that a higher level political conference be held within three months to negotiate a settlement. The duration of the agreement is fixed in Article V as 'until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for peaceful settlement at a political level between both sides.' The whole tenor of the instrument looks away from further resort to arms. In my opinion, the hostilities constituting the time of war commencing on June 25, 1950, as defined for purposes of Civil Service Law, Section 21, terminated on July 27, 1953, when armistice was put into effect according to its terms."

Thus, it is interesting to see how the trend of the decisions reversed itself, having started out with unfavorable decisions (to the insurance companies) of the Superior and Supreme Courts of Pennsylvania and others, and gradually worked around to favorable decisions by the Supreme Courts of Texas and Iowa and the United States District Courts of California and Massachusetts and the Superior Court of New Jersey.

Apparently, the courts are still affected, as they were after World War II with respect to war clause cases, with a sympathetic approach to the beneficiary which decreases in proportion to the number of years intervening after the conclusion of hostilities.

Another allied subject I would like to mention is Aviation Exclusion Clauses, one with which all Nebraska lawyers must be very familiar.

Rarely does a year pass in which this type of case does not arise to harass those of us who concern ourselves with life insurance litigation from the company's point of view. Generally, the beneficiary of an insured, killed in private aviation, argues that there is an ambiguity in the policy between the incontestable clause and those clauses which exclude coverage in the event that death occurs in private aviation or as a result of some hazardous activity. The argument is always the same: that the expiration of the incontestable period bars the company's right to the defense of non-coverage.
Part of the trouble arises from the fact that, traditionally, the statutory incontestable clauses, which the companies are required to incorporate into their policies, contain an exclusion of risk in the event of death while in the military or naval service in time of war. This, argues the plaintiff's attorney, by the application of the time honored doctrine of \textit{expressio unius exclusio alterius}, bars the company from arising any defense based upon a risk exclusion unless that exclusion is found in the incontestable clause.

There have been a myriad of cases involving this problem and the majority of them have involved the aviation exclusion clause. By and large, the companies have been able to convince the courts that the incontestable clause and the exclusion of coverage clause are two entirely different clauses with two entirely different purposes, and that the expiration of the contestable period does not have the effect of expanding the coverage of the policy to include risks which, in the first instance, the company refused to assume.

This doctrine was most clearly stated by Judge Cardozo in the famous case of \textit{Metropolitan Life Insurance Company v. Conway}, 252 N.Y. 449, 169 N.E. 2d 642 (1930). The Conway doctrine was quickly adopted by most of the states. One of the most notable exceptions to this trend came about in your own State of Nebraska when your Supreme Court handed down the famous case of \textit{State ex rel. Republic National Life Ins. Co. v. Smrha}, 138 Neb. 484, 293 N.W. 372 (1940).

Undoubtedly while under the influence, to a great extent, of the Smrha decision, the Supreme Court of North Dakota, two summers ago, decided the case of \textit{Jordon v. Western States Life Ins. Co.}, 53 N.W. 2d 860 (1952). In that case, the company had attached a rider excluding death "as a result of operating or riding in any kind of aircraft or from exposure to any hazard incident thereto***" (except as a passenger of a commercial airline, etc.) The insured's death resulted from a fox hunting expedition in a private plane. Apparently, the plane flew too low and crashed, killing the insured. The Supreme Court of North Dakota, in holding for the beneficiary, reviewed at length the history of the Armstrong Committee report and the "Committee of Fifteen" which pointed out the evils then existing in the insurance business and recommended legislation to correct such evils. North Dakota, early in 1907, was the first state to enact the recommended legislation into law. The statute enacted, Chapter 140, Laws of North Dakota, 1907, provided for standard policies and these policies contained incontestability clauses such as I have just described. The court concluded therefrom that insurance
companies which use the standard form may insert in the incontestability clause any and all conditions and restrictions on liability that may occur to them but the effectiveness of them, except those relating to non-payment of premiums and military and naval service in time of war, is limited to a two year period subsequent to the issuance of the policy. From that point, the court jumps to the conclusion that insurers issuing non-standard policies, which also require an incontestability clause, should not be permitted to set up a different standard of incontestability. Therefore, the court said: "The legislative intent that the incontestability clause should bar all defenses, not expressly and allowably excepted from its operation, is distinctly expressed." The North Dakota court relied on the Smrha case and the Louisiana case of Bernier v. Pacific Mutual Life Ins. Co., 139 So. 629. We all know, of course, that the Nebraska legislature eventually corrected the situation which resulted from the Smrha case, but you can see how its effect continues to embarrass us elsewhere when another court is looking for a decision on which to hang its hat.

Another case in which the incontestability clause was held to bar reformation was Richardson v. Travelers Ins. Co., 171 F. 2d 699 (1948) in which the Court of Appeals for the Ninth Circuit permitted the insured to retain a policy providing twice the benefits of the policy applied for. The home office had mistakenly issued a policy known as "Pension Policy, Age 65" instead of a "Uniform Premium Plan" contract. Although the policy was in the insurer's hands several times for loan purposes, the error was not discovered for twenty years. The insurer then sought to substitute the policy applied for and when the insured refused to consent thereto, brought an action for reformation. The court held that the incontestability clause reading "This contract shall be incontestable after one year from date of issue, except for non-payment of premiums" was applicable and, in addition, that this was not within the exception of a mutual mistake nor was the instrument void for want of mutuality. The court stated it was not reasonable to bar raising of fraud as a defense and at the same time to allow the insurer to gain reformation for its own benefit on the ground of alleged mistake of its own skilled employees.

Now, having begun this review from the wrong end—we have only worked back to 1950 so far,—I would like to jump back to the beginning of the last decade, and mention a few of the very important decisions which have greatly influenced the life insurance business, and, in many cases, the entire insurance industry, beginning with the S.E.U.A. decision: United States v. South Eastern Underwriters Association, et al., 322 U.S. 533 (1944).
You recall that in that case the Supreme Court of the United States distinguished *Paul v. Virginia*, 8 Wall. 168 (1869) and held insurance to be commerce.

As a result of this momentous decision, the 79th Congress passed Public Law 15 or the McCarran Act which was approved March 9, 1945. That Act provided that the insurance business was subject to the Sherman, Clayton, Federal Trade Commission and Robinson-Patman Acts "to the extent that such business is not regulated by state law." The All-Industry Committee then met and studied the effect of Public Law 15 on state supervision and came up with many recommended bills for passage by state legislatures. This is not the subject of my paper, but to fill in, some of these were a Fair Trade Practice Act, Model Accident and Health Insurance Bill, Clayton Act type of legislation, a Robinson-Patman type Act and Unauthorized Insurers Service of Process Act.

Some of the important resulting litigation included the following cases:

*Prudential v. Benjamin*, 328 U.S. 408, 66 S. Ct. 1142, in which the validity of the South Carolina premium tax on foreign insurers was upheld. Only foreign insurers were subject to the state premium tax; domestic insurers being exempt. The Company had challenged the validity of the tax under the Commerce Clause of the Federal Constitution. The Supreme Court held the tax valid, stating that the cases cited by the Company were not in point because Congress, by enacting Public Law 15, had "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the Commerce Clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

On the same date, June 3, 1946, in the case of *Robertson v. People of the State of California*, 328 U.S. 440, 66 S. Ct. 1160, the Supreme Court held that the State of California had the power (without reference to the McCurran Act, since the Acts for which Robertson was prosecuted were done before the effective date of the McCarran Act): (1) to enact and enforce agents' licensing laws, and (2) would require foreign insurers seeking to do business in California to maintain minimum reserves for the protection of policyholders in the State, even though such insurers were in interstate commerce.

The following week, on June 10, 1946, the Supreme Court affirmed opinions handed down by the State Supreme Courts of Indiana and Kansas in *Prudential v. State of Indiana*, 328 U.S. 822, 66 S. Ct. 164 and *In re Insurance Tax Cases*, 328 U.S. 822,
66 S. Ct. 1360. These were per curiam opinions merely citing the earlier opinions in the *Prudential v. Benjamin* and *Robertson* cases. These cases upheld the validity of the Indiana premium tax on foreign insurers and the Kansas premium tax and retaliatory law.


In the case of *Travelers Health Association v. Virginia*, 339 U.S. 643, the Supreme Court upheld the Virginia Blue Sky Law which authorized service by registered mail and in which the defendant insurance company, which had its home office in Nebraska, had failed to register under the Act which specifically included as "securities," insurance certificates issued by unauthorized companies. The court stated that the solicitation of new members and delivery of policies through the mail and also the investigation of claims within the state were sufficient contacts to sustain jurisdiction under the Act.

In 1951 the United States Court of Appeals for the Seventh Circuit affirmed a conviction of mail fraud in an accident and health mail order business in the case of *United States v. Sylvanus*, 192 F. 2d 96, certiorari denied 342 U.S. 943. The defendants pleaded the McCarran Act as a defense but the court overruled their contention and held that the evidence of fraudulent advertising supported the convictions.

Somewhat along the same lines as the above cases was the case of *Darr, et al. v. Mutual Life of New York*, 169 F. 2d 262, certiorari denied 69 S. Ct. 166, in which case the United States Circuit Court of Appeals for the Second Circuit held that insurance policies may be "subjects of commerce." The broad definition of "goods" contained in Section 3 of the Fair Labor Standards Act includes "subjects of commerce of any character." The court therefore concluded that policies are "goods" produced for commerce as much so as commercial paper. The action was one involving elevator operators in the insurance company's home office and the claims were for overtime payments based upon an employment period prior to December 5, 1940. The court held that since maintenance employees are "necessary" to production of such goods, they are within the coverage of the Fair Labor Standards Act but that under Sections 9 and 11 of the Portal to Portal Act the insurance company was not liable in this case.
The question of whether settlement options violate the Statute of Wills has been decided favorably for the companies in several recent cases. The Supreme Court in the State of Washington, in the case of *Toulouse v. New York Life*, 245 P. 2d 205, held that the settlement agreement under Option 1, the interest option, with right of withdrawal, was not violative of the Statute of Wills but was a valid third party donee beneficiary contract. In the State of New York, the case of *Hall v. Mutual Life of New York*, upheld the validity of a supplementary contract as not being in violation of the Statute of Wills. The opinion of the Appellate Division, First Department, appears at 122 N.Y.S. 2d 239 and this decision was affirmed unanimously by the New York Court of Appeals, April 8, 1954 at 119 N.E. 2d 598. Another favorable decision was handed down in a lower court in Iowa in the case of *Basche v. Travelers Ins. Co.*, the court justifying the supplementary contract as not being in violation of the Statute of Wills on the ground it was a valid contract for the benefit of a third person. (District Court, Wapello County, Iowa, 1952).

One of the most interesting cases to insurance company lawyers in the past decade was the recent decision of the Chancery Court in Nashville, Tennessee: *New York Life Ins. Co. v. Nashville Trust Co., et al.*, involving the mysterious disappearance of the insured, Thomas C. Buntin, in 1931 and his reappearance in 1953. A few months after Mr. Buntin disappeared, his secretary also disappeared. Although strenuous efforts were made to locate both, they were unsuccessful and the only word received was a communication from St. Louis postmarked September 26, 1931, containing a copy of a typewritten will. One copy was sent to an uncle and other copy to the insured’s grandfather. The proceeds of the life insurance policies totaling $50,000 were payable to the Nashville Trust Co. as trustee and the beneficiaries were the insured's wife and three children. The Supreme Court of Tennessee held on March 10, 1942 that the insured was legally dead and the insurance company was required to pay the policy proceeds to the trust company. See: *New York Life v. Nashville Trust Co.*, 178 Tenn. 437. The insurance company apparently never gave up and on June 3, 1953, the insured was discovered living in Texas and married to his former secretary. The insurance company therefore brought suit to recover some $30,000 still retained by the trust company but the Chancellor held that in Tennessee insurance companies may expressly protect themselves from liability for presumptive death created by unexplained absence if they see fit to do so. The court concluded that the insurance company was
not entitled to recovery simply because of the insured's reappearance and it relied also on the ten year statute of limitations.

Another case which has created considerable interest in the life insurance business in the past year is the case of Weldon v. Liberty National Life Ins. Co., et al. This case has not been finally concluded but is on appeal. The trial court rendered judgment in favor of the plaintiffs for some $75,000 against three life insurance companies. The three companies issued policies on the life of a minor child and the policies were purchased and owned by the child's aunt in Alabama. The aunt, a nurse, then proceeded to poison the child by putting arsenic in her soft drinks and collected the insurance proceeds but subsequently confessed and was executed for the murder. The action was brought under the wrongful death statute of Alabama by the parents who claimed that the policies were improperly issued because the aunt did not have an insurable interest in the life of her niece. So far as I know, this was an entirely new approach as far as the insurable interest cases are concerned and the appeal is being watched with great interest by counsel for life insurance companies.

One other subject should be mentioned here as being of considerable importance to insurance companies, not only in New York State, but in all states. The question involved is that of insurance company regulation by state officials and the case involved is that of Guardian Life Ins. Co. v. Bohlinger, the Superintendent of Insurance in the State of New York. The decision of the New York Appellate Division, First Department, appears at 130 N.Y.S. 2d 705 and affirms the lower court opinion. The case is now on appeal to the Court of Appeals, the court of last resort in New York. The proceeding was instituted by the company to review the determination of the Superintendent of Insurance denying an application pursuant to subsection 7(b) of Section 81 of the Insurance Law, for approval of the acquisition of certain real estate in the City of White Plains. This subsection provides that the acquisition by a domestic insurer of real estate "shall be requisite for its convenient accommodation in the transaction of its business." The last paragraph of subsection 7 provides that "no real property shall be acquired by any domestic insurer pursuant to paragraph . . . (b) . . . of this subsection 7, except with the approval of the Superintendent." The Appellate Division held that Section 34 of the Insurance Law does not limit the power of approval granted to the Superintendent of Insurance, as contended by the company, to a mere supervisory function of checking its technical compliance with the standard established by Section 81-7(b). The questions presented on appeal are the avail-
ability of judicial review of such determination by the Superintendent, the proper construction of subsection 7(b) of Section 81 and the criteria that governs the Superintendent in making such determinations, and the scope of judicial review thereof.

Although I have not covered any one subject as thoroughly as one would like to do when presenting a paper to such a learned group as this, I hope that I have furnished here some research material which may be found of value in the future by those confronted with problems in the areas on which I have touched.

LESSEE PROTECTION: PROPERTY DAMAGE LIABILITY

By

M. L. Landis

Shortly after May 6, 1949, the date on which Judge Nordbye of the United States District Court in Minneapolis handed down his opinion in the case of Goldman v. General Mills, Incorporated, Docket No. 2692, on the Civil Docket (see 359 Fed. 2d 359) various and numerous speakers made the welkin ring with suggestions on how to meet the issues created by that case.

What created the great interest to so many people other than to the plaintiffs, defendants, and those immediately concerned? The opinion held that the Surrender Clause, in a lease between the parties, containing the phrase “loss by fire and ordinary wear excepted,” did not relieve the defendant from liability for negligently setting fire to plaintiff’s building. The phrase was said by the court to be “somewhat ambiguous” upon the question of the negligent conduct by the lessee. This opinion fell upon General Mills, who no doubt were without the benefit of insurance protection for the circumstance in which they found themselves. Almost any tenant in the country could look at General Mills and say “It could have been me.”

What are the customary insurance practices involved in matters of this kind? First, general liability insurance policies contain an exclusion of liability for damage to property of others in the care, custody or control of the insured. Second, direct damage policies, like fire insurance contracts, contain subrogation clauses affording insurers opportunities to seek reimbursement from tortfeasors from whom insureds might have sought recovery. Thus, there is an insurance vacuum in which tenants may find themselves.
In all of the speech-making, three principal ideas, other than insurance, were advocated as some relief to those facing this risk:

1. Reciprocal exculpatory or hold harmless agreements between landlords and tenants.
2. Subrogation waivers by companies insuring the landlord.
3. Joinder of landlord and tenant as insureds in basic direct damage policies covering real estate.

It is one of the purposes of this paper to point out those aspects of the insurance device which keep it from serving adequately in this situation and also to emphasize the dire need for more exacting or expert legal service to tenants as one proper and adequate solution to the problem.

However, before we continue further with our purposes, it seems desirable to mention a paradox: Speech-making practically ceased when, on September 19, 1950, the United States Court of Appeals for the Eighth Circuit, being a divided court, reversed the District Court and held that where the undisputed evidence established that the lease provisions specified that risk of loss by fire would be carried by a fire insurance company and that the amount of the rental included the cost of fire insurance, there was no logical reason for giving any stricter construction to the phrase "loss by fire" when used in a lease than when used in a fire insurance policy. The Court of Appeals noted that "In all standard fire insurance contracts, there is the same contracting against 'loss by fire' through negligence as appears in this lease but there is no decision in Minnesota that questions its validity or asserts any public policy against it."

Can it be assumed that the decision of the Federal Court of Appeals quelled the panic started by the District Court decision? Hardly. On the contrary, the subject had probably merely become stale as a platform topic. No complete and satisfactory solution had been reached. The insurance industry made some minor adjustments in an effort to cope with it but there is as yet no general insurance market where all of these needs can be freely and promptly satisfied.

Note, however, that this deficiency in insurance protection does not extend to the homogeneous group including laundrymen, furriers, jewelers, tailors, warehousemen and others having the relations of bailor and bailee, or perhaps pledgor and pledgee. Here the insurance problem is relatively simple. These are all situations where the defendant might be liable for the personal property of others in his care. There are many types of inland
marine floaters available which provide adequate insurance protection in such cases.

The insurance problem is acute in those other areas where either owners or tenants of real property have a duty to prevent the spread of fire to the property of their neighbors, and to the landlord-tenant relationship as such. In these situations there lies catastrophe or almost unlimited exposure. How much protection should Mrs. O'Leary have had to protect her, had she been proven negligent in permitting the cow to kick over the lantern which started the Chicago fire? How much protection should the rag sorting establishment have purchased to obtain immunity in the case of the Chelsea, Massachusetts, fire, where 3500 buildings were destroyed and the estimate of property loss was in excess of twelve million dollars?

Although a few states, by statute, limit the liability of an owner or tenant for damage to this neighbor's property as the result of fire, such limitations have not found much support in our courts or in our legislatures. It is suggested that this unlimited exposure is materially minimized by the general purchase of fire insurance by owners of property and by the comparatively few instances of catastrophe cases. When a catastrophe occurs, such as the Texas City disaster and the East Ohio Gas explosion, the damage is so vast and the problems involved so intricate that litigation seems a poor remedy for obtaining redress or reimbursement for loss suffered.

Thus, it may be said that only those tenants and those owners of property who sense an imminent exposure to loss apply for and want insurance protection. However, for a risk or exposure to be insurable, four requirements must be met:

(1) There must be a sufficiently large and homogeneous group of exposure units to permit accurate prediction of average loss by application of the law of large numbers.
(2) Losses must be definite in time and place.
(3) Loss must be accidental in the basic sense of the expression.
(4) Loss must not visit all or a large section of the insured group at the same time; that is, there should not be a catastrophe hazard.

Measured on such a scale, it appears that property damage liability in the areas under consideration does not fulfill the requirements as an insurable hazard on points (1) and (4).
Instead of coming directly to grips with this aspect of the problem the industry seemed to prefer to toss the “hot potato” from one segment of the business to the other. Casualty underwriters contended such risks should properly be handled by fire underwriters, since they understood the problem of handling large concentrations of risk and on a “named peril” basis. Witness fire insurance policies providing limits of liability running into the millions. Fire underwriters claimed that the primary coverage was casualty; that is, liability based upon fault, with all the attendant promises by insurers of liability risks to investigate, defend litigation, et cetera.

The impasse between the two segments of insurance lost some of its potency as each segment could point to multiple line underwriting powers now obtainable in practically all states. But still, there was no rush into the market by qualified multiple line carriers. The lack of homogeneity of risk and the catastrophe hazard made the offerings most undesirable.

It should be noted that liability insurance contracts, as traditionally written, are “all risk.” They do not, as a general rule, include coverage for contractual liability. Property insurance contracts have been traditionally written on a “named peril” basis. To balance these several concepts in a practical situation has been an overwhelming problem. And the recent advent of the use of atomic power for peaceful purposes has not made the task any easier.

It is currently reported that requests for liability insurance up to 100 millions have been made by private concerns entering the atomic field. The domestic insurance market can provide from 2 to 3 millions and the foreign market is limited to about 10 millions. Thus it appears that insurance pools, the private market generally, and even government subsidy may not solve the problem in its entirety. It has been suggested that what is needed is legislation circumscribing the liabilities of organizations and individuals engaging in enterprises which can use atomic power.

One other aspect of the insurance device adds a restraining hand to prompt and easy solution of the matter. That aspect is the problem of obtaining adequate reinsurance. Whereas, the risk of fire is covered up to substantial limits and reinsurers have adjusted themselves to the distribution of such risks, the fact is that the basis upon which such distribution was possible was that the losses were infrequent. On the contrary, in the casualty insurance field, the reinsurance market is adjusted to an excess-of-loss basis, which recognizes that frequency rather than severity is the primary consideration.
As one observer has pointed out, take as an example a city gas storage installation on which there might be property damage liability insurance for a limit of 1 million dollars. What is the peril of which the underwriters are apprehensive? Explosion. Do we think of a "little" explosion as against a "big" one? No. What frequency is to be expected? If the installation lets go, the loss will be total. If the primary insurer carries the first $100,000 of loss, the obviously reasonable premium to pay for the $900,000 excess over the first $100,000 is 9/10 of the direct carrier's premium. Hence, from a sheer dollars and cents viewpoint, such risks have no attraction for direct writers because of their reinsurance costs.

We come then to the remaining purpose of this discussion. Since the risks are so heterogeneous and unattractive to the insurance device, it remains for the lawyers to draft leases, write contracts, and propose such legislation as will afford the maximum immunity obtainable in these ways.

The General Mills case with which we started this discussion, and on which the United States Supreme Court denied certiorari on March 12, 1951, turned on the presence in the testimony of evidence that the parties had talked over the matter of transferring their several liabilities to an insurance carrier. An altogether different result was obtained in a recent case decided by the Supreme Court of North Carolina, Winkler v. Appalachian Amusement Company, (238 N. CAR. 589; 79 S.E. 2d 185) wherein an employee of a lessee of a motion picture theater negligently caused fire damage to the theater through the operation of a popcorn machine in one of the dressing rooms. The lease contained the usual clause for return of the premises in good repair, "loss by fire excepted." There had been no discussion of insurance between the parties prior to entering into the lease arrangement. The North Carolina Supreme Court said that:

"Contracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it... Did these words (loss by fire excepted) mean that the lessee was to be exculpated from a fire which was the result of its own negligence? Such a concession would scarcely be looked for in a contract between business men. If the parties intended such a contract, we would expect them to so state in exact terms. It would be natural for the lessee, who had contracted to keep up repairs, to desire to escape liability for purely accidental fires and for the lessor to be willing to grant that relief, but it would not be natural that the lessor would be willing to relieve the lessee from damage caused by its own active negligence."
Lawyers cannot afford to wait until a Federal decision in North Carolina comes in conflict with the Federal decision in Minnesota, and thus reopens the case for review by the United States Supreme Court. In the meanwhile, the best assurances we can afford our intelligent clients are our recommendations that leases be individually drafted to embody the exact terms the parties agree upon and that we use such words that make the intentions of the parties absolutely clear.

One such specimen is submitted for such use as you may choose to make of it. It came to light as the result of an elevator fire at Hebron, North Dakota, where the building was a complete loss with $40,000 of insurance, with additional loss of $10,000 on grain and merchandise with no salvage. The elevator was located on land owned by the Northern Pacific Railway and leased from the company by the Russell Miller Milling Company of Minneapolis. The stipulation in the lease, freeing the railway company from subrogation, is regarded as a masterpiece of precise, clear wording that leaves no loophole for recovery although the fire was clearly caused by the railway company. It reads in part as follows:

“It is understood by the parties that the leased premises are in dangerous proximity to the tracks of the railway company and that persons and property on leased premises will be in danger of injury or destruction by fire or other causes incident to the operation of the railway, and lessee accepts this lease subject to such dangers.

“It is therefore agreed, as one of the material considerations of this lease, without which the same would not be granted, that the lessee assumes all risk of personal injury to the lessee and to the officers, servants, employees or customers of the lessee while on said premises, and all risk of loss, damage or destruction to buildings or contents, or to any other property brought upon or in proximity to the leased premises by the lessee, or by any other person with the consent or knowledge of the lessee, without regard to whether such loss be occasioned by fire or sparks from locomotive engines or other causes, incident to or arising from the movement of locomotives, trains or cars, misplaced switches, or in any respect from the operations of the railway, or to whether such loss or damage be the result of negligence or misconduct of any person in the employ or service of the railway company, or of defective appliances, engines or machinery, and the lessee shall save and hold harmless the railway company from all such damage, claim and losses.”

In conclusion, there is submitted also a suggestion provided by Carl C. Jones of the Concord, New Hampshire, Bar in a paper delivered before the Insurance Section of the American Bar Association in 1946, in an article entitled “Will Exculpatory Provi-
sion in Lease Protect Lessor from Damage Caused by his Negligence?" An adaptation of the following language may provide a usable suggestion:

"It is mutually agreed between the parties hereto that the lessor (lessee) shall not be liable for any damage of whatsoever kind, or by whomsoever caused, to person or property of the lessee (lessor) or to anyone on or about the premises by consent of the lessee (lessor), however caused and whether due in whole or in part to acts of negligence on the part of the lessor (lessee), his agents or servants, whether such acts be active or passive, and the lessee (lessor) agrees to hold the lessor (lessee) harmless against all such damage claims."

SECTION ON REAL ESTATE, PROBATE AND TRUST LAW ..................................................John R. Fike, Esq. Chairman

PANEL DISCUSSION

"Effect of Owner’s Execution of Land Contract or Mortgage upon a Joint Tenancy"

Moderator

John R. Fike, Esq.
Chairman of the Section

Members of the Panel

Wilber S. Aten, Esq. ..................................................Holdrege
Herman Ginsburg Esq. .............................................Lincoln
Robert G. Simmons, Jr., Esq. .................................Scottsbluff

EFFECT OF OWNER’S EXECUTION OF LAND CONTRACT OR MORTGAGE UPON A JOINT TENANCY

By

Herman Ginsburg

The subject assigned to this panel is the effect of owner’s execution of land contract or mortgage upon a joint tenancy. However, before we go into a discussion of the subject itself, it is necessary that we define our terms. This, I propose to do. After we have made our definitions and defined our subject, then we will get down to the answer to the particular problem presented.
However, we feel that any attempt to answer the questions pro-
pounded by the subject for discussion, without a complete under-
standing of what we are talking about, would be meaningless.

The first thing we must define is "JOINT TENANCY," it-
self. Just what is a Joint Tenancy? When does a Joint Tenancy
exist? What are indica of a Joint Tenancy? What are the rights
of a joint tenant?

I presume that it is no longer necessary to tell any Nebraska
lawyer that the estate in joint tenancy is recognized under Ne-
braska law. However, it is wise to note that the presumption is
against a joint tenancy, and that only when the instrument in
question clearly shows that it was the intent to create a joint
tenancy, will the court find that a joint tenancy exists. (See
Anderson vs. Everson, 93 Neb. 6063. It is therefore necessary
in every instance, before endeavoring to answer the problem sug-
gested in the title of the discussion in which we are now engaged,
that the attorney first interpret the conveyance in question in the
light of the Nebraska law to ascertain whether there is a true
joint tenancy involved, or whether the estate is actually something
different. Of course if the transaction in question is not a true
joint tenancy, then the rules which the members of this panel
will hereinafter discuss with reference to the effect of the execu-
tion of a contract or mortgage, will not necessarily apply.

This leads me to my next proposition. It must not be as-
sumed that simply because the conveyance in question contains a
 provision for survivorship that we are necessarily dealing with a
joint tenancy estate. There are a number of circumstances and
estates wherein a right of survivorship is created, or provided for,
which are not true joint tenancies and to which the rules applic-
able to joint tenancies will not apply. Thus, under the Nebraska
law it is perfectly competent for a party to create an estate in
tenancy in common and provide that the survivor should take the
remainder. (See Anson vs. Murphy, 149 Neb. 716; Neneman vs.
Rickley, 110 Neb. 446, and Arthur vs. Arthur, 115 Neb. 781). In
these cases, where you have tenancy in common with a right of
survivorship, or an estate for life with remainder in fee to a sur-
vivor, entirely different rules will apply. In such cases, contrary
to the rules applicable to joint tenancy estates, neither party can
destroy the right of survivorship; and secondly, the survivor
would take subject to the liability for debts. (See the cases above
cited and 2 Tiffany, Real Property, Sec. 421 (3rd ed). So again
I repeat, that before doing anything else it is incumbent upon the
attorney to first interpret and determine exactly what sort of an
estate he is dealing with, and to ascertain whether or not he has
a genuine joint tenancy to consider. To assume a joint tenancy merely because of a provision for survivorship or merely because the word "joint" is used in the conveyance, may, and undoubtedly will, lead the attorney into serious difficulty to say the least. In Nebraska, the attorney examining the particular conveyance involved should first satisfy himself that there was a clear expression of an intent to create a joint tenancy; and in answering that question he must remember that the provision for survivorship, if such he finds in the conveyance, is only one of the factors to be considered, and does not in and of itself necessarily indicate the creation of a joint tenancy; and then he must ascertain whether the manner of creation complied with the requirements for a joint tenancy.

Next, I would like to point out that there are, by virtue of specific statutes, certain estates which I will call hybrid estates, which may have certain of the attributes and incidents of joint tenancy, but which are not true joint tenancies. The rules applicable to these particular statutory provisions are not necessarily the rules which would be applicable to a true joint tenancy. I refer, for example, to Section 8-167 of the Revised Statutes, which deals with bank deposits. You will recall that the statute provides that if a deposit is made in the names of two or more persons, deliverable or payable to either or the survivor, then certain results follow. It will be noted that the language of the statute clearly says that if the deposit is payable to A or B, or to the survivor of A or B. At common law a conveyance to A or B or the survivor would not create a joint tenancy. As a matter of fact such a deposit is not a true joint tenancy. However, by virtue of this statute our court has held that there is a right of survivorship which can be enforced by the survivor, and which is not severed or destroyed by the withdrawal of the funds by one of the co-owners during his or her life time. (See Crowell vs. Milligan, 157 Neb. 127). In the last cited case it is said by our Supreme Court that,

"Where one joint tenant without consent withdraws the whole or part of the funds of a joint bank account during the life of both tenants, the joint tenancy is not destroyed."

This would indicate that if one of the joint owners of the account withdrew half of the deposit and placed it in his own account, that upon his death the survivor could claim the proceeds so deposited in the decedent's account. If that is the case, the court in effect does not recognize any right to sever a joint bank account at all. I am not going to go into all of the ramifications of the law relative to bank accounts in the names of two or more persons; but
I simply call attention to them in this discussion to the effect that we are not dealing with a true joint tenancy estate; and that the same rules will not necessarily apply in answering the question as to the effect of a lien upon, or conveyance of a part of the joint bank account by, or on behalf of one of the joint owners.

Also, under the provisions of Section 8-317 of the Revised Statutes it is specified that when a certificate of stock in a building and loan association is made to the joint account of two or more persons, the shares represented thereby shall be payable to either of them or to the survivor. It will be noted that the statutory language is simply that the share be made payable to the joint account of two or more persons. Apparently, under the statutory language, it is not even necessary that the shares state that they are to be paid to either or to the survivor or to them jointly, or whatever the case may be. The statutory language is broad enough to cover the case simply of where the certificate is made payable to the joint account of two or more persons. In Tobas vs. Mutual Building & Loan, 147 Neb. 676, the Supreme Court treated this statute the same as the statute with reference to bank deposits. Again, I simply repeat that we are not dealing with a true joint tenancy estate; and it behooves any attorney dealing with this subject to be certain to differentiate the rules applicable to true joint tenancies.

Likewise, in passing I will mention U. S. Treasury savings bonds, which are subject to the rules specified by the United States laws, and which are payable as herein specified. These are not to be treated with the rules of law applicable to joint tenancies. As a matter of fact, you are no doubt all familiar with the fact that the United States Government will pay the survivor on a bond made payable to A, and on his death, to B. Whereas under the state law such an attempted conveyance will be a nullity since it is an attempt to make a testamentary disposition without compliance with the laws relating thereto. I merely call attention to this in passing so that we will realize that when we are dealing with items of that nature we are not concerned with the true joint tenancy.

While it is true that the subject, as given to us, refers to the execution of a land contract or mortgage, which would indicate that we are to deal with real estate only, yet it is clearly the law of Nebraska that joint tenancies exist in personal property as well as in real estate. In the case of a true joint tenancy there is no difference in the rules applicable to personal property and real estate, subject to the statutory exceptions, to which I have hereinbefore referred. In the Crowell vs. Milligan case, heretofore cited,
the Supreme Court impliedly recognized that the estate of joint tenancy could exist in corporate stocks and bonds. In Homaker vs. Vesey, 57 Neb. 418, the court recognized joint ownership in personal property generally.

Now, after getting these preliminaries out of the way, we return to our first question: What is a Joint Tenancy? The answer is, that it is a particular estate in property which must be created in a certain way, and which has certain specific attributes. The answer in Nebraska was spelled out in Stuhm vs. Mikulski, 139 Neb. 374, wherein the court said,

"Such an estate must be created in two or more persons at the same time by the same conveyance and the holders of such an estate must be given an equal and like right to possession of the corpus of the estate. There must be a unity of possession, a unity of interest, a unity of time, and a unity of title in the holders of such an estate."

While it is true that a great deal of this discussion in the case cited may be said to be dicta, yet this statement which I have just read is a classic definition of a joint tenancy. In every case, therefore, after eliminating the exceptional circumstances which I have heretofore discussed, it is necessary for the attorney to first find whether the estate was created as required for the creation of a joint tenancy, and whether the four unities exist. (Since the Act of 1941 there has been an exception created in the case of a conveyance direct from the grantor to himself and another.) If not, we do not have a true joint tenancy, even though there may be a provision for survivorship. On the other hand, if the four unities exist, and if we had a true joint tenancy created, then the law spells out certain rights which the co-owners have. It has even been held that in the case of a true joint tenancy any attempt by the creator of the estate to restrict any of the rights vested in such an estate under the rules of law constitutes an unlawful restraint upon alienation which will not be recognized. By analogy to the rule applicable to father and son as joint tenants, that neither shall sell or encumber the property without the consent of the other, is void as constituting a restraint on the inherent rights of alienation.

Let me close the introductory portion of this panel discussion with this general statement: That first, in every case it is necessary for the attorney to determine whether a true joint tenancy exists; and secondly, if a true joint tenancy exists, then to determine what is the effect of the particular act of the joint tenants, or one of them, in question.

The next speaker on the panel will therefore discuss the
rights which each of the joint owners in a true joint tenancy has
in and to the property held in the joint tenancy estate; and the
last speaker will then discuss the effect of the execution of a con-
tract or a mortgage upon these rights. It will be observed, there-
fore, that in order to answer the question propounded to this
panel, it is necessary that we first differentiate between a true
joint tenancy and the hybrid other estates which may, and do,
exist in law; and secondly we must then know the rights of joint
tenants in a true joint tenancy estate; and then finally we can tell
the effect of particular acts upon such particular rights. We be-
lieve that in every case in which the problem is presented to him,
any lawyer is going to have to proceed in this manner before he
can definitely answer the question propounded.

EFFECT OF OWNERS EXECUTION OF LAND CONTRACT
OR MORTGAGE UPON JOINT TENANCY

By

Robert G. Simmons, Jr.

The subject of this panel discussion has arisen due to the
recent Nebraska case of Buford vs. Dahlke,1 which apparently is
the first Nebraska case actually holding that a joint tenancy has
been severed and the survivorship characteristic destroyed by an
act of one or more joint tenants.2 Previous to this case there was
some difference of opinion among Nebraska lawyers as to whether
or not the doctrine of severability, which destroys the survivor-
ship characteristic, applied in Nebraska.3 There now having been
a case holding that this doctrine does apply and that the survivor-
ship characteristic can be destroyed, it becomes pertinent among
lawyers to know exactly how far it goes and when it applies.

Since it admittedly does not apply to all “joint” ownerships,
which have been loosely referred to as “joint tenancies,” “in the
determination of whether or not any particular cotenancy is sever-

1 158 Neb. 39, 62 N.W. 2d, 252.
2 The cases of Stuehm vs. Mikulski, 139 Neb. 374, 297 N.W. 595, and
Anson vs. Murphy, 149 Neb. 716, 32 N.W. 2d 271, are sometimes quoted
to this effect, whereas, in truth the court held in these cases that no joint
tenancy had ever been created in the first place. Olander vs. City of
Omaha. 142 Neb. 346 N.W. 2d 62, is a case where property held in joint
tenancy was condemned by right of eminent domain. The effect of the
decision indicates the severance of the joint tenant’s interest, however the
subject of severance is not discussed.
3 See 29 Nebraska Law Review 244.
able in Nebraska, it is necessary first to determine whether the estate is in law a joint tenancy or whether it is some other estate to which has been attached a right of survivorship.”

TYPES OF COTENANCIES

Joint Tenancy

A true common law joint tenancy is defined as follows:

“an estate created in two or more persons at the same time by the same conveyance, and the holders of such an estate must be given an equal and like interest therein and be given equal and like right to the possession of the corpus of the estate. That there must be a unity of possession, a unity of interest, a unity of time and a unity of title in the holders of such an estate in order for it to exist.”

The mere fact that the standard form of a joint tenancy deed providing that grantees shall hold title “as joint tenants, and not as tenants in common” is used, does not necessarily mean that the joint tenancy defined above, and to which the doctrine of severability applies, may exist in any given situation, and that a tenancy in common was not created. Such deeds describing the grantees as “joint tenants, and not as tenants in common” were used in the cases of Stuehm vs. Mikulski, supra, and Anson vs. Murphy, supra, where the court held joint tenancies did not exist and that a tenancy in common was created. Arriving at such a result contrary to the expressed intention is not foreign to our law and is not restricted to joint tenancy deeds. Our court has often held that regardless of the indicated intent of the parties in the instrument “if the language used when weighed in the light of existing law defeats that intent and purpose, such intent and purpose must be discarded by the courts and the law allowed to control.”

Thus, even though the words “joint tenancy” may be used, and even the phrase “not as tenants in common,” if the facts creating

5 Stuehm vs. Mikulski, supra. This definition is not affected by the subsequent passage of Section 76-112 RS 1943 which in effect holds that such a joint tenancy can be created even though the conveyance is by a person to himself and another as joint tenants, thus removing the pitfall of Stuehm vs. Mikulski.
6 Jones vs. Shrigley, 150 Neb. 137, 33 N.W. 2d 510. The intent statute, Section 76-205 RS 1943, does not change the effect of the instrument in such circumstances regardless of the intent ascertainable from the four corners of the instrument. Andrews vs. Hall, 156 Neb. 817, 58 N.W. 2d 201.
the tenancy come under the definition of a tenancy in common, as distinguished from the definition of joint tenancy set forth above, the title will be considered to be tenancy in common rather than joint tenancy. "As between joint tenancies and tenancies in common, the law prefers the latter."

**TENANTS IN COMMON**

The following definition of a tenancy in common has been accepted by our court:

"A tenancy in common is where two or more persons hold the same land, with interest accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares."

**Bank Accounts**

Obviously, "joint" bank accounts under these definitions, are tenancies in common and not true joint tenancies. The rule seems now reasonably well settled that when deposits are made in a bank in the name of two or more persons, deliverable or payable to either or to the survivor or survivors, the deposit or any part thereof or the increase thereof may be delivered by the bank to either or the survivors, and that that rule of law not only protects the bank, but also fixes the property rights of the persons named in the deposit "unless the contrary appears from the terms of the deposit." A long line of cases so holding stem from In re Johnson's Estate. In that case the Supreme Court of Nebraska realized that all of the elements of a joint tenancy as required by the common law definition did not occur in a bank account, and that the bank account did not establish a technical joint tenancy. The court called the cotenancy there "an interest in the nature of a joint tenancy with the attendant right of survivorship."

**Real Estate**

There are other cotenancies than joint tenancies with the at-

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7 In re Estate of Vance, 149 Neb. 220, 30 N.W. 2d 677.
8 Jones vs. Shrigley, 150 Neb. 137, 33 N.W. 2d, 510. Although this definition, quoted from Black's Law Dictionary, page 713, limits the tenancy in common to land, the distinction between land and personal property apparently does not necessarily exist and a true joint tenancy or tenancy in common can occur in both personal property and real estate. See In re Estate of Vance, 149 Neb. 220, 30 N.W. 2d, 677.
9 Scriven vs. Scriven, 153 Neb. 655, 45 N.W. 2d, 760.
10 116 Neb. 686, 218 N.W. 739.
tendant right of survivorship, as in Anson vs. Murphy, supra, the tenancy is called "a tenancy in common with benefit of survivorship." The characteristic of survivorship is attached to the tenancy in common because the intent to have a survivorship among the grantees was evident and clear and the court held that the intention decreeing a survivorship is effectual.

Contract Tenancies

Likewise, an interest in the nature of a joint tenancy with the attendant right of survivorship which is not a joint tenancy can arise by contract and the tenancy will be subject to the conditions described in that contract. 11

ON WHAT COTENANCIES DOES SEVERANCE OCCUR

The doctrine of severability and consequent destruction of the survivorship characteristic occurs only in the true joint tenancies, and not the tenancies in common with the attendant right of survivorship. Our court in Anson vs. Murphy, supra, shows the difference between the two cotenancies in this regard as follows:

"It must be borne in mind that the creation of a joint tenancy includes the right of the survivor to take the whole estate as an incident thereto. In this respect it will be noted that an estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and that such an act has the effect of destroying the right of survivorship incidental to it. After the destruction of a joint tenancy by a joint tenant, nothing more than a tenancy in common remains. A survivorship attached to a tenancy in common is indestructible except by the voluntary action of all the tenants in common to so do. It will be noted, also, that survivorship as it relates to a tenancy in common is subject to certain restrictions, such as liability of the surviving estate for the debts of the deceased tenant in common, a liability which does not exist in the case of a survivorship incident to a properly created joint tenancy that is in existence upon the death of a joint tenant."

Further description of the distinction so far as severability is concerned between the true joint tenancy and a tenancy in common in the nature of a joint tenancy with the attendant right of survivorship, is set forth in the concurring opinion in Stuehm vs. Mikulski, supra, as follows:

"An estate in the nature of a joint tenancy can be created by contract. The right of survivorship can be supplied by the agree-

ment of the parties. But it is not, strictly speaking, a joint tenancy and it does not have all of the attributes of such an estate. There can be a sale, gift or pledge of the interest of one cotenant in such an estate created by specific contract without the destruction of the estate. The interests of the joint owners in such an estate are subject to debts. Such is not the case in a common-law joint tenancy."

Thus, all of these interests, which we loosely call "joint tenancies" do not fall within the narrow confines of the common law definition of the joint tenancy as set forth above. All of these tenancies do not have the characteristics of severability. The doctrine of severability as described in the case of Buford vs. Dahlke, supra, does not apply and the survivorship characteristic continues. This court, without specifically discussing severability, has in the case of Crowell vs. Milligan, applied this distinction as to severability. There, although the account was not a bank account it was a survivorship account with a trustee, where it was "clear that it was intended that the right of survivorship exist." The court, realizing that the account was not a true joint tenancy, but a tenancy in the nature of a joint tenancy with the attendant right of survivorship states:

"One of two joint owners of money deposited in a joint account payable to either or the survivor, cannot divest the survivorship right in the jointly owned account by withdrawing the money and depositing it in his individual account, without the knowledge and consent of the other."

Destruction of the beneficial effect of the survivorship characteristic, or severability as we are calling it, may also result in all of the survivorship cotenancies when, on equitable considerations, the court separates the legal title, which follows the right of survivorship from the equitable title. Because of other considerations, the court may hold the beneficial ownership of the property may actually be in someone other than the surviving joint tenant. The surviving joint tenant may be found to be a trustee holding title for another, or the creditor may be permitted to reach the whole interest in the jointly held property.

In fact, the result as to who actually has the beneficial ownership of the property as distinguished from the legal title, may result from whether or not a creditorship problem presents the

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12 157 Neb. 127, 59 N.W. 2d 346.
13 Buford vs. Dahlke, supra, involving a joint tenancy; In re Johnson's Estate, supra, and Rose vs. Kahler, 151 Neb. 532, 35 N.W. 2d 391 involving bank account tenancies in common with attendant rights of survivorship.
14 Nowka vs. Nowka, 157 Neb. 58, 58 N.W. 2d 600.
question to the court, or whether it is merely a matter of survivorship interest without a creditor being involved. The court has specifically held:

"Debtors may not be permitted to make investments in this manner and take title in joint tenancy and thus find an escape from the payment of their existing legal obligations."\(^{16}\)

Nebraska law is more liberal in protecting the creditor in joint tenancy situations than is the law of most other states. Our court, in Boone County Old Age Assistance Board vs. Myhre,\(^{17}\) cites with approval Goff vs. Yauman\(^{18}\) which holds that the voluntary act of the deceased joint tenant in creating a lien upon her interest in the joint tenancy, sufficiently severed the joint tenancy so that the creditor could collect the obligation secured by the lien by foreclosing upon the real estate after death. Our legislature made Goff vs. Yauman a part of our law in 1951.\(^{19}\)

Surprising as it may seem, there are very few Nebraska cases which discuss the problem from the light of the creditor relationship. We strongly believe that from the approval of the legislature and our Supreme Court of Goff vs. Yauman, supra, and the language used in Nowka vs. Nowka vs. supra quoted above preventing the use of joint tenancies to avoid payment of debts, together with the general principle of law "as between joint tenancies and tenancies in common, the law prefers the latter,"\(^{20}\) the court would find that an equitable tenancy in common existed in preference to a true joint tenancy when creditor's rights intervened. As stated in Anson vs. Murphy, supra, a survivorship as it relates to a tenancy in common is subject "to the liability of the surviving estate for the debts of the deceased tenant in common." Certainly such a result would be desirable for the protection of innocent creditors, especially those creditors whose debts arise from the expenses of the last illness and burial, who have no opportunity to effect a collection from the jointly held property prior to the death. In joint tenancies are to be permitted to be used so widely as they apparently are used in Nebraska, such a result should certainly obtain.

\(^{15}\)The background of Buford vs. Dahlke, supra, is a creditor attempting to collect a debt of the deceased cotenant.

\(^{16}\)Nowka vs. Nowka, 157 Neb. 58, 58 N.W. 2d 600.

\(^{17}\)149 Neb. 669, 32 N.W. 2d, 262.

\(^{18}\)298 N.W. 179, a Wisconsin case.

\(^{19}\)68-215.09 CS 1953.

\(^{20}\)In re Estate of Vance, 149 Neb. 220, 30 N.W. 2d, 677; Sanderson vs. Everson, 93 Neb. 606, 141 N.W. 1025.
WHEN DOES SEVERANCE OCCUR

We have come to the conclusion that unless the tenancy is a true joint tenancy as described and defined above or equitable considerations intervene, there is no doctrine of severability in Nebraska and the characteristic of survivorship is indestructible. However, if there is such a true joint tenancy, the doctrine of severability does apply and destruction of the survivorship occurs as we have seen from Buford vs. Dahlke. To what situations therefore does it apply?

CONTRACTS TO SELL

Contract of One Cotenant

Although Buford vs. Dahlke is a case in which both joint tenants entered into a contract to sell and the court held that severability applied, it is obvious from reading the opinion that the court would hold that a contract to convey by one of the joint tenants would operate to sever the joint tenancy. This is the general rule, for the conveyance by one destroyed the four unities needed for a joint tenancy.\(^{21}\)

Contract by All Joint Tenants

The court holds in Buford vs. Dahlke that

"It logically follows from what has been said that if all the joint tenants enter into a joint contract to sell the joint property, receive and accept a part of the purchase price, and put the purchaser in possession of the property, this destroys the joint tenancy in the realty, even though the vendor has retained the legal title to the realty as security for the balance of the purchase price."

The court states this on the theory that the activity of the two joint tenants in delivering possession has destroyed one of the four unities required of a true technical joint tenancy.

Contract to Convey Less Than Entire Interest

We fail to see where any distinction exists as to whether or not the property contracted to be sold is the whole interest or an undivided interest. If one cotenant contracts to convey, the unities are destroyed and severance occurs. If all join, severance occurs as to the interest contracted to be conveyed, but the unities remain as to the part retained. We find no cases on the subject.

\(^{21}\) See 129 A.L.R. 816.
Mutual Contract to Sever

Since Buford vs. Dahlke appears to be the only Nebraska case on the subject, to dwell further we must follow the cases in other states and it seems to be generally recognized that the parties can divide and sever a joint tenancy by a mutual contract and agreement between them to do so.\(^2\)

Leases

Likewise, any action, conveyance or lease by one of the joint tenants would likewise destroy the joint tenancy and sever it for the reason that the four unities are destroyed and one of the joint tenants has performed an act inconsistent with the principles and philosophy of the joint tenancy.\(^3\)

PARTITION

This is discussed by other members of the panel.

MORTGAGES

Does the doctrine of severability come into execution when a mortgage is executed? There seems to be some difference of holdings among the various states when a mortgage is executed by one of the joint tenants upon his sole interest in the jointly held property. The courts seem to hold that where the form of the mortgage conveyance is that the legal title passes to the mortgagee, then in that event, there is a severance.\(^4\) There is no Nebraska case, but the Wisconsin case of Goff vs. Yauman, supra, which is approved by the Nebraska court in the case of Boone County vs. Myhre, supra, and adopted by the legislature in 68-215.09, indicates that execution of a mortgage by one of the joint owners, would sever the joint tenancy. Based upon this analogy, and also the language used by the court in Buford vs. Dahlke, we are of the opinion that the Nebraska court would hold that the four unities would have been destroyed by the execution of a mortgage by one of the joint tenants, that severance would occur and that the survivorship characteristics would be destroyed.

We do not feel, however, that the same effect would occur when the mortgage would be executed by all of the joint tenants. A hurried reading of the language in Buford vs. Dahlke would indicate that the court holds that since when one joint tenant

\(^2\) 129 A.L.R. 817.
\(^3\) 129 A.L.R. 817.
\(^4\) 129 A.L.R. 817.
contracts to convey his joint interest, a severance occurs, that naturally if all of the joint tenants so contracted, it would sever the joint tenancy. This result does not necessarily follow, however, from the language used in Buford vs. Dahlke for the court lays great stress upon the fact that the contract by all joint tenancies to deliver possession destroys the unity of possession. A mortgage by all of the joint tenants remaining in possession, would, in our opinion, not destroy any of the unities, nor effect a severance, even though the form of the mortgage may actually be to convey the legal title, the equitable interest remaining in the landowners and that the mortgage being for security only.

SEVERANCE BY ATTACHMENT OF LIENS TO JOINT TENANT'S INTEREST

In other jurisdictions, it seems to be the general rule that a lien which attaches by operation of law to the interest of one of the joint tenants, attaches only to the interest of that joint tenant, and when that joint tenant dies, before possession of the real estate is obtained by the judgment creditor or the lien holder, the lien disappears for the interest upon which the lien existed has disappeared, the title being all in the survivor. A corollary to this proposition is that should the lien be upon the interest of the joint tenant who survives, then the lien attaches to the entire interest in the real estate, just as it would disappear should the joint tenant having the interest on which the lien attaches die first. There is thus consistency. Under this theory, it would therefore become necessary in order to have a severance of the joint tenancy interest, that more than a lien attached by reason of the operation of law, that is, the mere recording of a judgment for example would not sever the joint tenants interest. There would actually have to be a levy and taking possession of that interest by the Sheriff in order to effect a severance.

We have doubts, however, as to whether or not this doctrine would be applied in Nebraska, along the technical lines described above followed in other states. The reason for our doubt upon this matter stems from the approval by the Supreme Court of Nebraska of the case of Goff vs. Yauman, supra, in the case of Boone County Old Age Assistance Board vs. Myhre, supra, and its adoption by the legislature as Section 68-215.09 CS 1953. In the annotation to Goff vs. Yauman at 134 A.L.R. 957, the annotator describes this case as the only case which holds that a lien voluntarily

26 See Annotation 161 A.L.R. 1139, Zeigler vs. Bonnell, 126 Pac. 2d, 118, and Application of Gau, 41 N.W. 2d, 444.
placed upon the real estate by one of the joint tenants effects a severance of the joint tenancy. Goff vs. Yauman so holds, sufficiently at least so that the creditors could be protected and the lien could be foreclosed.\textsuperscript{27} Even though the case of Goff vs. Yauman has been disapproved in Minnesota\textsuperscript{28} upon the theory that the lien could only attach to the joint tenant's interest and that that interest disappeared when such tenant predeceased the surviving joint tenant, and even though the Wisconsin Legislature apparently changed its Old Age Assistance Statute,\textsuperscript{29} on which the case of Goff vs. Yauman arose, we are of the opinion that Goff vs. Yauman indicates the law of the State of Nebraska concerning this matter at this time because of its citation with approval by the court and adoption by the legislature. Thus, we submit that in Nebraska, the voluntary action of a joint tenant creating a lien upon the joint tenancy interest, severs the joint tenancy.

Goff vs. Yauman states:

"As there was likewise such consent on the part of Emma Goff, the resulting lien on her joint tenancy interest under the provisions in Sec. 49-26(4), Stats., is comparable to the lien under a mortgage in that it likewise is a lien upon property as security for the repayment of money, and rests upon the consent of the person upon whose interest in the property the lien attaches.\textsuperscript{4- \* \* \*}

"At all events, it suffices in the case at bar that Emma Goff had, at the time she applied for old age assistance under Sec. 49-26(4), Stats., the right to terminate the tenancy by transferring her interest; and likewise the right to subject this interest to the lien provided as security for such assistance by Sec. 49-26(4), Stats. In applying for and accepting the assistance, under the law which provided for the granting thereof upon the conditions that would operate to sever the tenancy, she terminated the tenancy by her own voluntary acts and was doing nothing more than what she had the right to do; and to which plaintiff had no more right to object than she would have had to object to a severance by an outright conveyance by Emma Goff of her interest in the property. Plaintiff had nothing but the right of survivorship in the joint tenancy was not severed and she had no right to restrain Emma Goff from severing the tenancy."

The case of Goff vs. Yauman distinguishes, however, the situation of an involuntary lien such as a judgment lien. The matter

\textsuperscript{27} The case does not even discuss the question as to whether the heirs of the joint tenant first dying receive the balance of that one-half interest of his ancestor, such as would be true with a real severance, or whether the balance goes by the survivorship provisions to the surviving joint tenant.

\textsuperscript{28} Application of Gau, 41 N.W. 2d, 444.

\textsuperscript{29} See application of Gau, 41 N.W. 2d, 444.
is not discussed at length in the case and we doubt that it could be reasonably said that that distinction is also a part of the Nebraska law. Based upon the analogy of the Nebraska cases which involve creditor's interest in joint tenancies, and where there is a distinct policy of the court to prevent joint tenancies from being used to “find an escape from the payment of their existing legal obligations”30 we are of the opinion that the Supreme Court of Nebraska would find that the judgment creditor’s lien attached to the joint tenant’s interest and did not disappear by his death. The court might do this by adhering to the technical characteristics of a joint tenancy so far as the legal title is concerned, but hold that the legal title passed to the surviving joint tenant encumbered with an equitable lien for the amount of the judgment, or as was stated in Buford vs. Dahlke, be held by the surviving joint tenant as a trustee.31

The analogy used in the last analysis, however, is not perfectly complete and it can therefore not be stated with any degree of certainty as to what the law of the State of Nebraska is upon the subject. The question is whether or not a creditor can enforce his lien at law or in equity on the interest of the joint tenant dying first, after his death. For the creditor’s protection therefore, a hard-hearted, cold-blooded policy of reducing claims against persons holding their property in joint tenancy must be followed and expeditious execution and levy would be required.32 This apparently follows from the general rule enforced in other states, and apparently would require creditors to follow strict and rigid enforcement practices where joint tenancies are involved, even despite their humanitarian personal desires, or their good business policies. If the general rule is to prevail in Nebraska, however, the creditors whose debt arises out of the expense of last illness, when credit by person holding his property in joint tenancy is most urgently needed, are not protected at all and they may completely lose the possibility of collecting for their services, even though there be adequate funds available before death. The creditor thus loses, not because of his own action, but because of a convenience to the joint tenants in their testamentary disposition.

CONCLUSION

As shown by the statements in the Nebraska cases cited above, the doctrine of severability applies only in the case of the true

30 Nowka vs. Nowka, supra.
31 See also In re Estate of Johnson, supra, and Rose vs. Kahler, supra.
32 See Zeigler vs. Bonnell, 126 Pac. 2d, 118.
joint tenancy where the four unities apply, survivorship being only one of the characteristics of joint tenancy and survivorship being available in other forms of tenancy where severability cannot occur. Thus, since a running bank account or an open account cannot have those four unities of time, possession, interest and title, the doctrine of severability can never apply, apparently, to a bank account, even though it may be a survivorship and "joint" account. To the true joint tenancies, however, the severability of the joint title and the survivorship interest can occur by action of one of the joint tenants inconsistent with the existence of a joint tenancy, in contracting to convey his interest, in conveying his interest, in mortgaging his interest, in voluntarily entering into a situation where a lien may arise, and perhaps even by incurring an obligation disassociated with the joint tenancy property, which may become a lien thereon. To the true joint tenancies severance also occurs by the action of all of the joint tenants in contracting to convey and deliver possession, (although probably not by their joint mortgage of the entire joint interest) even though the severability of the joint tenancy and the destruction of the survivorship character of the joint tenancy was contrary to their specific desired and disclosed intent.

As stated specifically by the Nebraska Supreme Court in Anson vs. Murphy and in the concurring opinion in Steuhm vs. Mikulski, the only distinguishing characteristics between a joint tenancy to which the right of survivorship is an indispensable incident, and a tenancy in common to which the right of survivorship has attached, after the tenancies have been created, is the characteristic that a joint tenancy is severable, even involuntarily, and that the interest of the joint tenant descends to the surviving joint tenant free of the debts of the first joint tenant to die, whereas in a tenancy in common with right of survivorship, the survivorship characteristic cannot be destroyed and the interest of the first joint tenant to die remains subject to his debts. Frankly, we doubt very much that many of the persons, except members of the bar, using joint tenancy titles in Nebraska, where a deed is used describing the grantees "as joint tenants, and not as tenants in common" understand this distinction between a joint tenancy and a tenancy in common with right of survivorship as to severability or liability for debts. We doubt if persons using these deeds intend the existence of the possibility of severance, or intend that the property should descend without being subject to the legal obligations of the first joint tenant to die.33

33 Steuhm vs. Mikulski, Buford vs. Dahlke.
34 See Rose vs. Kahler, supra.
The Nebraska State Bar Association has seen fit to publish a pamphlet to educate the public on that subject.

The court attempts to apply the intent statute (76-205 RS 1943) to give the intended effect to deeds that is clearly expressed in the conveyance.\textsuperscript{35} Since the incident of the joint tenancy deed most clearly expressed is an intention that survivorship shall attach, which effect might be destroyed unintentionally, and since "as between joint tenancies and tenancy in common, the law prefers the latter"\textsuperscript{36} and the tenancy in common can carry the intended survivorship effect, it might seem that the reason for the existence of the joint tenancy, except to avoid the payment of debts no longer exists. If our analysis of the attitude of the Nebraska Supreme Court concerning the use of joint tenancies to avoid the payment of debts is correct, then that reason for the continued existence of a true joint tenancy likewise disappears. It may therefore be that the law not being a fixed science "but advances or retrogrades with the advancement or retrogression of society,"\textsuperscript{37} has now advanced to that point where, there being no further reason for the existence of a joint tenancy, it should no longer obtain in Nebraska, just as the Supreme Court of Nebraska in Kerner vs. McDonald found that when the reason for the existence of estates by the entirety having disappeared, such tenancy thereby also disappeared. Thus, perhaps, our court, should upon its next available opportunity follow the preference for tenancies in common, enforce the expressed intent of continued survivorship and recognize that one joint tenant's interest can be sold, given away or pledged without destroying the intended survivorship and hold that the cotenant's interest can be applied to the payments of his debts after his decease, thereby simplifying the real estate law and eliminating the confusion of the question as to whether or not the archaic doctrine of severability applies in any one given instance.

\textsuperscript{35} Anson vs. Murphy, supra.

\textsuperscript{36} In re Estate of Vance, supra; Sanderson vs. Everson, supra; Olander vs. City of Omaha, supra.

\textsuperscript{37} Kerner vs. McDonald. 60 Neb. 663, 84 N.W. 92.

EFFECT OF OWNERS EXECUTION OF LAND CONTRACT OR MORTGAGE UPON JOINT TENANCY

By

Wilber S. Aten

Probably a true interpretation of a joint tenancy is that such
tenants have the entire estate for purposes of tenure and survivorship, but only a particular part or interest for the purpose of immediate alienation. In other words, that pertains to possessory right entirely. In other words, a joint tenant holds the whole in possession jointly, but nothing separately.

Now that's a little bit hard to reconcile with some of our propositions with regard to estates, but that is the law. Each joint tenant has and must have possession of the whole but with and not to the exclusion of the other joint tenants. In order to understand joint tenancy you have got to understand that part of the proposition.

They have equal rights to share in the enjoyment during life. Joint tenancy and tenancy in common are similar in those particular aspects.

Now as to rights of title, that's a little bit different than the right of possession. It's similar, however; each must and do have the same rights in the title to the exclusion of the third parties, but with and not to the exclusion of each other.

There has been some discussion as to whether or not the proportional interest owned by each of the joint tenants must be equal. Some of the courts have used rather loose language in saying that they have to be. Personally, from the authorities, I think that one could have two-thirds and the other a third, and still have joint tenancy. Now everyone would not agree with me in that regard, because there would be a unity of interest and of title, and unless the contrary is expressed of course it's always equal in proportion. That does not necessarily follow but it must be equal in interest.

Another thing about joint tenancy as Mr. Ginsburg has stated is that the right of survivorship is an incident of joint tenancy. In other words it's a characteristic of it, it doesn't have to be a joint tenancy to have a right of survivorship.

In the case of Neneman versus Rickley, a Nebraska case, 110 Neb. 446 there was involved a pre-nuptial agreement between a man and a woman where by each conveyed one-half of his or her property to the other, saying in joint ownership, and that on death all of the property would vest with the survivor subject to the claims of creditors. You will notice its says “subject to the claims of creditors.”

The wife died and her heirs were claiming against the husband. The court speaking through Judge Letton declined to decide whether it was a joint tenancy, and I think that we on the panel would submit that it was not, but did enforce the right of
survivorship. This case could have been doubly interesting had the man and wife been divorced and then one of them had instituted a partition action.

It is probably appropriate to remark that a right of survivorship created by means other than a joint tenancy, is probably indestructible, as Herman has mentioned, except by agreement of all parties concerned. In other words you still have the rights of contract the same as anything else.

A right of survivorship can be created validly in Nebraska in connection with a tenancy in common; and that case of course is Anson versus Murphy, as Mr. Ginsburg has detailed to you.

Another incident of joint ownership is the severance, which means that a joint tenancy is terminated and anything that has the effect of termination is a severance. Any act which will destroy one or more of the unities, if the act is such as to preclude the claimed force of survivorship in any interest in the subject matter terminates or severs the joint tenancy.

Judge Carter mentioned that in his concurring opinion in Stuhm versus Mikulski. The right of survivorship is destroyed when the joint tenancy is terminated. Now that is the distinction of course between a right of survivorship in connection with a tenancy in common. That does not result. Anything that destroys the unity of title or interest without effecting the unity of possession will also end the joint tenancy.

A good example of this is where one joint tenant conveys his interest to a third party. The third party holds his interest as a tenant in common with the other owners but this does not terminate the joint tenancy between the other joint tenants if there was more than one. In other words, he could, a third party intervening can't effect the relationship previously existing between the other joint tenants, but only with the joint tenant with whom he dealt.

The severance must occur during the lifetime of the joint tenant. Therefore a device by tenant can not operate as a severance, or a conveyance to take effect after death will not operate as a severance.

It thus follows that an act of severance may be voluntary or involuntary. A conveyance or disposition of the interest of one or more of the joint tenants creates a severance because it destroys the unity of title. It may also be terminated or severed by anything destroying the unity of possession, such as a partition action.
It would appear that the partition action probably must be completed. In Arthur versus Arthur this particular thing was under consideration, but it was actually decided on this principle by the court and the writer of the opinion, Justice Dean, so stated. However it is submitted that under the practice in Nebraska in a partition case when the proceedings reached the stage that the court determines and enters a decree adjudicating or decreeing the shares of the parties that that probably will constitute a severance.

In this particular case the court entered a decree determining the shares and then the one party appealed. In the meantime the party plaintiff was deceased and the court held that the entire title vested in the surviving joint tenant because the decree of the court was not in effect.

Another situation we used to have that we do not have any more was the marriage of a female joint tenant resulted in a severance, because her property automatically vested in her husband. That is not of course the law at the present time and we are not particularly concerned with it.

Logically it would appear that for one joint tenant to convey to another joint tenant that a release would be the proper instrument rather than an ordinary deed of conveyance. There is some authority for this notably in Corpus Juris.

Regardless of this joint tenants can terminate the joint tenancy by mutual agreement, something that can not be done with a right of survivorship unless it is in connection with a joint tenancy. And it should be remembered therefore that a right of survivorship not an incident of joint tenancy may or may not be terminated by the action of one of the owners, but could be ended by mutual agreement of the parties.

Another method of severance is the matter of contract and mortgage, and that will be covered by Mr. Simmons who follows me.

A testamentary disposition does not operate as a severance because it is uniformly held that the right of survivorship takes precedence on death. Therefore, you can not have that situation in regard to joint tenancy.

A joint tenancy is also terminated involuntarily by the execution of a judgment, insolvency or bankruptcy.

Under Section 47 and 70 of the Bankruptcy Act, it is uniformly held that the title of a bankrupt passes to the trustee upon the adjudication and that the trustee stands in the shoes of a
judgment creditor as of the precise time of the filing of the petition, voluntary or involuntary, upon which the adjudication is made. Those claims of course are quite material in considering the question with regard to bankruptcy.

There are cases holding as to estates by the entirety, which estates involved a right of survivorship but did not give a right of severance, that this is exactly what happened. Logically it would seem that the trustee would have to do something creating a severance, just the same as the bankrupt, because after all he does stand in the shoes or in the place of the bankrupt; and in order to do this probably the trustee would have to actually sell the property and obtain a confirmation of the sale before there would be a severance of a joint tenancy under the Bankruptcy Act.

Insolvency, which involves the receivership, logically should be the same thing as bankruptcy, but I have found no cases on this point. Certainly insolvency of one joint tenant taken alone entirely would not appear to operate as a severance.

A judgment lien will not operate as a severance, and the basis for this rule is that the lien exists and operates on whatever interest the judgment debtor has in the property and his interest is as a joint tenant with the incident of survivorship. Some jurisdictions hold that the actual seizure by the court operating through an officer of the court such as a levy by the sheriff, does operate as a severance before the actual sale and confirmation. New Jersey, Alabama, England and Ontario follow this rule. The basis for the rule is that the levy destroys the unity of possession, one of the four unities required in joint tenancy.

Michigan holds that the service of a writ of garnishment on a bank in the case of a joint bank deposit, operates as a severance. That happens to be the only case that I found on that particular subject.

It is submitted that under our practice the levy of an execution on personal property which results in the taking of actual physical possession of the property, would operate as a severance because it destroys the unity of possession, but that a levy on real estate might not do so because the officer does not take possession of the real estate although actually the right of possession in the event of sale goes back to the time of levy. At least, the safest practical rule would be to get the real estate sold and the sale confirmed before the death of one of the joint tenants.
JUDGE ROBERT R. TROYER: Well, I'll lay off of all of the preliminaries and get right down to work. I have two or three things that I'd like to tell you Omaha lawyers who are here, I hope you will carry it along. It doesn't apply to you fellows out state.

I'm getting tired of policing the law profession and keeping the laymen out of the County Court when the lawyers won't sign their pleadings. In other words, I'm afraid I'm going to jail some day, under Section 7-101, that says if a judge accepts an unsigned pleading that he goes to jail for thirty days—and if you'd put the lawyers in with him I'd go along with it. So I hope that doesn't happen to any of you from out state.

It's important in an estate proceedings because so often applications are filed by other people than the lawyer who is perhaps the lawyer for the administrator.

Then another one, signing bonds.

Do they do that out state? I hope not.

Now that is clearly against the statute, it is 11-114. Here is what our courts said about it in 17 Nebraska.

"The law prohibiting such signing is based upon considerations of sound public policy. An attorney should never allow himself to be placed in the attitude of encouraging litigation. Nor should he allow himself to became personally interested in the cause of his client by assuming any personal liability. When he does become thus interested a strong inducement is offered to seek and take unjust and unfair advantage of the opposite side without reference to the justice of his cause."

Here is a case that I wonder if we overlook a little bit, and that's what we are going to do, just touch a lot of high points. It's Breuer against Cassidy 155 Neb. 836. Very often the day the administrator is appointed they want to pay all the household bills; the widow pays them, or, maybe the administrator gets the bills together from the power company and the gas company and from Brandeis, and the doctor bill, and pays them; and then they proceed to throw them in the lawyer's file and forget them.

Breuer against Cassidy, the record shows that Karl Breuer filed a claim against the estate in the amount of $589.03. The record does not reveal that this claim was ever allowed except as a credit to Karl Breuer, Karl was the administrator subsequently in his report and final accounting as administrator of the estate. The final account was approved by the county court for Custer
County on November 8, 1949. The claim contains a number of items which in substance were as follows: "Mileage for trips from his home to the home of the deceased prior to her death; mileage and expenses for a trip to Lincoln to see the brother of deceased before her death; and compensation for laundry work" —now let's forget that mileage but here are the two items that apparently were proven—"and compensation for laundry work and for miscellaneous items purchased for the home, including a grocery bill, all incurred during the lifetime of the deceased."

As to the first group consisting of items accruing in her lifetime, we fail to find any basis for their allowance as valid claims against the estate of Anna L. Breuer. As to the claim for the grocery account and other miscellaneous items paid with his own funds during the lifetime of Anna L. Breuer, they are not allowable for another reason. Our statute provides that "Every person having a claim or demand against the estate of a deceased person who shall not after the giving of notice as re- quired in Section 30-601 exhibit his claim" and so on, "is forever barred."

"The persons holding the obligations against the estate filed no claim therefor"—mainly, he is saying, I guess what they're saying, the grocery store didn't file a claim. Well they didn't have one of course after it was paid—"and it is fundamental that an administrator may not waive the defense of nonclaim. The claimant here took no assignment of the claims in question and has therefore failed to show, as a matter of law, that he was the owner of any claim against the estate for these items. When he personally paid these claims he was a volunteer and nothing more. He was not authorized to pay claims of Anna L. Breuer during her lifetime. At most, he was but an agent who might obligate his principal" and so on.

Now how is it important? I wonder if we're slipping a little once in a while and not getting the claims on file, and of course in ninety-eight percent of the cases it runs along fine and nobody complains, and then you get one of these and then you're in trouble.

I even question the procedure where they come in with an application to pay claims and have the court sign an order. I don't know whether, under this case, this would be permissible or not, I don't know enough about federal estate tax, but sup- posing they'd pick it up and say, "Well, maybe you paid those bills, but you weren't supposed to, and we won't allow you deduc- tions there," I don't know. But I'm throwing that out as a sort of case you ought to study a little and see if it's something that's going to get you or your client into trouble.
Now there was another group of items in the same case. The second group of items in the claim were those incurred after the death of Anna Breuer; services for cleaning up the house after death, amounts paid for non-professional care of the deceased during her last sickness, in other words, he paid the nurse, a practical nurse; amounts paid himself and others in repairing a house for rental purposes which belonged to the estate.

As to the second group, consisting of items which accrued after the death of Anna Breuer and before the appointment of Karl Breuer as special administrator, a different rule is applicable. During this period he was an intermeddler. If the estate demanded immediate handling, the provisions of our statute providing for the appointment of a special administrator afford an adequate remedy. No claim is here made that all the assets of the estate were not accounted for, and therefore he can't be an executor de son tort.

I'm not going into the soundness of the decision, but I'm calling it to your attention that it's a danger point.

Now there were items that are properly allowable; cleaning up the house in order to rent it, and paying the nurse who probably needs the money; if so you better do it according to the rules or your client might be in trouble.

Another case that many of the boys overlook, in re Estate of White, 150 Neb. 167. That's on the question of the wife's funeral bill and expenses of last illness. The case says that the husband is liable for the funeral bill, expenses of last illness, but the wife may relieve the husband by providing in the will that they be paid by her estate; but if he elects against the will he can't take advantage of that provision.

Now we get a lot of accounts in the wife's estate where the funeral bills are paid out of the wife's estate, even intestate estates, or provisions with a will that is not broad enough. So something to think about in drawing wills, which is best; let the husband pay it or let it come out, and here's where they put the court on the spot a little on that. You have some small children perhaps and it's a rather small estate and the husband says he can't afford to pay the bill and they had a thousand dollars in the bank in the wife's name or a couple thousand. We shouldn't pay the funeral bill out of that money, he should pay the bill, and again, it's a case to call to your attention to perhaps save error.

Another subject entirely—what about non-resident executors? The general rule is stated in 95 A.L.R.: The rule is well settled that ordinarily courts have no discretion in respect to the
issue of letters to the persons nominated in the will, unless such persons are especially disqualified or such discretion is created by statute; and that the person appointed by the will can not be rejected by the court except where the law expressly so provides.

I re Estate of Haeffele, of course, is the case that said: "It's mandatory upon the court to appoint the named executor unless that person is legally incompetent." And they also said that the grounds for removal are not grounds to consider in making the appointment in the first instance.

Now one of the grounds for removal of course is if they remove the court may, that is a discretionary permissive; the other is a mandatory. In other words letter shall issue to the named executor unless legally incompetent. And it's surprising the number of cases that the men will come and say, "Well, this fellow is a non-resident so he can't serve." Well I think to have our record correct he should file a declination if you are going to do it that way.

Now American Jurisprudence, under "Executors and Administrators," says that: "In the absence of a statute to the contrary, nonresidence does not disqualify or render a person incompetent to be appointed and to qualify and serve as an executor or administrator." Of course, in Nebraska the administrator must be a resident of the state.

In still other states the statutes have changed the common-law rule only so far as to prevent non-residents from acting as administrators; and the courts, when construing legislation on this subject, seem more tender of the testator's right to choose whom he will to administer his estate, than of the right of a non-resident to be appointed administrator, if otherwise entitled to the appointment.

Bancroft's "Probate Practice", Section 234, citing California and Wyoming.

"The fact that a statute authorizes suspension of the powers of a representative who 'has permanently removed from the state' does not disqualify a non-resident named as executor in the first instance where he is not otherwise declared incompetent by the statute; nor does it authorize the court, immediately upon issuance of letters, to revoke them on the ground of nonresidence.

"The proper construction of such provision is only that if the executor, at the time of his appointment is a non-resident, and fails to come into the state and personally to conduct the business of the estate at such time and as frequently as the in-
terest of the estate and of those concerned in its settlement may require, his powers may be suspended and he may be removed. And in this respect the statute applied equally to resident as well as non-resident executors."

Now the Haeffele case cites a Michigan case which is a non-resident case. That's Breen against Kehoe, 142 Mich. 58.

"The foregoing discussion of the authorities satisfies us that our statute was not intended to absolutely disqualify or prohibit the appointment of non-residents to the office of executor, but to make the non-residence ground for the exercise of a discretion both in appointment and revocation. There is a wide difference between an administrator and an executor. The latter's appointment must ordinarily be made in accordance with the will of a testator, unless he is ineligible, or a statutory discretion, express or by implication, to refuse it is lodged with the court."

And they cite an early Wisconsin case that has some very nice language that goes this far in the syllabus. "By the common law an executor may be an alien, or born and reside out of the king's allegiance, and even an alien enemy, but yet he may be qualified to hold his trust."

So historically I think Nebraska is following the general rule, and a non-resident is eligible to serve, something to consider in drawing wills and also in the administration of estates.

However, we try to discourage it because we have had a lot of trouble. We discourage it by trying to talk them out of it, that the expense will be greater, and that the executor won't be able to charge for his traveling expenses back and forth.

On the matter of the foreign corporation, it's a little more complicated. We have had a couple of applications for the Council Bluffs Savings Bank which has trust powers, fiduciary powers, in Iowa, and we have taken the position that they are not eligible to serve as fiduciary in Nebraska.

Our statute permitting corporations to act as fiduciaries says "Trust companies organized under Sections 8-201 to 226," or then "National banks may also qualify." Just what would happen if a national bank in Iowa was authorized by the Federal Reserve, or, the Board of Governors of the Federal Reserve Bank, to qualify, and they would put their deposit up with the State Department perhaps they would be eligible to serve in Nebraska, but they would in all events have to qualify with our State Department.

The United States Supreme Court has passed on the question that they are subject to the state laws in acting as fiduciary. I
think that's probably in the Federal statute also. So, so much for foreign executors.

But here is what to try to do to cure it. Well, we are going to try to appoint a local administrator appointed with him, it's all right, we are going to have somebody local; or else the widow wants the bank to take care of everything, but still she doesn't want to resign as executrix.

That's no good, unless a vacancy exists, I believe that is administrator C.T.A. The court is without authority to appoint an extra one, and therefore he would be a mere trespasser, and in a dangerous position.

21 American Jurisprudence, Executors and Administrators, Section 774. "It is likewise essential to the validity of the appointment of an administrator with will annexed that it appear either that no one was nominated in the will as executor or that the person named can not or will not act. The appointment of an administrator with will annexed is void when made before the executor named refuses to act.

Now we have Nebraska Statutes 30-307. If the executor fails to qualify you may appoint. If the executor is a minor you may appoint during minority, or if he would die or if he were to be removed; and there is no remaining, then you may appoint, but there is no statute that authorizes the appointment of an administrator C.T.A. unless there is a vacancy.

The United States Supreme Court, Kane against Paul, 14 Peters 38, said "The powers given to the court are intended to protect the rights of executors; not to enlarge its jurisdiction to transfer them to another person. The action of the court, to be effective, to grant administration upon a will, an executor being alive, and capable of acting, must be within its powers. If not, the administration will be void."

Now here's another question, we have a little more time. Should the attorney witness the will? Should the attorney be the attesting witness?

Well, I think it depends on the circumstances, and you should know what the law is, discuss it with your client and advise him before you are or are not. In re Estate of Coons; the lawyer was not a witness, and they held that it was error to permit the attorney to testify to the mental capacity, because his information was gleaned in his professional capacity.

They cited another, or, there's another case in which the Coons case is affirmed, it's a case of a suit on an oral contract, however, of Nelson against Glidewell, 155 Neb. 372, in which the
court said "The only evidence offered in addition to this was
testimony of an attorney. Whether or not this offered testimony
had probative value in support of the alleged contract we are not
required to decide. It was clearly inadmissible.

"The testimony sought to be elicited was clearly communica-
tions and information received by the attorney in the role of att-
torney for the Glidewells and therefore inadmissible," and cited
the Coons case.

I'm wondering if it isn't also the duty of the court in the
absence of objection, to protect the professional relationship and
make the objection.

Now if he is a witness, an attesting witness, he must be
called as a witness if there is a contest. The Coons case also de-
cides that in order to make the prima facie case all attesting wit-
tnesses must be called as part of the prima facie case; so that's
another thing to consider before he becomes a witness.

And then I believe it is wide open if he is an attesting wit-
ness. Now maybe there are cases where it will be advisable to be
the attesting witness because the attorney has information that
will help sustain that will, that might, where he had been an
attorney for the family perhaps over a long period of time, the
testator would want him to disclose that information, and then
clearly he should be an attesting witness.

The case of Brown against Brown, 77 Neb. 125, is clearly in
point and there they held that when the attorney was requested
to act as a witness then he became, he stepped out, that was a
waiver, if you please, of the confidential communication, when
he became the attesting witness.

They have considered several other cases, but the Brown case
has never been reversed and it is clearly in point.

Now Lennox against Anderson is dicta on the point, but
they do quote what seems to be the general rule out of 64 A.L.R.
192, which is "Where a testator requests the attorney who drafted
the will, and with whom he has consulted in regard thereto, to
sign the will as an attesting witness, and the attorney does so, his
testimony with reference to the transaction and communications
between him and the testator at the time are not inadmissible as
privileged."

So those things are to be considered before you act as a
witness. Then of course the attorney is barred from further par-
ticipation in the case and his partner may be. Now the case of
in re Estate of Benson, 153 Neb. 824—I thought until I read it the other day, permitted the partner to serve, but the court says no, he may be.

In our opinion it can not properly be said in every case that a lawyer may not properly appear in a case where his partner could not, but that each case should depend on its own facts. In other words the partner may be barred.

Now let's talk about legislation.

Now there are two bills that were in the report of the Legislative Committee. I understand the House of Delegates referred that back to this Section.

Section 1 makes it easier to probate a will on default; but the section that really gets us into trouble is the third section which says that we are going to try the case according to the law of civil cases and whoever has the preponderance of the evidence, and its going to create a presumption of testamentary capacity, just a lot of things—I haven't had time to look at all the possibilities, but here, for example, under the new law if it's passed, who has the burden of proof? Who has the burden of going forward? Who has the burden of proving undue influence? Who has the burden of proving testamentary capacity?

Those are some of the things that have been settled over the last hundred years. Now if we are going to upset them, let's take some statute from some other state that has some interpretation, I mean, that has had a series of judicial interpretations, instead of taking just a hybrid.

In re Estate of Grey, 88 Neb. 835, decided in 1911, and never overruled, it is held that the doctor can testify to confidential communications in will cases.

Now I point that out. Why? Because I don't know what we're getting into in upsetting our settled law, and I do hope that this Section will turn down that proposed amendment to, I think it's 30-219. We are on dangerous ground when we are going to pioneer, and what's the need of it? What is the need of it? If our law is settled now, let's keep it settled unless you are looking for some more lawsuits and more trouble and expense, and I know that there's no one here that has that attitude, they want our law to be more efficient.

The other bill is one that I don't know that there's much need for. They want to upset our law of homestead, and I guess it's because of some guy that has a hundred thousand dollar
homestead and hasn’t made a proper will to take full advantage of the marital deductions, and so they want to pass a law. Pass a law to take care of some isolated situation, upset all of our law of homestead, at least, what will it mean after it is all done?

The Judicial Council is again recommending to the Supreme Court, and we hope they will recommend it to the legislature, the Model Small Estate Act, which was L.B. 143 of the last session of the legislature. That is the act that will take care of the transfer of personal property in amounts up to seven hundred dollars without probate, by affidavit.

The bill as introduced said seven hundred dollars less liens and encumbrances, in defining estates. The legislature took out the words “less liens and encumbrances” and the Attorney General has interpreted that to mean, that if the car is worth seven hundred one dollars and if there is a seven hundred dollar mortgage on it, you still have to go through probate. Why? Because the legislature took out that “less liens and encumbrances.”

Now I don’t think that there is anybody here that’s hungry enough to want some widow to probate an estate to get a couple hundred dollars out of the bank over here to pay the funeral bill, or out of a building and loan. The act is the model act suggested by the American Bar Association after a great deal of study by the Commissioners on Uniform State Laws.

Now one of the arguments against the bill, as I understood it, at the last session of the legislature was, that it could be a chance for fraud. It is not; because the creditor or the other person has forty days to file petition for administration, and if the petition for administration to probate of the will is filed, then the act can’t be used, and the title which the transferee gets is a defeasible title that the true owner can always take away from him.

So there is the protection, that’s what the Commissioners on Uniform State Law say about it, and I am talking about this because I hope the lawyers will say to their legislators, “Well, here is one that’s maybe going to take a little law business, but we think the public is entitled to it.” If we are going to have good public relations, let’s show them that we do work for the public interest.

Now there is another bill that the Judicial Council is recommending to the Supreme Court, and we hope the court to the legislature, to amend Sections 30-1102 to 1106, permitting the sale of real estate by an administrator for the payment of debts. The purpose of the bill, is to get an adjudication in that action that
the property is not a homestead, so the buyer may have an ad-
judication to rely on that the property is not a homestead.

I wanted them to go a step further and do what the Model
Probate Code does in Section 162, you can quiet title in that li-
cense action, and it seems to me that sometimes we are going to
have to come to that. An administrator has to sell some property
to pay debts and it is full of clouds on the title, he is not going to
find a buyer. Still the cases say that the administrator can not
quiet title. He does not have the legal title, therefore he can not
quiet it. We ought to have some legislation on that, and that is
something for you folks to study at a future session.

And you also, I think, might give some study to the question
of operation of a business by a special administrator and a regu-
lar administrator; and the Model Probate Code has gone into that,
that's Section 101. I am throwing these things out for future
study.

PANEL DISCUSSION
“Sundry Title Problems”
Moderator
John R. Fike, Esq.
Chairman of the Section

Members of the Panel
Lynn E. Heth, Esq. .................................................................Valentine
C. B. Pedersen, Esq. ..............................................................Omaha
David R. Warner, Esq. ......................................................Dakota City

JOHN FIKE: There is one more part to go through the re-
mainer of this program, the panel on “Sundry Title Problems”.

This panel is to proceed with this program at this time. I
might say as a word of introduction that there is a little message
that goes with this, it has to do with our real estate transactions.
We all know that at best a real estate transaction from beginning
to end is rather cumbersome, it is based upon your abstract, the
preparation of it and the extension of it and the examination of
it, and the general public does not understand what all is involved
in that, they can not understand where this lawyer has to examine
it and this lawyer has examined it and then another examines it,
and then on top of it they can't understand why one lawyer says
it's perfectly good and a little later on the other lawyer says
there's something wrong with it, and so forth.
All of that leads to the point that we need some kind of simplification if we can, and here in Nebraska we have a little help on that, we have our title standards and we have our Merchantability Act, which we all agree are both a big help to the examining lawyer in examining an abstract.

Now the purpose of this program here is two or three-fold, I presume, of this panel. Then I want to point out to you a few of the practical problems you may hit. The other thing is to correlate for you perhaps how they are related to some particular title standard, and, third, that perhaps in so doing we may find that there are some of our standards that may need to be revised or we may need new ones or for it to serve as a guide for your committee that you have just proceeded to elect in working on standardization for next year.

So to let you know that there is this little message, we will proceed with it. This panel program is on the basis of questions and answers back and forth.

Mr. Heth, a client comes into your office, tells you he has purchased some real estate, and he wants you to examine the abstract. What is your basic consideration in making that examination?

LYNN HETH: Well, it is to arrive at a conclusion as to whether or not the abstract shows a merchantable title in the seller and to advise the client as to whether or not it does.

JOHN FIKE: All right, everyone knows generally what a merchantable title is, but in order to get this thing under way will you state briefly what you understand by that term?

LYNN HETH: The Supreme Court of Nebraska has given us various definitions. In Northhouse v. Torstenton, 146 Neb. 187, 19 N W 2d 34, 36, the court quoted with approval the following:

"The term ‘marketable title’ is difficult of definition, but, accepting the prevailing rule that a good title is a marketable title, a ‘clear title,’ ‘merchantable title,’ or ‘marketable title’ generally means a title which consists of both the legal and equitable title, and is free from reasonable doubt in law or in fact; not merely a title valid in fact, but one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money; a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept."
and in Campagna v. HOLC 141 Neb. 429, 3 NW 2d 750, 751, the court said:

"A merchantable title need not be free from every technical defect, but the test is whether a man of reasonable prudence, familiar with the facts and the questions of law involved, would, in the ordinary course of business, accept such a title as one which could be sold to a reasonable purchaser."

JOHN FIKE: Those are good definitions. It shouldn’t be too difficult to determine whether the title this abstract discloses is free of reasonable doubt or not. But when you find something in the abstract which you think is not serious but is a defect in the perfection of the title do you ever have any trouble deciding whether it affects merchantability?

LYNN HETH: Yes, of course I do, and I imagine in this I am not different from any other lawyer in the state of Nebraska. But the unfortunate thing here, particularly from the professional standpoint, is that in many of these cases our uncertainty stems, not from wondering whether this defect creates a reasonable doubt as to the validity of the seller’s title, but from wondering whether a future title examiner might assert that it does. In other words, I think that most lawyers, at least in some instances, still examine titles from the standpoint of what some later examiner might require, whether it might be right or wrong, rather than solely from the standpoint of whether, in the examiner’s opinion, the abstract discloses anything which reasonably affects the certainty of the seller’s title.

JOHN FIKE: I agree that probably all of us at times commit this error. But certainly the bar of Nebraska is much better fortified toward avoidance of the error than it was ten years ago. The Standards for Title Examination which were first approved by this Section in 1945 and our Marketable Title Act of 1947 have eliminated as possible future objections a great number of questions which were formerly made the basis of objections often-times out of fear as to a future requirement rather than out of a conviction on the part of present examiner that the title is really doubtful.

LYNN HETH: Yes—the Title Standards and the Marketable Title Act have been a great help to the lawyers of Nebraska—and they have also been of much benefit to the public generally through their elimination of many needless quieting title actions and of the need to correct non-meritorious objections. I think the lawyers of this state are relying more and more on the title standards and have come generally to accept them for the purpose for which they were intended. These standards and the Marketable
Title Act have done a lot to simplify the perhaps overly technical practices which have developed over the years in the handling of real estate transactions. The public should be, and I think it is, pleased with these advancements.

But I think there are still, notwithstanding these developments, too many uncertainties in the determination of whether or not a particular title is merchantable. It occurs to me that there is a continuing need for review and modification of the title standards which we already have, and for additions to them.

JOHN FIKE: That brings up this point. Here in Nebraska our title standards have become more than standards agreed upon among the lawyers to promote uniformity in the examination of titles. They have been enacted by our legislature into the law of the state. What do you think of that, Mr. Warner?

DAVID WARNER: We are using hindsight which we all recognize is generally sharper than foresight; and with that in mind I would say I think there is a considerable amount of question as to the advisability of having enacted the Title Standards into law.

I believe it was done originally with the best of intentions. In the beginning there was skepticism as to the use of the standards. Much of that skepticism was reasonable. The standards were new and no one was sure just how the other fellow would react to them. One examiner might be afraid to use them because he feared that the next one might refuse to use them. The legislation was promoted, I presume, on the theory that if the standards were enacted into law the hesitancy to accept them as sufficient guides would be overcome.

It is probably true that the original enactment of the standards into law did serve its purpose of accelerating their general acceptance by the bar. But I think the value of the legislation ended there. If the original enactment wasn’t a mistake I think the continuance in effect of the statute is.

JOHN FIKE: Why do you say that?

DAVID WARNER: For one thing, and with the greatest respect for the lawyers who worked to develop the standards in the first place and with very sincere appreciation of their very hard work I think Title Standards to serve their underlying purpose should be reviewed from time to time to determine whether in the light of recent developments there are modifications which should be made in them or in the comments on which they are based. Also, toward the end of adding more standards. The requirement of amending a statute in order to modify or add a standard involves too much time and too much red tape. These should be standards which the lawyers adopt for their own guidance and
should be subject to revision and modification by the lawyers themselves as the need may arise. Legislative enactment is unnecessary and cumbersome.

Secondly, the comments and discussions explaining the standards can not be included in the legislation. Their effective availability to the profession of the comment is lessened considerably as a result of this—as for example in the case of a lawyer who uses his statutes in looking up the standards and goes back no further than that.

Next, there is a possibility of some lawyers looking to the standards as the basic law. We know this shouldn't be done—but on the other hand the same lack of uniformity in the thinking of lawyers which has created the need for title standards may also suggest that some lawyers will fail to recognize the standards for what they are, especially since they are found in the statutes. And this possibility in my opinion ought not to exist.

Another objection is that so long as some of the standards are in the statutes, modifications and additions which haven't been given legislative approval are likely not to have general acceptance by the bar.

JOHN FIKE: Your thinking is in line with that of the Committee on Acceptable Titles to Real Property, of the American Bar Association's Real Estate Section. In a report of that committee to the 1953 meeting of the Section it was noted without commendation that Nebraska is the only state which has legislation of this kind and that, as far as was then known, no other state had given serious consideration to legislation of this type. It is interesting to note that in a footnote to that report Perry W. Morton, past chairman and one of the hardest working all time members of this Section, was quoted as follows:

"Practically all of us are now sorry that the legislature ever saw fit to write the first forty-one standards onto the statute books. I am very certain that the disadvantages of such an enactment greatly outweigh the advantages. I would strongly urge that you 'think twice' before doing anything to encourage other states to follow the plan of having standards adopted by the legislature."

Mr. Pedersen, Mr. Warner has suggested he thinks it's a mistake to continue in effect the Standards of Title Examination Act. How do you think the bar would react to the repeal of the Act?

C. B. PEDERSEN: Well, perhaps some lawyers would take the position that by its repeal of the Act the legislature had declared the Standards ought not to be relied on. And then we might be
even behind where we were when the act was first adopted. But it seems to me it would not require too much additional education on the reasons for repeal to get all our lawyers to thinking again of Title Standards as what they are—standards agreed to and accepted by lawyers generally, for their own use, as guides in determining whether a particular title defect creates a reasonable doubt as to the validity of the title in question.

JOHN FIKE: All right—I think we have spent enough time on this general problem. But we have suggested that some modifications of and additions to our title standards may be in order.

Have any of you fellows anything in mind which might be a necessary or proper subject of addition or modification?

C. B. PEDERSEN: Yes, I thought of a possible enlargement of Standard No. 34 which relates to the federal estate tax lien. That Standard as originally enacted provided in substance that an examiner need not request any showing as to payment of such tax if more than ten years had elapsed since the death of the titleholder. It seems to me that in view of the provision of the federal estate tax law which releases from the lien of the tax any property which is sold or mortgaged by a surviving joint tenant, and other persons in a defined class, to a bona fide purchaser or mortgagee for an adequate and full consideration in money or moneysworth, the Standards could be enlarged to cover such a situation. See Section 6324 of the Internal Revenue Code of 1954.

JOHN FIKE: Mr. Heth, do you think this same situation could be applied to the federal gift tax?

LYNN HETH: Under the 1939 Code the matter of estate and gift tax liens were treated in entirely different sections of the Code, the estate tax under Section 827 and the gift tax under Section 1009. Under the 1954 Code, these liens were treated under subsections of Section 6324. In each instance, the period of limitation is the same, and in each instance the property is relieved of the lien when transferred to a bona fide purchaser, mortgagee, or pledgee, for an adequate and full consideration in money or moneysworth. So, the Standard of title examination could equally apply to both liens.

JOHN FIKE: Would you have any idea as to what would be the possible reason for the lien removal provision in the Code?

LYNN HETH: One of the reasons may be suggested by the Code itself which provides that the lien shall attach to the money or property of value received for the property sold, so that the Government's position is not changed.
JOHN FIKE: Mr. Heth, what do you think of the adequacy of our present Standard No. 33 with respect to the lien of the state inheritance tax?

LYNN HETH: Well, that standard merely states in effect that after five years from the assessment of the state inheritance tax the tax is no longer a lien on the assets of the estate. It's all right so far as it goes, both under the prior inheritance tax law and the revision of 1953. But it says nothing about a bona fide purchaser—yet the new inheritance tax law, Section 77-2037, except from the provision that the lien shall continue until the tax is paid the case of a bona fide purchase for value without notice. I understand there is considerable disagreement as to just what, if anything, this exception means—that some lawyers even take the position it is impossible for there to be a bona fide purchaser so far as inheritance tax is concerned if there has been no determination as to liability for such tax.

If our legislature intended to provide a rule similar to the federal rule probably an amendment of the law to clarify the legislative intent would be required. In the meantime, a Title Standard defining those situations in which there could be a bona fide purchaser without notice of a lien for inheritance tax where there has been no determination might be in order. Also, a standard advising whether the word “purchaser” includes “mortgagee.” That would be something to refer to the Title Standardization Committee.

JOHN FIKE: Here is a problem which I understand was submitted to the officers of this Section about a year ago for consideration in determining whether some modification in Standard No. 9 might be in order. You will recall that Standard No. 9 relates to escheat proceedings in the case of title in an alien or a foreign corporation. Among other things it provides that where title to land is now held by a foreign corporation or by an alien and the state has not instituted escheat proceedings, the title examiner should pass the title with the notation that the transfer contemplated should be made prior to institution of such proceedings by the state. In the comment under the Standard it is observed that the state alone can take advantage of the statutory restrictions on foreign corporations and can not do so after title has passed to one capable of receiving and holding it. Among other authorities cited in the comment in Section 76-402 of the Statutes, which is the basic prohibition against aliens and foreign corporations acquiring or holding title to land.

The problem was this: Some Nebraska real estate was devised to a foreign corporation. The corporation entered into a
contract for the sale of the land to an individual. The buyer had the abstract examined, and the examining attorney, noting that no escheat proceedings had been instituted, passed the title. The abstract was then examined by another attorney for a loan company to whom the buyer had made application for a loan to finance the purchase. The attorney for the loan company refused to pass the title. His reasoning was that the devise to the foreign corporation was completely void and that therefore no title at all ever vested in the corporation. Accordingly, it had no title to convey even though escheat proceedings had not been instituted. The first examiner referred to Standard No. 9, but the second examiner asserted it had no application because it requires that title be held by the foreign corporation, or alien. Now, Mr. Warner, do you think there is any need for a change in Standard No. 9, in the light of this situation?

DAVID WARNER: Well, I have not reviewed the authorities on which the second examiner based his opinion. However, I understand he cited strong authority in support of the conclusion that the devise to the foreign corporation was completely void, and that the probabilities are he was right—that is, that no title at all passed to the foreign corporation under the void devise. Assuming that his conclusion was correct, then I think definitely some modification should be made in the Standard, or at least in the comment explaining the Standard.

Granted that the Standard does purport to apply only where title "was held by a foreign corporation or by an alien" or "is now held by a foreign corporation or by an alien," many lawyers not familiar with the fine distinction which the problem involves would, I believe, fail to note the inapplicability of the Standard in the case of a completely void transfer to a foreign corporation or alien. Beyond this, I think it's possible that the language of the Standard itself may be in some degree misleading in its broad reference to the state not having taken advantage of "the statutory restrictions on holding of land by such parties," and also I think there's a possibility of being misled by the citation and the comment of Section 76-402, the statute on which the second examiner's conclusion had to be based.

If we still assume that the second examiner came to a correct conclusion, it would seem to me that the Standard itself should be modified to clearly point out its inapplicability in the case of a transfer to a foreign corporation or alien which is completely void. And if such modification of the Standard were not made, certainly the least that should be done would be to add to the com-
ment a caution against misapplication of the Standard in a situation such as the one we are talking about.

JOHN FIKE: Mr. Pedersen, a client comes into your office stating that two years ago he purchased black acre from Jones under a land contract for $10,000, paying down $3,000 in cash, and the balance of $7,000 to be paid in monthly installments of $60.00 of principal and interest. The purchaser is in possession of the property. He states that yesterday he received a letter from Brown's attorney that Brown obtained a judgment of $5,000 against Jones on September 1, 1954 in the District Court of Douglas County, Nebraska, and that any further payments made by the client to Jones would be at the client's own peril. The unpaid balance due Jones under the contract is $6,000. Is the client safe in continuing to make payments under the contract?

C. B. PEDERSEN: I think he should be, although the matter has never squarely been decided by our Supreme Court. In Wehn v. Fall, 55 Neb. 547, the Court stated that the mere docketing of a judgment against a vendor of real estate is not notice to the vendee in possession and does not impose on him a duty to apply deferred installments of the purchase price in satisfaction of such judgment. The vendee is not bound to keep the run of the dockets, but a judgment of the District Court, against the vendor of land who retains legal title, attaches as a lien to such land, and, as against vendee in possession with actual notice may be enforced to the extent of the unpaid purchase price. There have been a number of Nebraska cases along this same line, but none has defined what is meant by actual notice. The nearest approach to an answer is in the case of Filley, et al. v. Duncan, 1 Neb. 134, where the Court stated that it did not think that a simple notice to the vendee was sufficient, and that the creditors should bring an action in the nature of a creditor's bill, and have the payments enjoined until the rights of the parties are determined. The Court further stated:

"The party who seeks to interfere with and override a lawful transaction, and intercept payments due under legal obligations, and have the same applied in satisfaction of his claims should, it seems to me, provide himself with authority from some competent power."

JOHN FIKE: Do you believe that the dictum in that case expresses good law?

C. B. PEDERSEN: Everybody understands that dictum is not law, but it seems that what the judge said in that case should be the law.

JOHN FIKE: Considering that to be the law, should we, as
examiners, be able to pass a title and ignore the judgment unless the judgment creditor has taken legal action to enforce his judgment?

C. B. Pedersen: It seems to me that we should be able to pass the title, but this is a matter that could well be considered by a Title Standardization Committee.

John Fike: We are getting down pretty close to the end of our time here, but I think we can take up one more problem here and then any discussion that may follow after that.

David Warner: I have quarreled with myself for several years over whether a straight quit claim deed is sufficient to start an unbroken chain of title under our Marketable Title Act when the grantor in that deed had no title of record.

John Fike: I don’t see why. It seems to me it makes no difference what kind of deed you’ve got—if the chain of title under it is unbroken for twenty-three years or longer the Marketable Title Act applies. And that is true regardless of whether the grantor in the original deed had no title at all or whether the deed is completely void.

David Warner: I have in mind a deed which simply quit claims, or conveys, “all my interest,” when the record shows no interest in the grantor. Section 2 of the Act provides a person shall be deemed to have an unbroken chain of title “to an interest in real estate” when the public records disclose a conveyance, or other title transaction, recorded for twenty-two years or longer “which conveyance or other title transaction purports to create such interest in such person or his immediate or remote grantors.” My concern is over the fact that a mere release or conveyance of such interest as the grantor may have, coupled with no warranties of any kind, does not purport to create any interest in the grantee where the grantor has no title of record. The problem is not that the deed conveys nothing because of the grantor’s lack of title, but because the grantor does not purport to convey anything—only what he may have—and so far as the record shows he hasn’t anything.

John Fike: Well, I am still not convinced. My thinking is that the legislature was really concerned only with the length of the unbroken chain—and not with the nature of the title transaction which starts it. A completely void deed—for instance, a bad tax deed—starts the chain. Why shouldn’t a quit claim deed, even though the grantor, has no title of record? Isn’t it fair to assume that he wouldn’t have given the deed unless he had some kind of claim, even though it doesn’t appear of record?
DAVID WARNER: I agree that that should be true. But I look at the statute again and it says a conveyance “which purports to create such interest.” And I do not see how a conveyance of “such interest as I may have” by one who has no interest of record purports to create the interest with which we are now concerned. I would like to agree with you, but I would feel better about it if I had a Title Standard to back me up.

JOHN FIKE: That concludes our portion of the program.

ASSOCIATION DINNER FOR MEMBERS
AND THEIR LADIES
Presiding ............................................................J. D. Cronin, Esq.
President of the Nebraska State Bar Association

INTRODUCTION OF DISTINGUISHED GUESTS
“THE THIN LINE” ..................................................Hon. John Daly
New York, N. Y.
Vice-President in charge of news and public affairs of the
American Broadcasting Company.

THE THIN LINE

By
Hon. John C. Daly

I’m here to discuss a serious subject—Foreign Affairs. A subject infinite in its complexity, using a language virtually unintelligible to laymen. It is a subject so gloomy that at times I think we’re all tempted—like the tipsy gentleman on seeing the pink elephant—to pretend it isn’t there. Unfortunately, everytime we try this, something, somewhere in the world, rises like a spectre to haunt our every wakeful hour.

An an alternative, I think many of us would generously make Foreign Policy the exclusive property of those well-dressed, convenient servants in the State Department (hoping they won’t overdo it, of course). We, then, can be free to forget it beyond reading a headline (and maybe the first paragraph) before turning over to see what’s new with Marilyn and Joe.

But none of these will do, and we might as well accept it: The Foreign Policy we pursue as a nation will influence the kind of life we’ll lead, and may determine if, indeed, we will live at all.

When diplomats talk to one another, we are reminded of the two psychiatrists who met on Fifth Avenue. One said a bright
“hello” to his colleague and moved down the street. His colleague turned and looked after him for a moment and then said—“I wonder what he meant by that.”

I want to state that in my opinion, our present Secretary of State, John Foster Dulles, has done an excellent job in the face of an over-powering and complex problem.

The problem is Communism. The menace is Soviet Russia. The threat is conquest. Possibly—destruction.

The threat is great and growing ... and something more than what we have now is needed. I think we are all becoming aware that for our country—our families—ourselves—there exists only a thin line between security and disaster. If we want the kind of Foreign Policy that will ward off and eliminate the threat, we’ve got to demand it, support it, no matter how unpleasant or difficult the sacrifice, and use our influence as community leaders to sway public opinion.

Neither this Administration, nor any other, can pursue an effective Foreign Policy without support—grass roots support—that will even persuade some of our congressmen to look beyond their own district. It always comes back to us—the people. If we don’t want to do anything about helping ourselves, nobody is going to do it for us.

Let’s look at the degree and kinds of danger...

The most obvious facet of the Soviet threat is military. Second, we are aware, too, of the subversive technique of aggression. Finally, there is the economic threat—which could be the gravest of all.

These threats emerge from the Soviet power system—a power system symbolized by a handful of ambitious men in the Kremlin.

The Soviet Union remains today a ruthless police state—its penal camps, in Siberia and the Northern Wastelands, crowded. The ordinary Russian people must still work long hours at hard monotonous work—but, there is no denying there has been an improvement in their lot since Stalin’s death.

 Slackening internal controls and more consumer goods have been profitable for the rulers. These tactics have resulted in greater production of both military and civilian goods. They have increased their strength at home and in the councils of the world...

The new team in the Kremlin—on the basis of debit and credit for the past year-and-a-half—shapes up as being no less ambitious than the old—and even more formidable....

If you doubt their objectives—consider the harsh facts of Soviet military strength. Russian ground forces number roughly 175 Divisions. By way of contrast, the United States has nineteen.
The 175 Red Army Divisions are fully equipped. Sixty-five are motorized and bolstered by tanks. There has been a constant increase of all-important divisional firepower over the years since the Second World War.

The Satellite States provide the rules of the Kremlin with another eighty divisions. All told, the Soviet Union commands some six million men under arms. It’s estimated that within 30 days, the Soviet Union could muster no less than four hundred divisions, ready for action.

The military manpower of the Western World doesn’t bear comparison. The great balancing factor has been and remains our headstart in nuclear weapons, an advantage we must maintain until the task of building the Free World’s defenses is completed.

A secondary balancing factor is what our NATO Commander, General Alfred Gruenther, calls “superior American strategic air power.” But he’s quick to add that this, alone, couldn’t prevent Russia from over-running Europe tomorrow if she wanted to. What General Gruenther does say, (and wisdom dictates that he could hardly say less) is that while Russia would win the first phase of a war now, in the long run, our strategic air power would ultimately bring Russia to defeat.

The General explains: “As of now, we depend very heavily upon the strategic air command because our shield is not sufficiently strong. The shield should be strong enough,” Gruenther adds, “to force them to concentrate so that we may use atomic weapons and allow time to mobilize reserves.”

The General feels that it will take another three to four years still to forge a combination of NATO Forces, bolstered by German troops and atomic weapons, as a sufficient shield to prevent the Russians from over-running Europe.

You will note the stress General Gruenther places upon German troops. By accident or design, he couples them equally with atomic weapons when he speaks of his NATO strength.

Our military strategists were never hesitant to point to West Germany—its geographic position, productive strength and its manpower—as the key to Allied defense of Europe. In short, they feel that without West Germany, an effective defense of Europe might not be possible—and therein lies a prime example of the thin line standing between the Free World’s security and disaster.

We need West Germany—but we can never be completely sure she will join or remain in the Western Alliance.

We can count on West German participation so long as Chancellor Konrad Adenauer and his Christian Democratic Party com-
mand the loyalty and support of the West German people. This they have managed to do since the end of the Second World War. The Christian Democrats are West Germany's largest and most powerful political party. Konrad Adenauer, a staunch supporter of the West, a bitter and expert foe of Communism—is West German's ablest statesman.

But Germany's second most powerful party—the Social Democrats—are a constant threat, and if they held the reins of Government today, West Germany would not be in the process of entering the Western Alliance, or preparing to re-arm to defend themselves against possible aggression from the East.

The Social Democrats are not anti-Western or Pro-Communist. They are neither. They are intent upon but one objective—and this shapes all their thinking and actions. That objective is the reunification of divided Germany. Adenauer rejects the principal of reunification at any price. But the Social Democrats are willing to take desperate risks. And many Germans are listening.

They propose to make a deal with the Russians. They would say: "Give us back the East Zone and we will remain neutral. We will strictly limit the size and strength of our armed forces so as never to be a threat to you. You can come in and investigate whenever you choose and see that we're keeping our bargain." At the same time, West Germany's Social Democrats would not ignore the West. On the contrary, Britain, France and ourselves would be invited to keep an eye on them, too. In fact, they'd ask Russia and the three Western Allies to agree to retaliate against any nation—themselves included—who took advantage of Germany's weakness and attacked. In short, the Social Democrats choose to make German a neutral state—a pacifist state—finding security in setting East and West to watching one another. It's an insidious siren song—denying reality.

The German situation is volatile. And of this, Soviet Russia is well aware. Last week, Soviet Foreign Minister Molotov opened the climactic diplomatic battle for Germany. His approach was direct—and aimed straight at the hearts of every German who wants to see his country united again. Molotov called for a Big Four meeting to discuss reunification of Germany. In effect, he was begging the West Germans to throw out Adenauer, throw out the Christian Democrats—turn from the West. For the present, the West Germans have turned a deaf ear to Molotov. In the first test in the Lower House of Parliament, Adenauer was given over-whelming support for his program of military integra-
tion with the West. But this is only the first round in a new major engagement in the cold war.

West Germany then represents a striking example of the thin line between security and disaster. And if West Germany has been and is a source of concern to us, we can begin to appreciate what terror this particular thin line strikes in the hearts of Frenchmen....

We are all inclined to lose patience with our Gallic cousins—and more often than not with good reason—but not always. Had we been invaded three times in three-quarters of a century, we would hesitate to re-arm the aggressor.

France does not trust Germany; yet all responsible Frenchmen will admit that they—like the rest of Western Europe—need German support to effectively defend themselves against Soviet aggression—should it come. This ironic touch—having to depend on someone you believe undependable—explains much about the French character. When an individual finds himself caught in similar quandry—he usually winds up on the psychoanalyst's couch...and there isn't a couch big enough for fifty million Frenchmen....

France has been an indecisive and uncertain ally. The same frustrations and rebellions that brought a French rejection of the European Defense Community some months ago may bring further irresponsibility in the future. Obviously for our diplomats to work with this uncertainty is exasperating in the extreme...yet, the situation is such that we could not, even if we choose, go ahead without France.

Under optimum conditions, the defense of Europe will be difficult enough. We must have free and willing access to the real estate of a friendly France; we must rely heavily on French communications, pipelines, airfields and staging areas in any emergency. Even with German troops and resources, the problem of defending Western Europe without the full support and cooperation of France is virtually unthinkable. Hence, because of its great dilemma, France, too represents a thin line between security and disaster for the Free World.

If France were strong, her fears of a revived Germany would diminish. But France is weak—and the roots of her weakness are economic. Premier Mendes-France is an economist and intends to rebuild France economically from the roots up. That's the solution—but every other French Government since the Second World War has foundered on the shoals of economic reform.

The Communists within France have become experts of exploiting economic grievances. That's part of their strength. The
Communists from without the Soviet Union speak often to France in soft and reasonable tones... and never forget that France and Russia traditionally are allies....

Despite provocations, our Foreign Policy must embrace France and Frenchmen—lest they be wooed or driven to look Eastward.

History turns on single events at times... and one such event occurred recently and the French rejected the European Defense Community—after three years of procrastination... I think very few of us realize how close to disaster we stood on that day and the gloomy weeks following when it seemed that all our planning for defense was wasted. That single action might have toppled Adenauer in West Germany. We might have lost Germany for good and the fabric of the only defense possible short of our own shores would have been torn to shreds.

I think a good deal of the credit for saving the day must go to the British—and particularly Anthony Eden, its Foreign Secretary—who broke a century of tradition and committed British troops to Europe for the next one-half century. He expanded the Brussels Treaty to replace the European Defense Community—and accomplished most of its goals...

It was at this point that United States Foreign Policy—wisely I think—remained largely inactive, allowing Europe to solve what was basically a European problem. For many years past, our policy had been alternately to cajole and thunder at Europeans for not ratifying the European Defense Community. Though, ironically, EDC was a French invention, we had adopted the thankless task of trying to make Europe take the bitter medicine we knew she needed to survive.

I think it is all too obvious now that we were pushing Europe too hard; and its people and governments resented it, no matter how good our motives...

At the Nine Power Conference in London, we arrived purposely without a plan, and without the intention of pushing any particular plan on anyone. And this represented a major change in foreign policy. Nevertheless, we played a major role in that we insisted Europe adopt some plan that would result in the rearming of Germany and thus permit the Defenses of Europe to rise. When Eden’s idea of expanding the Brussels Pact appeared most likely to accomplish this, Secretary Dulles threw his full support behind it. Even so, that meeting would have failed, but for a generous and unexpected action by Britain.

France had previously rejected the idea of West German rearmament largely because she felt she might have to stand alone someday against a new German tyranny. She rejected EDC be-
cause England had made no commitment to stand beside her in such an eventuality.

At the London Conference, Britain made that commitment—assigning powerful forces to the Continent—with the promise to leave them there until the other West European Nations—including France, indicated that they might safely depart. The sacrifices for Britain were great; not only financially. By relinquishing the right of free withdrawal of her forces from the Continent, she gave up part of her sovereignty.

The Nine Power London Conference was a turning point in history; approved by the French Assembly, it may well save Europe and the Free World from disaster...

There, indeed, the line between security and disaster was a thin one...

We've dealt at some length on Europe's defense—and the Soviet military threat... But, Europe, like the rest of the Free World, is threatened internally....

The Soviet's once obviously hoped they could win the world through a series of internal revolts...

The Communist methods are political and psychological warfare, waged from within each nation, usually by a legally recognized Communist Party. How strong are these parties within Europe—and what degree of danger do they represent? Obviously, it varies from nation to nation.

Beginning with Britain, there are less than forty thousand Red Party members in England, none are in Parliament... Hardly anybody bothers to read the Communist Party newspapers or magazines—which I might add—are pretty dull.

And Aneurin Bevan, you will have noticed this week, having lost all of his official offices in the Labor Party, now has to return to his own constituents to find a sounding board for the Labor Party's far left wing which he leads.

On the whole, I don't think Moscow would be very pleased with the effectiveness of its British Branch office...

They would be more pleased with their agents in France... France's Communist Party regularly polls about a quarter of the votes in the National elections. Of the 627 deputies in the National Assembly, one hundred are Communists. They vote as a solid block and were instrumental in rejecting the European Defense Community.

To understate the case, this is an unhealthy situation; in effect, a foreign country—and a hostile one at that, Soviet Russia, has one-sixth of Parliament in its pocket. Nevertheless, there are encouraging signs in France. The Reds admit their Party
membership has fallen to less than four hundred thousand. It
was once double that figure and observers in France say the
Party isn't attracting young people anymore.

In the labor movement, the Reds are still powerful. Yet,
it's significant that where once—in the post-war years—they
could tie up the country—of late years, strikes called for Red
political purposes are failures...

Altogether, I think we can conclude that the Communist
Party in France represents a real, but a diminishing danger. The
Communists are not in a position to take over legally unless the
situation changes radically for the worst...

As in France, the Communists made strong inroads in Italy.
There, the Reds work closely with the Socialists—and this grue-
some alliance forms Italy's second most powerful party. How-
ever, this Party is not strong enough to take the reins of Govern-
ment legally, and there are no indications they feel strong enough
to take over by revolution.

Elsewhere in Europe, Communist Parties are weak. West
Germany, Turkey, and Spain are among the most anti-Communist
Governments on earth. The Reds made their move to take over in
Greece several years ago—full scale civil war that was put down
with American aid supplied under the Truman Doctrine... To-
day, the Communist Party is outlawed in Greece.

Overall, the Red cry of yesterday for a revolt by the workers
of the world has been a dismal failure in Free Europe. Europe,
on no account, can be said to be ripe for plucking by internal
revolution. However, in France and Italy, the Reds can on oc-
casion defeat Allied programs, and in time of war would repre-
sent an obvious danger...

A final threat from Soviet Russia—economic. Early this
year, Soviet Russia opened a drive to re-enter the world's trade
markets. These markets may become the decisive battleground in
the struggle between East and West. Not long after the Second
World War, when Russia began grabbing up real estate, Western
commerce with the USSR and its satellites began to dwindle.
With the outbreak of the Korean War in 1950, the noose on trade,
particularly on items useful for war, was drawn tighter by the
West. We, in the United States, took the lead in drawing up a
long list of banned items... and we asked other Western nations
not to ship them to the Soviet bloc. Generally, we received co-
operation although there were some instances of evasion.

Now the Soviets are determined to break down these barriers,
and they are starting by seeking to build up good trade relations
in non-strategic goods. Among businessmen generally, and among many Governments—the prospect of trading with the Russians has great appeal.

Many of our Allies have openly—even eagerly—accepted the Russian offer to trade, particularly nations like Britain which must trade to live—and all those nations who don’t have enough dollars to buy what they want, but do have materials to barter. In many instances, too, where Russia can’t provide goods in exchange, she pays with gold, or dollars bought on Europe’s black market.

The broad outlines of the Soviet economic threat are clear.

Outside the Iron Curtain—just outside—we have the example of unhappy Finland, one of Europe’s most anti-Russian as well as Anti-Communist Nations. The Finns have as little as possible to do with Russia—but unfortunately, that happens to be a good deal. Finland finds itself in a position where it is heavily dependent on trade with the Soviet bloc... Fully one-third of its foreign trade is with the Communist World... Why? Largely because Finland’s major items for export are ships and metal products—products which—in most cases are not competitive on Western markets. This necessity to trade with Russia has its ironic overtones: Finland would like to buy American or British or German automobiles, but instead—because she has to trade with Russia—must accept inferior Russian automobiles. What is worse, the Finns realize that Moscow can turn its buying on or off at will—and cause painful economic distress to Finland and its people.

Throughout Europe—a meandering thin line—all that’s holding back disaster from the Free World... a line which extends across the Middle East—and if anything, grows thinner. For several years we have sought to establish a Middle East Defense Command—to block a broad and undefended road of Soviet expansion. The Soviets could break through the Middle East quite easily and across to Africa, traditional springboard to conquest. In the Middle East, today, all the forces of Red infiltration are at work—as in Europe. But here they find a more fertile field.

For our part, we are supplying military aid both to Israel and the Arab States, led by Egypt. A thin line, indeed, guarding the Free World’s security—for we can never be sure these nations will not take their eyes from their not too distant Russian neighbor—and turn on each other.

If anything, the line grows thinner still as it moves into the Far East—where the Communists have scored an impressive victory. Their conquest of part of Indo-China provides the Reds a
foothold—which, if exploited could bring the ultimate conquest of all of Southeast Asia. For the present, our security depends on the recently concluded Southeast Asia pact. This Pact saved what it could from the wreckage of Indo China. It binds the United States, Britain, France, Australia, New Zealand, Thailand, the Philippines and Pakistan to joint action to prevent further Communist expansion in Asia. The Pact neglected, however, to bind member nations to fight if any one member is attacked; rather, each nation would go back to its Congress or Parliament and ask if it should go to the defense of its Pact neighbor... Whether this will discourage new Communist aggression in Asia, is a moot question.

Our real problem in Asia appears to be selling ourselves to the Asians... In Europe, the free population generally is aware that the Soviets are the villains, but in Asia they're not so sure—European colonialism is a fresh memory. Communism—a font of bright promises.

Even Japan, so grateful for our aid in restoring her as one of the powers of Asia—is sick of the Occupation, angered by the death of the fishermen caught by radioactive ash, and so full of the memory of Hiroshima as to be uncertain about the wisdom of re-arming...

However, in any emergency, Japan can be depended on, for her own security, if not ours...

Nobody is quite sure just where India stands in the cold war—and that probably includes the Indians. But Prime Minister Nehru is certain of one thing—and keeps repeating it to East and West. He states: "Co-exist or fight... There is no alternative."

It would seem to me that we Americans are unwilling to accept either... No one wants to fight—not with atom and hydrogen bombs. Nobody can win that kind of a war—and everybody has to lose. Yet, neither are we morally capable of accepting Soviet Russia as she is—or agreeing to allow Russia to keep half a world in chains.

Foreign Policy is flexible—but this simple truth has never changed. I think it was best stated by John Foster Dulles when he told a Committee of Congress: "The captive peoples should know that they are not forgotten; that we are not reconciled to their fate, and above all, we are not prepared to seek illusory safety for ourselves by a bargain with their masters which would confirm their captivity."

The alternatives to co-exist or fight is—cold war. It is not a war of our making or our choosing; it is of Soviet design. It is a dangerous war, yet, the rewards of victory could be great.
By waging it fully and well, with all our resources and vigor, we can convince Russia of the folly of starting a war she cannot win...

The Soviet power system is geared to aggression; frustrated; its outlets blocked, disintegration must follow... At the first signs of weakness, the enslaved nations within, with our aid from without, will do the rest. That day obviously is a long way off—and its accomplishment difficult.

I was interested to read the other day of something Winston Churchill said about American Foreign Policy. He said there is no other case of a nation arriving at the summit of world power, seeking no territorial gain, but earnestly resolved to use her strength and wealth in the cause of progress and freedom...

This makes us sound generous to the extreme, but we can admit to ourselves, we are doing no more than we must—and our motive in the final analysis is not altruistic; we are acting for our own security.
STATE TAXATION IN NEBRASKA

By
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I.

THE EQUALIZATION FUNCTION OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT. (Art. 5, Chap. 77, Revised Statutes)

Section 77-501 provides that the Board shall consist of the Governor, Secretary of State, Auditor, Treasurer, and Tax Commissioner (as required by Sec. 28, Article IV of the Constitution, which also provides that they shall "have power to review and equalize assessments of property for taxation within the state.")

Section 77-1514 requires each county assessor, not later than June 25 of each year, to prepare an abstract of the assessment rolls of his county, and to forward it to the State Board of Equalization and Assessment on or before July 1. The fact that abstracts are not received from every county at the time required by law does not prevent the State Board from proceeding with its equalization function. (Grant County v. State Board, 158 Neb. 310, 63 N.W. 2nd 459; Douglas County v. State Board, 158 Neb. 325, 63 N.W. 2nd 449.)

Section 77-505 requires the Board to meet on the first Monday in July "for the purpose of equalizing assessments on both real and personal property." The following section then requires that the Board "shall proceed to examine the abstracts of real and personal property ** and shall equalize such assessment so as to make the same conform to law."
If the Board at its first meeting decides that "a just, equitable and legal assessment of the real or personal property in the state cannot be made without increasing or decreasing the valuation of such real or personal property as returned by any county, the board shall issue a notice to the counties which the board deems either undervalued or overvalued, and shall set a date for hearing at least five days following the mailing of such notice."  

(77-508) History of the requirement of notice is traced in County of Antelope v. Board, 146 Neb. 661, 21 N. W. 2nd 416, and it was there held the Board could not acquire jurisdiction without the giving of notice. Boyd County v. Board, 138 Neb. 896, 296 N.W. 152, held that the notice did not have to advise counties whether they were to be increased or decreased, or how much, but that notice given in the language of the statute was sufficient. This procedure was followed in 1953 when all counties were notified to appear, and the notice used was set out at length and approved in what will hereafter be referred to as the four 1953 cases: Douglas County v. Board, 158 Neb. 325, 63 N.W. 2nd 449; Grant County v. Board, 158 Neb. 310, 63 N.W. 2nd 459; Howard County v. Board, 158 Neb. 339, 63 N.W. 2nd 441; Buffalo County v. Board, 158 Neb. 353, 63 N.W. 2nd 468.  

The final case on notice is Laflin v. Board, 156 Neb. 427, 56 N.W. 2nd 469, where the Board had not given notice to Johnson County and so claimed it had no jurisdiction to change the valuations of that county, even though representatives of the county and a taxpayer there were present and demanded appropriate relief. The Court told the Board:  

"* * * The statute does require that notice be given to a county * * *

But the duty is upon the Board to give the notice when the facts show that the valuations in a county must be reduced or increased in order to comply with applicable statutes on the subject. Where the Board fails to give the notice when the facts show that one is required * * *, the Board cannot give validity to an otherwise invalid order by the simple expedient of not giving notice to those entitled to it under the statute. * * *"

Section 77-509 is the only section providing procedure to be used at the hearings. Many of you are aware that the procedure is very informal. That complaints have been made to the Court about this informality appears to be indicated by this language in Boyd County v. Board, supra:  

"It does not appear that any person was prevented from taking a stenographic report of any portion of the testimony or evidence which might be desired, nor from presenting for settlement and allowance a bill of exceptions as to any or all of the evidence."

The Buffalo County case in 1953 again points out that the
board is not required to have a stenographer, “nor to keep a complete and exact record of all its proceedings,” but that this “does not prevent any interested party from having a reporter and making a bill of exceptions of the evidence.”

Turning next to a consideration of the amount and kind of evidence required to justify the equalizing action taken by the State Board, the 1904 case of Hacker v. Howe, 72 Neb. 385, 101 N.W. 255, set a pattern which has been consistently followed:

“...The board is not under the statute required to enter into a formal judicial investigation of the values of property to be affected by its action. It is its duty under the law to adjust and equalize the valuation of real and personal property in the different counties by a per centum of increase or decrease of the aggregate valuation of the county, with the view of apportioning equitably the burden of state government, and, in doing so, each member acts upon his own knowledge of the facts and without requiring other evidence. The fact that valuations are increased or decreased in any one county without the examination of witnesses is immaterial. When the board has before it the abstracts of assessment of the different counties, it is in a position to proceed in the discharge of its duties pertaining to the equalization of assessments of the different counties, and is authorized to act upon such information and the knowledge of its members as to values of property generally without further or different information or greater formality.”

In the Douglas County case that year, the Court pointed to the language in Boyd County v. Board, supra, where it was said that the statute did not require any particular kind or standard of evidence; that the method used is left to the discretion of the state board, and that no formal hearing is required. In the Howard County case it was phrased in this manner:

“The purpose of a statutory hearing is to afford the County an opportunity to offer evidence for the purpose of establishing that its returned valuations do in fact conform to law. The hearing is not for the purpose of affording the State Board an opportunity to demonstrate wherein the valuations returned by the county do not conform to law.”

In the Buffalo County case, the Court re-affirmed that the burden was on the party assailing the action of the Board, and that “the presumption obtains that the board faithfully performed its official duties, and that in making the assessment it acted upon sufficient competent evidence to justify its action.” However, in the same case, the Court pointed out an instance where the evidence before the Board would not be presumed sufficient:

“In the event the record discloses on its face, as in the case of Laflin v. State Board, that the action of the State Board is arbi-
trary, then the abstracts of assessment of the various counties, the
knowledge of the members of the State Board as to value, and
other information satisfactory to it would not prevail." In the
Laflin case, record showed that the Board had used a 20-year
average sale price of farm lands as a basis for increasing values
in 19 counties, but had refused to extend this measuring stick to
Johnson County. which if used would have caused a substantial
reduction for the latter county."

One final case relating to the scope of the powers of the
State Board: Scotts Bluff County v. Board, 143 Neb.

"...the state board of equalization and assessment cannot deal
with individual taxpayers, and cannot adjust inequalities between
townships, precincts, or districts within the county, but deals only
with the values of taxable property of the county as a whole as to
any class, classes, or kinds of property, personal, real, or mixed."

II.

STATE BOARD OF EQUALIZATION AND ASSESSMENT
AS AN ASSESSING BODY

A. ASSESSING RAILROADS. In addition to its function
as an equalizing body, the State Board also has the primary func-
tion of assessing certain types of property, usually referred to as
centrally-assessed property as distinguished from property which
is valued in the first instance by county assessors. The principal
type of centrally-assessed property at the present time is the prop-
erty of railroads, assessment of which is covered by Sections 77-
601 to 77-623.

Section 77-601 requires the Board to assess all railroad prop-
erty within the state, except for property outside of right-of-way
and depot grounds which are assessed locally. To provide a
basis for this assessment, railroads must make a comprehensive
return to the State Board by April 1 of each year. On the first
Monday of May, the Board meets for the purpose of making the
assessment, and at such hearings the railroads normally introduce
comprehensive exhibits and other testimony relative to their valu-
ations.

Normally the Board arrives at the assessments for the rail-
roads within two or three weeks of this meeting, and then in an-
nouncing the values it has reached the Board must set forth the
manner in which it arrived at the assessment, including a listing
of the factors they used in determining the valuation and the
exact methods employed. They are also required to make a com-
plete transcript of their proceedings on these assessments, con-
trary to the procedure followed when they act as an equalizing board. These requirements were added in 1927.

If either the railroads or the Attorney General are dissatisfied with the assessment, a protest may be filed, and this is heard at the next meeting of the Board. Either side may introduce additional evidence at the meeting, and thereafter the Board enters its final order on the assessed values. Either side may appeal, the procedure being fully covered by statute. So much of the assessed valuation as is uncontested in the event of an appeal is immediately certified to the counties, pending determination of the appeal, and taxes may be levied against the amount of the uncontested value.

The Supreme Court when there is an appeal on a railroad assessment considers the valuations *de novo*, and may even order the taking of additional testimony. Their order as to value is of course final. The total value is broken down by counties, based upon the number of miles of track within the county, and this figure is further broken down by track mileage within school districts, municipalities, and the many other taxing districts.

So much for the statutes. They tell very little about how railroads are actually assessed.

The first step in assessing a railroad is a determination of the value of the particular railroad throughout the United States. That is, the Nebraska State Board arrives at what they determine to be the value of all the operating properties of each railroad. No statutory method is prescribed for arriving at this figure. From 1928 to 1942, the market value of the system's stocks and bonds was used; that is, the value of the secured indebtedness of a railroad when added to what the stock market shows to be the going price of the company stock, is one measure which is used to determine the total value of the company. During some of those years an average of the stock-and-bond figure for the preceding four or five years was used as being determinative of the value of the railroad being assessed.

From 1943 to 1945 the Board used “capitalized net railway operating income” exclusively in arriving at the value of a railroad; that is, net income was capitalized at 6%. From 1946 to 1952 both capitalized net income and stock-and-bond value were used, each of these factors being “weighted” by the Board. Thus in 1952, net income was “weighted” at 20% and stocks and bonds at 80% in arriving at system value, while in 1947 each of these factors were given equal weight. Different versions of the motive for using different factors, and for giving varying “weights”
to these factors, can be had, depending upon whom you may be
discussing the matter with at the time.

Use of the factors named, and of using this method of valuing
railroads, have been specifically approved by our Court. (State
v. Savage, 65 Neb. 714, 91 N.W. 716; State v. Back, 72 Neb. 402,
100 N.W. 952; C.B. & Q. v. Richardson County, 72 Neb. 482, 100
N.W. 950; and, all of these cases contain an excellent general dis-
cussion on taxation, and are recommended reading).

In 1953 and 1954 a third factor was added and used in deter-
mining the value of the railroad companies. This factor is the
investment in railroad property less depreciation. Use of this
factor gave rise to substantial objections from the railroads, and
the right of the Board to use this factor has been by no means
conceded by the railroads, and will quite probably result in a court
test at a future time. Use of this factor made a substantial dif-
ference in the case of some railroads in 1953, one example being
a railroad whose value would have been around a half billion by
either the stock and bond method or the capitalized net income
method, where as the investment-less-depreciation figure amounted
to almost a billion.

Once the value of an entire railroad system has been deter-
mined, the next step is for the Board to allocate the proper part
of that value to the State of Nebraska. Here again no statutory
procedure is provided, and no fixed formula has been followed very
long by the Board. It is my understanding that four factors are
being used this year, and these factors also have been given vary-
ing “weights.” The first factor is “Traffic Units,” or ton-miles
moved in Nebraska as compared to movement on the system as a
whole; second factor is gross earnings attributable to this state in
proportion to the system as a whole; the third factor is “car and
locomotive mileage” within this state as compared to the system
as a whole. Finally, track mileage within this state as compared
with total system mileage. One other fact which is somewhat
confusing to the neophyte is that not all four of these factors may
be applied to all railroads in the state in any given year. How-
ever, there does appear to be an explanation for this based partly
upon the fact that one railroad has less than a mile of track in
this state, whereas others go up to almost 3000 miles; and, in
addition, there is apparently a substantial difference in the type
of operation conducted within the state by some railroad com-
panies.

Having achieved the total value of a railroad within this state,
the next step in the division process is to allocate that value among
the counties and other taxing districts on the basis of miles of
track, a method approved by the Court in State v. Back, 72 Neb., a case wherein Douglas County felt that it was not receiving a fair allocation of railroad valuations, since a great deal of the valuable property of the railroads was concentrated in that county. However, the Court reasoned that such property would lose much of its value if the railroad track were cut at the county line, and that a railroad actually was an entity, and not the sum of a number of parts. This case did lead to the enactment in 1907 of the statutes on "terminal taxation," which are hereafter mentioned.

Allocation to the counties also varies somewhat on whether main line track or branch line track is involved. This variation is not authorized by statute, but grew up as administrative practice, and after 40 years was approved by the Court in 1907. (State, ex rel Platte County v. Sheldon, 79 Neb. 455, 113 N.W. 208).

Although there do not appear to be any substantial statutory controls on the action of the State Board in assessing railroads, the leading case of C. R. I. & P. RR. v. State, 111 Neb., does establish that there must be equalization between the value placed upon railroads and the value placed upon other property in the state. In addition to discussing valuation and allocation factors, the Court in that case determined that the railroad had been inequitably assessed, and used this language:

"The most that any assessing officer or board can do in this direction (uniformity of assessments) is to make a valuation in such a reasonable manner, having regard to all the circumstances, as to show that the intention was not to create disparity but to secure uniformity."

B. TERMINAL TAXATION. You will recall that in the regular assessment of railroads, the total assessed value is divided among the various taxing subdivisions on the basis of track mileage within the district. That method of allocating value would not fairly reflect the value of the property of railroads located within municipalities, and it was therefore determined by the Legislature in 1907 that for municipal tax purposes a different system of valuation should be set up so that the railroads would bear a share of the cost of city government which was reasonably proportionate to the value of railroad property within the municipality as compared to the value of non-railroad property within the municipality. This value for municipal tax purposes is fixed by the State Board and then certified out to the municipalities.

C. SLEEPING CAR COMPANIES. (Section 77-634 to 77-636) Such companies are required to make a report to the State
Board, on the basis of which the Board determines the total value of all the cars owned which are used for transacting business in this state, and it is then provided that the Board “shall assess that proportion of such total value which the number of miles of railroad main track over which such cars were used within this state bears to the total number of miles of railroad main track over which such cars were used everywhere.” The value thus arrived at is apportioned to the counties on the basis of track miles over which the cars are operated.

D. MOTOR VEHICLES. (Sections 77-1238 to 77-1242.02) Passage of L.B. 165 at the last session has made motor vehicles a class of centrally assessed property, but the extent to which this is true is now in controversy before the court.

E. CAR COMPANIES. (Sections 77-624 to 77-631) In two cases, the State Board not only fixes the assessed value, but levies the tax, which is then paid directly into the State General Fund. Car companies are those which operate their own or leased freight cars over Nebraska rails. Valuations are fixed in much the same manner as for sleeping car companies, and the amount of the levy is “the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.”

F. AIRCRAFT FLIGHT EQUIPMENT. (Sections 77-1244 to 77-1250). Here the Tax Commissioner makes the assessment, and the State Board applies the same levy as is used for car companies. The assessment is based upon the value of fully equipped aircraft, with a proportion of its value allocated to this state based upon ratios which are related to aircraft arrivals and departures within the state, revenue tons handled within the state, and revenue originating within the state. (Mid-Continent Airlines v. State Board, 157 Neb. 425, 59 N.W. 2nd 746; affirmed in Braniff Airways v. Board, 347 U.S. 590, 98 L.Ed. 648, 74 S. Ct. 757).

III.
CURRENT STATE TAX PROBLEMS
AND
THE PROPOSED CONSTITUTIONAL AMENDMENTS

A. CAN WE “GET THE STATE OUT OF THE PROPERTY TAX FIELD”? After the decision of the Court in January 1953 in the Laflin case (Laflin v. State Board, 156 Neb. 427, 56 N.W. 2nd 469), and after the rather drastic changes in assess-
ments directed by the State Board in July of the same year, there was a great deal of sentiment which favored getting the state out of the property tax picture, presumably on the theory that the counties could go ahead and assess property at any value which seemed desirable or fair without being subjected to the confusion which results when the State Board orders substantial changes in assessments.

The drawback to that theory is that it creates several substantial problems of a practical nature. First, of course, would be the necessity of finding another source of revenue for the state. But that would not necessarily be the biggest problem. The real problem would arise in connection with taxing districts which overlap county lines, and in connection with centrally assessed property.

For example, a school district is located in parts of two counties. County "A" assesses its property at 50% of actual value, and county "B" at 25%. When the levy is fixed for that school district, property owners in County "B" are only going to pay one-half the tax they should be paying because their assessments are only half as high as in County "A." In other words, somebody is still going to have to equalize the values as between those two counties. School districts are becoming larger all of the time. One county may have districts which extend into four adjoining counties, and in that case all 5 counties would have to have equality of assessments.

Centrally assessed property gives rise to the same problem. If the property of railroads should be assessed at 100% of actual value, and the counties through which it operates assess their property at from ten to eighty per cent of actual value, an unconstitutional lack of uniformity would result. Then why not certify out a smaller valuation to the counties which do not assess at full value? But who is to determine which counties have failed to assess at full value? In other words it would still take a central board of equalization.

The same is true in the case of motor vehicles. If the State Board values a 1954 Oldsmobile at $2000, the owner of such a car who resides in a county which assesses its property at 10% of actual value would be paying ten times as much county, school, and city tax as his neighbor who owned another type of property of the same value.

One suggested solution has been to certify a different state levy to each county, depending upon the rate at which the county assesses its property. But this solution disregards the problem of
centrally assessed property, as well as the need for a central board to determine the percentage of value currently employed in each county for assessment purposes.

Unless we choose to entirely abandon the tax on property, not only for the state, but for the schools and other taxing districts which may overlap county lines, it would appear that equalization in some form will be a continuing necessity, and that therefore the real problem is the development of the manner and procedure which is best adapted to accomplish equalization.

In a general way, the foregoing is what the Legislature had in mind in proposing two amendments which are to appear on the November ballot. The first of these would amend the present section 28 of Article IV, which now inflexibly requires appointment of a Tax Commissioner, who serves with four elected officials as the State Board. The proposed amendment provides:

"The Legislature may provide for the appointment of a Tax Commissioner or a Tax Commission, which commissioner or commission shall have such jurisdiction over the administration of the revenue laws of the state. and shall possess such powers to review and equalize assessments of property for taxation, as may be provided by law."

The proposal would give the Legislature greater latitude in setting up a central taxing authority. At present, four members of the Board can spend but a small part of their time on the important work which they have to do. It is the thought that a full time board could give tax matters the attention they deserve, and that their tenure of office would minimize the possibility that their decisions would be colored by political considerations.

The second proposed amendment would make the office of county assessor appointive, rather than elective as now required by the Constitution. In actual fact, if the original assessment of property is made in accordance with existing law, most of our problems of equalization will never arise. It is the thought of some that removal of this office from the field of politics is a move reasonably calculated to produce original assessments which are more uniform throughout the state.

B. THE LAFLIN CASE. For a number of years, the Tax Commissioners have been trying to develop some method which will make the State Board of Equalization an effective instrument for securing equalization. At the present time the Board has no appropriation and no adequate means for preparing for its annual tasks. The Tax Commissioners have done everything they can to make the Board effective, but if there is no statutory or
court-approved guide for the Board to follow in equalizing, there is no compelling reason for members of the Board to offer themselves as a political sacrifice simply for the purpose of achieving a somewhat illusory goal referred to as equalization.

To create this necessary instrument for the Board, the various Tax Commissioners over a period of years built up statistics showing the ratio between selling price and assessed value of every real estate transfer. (Sec. 77-1320 requires counties to report real estate transfers, and, believe it or not, Sections 76-214 and 76-215 make it a misdemeanor for a grantor to fail to “truly and correctly state in the body of such instrument the actual consideration paid for such transfer.”) In 1952 the Tax Commissioner openly used a 20-year average of this ratio, and sought to have the Board follow it in equalizing between counties. The figures that year showed that if all real estate were then assessed at its 20-year average selling price, it would still only be assessed at 50% of its 1952 selling price, the statute at that time requiring that all property be assessed at 100% of its actual value. The figures also showed that real estate in 19 counties were assessed at less than 50% of the 20-year average selling price, and that one county, Johnson County, was assessed at 82% of the 20-year average. A motion by Governor Peterson at the 1952 session of the Board to equalize all counties by 50% of the 20-year average failed of passage. The motion adopted called for the 19 low counties to be raised to 50%, and the others were left untouched. Johnson County protested, and Mr. Laflin appealed as a taxpayer from that county. In its opinion the Court said:

“it is the function of the Board to see to it that all property is assessed at its actual value and that the failure of any of the various counties to comply with this requirement shall be corrected by the process of equalization.

“It is clear from an examination of the record before us that the Board failed in its duty to value farm lands and improvements on the basis of their actual value and to equalize between counties for the purpose of compelling compliance with controlling statutes on the subject. We cannot see where the 20-year average sale price of lands of similar kind or class in a county can have any evidentiary value in determining present market value. It seems to us that an attempt to offset present high or inflationary values by averaging in the low-market values of 1933 and 1934 is in direct opposition to the intent of the law. It is the duty of the Board to fix the value of farm lands and improvements at their actual value at the time they are appraised for assessment purposes. Any attempt to depart from this provision of the statute by averaging values during past periods of time which are too remote to have evidentiary force, constitutes a noncompliance with
legislative direction and any relief from the requirement, if relief is required, must come from the Legislature.

Shortly after this decision, 3 senators introduced the famed 50% bill, calling for all property to be assessed at 50% of its actual value, the reasoning being that since real estate at that time was only assessed at about half its actual value it would be a practical impossibility to get assessors and boards of equalization to more than double assessed values on farm lands. Since that time the Legislature has ordered a number of studies to be made and has taken other actions in an effort to develop a permanent solution to the problem of assessments. One of the steps taken was the introduction in the special session of a proposed amendment to the present section 1 of Article VIII of the Constitution which would have permitted the Legislature a greater latitude in classifying property for assessment purposes. However, the amendment which finally came out of the Legislature and which will be on the ballot, falls far short of what was originally contemplated. The proposal in its final form is innocuous and can be relied upon to forestall any dramatic changes in our present tax structure. The proposal would add the following language to the existing section 1:

"The Legislature may prescribe standards and methods for the determination of the value of real or other tangible property at uniform and proportionate values."

The language selected for the foregoing proposal is reminiscent of that employed in the same section prior to its amendment in 1920, the Constitution of 1875 having provided that the value of property and franchises was "to be ascertained in such manner as the Legislature shall direct." It was this phrase which was largely relied upon by the Court in upholding the separate classification for valuation purposes of grain brokers, motion picture distributors, sugar manufacturers and oil dealers. (Secs. 77-1222 to 77-1224; Central Granaries v. Lancaster County, 77 Neb. 319, 113 N.W. 199). Whether the newly proposed language would permit additional classifications for valuation purposes would appear to be extremely doubtful, unless the new classifications could be related to the valuation placed upon other property through some common denominator, in order to preserve the requirement of uniformity.

It is known that serious consideration has been given to classification of certain businesses or types of property in order to overcome some obvious inequalities. For example, the farm machinery dealer and the seed dealer have an abnormally high in-
ventory on March 10, the present assessment date, and the require-
ment that they list property on hand as of this arbitrary assess-
ment date works to their disadvantage. To overcome the disad-
vantage, one proposal advanced was to either classify and assess
such businesses on an average annual inventory basis, or if such
classification was not constitutionally possible, some thought has
been given to assessing all personal tangible property on the aver-
age annual inventory basis. The basis for this thinking is some
language employed by the Court in the Central Granaries case, supra:

"Property necessarily fluctuates in value, and ownership is chang-
ed from one person to another, so that if the average value dur-
ing the year could be accurately ascertained it would furnish the
true basis for taxation."

Use of the average annual inventory basis might solve some
assessment problems, but would naturally create others. For ex-
ample, what is to be the average annual inventory of a wheat
farmer who harvests a crop in July, and sells it the same day he
combines it for a total of $20,000?

The Legislature has also given considerable thought to the
problem of setting up standards for the valuation of real estate in
order to promote both uniformity and equalization between taxing
districts. One approach to this problem has been the suggested
use of "normal value," which is in fact the return which a given
piece of real estate will produce over a period of years, and repre-
sents the method used by many companies in determining the
loan value of land. Statistics show that the normal value so cal-
culated is remarkably equal to the 20-year average selling price
of land, as used in the partial 1952 equalization by the State Board.

Use of the net income method of valuation appears to be a
constitutional impossibility, although at one time the method was
approved, with 3 justices dissenting, in Schmidt v. Saline County,
122 Neb. 56, 239 N.W. 203 (1931), when the Court said:

"The net income derivable from real estate, prudently used for
the purpose for which it is best adapted, is a proper factor to
consider in determining its actual value."

The Schmidt case arose because some farm lands were in a
school district with a high levy and the farmer had to pay a
school tax of about $350 on a quarter section, whereas his neigh-
bor across the road, in a different school district but with similar
land, paid a school tax of only $175 on his quarter. The plaintiff
contended that his high tax reduced the amount of net income
which could be produced from his farm and therefore reduced
its value.
Seven years later the Schulz case came along, and by a unanimous decision the court reversed the Schmidt case. (Schulz v. Dixon County, 134 Neb. 549, 279 N.W. 179). The Court held that the net income method could be used on railroads and similar property, but had no application to real estate for the reason that real estate “has a known and determinate value ascertained by commerce in it.”

After the Schulz case, the Legislature amended what is now Section 77-201 to provide that all property should be valued and assessed at its actual value, but then went on to specify that, “In arriving at the ‘actual value’ of property, * * there shall be taken into consideration its value in the market in the ordinary course of trade and in arriving at the ‘actual value’ of real property there shall also be taken into consideration the proximity of such property to markets, the school facilities and other advantages and other facilities afforded by the governmental subdivision or subdivisions in which the real property is situated, the tax burden upon the real property, and every other element or factor affecting the actual value of said real property.”

This statutory provision was attacked almost immediately and was held unconstitutional in Homan v. Boone County, 141 Neb. 400, 3 N.W. 2nd 650, where it was said:

"... We are inclined to the view that the inclusion of the additional elements to be considered in fixing actual value of real property creates two different methods of appraising property in the same class. * * We conclude therefore that the establishment of the two methods of valuation of property in the same class for taxation purposes results in a want of uniformity prohibited by Section 1, Art. VIII of the Constitution."

In other words, it appears to have been the view that since such factors as proximity to markets and amount of the tax burden could not be used in valuing personal property, they could not be used in the case of real estate. However, one of the reasons underlying both the Schulz case and the Homan case might be said to be the fact that introduction of the net income method of valuation and permitting reductions in assessed valuations because of excessive school district taxes, would actually result in permitting the school district to impair the power of taxation of the state, since the revenue accruing to the state and county from a particular piece of real estate would be progressively reduced as the school district chose to increase its levy.

The 20-year average has not been entirely abandoned as the basis for a solution, one suggestion being that real estate be valued by that method, and that the State Board then determine
each year what percentage of actual value this represented, after which all other property would be valued at its actual value but assessed at the percentage of its actual value arrived at by the State Board. Although this suggestion has possibilities, much personal property might go into hiding in depression years when real estate might be selling for only half its 20-year average value, thus making it necessary for the State Board to decree that for that year all other property should be valued at its actual value but assessed at 200% of its actual value.

C. PROPOSAL FOR CHANGING EXEMPTIONS. Another proposal for amendment of the Constitution which will appear on the ballot would change Section 2 of Article VIII, and would eliminate the present $200 exemption for household goods, substituting therefor the following language:

"Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be provided by general law, and the Legislature may prescribe a formula for the determination of value of household goods and personal effects.""

The provision for prescribing a formula was inserted for the reason that it is understood that one state has eliminated much of the detail work in connection with assessing such items by setting up a value formula based upon the assessed value of the home in which the household goods are used.

D. THE SALES TAX-INCOME TAX PROPOSAL. The final amendment proposed by the special session of the Legislature would introduce an entirely new restriction in the Constitution. It provides:

"When a general sales tax, or an income tax, or a combination of a general sales tax and income tax, is adopted by the Legislature as a method of raising revenue, the state shall be prohibited from levying a property tax for state purposes."

If adopted, this proposal would require elimination of all property tax levies by the state upon the imposition of either a sales or income tax. What is a "state purpose" has been defined by the courts of several states as including everything required for the operation and maintenance of state government and state institutions. Adoption of the amendment and subsequent passage of a sales or income tax would not eliminate the need for a state board of equalization, as previously discussed herein.

CONCLUSION

The "state tax problem" is not a new thing which has just
arisen within the last year or two. It existed in 1920 when the constitutional convention struggled with the problem of intangible taxes, in 1921 when the legislature changed the basis of assessment from twenty per cent of actual value to one hundred per cent and cut all mill levy limits by four-fifths; and the comprehensive revenue act of 1903 must have been the culmination of a number of bitter fights resulting in more than a few political deaths, even as today. Actually the state tax problem must have arisen the first day the state pointed at the original taxpayers and said it needed money. Surely some of them said on that day, "You are taking more than my share from me—we need equalization so everyone will pay his fair share."

The discussions on taxes which have taken place in this state during the past two years have been a helpful thing. Unless all of the people take an occasional interest in their government and in their taxes, inequalities will never be corrected, but will continue to grow in proportion to the lack of interest on the part of those who are taxed. Only when a substantial number of the people become acquainted with the facts and with the problems involved, will it be possible to find and agree upon the answer.

"Taxpayers' Remedies in State Tax Matters." A Panel discussion of specific problems and the remedies of the aggrieved taxpayers.

Members of the Panel

Fred White, Esq. .....................................................Omaha
Chauncey Barney, Esq. ..............................................Lincoln
Robert Armstrong, Esq. .............................................Lincoln
Seymour Sidner, Esq. ..................................................Kearney

CHAUNCEY BARNEY: A well known author once divided the words in the English language into good and bad words. Did you ever stop to contemplate the word "tax" on that basis? There probably never was a nastier little word, it does not look good, it is an ugly little word, it does not sound good; and of course when it hits you on the pocketbook nerve it does not feel good.

But another amazing thing has been the number of beautiful adjectives that that word has picked up along the way to cover up its own shortcomings.

I noticed in Clarence’s fine dissertation, and I suppose you did, how many of those beautiful adjectives it picked up along the line—equal tax, a fair tax, proportionate tax—all those nice words
that even in recent months of course the virtuous basic word "honesty" has been added to cover up the thought of the odious process of the tax on a man's private funds.

Since the purposes of this panel are technical and not political, and all of us here are agreed at least for the time being of the necessity of impressing a client or persuading a tribunal, I would like at the outset to suggest, because I think it is part of the basic concept from which you have to approach this whole tax problem, that the law of taxation by levy upon private property, the basic concept of that law, is neither fairness, justice, equality or even honesty, as we know it in our dealings in society; but is today just as it was in the days of Caesar Augustus, based upon the overriding necessity of the sovereign to obtain the means for the continuation of constituted government.

Now before I have a committee investigating my political views for the benefit of those that don't happen to know them, I would like to hasten to assure you that I intend no attack upon the system. I do believe that it is necessary, but I believe that such a concept as I have outlined may lead the practicing lawyer to a better understanding of the law than the usual approach of justice, equity and good conscience, which we normally use to appraise the individual problems of those who look to us for advice.

As a small example, if you have an overcharge or pay too much at Gold and Company or Brandeis, or your own local department store, upon the discovery of that error, not only will he as a good businessman and an honest citizen give you a refund, but you can insist on it as a matter of law. Not so with the County Treasurer or the school board or the state of Nebraska, and that is what I mean about a different standard of values in this tax field than we have in the ordinary business transaction between individuals.

Now at the risk of being too basic and elemental I have been asked to trace the outline and the chronology of the property tax system in Nebraska.

It is basically a very simple tax of course and it is one of the oldest forms of taxation. You have to do two things in order to enforce the tax; the sovereign has to find out how much property it has to tax. Now that's a pure proposition of inventory.

The first thing we must do in order to start the taxing system is to inventory the entire value of the particular taxing subdivision. The second factor that we need to know of course is the amount of money which is needed to operate the government for the period for which the tax is being raised, that is the budget,
and once those two factors have been gained then as Clarence said it is a simple bookkeeping matter, it is a simple long division problem.

You know how much money you need, you know how much property you can count on, and you divide one into the other and you have the mill tax levy. It is as simple as that.

However, as all of us know it has not been so simple and there are a lot of problems that come along the line in the inventory part of it.

How do we find out how much value a particular individual has and what can he do about it? We would like to point out to you this morning some of the problems that will arise along the line and what your people may do about it.

Now to come back to this business of mistake or overvaluation and the overriding necessity of the state to raise money. While the tax levy is a simple one, it is also one by which the state can be hurt, and of course because the state must run, regardless of the impact upon the individual taxpayer, the state is going to get the money.

Let us talk for a minute, oh, about this package of cigarettes. In this business of inventorying value we must remember that that is one of the basic factors upon which the money is raised. So if, for example, either in a fit of whimsy or by mistake or by accident or because my wife had an over-exaggerated idea of what the particular thing is worth, and that by the way from the County Commissioner's standpoint causes us more trouble. Wives are either more honest or they have an inflated idea of what it's worth, father comes in in November after the tax bills are out and says, "My God, I can't pay this." And it is too late.

But regardless of that, suppose I decide that instead of fifteen cents I put this package of cigarettes down on my tax schedule as worth fifteen thousand dollars, I slip on a couple of the oughts. Now unless that is corrected sometime before the amount, the inventory of value, if you please, becomes final, you can see that that would disturb the amount of dollars needed to run government because here in the valuation is a hundred and fifty thousand dollars. It is there, and since the levy is based upon that valuation as one factor, if I come along later and say, "Boys, I am sorry, I did not mean one hundred fifty thousand dollars at all, I meant only fifteen cents"—to allow that removal of that valuation from the tax rolls would simply deprive the governmental subdivision of that amount of money. The tax on a hundred and forty-nine thousand plus dollars less fifteen cents of it,
that would be gone and there would be no way for the state to recoup it.

For that reason as you will notice as we pass along there are a number of places in which the wall is dropped, the right of the taxpayer cut off and the state gets the money, no matter what—honesty, fairness, equality, justice, and all the rest notwithstanding.

Now to start along that process we are now to the point where we have started a basic inventory of that value. The first thing that you must watch, and your client must watch, of course, is that it is not excessive, and your first appeal of course is to the Board of Equalization, the local Board of Equalization, which can hear your complaint of which your client of course must apprise himself, and for that discussion, Bob Armstrong.

ROBERT ARMSTRONG: The part of the discussion that was assigned to me on this panel was divided into two parts in reference to the local Board of Equalization; the first, the appeals from the action where the Board acts on the protests of the taxpayer, an individual protest.

And, second, where the Board acts to equalize the assessments generally in the county or in the district of the county.

From the nature of the statutory provisions and the decisions of the courts, the two subjects, that is, where the Board acts on taxpayers' protests and where it acts in general, it seems to me are so intermingled that I feel we could develop the subject more briefly by discussing them together.

Also in studying this question I find that the matter of the protection of our rights in the matter of appeals from the local County Board of Equalization are also geared to and involved with the actions that may be subsequently taken by the State Board of Equalization, so that brings that into the picture and I think Clarence Meyer has given you a very good outline of the functions and methods by which the State Board acts.

A little background, probably is pretty elementary, but I think that maybe it would point up our position. As you know the personnel of the County Board of Equalization was changed in 1953 by simply eliminating the Clerk and the Assessor and confining it to the members of the County Board of Commissioners or Supervisors.

There is one new feature though that was changed, the time and the length of the sessions. That is, the meeting and the length of the session is now limited to not less than three and not more than forty days, commencing on the third Monday of May of each year. That is Section 77-1502. Now this period of
not less than three or more than forty days for the purposes of
the general equalization of property assessments in the county is
stated in the Sections 1503 to 1507.

In addition to that the statute now provides that the Board
may meet at anytime on the call of the chairman or any three
members, quote “For the purpose of equalizing assessments of any
omitted or undervalued property.” Now the one little important
point I think we should keep in mind is that the Board is required
to maintain a written record of all proceedings and actions taken
which shall be available for inspection in the office of the County
Assessor. This latter provision was construed by the court in the
recent case of Fromkin versus the State. However in that case
you recall the County Board of Douglas County on July 7, 1953,
passed a resolution increasing the assessed valuation of real estate
in certain precincts of the county. This action was taken after
the statutory time for filing the abstract of assessment with the
State Board had expired, but before the abstract was actually
filed.

After the passage of the resolution the County Assessor pre-
pared the abstract and it was received by the State Board on the
27th of July.

On the same day, as of the same day, at least, the State Board
entered an order increasing the assessment of all lands and im-
provements in Douglas County by twenty percent and all lots and
improvements in Douglas County by forty-eight percent.

The action of the Board, of the County Board, was challenged
as null and void. The plaintiff sought a declaratory judgment
that the lawful assessment was as found and fixed by the County
Assessor as of March 10, 1953.

The court determined the resolution of July 7th by the County
Board was void, but that the action of the State Board ordering
the increases was valid. The court ruled that the time limit in
Section 1502 constituted the term during which the County Board
of Equalization can act for the purpose of general equalization;
that the power to meet at any time on the call of the chairman
or any three members is limited specifically to the assessments of
omitted or undervalued property.

The court said this: “Obviously the power of the County
Board of Equalization to equalize the assessments of omitted prop-
terty is a necessary act with reference to omitted property as-
sessed subsequent to the regular time. The legislature used the
one word ‘property.’ It used the qualifying words ‘omitted and
undervalued’ to define categories of property within the class of
specific items and parcels of property.”
The power given in Section 1502 authorizing equalization of undervalued property is limited to particular items and pieces of property. It does not extend to any equalization of aggregate values between taxing districts.

Now the County Board acts under different sections of the statute on different phases of equalization, and I'll point them out quickly. First, the County Board equalizes the valuation of personal property in the county, including the application of individuals who between themselves agree that there are protests and complaints. Also complaints that some other individual may be assessed too low. The County Board shall also equalize the values of real property by raising or lowering the values of such individual tracts and lots as are assessed too low or high.

Now these actions require notice to the owner of the property of course. There is another following section however that does not require notice, and that is the section which provides the County Board shall equalize the valuations of townships, precincts or districts in the county and may increase or diminish the aggregate values of the properties in the district. That was a method used by the County Board in the case in 1953 as I understand it.

Now that doesn't require any notice. Also this section provides that the Board may equalize lands and lots and personal property and different classes of property except property assessed or valued by the State Board of Equalization and assessments which Mr. Meyer referred to as the centrally assessed property.

Now the point is it may determine a separate percent of, additional reduction to adjust the equalization of the property; just as it was explained by Mr. Meyer the State Board makes the equalization by a flat blanket percentage on all property in that class.

Now of course our court many years ago held that where the value of property of an entire precinct is too low the Board of Equalization may raise it without giving notice to the individual owners of the property in that precinct. That is Lancaster County v. Whedon, 76 Neb. 753 & 761.

The County Board of Equalization shall also adjust assessments for the county by raising or lowering the assessment of any person as to any item or all items of assessment. That also requires notice.

The County Board of Equalization can not raise the assessment of a person not previously notified of the contemplated change; an injunction is held to be the proper remedy, where
they do it without notice, without jurisdiction. That is Crane Company v. Douglas County, 112 Neb. 365.

The County Board shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owners as the assessors should have done, but again no personal property shall be so added to the rolls unless the owner thereof is previously notified if he be found in the county.

Now in the case of Farmer's Co-operative Creamery & Supply Company versus McDonald, 100 Neb. 33, the court said that the County Board must give notice when assessing omitted personal property, property not previously on the list. In the annotation we also find The Radium Hospital v. Greenleaf, 118 Neb. 136, in which the court said that the Board may assess real estate omitted or underassessed, either omitted or underassessed, real estate, may be assessed without previous notice to the owner.

Now I surmise that the ruling is based on the proposition that the owner of the real estate is charged with notice that it is liable under the statute to taxation, and therefore it is presumed it is to be assessed, and the burden is on him to check the record and see what the assessment is on it.

In addition to the foregoing provisions by way of background in addition to that, the Board is authorized to call in persons, individuals, representatives of firms or corporations, and require them to produce their books and records for an inspection, and issue process in the nature of a subpoena or summons to appear and bring with them the papers, and so forth.

Now we come to the matter of appeals. Of course the statues, 77-1510, provides that the appeal shall be taken to the District Court within twenty days after the entry of such action on the records of the county by the County Clerk. Now that is specific language I am calling to your attention. In discussing this sometimes the question arises when the twenty days begins to run.

Well according to the statute the twenty days begins to run after the entry of the action of the Board on the records of the county by the County Clerk. It is taken in the same manner as the prosecution in appeals from the allowance or disallowance of claims against the county, that is, within twenty days you file a bond, executed bond, and notice of appeal and prepare the transcript from the Clerk and file it with the District Court within the twenty days.

Now a brief run down of some of these decisions, I am taking time to quote those, I call them to your attention because my conclusion, I think, has a definite bearing on them. That is, from
any action of the County Board an appeal may be taken, that is
the Scotts Bluff case that Mr. Meyer referred to. And another
thing is that the taxpayer having a direct interest must give no-
tice of the appeal within twenty days as I have said. One having
an indirect interest in the result of the assessment must give no-
tice of an appeal within ten days. That is Sommerville v. Board
of Commissioners, 117 Neb. 507. Now the court says "Resort
can not be had to injunction when an appeal will afford the plain
and adequate remedy at law." That's the Greenleaf case again.
"Where the assessment is increased however without the juris-
diction of the Board, that is, where there is an inadequate or in-
sufficient notice or no notice given, then the court has said that
the collection of taxes may be enjoined and you may invoke the
injunctive remedy. That is Farmer's Company versus McDonald,
100 Neb. 33.

"A suit in equity of any kind will not lie to correct the assess-
ment," as the court says, "the appeal, method by appeal, affords
the remedy for an excessive valuation."

Now we come to this old landmark that Mr. Meyer mentioned,
that's Hacker v. Howe, 72 Neb. 385. In that case the court said
"An owner is not deprived of his property without due process of
law. If he has had an opportunity to question his validity or the
amount of the tax or the assessment at some state of the pro-
cedings, either before the final determination of the amount or
in subsequent proceedings for its collection. A taxpayer failing
to avail himself of the opportunity thus presented has no legal
ground of complaint because of the action of the State Board in
lowering or raising the valuations of all the property in the county
so as to conform with all other property throughout the state."

In other words, if the taxpayer fails to invoke his remedy
by appeal and the valuation of his property has been increased
by the State Board, he has no alternative or no relief if he has
not availed himself of that appeal.

Now the District Court shall hear these appeals as in equity
without a jury and may determine anew all questions raised be-
fore the County Board of Equalization which relate to the liability
of the property assessed.

The court has said that the review of the county assessment
is limited to the questions presented to the County Board of Equal-
ization, citing a number of cases of our court; and where the tax-
payer appeals of course the burden of proof is on the taxpayer
to show that the decision of the Board was erroneous.
Now it occurs to me in studying these recent cases that simply appeal from the County Board of Equalization to the courts and then resting our case is not always adequate to protect the interests of the individual taxpayers. Action to the State Board making blanket increases in the assessed valuation of certain classes of property frequently cause an unjust increase in the tax valuation of an individual taxpayer.

Now we know of many instances of that in the past two years or so, where pending the final determination of the appeal from the County Board of Equalization to the District Court, the State Board has ordered general increase in the assessment. In this Hacker case as early as 1904 the court ruled that an owner is not deprived of his property without due process of law. I mentioned that rule a moment ago; that applies in this situation, because in the Hacker case the plaintiff contended that he had returned his property at full one hundred percent of actual valuation, and the State Board in equalizing the assessment of Nemaha County ordered a blanket increase of all property in the county, and the court in denying the right of the taxpayer to have his property adjusted pointed out that he had failed to protect himself by an appeal in the local county and no appeal had been taken from the order of the State Board ordering the general increase, therefore he was bound.

Now that was more recently pointed up again in Homan v. Board of Equalization, 141 Neb. 400, the record showed that the State Board of Equalization ordered an increase in valuation over that fixed by the County Board. The county found that the order of the State Board was not appealed from and had become final. The Supreme Court then directed the District Court to determine the actual value of the property and to give effect to the final order of the State Board of Equalization.

The court said: “The plaintiff not having appealed from the order of the State Board is in no position to complain of the increase ordered by that body over and above the amount of the actual valuation determined under the provisions of the statutes of the County Board of Equalization.”

FRED WHITE: Let me interrupt you for a minute, here, Bob, and maybe we can focus the audience's attention upon the very proposition that you just mentioned there, where the Supreme Court said the taxpayer having failed to appeal to the Supreme Court.

Suppose the taxpayer did come down to the Board of Equalization looking after the interests of his own piece of property
after the county—I am talking about the State Board—after the county had been cited to appear before the State Board, and the State Board of Equalization then increased the county as a whole, and Mr. X, who came down to look after his own interests appeared before the Supreme Court on appeal from the ruling of the State Board of Equalization.

Would not the State Board then following its guiding light, the Hacker-Howe case, say that “We are not interested in individual inequities and inequalities,” and say, “It is too bad, we are concerned only with the value of the county as a whole for the purpose of determining equalization between the counties, and even though you, Mr. X, have had your property assessed too high and it is inequitable and unjust, we can not do anything for you.”

Now is not that the net result of the law as it has been interpreted by the Supreme Court of this state?

ROBERT ARMSTRONG: I think if I followed you, Fred, that is true.

As I was about to point out, maybe I did say it, I think that this may lead to a multiplicity of appeals, but under the present situation it would seem to me after this decision in the Laflin case wherein Mr. Laflin appeared before the State Board and filed his complaint, asking the Board to take action in reducing the valuation of land, the Board refused, and that was the basis upon which he appealed; and the court said that he had a right to appeal as an individual and that is the law as announced by the court.

Now what I am suggesting is that maybe if our case is important enough that we should file a formal complaint with the State Board when our county is cited and make a record. Now Mr. Meyer, if you recall, pointed out the inadequacy of some of these records. I was amazed at the hearing in 1953 when practically all of the ninety-three counties appeared at the utter informality of the hearings, having been Tax Commissioner and sat on the Board, I know that they are informal and I know that usually no record is made.

As I recall it there was only one county who had a reporter there to take the transcript of the testimony; but over and above that I think the court still is going to say when you take your appeal that, “We will not make individual adjustments.”

FRED WHITE: Well of course in the Laflin case, Mr. Laflin appeared, and after the technical aspects were determined by the court that he had the right to come there without being cited and that he could institute the proceeding before the State Board, he
appeared for the purpose of effecting equalization of the whole county, not for his individual piece of property.

Now the hypothetical case that I think you have in mind that can be directed to the audience is this; suppose Mr. X has a house that is worth twelve thousand dollars, there is no question about it. He buys a lot for two thousand and he builds a house on it that cost him ten, prior to March 10, 1954, everybody admits is is worth twelve thousand. Now under the fifty percent law it ought to be assessed at six thousand dollars. The County Assessor puts it on the books at seven thousand. He appeals to the Board of Equalization; the Board of Equalization denies him any relief and says, "It stays on the books at seven thousand," which is more than fifty percent of its actual value.

Then he appeals to the District Court of the particular county in which he lives, in the proper manner, and says, "My house ought to be put on the books at six thousand dollars, that's the lot and the improvements."

While that action is pending in the District Court of the county to reduce the assessment to six thousand his county is cited in by the State Board for the purpose of determining whether the county as a whole, real property, should be, town lots, should be increased or decreased, and the State Board of Equalization issues an order like it did in Douglas County last year increasing town lots in his particular county fifty percent.

He has his trial in the District Court and the county's experts and everybody admits on the trial that the property is only worth twelve thousand dollars, and therefore ought to go on the books at only six.

Now Mr. X, the appellant from the County Board's action, has appeared before the State Board and put in his protest and put in his two cents worth; but they have still increased the value of his property, of all property in the county, fifty percent. He ends up, notwithstanding the District Court decision that that house is only worth twelve thousand and should only be assessed at six, he ends up by virtue of the State Board's fifty percent increase with a valuation of nine thousand dollars on the books, because they said in the Homan case that you refer to, that after the District Court determines the value the increase that's ordered by the State Board shall be certified to the County Clerk and that percentage shall be added onto the District Court's opinion. So even though he's appeared before the State Board of Equalization, the Laflin case gives him little if any comfort.
Does it not require in your opinion this specific case, and there are any number of them that I can refer to, particularly in this county, doesn't it necessitate under the circumstances some change in the law, some legislative enactment by the 1955 legislature; and I see Brother Lee is here, and he knows a little bit about that fifty percent law, do you not imagine that we ought to focus our attention and centralize our thoughts on an amendment to one of the existing statutory provisions giving a taxpayer under those circumstances some relief.

CLARENCE MEYER: But, Fred, if that procedure is followed the assessment process will never be completed, I mean, for years in the courts the 1954 assessed valuation for Douglas County would be litigated.

FRED WHITE: Well, you are confronted with this question; here's a legislative enactment by the '53 legislature that says it is the policy of this state that property should be assessed at fifty percent of its actual value. You end up with an assessment in excess of fifty percent of its actual value after a finding based on the evidence by the District Court, and I do not say that the action of the State Board is in most cases arbitrary to be facetious, but that is a fact because the court in the Hacker versus Howe case in 1904, some fifty years ago, said that the minute you are automatically elected to any one of these four State offices and are appointed State Tax Commissioner, you automatically become an expert as to value, and they are presumed to know and you do not have to offer any evidence, and the burden of proof is upon the appealing county to show that the intended raise is unwarranted and unjustified.

ROBERT ARMSTRONG: Fred, I'd like to add my own personal opinion as to what little relief might be obtained by legislation. Senator Lee will remember that there was a bill late in the session came up on the closing days that failed of passage.

Under this present law the State Board makes a blanket increase which results in these conditions that you have described, and they apply to personal property as well as real estate too.

And then that is certified back to the County Clerk and he automatically has to extend that increase to every taxpayer of property of that cause. Now this bill would have provided that the State Board instead of ordering this increase by a blanket percent of twenty or forty, would make the increase in dollars and order the local county agency, the County Board, or the assessor, to adjust his valuation of that class of property so as to attain
that number of dollars of increase, but that the imposition of the increase should be placed upon the property by the assessor, or you could provide by the County Board of Equalization.

Some states do have a provision in their law that after an order is made by the reviewing board on state level that the county reviewing board or Board of Equalization then reconvene and make the adjustments on the individual pieces and parcels of property.

In other words they have been ordered, their original assessment has been found to be too low, they have been ordered to increase. Then they must re-examine the property and determine, or, re-examine the assessment, and determine just where they will impose the increases. The twenty-five percent man will get an increase, the man who is already assessed at the legal standard of fifty percent will not get the increase.

That will then give the local taxing authorities an opportunity to adjust without creating these undue conditions.

CLARENCE MEYER: Well then, Bob, instead of certifying out percentage increases to the counties if the State Board said to County X, “Now you fellows out there are just about a million dollars short of coming up to the amount of value that you should show. Therefore we are certifying out this amount of one million dollars. You tack it on wherever you think it ought to be.”

ROBERT ARMSTRONG: That’s right.

CLARENCE MEYER: Is that what you are proposing?

ROBERT ARMSTRONG: In other words, the local authorities know where to put the increase instead of making it automatic on their part.

CHAUNCEY BARNEY: Let me point out one thing, Bob, in representing a local authority. I frankly disagree with that kind of passing on. The only reason that the situation exists is that the local authorities have failed in the first place to accomplish equalization; that failure has occurred prior to the State Board.

Now once you are caught, you say, “Well, all right, now let’s pass it on.” What makes us any more omnipotent or better judges of passing it on after we know we are caught than before we are caught?

Let me remind you of one other thing, this thing proceeds on a very tight schedule.

The process starts early in April, around the middle of May the County Board of Equalization meets, it must be concluded and its abstract in the hands of the State by around the 1st of July. Lancaster and Douglas being the worst transgressors on that score,
but it should be in around the 1st of July, they must act, have the valuation certified back out to the county in August. At that time the levies are set and the process from there on is a very tight one in order to get the money so that it can be paid along in November.

And that, having just been through a disturbance of fifty thousand pieces of property in Lancaster County, with the fund that was occasioned by my fellow practitioners before the Board, that was a real problem, it was a forty days day and night proposition.

And I think you can grind government frankly right to a halt.

ROBERT ARMSTRONG: Well, Chaunce, I agree that the county officials and state officials and government, as you call it, have their problem but just keep in mind, Chaunce, that this question that we are discussing this morning are the remedies and rights of individual taxpayers that own a property and has to pay the taxes.

Now I agree that the schedule is pretty tight, but it can, I think it is possible, to work out a time schedule there that will permit it. In 1947 an attempt was made to advance to an earlier date the assessment date so as to give the assessor and the County Board more time in which to complete their work in a thorough, efficient manner and still get it into the State Board and get it back again before the date of the tax levies in August.

The attempt was made first to push the assessment date back to January 1st; that failed. And then the committee, I believe, put the bill out with February 1st as the new date. At that time the assessment date was April 1st, and there was some objection, some protest, on the part of a substantial interest of the people of this state, agriculturally speaking, the farmers objected to the earlier date, so there was a compromise by which March 10th, was fixed.

Now if you could work out an assessment date for January you could have time to work out this schedule, and following up what I said a moment ago, I think that where you say the County Board is caught, the State Board has ordered them to raise, I think in justice to the taxpayer that there ought to be a time in there which, after the County Board gets the order to make the increase in dollar amounts and adjust the individual parcels of property, that a reasonable time ought to be given to the taxpayer again to appear there and show cause whether his property is the property that ought to be assessed. There ought to be a time limit on there and I think you could work that in and still
get your levies made in time to certify the taxes in November or December.

FRED WHITE: I know that Mr. Sidner has a paper on special taxes that will be of interest to the members here and that thereafter Mr. Barney is going to suggest how we can get some money back that we pay under protest, so perhaps we should hear Mr. Sidner.

SEYMOUR SIDNER: Well, this field is a little bit different than what you have been talking about, and yet some of the very pertinent rules apply. I am looking at this solely from the viewpoint of the lawyer who has as a client a taxpayer who is complaining about special assessments being too high.

First I am not going into the question of whether the special assessment district was properly created, or whether proper notice was given to the taxpayer. We assume that he has had proper notice that there was going to be a special assessment levied against him.

Then he comes into your office, and in most of all these cases there is the Board such as the County Board, the City Council, Sanitary District or the Drainage District that has instigated this special improvement. You go before this Board on receiving the notice. What can you do at that hearing?

In the case of Chicago and Northwestern Railway Company versus City of Albion, in 109 Neb. 739, the taxpayer has a right to introduce evidence and have a bill of exceptions made of all the testimony that the taxpayer presents at such hearing. However the assessing board was held in the above entitled case not to be required to insert in the bill of exceptions all of the evidence that it considered in reaching its result.

In other words, it is another one of these boards which instigates something and is final in its matter.

Suppose you are dissatisfied; every single different type of special assessment district has different rules as to whether or not you may appeal. I will not try to cover all the special assessment districts, I will try to just hit the high spots with you in order to illustrate the problem.

First, in cities of metropolitan class the statutes, Section 14-547, provides that all orders of special assessments shall be final and binding as the order or judgment of a court of general jurisdiction, except that you have the right to appeal.

Also there is provided for the mechanics for the appeal and it appears that on the trial in District Court it is a trial de novo, there is nothing shown as to whether or not it is before the court as an equity matter or just how it should be tried.
However, the court found that this did not apply to Metropolitan Utilities District and you would have no right in that case to appeal. Petition in error was your only right to a review.

As to cities of the primary class it was held in Webster v. City of Lincoln, 50 Neb. 1, that taxpayer who was aggrieved by special assessments had no right to appeal, his only remedy was a petition in error. In other words if he just didn’t like the amount he had no remedy except the petition in error.

In cities of the first class, Section 16-707 of the Nebraska statutes provides that the right of review is limited to the questions of fraud, injustice or mistake. Therefore, you see in that case again the taxpayer had no right to have any review by a court only on those specific issues which practically amounts to a petition in error.

As to cities of the second class, there is an excellent case on that, Roberts v. the City of Mitchell, 131 Neb. 672. The court said “Nowhere in that section is an appeal provided by which the District Court is granted jurisdiction to review by appeal the proceedings of a city council in a city of the second class in its findings, orders and judgments in making special assessments. Nor do we find such power elsewhere in the statutes. Such provision can not be supplied by the courts. This is probably due to legislative oversight, because the right of appeal rather than review by error proceedings is granted by statute in the case of review of the acts of most other tribunals. We can not amend the statute. It is not the function of the courts to make statutory law, but to interpret such laws devised by the legislature. We respectfully call the attention of the legislature to this particular situation, so if it wish, it may grant the courts the jurisdiction lacking in the respect pointed out.”

We find in drainage districts there are four or five different kinds of drainage districts in the state of Nebraska, the one where it is by county authorities, there is no appeal where the County Board acts as the drainage district creator, and yet we have found that three other sections on drainage districts provide for an appeal where the District Court shall hear it as a matter in equity.

In sanitary districts, there are three kinds of sanitary districts; in one there is a right to appeal to be heard as a matter in equity; in the others the matter in District Court is only a petition in error.

Briefly then, this sets forth the right of the taxpayer to hear or be heard in District Court on a matter of review if he’s unsatisfied with these decisions of the taxpayer, of a taxing board.
There are however other remedies and rights that the taxpayer has. Under the general tax laws Neb. 77-1729 to 1733, it has been reiterated here today earlier that the taxpayer can secure back taxes that were illegally collected by mistake or double taxation under certain protest forms, but the most common method of relief has been the method of injunctive relief. In many cases in Nebraska where the taxpayer has felt badly aggrieved he has gone to the courts and he's attacked the formation of the special assessing district and he's gotten relief.

I believe the injunctive process has been extended overly by the courts in Nebraska in this situation because of the lack of the right to have his case heard on appeal.

I will cite two cases which I think clearly illustrate this. The constitution of Nebraska says that the power of the cities on special assessments should be based on the matter of benefits. In the case of Munsell versus the City of Hebron, the real estate was located on the edge of the town and was agricultural in nature, but it was subject to a paving district. The property was said to have a value of twelve thousand dollars before the property was improved by the assessing district, and the testimony indicated that this special assessment amounted to three thousand dollars.

There was a trial of the case and all the testimony indicated that the property was not benefited in the excess of one thousand dollars and that the property which was formerly worth twelve thousand dollars was now not worth over thirteen thousand dollars with the improvement. The court in this case said that when a party attacks a paving assessment as void there is a burden upon him to prove the invalidity. The court went on to state that the vital principle is that the value of the property tax has been increased in the sum at least equal to the assessment levy.

To levy a tax without a corresponding increase in value is to take private property for public use. And they said that the order was void to the extent that there was not an increase in value, and reduced the amount of the assessment to one thousand dollars, which in my opinion granted an appeal by the use of an equitable action.

Just a quick summary, I believe that this is a definite field for legislative action. I believe that any tax originating body should be subject to review by an impartial District Court. I believe the Supreme Court has well spoken in that case where they called it to the legislators' attention. I believe that if such a procedure existed an appeal in every case, the necessity for
these equitable actions to try to declare everything void on the least technicality, could be eliminated to a large extent by the proper legislation.

Flavel Wright: Now, Chaunce, I'd like to have you, if you will, summarize the payment of taxes under protest, in five minutes, and then we might have five minutes for question and answer.

Chauncey Barney: I think the payment under protest is probably one of the most misunderstood sections, both by taxpayers and by lawyers.

We hear it every day, "Why, I don't like this tax, I'm going to pay it under protest," and demand is made on the County Treasurer many times to pay it under protest.

Actually payment under protest is rather narrowly limited. Now remember that we are past the point where the taxpayer has the right of appeal about his valuation, that has gone back, before the Board of Equalization, and after the expiration of twenty days from that date, his right of appeal is gone.

Now all that is left, the tax has been levied, he owes the money, and now what to do about it.

There are two things that he may do, actually three, but your first glance at the statute would indicate two. First of all, in 77-1729 to 1734, we do have provisions in respect to a tax which is invalid by reason of nonliability of the property to taxation.

In other words property not subject to taxation, charitable property, property owned by a church, and that kind of thing; or double taxation that has been twice assessed.

Now those are the only two situations in which you can pay your tax, and you must pay it in order to get the remedy, you must pay the tax, you can pay it under protest and it will be indicated by the treasurer at that time. No particular formality is required, you simply indicate that you want to pay it under protest, but, remember, that applies only to two things, that is, the property is not liable to taxation, or it has been twice assessed.

That is all there is to payment under protest. Now there is one other remedy set forth in 77-1735, and the following sections, and that is in connection with the tax levied or assessed for an illegal or unauthorized purpose.

Now there the taxpayer has thirty days after the payment of tax, he must pay the tax and then he has thirty days in which he may demand in writing from the County Treasurer with which he paid the tax, the return of that tax. Now although he makes demand upon the County Treasurer and the County Treasurer in
turn notifies the other taxing subdivision, of course, the County Treasurer as you know collects for the school district, sanitary district, other special assessment districts, the state, and all the rest of them.

In spite of the fact that the County Treasurer also notifies the treasurers of the other districts you also must notify the treasurers of those other districts because the money has been distributed, it is in the hands of the state or the school district or the special assessment district, and you must make the same demand upon those other taxing authorities.

That is by decision of the Supreme Court in one of the cases you will find listed in the annotation.

If within ninety days you do not get a return, you may then file suit against the various subdivisions and have a hearing upon the return of your money.

One other thing that has been briefly touched upon, and that is the right of injunction in this area. Although we have a statute which almost flatly says that injunction will not lie, it has been tempered by the judicial decision to the point that has been indicated by Mr. Sidner, there is a rather wide range of cases in which injunction and declaratory judgment are available.

"Planning the Estate of John Farmer." A panel discussion of estate planning problems with particular reference to changes arising under the Internal revenue Code of 1954.

Panel Members

Barton H. Kuhns, Esq. .....................................................Omaha
Keith Miller, Esq. ........................................................Omaha
Robert R. Moodie, Esq. ................................................West Point
Daniel Stubbs, Esq. ....................................................Alliance
John C. Mason, Esq. ......................................................Lincoln

FLAVEL WRIGHT: Now for this afternoon's program this is known as "Planning the Estate of John Farmer."

I think I will turn it over to the panel to proceed and discuss the planning of the estate of Mr. and Mrs. Farmer.

ROBERT MOODIE: This law firm is now having a conference to discuss the planning of the estate of John Farmer.

We will take up pretty largely this afternoon the items which are mentioned in the mimeographed material which you have. You will find however that this is annotated to the code and you may want to take it home and study some of the things which we are unable to incorporate this afternoon.
Now we will proceed as though we were meeting as a law firm. I think the first thing we will want to take up at this conference today is the estate of John Farmer. John was in the office the other day and asked me to draw him a simple will leaving everything to Mary. I do not know why they always ask you to draw a will, these people don't seem to have ever heard of will drafting in estate planning, but he just wanted to draw a simple will.

John is a pretty successful farmer. He has a wife forty-five years old, John's forty-eight, and they have two children, a daughter fifteen and a son seven. I had quite a time finding out from him just what he's worth, you know how a good many of them are, they never want to tell you all the property they have or the value of it.

But he has a farm of 320 acres he told me that it is worth $60,000. His farm machinery and equipment is worth $10,000. He feeds cattle, he has $35,000 worth of livestock out on the place with a chattel mortgage against them in the bank for $10,000. He has some United States bonds, Series E bonds, $12,000 worth; some listed corporate stocks at $5,000.

Then he has some stock in a local feed company, a minority interest, of $10,000. Right now he has $5,000 in the bank. They have a house in town that they rent out, they do not live in it. They bought it some years ago when they thought they were going to move to town.

And he has $50,000 of ordinary life insurance. Well after he was in I checked his titles and I found that he did not quite understand how the title to that farm was held. He told me it was all in his name, but 80 acres of it that he bought in 1938 was taken in joint tenancy with his wife. He has the balance of the farm in his own name. He paid $8,000 for it when he bought it, it is now worth $16,000.

The other 240 acres is in his name in fee simple. He bought it for $20,000 and it is now worth $44,000. The farm machinery and equipment and livestock of course are all owned solely by John. The U.S. bonds are in co-ownership with his wife, but he paid the consideration for them.

All the corporate stocks are in John's name. The stock in the feed company is pretty widely scattered. Both numerical and operational control is owned by one person who is not related to John. That company has not paid very many dividends and there is no ready market for the stock at all.

The bank account is in John's name but the bank has been paying checks drawn by Mary. The balance usually varies from
about $2,000 to $10,000 during the year, depending on what John has to sell.

The house in town was bought on July 2, 1948, for $14,000. He figured he would move in while the children went to high school, but they never moved in. John furnished the funds and they took the title in joint tenancy and rent out the house.

John's $50,000 of life insurance policies now have a cash surrender value of $5,850. The net premiums on those policies are about $1,400 a year. They would provide Mary a monthly income of $185 a month with payments guaranteed for life if John were to die now, and payable for twenty years in any event.

The policies are payable to Mary at the present time in a lump sum.

I asked John if he had ever made a gift tax return and he said he had not. John's father is still living and he is seventy-five years old but his mother is dead. He has a sister and no brothers. John's father has 160 acres of land which is clear and now worth about $32,000, and it is possible that John will eventually inherit a part of that property.

Mary's father is dead, he died in 1946 intestate and left a farm which was worth $40,000. Mary has no brothers and sisters and she now has a half interest in that farm and her mother has the other half interest. John does not know anything about the testamentary plans of either his father or Mary's mother, they are all on friendly terms, but he knows nothing about what their plans are.

Well I followed the check list that we ordinarily use in the office to get this information, and then after John was in I made up a flow chart or two showing about how the property would go as John wanted it to go and what the expenses would be for administration and taxes at John's death and also at Mary's death if she survived, and that is the flow chart A before you and also flow chart B, which takes the estate of Mary Farmer in the event that she died before John, and also John's estate at his subsequent death.

The computation of tax and expenses on John's death if Mary survives him under a will which John wants leaving everything outright to Mary in fee shows that the total expense would be $14,060. There would not be a very high federal estate tax because of course under his plan there would be full advantage of the marital deduction; but when Mary died later on, owning all of John's property and the property that she also has, we find that the federal estate tax would run to $30,280.
I told John I thought we could save him some money and he was interested in that and thought that he would like to have us discuss this and see if we could not come up with a solution. He said that he was interested in saving money but he did want the best plan that could be worked out for the benefit of his family, and I thought John was entirely right about that.

I wonder if we should not start in here now at this point and discuss this jointly held property, he wants to make a will and he has jointly held property in the estate. Perhaps we ought to see what we think ought to be done about that.

Bart, do you have any ideas on that?

BARTON KUHNS: Well, before we get into the disposition of it I notice you say John has never filed any gift tax returns. That does not bother me so much about the farm which he bought because the farm he bought and placed in joint tenancy did not have sufficient value then, so that under the law back in 1938, he would have had to have filed a gift tax return, but this house that he bought a little later and placed the title in joint tenancy, seems to me that any way you figure that he has used up a little more than his annual exclusion for that year, and that a gift tax return should be filed.

Do you think if you tell him that that he will ever come back?

ROBERT MOODIE: Well, I think he will, because there will not be any tax to pay. If there was a tax to pay he might never come back.

BARTON KUHNS: I think you might try to explain to him that all he is really doing is using up $500 of a lifetime exemption of $30,000 or possibly $60,000 for both of them if he makes a gift tax return, and if he does not make it, the statute's never going to start to run on that, and I think he should be told to do that.

ROBERT MOODIE: That property was bought after the Revenue Act of '48 went into effect and they had the marital deduction with respect to that gift.

BARTON KUHNS: Yes.

ROBERT MOODIE: So you say that would result in a $500 net gift?

BARTON KUHNS: Yes; basing it on the value of $18,000, which he paid for it, and taking into account the $14,000, taking into account the application of marital deductions to gift tax returns, it would come out with use of just $500 out of the $30,000 specific exemption.
ROBERT MOODIE: In other words half of the purchase price of $7,000 would be the gift and the marital deduction would reduce that by a half to $3,500 and the annual exclusion by $3,000 and that would leave $500 net gift?

BARTON KUHNS: That is right.

ROBERT MOODIE: To take off of his $30,000 lifetime exemption.

BARTON KUHNS: Yes.

ROBERT MOODIE: Yes, I think we can arrange that with him.

BARTON KUHNS: Well, now, it is just a matter of making the final return and paying no tax.

Now there are, of course, a lot of problems that result from this joint tenancy, practically, I do not know how desirable it is to leave the real estate in joint tenancy regardless of the law. One way that occurred to me would be to just break the joint tenancy and let each of them have an undivided half interest, but it seems to me that that is equally undesirable and I think we should try to work out some plan whereby the title to this property in joint tenancy becomes vested in one or the other of them individually, perhaps one property in one and one property in the other.

Of course under the new code, but not effective as the outline says on August 18 of '54, but effective commencing next January, if the joint tenancy of real property between husband and wife is created, the husband has the option of treating it either as a gift or leaving it in joint tenancy, but that is of no help to us, in this situation, because these properties were acquired a long time ago.

I am a little inclined to think that some consideration should be given to letting John own the farm, and working it out so that Mary would own the house, and these values can be accepted, I think you could make a tax free exchange of their respective interests in those two properties.

I think at least we might have that in mind as we proceed with this estate and see where that puts us on values.

There is one thing to watch in connection with that, exchanging his half interest in the farm for a half interest in the house would result in their being a thousand dollars of gift from John to Mary, we must not overlook that if we make any more gifts this year for them.

And then also I think they should be told that that tax free exchange will not affect their income tax base on either of the two properties, but by doing that they get the farm completely out of Mary's estate and get the house completely out of his estate.
ROBERT MOODIE: The whole farm would be in John’s name alone as one unit?

BARTON KUHNS: That is right.

ROBERT MOODIE: Well that sounds desirable.

You were talking about any future gifts, Bart.

Keith, do you have any ideas about whether this estate is in shape to make gifts or whether we ought to recommend the making of gifts to John?

KEITH MILLER: Generally speaking I think with a man who has an estate of this size we have to be a little bit careful about telling him to give away his property or he will be coming back here to us in a few years and say, “Look, you told me to give everything away, and now I do not have anything, it is your fault.” However as a general proposition under the new code you can save substantial federal estate taxes by a gift program.

The new code still provides the $3,000 annual exclusion per donee; the same $30,000 lifetime exception. You still have the advantage of being able to take property off the top brackets in your federal estate tax and making gifts where you pay the tax in low brackets for the gift tax purposes. All those are advantages to making present gifts.

Now you also have the advantage—I do not know what John’s income is here, but if he’s in a high income tax bracket and he gives away income producing property, we can transfer that income over to a donee who has little income and have it taxed at low income tax brackets, therefore saving more tax dollars.

JOHN MASON: It seems to me if we are going to talk about having John make some gifts we are going to have to be a little bit careful and observe a few precautions. There are several ways in which he can make gifts, but we have to remember that, or at least advise him of the fact, that if he makes a gift which could be held to be in contemplation of death. For example, if he should give away any of his insurance, and then if he should die within the first three years after making the gift, it would undoubtedly be included in his estate and we would not have removed it as far as the estate tax picture is concerned.

However, if he can outlive the three years which we have every reason to expect, I know we would not have any problem on contemplation of death on any gifts that he would make at
this time because the statute makes that clear now under the new code.

Also if we would try to have him give away some property, retaining a life interest in it of any kind, such as the right to take income or a right to say who should be the beneficiary of the gift, if he should make it in trust, for example, then that is going to throw it back into his estate. We have to cut the strings and make it a complete gift if we expect to get it out of his estate.

Another thing that we would have to be careful about would be to ascertain that we do not have him make a gift which might be a transfer taking effect at death, because that too would throw it into his taxable estate. If he reserves more than five percent reversionary interest in whatever gift he might make, he would throw it back into his estate.

And of course also if he should want to set up a trust or make some kind of a gift of that nature and retain the right to revoke it or to amend or modify it in the future, that is going to defeat our plan, so he can not make it a revocable transfer and still plan on getting it out of his estate for estate tax purposes.

Another thing that he probably will want to be advised about and think about is that if he does make a gift of property, his basis in the property continues in the hands of the donee, so that if the donee sells it and there is a capital gain on it, and the new, the value now, is not the basis on which that is to be computed but it is John's basis or the value in his hands, that would carry over into the hands of the donee. So if he had some asset that he might want to get rid of that is going to depreciate in value, we would want to give thought to the fact that he could hold it until his death and then if the beneficiary receives it, it will acquire a new basis. Of course, it would be in his estate then too.

KEITH MILLER: There is another hitch in this business of giving away property which may be disposed of, even though the new code gives you a stepped up basis. If that gift property is taxed as being in contemplation of death, you have this problem, that if you give away property and the donee disposes of that property within three years, then the donor dies and it is held to be in contemplation of death, you have included in the donor's estate the property which he gave away at value as of date of death, but since the donee no longer has that property, he does not get the advantage of the stepped up basis anyway.

So if we are going to advise making any gifts, I think we should advise giving something that would not be disposed of in that three year period.
JOHN MASON: And there is one more little point, and that is that the government is going to get him in another way, and that is that if the market value right now is less than the basis and they try to sell the property in the future and try to take a loss on it, the lower of the two values will be taken into consideration so that it would cut down on any loss that they could take advantage of so they get him going and coming on that.

But in any event it seems to me that the point that was mentioned a minute ago is certainly to be kept in mind, and that is that he must not sacrifice his and Mary's security just to get rid of some property now for estate tax purposes or for the purpose of reducing taxes, because after all if he does live to the age when he wants to retire and he and Mary live on to eighty or ninety years old, they certainly want to have property available to furnish them an income during those years.

KEITH MILLER: Bart, I would like to ask you one question on this business of reducing your income taxes by making gifts.

Now is it not true that under the new code a son or daughter can still be taken as an exemption even though he or she might make more than $600 in her own right?

BARTON KUHNS: Yes. The disadvantage of gifts to children is removed to some extent by the new code. Formerly, if you put your children in a position where they were getting more than $600 of income you lost the opportunity to claim them as an exemption on the return. But now, if the children are not over nineteen years of age or are students, unmarried, and live or make their home at home, they can be away at college, but headquarter at home, regardless of what their income is, the parents can still take the $600 for them.

So I think that part of the disadvantage of gifts to children is removed at least to that extent, and if he was sure of their requirements and sure they were going to college, there might be some advantage in the gifts even in spite of some of the disadvantages that have just been mentioned.

ROBERT MOODIE: We have here two children.

DANIEL STUBBS: Did you say they were minors, Bob?

ROBERT MOODIE: They are fifteen and seven. Now the usual question arises of course if there is going to be a gift to them, should it be an outright gift or should it be a gift in trust. I know you have got some definite ideas on that, Dan, what do you say?

DANIEL STUBBS: The only thing that is involved tax-wise right now is whether you get that $3,000 annual exclusion on the gift to the children.
Since we have not even begun to use up the $30,000 lifetime exemption of $60,000, if both husband and wife join, it does not make any dollar difference whether we get the annual exclusion or not. If it did, of course, you have a question when you make a gift to children if we can find something here that ought to be given to the children, we then have a question of whether we have made a gift of a future interest which eliminates the annual exclusion.

Of course, there has been considerable doubt whether you could make a gift to a minor in any way that would not be a gift of the future interest, up until the time of the new code and under the laws of our state.

Now of course the reason is that when you give property to a ten year old child our laws are pretty stringent that that money or the income from it can not be used for the benefit of the child if he has parents and they are able to support him. Therefore his enjoyment of the fund or the income from it is necessarily postponed until he is of age.

That sounds like a future interest, the postponement of the enjoyment to a future time; and there are cases which indicate that that is sufficient to characterize it as a future interest.

Therefore a gift to a minor may be one in any event that is not qualified for the $3,000 annual exclusion. Of course, under the '54 code we could give them property in trust and if the trustee may pay the minor all the income, he may, if the trust instrument says that the trustee may pay to the minor in his discretion all income, and it all passes to the minor at age twenty-one, and if the minor dies before he is twenty-one it goes to his estate, or subject to his general power of appointment. Then it is not a future interest.

I do not suppose it is particularly important here, but maybe we will get one before long, where it will be important, and it is still very doubtful in my mind whether you can even by means of a trust give a minor any property which is not a gift of a future interest under our laws, because even though you provide that the trustee may pay to the minor all income from the trust, is that not subject to the local law which says that the minor shall not be allowed to use any of the income so long as his parents may support him?

And in that event there can be no distribution of the fund during his life. So that for the present purpose it is probably sufficient to say that we had better keep in mind that if we are going to give gifts to children to investigate carefully before you
take that $3,000 annual exclusion, there is considerable doubt as to whether it is available in any event or at any time.

Do you agree with me on that?

BARTON KUHNS: Do you think under the new law there is a requirement that the income can not be accumulated by the child, that it has to be actually used?

DANIEL STUBBS: No, I do not think that; but they must have the power to distribute—under a trust, you mean, Bart?

BARTON KUHNS: Yes. The trustee is required to pay all the income to the minor, the fact that it went to a guardian for the minor instead, do you think that would make any difference?

DANIEL STUBBS: Of course, it is being accumulated if it goes to the guardian if he can't spend it for the minor, and the new code says no part of a gift to an individual who has not attained the age of twenty-one years on the date of such transfer shall be considered a gift to the future interest in property if the property and the income therefrom may be expended by or for the benefit of the donee before he attains the age of twenty-one years.

Can he do that in Nebraska? I think it is doubtful.

KEITH MILLER: I think if you give a trustee power to expend all the income for the benefit of the minor that your guardianship law will never apply.

I think the trustee can directly spend that money for the benefit of the minor and you have qualified for the annual exclusion, and I do not think Nebraska law will bother that, I think it is the intent of the new code to eliminate those restrictions.

DANIEL STUBBS: Well, I hope so, because we frequently run into gifts to minors.

Without a trust, there would be considerable doubt about it.

KEITH MILLER: I think your local law may come in if you try to qualify for the annual exclusion by giving a minor a testamentary power of appointment, which in the new code says it can be a general power of appointment, but if you say in your trust agreement that that minor has a testamentary power of appointment and that minor is not capable of executing a legal will, then your trust may not qualify for the exclusion.

BARTON KUHNS: I still think it could qualify because I do not think the exemption is dependent upon the residence of the minor, and conceivably this minor might move, the whole family might move to some jurisdiction where he would have testamentary power and could make a will. It is not universal law in the United States that prohibits the minor from exercising that power.
until he is twenty-one, and I do not think the code means to
draw a distinction that seems to me that would be unfair based
on residence of minor.

The whole theory of our tax law recently has been to equalize
the states where disproportionate results would occur from dif-
fferences in state law.

DANIEL STUBBS: I would agree with Bart on that partly be-
cause the code does not require him to make a will. It says in
the event it is payable to the estate of the donee who is the minor,
or as he may appoint; so at least you could make it payable to
his estate.

KEITH MILLER: And I think that is the safe way to do it.

BARTON KUHNS: Really, what we are talking about goes to
the $3,000 annual exclusion.

DANIEL STUBBS: That is right, and it is not important.

ROBERT MOODIE: There is an income tax problem though. If
the trustee does use the income for the support of the minor
that income is taxable to the father if he was able to support the
minor, is that not correct?

DANIEL STUBBS: That is true if the income is used to dis-
charge an obligation of support which the grantor of the trust
had. Then the income is taxable right back in the grantor's in-
come.

Now I suppose that it should be just mentioned in passing
that in considering the income of these trusts, whether it is to a
minor or anyone else, that it is cut across by the so-called Clifford
regulations which we now have codified, so that all you have to
do is turn to Section 671 and the following sections to find out
what the Clifford regulations are all about.

It is sufficient to say though now that a trust with a term
of less than ten years will not take the income out of the grantor's
income, that if the grantor retains, even though the trust is
longer than ten years, certain beneficial interests that are set
out in the code, or if he retains certain administrative control
of that trust and does not divest himself of it, he can still find
that he has to pay the tax on that income, and that is true whether
the beneficiary is a minor, or anyone else.

JOHN MASON: On this ten year business, there's one excep-
tion to that, that although John has indicated in this case no dis-
position to give anything to charity, there is one exception—that
if the income is payable to a charity for two years that is suf-
ficient to bring the trust within the Clifford codification, as dis-
tinguished from ten years, if there is no charity involved.
DANIEL STUBBS: That is right. That grows out of that case which the Commissioner took up.

ROBERT MOODIE: When you look over John's estate here, there isn't really very much that you can advise him to give away except perhaps some of the life insurance, and that raises some problems.

BARTON KUHNS: The life insurance was the thing that I was thinking about when you read the facts and why I suggested we must keep in mind we have already taken into account a $1,000 gift. But it seems to me that subject to what Keith has said about not encouraging John to give away all he has or too much of what he has, that if we are going to approach this from the point of view of trying to develop a plan that will result in a smaller amount of federal estate tax out of the two estates, that probably the life insurance becomes one of the subject matters of possible gifts.

Now of course once he starts giving away some of his life insurance, we run into problems as to how much he is giving away. I take it that none of this life insurance is paid up. If it was paid, then the value of the gift, the amount of the gift, would be the replacement cost of that amount of life insurance at the then attained age of the insured.

But if the insurance is ordinary life insurance which has accumulated some cash values during the year, then, the value of any life insurance which is given is based upon the cash values of that insurance plus an adjustment for prepaid premiums on that.

I think that there is a possibility of donating some of this life insurance and that that is particularly attractive now as compared with the old law, because the new code has eliminated the payment of premium tests, and with some qualifications what Keith has mentioned and worried about, seems to me that the insured can divest himself of some of his life insurance. How much depends on how much it is smart to diminish his own estate, but he can divest himself of some of his life insurance and still be responsible and actually pay the premiums on that life insurance, and still the life insurance of which he has divested himself does not become part of his estate.

Of course we have still the problem that John mentioned, we have to assume that he is going to live another three years, but that problem exists with respect to any gift, that might be made. There is a question as to whether the payment of premiums might be construed as gifts of a future interest because of the nature of what the premiums are being used for.
But it seems to me that the new code contemplates that the insured may pay the premiums on policies which he no longer owns, and that he does not create any interest in those policies for estate tax purposes by reason of his payment of those premiums. There is no question in my mind but that he makes a gift of the premiums.

But I am not concerned about the fact that those, that might be a gift of a future interest, but that is certainly something to think about, and maybe you want to explore that a little more, Keith.

KEITH MILLER: I do not think very much, except I just want to wave a lot of red flags all the way around in connection with this giving away of life insurance. I do not think we can anticipate what the answers are going to be to a lot of these questions.

That question of whether or not you qualify a gift of an insurance premium for the annual exclusion is important.

Then there is also the question on your estate tax valuation as to how much is included in the estate for premiums given within the last three years before the donor died.

Does that thereby include the whole policy's proceeds on the theory that the insurance policy would have been worth nothing had he not paid those last three years' premiums, or will they include in the donor's estate a proportionate amount of the proceeds in proportion to the total premiums paid; or will they simply include the amount of those last three years' premiums. Those things we do not know. It is probably the proportion that will be included but we do not know for certain.

BARTON KUHNS: What do you think of overcoming that objection by giving enough cash along with the policy to pay three years premiums in advance.

DANIEL STUBBS: He might live ten years.

BARTON KUHNS: But after the three years are up, you have overcome any relationship between the time of the donation of the policy and the payment of the premiums.

KEITH MILLER: I think that is all right, except that there you are not taking advantage of the so-called loop hole that you can give away the policy and continue to pay the proceeds and not have to give away all the money to pay the premiums with.

DANIEL STUBBS: We do not want to give this away before January 1st, do we? The policy shouldn't be transferred before next year, because of the gift tax provisions.

KEITH MILLER: I do not think we are worrying about gift tax provisions. The only change in respect to giving life insur-
ANCE IS THIS ADVANTAGE FOR FEDERAL ESTATE TAX PURPOSES OF ELIMINATING THE PREMIUM PAYMENT TEST. IF WE GIVE IT NOW IT IS ALL RIGHT.

DANIEL STUBBS: THAT IS EFFECTIVE AS OF AUGUST THE 16TH.

KEITH MILLER: THAT IS RIGHT, IF THAT'S THE DATE OF THE CODE.

BARTON KUHNS: I DON'T THINK IN ANY EVENT WE WANT TO GIVE AWAY ALL OF THE LIFE INSURANCE, JUST PART OF IT.

OF COURSE, I THINK ONE OF THE MAIN PROBLEMS IS TO BE SURE THAT IN GIVING THIS AWAY WE DO NOT LEAVE JOHN WITH SOME RESERVATIONARY INTEREST THAT IS GOING TO LEAVE THAT INSURANCE TAXABLE IN HIS ESTATE.

NOW THAT RESERVATIONARY INTEREST REFERS TO THE POSSIBILITY THAT IN SPITE OF HIS MAKING MARY THE OWNER OF THAT POLICY IN THE EVENT OF MARY'S DEATH, BEFORE JOHN, OR, THE THEORETICAL POSSIBILITY OF HIS RETAINING A SUFFICIENT RESERVATIONARY INTEREST, MORE THAN FIVE PERCENT UNDER THE LAW, SO THAT OUR WHOLE PLAN IS GOING TO FALL FLAT ON ITS FACE. WE HAVE TO BE VERY SURE THAT HE DOES NOT HAVE THAT, THAT HE DOES NOT RETAIN A FIVE PERCENT RESERVATIONARY INTEREST.

I THINK THERE ARE PROBABLY TWO WAYS OF OVERCOMING THAT, BUT ONE THING I THINK WE WILL HAVE TO FIND OUT BEFORE WE GET THIS WILL EXECUTED IS WHAT COMPANIES THESE POLICIES ARE WITH, BECAUSE WE'VE ALREADY FOUND THAT SOME COMPANIES ARE WILLING TO DO SOME THINGS WITH POLICIES THAT OTHER COMPANIES SHY AWAY FROM AND THERE IS NO USE IN MAKING THIS TOO CONCLUSIVE UNTIL WE FIND OUT WHETHER OR NOT THE PARTICULAR COMPANIES INVOLVED ARE WILLING TO DO WHAT WE WANT THEM TO DO.

BUT IT SEEMS TO ME THAT ONE POSSIBILITY WOULD BE TO GIVE WHATEVER AMOUNT OF INSURANCE IS DECIDED TO MARY, AND THEN IN THE EVENT OF HER DEATH LET THE OWNERSHIP OF THE POLICIES DESCEND TO THE CHILDREN. AND THEN I HAVE READ SOME PLACE THE SUGGESTION THAT THEN LET THE OWNERSHIP GO TO CHARITY, OR IT SEEMS TO ME THAT THE COMPANY MIGHT BE WILLING TO LET THE OWNERSHIP DESCEND TO HEIRS OF THE WIFE AND OTHER MEMBERS OF THE FAMILY WITH THE DISTINCT PROVISION THAT IN NO EVENT WOULD THE INSURED EVER HAVE AN OPPORTUNITY TO ACQUIRE ANY OWNERSHIP OR INTEREST. IF THE COMPANY WOULD DO THAT I THINK YOU WOULD BE ALL RIGHT.

OTHERWISE ANOTHER WAY IN WHICH IT COULD BE DONE WOULD BE TO DO THIS THROUGH A TRUST, BUT THAT, THAT MAY NOT APPEAL TO JOHN, I DO NOT KNOW.

KEITH MILLER: IN THIS PARTICULAR ESTATE WE ARE TALKING ABOUT OF JOHN FARMER, HE AND HIS WIFE TOGETHER HAVE ASSETS INCLUDING FACE VALUE OF LIFE INSURANCE OF $215,000. IF WE GIVE THIS INSURANCE TO THE WIFE AND IF IT IS TAXABLE IN HER ESTATE, THEN WE HAVE NOT SAVED HIM ANY FEDERAL ESTATE TAXES IN THE LONG RUN, WE HAVE
simply postponed the federal estate tax from his estate over to hers in the event he dies first.

Now then the question arises as to whether or not there is any way you can give this insurance to her and yet not have it taxable in her estate.

I personally do not think there is any way you can eliminate life insurance proceeds from both estates and yet give either of the spouses any of the incidents of ownership.

I think the only way to virtually assure that you will eliminate it from estate tax in both estates is to put it in an irrevocable trust.

DANIEL STUBBS: I disagree.

You are dealing with two things, and you must always bear in mind that when we talk about transferring the insurance policy we are talking about, number one, transferring the incidents of ownership in that policy; and, number two, making the proceeds of the policy, and that is what everybody is familiar with by and large, making the proceeds of the policy payable in such a way that they can not revert to the insured’s estate.

Now so far as the proceeds are concerned that is fairly simple. We simply provide in a proper endorsement that the proceeds shall be payable to Mary whether by lump sum, or if we want to get them out of her estate of course, I think you make them payable to her with an annuity option, which of course terminates at her death, twenty years continuous and certain, or ten years continuous and certain.

And upon her death payable to the next beneficiaries who are the children, or to the issue per stirpes, which will take care of the children whether there are more children to come or not.

And, third, I think there should be a provision in the event everybody else dies to the X charity, so there is no possibility of it coming back to the estate of the insured.

Now, number two, the incidents of ownership, and if there is a reversionary interest in the ownership of the policy or in those incidents of ownership, then it may be found in the estate of the insured also. That’s the problem. How do we get rid of those?

There are some companies which will not do what I have suggested, that is, transfer the incidents of ownership to Mary but right in the policy provide that in the event of her death
before the proceeds become payable, by reason of the death of the insured, that the policy and all the incidents of ownership descend to it, or are owned by the beneficiaries whom you have set up for it, to receive the payment of the proceeds, that is, the children in this case. And if everybody's dead, the X charity.

Now it seems to me that you have gotten rid of the incidents of ownership both as to the insured in any event, and the incidents of ownership that you have transferred to Mary is in the nature of a life estate so that when she dies she only had a life estate anyhow, which is never found in the estate of the—I can't say it's never found there—but it didn't pass from Mary to the children, it passed from the grantor, it was set up in the policy originally.

You would in effect as to the incidents of ownership created a life estate in Mary with the remainder over to the children, with remainder over to the X charity.

You have got to worry both about transferring those incidents of ownership and the proceeds of the policy. If you can find a company that will permit the ownership of the incidents in that way then it seems to me that you have taken it out of both estates. Now clearly we can do that same thing by a trust.

I suggest you can do it also by agreements right in the policy.

BARTON KUHNS: If you do it by a trust there's one other point that's bothered me just a little. If the premiums are paid by John to the trustee, it seems to me you might run a little bit closer to making those, that the premiums might be a gift of a future interest there, thinking in terms of a corporate trustee to whom you would not normally be making gifts.

However that for some reason does not bother me so much if we have some trusted member of John or Mary's family who could be the trustee and to whom the premiums could be given each year. Maybe there would not be anything to be concerned about in the case of a corporate trustee, but I would like it a little better with the individual.

ROBERT MOODIE: You know it seems to me that in worrying about getting this life insurance out of Mary's estate as well as John's estate, you are all overlooking the realities.

Mary is a quite normal wife, chances are she'll outlive her husband by a number of years, and I doubt very much whether there'll be any of that life insurance left when she dies.

The thing that is worrying me about this estate is the problems about this closely held corporate stock, this stock in the feed company. It has not paid John many dividends, there is no
market for it and we have got to arrange something to do with that stock in this estate plan.

Dan, what do you think about that?

Daniel Stubbs: Well of course, it is the perfect case where we should get it disposed of if possible at least on John's death. As long as he is around if there ever is a chance to get any dividends he is probably the fellow that can get them. When he dies the widow and the children are not going to have much of an influence with the surviving majority stockholder, and the stock is going to be even more worthless to them than it is now.

It is not significant from an income standpoint because it is not paying many dividends, and from the standpoint of the majority stockholder it is to his interest to get rid of this widow who may make him a lot of trouble because she can not understand why she does not get dividends. And he can acquire it at the time of John's death by the very simple procedure of a buy-sell agreement and fund it with life insurance for which he would pay.

If that can be done it will have a lot of advantages of course. I think if the contract is properly drawn you can fix the value of that stock which will determine its value in the estate and will represent actually what you get out of the stock, so nobody is hurt. If it is just left as it is there will be problems of valuation over stock that represents no real benefit to this family.

Of course, if that were possible, we should be very careful to make sure that, number one, the majority stockholder binds himself to buy it, that he does not have any option which he can run out on, and, number two, that John shall be bound to sell to the majority stockholder at the price we fix before he dies if he sells his stock.

Barton Kuhns: What if the other stockholder is not willing to do that, Dan?

Daniel Stubbs: In that situation of course our buy-sell agreement is out the window and it looks to me, if he refuses, I suppose it is impossible to sell the stuff.

Of course, if the majority stockholder will permit the corporation to enter into an agreement to buy the stock and take out the insurance we do not need to tell him so, but it has a distinct disadvantage to him in that later on after John's death and when the corporation has acquired the stock, if the majority stockholder who then will have his own stock increased in value considerably because of the retirement of John's stock to the treasury, sells the business, and attempts to decide what his gain is
on the stock that he has owned all along, he will find that he will then pay a tax on the amount that the corporation has paid to John, because his stock has been increased in value that much, and he did not get the stock, the corporation paid for it, not the stockholder, and therefore it does not become a part of the basis of the stock he holds.

If the business is going to last for the next hundred years I guess we do not have to worry about it, but you can not tell from one year to the next how their minds may change, and that plan does involve a distinct disadvantage in income tax to the surviving shareholder when he later sells his stock.

JOHN MASON: Well, I think it’s time in our discussion to talk a little bit about the marital deduction and whether or not John should take advantage of it in the estate plan we will make for him.

It seems to me that it is clearly indicated in this case that advantage should be taken of the marital deduction and that by taking advantage of it, it will substantially reduce or may possibly eliminate the estate tax in his estate, and of course we can do some giving which will make it possible to reduce all estate taxes in this estate.

Now to consider what it is that you have to do to take advantage of the marital deduction, we had better just briefly review what is the marital deduction.

Under the 1948 code, and it has been of course kept in force by the new 1954 code, a man can give up to half of the property which is taxable in his estate to his wife if he does it in the proper manner and make that gift tax free as far as the estate taxes are concerned.

The property which goes to the wife can go to her either by will, which will certainly be considered in John Farmer’s case here. Even if John gave her no gift under his will and she came in, in the course of the year of the administration and elected to take her statutory interest in his estate, that election in the property that she got by reason of that selection would qualify for the marital deduction to the extent of it.

It would also be possible if John did not leave her enough property to take advantage of the marital deduction or if he did not lease her any property it would be possible as far as the estate taxes are concerned for the children or other beneficiaries to disclaim all or part of their interest and what she might take by disclaimer, if anything, depending on how we would set this will up; but what she might take by disclaimer of other people
would be eligible for the marital deduction. The limitation of course if fifty percent of his adjusted gross estate and his adjusted gross estate basically is all of the property taxable as part of his gross estate less the claims, funeral expenses, administration expenses and also any casualty losses that might occur, and also reduced by the value of any mortgages which are liens against the property which she might receive.

Another way in which she could take advantage of the marital deduction would be by giving property to her, reserving to himself a life estate. By reserving a life estate the property becomes or is still taxable in his estate and if she takes as remainderman, that taking is also qualified for the marital deduction.

And of course if he makes any gifts to her which are held to be in contemplation of death or intended to take effect at death or by some reason of that nature are included in his estate, but if they go to her, why they would qualify for the marital deduction.

Now he can leave her a bequest which might be held in trust, and if he gives her the proper interest in the trust it will qualify and be deductible. Likewise in his will he could give her a life estate. If he gives her a life estate or an interest in a trust in order to qualify it she must have the right to the payment of all of the income of that portion which we are trying to qualify payable at least annually, and she must have a power to appoint the property either during her life or by her will, or both; but if she has one of them it is sufficient, and the power of appointment must be general, so that she could appoint to any person or in any way that she wanted to.

Now under the new code, but not formerly, it is possible to set up one trust and to qualify a portion of that trust. For example, give her a half interest or give her all of the income, with the power to appoint but half of the trust. In other words, to qualify a portion rather than all of the trust and that portion which is so qualified will be allowable in the marital deduction.

That has not been true under the old law and there have been some recent cases in which such provisions were made, the wife was given the power in only part of the trust and it has disqualified the entire trust for the marital deduction. Now we can do that.

And likewise in this farm, if we wanted to, we could give her a life interest, or, a remainder interest in the farm, or if we give her the life income and the power of appointment over half of the farm, it would qualify that half.
Now if, however, we should create what would be known as a terminable interest, in other words, an interest in the wife which might terminate by lapse of time or by the occurrence or non-occurrence of some event, and if in such case the property would go to somebody other than the wife, then that would not qualify with a couple of exceptions.

We can provide that she has to survive by at least six months from the date of John's death in order to take her interest in what we are attempting to qualify for the marital deduction, and the fact that if she might die within the six months then her interest will be terminated, will not disqualify the gift, and I am assuming that she would outlive the six months. Of course, if she did not outlive it she would not take it and it would not qualify, I believe.

We can also as an alternative provide that if she dies in a common disaster, then her interests will not be set up, and that provision would not disqualify it for the marital deduction, and as far as I can tell there is no limitation as to when her death must occur, it is separate from the six months provision. It is separated by an "or" rather than an "and" and I would gather that even though she might live some time that if her death was attributable to the common disaster, it would still, not disqualify it for the marital deduction.

KEITH MILLER: Do you think that the use of that common disaster provision is practical?

JOHN MASON: It seems to me that it would not necessarily be something we would want to do. It seems to me that six months will be long enough because if you tie it up longer than that you are confusing the administration of the estate quite a bit, and you are withholding property from the beneficiaries.

KEITH MILLER: It would also raise a title question there, if you have real estate involved. How do you know when the title vests, if you have to wait an indefinite time to see whether or not she is going to die?

At least you would have to get some kind of a court order construing the will, and make a definite planning that she had not been involved in a common disaster or there was no possibility that she would ever die as a result of a common disaster, in which her husband had died.

JOHN MASON: In this particular case, because of the fact that it is possible for us to set it up in such a way that we practi-
cally eliminate federal estate taxes from either estate and thereby save quite a bit of money, I think we would want to consider giving it to her even if she only lived a very short interval in order to take advantage of the marital deduction in his estate, and then by not having all of the property taxable in her estate we cut down the taxes in both of them, which would more than offset the expenses in administering the additional property in her estate, I think, at least, that is what we should examine.

KEITH MILLER: I would like to ask you another question about a remark you made a minute ago, concerning the new provision which allows you to take one trust and qualify part of it and not qualify the other part.

Now it is my impression in reading the new code in Section 20-56 that if you give the wife the right to all the income of a trust for life, but the power to appoint only half, you may think that you are qualifying half the trust for the marital deduction, but I think the way the code reads you will not have qualified any of it, because the code says that if you give the wife the income from a specific portion and also give her the power of appointment over that portion, then that portion will qualify; but in the situation I just said you have not done exactly that. You have given her the income, not from a specific portion but from all, and the power to appoint over only that specific portion, so you may be losing all of the marital deduction you thought you were getting. As a practical matter you are better off to have two trusts anyway, you have two separate taxable entities there for one thing and you have separate administrations there. You might want separate definite provisions. You might want a spray income provision as to one, the non-marital trust.

So I think as a practical matter you should not ever try to use that one trust, qualifying part and not qualifying the other.

JOHN MASON: As in so many of these things we are in disagreement.

It seems to me that if you give her the income from all of it, you are giving her one-half plus one-half, or one-third plus one-third plus one-third, but I do not think the code would be interpreted quite as strictly, in other words, of your many red flags I would say this would be a tiny one, however it is one well worth thinking about.

In connection with the life insurance in order to qualify the life insurance for the marital deduction, again the code says that you can qualify part or all of the life insurance.
If the insurance is payable outright of course to the wife upon the death of the insured, that qualifies. Also if the insurance company holds it at interest subject to the right, for the benefit of the wife, and subject to her right of withdrawal, that would qualify it if the interest is to be paid within thirteen months after the death of the decedent.

If the insurance is to be paid to the wife in installments, and apparently the installments do not have to be any particular size or duration, and if the installments are to commence within thirteen months after the death of the insured, then that too will qualify that insurance for the marital deduction.

She has to have, however, the power to appoint the remainder that might be left over at her death in such manner as she sees fit.

BARTON KUHNS: Do you not think we should tell them about the change in the new law and the income tax liability on the insurance installments, I mean, the interest?

JOHN MASON: You go ahead and tell them, you know more about it than I.

BARTON KUHNS: I was just going to say that formerly where the life insurance installments included some interest, that interest came to the wife free from income tax, but under the new code, that benefit from insurance installments is removed, and there is income tax liability on the portion of the payments that represent interest.

DANIEL STUBBS: Well, is there not an exclusion of a thousand dollars?

BARTON KUHNS: With that exclusion.

KEITH MILLER: And that exclusion of a thousand dollars only pertains to a spouse?

DANIEL STUBBS: That is right.

KEITH MILLER: Well we have got to discuss too the question here of what form of marital deduction gifts we are going to take, whether or not we are going to use a trust or life estate, and also the problem of what property we should qualify for the marital deduction and what we should not.

I think in trying to determine what property you qualify you have to decide first whether your non-qualifying property is going to be in a trust or a life estate or is going to go directly to third persons.

Now in John Farmer’s estate, his estate is not large enough that he wants to give anything away to his children and bypass his wife, because she is probably going to need all this property to take care of herself upon his death.
So he would prefer that none of his property go directly to his children, I think.

Now in his estate it does not exactly fit a trust. First of all I understand his wife is six foot three inches tall, and she can handle those cattle as well as he can, and that she would like to just take over and run that farm upon his death; so she would not like to have a marital deduction trust. She is going to run the place and take care of it.

Now with the assets we have in his estate the farm is really about the only asset, in addition to the insurance. The insurance and the farm are about the only two assets which would be conveniently suited to a non-qualifying gift to her since we do not want to put it in trust, we can give her the farm with a life estate, with the power to sell the property, if she wants to, but without power to consume the proceeds, and that would not qualify for the marital deduction trust.

Now the way it will work out the balance of the assets after paying the claims and expenses of settlement, and the taxes, and so on, will be just slightly more than enough to get the maximum marital deduction, so that we will not have a double tax in her estate on very much property. On an estate of this size I think that suits the picture much better than setting up a trust or a non-marital deduction trust in either event.

Now as long as we are not going to have a trust for the non-marital property, then we want to have all the personal property passing to her and qualifying because a life estate in personal property ordinarily is not a very good device to use because of your accounting problems and title problems, and so on.

JOHN MASON: If we were to use a formula clause in this estate or some other estate, how does that work generally?

KEITH MILLER: Well, the formula clause in most estates is a very good device and probably should be used.

I do not think it exactly fits here, but the formula clause ordinarily will solve two problems at once. Since you do not know now and can not tell exactly what the value of your assets are going to be when you die and whether or not they are going to have changed any form, it is difficult to hit the marital deduction exactly on the nose without overdoing it or losing part of the total deduction allowable.

Your formula clause will allow you to get the exact marital deduction because you simply say that you will give to your wife enough property that you get the maximum marital deduction.

In the use of that formula you can at the same time leave the
particular assets to go to the wife up to the discretion of your executor and he can then examine your assets at the time of your death and determine which would be the best ones to give to the wife outright or put in the marital deduction trust.

So that ordinarily I think that the device should be used. I say that without ever having probated an estate where the marital deduction formula clause was used.

JOHN MASON: We haven't had any contests, so I do not think our experience necessarily proves anything; but there has not been any difficulty so far.

I might suggest something though we have not done previously but are beginning to do now. In situations where you have a man who has enough property that you are talking about formula problems and marital deductions, et cetera, and where his wife has and is likely to have some property at the time of her death, it seems to me that it would be helpful as a matter of draftsmanship and so that there could be no misinterpretation of the will to insert a disclaimer clause to the effect that the provision for the marital deduction trust, might be disclaimed by the wife in whole or in part so that at the time of the husband's death the wife and her counselors could appraise the situation, find out what they then think would be the value of her estate at her death, and give her an opportunity to refuse to take some part or all of the marital deduction provision if it seems advisable at that time and if she wants to do it.

Of course, she would be under no obligation to do it, but it might be handy for her to disclaim part of it, and it might not be possible, I think, for her to disclaim only part of it if there isn't any such provision in the will, and it seems to me that she'd have to take it or leave it, if there is no such provision in the will.

Another thing which might be considered, and one fact I think that it should definitely be considered, is that our normal formula type will sets up the provision that the marital deduction amount would go into the marital deduction trust, and the income will be paid to the wife for life and then carry over into the residual trust, and the rest of the estate will go directly into the residual trust and she will get the income in that for life also; and then after her death that property will be distributed to the children or held for their benefit.

If she should happen to elect to take against the will for some reason and if you have not provided otherwise, your residual
trust will be set up in such a way that the children would not be entitled to the income or the principal until after the wife's death; but if the wife chose to take against the will she neither would be entitled to take the income during her life and you might have a situation which might be productive of litigation or might result in a situation where the income had to be accumulated for a great number of years because of having overlooked that point in draftsmanship.

So the point would be that if you have that type of a will, I think it might be wise to provide that if she does elect to take against the will that the marital deduction trust will not be set up at all. All the property will go into the residual trust and the payments for the benefit of the children will commence immediately rather than being deferred until the wife's death.

BARTON KUHNS: Bob, I'm wondering if John's original idea was to leave everything to Mary, what is his reaction going to be to a residual trust?

ROBERT MOODIE: Well, I do not think John is going to go for that at all, at least, I don't want the job of explaining it to him. Maybe one of you boys could explain it, but I doubt whether he will go for it.

BARTON KUHNS: Well, of course, it makes quite a difference in the way his estate is handled; I think certainly the possibilities should be fully explained to him.

ROBERT MOODIE: That is right.

BARTON KUHNS: There are a lot of questions which he will have and perhaps some uncertainties in his mind, but I think that before finally concluding on the plan that we should discuss with John the advantages and the disadvantages of trusts generally, not only the tax situation as applied to this particular situation, but there are going to be some problems in connection with the handling of this property in the future, and his children are not too experienced, and in the event of the death of his wife within a comparatively short time there could be problems where he would be mighty happy to have a competent trustee.

I think one of the things that will have to be discussed with him is the matter of selection and choice between a corporate trustee and an individual trustee. I think the advantages of a corporate trustee from the point of view of succession and experience and tax problems and everything else, should be clearly pointed out to him. I think some of the advantages of the in-
individual trustee, the closeness of the interests, and so on, perhaps the solution would lie in having some individual member of his family or Mary's family serve as a co-trustee or perhaps provide in the trust agreement that the trustee should not take certain action without the consent of some member of the family.

I think, in the residual trust, we have to be very careful about the extent to which Mary would have any influence over that trust, because we get into the possible danger that we place property in her estate, I think there is a provision in the new law that would permit expenditure of principal for hospital and medical expenses and maintenance according to ascertained standards, but it is not too clear yet at least as to who does the ascertaining of the standards and I would be a little reluctant to leave too much of the ascertaining to Mary unless we put this back into her estate. I think some consideration ought to be given to the desirability of the provision that would be made for the children, in the event they were the direct beneficiaries of the trust, whether separate divisions of the trust should be made just arbitrarily or whether the trustee should be given authority to distribute income or even principal according to the discretion of the trustee and in accordance with the needs of the children.

One child might have some serious illness or something of that kind which might require much greater expenditure. I think those are all factors that should be discussed.

I would be inclined to give the trustee quite broad authority. I would be specific in doing that, but put in provisions that would not limit his authority too much.

And then one other thing to discuss with him in connection with these trusts is when the children would get the property outright. Whether it is desirable to have them do that on attaining age twenty-one or whether it should be held longer. One other thing we would have to know before the final draft comes is what happens in the event of the death of the children, whether it goes to the survivor of them or their children.

ROBERT MOODIE: Well, those are all matters that we will have to take up with them.

DANIEL STUBBS: Of course we do not have to put the farm in trust, and to him that is one of the very important assets that he is concerned about. There is plenty of property other than the farm to take advantage of the marital deduction.

We can leave the farm in such a way therefore that it will
not appear in Mary's estate by leaving her a life estate, with the power to consume if she needs it for support or emergency, with the remainder to the children.

That of course will mean it will place the farm in a situation where Mary gets all the income from it as long as she lives and can use some part other than the income if it becomes necessary, she is going to have all the income from the life insurance too, so it should not be necessary, and it insures that it goes to the children.

It will not then be found in her estate so there's only one tax and not two.

I think it has been suggested that the personal property, that is, the cattle and the machinery and equipment shown in the inventory on page 1 was going into a residual trust, is that right?

KEITH MILLER: No.

DANIEL STUBBS: It went to her outright?

KEITH MILLER: That is right.

DANIEL STUBBS: Well now that would permit her to continue the operation of the farm. She would have the equipment and cattle and personal property that she needs, and she would have the life use of the farm if she wants to.

She could on the other hand dispose of the personal property and rent the farm, and she is entitled to the income.

BARTON KUHNS: What if she wants to sell the farm?

DANIEL STUBBS: She could not do it, except under pretty rather dire circumstances, because it would be difficult for her to get into the situation, where she would need to sell any part of the farm as principal even under the power to consume.

JOHN MASON: That is not going to be very satisfactory to John then. It seems to me that we ought to give her a power of sale but limit the power of consuming so that if conditions change, and she wants to leave the farm, she ought to have the right to sell it because it might not be convenient or desirable for her to manage it.

And we can do that, as long as she reinvests the proceeds in something else that are still subject to the life estate.

DANIEL STUBBS: Yes, she then would have to preserve the proceeds.

BARTON KUHNS: The preservation in the proceeds of a life estate in personal property is not too satisfactory, that is where we get back to emphasizing with John, I think, the desirability of trust.
Keith Miller: Why can we not eliminate this business of giving her any power to consume? Simply give her a power of sale without power of consumption; then as a practical matter the remainder goes over to the children, or for their benefit, so that if during the wife's lifetime all the other assets of this estate are so reduced and used up, that it is necessary to actually sell the farm and for her to live off the proceeds of that farm, then the children are going to want their mother to have it anyway as a practical matter. Then upon the wife's death the children will have a claim against her estate because she has wrongfully used up the proceeds of that farm.

Barton Kuhns: I think there is a little danger too in the practicalities of this when you get into it, get the proceeds of the farm and the personal property in it that's in the form of the life estate, so that the wife can not consume, during her lifetime, she is going to get a little confused sometime as to which money or which bank account is which, and we are running into some danger that we will lose track of this life estate and we will have an argument with the revenue agent in Mary's estate tracing these funds to try to show that actually they are not part of her estate.

John Mason: Of course that's why she has hired a lawyer.

We do have a situation that I am familiar with where a life estate in personal property was set up and they just kept all the property segregated and kept separate accounts of it and treated it almost as if it were a trust, except the fact that a widow does have the power to sell and in an emgerency the power to consume, and I think in that particular situation with the aid of people keeping track of it for her she is able to keep them separately, so it is a solvable problem although it is a problem certainly.

Barton Kuhns: I agree that theoretically there is no problem, but as a practical matter I am not sure that Mary is going to come and see us every time she has a check to be sure where it should go.

Keith Miller: If she does not keep any accounting the least that can happen is that if she has sold the farm we will not have any trouble upon her death finding out what were the proceeds, and the least we can do if we can not trace those proceeds, I think, is file an application in her estate, a claim against the administrator or executor, whichever she has, for the amount of those proceeds, saying that she had only a life estate in those
proceeds and they are in this estate somewhere and we are entitled to that much money out of the estate, and I think you can make that claim stand up.

BARTON KUHNS: That will be a claim by the children?

KEITH MILLER: That is right.

BARTON KUHNS: I am not satisfied with that suggestion, because I do not think that in the average situation children are going to want to file a claim against their mother's estate, claiming maladministration of the life estate, and if that is our out, I am prompted to go back and try to persuade them to try to make it a trust.

DANIEL STUBBS: The power of sale can certainly lead to complications, and one thing it leads to is possible future litigation. I think we should be here attempting to formulate something that will eliminate all possible future litigation, it is not a very good plan if you haven't done that.

Among other things of which I could complain is whether she got the right amount for it or not. I think there are some cases pending around the state now which involve that question.

If you give her the power to consume does that not carry with it the power to sell if the conditions exist? Where she needs the money? Which in this case should not occur. She is immediately suspect if she sells the farm, I would think.

ROBERT MOODIE: Now there is one notation that you might want to make. You may be interested in knowing the exact date and hour of the approval of the 1954 Revenue Code.

It was August 16th at 7:45 a.m., central standard time. It was signed by the President at 9:45 eastern daylight saving time, or 7:45 central standard time.

Now Keith is going to proceed with the suggested plan and before he does it I want to say that this is not the only plan that could be arrived at in this estate, it is not the plan that would save the greatest amount of federal estate tax. A plan could be worked out so that there will be no federal estate tax to be paid. What we have tried to do is to face realities and work out something that would work out best for John's family.

KEITH MILLER: One thing we have tried to do is to demonstrate the use of different devices, and one of the devices we have used in this suggested plan you will recall from the discussion that
there were many objections too, at any rate, this is the way this one fits together.

First, we follow the suggestion on the two pieces of real estate which they own in joint tenancy. We have the husband exchange his half interest in the rental house in town for the wife's half interest in an 80 which is part of their farm as a unit. That gives the title to the farm in the husband and the wife has this house in town as her own separate property, and she will then thereafter get the income from that.

There is no income tax consequence because both being rental properties it is a tax free exchange, the only tax consequence is that the husband by exchanging $9,000 in value for $8,000 in value has made a gift to his wife of $1,000, and of course there is no tax on that.

JOHN MASON: I think we should just emphasize, because we're talking about a house here, and normally if you are talking about the house you would be talking about a home, that if this house was their home it would not be rental property and it would not be a tax free exchange, and that would change the effect of this exchange.

KEITH MILLER: Yes, the tax free exchange is like property for like property and residence and income producing property would not be considered like property.

Secondly, we recommended to John that he give his wife this $10,000 worth of closely held corporate stock, the reason being, and we recommended that he do it in two installments, one now and another one after the first of the year; thus he has given her $5,000 each time.

And I would suggest that he give her $6,000 a year without gift tax consequence. Therefore there is no gift tax. The valuation problem which will be difficult will be met upon audit of the gift tax returns. Since there is no possibility of an actual tax to the government the auditing agent probably is not going to be so particular about trying to boost that value, so at least in John's estate you have avoided that valuation problem which might be difficult to handle.

You have also accomplished a little better balancing of his estate with Mary's estate so that in the event of her first and prior death you have not lost the opportunity to take advantage of her $60,000 exemption for federal estate tax purposes.
We probably should say that we will recommend to John that Mary's estate be built up more so that she not die without at least $60,000 of property. In getting that balanced then you are assured that you are going to get minimum cut of estate taxes regardless of which spouse dies first.

Then we recommend to John that he create an irrevocable trust and that he transfer $20,000 in face value of life insurance to that trust. The trustee then will be given all the incidents of ownership over those insurance policies. Upon the death of John the trustee will collect the $20,000 in proceeds and thereafter invest and will have absolute discretion to qualify or to distribute the income to Mary the wife or to the children as their needs appear, and it probably will go to the wife. However we have got that spray provision there for income tax purposes should Mary be making a considerable income in her own right, not having the benefit of the joint returns any more. Then we can distribute that income directly to the children and have it taxable to them, or the trustee may accumulate it and have the income taxable to the trust itself.

You will also see later on we have the final residue from all of this property pour over into this trust. This gives another advantage in that this trust being an intervival trust is not subject to the county court's jurisdiction, you have to make no reports to the court, and so on, so that upon the death of the last of the two, husband and wife, to die, the residue of all their property will go over to their trust which is not then a testamentary trust and not subject to the court's supervision and thus will be much easier to administer.

We think by giving this life insurance we have eliminated $20,000 from the gross estate of both the husband and the wife. We also would want to put in that trust a provision directing the trustee to cooperate with the executor of either or both of the estates so that the trustee could buy assets from the estate, thus getting that $20,000 back into the probate estate so that it can be used to pay taxes and expenses of administration, and so on.

Then, fourth, we recommend that he file gift tax returns. The first sentence there in paragraph 4 says that the gift tax return should be filed on or before April 15, 1955. The new Internal Revenue Code provides for both income and gift tax returns to be filed before April 15th, where it was March 15th. There is some question amongst us as to whether or not the gift tax return in 1955 should be filed by March 15th since the new gift tax law does not take effect until January 1, 1955; so that in
order to be safe here we probably should tell John that he should file his gift tax return by March 15, 1955, and thereafter by April 15th.

Then we recommend to John that in his will he leave his farm to his wife Mary for life, she to have a power of sale or exchange or to convert to other form, but with no power to consume or to appoint the corpus; the remainder goes over to the children per stirpes.

As we have seen there is some question there as to whether or not it would be advisable to give her a limited power to use up the proceeds.

We recommend that he then leave the rest of his property to Mary outright, and as you will see in a minute we will look at these flow charts and you will see that he is just a little bit overdone, the maximum marital deduction not enough to make a big tax difference in her estate upon her subsequent death, and certainly a much easier and more flexible set up to operate than if we put a little bit of personal property in the trust or a life estate or something which won't be practical.

We want to be sure to put in his will that provision specifying how and where the estate taxes and inheritance taxes will be paid from. The Nebraska statute on apportionment we found is very very difficult although it seems pretty simple. When you get down to actually figuring out that apportionment you as lawyers will spend about three extra days of your time over and above what it would normally take you to probate the estate just figuring out that apportionment.

Then maybe it will take two more days trying to convince the county judge that your computations are right, and if he goes along with you, you have the possibility yet that some legatee or devisee will come back and say that you have apportioned it too much against me and you have litigation. So I think in almost every instance you should specify that the apportionment act would not apply and that all those death taxes would be paid from the residue or from some specific asset or fund.

Then in Mary's will we do just what we have said is a bad thing. Here we have given some personal property to John with a life estate. Now actually what that is going to be in Mary's estate if she dies first is this $10,000 worth of closely held stock in the corporation. If John retains that stock during his lifetime he will get the income from it and it will not be a difficult thing to trace. The remainder of her estate will be real estate so there is no problem in giving him a life estate.
We have done one thing in Mary's will where she gives John a life estate. We give him a limited power to appoint the remainder among his children where in John's estate he simply gave Mary a life estate with remainder automatically over to the children. Now that limited power to appoint in John will not make this property taxable in his estate should Mary predecease him.

To qualify the remaining $30,000 worth of life insurance for marital deduction we make it payable to Mary in installments, and giving her the power to withdraw all or any part of the proceeds at any time.

Then last we admonish John and Mary that henceforth they should try to keep their incomes separate, and not to accumulate large amounts of money in joint bank accounts and create tracing problems which will be difficult for us when we probate their estates.

We can also, if Mary will do that, keeping her income in a separate bank account, they can live on John's income, we hope, and Mary can accumulate her income or reinvest it, thus building up her estate so that we can get a better balance between the two.

We also advised John and Mary that they have a problem here that should either of them inherit property from their parents who are still living they will create for themselves greater federal estate tax problems, and suggest that they bring their parents in and let us fix up their estate plans. And we will probably in that event try to have the parents leave their property to John and Mary in such a manner that it will not be taxable in John's and Mary's estates upon their deaths.

When we finish all this, we send the bill to the client for all this work and in addition to showing him the two wills and the trust agreement, we thing it is wise to give him these flow charts which give him the simple picture of what we have done, because with all these complicated administrative provisions in the will, they probably will not understand it even though you have taken great pains to explain it.

These pictures are something in which we can take a lesson from life insurance men. When they go out to sell a policy they show up with all kind of colored diagrams and pictures which are very impressive. You probably double your fee by drawing a couple of simple pictures for your client.

Now the results of our plan shows how their two estates are now distributed, the total amount is now $20,000 less than it
was when we began because we have given away $20,000 worth of life insurance. We accomplish that by actually making a gift of only about $2,000, the present value of the insurance, and yet eliminated $20,000 from the gross estate.

We show the client that we have saved him at least $18,362 possibly $25,245 in future federal estate taxes, depending on which one dies first.

That winds it up, and remember there a lot of other plans that would be just as good, but we have demonstrated just how you can come up with some kind of a solution.

JUNIOR BAR SECTION .........................Dean Wallace, Esq.
Chairman

PANEL DISCUSSION

“Law Office Management” ......................Luther M. Bang, Esq.
Austin, Minnesota
Chairman of the Committee on Fees and Law Office Management of the Minnesota State Bar Association

Members of the Panel
Raymond M. Crossman, Esq. ......................Omaha
Fred M. Deutsch, Esq. ............................Norfolk
Jack H. Myers, Esq. ..............................Kimball

The participants in the program of this section did not submit manuscripts for publication.

SECTION ON ADMINISTRATIVE AND LABOR LAW .........................John E. North, Esq.
Chairman

PANEL DISCUSSION

“A Businessman Looks at the NEW N. L. R. B.”

Moderator
David S. Lathrop, Esq.
of the Omaha Bar

Members of the Panel
Harry Henatsch, Esq. ............................Omaha
Wade Newhouse, Esq. ............................Omaha
Edson Smith, Esq. ..............................Omaha

The participants in the program of this section did not submit manuscripts for publication.
FRIDAY NOON

NEBRASKA STATE BAR ASSOCIATION LUNCHEON

Ball Room—12:15 P. M.

Presiding ................................................................. J. D. Cronin, Esq.
President Nebraska State Bar Association

ADDRESS .................................................. Hon. Harold M. Stephens
Washington, D. C.
Judge of the United States Court of Appeals for the District of Columbia

PRESIDENT CRONIN: The speaker for our luncheon is an old friend of Clarence Davis and is the official who administered to him the oath as Undersecretary of the Interior, so with your permission, Clarence Davis will present to you the speaker at this luncheon meeting.

CLARENCE DAVIS: Thank you, Mr. President. Your Honors of the Bench, I don't think Julius should have handicapped the speaker by that kind of a remark. After all he has given the oath of office to a lot of people during the years, and I do not think my name should be hung around his neck when he is brought here to a Nebraska audience.

Well, anyhow it is a great personal pleasure to me to be able to be here and to present the speaker.

I would like to present him in two capacities. One, official, shall we say, and the other just a little bit personal, because among other things, the Judge and Mr. Stephens live at the same apartment hotel where Mrs. Davis and I are living, and we were terribly disappointed that Mrs. Stephens did not come out with him.

Now it is always a pleasure to introduce distinguished guests to this Bar Association, and I have had the pleasure many times. Today I think that with the Judge's permission I am going to give you just a little bit of his biography, that you may realize how close his roots really are to this state from which we all come.

Judge Stephens was born here in Nebraska, and as somebody said about me the other night, some time ago, and at Crete; and then removed as just a child to Salt Lake, where he attended school, finished high school, I believe perhaps some of the University, then went on through Cornell to that other nefarious place known as the Harvard Law School.
After that the Judge returned to Salt Lake where he engaged in the practice for some little period of time, was on the District Bench in Utah in Salt Lake, and incidentally I know that Frank Holman has a lot of friends in this crowd, because Frank has been here several times, and Judge Stephens and Frank Holman were law partners in Salt Lake for a period of a few years. So that is another tie which exists to this group.

The Judge's grandparents and a lot of his family have lived and passed away and are buried here in this state, so while he has not been with us very much, he has a lot of ties into Nebraska; and I can guarantee, talks to us and with us as a typical Midwesterner from Utah, Nebraska, Colorado and this region, despite the fact that now he has been for some time on the Federal Bench in Washington.

Now then after the period in Salt Lake, Judge Stephens returned and did post graduate work at the Harvard Law School, and from there moved down to Washington and became Assistant Attorney General of the United States. He was in charge of the Anti-Trust Department of the Department of Justice for some time.

From there to the Court of Appeals of the District of Columbia, and then to the Chief Judgeship of that Court, which I need not remind any of you, gets most of the knotty governmental problems by reason of its geographical location. A powerful court and a strong man and one of which all of us are proud.

Now during the last few years, Judge Stephens has been a member of the Judicial Council of the United States, and has done a great deal of work and research on the Federal Judicial System, a thing which I must confess has always been quite Greek to me.

I know we have federal judges, I know they come in and sit up on the bench, we argue cases, and we get decisions, but beyond and behind that what makes a Federal machinery move, how it moves, how it operates, how it is financed, how it is managed? All of these things I know have always been totally Greek to me, and I suspect they are to a very great many of you.

Judge Stephens is a member of that Council, and one of its leaders, and one who has been familiar with those things, presenting them to Congress, and all that sort of thing, is thoroughly familiar with it.

So it gives me very great pleasure to present Judge Stephens
to you. He is going to discuss some of the management and fiscal problems of the Federal Judicial System.

It is a very great pleasure, ladies and gentlemen, Judge Harold Stephens.

JUDGE STEPHENS: Clarence Davis is not a millstone around my neck; on the contrary, I am proud to have had the opportunity to swear him into his office, and proud to have him as my friend. I am publicly and privately in his favor.

He has risen to a point and place of great distinction and great responsibility in Washington in the few years he has been there, and he has deserved to rise because of his character and his wisdom and his loyalty to the underlying principles, which we believe make our great government a success.

I thank him for his complimentary introduction.

I pay my respects to my colleagues on the Federal Judiciary and the many friends I see here present today.

I had chosen, as Clarence warned you, a somewhat dismal topic. I have done so because I realize that this association of lawyers, meeting here in the Nebraska Bar, is really a hard working and professionally interested group, not here to play, but to work and inform themselves better about the profession.

There is an aspect to the work of the Federal Courts that is not generally known even to the bar, and for that matter not even to all of the Bench, so I think you ought to know about it and which in respect to which I can see as we go on, I really need your help, because it is lawyers and judges together that make a success of our Federal Courts and our State Courts also.

I suppose that as Clarence said most lawyers take it for granted judges will come to work and have the facilities to do their work; but there are housekeeping problems, problems of financial and administrative character connected with the operation of the Federal Courts and the State Courts, as well as concerning the operation of the law office.

In the law office you have got to have your overhead taken care of; you have got to earn enough to pay the rent. You have got to select a suitable location to have your office; you must have a library and keep it up; you must have clerks and deputy clerks and stenographers and assistants, and all of that takes a certain amount of administration and a certain amount of time.

We rather take for granted that that phase of the work for the Federal Courts is done by someone else than judges.
Up until 1939 it was done by the Department of Justice because there was no other agency in existence which Congress thought the fiscal and administrative affairs of the courts could be placed; but that was an anomalous situation, because the Department of Justice is the department which litigates most of the governmental business before the courts and can hardly seem that it should be in charge of our fiscal affairs.

In addition to that there is a divided authority, we were responsible for the efficiency of the courts, but the Attorney General had charge of our fiscal and business affairs, and therefore some of us, led by Chief Justice Hughes and Judge Parker, Judge Groener, my old chief, had legislation enacted in 1939 which created what was called the Judicial Conference of the United States.

It consists of the Chief Justice of the United States and the eleven Chief Judges of the U.S. Courts of Appeals, of which I am one. It meets at least twice a year and sometimes three times a year in emergencies and acts as administrative or directive body with respect to these administrative and fiscal problems.

They consist of in the first place formulating and presenting to the Congress the budget for the support of the courts during the year ensuing, appointing and fixing the salaries of the court reporters, approving their appointments, fixing the salaries and confirming the appointments of the District Judges, of the Referees in Bankruptcy, and United States Commissioners, and the probation officers, fixing the salaries, and including the appointments of the clerks and deputy clerks, and the stenographers, buying the supplies, books, paper, typewriters and the like and arranging for the housing of the courts.

It is an immense task that must be done by someone, and as I say we have the responsibility for that in the general supervisory way, and the Act also created the administrative office of the United States Courts, which has a director and an assistant director and has about a hundred and ten or fifteen employees, who carry out the details of these activities and aid us in our administrative responsibilities.

I am a member of the Executive Committee or Advisory Committee, more correctly called, of that organization. The Chief Justice and myself and Judge Phillips of the Tenth Circuit Court of Appeals, and Judge Parker of the Fourth, and Judge John Biggs of the Third.

We aid in presenting to the Congress and Congressional Com-
mittees the recommendations for the creation of additional judgeships as necessary, and recommendations for appropriations and other legislation necessary to the operation of the Federal Courts.

The Congress in passing the statute provided that we are to make recommendations of the legislation and report to the Congress the needs of the courts in order that they may be suitably equipped to operate.

Now that by way of a very brief description of our organization, and I am not going to try to tell you anything about many of our problems, because time will not permit that; but I do want to concentrate this afternoon upon one very serious problem that we have and have had for a long while and must find a solution to it. I want to tell you about it and ask your cooperation in solving it.

That is the problem of delay in the disposition of cases in the United States courts. It is a very serious problem because the delay is coming to be very great. In the eighty-six United States District Courts for civil cases, and I am talking largely about civil cases, ladies and gentlemen, because a criminal case is more promptly disposed of because they have statutory priority, and there is not too much delay in the criminal cases in the United States District Courts or in the Courts of Appeals, but the civil cases make up the greater part of our work and they are very large in volume.

They fall in very serious arrears gradually as the years have passed. I want to tell you something about that and ask you to listen to my suggestion as to the causes of it, and the possible remedies.

In the eighty-six United States District Courts for civil cases terminated in the fiscal year 1954, that is the year just completed, after a trial was held the median time interval from the filing of the cases in the District Courts to the final disposition after trial it was a little over twelve months.

By median time I am using the statistician’s technical average, it is kind of a better average than an average, it consists, as you know, of setting up an array of the cases from the shortest time to the longest time to disposition, and taking the middle case as typical.

If we take the figures for particular District Courts as a sort of spot check rather than that general median that I gave you for all of the courts, we find some rather shocking figures.
In the Southern District of New York the median time from filing to disposition for civil cases after a trial in the fiscal year 1953 was forty-five months, almost four years. In the District of Columbia it is in excess of twenty-two months for jury cases and sixteen months for non-jury cases of general character. Some of the states the lag is less but they are all too high.

In the Northern District of California, for example, the interval was 13.6 months. In the Southern District of that same state it is twelve. In the District of New Jersey the interval from filing to disposition of the civil cases after trial is nineteen months. In the Eastern District of Pennsylvania, which includes Philadelphia, it is 24.7 months, nearly twenty-five. In the Eastern District of Michigan, including Detroit, it is sixteen months. In the Northern District of Illinois, including Chicago, it is fifteen months, and in the District of Nebraska it is somewhat better, the interval from filing to disposition in the fiscal year '53 was 15.6 months in civil cases after trial.

Now if we take a series of years ending with the fiscal year 1954, which was just completed, for which figures were available here is 1945 to 1954, the showing is even more disheartening, except in a few cases. I have a table here on that subject, which I will not read to you, but I will give you what it shows. The eighty-six districts of the entire country in 1945, the time elapsing between the filing of the civil case in the District Courts and the final disposition after trial was nine months. It is now thirteen months in 1954.

In New York it was fifteen months in 1945 and it has risen to the forty-five months that I spoke of a moment ago in 1954.

In New Jersey it has stayed about static. In Pennsylvania it changed from eleven months in 1945 to twenty-four months in 1954.

Michigan thirteen to sixteen months; Illinois eleven months to fifteen months; California seven months to thirteen months.

It is quite a lot better in Nebraska, I am happy to say, because in 1945 it was twenty-nine months in Nebraska between the filing of a civil case and its disposition after trial, and it is now only fifteen. So the District Judges in this state have certainly done an excellent job of diminishing that time lag. It is too long everywhere.

Except in the few very sparsely settled regions where there is very little litigation, in the large centers where the large volume of litigation is carried on, the volume is very serious. Now if you add to that the amount of time it takes to get the case appealed
through one of the eleven United States Courts of Appeals, you have an additional lag which is still greater.

The median time for all of the eleven Courts of Appeals is seven months, and you add that to the number of months it takes to dispose of a case in the District Court, you have a denial of justice because of the lag in time in it.

In the individual circuits I could cite the figures, but time will not permit. In our circuit, the District of Columbia, it is eight months; in the 7th, it is six; and in the 8th, in which Nebraska is included, seven months. The median time from filing in the District Courts to disposition in all of the Courts of Appeals is 21.4 months.

Now this delay, ladies and gentlemen, in the disposition of cases is, as I have said, a denial of justice and it can't be doubted that it diminished the confidence of the litigants of this country in the Federal Courts, and that is the condition of affairs which we can not permit to continue or increase because of the importance of the courts in this government.

Now what are the factors which cause this delay in the disposition of cases in the Federal Courts; I might say by way of interesting comment, although I can't take time to give you the figures because I haven't them all with me, there is a similar problem in the State Courts in many cases, but I am not discussing the State Courts today.

Well the first cause is the great increase in the case load in the courts and in commensurate increase in the personnel, particularly the judicial personnel. In 1900, fifty-four years ago there were twenty-three thousand cases of all kinds, both civil and criminal, filed in the United States District Courts in this country. There were a hundred and one judges and the case load was 236 per District Judge. In 1920 that twenty-three thousand had risen to seventy-seven thousand odd; in 1940 there were a total of almost seventy thousand; in 1950 a total of ninety-three thousand cases, of which fifty-four thousand were civil and thirty-six thousand criminal, in round numbers, were commenced and in 1954 the fiscal year just completed, a total of 101,269 cases were commenced in the United States District Courts, and there were 251 judges. The case load was 403.

The total number of cases filed in the District Courts in '54 of 161,269 contrasts very strikingly to the total filed in 1900, 23,832. The number of cases had more than quadrupled and the number of judgeships had only slightly more than doubled. The comparison for the comparative time per judge, case load, 101
judges with case load of 236 in 1900, and 251 with case load of 403 in 1954; and considering the total in commensurate growth of the case load and of the district personnel the plain fact of the matter is that the load can't be dealt with. The same thing is true, somewhat less severely but nevertheless relatively true, with respect to the United States Courts of Appeals.

In 1900 there were 1,093 appeals and there were twenty-nine judges. I will not recite the intervening years, but in 1954 for the fiscal year instead of having 1,093 cases to deal with we had 3,481 appeals to deal with. A total number of cases was very striking, the number of cases had increased a little more than three-fold and the number of judges a little more than two and a third-fold in that fifty-four year period.

If the increase in judges had been commensurate with the increase in case load there would be at the present time eighty-seven circuit judges and there are only sixty-eight. In the District Courts if the increase in judgeships had been commensurate with the increase with case load, we would have 403 District Judges in this country in the Federal System, as a matter of fact, we only have 251.

We have been trying to bail out the ocean with a spoon of judges, to use a trite figure, we have been trying to accomplish the impossible; something has got to be done about it.

Now the second factor contributing to the arrears in the disposition of cases is the time lag in the creation of judgeships where they are needed. The twelve members of the Judicial Conference of the United States, the eleven Chief Judges and the Chief Justice, reached the conclusion after the recommendations from the District Judges and Circuit Judges as to the need of additional help. We carry those recommendations on to the Congress, and bills are drawn up and introduced for the creation of additional judgeships.

A second factor in dealing with our case load, as far as this delay is concerned is that it takes from one to five years to get judgeships created and the judges appointed. And this time in getting the judgeships created and the judges appointed and the judges at work in respect to the fifty-seven judgeships created since 1945 upon the recommendations of the Judicial Conference of the United States, only six were created during the year which the recommendation was made. Twenty-three were not created until the following year; nine were not created until two years later; twelve, three years later; twelve, four years later; and three until five years later.
Some of that delay is, of course, inherent in the legislation process. It takes much longer to enact a statute than it does to utter an edict. I suppose in the countries where the totalitarian powers can create judges, if you want to call them that, much more quickly than you can in this country. Most of the recommendations of the Conference are decided upon at our September session. Congress, of course, can’t act upon them until January, and then it takes time to have hearings on the bills and get them passed and signed. Sometimes there is controversy about them and sometimes there’s a lag about appointing the judges. When appointed then there is some time in the confirmation of the judges and getting them to work; and the result is during all this time one to five years after we recommend judgeships before the judgeships are created, and the judges are put to work. The case load continuing to build up, so that by the time that you get the new judges, there is a new demand in case load. The process gets to be rather hopeless. Any private industry that tried to operate its affairs on such a basis in delay and delivery of the products with the disposition of cases and difficulties in getting created personnel to do the work, it would close its doors, I suppose, in a year’s time.

I would like to give you a number of examples of what this delay in the creation and appointment and confirmation of the judges does, but time will not permit. I will give you just one, I think it will be sufficiently striking to prove my point.

I take the Southern District of New York, that district is one of the two most heavily burdened in the country, the other being the District of Columbia, my circuit.

In its survey of judicial business in the Southern District in 1947 the Judicial Conference noted the great increase in the number of cases filed from 3,597 in the fiscal year ’41 to 7,473 new cases filed in the fiscal year ’47. Pending cases have steadily risen from about 3,500 on June 30, 1943, to 7,400 on June 30, ’46, and 10,099 on June 30, 1947.

Two additional judgeships were recommended by the Judicial Conference in 1947, and the following year two more recommended to help cope with this case load.

In August 1949 Congress finally acted to provide these four judgeships. By that time the civil case load ran into another thousand cases or 11,099. In the following year even these new additions to the judicial staff of the Southern District seemed inadequate and the Judicial Conference therefore recommended three new permanent judgeships additionally to deal with the great
number of incoming cases, and two judgeships on the temporary basis to help reduce the tremendous case load.

Action by the Congress in these cases was not taken for almost four years. In February of 1954 provision was made for two new permanent judgeships, but the recommendations for the other three are still pending.

On June 30, 1954 the backlog of pending civil cases in the Southern District of New York, 10,939 cases which is almost one-sixth of all the civil cases filed in the United States District Courts in the whole year. During the years November 20, 1946, to July 1, 1954, while the recommendation for additional judgeships was being considered there arose thirteen vacancies by retirement or death. One of those vacancies remained unfilled for seventeen months, and another was filled, or wasn't filled for nine months and fifteen days. This judicial vacancy situation has sometimes itself alone been quite an obstacle.

I will permit myself to tell you an amusing episode concerning that. Learned Hand, who at that time was Chief Judge of the United States Court of Appeals for the 2nd Circuit, and myself and John Biggs, who is Chief Judge for the United States Courts of Appeals for the 3rd Circuit, were before the Senate Judiciary Committee several years ago and testifying for the Judicial Conference in support of the recommendations for more judgeships in the Southern District of New York.

Pat McCarran was Chairman of the Sub-committee, and by the way his death is a great blow to the Federal Judiciary. He was a devoted friend of the Bar and the Bench of this country, and also the Federal Judiciary, has never failed to lend his very powerful voice and very powerful personality to the betterment of the Federal Judiciary.

Many of the things we have accomplished such as enactment of the Administrative Procedure Act, and the creation of court reporters for the entire system and putting of the Referees in Bankruptcy on a salary rather than a fee basis, and expansion of the Probation Officers System, many of the accomplishments we have been able to bring about in the Federal Judiciary in the last ten or twelve years under the Judicial Conference management have been largely the product of the devoted help of Pat McCarran, and we mourn his loss.

Now as I say, we were before the Committee before which Pat, as we familiarly called him, was Chairman, and he said to Judge Hand, "We have got several vacancies in the Southern
District of New York at the present time, they have not been filled for several years, why can't you get those filled and that would help get these new bills passed. The members of the Congress don't like to vote for new judgeships when vacancies in the present judgeships exist."

Judge Hand said, "I don't see what I can do about it, that is the President's job." That was President Truman, I think, at that time. He said, "That's the President's job, and we don't have any influence over the President."

Pat McCarran said, "Why don't you get out a writ of arousalment against him?"

I must say that President Eisenhower and our fellow Nebraskan, Herbert Brownell, have shown the most, a great interest in the well-being of the Federal Judiciary and early and sound appointments to the District Courts and Circuit Courts, and I am sure they are devoted in their interest to the welfare of the Judiciary and will help us in the program which we have ahead of us.

By the way, I might interpolate now as an appropriate time as any other, that being a Nebraskan and being proud of my Nebraska birthright, I am proud of Clarence Davis and his accomplishments. I want to say also that you and I ought to have, and I am sure we do, I do and I am sure you do, a pride in the accomplishments of other Nebraskans in public office, Perry Morton, Mr. Rankin and Mr. Brownell, and Nebraska is rendering a good account of itself in the public service these days.

Now a third factor which contributes to the lag in the disposition of cases in the Federal Courts is a lack of enough money to operate the courts as efficiently as we should. In the last ten years our budget has increased, our budget in ten or fifteen years, 1946 to '55 has increased from fifteen million dollars to about twenty-eight million dollars, and I am talking about the United States District Courts, and also the United States Courts of Appeals, the Supreme Court has a separate budget of about two million dollars more. I am talking about the Federal Courts, that we workaday people in the Bar and Bench know of.

Our budget has been cut, and that great increase, of course, in our budget has been due to the increase in judgeships, as we have been able to get and an increase in the clerical and other personnel and court reporter system that has been added, and salaried Referee system and the increased salaries for personnel generally. The additional cost of supplies and law books, as you will see later in my remarks, it is not a very big budget either
in a relative or absolute sense. It has been cut every year as we presented it to Congress by something in the neighborhood of 800 to 1,200 thousand dollars or a million dollars. In the last fiscal year 1955, which we are now in, the budget we are now in, the budget we presented to the Congress was twenty-eight million dollars approximately. It was cut a $1,154,775.00 by the Appropriation Committee.

Now that is going to cripple the activity of the Federal Courts during this year very seriously, because it affects the salaries of the supporting personnel. It affects travel expenses for judges and their staffs when they go from one division to another, or one district to another, or one circuit to another in case of emergency.

It affects the salaries of the clerks, deputy clerks, court reporters, probation officers, law clerks, secretaries to judges, it affects the money with which we buy law books, and it affects our mail cost and our telephone and telegraph communications. All of those items and our office equipment itself is a very serious cut, and will reduce our efficiency very greatly.

The Director of the Administrative Office of the United States Courts, who I say is the executive officer for the Judicial Conference of the United States, he operates under our supervision, under our direction, he has had to send out a memorandum to every Federal Judge in the country telling him if his secretary goes on a vacation, if his law clerk goes on a vacation, or his deputy clerk or his Clerk of the Court goes on a vacation for two weeks or a month, he can’t have any extra help during the meantime. He has got to get along without a secretary or a deputy clerk during that period of time.

If an official resigns, like a clerk or a deputy clerk, and has some accumulated leave, you can’t appoint a successor until the accumulated leave has been eaten up; and we are being seriously crippled by these restrictions, which cut us down from year to year on the amount of money which we need, and we never ask for more than we need.

I think we have been overconservative to the point where we have to operate on an unduly limited budget.

Now what can we do about this whole situation? We can’t do anything about this increasing case load, gosh, if we could it would be like telling the sun to stand still, but no human authority is going to stop the growth of America and the growth of Ameri-
can business and the growth of the business in the courts. There is no hope of that and we don't want that.

As far as the judgeships are concerned, I think part of the fault has been in the Judicial Conference itself. Myself and Judge Biggs particularly and Judge Phillips also, have been revolutionary, so to speak, in the Judicial Conference. For a good many years we have been insisting that we have been overconservative on requests for budget. We ought to request larger budgets, request many more judgeships than we do because if Congress doesn't know our needs, how can we expect them to fill them. The majority of the Conference until recently has been extremely conservative about recommending the increase in judgeships, and that follows, I am sure, it is going to be changed because I think we have finally convinced the other members of the Conference and the new Chief Justice, that we must have a vast expansion in the Federal Judiciary if we are going to do our work in a manner which will not only dispose of the cases carefully, but promptly, to the interest of the people of this country.

Now so far as the diminution of the budget is concerned, to get more money to operate the courts is quite a problem because we don't have any political authority. The Federal Judiciary is appointed for life or during good behaviour, for the purpose of taking us out of politics. Traditionally we take no part in politics, and have no political spokesman.

When the Department of Justice was operating our fiscal affairs we did have then a voice of the Attorney General, which was a very powerful voice because he was the chief law officer of the administration in power. But that is not so any longer and while Attorney Generals are usually cooperative, they no longer speak officially for the budget of the court.

We don't have any political power, we go before the committees, as representatives of the Judiciary, usually Judge Biggs and myself, sometimes Judge Parker and sometimes Judge Phillips goes with us, and helps the Director of the Administrative office present the budget. After we have approved the budget, after the Judicial Conference has approved it, and we try to convince the Sub-committee that we need more money. But we get these cuts every year, every year but one in the last ten or eleven years we have had cuts. We get these cuts in our appropriation.

Now why is it? Well partly because there are frequent economy programs on and we are an easy place to cut, because we haven't our voice in protest, it isn't a very effective voice;
but it is partly due to the fact also that we have no means of emblazoning upon the consciousness of Congress and of the subcommittees and the Appropriations Committees and judiciary subcommittees in any dramatic manner. The catastrophic effect of this lag in the disposition of judicial business, we don’t have any way of dramatizing it, it isn’t spectacular.

When Mr. Hoover, for example, goes before the Appropriations Committees, and he gets every dime that he asks for, for operating the F.B.I., which is one division of the Department of Justice. He runs it as the Federal Courts are run on a non-political basis, and he runs it with great efficiency, and he is, of course, a rather dramatic personality. His work is dramatic and very important, but so is ours.

What is more important than the disposition of the cases in the United States Courts, where the constitutionality of statutes is tested and where the litigants are posed against each other on important matters, and where they are posed against the government, and look to the protection of the judiciary against the government, when the government seeks to encroach too far, as all governments from time to time do.

If a night club burns in Boston and a hundred people are killed or a theater falls in Washington and a hundred people are killed, there are headlines all over the country. The next legislature or next Congress passes some building regulations and fire regulations. If our Army or Navy diminish to a minuscule size, as it did before the Second World War, we get a Pearl Harbor to teach us. The great old American system of waiting for a catastrophe before remedying an evil doesn’t help us in the Federal Judiciary, because our catastrophes are to individual litigants, who can’t get their money, if they need money; can’t get their freedom, if they need freedom; can’t get their defense heard, if defending against improper claim. They are the persons that suffer. But they are individuals and except for an occasional spectacular case, you hear nothing about it.

Yet those have catastrophic and disasterous effects for individual litigants, and the confidence of the people in the courts, if we don’t discharge our work promptly, as well as carefully. It is done carefully because we know as Federal Judges, as you know as lawyers, that there is not more responsible civil task than of the passing upon the rights and liberties and properties of men and women in contest with each other and in contests with their government. This responsibility of our work sobers every man who accepts a judgeship, as you know, and every
lawyer who practices in the Courts, and we do do our work carefully; but we don't do it promptly.

One other difficulty of getting our story effectively to the Congress is that we deal only with sub-committees. The cut in our appropriations of over a million dollars last year was really due to the judgment of two men and the Appropriations Sub-committee of the House of Representatives. When it went over to the Senate, we tried to get the Senate to restore it, and they did restore it in their budget; but then it went to conference, and because of unavoidable compromise between committees, we lost again.

I am not criticizing the committees, they are conscientious men, and they have got a tremendous lot of work to do. Generally, except on controversial questions with political interest, the determination of the sub-committee is usually final on the budget for the operation of the government.

The committees as a whole, the Judiciary Committee, which passes on the need of additional judgeships and Appropriation Committee, as a whole, while formally passing upon the budget, usually adopt in non-controversial matters, the report of the sub-committee. As far as the Congress as a whole hearing the need of the judiciary or reports, it just doesn't.

The President reports once a year to the Congress in person and tells the story of the state of the union and needs of government, but we do our own reporting, and I am afraid not very effectively.

You see, this is the contact point. This presentation to the Congress of the budgetary needs and of the needs for additional judgeships and personnel, this is the contact point between the people of the United States, and who are entitled under our Constitution to efficient judiciary, and the courts themselves, if the people's representatives do not know what the needs of the courts are, do not sufficiently appreciate them, they are not going to give us what we need to operate upon. So this contact point is of great importance, and it hasn't been, as I say, as effective as we wish it might be.

The people of the country are entitled to effective, prompt, and efficient disposition of their cases, and unless we have personnel to do it, they are not going to get it.

Now this delay in the disposition of cases has simply got to be stopped. We can't have the confidence of the people impaired. The United States Courts are charged with the performance of
one of the most important functions in free government, the
administration of justice according to law, as a third independent
branch of the government, in all respects on parity with the other
two branches.

It is guaranteed in the rights and liberties and the perform-
ance of the functions must be brought to the state of efficiency
and must be maintained at whatever cost of effort and whatever
cost of funds, and it is appropriate at this point to point out to
you how little it really costs to operate the courts, relatively
speaking or absolutely speaking.

The budget for the courts in 1954, fiscal year, 1954, was the
expenditure, the actual expenditure was $28,368,325.00. The ex-
penditures for the government as a whole was $67,578,608,115.00.

In 1900 the cost of the support of the United States Courts
was one-half of one percent of the cost of the support of the gov-
ernment as a whole; in 1930 it was one-fourth of one percent;
in 1950 it was one-ninth; and in 1951 it was one-seventeenth; and
in 1954, one-twenty-fifth.

One-twenty-fifth of one percent of the cost of the operation
of the government for the operation of the Federal Courts. The
reason that there has been some increase is that our own costs
have gone up, of course, but the great reason for the increase
relatively speaking is universal increase in the cost of the sup-
port of government as a whole.

It is of interest, not only to tell you about the percentage,
but also to compare the cost of the support of the Judicial with
support of other branches and agencies of the government. The
United States Courts, all of them have, except the Supreme Court,
which has only small personnel, has 3,973 in personnel. That
includes the judges; there are 251 District Judges and 68 Circuit
Judges. That doesn't count the special courts, like the Court of
Claims, which has five, and the Court of Customs and Patent
Appeals, which has five; and the Tax Court, which has sixteen.

It is an approximate figure of 4,000 in the Federal Judiciary,
and our budget estimated expenditures for the present fiscal year,
1955, which begins 1954, July 1st, to twenty-nine million. Now
the legislative branch of the government has compared with our
4,000 employees, 7,500-odd, 7,600-odd, its budget fifty-five million
compared with our twenty-nine. The Department of Commerce
has 34,000 employees and its budget is $979,000,000. The Fed-
eral Bureau of Investigation, which is one division of the Depart-
ment of Justice, 13,000 employees and budget of seventy-eight
million. Over three times the budget of the Third Independent Judicial Branch of the government.

The Bureau of Indian Affairs—and Clarence Davis's department, one bureau in the great Department of the Interior, has 10,199 employees and its budget is $87,102,000 as compared to our 4,000 employees and budget of a little less than thirty million.

I am not assuming to say that these other agencies are overstaffed or overpaid. On the contrary, I am sure that Clarence Davis's department, at least, is being very efficiently operated.

The point is not that other departments and agencies of the government are having too much for housekeeping duties, but that we don't have enough to operate on relatively speaking.

The General Accounting Office, the General Accounting Office which is the bookkeeping department of the Federal Government, has 6,000 employees and a budget of thirty-two million dollars, more than the Federal Courts. Perhaps the most amusing illustration is the Weather Bureau. The Weather Bureau, that is not in your department too, sir.

CLARENCE DAVIS: No.

JUDGE STEPHENS: The Weather Department or Bureau has 3,377 employees and a budget of twenty-six million dollars, only slightly less than the Third Independent Branch of the government.

Now what can be done, ladies and gentlemen, by those of us who are charged with the responsibility on this subject, by the way, I won't have you think that I and my fellow members of the Judicial Conference of the United States, the eleven Chief Judges do nothing but fiscal and administrative business. We also have to write opinions, assume, you understand, and manage affairs of our own courts, most of the Chief Judges of the country are really quite busy.

Only one, and I am sorry he is not here to kid publicly, who is Calvin McGruder, who is Chief Judge of the United States Court of Appeals for the 1st Circuit, and has two Associate Judges with him, and they have about seventy-five to a hundred cases appealed to them a year, and have a very leisurely and pleasant life.

The people of Massachusetts and Rhode Island and Vermont for some reason or another don't seem to be litigious.

This case load, as I say, is going to continue, and I am not sure that we can diminish very greatly the delay in the creation
of judgeships. That is inherent in the legislative process. It is one of the prices we pay, I suppose, for the legislative process in a free government, it is bound to be less effective than in a totalitarian.

There are a lot of prices we have to pay for democracy and democratic institutions—more correctly speaking, republican institutions, because we are not a democracy, we are a republic. A lot of prices we have to pay, some people get impatient about it.

I sometimes am tempted to impatience when a litigant comes before my United States Court of Appeals in appearance, in forma pauperis, a poor person representing himself or herself with a case that is not well prepared, and difficult for us to understand on that account, and I always content myself and allay my irritation by the thrill that it gives me to know that I live in a country, I am a judge on a court in which the poorest person and the most uneducated person, even without a lawyer, can come in to the court and get a careful hearing and a careful disposition of his case.

The precious right of freedom of access to the courts by all, who seem to be wronged, of course, they are subject to abuse, but that abuse, that is what we have to pay.

Certainly the Judicial Conference should request the creation of many more judgeships, and certainly request a lot more money to operate the courts. No military commander is justified in entering a battle against an enemy superior in numbers and materials, if we can obtain more troops and funds and more food and equipment. It is his duty to get reinforcements, if he can. Likewise those in charge of the courts must take proper steps to improve finances, unless the people lose confidence in the courts and try to dispose of the cases and controversies elsewhere.

Already, gentlemen, such steps as abolition or waiver of jury trial or the increase in arbitration facilities for determination of disputes or for the setting up commissions to do the work for the courts in some places, in failures being heard about suggestions in the south, to get the lawyers to waive the jury trial, that the constitution guarantees, let those of us in charge of the courts, and that includes you as well as me because the Bar and Courts are a team, operating together, cooperative for the good of the Judicial system, unless we do something to improve the situation we will have the people turning to some sort of government without law, instead of disposition of cases according to law.

It seems to be obvious that the present method of securing
just funds are not effective for the exchange of the judiciary, it is necessary and not to be doubted that the members of the Congress as representatives of the people will, if fully informed of the needs of the judiciary, will cooperate, and the Bar of the country can be a very great help if they are informed on these subjects by talking with your own Congressmen, your own Senators about it and lending to the Federal Judiciary their support.

The Judicial Conference will use every proper and every possible means to acquaint the whole Congress with the needs of the whole Judiciary for proper expansion, and we invite the help of the Bar of the country in that effort.

I am very happy to be here, I prize my Nebraska birthright, I practiced law many years in the west, and I feel at home.

I thank you for the opportunity of appearing before you and hope I can come again.

The House of Delegates convened at 4:15 P.M. to receive reports of the Sections, with members of the assembly also present.

Jean B. Cain, Chairman of the House of Delegates, presiding:

JOHN FIKE: Mr. Chairman, and the House of Delegates, the Section on Real Estate and Probate and Trust Law held its meeting yesterday afternoon as scheduled in your program as shown there, and followed the plan as suggested there except for the election of officers, we were running a little short of time and we ran the election of officers in a different spot on the program.

For the election of officers, we appointed a Nominating Committee and they presented us with twelve names. We elected six from those twelve with the understanding that the top two men would be for three years, the next two, two years; the next two for one year. The result of the election was Herman Ginsburg and I were for the three year; Bob Simmons and Lloyd Pospicil for the two year term; and Dave Warner and Lynn Heth for the one year term.

That Executive Committee has held its first meeting. They accomplished two things at that meeting, I believe. They elected their officers. Dave Warner will be Chairman, Bob Simmons, Vice-Chairman; and Lloyd Pospicil, Secretary.

The other order of business before that committee this morning was the matter which was referred to the committee by the House of Delegates in connection with the Legislative Committee report, being the proposed bill that had been presented to the Legislative Committee by Mr. Albert S. Johnston. That bill appears at pages 37 and 38 of your printed program.
The Executive Committee gave some consideration to that proposed bill this morning, and came to the very definite conclusion we would have to have a little more time to study it. We have scheduled a meeting to be held in Lincoln at Herman Ginsburg's office on November 13th, and we hope that at that time Mr. Johnston if he wishes would appear before the committee and present his thoughts and ideas and views, and we very definitely wish that if there's anyone else who would care to present any thoughts or ideas with reference to that bill at that meeting they are certainly privileged to do so, either by writing or by appearing.

JEAN CAIN: The report of the Section on Administrative and Labor Law, John E. North, Esquire.

GEORGE TURNER: The Chairman of that Section asked me to state to the House that in view of the fact that that Section is now going out of existence he would make no report.

He had a very small meeting this morning, twenty-six people being in attendance, and relying upon the Section going out of existence they chose officers only tentatively. Mr. Dave Lathrop of Omaha, as Chairman; Mr. Ed Sklenicka of Omaha, as Vice-Chairman, with the understanding that if the Section does not function the election goes for naught.


DWIGHT C. PERKINS: Mr. Chairman, the Insurance Section met yesterday in this room and it had what we think was a very rewarding program.

We had a very large attendance; our speakers were Thomas Pansing, the Director of Insurance; Mr. John Dudgeon of the Lincoln Bar, Millard Landis of Van Wert, Ohio; and C. Clark Bryan of the American Life Convention in Chicago.

The Section has elected an Executive Council consisting of six members, which are as follows; for the three year term Jesse Cranny of Omaha, and Floyd E. Wright of Scottsbluff; for the two year term, Jim Ackerman of Lincoln and James J. Fitzgerald of Omaha; and for the one year term, Earl J. Moyer of Madison and Chauncey C. Sheldon of Lincoln.

The Executive Council has not yet had a meeting, as I understand it, to select the Chairman, Vice-Chairman and Secretary, but they will do so relatively soon.

JEAN CAIN: The report of the Section on Taxation, Flavel A. Wright, Esquire.
FLAVEL A. WRIGHT: Mr. Chairman, and members of the House of Delegates; the Section of Taxation conducted programs both this morning and this afternoon.

This morning Clarence Meyer gave a paper covering the property taxation particularly on the state level. Following that there was a panel discussion which Fred White of Omaha, Chauncey Barney of Lincoln, Robert Armstrong of Lincoln and Seymour Sidner of Kearney, together with Clarence Meyer participated on the panel.

This afternoon we had an estate planning program prepared and presented by Robert Moodie, Keith Miller, John Mason, Barton Kuhns and Daniel Stubbs.

The Executive Committee of the Taxation Section was elected and consisted of the following; for a one year term Tom Davies of Lincoln, Keith Miller of Omaha; for a two year term, Flavel Wright of Lincoln and Hale McCowan of Beatrice; for the three year term Barton H. Kuhns of Omaha and Robert Moodie of West Point.

The Executive Committee had a party caucus in the anteroom just recently and Robert Moodie has been elected Chairman of the Section; Hale McCown, Vice-Chairman; and Tom Davies as Secretary.

JEAN CAIN: Report of Committee on Junior Bar Section, Dean Wallace, Esquire.

DEAN WALLACE: The Junior Bar Section met this morning in Parlor J at 9:30 and it lasted until 12:30. And I think it was a program which every member of the Association should have seen and heard.

Mr. Luther Bang, who is Chairman of the Committee on Fees and Law Office Management of the Minnesota State Bar Association was the speaker. He presented very graphically by use of slides the comparison of fees for lawyers as to doctors, plumbers, electricians and even weed exterminators.

It really was a revealing lecture and I think perhaps the Junior Bar Section’s recommendation to the Executive Council which they will make that Nebraska conduct a similar survey is a very good one.

Appearing with Mr. Bang on a panel discussing the situation in Nebraska was Ray Crossman from Omaha, Fred Deutsch from Norfolk and Jack Meyers from Kimball. After the discussion we had election of officers, and Mr. Al Schotz from Omaha was
elected Chairman of the Junior Bar Section. Mr. Ray Simmons from Fremont was elected Chairman-Elect; Mr. Bevin Bump from Chadron was elected Secretary.

And in addition to those officers the Junior Bar Section has four Vice-Presidents over the state. About everyone in our Section is an officer, we think it gives us prestige.

Keith Miller is elected Vice-President of Congressional District No. 2; Hugh Stewart from Lexington was elected Vice-President from the Fourth Congressional District; Don Boyd was elected Vice-President for the First Congressional District, he is from Lincoln; and Vera Larson from Dakota City was elected Vice-President from the Third Congressional District.

JEAN CAIN: We have now reached the place on the program for the presentation of any matters which any Section or committee wishes to bring before the House of Delegates.

Are there any such matters to be presented?

(There was no response.)

JEAN CAIN: Unfinished business.

LAURENS WILLIAMS: Mr. Chairman, this is not exactly unfinished business, but I will ask unanimous consent to present to this House a resolution.

The resolution which I would like to present is as follows:

Be it resolved that the House of Delegates of the Nebraska State Bar Association hereby recommends to the state delegates of the House of Delegates of the American Bar Association the election of the Honorable Roy E. Willy of Sioux Falls, South Dakota, as President of the American Bar Association.

I recognize that I am out of order but I would like to ask consent to introduce and move the adoption of this resolution at this time.

JEAN CAIN: You move the adoption?

LAURENS WILLIAMS: I will move the adoption.

JUDGE SPENCER: I will second the motion.

JEAN CAIN: Are there any objections to the resolution being submitted? Does it have the unanimous consent of the House of Delegates?

Are there any remarks?

LAURENS WILLIAMS: I would like to say in support of it simply this. Mr. Willy has attended the annual meeting of this Association, I am sure, on every occasion for at least the last fifteen years continuously. He has done much for this Association, he has been one of the prominent members of the American Bar
Association; and in our view our kind of lawyer, the kind of man who ought to be President of the American Bar Association. I hope that the delegates will see it as I do.

JEAN CAIN: Are there any other further remarks?
(There was no response.)

JEAN CAIN: The remarks seem very convincing to me.
All in favor say aye.
Opposed, no.

JEAN CAIN: The motion is carried and the resolution is adopted, unanimously.

Now unless there's other business that will conclude the session of the House of Delegates.

What is your desire about the business of the Association?

SECRETARY TURNER: I believe upon motion the House of Delegates would now adjourn and the same group reconvene as the assembly for the conclusion of the assembly business by the President of the Association, Mr. Cronin.

MR. SAMSON: I so move.
(Motion duly seconded.)

JEAN CAIN: All in favor say aye.
Opposed, no.

(The meeting of the House of Delegates adjourned at 4:30 o'clock p. m.)

GENERAL ASSEMBLY
4:30 O'CLOCK P. M.

PRESIDENT CRONIN: Well, gentlemen, is there any unfinished business?
(There was no response.)

PRESIDENT CRONIN: Now, gentlemen, we are coming to the end of the meeting, this is the end of this official year in the life of our Association, and it now becomes my responsibility and my pleasure to present to you the officers as you have elected to serve you in this coming year.

In saying 'my pleasure' I do not mean to infer that this has not been for me a very pleasant year, it has been.

I am particularly happy to present to my successor on behalf of the Association this very beautiful gavel inscribed 'John J. Wilson-President of the Nebraska Bar Association-1954-1955.'

So now, first, I present to you with much pleasure the new
President of your Association, John J. Wilson of Lincoln, Nebraska.

JULIUS CRONIN: For the first time this year we have a House of Delegates and of course a presiding officer in the person of the chairman.

Mr. Jean B. Cain of Falls City has been elected Chairman by your vote. I am very happy now to present to him this gavel inscribed 'Nebraska State Bar Association-Jean B. Cain-Chairman of the House of Delegates-1954-1955.'

JULIUS CRONIN: By your vote you also elected a member at large of the Executive Council which is the Executive and Governing Board of your Association, and I am happy now to present to you Barton H. Kuhns, a member at large of the Executive Council of the Nebraska Bar Association.

JULIUS CRONIN: Now to the House of Delegates of the American Bar Association we elected this year two persons, both Past-Presidents of your Association, and I am very happy now to present them to you.

First, Laurens Williams of Omaha, Nebraska.

JULIUS CRONIN: Clarence A. Davis of Lincoln.

JULIUS CRONIN: Now, gentlemen, I am very happy and very pleased to turn the meeting over to my successor, Mr. John J. Wilson, of Lincoln, Nebraska.

PRESIDENT WILSON: Gentlemen, I am glad all the business has been disposed of for this year, so that we will have nothing to do, at this concluding session.

As I know from past experience in watching the officers and the members of this Association work there is much to do, there is a continuing program of bringing a better relationship between the bar and the public. That is the problem that each individual member can help solve by putting his shoulder to the wheel.

During the year you are going to be called upon to do a lot of jobs, and I am sure that every member of this Association will do his bit, and if he does his bit, perhaps next year we can say we have had as fine a year as this past year has been.

I find myself in a dual capacity this coming year. There was a large legislative program proposed to and adopted by the House of Delegates which will be the work of this Association. In order to make that succeed it will not only be the responsibility of your officers and of the Legislative Committee but it will be the responsibility of every lawyer in Nebraska.

I have a gentlemen's understanding with the legislature that
I will treat these matters the same as I will treat any other legislation. The committees will have to have a sponsor for all of the proposed legislation. I am sorry that as President I can not get the job done. I can help you, and I will write a letter to the chairman or to the member I think should assume the responsibility of sponsoring the legislation. If you get such a letter contact your Senator at once and secure your authorization to have the bill drafted, and let's do it before the 1st of January, there is much legislation to be proposed.

It may have to be submitted to your committee to see that it is properly drawn and that it is clear. As President of the State Bar Association I will try to help you, but I will be working for the legislature, so it will be the responsibility of the members of the Association and not the President this time to get it across. I am sure if the committees will put their shoulders to the wheel much of this legislation will be adopted, at least, we will give it a good try, and I am sure that when it is over with we will have made a good showing.

I appreciate the honor that has been bestowed upon me, I will give you all I can; but it will still require the help of all the members and of all the committees, as well as of the House of Delegates and the Executive Council.

Is there any further business?

JOSEPH VOTAVA: Mr. Chairman, Mr. President, I move you before we close this session, that the House of Delegates for itself and on behalf of the Association express its appreciation of the fine and constructive work performed for and on behalf of the Association by the outgoing president, Mr. Cronin; and by the other officers of the Association; and by the Executive Council and of the fine work done by the chairmen and the various committees that functioned during the last year, and I also want to include in the appreciation that we are extending to our presiding officer Jean B. Cain. I move the adoption of such a vote of appreciation.

LAURENS WILLIAMS: Mr. Chairman, I would love nothing more than to second that motion because I know it does express the heartfelt sentiments of every man in this room, but I rise to point of order. The rules forbid such a motion if I remember them correctly. I rise to a point of order.

PRESIDENT WILSON: That is my interpretation too.

JOSEPH VOTAVA: Well then, I will withdraw it.
PRESIDENT WILSON: The sentiment is there, I think everybody joins with you in that expression, and I think that is as much as we can do in this meeting; so I am going to rule it out of order.

Is there any further business?

(There was no response.)

PRESIDENT WILSON: I declare this 55th Annual Session of the Nebraska State Bar Association adjourned.

(The 55th Annual Session of the Nebraska Bar Association was concluded at 5 o'clock p. m.)
NEBRASKA STATE BAR ASSOCIATION  
STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS  
NOVEMBER 1, 1953 TO SEPTEMBER 30, 1954  

Receipts:  
Active Members Dues:  
1954 ........................................................ $27,230.00  

Inactive Members Dues:  
1954 ........................................................ 4,405.00  
1953 ........................................................ 6.00  
1952 ........................................................ 6.00  
1951 ........................................................ 6.00  
1950 ........................................................ 6.00  
1949 ........................................................ 6.00  
1948 ........................................................ 2.00  
1938 to 1947 ............................................. 10.00  

10.00  

4,447.00  

$31,677.00  

Sale of Pamphlets ................................................. 240.50  
Miscellaneous .......................................................... 1.10  
Abraham Lincoln Lawyers Luncheon Club .................. 20.32  
Certificates ........................................................... 2.00  
Less: Remittance to Clerk of  
Supreme Court ..................................................... 2.00  

Nebraska Session Laws, Etc. Sold ................. 22.70  
Less: Remittance to State Library .......... 22.70  

Overpayments ......................................................... 27.50  
Less: Refunds ......................................................... 27.50  

Total Receipts ........................................................ $31,938.92
### Disbursements:

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<th>Category</th>
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<td>Salaries and Payroll Tax</td>
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<td>Officers Expense</td>
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<td>National Council—Uniform</td>
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<td>Aid to Local Bars</td>
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<td>Campaign for Judicial Selection</td>
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Committee on Cooperation with
American Law Institute ............... 148.96
Committee on Administration
Agencies .................................. 15.25
Committee on Amendment to
Rules and By Laws ..................... 17.85
Committee on Inquiry and
Complaint ............................... 250.95
Committee on Disciplinary
Procedure ............................... 84.20
Institute—Demonstrative Evidence ... 80.00
Institute—Appellate Procedure ....... 607.03
Institute—1939 Federal Tax Law ...... $2,587.40
Less: Refunds ......................... 32.85 2,504.55

Institute 1954 Federal Tax Law .......... 4,624.77
Less: Food Costs
Reimbursed .......................... 123.00 4,501.77

Books and Pamphlets .......... 1,799.50
Less: Sales and Returns ...... 1,740.75 58.75

Miscellaneous ....................... 85.77

Total Expense .................................. $41,191.56

Excess of Disbursements over Receipts .......................... 9,252.64

Cash Balance, November 1, 1953 .......... $9,905.89
Excess of Disbursements over Receipts .. 9,252.64

Cash Balance September 30, 1953 ........ $ 653.25

Represented By:
First National Bank ...............$ 647.05
Continental National Bank .. 6.20

$ 653.25

Note: Cash Received from the Abraham Lincoln Lawyers Lunch-eon Club $20.32 is Subject to Return if the club is re-activated.
## Roll of Presidents

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<tr>
<th>Year</th>
<th>Name</th>
<th>City</th>
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</thead>
<tbody>
<tr>
<td>1850</td>
<td><em>Eleazer Wakely</em></td>
<td>Omaha</td>
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<tr>
<td>1851</td>
<td><em>David McHugh</em></td>
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<td>1852</td>
<td><em>Samuel P. Davidson</em></td>
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<td>1853</td>
<td>John L. Webster</td>
<td>Omaha</td>
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<tr>
<td>1854</td>
<td>C. B. Letton</td>
<td>Auburn</td>
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<td>1855</td>
<td>Ralph W. Breckenridge</td>
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<td>1856</td>
<td>E. C. Celkins</td>
<td>Kearney</td>
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<td>1857</td>
<td>J. Mahoney</td>
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<td>1858</td>
<td>C. C. Flansburg</td>
<td>Lincoln</td>
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<td>1859</td>
<td>Francis A. Bogan</td>
<td>Omaha</td>
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<td>1860</td>
<td>Charles G. Ryan</td>
<td>Grand Island</td>
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<tr>
<td>1861</td>
<td>Benjamin F. Good</td>
<td>Lincoln</td>
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<tr>
<td>1862</td>
<td><em>William A. Redick</em></td>
<td>Omaha</td>
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<td>1863</td>
<td>John J. Halligan</td>
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<td>1864</td>
<td><em>E. H. Wilson</em></td>
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<td>1865</td>
<td>C. J. Smyth</td>
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<td>1866</td>
<td><em>John N. Dryden</em></td>
<td>Kearney</td>
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<td>1867</td>
<td>L. V. Wilcox</td>
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<tr>
<td>1868</td>
<td><em>Arthur C. Wakely</em></td>
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<td>1869</td>
<td><em>E. E. Evans</em></td>
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<td>1870</td>
<td>W. M. Morning</td>
<td>Lincoln</td>
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<td>1871</td>
<td>L. G. Smith</td>
<td>Omaha</td>
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<tr>
<td>1872</td>
<td><em>George F. Corcoran</em></td>
<td>York</td>
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<td>1873</td>
<td>Edward F. Holmes</td>
<td>Lincoln</td>
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<tr>
<td>1874</td>
<td>Thomas J. Dodge</td>
<td>Lincoln</td>
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<tr>
<td>1875</td>
<td><em>Paul J. Jesse</em></td>
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<td>1876</td>
<td><em>E. E. Good</em></td>
<td>Wahoo</td>
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<tr>
<td>1877</td>
<td><em>F. S. Berry</em></td>
<td>Wayne</td>
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</table>

*Deceased*:
- 1850: Eleazer Wakely
- 1851: David McHugh
- 1852: Samuel P. Davidson
- 1853: John L. Webster
- 1854: C. B. Letton
- 1855: Ralph W. Breckenridge
- 1856: E. C. Celkins
- 1857: J. Mahoney
- 1858: C. C. Flansburg
- 1859: Francis A. Bogan
- 1860: Charles G. Ryan
- 1861: Benjamin F. Good
- 1862: William A. Redick
- 1863: John J. Halligan
- 1864: E. H. Wilson
- 1865: C. J. Smyth
- 1866: John N. Dryden
- 1867: L. V. Wilcox
- 1868: Arthur C. Wakely
- 1869: E. E. Evans
- 1870: W. M. Morning
- 1871: L. G. Smith
- 1872: George F. Corcoran
- 1873: Edward F. Holmes
- 1874: Thomas J. Dodge
- 1875: Paul J. Jesse
- 1876: E. E. Good
- 1877: F. S. Berry

## Roll of Secretaries

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<tr>
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<td>1860-61</td>
<td>Roscoe Pound</td>
<td>Lincoln</td>
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<td>1861-62</td>
<td>Geo. P. Costigan, Jr.</td>
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<td>1862-63</td>
<td>W. G. Hastings</td>
<td>Omaha</td>
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<tr>
<td>1863-64</td>
<td>A. G. Ellick</td>
<td>Omaha</td>
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## Roll of Treasurers

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<th>Name</th>
<th>City</th>
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<td>1855-56</td>
<td>R. W. Breckenridge</td>
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<td>1856-57</td>
<td>Andrew G. Ellick</td>
<td>Lincoln</td>
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<td>1857-58</td>
<td>Edmund H. Hinshaw</td>
<td>Fairbury</td>
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<td>1858-59</td>
<td>W. H. Kelligar</td>
<td>Auburn</td>
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<td>1859-60</td>
<td>Geo. N. Dryden</td>
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<td>1860-61</td>
<td>F. A. Brogan</td>
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<td>1861-62</td>
<td>S. F. Davidson</td>
<td>Tecumseh</td>
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<td>1862-63</td>
<td>W. V. Wilcox</td>
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<td>R. W. Breckenridge</td>
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<td>1864-65</td>
<td>Frank H. Woods</td>
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<td>1865-66</td>
<td>Charles G. Ryan</td>
<td>Grand Island</td>
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## Roll of Executive Council

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<th>Name</th>
<th>City</th>
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<td>1866-67</td>
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<td>1868-69</td>
<td>Geo. F. Corcoran</td>
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<tr>
<td>1869-70</td>
<td>Fred A. Wright</td>
<td>Lincoln</td>
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*Deceased*:
- 1866: Edmund H. Hinshaw
- 1867: W. H. Kelligar
- 1868: Geo. N. Dryden
- 1869: F. A. Brogan
- 1870: S. F. Davidson
- 1871: W. V. Wilcox
- 1872: R. W. Breckenridge
- 1873: John J. Halligan
- 1874: Arthur C. Ellick
- 1875: Geo. F. Corcoran
- 1876: Fred A. Wright

## Roll of Executive Council

<table>
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<tbody>
<tr>
<td>1877-78</td>
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<td>Stanton</td>
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<td>John A. Ehrhardt</td>
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<td>1879-80</td>
<td>C. J. Smyth</td>
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<td>1881-82</td>
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<td>1883-84</td>
<td>H. H. Wilson</td>
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<td>1884-85</td>
<td>Edwin E. Squires</td>
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*Deceased*:
- 1878: John A. Ehrhardt
- 1879: John A. Ehrhardt
- 1880: C. J. Smyth
- 1881: William A. Redick
- 1882: Fred A. Wright
- 1883: John J. Halligan
- 1884: H. H. Wilson
- 1885: Edwin E. Squires

**Nebraska State Bar Association**
64. 1935-37 Roland V. Rodman .......... Kimball
65. 1936-36 J. G. Mothersead .......... Scottsbluff
66. 1936-36 James L. Brown .......... Lincoln
67. 1937-39 David A. Fitch .......... Omaha
68. 1937-39 Raymond G. Young .......... Omaha
69. 1937-41 M. M. Maupin .......... North Platte
70. 1937-41 Golden P. Kratz .......... Sidney
71. 1938-42 Sterling F. Mutz .......... Lincoln
72. 1938-43 Don W. Stewart .......... Lincoln
73. 1940-46 George N. Mecham .......... Omaha
74. 1940-43 Abel V. Shotwell .......... Omaha
75. 1940-43 Frank M. Colfer .......... McCook
76. 1941-43 Virgil Falloon .......... Falls City
77. 1941-43 Joseph C. Tye .......... Kearney
78. 1941-47 Earl J. Moyer .......... Madison
79. 1937-37 C. J. Campbell .......... Lincoln
80. 1938-38 Harvey Johnson .......... Omaha
81. 1939-39 James M. Lanigan .......... Greesle
82. 1940-40 E. B. Chappell .......... Lincoln
83. 1942-45 Fred J. Cassidy .......... Lincoln
84. 1941-41 Raymond G. Young .......... Omaha
85. 1942-43 Max G. Towle .......... Lincoln
86. 1942-42 Paul E. Boslaugh .......... Hastings
87. 1942-45 John E. Dougherty .......... York
88. 1942-43 Yale C. Holland .......... Omaha
89. 1943-45 Robert R. Moodie .......... West Point
90. 1944-47 J. F. Butler .......... Cambridge
91. 1943-46 Frank M. Johnson .......... Lexington
92. 1944-49 Floyd E. Wright .......... Scottsbluff
93. 1945-50 John J. Wilson .......... Lincoln
95. 1944-46 George L. DeLacy .......... Omaha
96. 1945-47 Virgil Falloon .......... Falls City
97. 1946-49 Leon Samuelson .......... Franklin
98. 1946-46 Harry W. Shackelford .......... Omaha
99. 1945-42 Paul F. Good .......... Lincoln
100. 1947-48 Joseph T. Votava .......... Omaha
102. 1947- Lyle E. Jackson .......... Neligh
103. 1947-49 Robert H. Beatty .......... North Platte
104. 1947-50 Frank D. Williams .......... Lincoln
106. 1948-51 Laurens Williams .......... Omaha
107. 1949-51 Joseph H. McGroarty .......... Omaha
108. 1948-54 Wilber S. Atten .......... Holdrege
109. 1948-50 Abel V. Shotwell .......... Omaha
110. 1948- Paul L. Martin .......... Sidney
111. 1948- Joseph C. Tye .......... Kearney
112. 1948-51 Earl J. Moyer .......... Madison
113. 1949- Harry A. Spencer .......... Lincoln
114. 1949- Paul F. Chaney .......... Falls City
115. 1949- Paul L. Martin .......... Neligh
117. 1949- Paul L. Martin .......... Neligh
118. 1949- Thomas C. Quinlan .......... Omaha
119. 1951- George B. Hastings .......... Grant
120. 1952-53 Laurens Williams .......... Omaha
121. 1952-53 Laurens Williams .......... Omaha
122. 1952-53 Laurens Williams .......... Omaha
123. 1953-54 J. D. Cronin .......... O'Neill
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