

1970

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1970

William J. Baird

Nebraska State Bar Association, president

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PRESIDENT WILLIAM J. BAIRD

NEBRASKA STATE BAR ASSOCIATION
HOUSE OF DELEGATES

WEDNESDAY MORNING SESSION

October 21, 1970

The meeting of the House of Delegates of the Nebraska State Bar Association, convening in the Hilton Hotel, Omaha, Nebraska, was called to order at nine-forty o'clock by Chairman Bert L. Overcash of Lincoln.

CHAIRMAN OVERCASH: Gentlemen, can we come to order. I think we have a quorum but we'll have the Secretary call the roll and see.

... Roll call by Secretary Turner ...

SECRETARY GEORGE H. TURNER: We have a quorum, Mr. President.

CHAIRMAN OVERCASH: Gentlemen, there being a quorum, I will call the meeting of the House of Delegates to order. This is an important meeting, gentlemen. I am sure that when we are through you will know and realize that we have a substantial program and that this body has made a substantial accomplishment.

I want first to welcome the new members of the House. We are glad to have you here. This body has increasingly important duties, and I am sure all of you will realize that before the day is over.

The first order of business is the approval of the Calendar. All of you received the program which sets forth on Page 4 the Calendar of this meeting. I have had a number of inquiries this morning about the necessary adjustments in order. I trust that we can approve the Calendar, subject to some modification of schedule that I find necessary to make. Will someone move that the Calendar as printed be approved, subject to some re-scheduling as may be necessary.

SECRETARY TURNER: I so move.

VIRGIL J. HAGGART, JR., Omaha: I second it.

CHAIRMAN OVERCASH: There has been a motion and a second that the Calendar be approved subject to certain realignments in order. Those in favor say "aye"; those opposed the same. I declare the Calendar adopted.

The first item on the program is a statement by the President of our Association. The President has had a very busy year, gentlemen, and a very fruitful year. I look forward very much to his report and I am sure he is going to have a significant report for you.

It is my honor and privilege to present Mr. Baird.

STATEMENT OF PRESIDENT

William J. Baird

Gentlemen, Members of the House: A great deal has happened since I last reported to you at the meeting in Lincoln. You will recall that at that time the final draft of our proposed new rules and bylaws were presented and accepted, with one or two minor technical corrections.

Also you will recall a proposed budget based on an increase in dues was presented and adopted by formal resolution of this House. Both matters were approved by the Executive Council, and the officers were instructed to proceed to take whatever action might be called for in order to make both propositions effective.

To report first on the outcome of the matter of our dues increase, as most all of you know, since you were instrumental in bringing about what I consider an outstandingly successful effort, the decision was made to obtain approving signatures from as many of our active members as possible on petitions addressed to the Supreme Court. During the months of July, August, and early September a monumental task was undertaken of contacting personally as many of our members as possible and the remainder by mail.

Although most of you have probably heard generally of the outcome of your efforts on this matter, I would like to give you now the official results of our petition drive: As of August 26, 1970, we had 2,588 active members of our Nebraska Bar Association—these figures are taken from the official records of our Secretary-Treasurer—and of that number, 2,268 lawyers reside in Nebraska, and 320 active members are non-residents of the state. From this total number of 2,588 active members we obtained signatures of 1,494 lawyers, or 58 per cent. What is even more significant to me, of the 2,268 lawyers who live and most of whom practice law in Nebraska and are the ones most vitally interested, we obtained signatures of 1,417, for what I consider a resounding 62 per cent.

These petitions were presented to the Court September 18 at an informal meeting requested by Tom Davies and myself. As a result of this meeting, as you know, the matter was set to be heard

by the Court sitting formally in special session on October 18, a week ago yesterday. Once again let me say that the Association is indebted to many of the members of this House of Delegates for taking the time and effort to come to Lincoln a week ago Tuesday to attend and participate at this hearing.

As of the time that I dictated these remarks, day before yesterday, I had reached a blank wall because I had had no results of our hearing on October 13, but a half hour later I received a call from the Clerk of the Supreme Court advising me that I could now finish my speech, that the Court had just finished a consultation and had taken action to approve our new dues schedule effective January 1, 1971, in one hundred per cent form as we requested. So this, then, for the record, constitutes the official announcement to the elected representatives of the members of the Nebraska Bar Association that our new dues schedule will go into effect next year. You are all clapping for yourselves, because you are the ones who did it.

To report next on the status of our new revised Rules, a petition was filed with the Supreme Court in September requesting their adoption, and this, too, was called up for hearing on October 13. As a result of this hearing a subcommittee of the Reorganization Committee met with a special committee of the Court the very next day with regard to several suggested changes in our revised Rules.

These changes will be explained to the House this morning when Herman Ginsbrg makes the report, or maybe this afternoon, for the Reorganization Committee. But I am pleased to report now officially that our new revised Rules, with these changes, all of which I am sure will be satisfactory with the House, since they were with the Court, (laughter) have also been adopted by the Court, and these too will become effective January 1, 1971 as we requested.

Gentlemen, I hope that you share my elation at the fact that these two items, each of which is so important to the future of this Association, and each of which as come about as a result of the action and demands of this House of Delegates, have now been successfully accomplished. But I also hope that you share my feelings of the heavy responsibility that is now laid upon the elected officials of the Association, including yourselves, to see that the promises made to the membership and to the Court are going to be carried out.

This means that the additional funds which shall be generated by the increased dues structure must be devoted primarily to those areas which will further benefit the lawyers of this state as a whole.

This means that the members of the House of Delegates must take a more active interest in the affairs of the Association, since the new Rules now impose upon the House the responsibility for many important decisions which were formerly vested in the Executive Council, especially with respect to fiscal controls.

I therefore conclude this report by, first, again thanking each one of you who has given such splendid assistance and support during the year to these two extremely important projects; second, by venturing the opinion that as a result of your successful efforts the Nebraska State Bar Association is on the threshold of a new era of progress and development which can be achieved if each one of us will continue to strive toward making the Association a more vital part of the practice of our profession and a truly representative spokesman for the lawyers of Nebraska; and, finally, by wishing you well in your deliberations on the very many important subjects which will come before you for decision today.

Mr. Chairman, I think it might be appropriate at this time, even before the House is advised of what the relatively few changes are that were made in the new Rules as presented in our June meeting, I think it might be appropriate if we were to adopt a general motion that will cover the hiatus of the committee reports today, operating under our present Rules, and the new Rules which will become effective January 1.

I would like to move that all present special committees be continued until such time as the new Rules do take effect and that the reports of such committees be carried over to the appropriate successor committee under the new Rules.

The motion was seconded and carried.

CHAIRMAN OVERCASH: Mr. President, that was a wonderful report. I am sure that every member of the House is pleased that those matters that have been closest to the heart of the House have been adopted and finalized and approved by the Court.

I think it behooves all of us when we get through today and hear the report of Mr. Ginsburg and his committee that each member of the House obtain a copy of the new Rules of reorganization, study them, and make up your mind that individually and collectively the House is going to carry on and discharge the new and increased responsibilities that these Rules impose. It is going to be important to the members of this House that we demonstrate to the Bar as a whole, and to the Court, and to the Executive Council that this House can perform and discharge these responsibilities.

We will now have the report of the Secretary-Treasurer.

REPORT OF THE SECRETARY-TREASURER**George H. Turner**

Mr. Chairman, Members of the House: Some of you may be wondering why we're set up in this fashion this year as compared with our usual setup of individual tables. When Mr. Baird and I contacted the management of this hotel to see if we could move in here instead of the Fontenelle, a great deal of rearranging had to be done. Mr. Fricke, the Sales Manager of the hotel, did a fine job of trying to fit a very large convention into his other plans.

Next year we hope to have adequate space to use the customary tables and sections.

My report to you has really already been made. You were sent a copy of an audit, and later a revised audit of the funds of the Association showing an excess of receipts over expenditures and a balance on hand at the end of the fiscal year, August 31, of some \$18,000. Expenses since then have narrowed that bank balance down to about \$12,000, but I do believe that it is sufficient to carry the Association through this annual meeting, although annual meetings are expensive.

Since you already have a copy of the audit, I would move that the audit be approved.

The motion was seconded and carried.

CHAIRMAN OVERCASH: Next we will have the report from our new Executive Director, Mr. Burton Berger. I think all of you have met him and know him. He has been an important part of this transition period, he has been working with these committees, and we look forward to Mr. Berger's report.

REPORT OF EXECUTIVE DIRECTOR**Burton E. Berger**

These are exciting times, certainly for me and I am sure for you too, because we have done a lot of work and also developed a lot of challenges. These are the things we look forward to in the months and the years ahead.

I have now been with the Bar Association for ten months, and as I look back I'm kind of surprised at how busy those ten months have been.

One of the first things I learned as I sat in on a few of these Bar meetings is that they are action-oriented. You know, you

stand up, speak up, and shut up! So I will try to hit just a few highlights of what I have done, and then look forward to what I can do in the future.

First of all, we have established an office. As you know, it is at 1019 Sharp Building in Lincoln. It is a nice office. I feel very much at home in it. I would like all of you also to feel at home in it. We have a coffee pot going. People expect the Bar to serve something else occasionally but we are strictly on coffee. We look forward to having you drop in and visit us there.

I have hired a secretary who has been most efficient. She has been extremely helpful and knowledgeable and I would like you to meet her. The more of you she knows, the more effectively we can serve you when you call or drop in.

In general I have worked with a lot of committees and activities. Just to mention a few, I have worked with the Public Service Committee on Law Day, a number of news releases on the awards program. We will be giving awards tomorrow night.

At this point I would like to go on record as officially thanking Tom Carroll, who has been public relations consultant for the Bar in the past, for the many friendly and helpful suggestions and assistance he has given our office. Tom has been most gracious and most helpful and certainly is a loyal supporter of the Bar, although not a member.

I have worked with the Reorganization Committee. We have done a lot of work on this and it has been a wonderful committee to work with, and it is really thrilling to us to see this committee end up with such a successful program.

We have worked with the Committee on Legal Economics and Law Office Management on development of a new fee schedule. You will hear a report on this later. Our office had a large part in that.

We have also been quite active working with the Special Insurance Committee on insurance programs for the Bar. Again we will hear about this, but our office did work with the survey that was taken, in developing materials and statistics for that particular committee.

I also had a chance to visit a few local Bar Associations and get acquainted with some people. I would like to do a lot more of that. I am just beginning to find out what *you* are all about and the more I meet you, the more I like you. So I certainly look forward to visiting more of the local Bar Associations.

The last thing I might mention that I've worked with has been with the Dues Increase Committee. I was very fortunate to be working with our President-Elect, Mr. Tom Davies. He and I, I think, have developed a good working relationship. We mutually yell at each other, and it is amazing the amount of things we can agree to very rapidly. Again, that has been a tremendous amount of work.

Many of you I do know by voice over the telephone. You know, I'm the guy who called you and said, "Hey, where are all of those petitions?" I know a lot of voices but there are still a lot of faces to meet. So while I may know many of you, I'm still looking forward to meeting you.

We now have an organizational structure that will allow us to move ahead. I would like once again to clarify the way I see this, and if I am wrong you can individually and collectively straighten me out. But as I see my job as Executive Director, I exist to work *with* you and *for* you, but not *in place of* you. I kind of like to think of myself as maybe not transistorized yet but certainly a work amplifier, by taking your ideas and your needs and the things that come for your initiative and helping you get them into operation, to make ideas into action. That is sort of the way I would see it. It will take your work, your ideas, your initiative to really make this program a going concern in the future.

I would like to make this one last point, if I could. I am not an attorney. I come out of adult education, that sort of background. Why, then, would I be interested in working for a bunch of lawyers? I kind of wondered that myself when I was approached about taking this position. But it is not hard for me to visualize. I've looked at our nation and our world and I've seen all of us collectively facing some real challenges in the years and decades ahead. If there is any chance for us to maintain our identity as a nation and our identity as individuals, as far as I am concerned, it has to come from a position of law and order, of reason and logical procedure. I don't come from a profession that can do that. You do. Working for you gives me a chance to take part in what I consider one of the most responsible positions in our society today, that of the legal profession. I am certainly looking forward to working with you on that.

CHAIRMAN OVERCASH: Thank you, Mr. Berger.

BERNARD A. PTAK, Norfolk: I don't know whether this is in order at this time but on this Statement of Cash and Receipts, under Note, I notice that the Bar has approximately \$42,000 segregated from the operating fund. I think I, as a member of the House

of Delegates, would like to know how that is handled, what it is used for, and so forth.

SECRETARY TURNER: During the first two years that the Association had group life insurance we had tremendous casualties. As you know, it was an open enrollment period. The company was bound to take anyone who applied, regardless of the condition of his health. We had a substantial number of deaths during those first two years. The premiums had to be raised I think during the third year, and it was then decided, upon the suggestion of the company, that there be a Premium Reserve Fund created. The dividends of the certificates were divided half between the company, they are holding it in reserve, and the Association is holding the other half. That resulted from premiums that otherwise would have been paid to certificate holders.

For the past three years the entire dividend has been paid to the certificate holder because we now feel that the Premium Reserve Fund is adequate to safeguard against a disastrous year, which otherwise might result in an increase in your premiums. It is a trust fund. It belongs to the members, to the certificate holders. It is not used for any other purpose, such as the operation of the Association, but if we strike another disaster year where the claims against the company are large, you will not be asked to increase the premium which you are now paying.

CHAIRMAN OVERCASH: I might inquire if there are any other questions.

If not, we will then proceed to Item 5, which is the matter of introduction of resolutions. Are there any resolutions to be introduced to this House for consideration and action?

SECRETARY TURNER: Mr. Chairman, the only resolution that has come to my attention is by a committee of the Association, presented by a member of the House, so it does not require referral to a committee on Resolutions. The committee will present it when they make their report.

CHAIRMAN OVERCASH: We will then proceed to the matter of the various committee reports. Before doing so, I want to suggest to the House, for the purpose of convenience and the saving of time, that those reports requiring no affirmative action by the House be approved and accepted, as we did at the last session, by a blanket motion. This does not preclude any report by a committee, but it does not necessitate any action by the House. Quite a number of these reports are routine and do not ask any action by the House.

In order that the record will be clear in that regard, I have gone through the reports as printed and I would suggest that we adopt a motion to accept and approve the following reports as a blanket motion, and I will identify the reports as follows. The numbers, as I see it, are: Reports No. 7, 9, 11, 14, 16, 18, 19, 21, 22, 23, 24, 25, 27, 29, 30, 31, 34, and 37.

Do I hear a blanket motion to that effect?

HOWARD H. MALDENHAUER, Omaha: No. 21, we will want to give a supplemental report.

CHAIRMAN OVERCASH: We'll eliminate No. 21. Repeating the numbers: 7, 9, 11, 14, 16, 18, 19, 22, 23, 24, 25, 27, 29, 30, 31, 34, 37.

KENNETH M. OLDS, Wayne: The Committee on Judiciary will also have a supplemental recommendation.

CHAIRMAN OVERCASH: Which number was that?

MR. OLDS: No. 9.

CHAIRMAN OVERCASH: Suppose we eliminate 9, then, from the list. Any other corrections in that list?

RONALD G. SUTTER, Beatrice: No. 14, I will have a supplemental report.

CHAIRMAN OVERCASH: We will eliminate 14, then.

ALFRED G. ELLICK, Omaha: Mr. Chairman, does this mean that the chairmen of these committees will not make a report?

CHAIRMAN OVERCASH: It means that they don't *have* to, and that their report will be accepted and approved. However, we will go right down the list, and we welcome a report. They can discuss their report in any way they desire. And furthermore, if they wish to change their report and ask for a recommendation, they may do so. But on the basis of these reports we want it clear that the committees do not have to make an oral report.

HAROLD L. ROCK, Omaha: Mr. Chairman, I move that the reports enumerated by the Chairman be accepted and the recommendations in those reports be accepted, except for those that were eliminated subsequently.

The motion was seconded and carried.

The following reports were approved by blanket motion.

**REPORT OF THE
COMMITTEE ON LEGAL EDUCATION AND
CONTINUING LEGAL EDUCATION**

The Committee on Legal Education and Continuing Legal Education respectfully submits the following report:

The Committee has directed its effort principally toward the preparation of a Real Estate Manual for distribution at their 1970 Annual Meeting and with cooperation of the Section on Real Estate Probate and Trust Law was also assisted with the oral program being presented at their meeting.

A deep debt of gratitude is owed to Gene Spence, a member of the Committee, and to his partner, Joseph McNamara, who have organized and assumed chief responsibility for the preparation of the Manual, and in addition, played a principal part in organizing the oral program. Also, of course, a debt of gratitude is owed to all of the members of the Association who have contributed to the Manual.

It should be noted that various Sections of the Association acting independently continued to make available outstanding programs of Legal Education and Continuing Legal Education in the state. Among these contributions are the Bridge-The-Gap Program presented by the Young Lawyers Section in Lincoln during the month of June on an annual basis, the Institute on New Legislation presented in September of this year also by the Young Lawyers Section, the Great Plains Federal Tax Institute presented in November or December of each year on an annual basis and others.

Jerrold L. Strasheim, Chairman

**REPORT OF THE
COMMITTEE ON LEGISLATION**

During this off legislative year your committee has received two legislative proposals. Both are ready for introduction if desired.

Some time has been spent with the Judges Retirement Committee considering methods for improving benefits for the retiring judges. We will continue this project into the legislative session.

Julian H. Hopkins, Chairman
H. D. Addison
John M. Brower
James W. R. Brown

Edward F. Carter, Jr.
Patrick L. Cooney
Virgil J. Haggart, Jr.
John J. Higgins
Richard H. Hoch
James Lake
Jess C. Nielsen
William J. Panec
William J. Ross
Donald C. Sass
Otto H. Wellensiek
Malcolm B. Young
Earl Buckles (N)
Kenneth Gould (C)

REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE AGENCIES

The Special Committee on Administrative Agencies has studied the Nebraska Administrative Procedures Act, and has given consideration to repealing certain portions of it; and the procedure whereby appeals are taken from agency decisions. The Committee is considering whether to recommend a procedure whereby administrative agencies are appealed de novo to the District Court, or whether the Universal Camera rule of substantial evidence on the record taken as a whole should be applied. It is hoped that the Committee will have a recommendation in this regard prior to the commencement of the 1971 legislative session.

The Committee has also given significant consideration to proposed legislation advocating a state regulatory agency for natural gas rates in the State of Nebraska. This matter has generated a great deal of heat and some light, and the committee is still considering whether or not to make a recommendation concerning such legislation. The legislation will be introduced to the 1971 session, and the Committee is attempting to determine whether it should place its stamp of approval thereon.

The Committee continues to be concerned over the lack of adoptions of rules of practice and procedure by all state administrative agencies, and is continuing to work toward the adoption of such rules by those agencies which have not done so.

As this is a special committee, it is recommended that the work of the Committee be continued.

James W. Hewitt, Chairman

REPORT OF THE SPECIAL COMMITTEE ON COUNTY LAW LIBRARIES

At the 1969 meeting of the House of Delegates, our committee was authorized to use our best efforts to accomplish the following:

1. Arouse the interest of the members of County Bar Associations in the establishment, maintenance and improvement of their County Law Library.

2. Encourage each District Judge to fulfill his statutory duty with reference to supervision of the Law Library of each county in his district.

3. Join with the District Judges in persuading the County Board of each County to budget adequate funds for the establishment and improvement of its County Law Library.

Accordingly a survey was made by the committee by inquiries sent to the District Judges and the County Attorneys of Nebraska. Because law libraries are well established in Douglas and Lancaster counties, no inquiry was made in those counties which are Judicial Districts 3 and 4. As of this date, we have received replies from the County Attorneys of 91 counties to which inquiries were sent and from 11 of the 19 judicial districts to which inquiries were made. (No response has been received from Judicial Districts Nos. 1, 5, 7, 9, 13, 16, 18, or 20.)

The replies so far received indicate the following:

Counties for which we have no report from any source	2
Counties claiming no County Law Library	23
County with library (including Douglas and Lancaster)	68
	—
Total	93

The replies indicate that some of these libraries contain only a few hundred books, but a start has been made in more than two-thirds of the counties of the state. For the most part, it is the smallest counties which are without a County Law Library. However, some of the smallest counties do have quite adequate law libraries and some middle-sized counties have no library at all.

The following conclusions can be drawn from the reports received:

1. A number of the District Judges have been active in encouraging county boards and local bar associations where no county law library has been established to get one started. **Where they have do so, progress has been made.**

2. Many of the judges have brought about an upgrading of previously established county law libraries through the exercise of the supervisory authority conferred upon them by Sec. 51-220, R. R. S. 1943; for example:

a. by encouraging the interest of the local bar in the County Law Library;

b. by persuasion of county boards to make space available for a library and to make regular budgeted amounts available for the acquisition of needed additions to the library.

c. by encouraging the local bar to contribute to the maintenance of the library, for example, to agree that all guardian ad litem fees and a specified portion (i.e. \$50.00 to \$100.00) out of each referee's fee allowed by the court be allocated to the maintenance of the county law library.

d. by causing an inventory of all books in the county law library to be made and a copy supplied to the county board; and

e. by suggesting additions which should be made to the library.

3. None of the judges have adopted all of the steps for improvement of county law libraries proposed by the Resolution adopted by the District Judges Association in 1967 (47 Neb. L. Rev. No. 2, Page 206).

4. A few of the judges and county attorneys are not interested in promoting county law libraries. Where this is the case there is no county library. Generally speaking, this is the case in counties having only one or two lawyers and a population of less than 1000 people. However, Grant County, which has no lawyers and a population of less than 1000 people does have a basic library of about 200 law books.

I. Both of the counties having over 100,000 population in 1960, have good county law libraries.

II. Of the 12 counties having a population in 1960 of from 15,000 to 100,000 population, we have received reports from one source or another, from 11. Only one (Gage) has no county law library. The libraries contain from 1000 volumes to 6000 volumes. Attorneys contribute nothing for the support of the library in only three of these counties. The smallest amount contributed by each attorney in the counties in this group which makes a charge is \$6.00 per year and the largest amount assessed against each

attorney is \$60 per year. The largest amount contributed for maintenance of the county law library by any of these counties is \$3000 per year. The smallest amount contributed annually by any county in the group (except Gage County) is \$300 in Otoe County and \$650 in Scotts Bluff. The median amount supplied by the reporting counties in this group is \$2500 per year. In all of these counties, except one, the district judge has been most helpful in the establishment and upgrading of the county law library.

III. There are 47 counties having a 1960 population ranging from 5000 to 15,000. The smallest number of attorneys in any of these counties is 5 and the largest number of attorneys in any of these counties is 20. We have no reports from any source from one of these counties. Of the remaining 46 counties, only 9 have no county law library. Size of the library in the other counties range from 300 volumes to 5000 volumes. The average size of the libraries in these counties is around 2500 volumes. The attorneys contribute to the maintenance cost of the library in 8 counties, in some cases by the bar association, in some cases by an assessment of each lawyer and in others by assignment of guardian ad litem fees and a part of all referee fees. In the other counties, the county provides the full cost of the library. In two counties (Butler and Richardson), the only support for the county law library comes from the lawyers.

The largest amount contributed by the county in any of these counties is \$3000, the median about \$1500. In 16 counties the District Judge has been mostly helpful in establishing and upgrading the county library. Twenty-one counties report very little help, if any, from the District Judge. It is in those counties where the judges have been interested that they have the larger libraries and the greater support from the county funds for the maintenance of the library. In a few of the counties that have no county law library as yet, the District Judges have been encouraging the county boards and the local bar association to get one started.

IV. There are 32 counties having a 1960 population of less than 5000 people. One has failed to reply to this date. Seven counties have no lawyers living in the county. The largest number of lawyers in any of these counties is 9. Of the 31 counties for which we have received a report, 9 do not have a county law library and 22 do. The largest county without a law library is Howard County with a population of 4131 (as of 1960) and 7 lawyers.

One county with less than 1000 population and no resident lawyer has a law library of 2000 volumes and the county pays \$1500 per year to maintain it, whereas one county of over 4000 population and with 7 lawyers does not report any library at all. Nine counties

report that the encouragement by the District Judge has had much to do with the fact that they have a law library. All of those with acceptable libraries have received such encouragement. Twelve counties have reported that they have received no encouragement from their District Judge. Obviously some of these libraries consist only of the the Nebraska Reports and a digest. Some of these libraries also include the Nebraska Statutes, and some include an encyclopedia. However, these reports indicate that a beginning has been made on a county law library for 30 of these smaller counties with less than 5000 population.

A copy of this report is being made available to the District Judges Association by the courtesy of Hon. Norris Chadderdon, one of the Judges of the 10th Judicial District in order to encourage continued interest on the part of the District Judges in the establishment and maintenance of county law libraries in the counties under the supervision of each Judge.

Each member of the Bar is urged to review the situation in his own county, and to discuss the matter of the law library of his county with other members of his county Bar and the members of the County Board of his own county. It is hoped that a copy of this report will be presented by local lawyers to their respective County Boards so that they can see what is being done in the other counties of the State.

During the coming year, the committee will attempt to determine the kind of books which have been accumulated by the smaller libraries. We will also attempt to ascertain how successful the several county law libraries have been in keeping their services up to date. This information will be submitted with our 1971 report.

COMMITTEE ON COUNTY LAW LIBRARIES

Joseph Ach
Dixon G. Adams
Bevin B. Bump
John Elliott, Jr.
Robert S. Finn
Mark J. Fuhrman
David E. Gregory
Jack R. Knically
James A. Lane
Russell E. Lovell
William H. Norton
W. A. Stewart, Jr.
William H. Meier, Chairman

REPORT OF THE SPECIAL COMMITTEE ON MEDICO-LEGAL JURISPRUDENCE

This Committee continues its very pleasant association and rapport with the Medical-Legal Committee of the State Medical Association and with the Douglas County Medical Society.

The two medical associations, through their officers, have expressed to us personally and by letter their grave concern with the malpractice problems they are encountering, including the difficulty in obtaining malpractice insurance coverage and the cost of this coverage.

In the past we have counseled with them with respect to the various types of plans similar to the Pima County Plan in Arizona, but to date the medical associations have not given us a firm stand they are taking or would like us to take to help them.

As we have previously reported, several years ago this Committee, in conjunction with the two medical associations formulated a code which was approved by both the medical and our association and distributed to the respective associations. This code seems to have been put on the shelf. In the code there was outlined a method to process complaints made by patients, but this was never carried into effect, and nothing further has been done since the adoption of the code by both associations.

The associations too have requested us informally to help out in some legislative programs, particularly dealing with mental health, and a subcommittee of this Committee worked effectively with them in that area.

The Committee is continuing to carry on its work, and it is our recommendation that the Committee continue.

Harry L. Welch, Chairman
Ivan A. Blevens
Joseph P. Cashen
Kenneth Cobb
Kenneth H. Elson
Daniel D. Jewell
Joseph H. McGroarty
Robert D. Mullin
Thomas W. Tye
Eugene P. Welch
Charles E. Wright

REPORT ON THE SPECIAL COMMITTEE ON OIL AND GAS LAW

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

Oil and gas activities in Nebraska have been at a low ebb during the past year and there has very little litigation involving mineral law and no suggested legislation to be presented to the 1971 Legislature of Nebraska for consideration. The Nebraska Statutes with reference to minerals seem to be in a very satisfactory situation insofar as it affects the rights of the industry, the mineral owners and the public.

However, the Committee feels that there should be a group of interested lawyers continuing a study of developments in oil and gas law and considering any advisable change in the Statutes or legal developments of interest to the industry and the public in general, and we therefore recommend that the Committee be continued for another year.

Paul L. Martin, Chairman
Robert J. Bulger
John T. Carpenter
Kenneth Fritzler
P. J. Heaton, Sr.
Hans J. Holtorf
Jack R. Knicely
Bernard L. Packett
Ivan Van Steenberg
Floyd E. Wright

REPORT OF THE TRUSTEE OF THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

The Rocky Mountain Mineral Law Foundation is in its sixteenth year. Its purpose remains unchanged—the promotion of research and continuing legal education in Natural Resources Law. In accomplishing this purpose in the challenging decade of the 1970's, however, we have already seen and will continue to see an expansion of the foundation, scope and emphasis on newly developing areas of law.

Water Law, always an important aspect of Natural Resources Law, has received a greater degree of attention through the Water Law Section of the Annual Institutes. Further, with the cooperation of the Foundation's member law schools, a series of specialized

Water Law Institutes have been held at the Universities of Colorado, Arizona and New Mexico and a fourth Water Law Institute is scheduled to be held at the University of Oklahoma in November of this year.

The Annual Institute for the year 1970 was held in Albuquerque, New Mexico. The attendance was excellent and the program was outstanding.

The concern of our society with the quality of our environment was reflected in the program for the Institute. Seven of the papers presented dealt wholly or in part with environmental issues and the growing body of environmental law will receive additional specialized attention in the future.

The Foundation serves the legal community through the publication of continuing services, such as the three Gower Federal Services dealing with oil and gas, mining and outer continental shelf. Support from attorneys across the United States and from several other countries has made it possible to develop, prepare and maintain several sorely needed legal treatises, The American Law of Mining and The Law of Federal Law and Gas Leases. Current legal developments in the natural resources area are reported in the Foundation's Rocky Mountain Mineral Law Review, Water Law Newsletter and the published proceedings of the Annual Institute.

The membership now consists of sixteen law schools, ten bar associations, seven mining industry associations, four oil and gas industry associations with eight additional trustees at large and three additional trustees for the Regional Rocky Mountain Oil & Gas Association.

The Institute for the year 1971 will be held in Vail, Colorado. This will be a wonderful opportunity for the members of the Nebraska Bar to attend an Institute well worthwhile and at the same time enjoy a vacation in the high Rockies of Colorado. I feel sure that any member of the Bar Association attending the Institute will find his attendance of great benefit to his continuing legal education.

Paul L. Martin

REPORT OF THE COMMITTEE ON PUBLICATION OF LAWS

A number of complaints by local bar association and individual lawyers relative to the publication of the session laws and the Cumulative Supplement to the Nebraska statutes were referred to this committee during the past year. A meeting was held dur-

ing the midyear meeting of the Nebraska State Bar Association to which interested parties were invited. After a frank and open discussion of the problems, this committee voted to submit a Resolution to the House of Delegates at the mid-year meeting. The Resolution was adopted unanimously by the House and reads as follows:

WHEREAS, the Nebraska State Constitution provides for publication of the session laws within 60 days after the adjournment of the session, and WHEREAS, for a multitude of reasons it has been impossible to comply with this provision which has resulted in an enormous problem in the conduct of the governmental, business and private affairs of the people of the State of Nebraska, and

WHEREAS, the members of the State Bar Association have a particular awareness of the problem and a special obligation because of their daily dealings with the law to aid in finding a solution to the problem, and

WHEREAS, the Legislative Council of the Nebraska State Legislature by virtue of LB 82 is conducting an interim study on the publication of statutes.

NOW, THEREFORE, BE IT RESOLVED by the House of Delegates of the Nebraska State Bar Association that the Bar Association through its Executive Committee and the Committee on Publication of Laws advise and cooperate with the Legislative Council in finding a solution to the problem of delay in publication of the laws and urge that the necessary action be taken by the Legislature at the earliest possible time.

This committee has made formal offer of assistance to the Legislative Council and stands ready, to provide whatever help it can to solving this vexing problem. It is accordingly recommended that this committee be continued.

Richard M. Duxbury, Chairman
 Richard L. DeBacker
 John M. Gradwohl
 Vance E. Leininger
 Pliny M. Moodie
 Robert A. Munro
 William F. Ryan
 Lyle E. Strom
 Peter J. Vaughn

REPORT ON THE SPECIAL COMMITTEE ON RULES OF THE ROAD

The committee has continued to monitor proposals for the drafting of statutes for the revision of Rules of the Road.

Proposals have been made through the State Safety coordinator's office with the hope of obtaining federal funds, to be matched

by some private funds which the Nebraska Safety Council will undertake to provide, for a systematic and comprehensive revision of the statutes dealing with the Rules of the Road. This committee has maintained liaison with this effort and will continue to do so.

No specific statutory proposals are before the committee at the present time. In view of the continuing possibility of the proposal of substantial revisions of the Rules of the Roads statute, **we recommend the continuation of the committee.**

Patrick W. Healey, Chairman
John O. Anderson
James E. Dunlevey
Theodore J. Fraizer
Marvin L. Holscher
A. J. Luebs
E. Merle McDermott
George H. Moyer
Wallace Rudolph
Albert G. Schatz
David A. Svoboda
Fred J. Swihart

REPORT OF THE SPECIAL COMMITTEE ON WORLD PEACE THROUGH LAW

Your committee has continued to cooperate with the World Peace Through Law Movement originated by Charles S. Rhyne, past president of the American Bar Association. This movement was instituted by the A.B.A. and has grown rapidly throughout the civilized world. Many nations have cooperated although attendance at the conferences from nations behind the iron curtain has not yet developed as hoped although lawyers and jurists from some of these countries have expressed interest and a desire to cooperate.

The Fourth World Conference was held in September 1969 in Bangkok, Thailand. The concensus of this meeting was summed up in the adoption of a resolution in part, * * * "without a well-trained legal profession and adequately equipped law schools there can be no sound foundation for the peaceful and orderly development of the political, social and economic life of a country", and resolved: "to draw the attention of Heads of State and Government to the necessity for including, in the general educational curricula, studies to acquaint the students better with the province and function of law and lawyers in the community".

World Law Day was celebrated November 24, 1970 and publications circulated in three different languages to the legal pro-

fession throughout one hundred twenty-eight countries holding membership in the World Peace Through Law Center.

The Fifth World Conference will take place in Belgrade, Yugoslavia July 21-25, 1971. This conference will, in the words of President Charles S. Rhyne: "seek ways and means in the field of law to bridge differences between the East and West, and different systems of government to facilitate world trade and travel so as to help satisfy the common aspirations of mankind to live and prosper in an atmosphere of peace throughout the world:"

The law is common ground, regardless of race, color, or creed, all jurists and all men of good-will believe in the rule of law—that law which offers man's concept upon which to build world peace.

Law leaders will assemble in Belgrade from more than one hundred nations and will endeavor to help build a system of law and a court system for the world community which will avoid conflict, or will transpose conflict into institutions such as courts for peaceful settlement.

Every member of the legal profession from all the world's nation's is invited to attend the Fifth World Conference in Belgrade, and all participants will have the opportunity to express their views.

The Third World Assembly of Judges will take place concurrently with the Belgrade Conference, and it is believed that over four thousand of the world's highest legal leaders and high court judges will meet again in Belgrade in July 1971.

Thus, the legal profession in endeavoring to bring about world peace and avoid the multiplicity of wars which have engulfed humanity throughout the world over the entire period of human existence.

This being a special committee appointed for the purpose of co-operating with the A.B.A. Committee on World Peace Through Law and the World Peace Through Law Center it is recommended that the committee be continued.

On behalf of the committee,

J. C. Tye, Chairman

REPORT OF THE COMMITTEE ON FAMILY LAW

The Committee on Family Law was called to a meeting thereof at the June meeting of the House of Delegates in Lincoln.

The Committee, pursuant to the House's approval of its 1969 Report, had been, through its Chairman, in liaison with the Nebraska Committee for Children and Youth. The major problem of mutual interest is some reform in the grounds for divorce under R. R. S. 42-301 and 42-308. A draft of such a bill was approved by the N.C.C.Y. at their annual meeting on June 2, 1970. This draft, it is hoped will have the support of the N.B.A. Committee on Legislation. This was the only measure submitted to the Committee during 1970.

The Committee recommends that it be continued for the purposes stated in the 1969 report, particularly to represent the Bar in the N.C.C.Y.'s planning of Nebraska's participation in the N.C.C.Y. (National Committee for Children and Youth), whose major function is the decennial White House Conference for Children and Youth planned for 1971.

LeRoy E. Endres, Chairman

REPORT OF THE SPECIAL COMMITTEE ON REORGANIZATION OF THE NEBRASKA STATE BAR ASSOCIATION

This Committee made its report to the Mid-year Meeting of House of Delegates, at which time the Committee submitted a complete draft of Rules and By-laws. The proposed Code of Rules and By-laws was approved by the House of Delegates; and the Association directed to proceed to submit the same to the Supreme Court for acceptance and approval.

The Committee stands ready to do whatever further may be required of it with reference to the procuring of final action on the proposed Rules and By-laws.

M. M. Maupin
Frank Mattoon
Charles E. Wright
Robert C. Bosley
William E. Morrow
John C. Gourlay
Joseph C. Tye, Vice Chairman
Herman Ginsburg, Chairman

REPORT OF THE TRUSTEES OF THE DANIEL J. GROSS NEBRASKA STATE BAR ASSOCIATION WELFARE AND ASSISTANCE FUND

The Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund was established under the terms of the Last

Will and Testament of Daniel J. Gross, Omaha attorney who died November 12, 1958. The sum of \$25,000.00 was set aside to be administered by trustees appointed by the Nebraska State Bar Association, such funds to be used "for charitable and welfare purposes of active practicing Nebraska lawyers, their wives, widows, and children."

The Executive Council of the Nebraska State Bar Association on July 12, 1959, accepted the gift and resolved that the funds be administered by a board of three trustees to be appointed by the president of the State Bar Association. At the same time, the then president, Joseph C. Tye, named as trustees, attorneys Harry L. Welch of Omaha, chairman, Earl J. Lee of Fremont, and John C. Mason of Lincoln. Following the death of Mr. Lee in 1963, Lester A. Danielson, Scottsbluff attorney, was appointed to the vacancy.

The Executive Council of the Nebraska State Bar Association by resolution has granted the trustees of the fund the authority to disburse and distribute for welfare and assistance purposes, from either income or principal or both, such amounts, on such occasions and to such active practicing Nebraska lawyers, their wives, widows and children, as they in their sole discretion, determined by a majority vote of the members of the Board of Trustees, may determine. The trustees have considered numerous requests of lawyers and their dependents, and have granted benefits upon showing of need and incapacity of the applicants to otherwise provide for themselves.

The Executive Council of the State Bar Association also has granted the trustees the right to accept and receive any other contributions that may be made to the fund, and to manage, administer and disburse these additional funds in the same manner as the original funds.

The Executive Council has provided that the proceeds of the fund shall be invested in a manner permitted and authorized by Sec. 24-601 of the Revised Statutes of Nebraska, 1943 (Reissue of 1956). A good portion of the fund has been invested by the trustees in securities after consultation with investment specialists.

It is provided that the fund shall terminate and wind up its affairs when all the assets shall have been disbursed and distributed.

As of June 30, 1970, the fund had securities and deposits in the total amount of \$32,423.58. Income for the year amounted to \$1,809.34, and disbursements to the widow and child of deceased attorneys totaled \$1,885.50.

Harry L. Welch, Chairman
John C. Mason
Lester Danielson

REPORT OF THE SPECIAL COMMITTEE ON LAW COMPLEX

In February, 1970, President William Baird appointed this Special Committee. After the Chairman had conferred with Dean Henry Grether, Chief Justice Paul White and Senator Jerome Warner, the Committee met in Lincoln.

The conclusions of the Special Committee are included in the Resolution on this subject which was adopted by the House of Delegates and is as follows:

"WHEREAS the present University of Nebraska Law School building does not have an adequate number of classrooms for the education of the number of law students presently enrolled at the School, and

"WHEREAS the construction of the Interstate Highway has made it highly undesirable to conduct classes in many of the present classrooms of the Law School because of the noise of traffic, and

"WHEREAS the present Law Library of the Law School is not adequate for the needs of the present number of students, and

"WHEREAS the number of students now attending the Law School does not result in graduating enough lawyers to take care of the need for lawyers in the State of Nebraska, and

"WHEREAS approximately five times as many students are applying for admission to the Nebraska Law School as can be admitted with the present facilities.

"NOW, THEREFORE, BE IT RESOLVED that the House of Delegates of the Nebraska Bar Association supports the following:

"1. A new Law School building should be financed by a State appropriation and constructed on the East Campus in Lincoln adequate to accommodate a total enrollment of approximately 600 students.

"2. An adequate Library should be provided in the Law School building.

"3. The Nebraska State Bar Association should offer to rent from the University, office, work and conference space of approximately 1,000 square feet in the Law School building if the University provides such space in the new Law School building.

"4. As may be feasible from time to time, living facilities for law students, both married and single, be constructed from the proceeds of revenue bonds without using tax funds in the area around the new Law School building so as to form a Law School Complex.

"5. The University should reserve sufficient ground near this Complex of the Law School and residence building for a new Supreme Court building if it is later determined to build such a facility at that location.

"6. The members of the Nebraska State Bar Association are urged to publicly support and seek accomplishment of this program."

Dean Grether and the Staff at the Law School have participated actively in the development of conclusions as to the space required and in obtaining estimates of the construction cost, which is now approximately \$3,800,000.00.

The need for this new building has been made known to Chancellor Varner in meetings with him and has been communicated to Governor Tiemann. As of the date of writing this Report, the budget adopted by the Board of Regents does not include funds for a new Law School, but the Committee intends to continue seeking funds for a new Law School.

Claude E. Berreckman
Marvin G. Schmid
Thomas W. Tye
Warren K. Dalton
Kenneth H. Elson
M. A. Mills, Jr.
Robert H. Berkshire
Charles E. Oldfather
J. H. Myers
Richard D. Wilson, Chairman

REPORT OF THE COMMITTEE ON COOPERATION WITH THE AMERICAN LAW INSTITUTE

The 1970 annual meeting of the American Law Institute was held at Washington, D.C., in May. Members of the Nebraska Bar Association attending as elected or ex officio members, or both, of the Institute were the Honorable Paul W. White, Chief Justice of the Nebraska Supreme Court, and the Honorable Hale McCown, Justice of the Nebraska Supreme Court, Clarence A. H. Meyer, Robert J. Kutak, John C. Mason, Laurens Williams, and the Chairman of your Committee, Edmund D. McEachen.

The meeting was opened with remarks by the Honorable Warren E. Burger, Chief Justice of the United States, long a member of the Institute, but appearing for the first time as Chief Justice.

Portions of a day were spent in discussion of a model code of prearrestment procedure and discussion of a model land development code. A day was spent on a major project of the Institute, the Restatement of the Law, Second, Torts, on which Dean Prosser is the reporter. A half day was spent in continued discussion of the Restatement of the Law, Second, Contracts.

A half day was spent in report and discussion on Preliminary Draft No. 2 of the Review Committee for Article 9 of the Uniform

Commercial Code, relating to the subject of Fixtures. Partially as a result of the extended discussion of Preliminary Draft No. 1 during the 1969 Meeting of the Institute, at which that draft had been rather severely criticized, Draft No. 2 was a radical departure from the previous draft, improved in many respects but not in form ready for presentation to our Association or for proposed amendment of the UCC as adopted by the Nebraska Legislature.

The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association has continued to develop study materials and encourage development and growth of state organizations for the purpose of continuing legal education. Your Committee recommends further efforts by this Association in developing continuing legal education for members of the Nebraska Bar.

Your Committee further recommends continuing efforts to revise Nebraska Statutes in those few areas in which they depart from the Uniform Commercial Code, in order to provide desired uniformity in commercial law throughout the country; and to give consideration to any proposed revisions of Article 9 of the UCC, immediately upon finalization by the permanent Editorial Board for the Uniform Commercial Code.

Your Committee commends the Nebraska State Bar Foundation for its recently completed and published Nebraska Annotations to the Restatement of the Law of Torts, Second, compiled by Professor Lewis A. Huskins of the University of Nebraska School of Law, under the auspices of the Foundation, and for its continued work in sponsoring a compilation of the Restatement of the Law of Trusts.

Your Committee strongly feels that the Committee should be continued and that the Nebraska Bar Association could continue to be represented at meetings of the American Law Institute by a liaison member. The Restatements of the Law and other works of the Institute have enormous impact on the Courts and on the law throughout the nation. The Nebraska Court has made frequent use of these materials. The Committee feels that it is most important that the State be represented in the studies conducted by the Institute and take an active part in its decisions.

The Committee recommends that the Committee and its work be continued.

Edmund D. McEachen, Chairman
Hale McCown
Charles F. Adams
James A. Doyle
Allan Garfinkle

John C. Gourlay
Henry M. Grether, Jr.
Fred T. Hanson
John C. Mason
Thomas N. Wright

**REPORT OF THE
SPECIAL COMMITTEE ON COOPERATION WITH LAW
SCHOOLS AND ON ADMISSION TO PRACTICE**

A meeting of the Committee on Cooperation with Law Schools and on Admission to practice was held on June 12, 1970, at the Mid-Year Meeting of the Association. Three members of the Committee were present. The Committee respectfully reports:

1. Progress on the rejuvenation and expansion of the physical plants of the law schools at the University of Nebraska and Creighton University was reviewed. The Committee again pledged its support in the continued effort to improve these physical plants. The Committee agreed to cooperate with the newly-created special committee of the Bar Association established for the purpose of working toward the acquisition of a new law college complex at the University of Nebraska.

2. Dean Henry Grether of the University of Nebraska College of Law reported that under the rule adopted by the Nebraska Supreme Court authorizing limited practice by law students under the supervision of a member of the Bar, several students have been certified for limited practice.

3. The Committee also discussed the current need to increase the number of law school faculty members to maintain a desirable student-faculty ratio. This increase is necessary because of the increased number of students attending law school in Nebraska.

4. The Committee determined that it serves a purpose in its availability for advice and assistance, and is a means by which the law schools and the Bar Association can consider matters of mutual concern. It is therefore recommended that the Committee be continued.

Larry G. Carstenson, Chairman
Dean James A. Doyle
Dean Henry M. Grether, Jr.
Julian H. Hopkins
M. A. Mills, Jr.
Robert D. Mullin
Hon. John E. Newton

Charles E. Oldfather
Marvin G. Schmid
Robert G. Simmons, Jr.
Earl H. Scudder, Jr.

CHAIRMAN OVERCASH: In proceeding with these committee reports there are a few changes in order to accommodate individuals that I indicated to you I would make. In that connection I would like first to accommodate Mr. Welch, Report No. 22.

CHAIRMAN OVERCASH: No. 8, report of the Committee on Crime and Delinquency Prevention. That report requires some action.

REPORT OF THE COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Melvin K. Kammerlohr

This committee does have a couple of matters that will need affirmative action.

The report, starting on Page 37 of the Program, and skipping down to Page 38, Item No. 4 which, very briefly, is a recommendation to change the quantum of proof in juvenile cases to "beyond a reasonable doubt" rather than "preponderance of the evidence" as now contained in the juvenile court law.

In connection with that I would like to have you change on Item No. 4 the last line "the DEBACKER Case". That should read "Winship", a case last March in the United States Supreme Court which required as to juvenile cases this new quantum of proof.

We raised this issue in the Debacker Case in the United States Supreme Court but the Court didn't reach it when we were up there. So that reference there is not accurate.

The change that we suggest could be easily taken care of by an amendment in Section 43-206.03(3) in the juvenile court law by striking the words (quote) "the preponderance of the evidence" in Line 5 and inserting therein the words (quote) "the evidence beyond a reasonable doubt"; and then striking in Line 6 the same section the words "or not".

All this would do would be to require the juvenile court judge to make his adjudication, at the adjudicatory stage "beyond a reasonable doubt" whether or not this child comes within the definitions of a delinquent child in need of supervision, and so on, rather than by a "preponderance of the evidence."

Our second recommendation that needs action is under No. 5, and I can summarize this briefly by stating that the legislature in the 80th Session in 1969 passed two different bills which provided that in certain situations a conviction or a finding of delinquency or a need of supervision could be set aside after a person has made satisfactory adjustment while on probation or in other certain named situations. However, in the case of juveniles they also made the statement that the records could be sealed after the case had been set aside. They didn't do this anywhere in the one relating to criminals, and we are suggesting that those persons under eighteen years of age who are convicted of a crime, rather than taken to the juvenile court, that in the situation where their record is set aside that it also be sealed—only as to those under eighteen—so that would be on the same footing as those under eighteen who go through the juvenile court. The reason for this is that oftentimes the same conduct can result in the person going through the criminal court rather than the juvenile court. When they are under eighteen the discretion is purely up to the county attorney, as you know.

So our recommendation could also easily be done by adding to what is now Section 29-2242, subdivision (3) of the 1969 Supplement, the following: "If said person was, at the time of his conviction, under the age of eighteen years, the order shall require that all records relevant to the conviction be sealed. Thereafter such records shall not be available to any person, except upon order of the court for good cause shown." This is the same provision as now in the juvenile section.

Mr. Chairman, I move the adoption of these two specific recommendations and that the Nebraska Bar Association sponsor legislation similar to that outlined above: (1) to change the quantum of proof necessary for an adjudication in juvenile court cases; and (2) to allow the court, when setting aside a conviction, to seal the record as to persons who are under eighteen years of age at the time of their conviction, said records thereafter to be opened only on order of the court for good cause shown.

JULIAN H. HOPKINS, Lincoln: Mr. Overcash, I am Chairman of the Legislative Committee and I think maybe Mr. Kammerlohr's recommendation would be to transmit it to the Legislative Committee for drafting, as soon as the delegates approve the recommendations of the committee.

CHAIRMAN OVERCASH: Is that agreeable?

MR. KAMMERLOHR: That's fine, yes. If they will take care of it that will be fine with us.

CHAIRMAN OVERCASH: You have heard the motion. There are two aspects to the motion and then there is another procedure. I assume you understand the motion. Is there a second to this motion?

CHARLES F. ADAMS, Aurora: I'll second the motion.

CHAIRMAN OVERCASH: Is there any discussion of the merits of this motion, of the matters involved? If there aren't any questions propounded, do any of you desire to speak upon this subject? As you know, there has been some reference to this in the newspapers as a matter of change of substantive law. Do you understand the motion? Do you desire to discuss it?

ALFRED G. ELLICK, Omaha: I am just wondering now, What is the committees feeling?

CHAIRMAN OVERCASH: To bring it to a head, with the permission of the mover I will first put the question with reference to the quantum of proof. Do you understand the motion in that regard? Let's vote on that separately. Will that be agreeable?

MR. BEGLEY: If you please, I don't think we have had enough time to think about this. I am not sure that I have made up my mind whether I want to approve or disapprove the committee's report. Has it been referred to the Judicial Council? Have they had an opportunity to investigate this thing? This is a fundamental change. So under the circumstances I would move a substitute motion to continue the report of the committee and refer the matter to both the Judicial Council and the County Attorneys Association for their recommendation.

CHAIRMAN OVERCASH: You have heard the substitute motion. Is there a second to that?

CHARLES F. GOTCH, Omaha: I second the motion.

CHAIRMAN OVERCASH: We will vote on the substitute motion. Does that relate to both aspects of the primary motion?

MR. BEGLEY: Yes sir.

CHAIRMAN OVERCASH: On that basis, those in favor of the substitute motion will signify by saying "aye"; those opposed the same. I believe the substitute motion was adopted. Unless you desire a division or some other way of voting I will declare the substitute motion adopted.

The next report, No. 9, is the report on the Committee on Judiciary. Mr. Ackerman.

THOMAS M. DAVIES: Mr. Chairman, may I inquire, if this is approved by the County Attorneys and by the Judicial Council, then does this body authorize this to be presented to the legislative on behalf of the Legislative Committee and on behalf of the Bar Association? I think that has to be answered now, because this group will not meet again in time for us to do anything for the legislature.

CHAIRMAN OVERCASH: Well, would you care to make a motion to that effect, Mr. Davies, so that the record will be straight?

MR. DAVIES: I would so move, that if adopted by the Judicial Council and by the County Attorneys Association that the Bar Association Legislative Committee be authorized to go ahead with it.

CHAIRMAN OVERCASH: Is there a second to that motion?

HOWARD H. MOLDENHAUER, Omaha: I second the motion.

CHAIRMAN OVERCASH: Is there discussion?

CHARLES F. ADAMS, Aurora: Mr. Chairman, I would speak to Mr. Davies' suggestion that as a former member of the Judicial Council I think we should be reminded that whatever action they take, if approved by the Supreme Court, automatically goes to the legislature. So it seems to me that referring this matter to the Judicial Council runs counter to the philosophy of what the Judicial Council is supposed to do and what happens after they do it.

I think it would be helpful to get the recommendation from the Attorneys' Association because they are the prosecutors that have to live most intimately with this juvenile court, but I would suggest that we delete any reference to referring this matter to the Judicial Council.

CHAIRMAN OVERCASH: Mr. Adams, we have already adopted a substitute motion to refer it to the Judicial Council. Presumably, under that, if it is not appropriate they wouldn't consider it, or if it is they would act, and unless there is further motion to override the previous one I would assume that we would have to proceed on the basis of the substitute motion.

MR. ADAMS: I was speaking to Mr. Davies' motion which would make it automatic that this Association sponsor legislation, despite what we have done today, if these two groups approve.

MR. MOLDENHAUER: As I understand it, if the Bar Association is to appear in support of any legislation it also requires action by the House or by some Bar Association body and eventually it would allow the Bar Association to support any such legislation.

CHAIRMAN OVERCASH: That is correct. In the absence of any amendment to the motion I will put the question. Will those in favor of the motion of Mr. Davies signify by saying "aye"; those opposed the same. I declare the motion of Mr. Davies adopted.

SECRETARY TURNER: Gentleman, may I make a statement to you as Secretary of the Judicial Council? Some of you who may not be familiar with the matter in which the Council operates, when a question is submitted to the chairman, he refers it to a subcommittee of the Council for investigation and report at the Council meeting. Unless this is sent to Judge Carter, who is Chairman of the Judicial Council, very promptly, I don't see how it can be considered. The next meeting of the Council will be December 18, and that will be the last meeting probably before the legislature convenes. So if this matter is to go to the Judicial Council, it should go very promptly.

CHAIRMAN OVERCASH: Well, Mel, you will have to be guided accordingly.

MR. KAMMERLOHR: The County Attorneys meet tomorrow morning, so I will try to take it up with them then and hope to get some action with the County Attorneys Association the first thing in the morning.

CHAIRMAN OVERCASH: I assume that clears up, finally, Report No. 8.

Report No. 9, the Committee on Judiciary.

The report of the committee follows:

REPORT OF THE COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

A meeting of the Committee was held in conjunction with the mid-year meeting of the House of Delegates. At this meeting the following proposals were adopted:

1. That this committee and its members coordinate with and assist the State Crime Commission.
2. That the Committee should encourage and assist in the prison studies now under way.
3. That the Committee study and make recommendations on the Uniform Juvenile Court Act.
4. Recommend that the Juvenile Court Act be amended to change the standard of proof from "preponderance" to "beyond a reasonable doubt" as required in the DEBACKER case.

5. Recommend that the provision of the Juvenile Court Act which seals the records for persons under 18 years of age as set forth in L.B. 1379 (Session Laws 1969) be incorporated in L.B. 908 (Session Laws 1969) to afford persons under 18 years of age the same remedy when charged with an adult offense.

6. To obtain a copy of the report calling for changes in the Juvenile Court Act made for the County Board of Douglas County and to study same.

The recommended studies are being made.

Don Brock, Chairman
Bernard J. Ach
Harold E. Connors
Seward L. Hart
Melvin K. Kammerlohr
Alfred J. Kortum
Richard L. Kuhlman
Walter J. Matejka
Richard E. Muetting
Clark G. Nichols
W. W. Nuernberger
Elizabeth Pittman
Gerald S. Vitamvas
Walter D. Weaver
Cloyd Clark

REPORT OF THE COMMITTEE ON JUDICIARY

Kenneth M. Olds

I am reporting on behalf of the Judiciary Committee because of the absence from the state of Jim Ackerman.

You have the written report in front of you so I am not going to discuss that. But since the filing of our report we were requested by the President of the Association to make a recommendation to the House of Delegates on Proposed Constitutional Amendment 4, which deals, among other things, with the proposal to authorize retired Supreme Court judges or district judges to be called upon for temporary duty by the Supreme Court.

This provision dealing with retired judges seems to have some controversial aspects. The request came to the committee too late to have a meeting of the committee. Mr. Ackerman polled the membership of the committee and received six votes supporting

Amendment No. 4 and one vote opposing it. The member of the committee opposing Amendment No. 4 expressed concern that the amendment was inconsistent with the Missouri Plan and that it failed to give the electorate an opportunity to pass upon the qualifications of the judge involved. Those favoring the amendment felt that the supervision of the Supreme Court over the designation of retired judges was sufficient supervision of the appointments.

Since the great majority of the committee favored Amendment No. 4, and although I am not a member of the House of Delegates, I would move the adoption of the report of the Judiciary Committee recommending support of Constitutional Amendment No. 4.

CHAIRMAN OVERCASH: You have heard the motion. Is there a second?

GEORGE E. SVOBODA, Fremont: I second it. I'm a member of the Judiciary Committee.

CHAIRMAN OVERCASH: Is there any discussion? If not, those in favor will indicate by saying "aye"; opposed the same. I declare the motion adopted.

The report of the committee follows:

REPORT OF THE COMMITTEE ON JUDICIARY

Your Committee met at the time of the mid-year meeting in Lincoln, on June 12, 1970. At that time two items were discussed—(1) the proposed amendment to the Nebraska Constitution embodied in Legislative Bill 476 passed by the 1969 Legislature and (2) the Judges Retirement Plan.

With the approval of the Committee the Chairman had appeared at one of the public hearings of the Legislative Study Committee which was sponsoring the amendment embodied in LB 476 in support of the amendment.

One of the members of the Constitutional Revision Commission, Mr. James W. R. Brown, had directed to our Committee a question as to the effect of the amendment upon the status of County Courts as courts of original jurisdiction, since the amendment would delete from the constitution that language specifically stating the probate jurisdiction of the county courts. The opinion of Mr. James E. Dunlevey, Research Assistant to the Legislative Council, and written opinions of several members of the Committee on Judiciary were reviewed, and after discussion the Committee, by unanimous vote of all members present, agreed that the proposed amendment would not create any material doubt as to the probate jurisdiction of the County Courts.

The subject of the Judges Retirement Plan was raised by the Legislative Study Committee on Retirement Plans, of which Senator C. W. Holmquist had asked for comments on an analysis of the Judges Retirement Act made by the actuarial consultants employed by his Committee. After discussing the criticisms and recommendations of the consultants the Committee directed the Chairman to write a summary of its observations to Senator Holmquist. This was done. The Committee's observations emphasized the important differences between the Judges Retirement Plan and the usual pension plan for employees of a business organization, and urged the Study Committee to keep these differences clearly in mind in making its recommendations.

No other matters have been referred to our Committee.

Auburn H. Atkins
Chauncey E. Barney
Thomas F. Colfer
Harold W. Kay
Clark O'Hanlon
Kenneth M. Olds
L. F. Otradovsky
Carlos E. Schaper
George E. Svoboda
Richard N. Van Steenberg
Joseph T. Vosoba
Carlton Clark
Dennis Martin
James N. Ackerman, Chairman

REPORT OF THE COMMITTEE ON LEGISLATION

Julian H. Hopkins

This past year was a good year to be Chairman of the Legislative Committee, since the legislature wasn't in session. The forthcoming year is a legislative year.

We have received, in addition to items mentioned in the written report, three additional proposals from various committees for consideration by the Legislative Committee. One of these involves a group insurance amendment. Others are technical changes from committees. We have submitted these items that have not been previously covered by either House of Delegates or Executive Council action to appropriate committees for their consideration, or to the Executive Council.

We will be looking forward primarily to developing a system whereby in areas where we need contact with local Representatives of the legislature we can do so through members of this Association.

We also look forward to your interest and support in the legislative programs of the State Bar, and I assure you I think we are going to have a very busy year in this forthcoming session.

The report of the committee follows:

During this off-legislative year your committee has received two legislative proposals. Both are ready for introduction if desired.

Some time has been spent with the Judges Retirement Committee considering methods for improving benefits for the retiring judges. We will continue this project into the legislative session.

Julian H. Hopkins, Chairman
H. D. Addison
John M. Brower
James W. R. Brown
Edward F. Carter, Jr.
Patrick L. Cooney
Virgil J. Haggart, Jr.
John J. Higgins
Richard H. Hoch
James Lake
Jess C. Nielsen
William J. Panec
William J. Ross
Donald C. Sass
Otto H. Wellensiek
Malcolm B. Young
Earl Buckles (N)
Kenneth Gould (C)

CHAIRMAN OVERCASH: No. 13, Committee on Public Service. Mr. Abrahams is out of the country. He reported to me, although the Committee report requires some action. Is there a member of that committee here? We'll pass that one.

No. 14, the report of the Committee on Unauthorized Practice, Mr. Sutter.

REPORT OF THE COMMITTEE ON UNAUTHORIZED PRACTICE

Ronald G. Sutter

The report of our committee can be found on Pages 30-31. The Unauthorized Practice of Law Committee is very enthused about

the cooperation that we are getting from the Nebraska Collection Agency Board.

Since the filing of our report there has been filed in the Secretary of State's office a complaint against a company in Omaha using simulated process. There was a notice of garnishment that was being sent to people. The same company was also calling debtors on the telephone advising them that this was Attorney Phillips on the telephone and that unless he paid by five o'clock he was going to sue. The Collection Agency Board on its own motion filed its complaint. I want the members of this House to know that we are getting very good cooperation from the Collection Agency Board in the State of Nebraska.

The other matter that needs attention or needs to be explained to the House is on the last item involving estate planning. The first part of the year we had a complaint of life insurance agencies offering estate planning services. Shortly after receiving that report I was in contact with a member of the Chartered Life Underwriters who lives here in Omaha, and through his efforts and through the efforts of your committee we are working toward a joint committee of Chartered Life Underwriters and members of the Unauthorized Practice of Law Committee who will work out complaints of this nature; in other words, try to contact the offending party and work some standards that can be adopted by both professions, perhaps. At any rate, Chartered Life Underwriters have already formed a committee and they are ready to meet.

I don't know whether it is going to require action on behalf of the House or not, but I believe that we have the authority to appoint members of our committee to meet with them to work out these problems. Now, if we do not have that authority I would request that we be given it, because I think that this is an area where a lot of good can be done for both professions.

I talked with the President-Elect last week when we appeared before the Supreme Court and he was of the opinion that the Chairman of this committee could appoint members of the Unauthorized Practice Committee to meet with this committee that has already been appointed by the Chartered Life Underwriters. If that is proper then we will proceed on that basis and won't need any further action from this body.

The report of the committee follows:

SIMULATED PROCESS

The use of simulated process continues as a recurring problem for the Unauthorized Practice of Law Committee. Some progress

seems to have been made, however, through the cooperation of the Nebraska Collectors' Association and the Collection Agency Board. Complaints appear to be less frequent than in the past.

As an example of the cooperation between the two groups, an officer of the Collection Association recently referred to the UPL Committee advertisements he received from a company offering for sale demand letters and notices of a questionable nature. These advertisements have been dispersed to members of the UPL Committee for their opinions as to whether these forms are in violation of the standards for simulated process.

The use of a simulated process by an out-of-state firm in an effort to collect from a Nebraska resident received the attention of the Committee. The complaint was referred to the Secretary of State who, in turn, notified the collection agency licensing bureau of the state in which the offender resided. In addition, action has been taken by the Justice Department of that state against the offending agency. The result of the action is unknown to the UPL Committee as of this date.

WILL FORMS

The UPL Committee has received a number of complaints concerning the offering of ready-made will forms by businesses who warn in their advertisements that if a person dies intestate "the court decides which grandparent will have custody of the minor children." To avoid this result the advertisement suggested that "for the small cost of just one dollar" the company will "rush you your will form along with simple, to-the-point instructions."

The newspapers and magazines running these ads were contacted by mail and by telephone. Assurances were received that such advertisements would not be received for publication in the future. In addition, the Committee contacted the companies directly and suggested to them that such offerings constituted the unlawful practice of law.

Every radio station in Nebraska had an opportunity to carry similar advertisements. Unfortunately, several of the stations did broadcast the material. The attention of counsel for the Nebraska Broadcasters' Association was directed by the Committee to the problem. The matter is on the agenda for the State Convention of the broadcasters, and strong recommendations will be made that future advertising of this kind be refused.

The efforts of the UPL Committee have apparently been somewhat successful in that no recent complaints have been received and this activity seems to have diminished. The Committee is of the opinion, however, that this activity will continue to be a problem

for the general public and the members of the Bar and that efforts should be made to alert laymen of the pitfalls and hazards of using the "simple" will forms as offered.

ESTATE PLANNING

Early in the year the UPL Committee received complaints of life insurance agencies offering their services for estate planning. The material has been referred to members of the UPL Committee residing in the area for further investigation. Meanwhile, the materials were also delivered to the National Headquarters of Chartered Life Underwriters for review. Efforts are being made by members of this organization to form their own Unauthorized Practice Committee. The UPL Committee supports such an effort and believes that the creation of a conference committee to develop principles of conduct and to review complaints of improper conduct in this area is needed.

Ronald G. Sutter, Chairman
 John P. Ford, Vice-Chairman
 Bevin B. Bump
 Joseph C. Byrne
 Edward F. Carter, Jr.
 Frederick S. Cassman
 Raymond M. Crossman, Jr.
 J. Taylor Greer
 LaVerne H. Hansen
 Francis J. Kneifl
 Joseph L. Krause
 Albert T. Reddish
 August Ross
 Edward Shafton
 Rosemary M. Skrupa
 Bernard Sprague
 J. Marvin Weems
 Dave Parker
 Larry Forman

CHAIRMAN OVERCASH: I understand that Mr. Ginsburg desires to report for Mr. Krivosha on the Committee on Procedure.

REPORT OF THE COMMITTEE ON PROCEDURE

Herman Ginsburg

President Baird, Chairman Overcash: There is just one objection I want to make to the statement your Chairman made. I do not

desire to report, I have been ordered to report. (Laughter) Mr. Krivosha, up until four o'clock yesterday afternoon, had planned on being here and then got called into a lawsuit and handed it to me and said, "Now, Herman, take care of this." So I will do the best I can. I want to apologize for having to handle the matter in this way but it was entirely unexpected.

Mr. Krivosha has handed me, for inclusion in the Minutes, a formal written report, but he has asked me to comment on a few matters that are touched upon in this report.

No. 1, the Committee considered the matter of taxation of costs for the printing of briefs in the Supreme Court. I knew that the amount allowed was inadequate but I didn't know just what it was. I am informed by Mr. Krivosha that his committee has ascertained that the printing allowance made by the Supreme Court now is \$2.40 a page . . .

SECRETARY TURNER: \$2.60.

MR. GINSBURG: \$2.60 for not to exceed 75 pages. The committee recommends that that be changed to \$5.00 a page for not to exceed 75 pages.

There apparently was presented to the committee some suggestion that briefs be prepared otherwise than in printing, and the committee considered it and decided that there wasn't, for the present, justification for discontinuing the practice of printing briefs. It was the opinion of the committee that the request that briefs be permitted in forms other than printing be deferred, at least for the time being.

The committee also considered the matter of the cost bond for appeals to the Supreme Court, which as you all know is \$75.00, which doesn't cover anything any more, and the committee made the recommendation in its report that the Supreme Court be requested to set the cost bond at \$250.

There was considerable discussion about the cost of bill of exceptions. Some people apparently wanted a provision that a bill of exceptions be made with duplicate copies so that there would be copies available in addition to the copies available in addition to the copies for filing.

There is also some question about the amount of fees taxable to the court reporters for preparation of the bill of exceptions. The committee decided they didn't have sufficient evidence to justify any recommendations one way or another and thought that further study should be made, that the court reports should be requested to submit further information regarding the matter of fees and that we continue the practice of the preparation of the bill of exceptions as it now exists.

The committee made considerable study over the new federal rules relating to discovery and has arrived at the conclusion that more study is required, that either the Committee on Procedure itself or some successive committee be instructed to study the new federal rules in comparison to Nebraska practice, and to then come up with a recommendation at the next annual meeting as to what recommendation they want to make as to the Nebraska procedure or as to the possible adoption of the new federal rules.

I do not see in the typed report which was given to me any recommendation for any action, and therefore I will just request that the report be accepted and placed on file.

CHAIRMAN OVERCASH: I gather that there was nothing in the printed report indicating action, and I gather from the report made by Mr. Ginsburg there is nothing additional that requires affirmative action.

REPORT OF THE COMMITTEE ON PROCEDURE

The Committee on Procedure met on September 12 and September 26, 1970, to discuss matters then pending before the committee.

The committee first took under consideration the matter of the printing allowances permitted by the Rules of the Supreme Court. After discussion it was recommended by the committee that the Supreme Court be asked to increase the printing allowance from its present amount of \$2.40 per page to \$5.00 per page, but in no event to exceed the actual cost nor to be taxed against more than seventy-five (75) pages. The committee further recommends that the requirement that the brief be printed continue in effect. It was felt that in most instances the cost of printing was not significant enough in terms of the value of a lawsuit. Moreover, this might tend to cause a litigant to give further thought to the matter of appeal. Moreover, it was felt that the use of current modern office equipment devices are not so uniformly used throughout the state as to insure that all copies filed with the Court would be legible.

The committee further recommends that the present cost bond be increased from its current amount to \$250.00 so as to attempt to come closer to insure the successful litigant that there will be sufficient funds available to satisfy court costs.

The question of the Bill of Exceptions was then raised. Two matters were involved. One concerned the preparing of originals and copies as a matter of course and filing the same in the office of the Clerk of the District Court as opposed to the Supreme Court;

and the other concerned increasing the cost per page to be paid to the Court Reporter. The committee felt that experience was not such as to create any difficulty in obtaining the Bill of Exceptions from the Clerk of the Supreme Court and that therefore, unless a litigant desired an extra copy, this should not be required. With regard to the increase of cost, the committee recommends that the Court Reporters be requested to submit further information and documentation to substantiate a requested increase. The committee felt that while an increase was probably justified, there was insufficient evidence to determine what the amount of that increase should be and that therefore further information should be obtained before a recommendation is made.

The committee then took up the matter of the federal amendments to the Rules of Discovery and their impact on the Nebraska statutes. The members were of the opinion that the changes were sufficiently different in both substance as well as form as to require additional study. The committee therefore recommends that either the Committee on Procedure or a separate committee be appointed with help from the respective law schools to examine this matter in depth and to analyze the Federal Rules' effect on practice in Nebraska during the current year so as to be in a position at the next annual meeting to make specific recommendations on which changes, if any, form the newly adopted amendments to the Federal Rules should be incorporated in the Nebraska statutes.

John K. Boyer
D. Nick Caporale
Kenneth H. Elson
Robert T. Gritmit
Richard S. Harnsberger
David L. Herzog
Hans J. Holtorf
Keith Howard
Daniel D. Jewell
John C. Mitchell
William T. Mueller
Albert G. Schatz
Warren C. Schrempp
Robert E. Sullivan
Thomas A. Walsh, Jr.
C. Thomas White
Thomas A. Brown
Steve Mazurak (N)
Norman Krivosha, Chairman

The report of the committee follows:

REPORT OF THE COMMITTEE ON PROCEDURE

During the past year, the Committee on Procedure has undertaken consideration of several matters which ultimately will have a far reaching effect on the practice of law in the State of Nebraska insofar as procedure is concerned.

The members of the Committee are currently examining the newly adopted Federal Rules of Civil Procedure to determine whether such changes made in the Federal Rules should likewise be made in the State Rules in order to continue keeping both practices similar.

The Committee is further considering the question of the manner in which briefs should be prepared for submission to the Supreme Court and the taxing of costs therefor. The Committee is hopeful that several meetings can be held prior to the annual meeting at which time a recommendation can be made to the House of Delegates with regard to the matter presently under consideration.

Thomas A. Brown
C. Thomas White
John K. Boyer
D. Nick Caporale
Kenneth H. Elson
Robert T. Grimit
Richard S. Harnsberger
David L. Herzog
Hans J. Holtorf
Keith Howard
Daniel D. Jewell
John C. Mitchell
William T. Mueller
Albert G. Schatz
Warren C. Schrempp
Robert E. Sullivan
Thomas A. Walsh, Jr.
Steve Mazaurak

Norman Krivosha, Chairman

CHAIRMAN OVERCASH: Next is the report of the Special Committee on Legal Economics and Law Office Management. Mr. Moldenhauer.

**REPORT OF THE
COMMITTEE ON LEGAL ECONOMICS AND LAW OFFICE
MANAGEMENT**

Howard H. Moldenhauer

Mr. Chairman, Members of the House: The Advisory Fee Schedule which as adopted at the mid-year meeting in June is in the final form for the printer and the only thing that has delayed it has been a lack of funds. Hopefully, with the new dues increase it can be printed and disseminated as soon as possible.

Tomorrow morning Leo Clinch of Burwell and myself will address the Nebraska District Judges Association on the problems of court set fees.

In connection with the study of this matter it has now been called to the committee's attention that there is a very serious problem, particularly in Lincoln, in connection with appointments by the Federal District Judges. One office which kept track of this found that they had twenty appointments in a year and one-half for both federal and state matters and that of their time at the usual hourly rate of about \$18,700 spent on federally appointed matters, they were only compensated \$1,600. In the state courts, of \$5,600 in time they were only compensated \$1,800.

Since there has been such concern, particularly among many lawyers in Lincoln about the added burden which has been placed upon them, we have an additional resolution to offer at this time.

I might also mention that the chairman of the Federal Criminal Justice Act Committee informed me yesterday that in 1959 there were only approximately 100 habeas corpus cases filed in the entire United States, whereas in 1968 the number was approximately 7,000. I suppose, with the penitentiary being in Lincoln, there is an added burden because of that.

The committee therefore would like to offer the following resolution:

WHEREAS the cost of legal services is a matter of increasing concern to the Nebraska State Bar Association, and the rising costs of overhead are also a matter of deep concern; and

WHEREAS the number of court appointments for the representation of indigent defendants by the United States District Court for the District of Nebraska has increased in recent years to the point where such representation without adequate compensation to the attorneys has become burdensome to some segments of the Bar; now therefore be it

RESOLVED that the President of the Nebraska State Bar Association is hereby instructed and authorized to request a conference with the Fed-

eral District Judges of the United States District Court for the District of Nebraska in order that representatives of the Association to be selected by the President may explain to the Federal District Judges the overhead costs in the operation of a law office and present such other considerations as the Committee on Economics and Law Office Management and the Committee on the Federal Criminal Justice Act deems appropriate in the setting of legal fees by the court.

May I have a second to that motion, Mr. Chairman?

CHAIRMAN OVERCASH: Is there a second to this motion?

ALFRED G. ELLICK, Omaha: I'll second the motion.

CHAIRMAN OVERCASH: Is there any discussion of this motion?

RICHARD A. KNUDSEN, Lincoln: I think one problem in addition to the number of cases that are being handed out to the lawyers is the fact that it seems like the defendants are requiring us to *try* them all. We can't go up and work out a case, you know, it's all free, so go try it! And not only try it, but let's appeal it! So this is running up the hours on these cases. What have they got to lose?

CHAIRMAN OVERCASH: I would like to say "Amen!" to that. I know in our office it seems like particularly the younger lawyers are getting drafted regularly.

Is there any further discussion? All those in favor of the motion please say "aye"; opposed the same. I declare the motion adopted.

Mr. Moldenhauer, you are going to talk to the District Judges tomorrow morning?

MR. MOLDENHAUER: Yes sir.

CHAIRMAN OVERCASH: Have you prepared a statement or anything that is going to be submitted to them?

MR. MOLDENHAUER: Yes, we have a manuscript which is fairly short.

CHAIRMAN OVERCASH: Could you make that manuscript available so we could put it into our proceedings here as a part of our action?

MR. MOLDENHAUER: We would be happy to. We can furnish you with a written copy tomorrow.

SECRETARY TURNER: Howard, may I ask a question? Do you contemplate a separate pamphlet printing of the Fee Schedule, or is it prepared for the Desk Book?

MR. MOLDENHAUER: We have prepared the Fee Schedule so it will fit into our present Desk Book and merely supplant the pages which would have been replaced. I think that Burt will work with you when the funds are available. We knew it wasn't available at this time. The form is prepared and he has been holding it up until we have the money.

THOMAS M. DAVIES: Mr. Chairman, I would like to ask a question while Howard is here. Does anyone know whether or not a public defender for a state can also be appointed by a federal court to serve. Do you know?

MR. MOLDENHAUER: I don't know, and we haven't gotten into that possibility of public defenders.

GEORGE F. JOHNSON, Superior: Mr. Moldenhauer, as I recall, there was no new probate fee schedule. It was being referred to a committee. Has that been adopted, or has something happened to it?

MR. MOLDENHAUER: I don't know. That was referred to the Probate Section for further action.

MR. JOHNSON: I see.

MR. MOLDENHAUER: Then, Mr. Chairman, we would also like to move the continuation of the committee.

CHAIRMAN OVERCASH: I believe that is automatic. You will finish that document for the record, Mr. Moldenhauer.

REMARKS BEFORE THE NEBRASKA DISTRICT JUDGES ASSOCIATION AT THEIR ANNUAL MEETING ON

OCTOBER 22, 1970

President Brodkey, Your Honors: The Nebraska State Bar Association wishes to express its appreciation to you for allowing us a few minutes from your busy schedule in order to present a problem which is becoming a matter of great concern to the Bar in general. As many of you know, our profession, in terms of economic rewards, for many years failed to keep pace with other professions. Commencing in the early 1960s the Bar Association as a group, and with the assistance of many of you who were then practicing attorneys, embarked upon a concerted effort to provide attorneys with sufficient economic incentive that we could maintain a healthy and independent Bar.

However, in spite of the attention which has been placed within the Bar upon the economics of the profession, there are still some

problems which have to be faced. One of these, and the reason I am here today as representative of the Nebraska Bar Association, is an increased disillusionment and dissatisfaction on a state-wide basis with fees which are awarded to lawyers by the Courts.

At the June mid-year meeting of the House of Delegates of the following resolution:

"BE IT RESOLVED that the cost of legal services is a matter of increasing concern to the Nebraska State Bar Association and the rising costs of overhead are also a matter of deep concern. The President of the Nebraska State Bar Association is hereby instructed and authorized to request that a representative of the Association be given the opportunity of making a presentation before the Nebraska District Judges' Association to explain to the District Judges the overhead costs in the operation of a law office and to present considerations which the Committee (Economics and Law Office Management) deems appropriate in the setting of legal fees by the Courts."

Consequently, President Baird requested that I, as Chairman of the Committee on Economics and Law Office Management of the Nebraska State Bar Association, and Mr. Leo Clinch of Burwell, a former member of the House of Delegates, make this presentation to you, and President Brodkey was very cooperative in granting us this time on your program.

We are here to present some of the problems about the realities of the practice of law facing the present day lawyer. The lawyer is caught in the overhead bind generated by inflation and rising costs to the extent that it has become an extremely serious problem.

As you know, the lawyer, being in a service profession, is limited in everything he does by *time*. According to an American Bar Association survey taken in 1966, the average lawyer who works an eight-hour day devotes two and one-half hours to non-paying matters. He is only compensated, assuming that he keeps complete time records, for five and one-half hours in the day. In a year, the lawyer who devotes 2,000 hours to practicing law and related activities is fortunate if he is paid for an average of 1,360 billable hours. His paid hours constitute 68 per cent of his time, unpaid legal work 14 per cent of his time, or 280 hours, continuing legal education 2 per cent of his time, or 40 hours, and office management, Bar activities, public service, and other activities 16 per cent of his time, or 320 hours.

Of course, since 1966 there have been added demands of society upon the legal profession. Not only has there been rapid change in decisions concerning the rights of indigent defendants to counsel, but society is demanding that Bar Associations and lawyers devote more of their time to civic activities than ever before. There are

demands for participation by the lawyers in penal reform, police relations, drug control and abuse, as well as a feeling on the part of society that adequate legal representation is a matter of right rather than a privilege and that everyone should be entitled to counsel not only in criminal matters but in civil matters as well.

All this means the demands upon the lawyer's time are greater than ever before, although the time available to him has remained constant.

In addition, the lawyer's overhead has continued to rise. Statistical studies show that the overhead for lawyers averages between 30 and 40 per cent of his gross income. In general, the average lawyer keeps only about 65 cents out of every dollar which he takes in. In smaller offices this overhead can run as high as 50 per cent because the sole practitioner cannot spread out the costs of a secretary, office rental, library, and equipment as the larger law firm can.

Let me give you an example of just a few of these cost increases. As recently as 1965 a legal secretary may have been paid between \$270 to \$350 per month. Today that same girl requires at least \$450 and closer to \$500 if you expect to keep her. In 1961 it was possible to hire a new legal secretary at \$200 a month but today it is impossible to find one for less than \$400 a month and even then she would be a girl with little or no experience. This is a one hundred per cent increase. A legal secretary who was paid \$420 in 1965 now receives \$590, a forty per cent increase in five years.

Everything has gone up. Paper has gone up, envelopes have gone up, pencils, supplies and rent. An automatic IBM electric typewriter which cost \$415 in 1965 is now \$500, a twenty per cent increase. A dictating machine which cost \$425 just a couple of years ago is now \$500. Rent which may have been \$4.00 a foot in 1964 is now \$6.00 a square foot, a thirty-six per cent increase.

These are actual comparative figures, and although they may vary in different areas of the state, the percentage increase would probably be comparable. This overhead comes out first, and it is a constant battle.

And please don't think that the situation is that much different in the small towns than in the cities in Nebraska. In fact, when you really analyze it, there is very little reason to distinguish between the cost of legal services, no matter where they may be performed within the state. As to some items, the costs are even higher in the small town because the small town lawyer must buy many of his supplies from the local stationery store because it is a local business.

He doesn't get the advantage of quantity discounts or selective buying. The cost of books is the same and his electricity may be even higher than it is in the city. Office machines will cost as much or more, and the maintenance, if you can get it, will be considerably higher in the small town as well as being irregular. The small town lawyer pays the same rates to Uncle Sam by way of taxes and the only areas in which he may really save money are salaries and in rental of office space which may be lower. However, his costs are also markedly increased because of the additional distances which he must travel and the time consumed in travel.

Consequently, as I previously mentioned, his overhead may run as high as 50 per cent, and it is a fallacy to think that just because a lawyer is practicing in a small town his fee should be less.

Another item of general overhead to most practitioners is the cost of the new associate. Fourteen years ago when I started to practice, the going rate was \$300 per month, but now the young lawyers are requiring \$900 to \$1,000 per month or they won't come to work for you. So that young lawyer you may see in your Court who has little or no experience may represent \$1,000 a month in overhead to the law firm. This is \$9.00 per billable hour in overhead to a law office. It isn't a question of whether he is worth it to the office, as he can receive more working for a governmental agency or some corporation. The lawyer either has to pay the freight or cut down on the services he performs for his clients, or do a poor job.

A common laborer in Omaha today with an eighth grade education receives \$5.20 per hour just for laying sewer pipe, plus 90 cents an hour by way of pension and health insurance benefits, and he has absolutely no worries and no responsibility. Yet some of our Courts are allowing fees to educated lawyers, operating under considerable stress, with a substantial capital investment, which don't even total that amount, much less net that much to the lawyer as profit.

These are some of the reasons why there is a great deal of disillusionment among lawyers with the amount of Court set fees. There is a general impression from comments received throughout the state that judges are arbitrary and have no conception whatsoever of the attorney's business problems. It is this feeling which militated the resolution adopted by the House of Delegates.

You have before you a summary by a medium sized firm in Lincoln of indigent defendant cases during a one and one-half year period. This firm received only \$1,602 in compensation for \$18,697 of work at its usual hourly rate for federal court appointments,

and \$1,810 for \$5,652 in time on state court appointments. This is a tremendous burden to place upon any law firm, and the senior partner's comment was: "This is a very serious economic problem for our office to the point where, in my opinion, it is really endangering our ability to retain our staff and pay them adequately for their services." A lawyer recently told me that the next time he was asked to serve he would respectfully decline. Another out-state lawyer has stated that one of his partners is running for County Attorney, motivated solely by the purpose of eliminating and disqualifying attorneys in the office from being appointed to represent indigent criminals.

When you were practicing law you might recall a rare appointment once in every four or five years, and be glad to perform it as a service to the profession. But today this firm had twenty such cases in a year and one-half.

Times have changed. In 1959 there were only approximately 100 habeas corpus cases in the entire United States in the federal courts, but in 1968 there were approximately 7,000. It has become a burden which the profession can no longer bear without being made destitute, and the state must recognize its responsibility also.

Although the statutes use the term "reasonable fee" as a standard in the award to the attorney, the Bar feels that inadequate fees have become the rule. Now, we are talking in terms of generalities and I know this is not applicable in many instances, but we have scores of examples where awards have equaled three or four dollars per hour, or something less than the former minimum fee schedule of \$18.00 per hour as set by the Nebraska State Bar Association. We would submit that anything under \$10.00 per hour at the very least in the cities and \$7.50 per hour at the very least in the rural areas does not reimburse the lawyer for his out-of-pocket overhead. So if you award those amounts you are not allowing the lawyer one cent for his efforts.

As many of you are aware, the Nebraska State Bar Association at its June meeting approved a new minimum fee schedule which raised the minimum fee from \$18.00 to \$25.00 per hour. This is considerably less than the minimum which exists in many states. It is intended to be only a minimum, but unfortunately it is used as a maximum by some people for some purposes. It does represent the judgment of all segments of the State Bar Association, and the lawyer must realize this minimum for each productive hour he works if he is to meet the overhead and survive in the practice. Yet the comment by many lawyers throughout the state is that it is the practice of their District Courts to allow considerably less than the minimum fee, and some judges have made the statement

that they have never allowed the \$18.00 an hour which was the standard under the former schedule. We submit that this is an unrealistic approach and that it is not fair to the lawyer. No fee less than the minimum fee schedule is "reasonable".

Whenever the Court cuts the fee it is putting a premium upon incompetence and it may be assuring inadequate representation. There is another consideration, and that is that someone must support the lawyer, and the Court by awarding inadequate fees may really be penalizing other clients who do pay their bills and this isn't fair to those people. And, when the statutes put the burden of representation upon the public, who is in a better position to bear that burden? A lawyer has to support his wife and family, and they shouldn't be penalized. And when the policy is, as in the condemnation cases, to make the landowner whose property is being taken, whole, the Court is not doing this when they refuse an attorney's fee as provided by the statute. A real estate man will automatically get his six per cent commission, even though it may have taken little or no effort to make the sale, but in some partition cases there have been complaints that the award has been as low as two or three per cent, even when the benefit because of the lawyer's efforts was substantial.

The most often heard complaint by lawyers around the state about Court set fees is that there is often a lack of justification of the fee. Comments have been received such as "The fees are rather arbitrary, they always appear to be the same regardless" or "How the Court arrived at the figure, no one will ever know."

We should like to submit that there should be some justification for the fee, whether it be based upon the time involved, the complexity of the case, the result achieved, the experience of the lawyer, or such other factors as are properly considered under our Canons of Ethics. We have even had the rather ludicrous situation where Courts have refused fees to attorneys because the award to the client was higher than the Court felt proper. Usually lawyers are rewarded for their excellence and not penalized.

Of course, we realize that there always are exceptions and the Bar further realizes that your decisions must be free and independent. We just request that you consider some of these factors which have been presented to you in this very short presentation today and that you receive them on an impersonal basis as an attempt by the Bar Association as a whole to explain some of the problems from its standpoint. We realize that you see at times incompetent work, that there are situations where in your judgment a lawyer may have spent much more time on a matter than it justified, and that there may be other considerations. We hope these are the exception.

Unfortunately, every now and then one will hear a comment by a judge that lawyers are making too much money or that they are over-compensated, and this is always very disturbing. There may be a few lawyers who feel that perhaps judges are over-compensated or have too much security, and so they should work for starvation wages, but obviously that is just as unrealistic. There is no reason for jealousy between lawyers and judges since we are all officers of the Court and a part of the administration of justice. Certainly we need a strong, independent bench, and this can only be assured by having adequate economic incentive. By like token, we must have a strong and independent Bar so that the only motivation behind each decision is the legal judgment and what is best for the client.

Our whole life deals with the problems of other people, whether we be lawyers or judges, and with the pressures of these decisions we submit that both the bench and Bar should not be subjected to additional economic pressures which might interfere with our independent judgment. How can we adequately devote our time and effort to our clients' problems when we have those personal problems of how to pay the rent, how to send our children to college, or how to meet the doctor bills?

In closing, let me suggest that the Bar is seriously concerned about legal fees, and many lawyers feel that we cannot raise the fee schedule any higher without pricing ourselves out of the market and without depriving people of representation who are really in need of legal services. Part of the answer lies in having everything a lawyer does pay its own way, and society must also pay its share.

Perhaps part of the answer lies in being more efficient and in that regard the bench and Bar have approached the problem by engaging in such activities as the drafting of pattern jury instructions and working on uniform rules of evidence. If there is any way in which we can cooperate in the future to provide a more efficient administration of justice we should keep the door open and cooperate to that end.

We again would like to thank you for your consideration and we hope that these remarks will be taken in the spirit in which they are intended, namely, in a cooperative approach intended only to promote a stronger Bar to the end that there will be a better system for the administration of justice and preservation of the rule of law in Nebraska.

(These remarks were supplemented by remarks of Leo Clinch concerning the responsibility of the lawyer in appointed cases.)

APPENDIX

FEDERAL

<i>Case No.</i>	<i>Hours</i>	<i>Value of Time</i>	<i>Fees Paid</i>
1.	290.00	\$ 7,173.15	\$ 310.33
2. (Civil Rights)	86.75	1,828.27	None to be paid
4.	6.75	168.75	
9.	45.75	1,143.75	200.00
12. (Habeas Corpus)	21.00	525.00	
16.	42.00	952.50	365.41
17.	211.50	6,771.25	700.00
20.	4.50	135.00	27.00
Total	708.25	\$18,697.67	\$1,602.74

STATE

<i>Case No.</i>	<i>Hours</i>	<i>Value of Time</i>	<i>Fees Paid</i>
3.	8.25	\$ 206.25	\$ 75.00
6.	18.50	647.50	150.00
7.	98.00	2,400.00	750.00
8.	12.00	330.00	125.00
10.	18.25	456.25	100.00
11.	10.50	262.50	75.00
13.	24.00	731.35	200.00
14.	1.75	43.75	
15.	9.00	225.00	110.00
18.	8.25	206.25	75.00
19.	5.75	143.75	150.00
Total	214.25	\$5,652.60	\$1,810.00

**REPORT OF THE
COMMITTEE ON LEGAL ECONOMICS AND
LAW OFFICE MANAGEMENT**

The Committee on Economics and Law Office Management was active in the following areas:

- (1) **Minimum Fee Schedule.** The Committee drafted a new minimum fee schedule based upon the unit system, which was adopted by the House of Delegates at the mid-year meeting. A resolution was also adopted at that time delegating responsibility for any revisions in the probate fees to the Section on Real Property, Probate and Trust Law which was instructed to report at the Annual Meeting.

- (2) **Court Set Fees.** The Committee has received numerous complaints about the inadequacy of Court set fees which fail to cover the overhead of the lawyer, and the following resolution was adopted by the House of Delegates at the mid-year meeting in June, 1970:

"BE IT RESOLVED, that the cost of legal services is a matter of increasing concern to the Nebraska State Bar Association and the rising costs of overhead are also a matter of deep concern. The President of the Nebraska State Bar Association is hereby instructed and authorized to request that a representative of the Association be given the opportunity of making a presentation before the Nebraska District Judges' Association to explain to the District Judges the overhead costs in the operation of a law office and to present considerations which the Committee (Economics and Law Office Management) deems appropriate in the setting of legal fees by the Courts."

Pursuant to this Resolution your Chairman, at the request of the President of the State Bar Association, was to address the Nebraska District Judges' Association at its meeting in October.

- (3) **Professional Corporations.** The Chairman appeared before the Supreme Court of Nebraska to present the court rule drafted by the Committee authorizing attorneys to practice under the Professional Corporation Act and such rule was adopted by the Court.
- (4) **Institutes.** The Committee cooperated with Creighton University Law School in sponsoring an Institute on Economics at the University in June, and the Committee also provided a program for the annual meeting of the Central Nebraska Bar Association. In addition, the Chairman addressed the Fourth National Conference on Economics and Law Office Management sponsored by the American Bar Association in New York, and the Practicing Law Institute Program on Successful Management Systems for Law Firms at Dallas, New York City, and Las Vegas.

Because of the continuing need for the activities of the committee it is moved that it be continued.

Jesse T. Adkins
Lansing Anderson
Thomas R. Burke
Edward A. Cook, III
Harvey D. Davis
Richard A. Dier
Kenneth H. Elson

James J. Fitzgerald, Jr.
 Clinton J. Gatz
 Robert A. Munro
 Carlos E. Schaper
 Robert G. Simmons, Jr.
 Thomas W. Tye
 Benjamin M. Wall
 Howard H. Moldenhauer, Chairman

CHAIRMAN OVERCASH: No. 25, report of Special Committee on Publication of Laws. Mr. Duxbury, any oral report there? I assume there is none.

The report of the committee follows:

REPORT OF THE COMMITTEE ON THE PUBLICATION OF LAWS

A number of complaints by local bar associations and individual lawyers relative to the publication of the session laws and the Cumulative Supplement to the Nebraska statutes were referred to this committee during the past year. A meeting was held during the midyear meeting of the Nebraska State Bar Association to which interested parties were invited. After a frank and open discussion of the problems, this committee voted to submit a Resolution to the House of Delegates at the mid-year meeting. The Resolution was adopted unanimously by the House and reads as follows:

WHEREAS, the Nebraska State Constitution provides for publication of the session laws within 60 days after the adjournment of the session, and

WHEREAS, for a multitude of reasons it has been impossible to comply with this provision which has resulted in an enormous problem in the conduct of the governmental, business and private affairs of the people of the State of Nebraska, and

WHEREAS, the members of the State Bar Association have a particular awareness of the problem and a special obligation because of their daily dealings with the law to aid in finding a solution to the problem, and

WHEREAS, the Legislative Council of the Nebraska State Legislature by virtue of LB 82 is conducting an interim study on the publication of statutes.

NOW, THEREFORE, BE IT RESOLVED by the House of Delegates of the Nebraska State Bar Association that the Bar Association through its Executive Committee and the Committee on Publication of Laws advise and cooperate with the Legislative Council in finding a solution to the problem of delay in publication of the laws and urge that the necessary action be taken by the Legislature at the earliest possible time.

This committee has made formal offer of assistance to the Legislative Council and stands ready to provide whatever help it can to solving this vexing problem. It is accordingly recommended that this committee be continued.

Richard M. Duxbury, Chairman
Richard L. DeBacker
John M. Gradwohl
Vance E. Leininger
Pliny M. Moodie
Robert A. Munro
William F. Ryan
Lyle E. Strom
Peter J. Vaughn

CHAIRMAN OVERCASH: There were a number of members who came in after we called the roll. I believe it would be good to have our record show the attendance of these gentlemen. I will ask the Secretary to call the names of those who were not present when we started the proceedings.

... Roll Call ...

CHAIRMAN OVERCASH: Members of the House, I think at this time I will ask Mr. Ginsburg, Chairman of the Reorganization Committee, to make his report. The President reported at the beginning of our meeting as to the action of the Supreme Court. I know you are all interested in the work of this committee and the product, and the changes involved in it.

I will ask Mr. Ginsburg to make his report. That is No. 31.

REPORT OF THE SPECIAL COMMITTEE ON REORGANIZATION

Herman Ginsburg

Mr. Chairman and Members of the House: What I am about to say will be, of course, no surprise to you now because you have been informed as to the ruling of the Supreme Court. However, I thought you might be interested in some of the details and how it came about, and some of the things that have been changed. While I am doing that I am going to ask Mr. Berger, who has now prepared the Rules and the Bylaws in their final form as they have been adopted and approved by the Supreme Court, to distribute the same around the room.

As you all know, the final draft was approved at the last semi-annual meeting of this House. So far as your Committee on Reorganization was concerned, that was as far as our authority went.

A petition was then filed with the Court for approval and the adoption of the Rules, a hearing was held, and shortly after the hearing President Baird was notified that the Supreme Court had appointed a subcommittee of the Court to meet with a committee of the Bar to consider some questions which the Court had itself raised concerning the proposed Rules.

President Baird appointed Mr. Moldenhauer, Mr. Charley Wright, and myself as the subcommittee. We happened to be the ones who were available.

We met with the committee of the Supreme Court and were advised by the Court that there were certain questions which the Court had that they thought ought to be taken care of.

Now we were confronted with this situation, and I say this by way of perhaps apology in advance, I don't want anyone to think that we took it upon ourselves to make the commitments or to go beyond the scope of the authority which had been granted to us at the June meeting, but we felt that since the Court had raised these questions and, as far as our committee was concerned we could see merit in them, that we would volunteer our help as draftsmen to redraft the corrections that the Court committee felt they wanted.

So I want to go at this point in my explanation and tell you about the changes that the Court wanted.

First let me say this: There was included in our report, and I remember that our committee struggled quite a bit about it at the time we did it, two rules, I believe that originally they would be Rules 12 and 13, 12 dealing with disciplinary proceedings, 13 dealing with professional incorporations. We thought that inasmuch as these rules already existed and had been adopted by the Supreme Court, they should be included in the new Rules, so we would have these Rules all in one place. But the members of the committee of the Supreme Court thought, no, that the disciplinary rule should be a rule of its own so that if the Court wanted to make any changes they wouldn't have to be involved with the Bar Association, or that we wouldn't have to amend all of the rules if they wanted to amend some procedure with reference to disciplinary proceedings.

As far as we were concerned, as you will recall—I say “we”, I mean the committee—we reported that the committee had made no changes whatever in the disciplinary rules, and when the Supreme Court suggested they would like to keep that as a separate rule we said, “Well, we have no objection. That is perfectly all right with us.” So we have deleted the disciplinary rules from the code, Rules and Bylaws, as submitted to the Supreme Court.

In the same manner and in the same way question was raised concerning professional incorporations. One of the judges even said he understood that there were some matters going on in Washington which might affect or might change some of the procedures relating to professional incorporations, at least so far as lawyers were concerned, and therefore the Court thought it best that be left as a separate rule so that they could manipulate with that as they saw fit. And again our committee could see no reason why that wasn't perfectly proper and logical, so we offered and said we would delete Rule 13 from the Code Rules.

So now the Rules that have been distributed to you will make no reference to what I will call the Code of Disciplinary Procedure, which is left exclusively in the Supreme Court by a separate rule, and we have no reference whatsoever to professional incorporations.

Now, then, the Court raised as a question the authority of the Bar Association to deprive any member of the Bar of his right to practice law. How does that come about? It comes about in this way.

The proposed Rules provide, if you will turn to Page 6, Section 5, the Rules provide that dues are to be paid by a certain date. And if the dues are not paid by a certain date, then the member is notified of his delinquency. Then if he still doesn't pay within thirty days, I believe it is, he is suspended from the organization and is prevented from practicing law.

The Supreme Court said, "Nobody, but *nobody*, is going to tell anybody that he cannot practice law but the Supreme Court." We said, more of less facetiously, "This is the way you had it in the old rules."

The Supreme Court said, "Well, somebody pulled something over on us. We don't go for that."

We said, "Well, we can see your point," and we offered, in order to expedite action, to redraft this section so as to eliminate the objection which was brought up. So Section 5, which originally read, "All dues not paid by April 1 of the current calendar year shall be considered delinquent, and the Secretary shall send written notice by certified mail to each member then delinquent in the payment of his dues, which notice shall be addressed to such member at his last address and shall notify such member of such delinquency," and then went on to say that if he didn't pay within thirty days he would be suspended from membership. We have eliminated that and have added this language:

"All members who shall fail to pay delinquent dues within thirty (30) days thereafter shall be reported to the Supreme Court by the

Secretary, and the Supreme Court shall enter an order to show cause why such member shall not be suspended from membership in this Association, and the Court shall, after hearing thereon, enter such order as it may deem appropriate. If an order of suspension shall be entered, that party shall not practice law until restored to good standing."

At this point I raised the question with the Supreme Court committee, "How can we tell the Court, now that you have raised that point, how can we tell the Court that you've got to enter an order to show cause?"

They said, "Well, we are giving you that authority to do that."

So we report to the Supreme Court and we tell them, "Now you enter an order to show cause." The Supreme Court enters an order to show cause, and then enters such orders as the Supreme Court deems appropriate. And, personally, and I know I speak for all three members of the subcommittee, we think that is eminently fair and proper. In case anybody has any cause to feel that he is being railroaded by the Association or anything of that kind, he has got his rights to make his complaint known to the Court, and it's the Court that will decide whether or not he shall be dropped from membership.

Then we added this phrase, "The Secretary shall keep a complete record of all suspensions and reinstallments, and no person while his membership is suspended shall be entitled to exercise or receive any of the privileges of membership in this Association."

In other words, the change is something that we considered relatively minor. Instead of it being an automatic suspension by the Association, it's an automatic report to the Supreme Court, and then a determination by the Supreme Court as to what they want to do about it.

Now, we had also a provision relating to waiving dues or remitting dues or suspending payment for some period of time, and so forth, and because of this change it was also necessary to change Section 6 to read as follows:

"The Executive Council may, for good cause shown, prior to proceedings for the reporting to the Supreme Court of delinquencies in the payment of dues by any member, remit or abate such dues in whole or in part or waive or suspend payment of dues . . ."

So we have this situation, that if somebody has had misfortunes which make it difficult for him to pay his dues, we don't even have to report him to the Supreme Court, but the Judicial Council has the authority, prior to the report to the Supreme Court, to give

the man grace, so to speak. Once, of course, this is reported to the Supreme Court, then it is within the jurisdiction of the Supreme Court exclusively. That was a change which we drafted and, again, I want to make it clear, we drafted this simply as an arm of the Supreme Court to carry out their wishes, and we thought that the change had merit.

Then the Supreme Court brought up another question which was quite important. As you know, any of you who were present at the presentation to the Supreme Court are well aware of how emphatic this was made, that there was going to be now a rein on expenditures and, by golly, money wasn't going to be spent without sixteen different committees' approval first, vouchers and re-vouchers and budgets, and what-have-you. Well, the Supreme Court said, "That's all fine. That's all well and good, but you know, you fellows came to us," and when I say "you fellows" I am referring to a few of the gray beards around here—I don't see very many any more—the ones who were practicing law when the Bar was integrated in the first place, the Supreme Court said, "We call your attention to the fact that you fellows got this integration of the Bar on the plea or on the representation that that would be a great help and a great means of taking care of disciplinary problems. Your Bar was integrated for that purpose. Now we are not going to leave the Bar in a position where the Bar can say, 'Well, we've decided we're not going to spend any money to send anybody to Coventry or to deprive anybody from practicing law. We decided that this year our budget can't afford it so John Doe can go out here and steal all the money he wants from his clients and we won't do anything about it.'" The Supreme Court said, "We're not going to accuse you that you would do that but we don't want any limitations on the expenditure of funds required in disciplinary proceedings."

So if you'll turn to Page 21 and you read Section 2, you will find a very significant change. One is simply in verbiage. We used the word "non-budgeted", and one of the judges pointed out that that is an ambiguous word. Does "non-budget" mean something isn't in the budget at all, or does that mean something that is in the budget for \$100 and you want to pay out \$150 now? So instead of using the word "non-budget" we changed that to the word "additional". So you will notice that "the President of the Association may authorize additional expenditures not to exceed \$100.00 in any one instance . . . (and) the Executive Council may, by a vote of two-thirds of its members, authorize additional expenditures not exceeding the total sum of \$5,000.00 in any one year. No other expenditures incurred or cost taxed under any proceedings instituted under the Rules of the Supreme Court relating to

disciplinary proceedings against lawyers, shall not be subject to the provisions of this and the immediately succeeding section of these Rules."

In other words, cost of disciplinary proceeding, whether incurred in the way of investigations, investigators' fees, court reporters, subpoenas, and all that stuff, or whether actually incurred as cost taxed by the Supreme Court, are not going to be limited by any of the Rules of this Association relating to the budget.

Now those changes which I have told you were the only changes which were made in the Rules as compared to the way they were submitted to you last June.

Again I want to say this, your committee did not bind anyone, we did not say we amend our proposal in any way, we simply offered to draft whatever changes the Court thinks you want us to make, and these were the changes they wanted. We drafted them immediately and got them to the Court. My recollection of it is that the Court was in a hurry because of certain commitments that some of the judges had. At any rate, we got it to the Court within twenty-four hours, the Court ruled on it and adopted it, and these *are* the Rules now, as you have them.

I would recommend, therefore, that you destroy, any of you who have the copies of the Rules as they were submitted last June, now destroy them and substitute the copy that has been handed out to you this morning.

These rules, as you have been advised, have been adopted effective January 1.

There is one small suggestion I want to make. Mr. Berger has already made an analysis—have you handed those out yet?—of the new committees as compared to the old committees, and somebody is going to have to decide, I guess, how to distribute the unfinished business of the various committees to their successors. Let me illustrate the point I am getting at. I was asked during the recess about the suggestions that the Committee on Procedure had made relative to cost of printing briefs and some of the other matters that they brought up, I was asked whether the committee intended to bring that up next year. I said, "That was their thinking but they thought it was rather presumptuous of them because they didn't know whether that committee would be confined to some other topic or some other line or some other field." At any rate, somebody is going to have to distribute the pending work among the committees as they now exist under the new Rule.

Now just a word—when I say "a word" that means a dozen words (laughter)—before I leave the podium, because this will

probably be my last opportunity and I feel like I had better take advantage of it. So I want to publicly at this time express to the members of this House my gratitude to the members of the Special Committee. I don't think there has ever been in the history of any Association a harder-working, a more, shall I say, forgiving one. We had some terrible debates. We had some terrible times. We almost came to blows, but we decided that we were going to produce a unanimous report, and we have done so, and we are really thrilled. I have no reason to be here other than just accidental because I didn't accomplish this; this was accomplished by the members of the committee.

Another thing I want to say in addition to that is, now that we have the Rules I hope we are not just going to say we can take them for granted, the organization will just operate itself from now on. These Rules are simply the tools which we now have. We decided we were going to democratize our Association. We have done it. We decided we were going to streamline our Association. We have done it. We decided we were going to have different fiscal controls. We have accomplished that. But none of these will amount to anything unless *this* body right here, which now becomes the supreme legislative body of the Association, will see to it that these Rules are carried out, performed and fulfilled.

Now, therefore, I have one pleasant duty left for me. Our committee, having successfully accomplished the task assigned to it, now respectfully moves that it be discharged.

CHAIRMAN OVERCASH: Mr. Ginsburg, on behalf of the House I want to try to express to you the gratitude and the appreciation which all of us feel for your work and the work of this committee.

Several years ago in my work with the Association I was called on ex-officio to attend some of the meetings of this committee. This has been one of the hardest working committees this Association ever had. Just turn in your program to Page 17, if you will, and there is a list of the members of this committee. Read their names over. Three of this committee are former Presidents of this Association, and I don't remember a committee of this Association that has worked harder to carry out the desires of yourself and the members of the Bar than this committee. I think they deserve our everlasting gratitude, and I think the way to express it is for this House, from this time on, to assume its responsibilities. These new Rules are your bible. I hope you will take them home and study them because from now on this is the framework for our organization and the carrying on of our duties.

Mr. Ginsburg has made a motion that the committee be discharged. I think after about five or six years they would be entitled to be discharged with honor. Is there a second to that motion?

THOMAS M. DAVIES: Mr. Chairman, I would like to disagree a little bit with that. We are going to have to live with these new Rules. I suggest that the committee be continued until we have a shakedown on the Rules so that matters can be referred to them, if Mr. Ginsburg would agree.

MR. GINSBURG: I thought you were a friend of mine. (Laughter)

CHAIRMAN OVERCASH: Mr. Ginsburg, will you withdraw your motion?

MR. GINSBURG: Let me say this. I can speak for these gentlemen who are on the committee, some of whom are in the room, some of whom I don't see. I can say that we will volunteer to be helpful to Tom and all the new officers. I really do think that the committee ought to be discharged, but we will help in every way we can if there are any problems.

CHAIRMAN OVERCASH: On that basis I think we can discharge the committee. Is there a second to Mr. Ginsburg motion?

THOMAS R. BURKE, Omaha: I second it.

CHAIRMAN OVERCASH: Those in favor signify by saying "aye"; opposed the same. The motion is carried with our thanks, Mr. Ginsburg.

MR. GINSBURG: Thank you.

CHAIRMAN OVERCASH: Mr. Baird.

PRESIDENT BAIRD: Gentlemen, I think that inasmuch as the last time that the House took action to approve the Rules was last June before these changes which Mr. Ginsburg has just related took place, it would be appropriate that the House now formally approve the Rules as changed. While I realize this is a little bit in the nature of "If you're going to be raped, relax and enjoy it," I nonetheless would like to move that the adoption of the revised Rules as amended and presented by Mr. Ginsburg this morning, and also that the new Bylaws which have been presented and approved by the House prior to this time, again be adopted to go with the Rules, and further, George, that the fiscal year of August 31 be retained under the new Rules.

CHAIRMAN OVERCASH: Is there a second to the motion?

CHARLES E. OLDFATHER, Lincoln: I second the motion.

CHAIRMAN OVERCASH: Is there discussion before we vote?

CHARLES ADAMS, Aurora: I have a question. The Bylaws which were distributed this morning, do they incorporate any changes from the Bylaws which were previously approved by the committee or the House?

CHAIRMAN OVERCASH: Mr. Wright.

CHARLES E. WRIGHT, Lincoln: If I might respond to that, they have about two substantive changes. If you will turn to Page 17, on Committee Structure, when we originally lined out the committees we checked the Proceedings of prior Bar committees. We didn't see much activity by the Committee on Crime and Delinquency Prevention so we omitted them from an earlier draft. They are now going full speed so we have included that committee with their duties at the bottom of Page 17.

The only other substantive change, and, incidentally, all the changes are underlined in this draft that you have, other than the capped headings, would be on Page 18. We added the words "paralegal education" on the last line of the duties of the Committee on Legal Education, Law Schools, Institutes, and Prelegal Education, because we feel this is an area that is going to deserve a considerable amount of study in the future.

Other than that, all of the changes that are in here are, to my knowledge, merely matters of form and not of substance. Mr. Ginsburg went over them quite thoroughly. I went over them. Burton Berger went over them. I think we managed to find most of the grammatical errors and correct them.

CHAIRMAN OVERCASH: Is there any other discussion, any other comments?

JAMES W. R. BROWN, Omaha: Mr. Chairman, this is merely an inquiry. As I understand it, the disciplinary proceedings will now be a function of the Supreme Court—I suppose they always have been—but at least it is excluded from our Rules and Bylaws. I am wondering, is the budget for that the Supreme Court budget, or does the change that we had read here imply that this Association will bear the cost of those proceedings?

MR. GINSBURG: Mr. Brown, your question is a very good one and I think we might as well make it clear. This is something that we have over us that we bear the cost of and that we have no control over, and all we can do in preparing a budget is sort of estimate.

We can go by, for instance, that last year, say in the year 1969, the expense of the committee to the Bar Association was \$500. And

maybe we'll say that for 1970 we will assume and we will budget that amount. But, as Judge Carter mentioned, and I use his name advisedly, he pointed out that there were cases where the cost had run to thousands of dollars, and he said, "We expect the Bar Association to pay it." So it is just something that we have no way of saying that we are going to *budget*; all we can do is make an educated estimate.

MR. BROWN: As a policy matter, I was wondering whether or not that cost should be taken from this Association's funds or out of the Supreme Court's budget.

MR. GINSBURG: Well, it is very clear that it is. As a matter of fact, we were told of a case where the cost ran several thousand dollars, but the Association was able to reimburse itself in great part by getting out an execution, or something like that. But *we* are the ones who are stuck with it.

SECRETARY TURNER: You advance it, Herman, and hope to collect it.

CHAIRMAN OVERCASH: I think we should keep in mind, gentlemen, I think right there is something we need to use in our public relations with the public: Do you know of any other profession that disciplines itself, pays for the cost of doing it, provides the machinery for it, and *does* it? I think it would be a great help to the lawyers as a whole for the public to understand that that is one of the burdens and responsibilities as an Association that we carry.

GEORGE E. SVOBODA, Fremont: If you only have \$500 and you run into a \$2,000 case, do we budget for a major case, do we leave it at \$500 each year even though it is not spent.

MR. GINSBURG: Excuse me, Mr. Svoboda, what I was going to say is that I think your question is a good one, but you are kind of jumping the gun. I think the new Budgetary Committee should anticipate and maybe set up a reserve fund. As years go by there will be some years when the amount may be very small, and then they should reappropriate that and build up a fund. I can see, for example, where you might run into a year where you could easily have \$5,000, but then you have other years where you might have only \$100 or \$200.

CHARLES E. WRIGHT, Lincoln: I think the question that may come up, and I am sorry we didn't get it thrashed out earlier, but if we adopt a fiscal year beginning on September 1 and our new dues structure goes into effect, I assume, the first of the year, are we thinking about prorating for that or are we going to pay dues

for a short year? I also have some question as to the advisability of our year beginning September 1 as opposed to a calendar year. I think we ought to consider that at this meeting and make some determination before we leave.

SECRETARY TURNER: May I explain that?

CHAIRMAN OVERCASH: Mr. Turner.

SECRETARY TURNER: I'll explain why I suggest that the fiscal year be August 31. Your annual meeting is normally in October or early November. Unless the books are audited as of August 31 there is no opportunity to get into your hands, as members of the House, an audit of the Association. If it is January 1, then you would receive a report of the financial condition of the Association until a possible meeting in June, if there is a mid-year meeting. It is purely a matter of informing you as to where you stand. The dues, as you suggest, Charlie, are due January 1, but I do think that the House of Delegates ought to know at each annual meeting just how you stand financially.

PRESIDENT BAIRD: Mr. Chairman, I might say also that under the new rules, Section 4 of Article III provides that every member shall pay membership dues to the Association for each calendar year from January 1 to December 31 following, so that while we still have this inconsistency between the fiscal year, for auditing purposes, and our dues year, I think it will go on just the way it has been before and this will not cause any problems so far as prorating dues are concerned, because they clearly will be for the *calendar* year.

CHAIRMAN OVERCASH: Now the question is on the approval of the motion of Mr. Baird. Is there any further discussion? If not, those in favor of Mr. Baird's motion signify by saying "aye"; opposed "no". I declare the motion adopted.

It is noon now, gentlemen. We have two or three matters that were scheduled for the morning. With your permission we will adjourn until one-thirty.

WEDNESDAY AFTERNOON SESSION

October 21, 1970

The afternoon session was called to order at one-thirty o'clock by Chairman Overcash.

CHAIRMAN OVERCASH: Gentlemen, can we come to order.

It pleases me, gentlemen, that we have one of the members of the House who was not here this morning who is here this after-

noon. He is a man who was injured, I understand, in the line of duty on the Court House steps. Where is Vance Leininger? Is he here? He was at the luncheon this noon.

I want to announce to the House that the Executive Council at noon took necessary action to see to it that the new Rules, the new Bylaws, and the new fee schedule will be printed and submitted to the entire membership, in accordance with our practices and the usual requirement.

There were two or three items left over from this morning that we will take up now. On the agenda there is Report No. 10 and Report No. 15. As I understand, these were to be considered together—No. 10 by Mr. Meyers, No. 15 by Mr. Tracy. Mr. Myers, do you desire to be first? Come up and make your report please.

REPORT OF THE COMMITTEE ON LEGAL AID

J. H. Myers

I feel that the Legal Aid situation in the State of Nebraska has been treated somewhat like a poor child born out of wedlock, since we don't have the other kind. I also feel that this probably sociologically is one of the most important committees of the standing committees because, whether we like it or not, we are being faced with creeping socialism.

As a profession we are lagging 'way behind. Our fellow professionals, the doctors, the dentists, the pharmacists are all being paid better by the indigents than they are being paid by the people who can afford to hire their services. I don't suggest that we get on the bandwagon as heavy as they have, but I do suggest that we get on the bandwagon to the point where our services to the indigent are economically feasible.

We at the moment have no real Legal Aid organization. I think we need one very badly. We need a *state* Legal Aid organization. It is time we started to think about it because we are 'way behind already.

I am going to suggest to the President-Elect that in the appointment of this committee he should appoint people who are versed in this field. And we have some people in the State of Nebraska who are well versed in this field. We have an established Legal Aid situation in Omaha and we have one in Lincoln. Needless to say, in Kimball we don't, and I am about as far away from the problem as anybody could be. But it is time that we got on the bandwagon. It is time that we tap the treasure chest a little bit, like our fellow

professionals are doing, and it is important to this Association more that we become the good guys with the white hats and not the bad guys with the black hats to everybody concerned.

The lower income class people generally look at lawyers as being too expensive for them to even talk to. They also look at them as the guy who forces them to pay their bills that they haven't got enough money to pay. The doctors, the dentists, and the pharmacists have changed this. I think we can make a great step in changing it if we will ask the Nebraska legislature to establish a fund with which we can go to either the Office of Equal Opportunity or the Department of Health, Welfare, and Education for matching funds. I think we can put this thing on the basis where we can educate the poor man that he is just as entitled to competent legal service as the rich man is.

I am not up here storming for social change. I am opposed to the hand-out theory. But it is here. The other professions have bridged the generation gap, and we may as well make up our minds that it is time for us to do so soon and we should get it done in this next legislature.

I therefore move that the recommendations of my committee be adopted, that the committee be made up more of members of the profession who are actively engaged in legal services to the indigent, and that they appoint somebody a little closer in than I who can better coordinate a committee. Thank you.

CHAIRMAN OVERCASH: Thank you, Jim. Do you desire the other report to be presented before we vote on your motion?

It has been suggested that this committee's report be coordinated with that of Mr. Tracy before we act. I will therefore call on Mr. Tracy.

REPORT OF THE SPECIAL COMMITTEE ON AVAILABILITY OF LEGAL SERVICES

Howard E. Tracy

I appear here as the Chairman of the Special Committee on the Availability of Legal Services. The report is in your booklet. The main thrust of our report is that this special committee be dissolved.

I want to take just a minute, though, to tell you that I feel that the Bar Association necessarily must become involved actively in this business of legal services. I went around in the country and talked to as many as six or ten separate Bar Associations at the time that this OEO war was on, and General Shriver was actively

out to establish in every neighborhood something called the Legal Service Office, funded by the Congress.

The thrust of the American Bar Association's view on this subject was that local legal service offices *are coming*, that they will be established, and that the only question left is whether the Bar Associations throughout the country are going to have control or not have control.

For example, in many areas, largely the bigger cities, groups of, say, cab drivers or plumbers, or whatever, would say to each other and to their OEO worker, and perhaps led by their OEO worker, "The lawyers are no damn good. We've got to have better legal services. They are not taking care of us." Then this application would go forward for the establishment of the federally funded Legal Service Office. And if you have seen throughout the country some of the things that those fighting young lawyers have done, being federally paid, you will see that, in my opinion, we must have control of these offices on the state level and on the local level.

As I talked to the various Bar Associations I said, "I am going to give you my Paul Revere speech." And they say to me, "Well, we all take care of all these indigent people. We do this. We give so much of our time." They gave me all of the arguments that the AMA gave against Blue Cross and Blue Shield in 1929 and 1931. It is my opinion that we've got to get our head out of the sand and that we have to take control.

For example, under the OEO program they would say, "You have to have a separate, non-profit corporation be the sponsoring organization." But they would say that the lawyers can make up a majority of the directors of that non-profit association *if* the lawyers are the organization that promulgates it. But if it is the cab drivers that promulgate it—and I'm not speaking against cab drivers; I know there are a lot of good lawyers driving cabs (laughter)—but really if the lawyers take control they get the majority on the Board. But if the lay people take control, *they* get the majority on the Board.

Now, what difference does that make? One of the big differences that it makes is that it is this Board that is going to describe what areas of service this federally-funded on a state-matching basis if we can get the legislature to go along with that program, what functions they will and will not perform.

Now, understand first of all we are talking in the area of non-criminal law.

The special committee over a period of about four of five years developed a program and said that from the general area of *civil*

law this Legal Service Office would be excluded from handling such things as fee-generating cases of all kinds, plaintiff cases, workmen's compensation cases, that kind of thing, estates, and son on. In some areas there is a question of how much actual family litigation they should get into. Then there is an area of misdemeanors.

The point is that in my opinion, handled by the lay people it's but a small step from the local neighborhood Legal Service Office where the federally paid lawyer does indigent's type of work, and the federally paid fellow who has got his office a little closer to the court house and is called "probate lawyer" and who handles all probates for a particular area for anything that comes to him for nothing, as far as fees are concerned. And you say, "Well, what are you talking about?" I suggest to you that those of you who have remembered what you used to study about the history of this profession will find out that it used to be, back in old, old times, the cardinal sin of the lawyer was to collect a fee. And I'll tell you that the OEO people are back to hanging that same sin on us.

So I recommend that our report be adopted, that this committee be abolished and merged actually into Jack's committees, and that this Association actually go forward with the attempt to get the Nebraska Legislature to fund a legal service program for the entire state.

CHAIRMAN OVERCASH: Thank you, Howard. Let me ask you a question before we vote on this. Under your report, Page 28, you have three recommendations. You have sponsored the second in your motion and the third one about discontinuing your committee, but the first one was the implementation of the state-wide plan be held in abeyance until further funding becomes available. Now, that was another recommendation. What do you have to suggest in that regard?

MR. TRACY: What I have to suggest is, when I said "held in abeyance" with regard to the OEO program, I was talking especially to that program which presently has no special funds. As the alternative, if we adopt Jack's program of going to the legislature and seeing whether or not the State of Nebraska will put up money so that we can go to another department of the federal government for matching funds. The HEW program is different from the OEO program.

CHAIRMAN OVERCASH: Then the three recommendations of your report are part of your motion and are consistent with the motion you made?

MR. TRACY: I think so.

CHAIRMAN OVERCASH: Jack, what was the motion you made? To adopt your recommendation.

MR. MYERS: Yes sir.

CHAIRMAN OVERCASH: The motion has been made. Do you understand the motion? Is there any discussion?

CHARLES E. WRIGHT, Lincoln: I want to ask this one question. I certainly don't disagree with anything that Jack or Howard have just said. We have already adopted revised Bylaws to take effect on January 1 which, I believe, have in mind under the Committee on Legal Services of combining the Committee on Legal Aid, Howard's Committee on the Availability of Legal Services and the Committee on Lawyer Referral to cover this entire area. I believe it also has in mind that they can have subcommittees on Lawyer Referral to cover this entire area. I believe it also has in mind that they can have subcommittees to perform these very same functions.

Is this in conflict or is this different from what we've proposed in the alignment of these three committees? I am just raising this question. I think maybe Howard or Jack could address themselves to it.

MR. TRACY: My feeling, Charlie, is that the two different items are consistent except that I don't really know what functions the Committee on Lawyer Referral has performed so I can't speak for them, but as far as Jack and I are concerned this is consistent.

CHAIRMAN OVERCASH: I might say in response to that we took action this morning that anything we do here about the committee continuation and the committee function is subject to being overridden by the new Rules of reorganization if there is any inconsistency or any conflict. So I would suggest that I think we can approve these recommendations, subject to that over-all consideration and motion. Is there any further discussion?

MR. SVOBODA: Is Mr. Tracy asking that we authorize the Legislative Committee to formulate a bill, in addition to this committee business, to go to the legislature and get the matching funds? Is this what you have in mind?

MR. TRACY: Yes.

CHAIRMAN OVERCASH: That is correct. This is a part of Jack's motion, part of his report and recommendation. Is there further discussion?

ALFRED G. ELLICK, Omaha: Mr. Chairman, what kind of an appropriation would be required, do you think, to get matching funds? How much are the matching funds? Do you have any idea?

Mr. MYERS: I don't have any idea. And as to the size of the fund, \$40,000 was suggested. The figure that a \$40,000 state funding program, with what they have from other sources, would come into the general area of about \$200,000 to expend. And of course this is just a start.

MR. ELLICK: Does the Department of Health, Education and Welfare have matching funds that they are ready to make available, or do you know?

MR. MYERS: There, again, I am not an expert in this field, but the people that I have talked to who deal with the problem and should be experts, indicate that probably funds will be available if we make *our* funds available first. In other words, if we have a program then they can go to the other two federal agencies and get funds. If the fund was raised and no program could be set up, probably the money wouldn't be lost.

CHAIRMAN OVERCASH: Any further questions?

GUY CURTIS, Imperial: The committee indicated that they are against hand-outs and creeping socialism, but I am wondering if this isn't going to open the door to exactly the same thing that is happening to the medical profession. They are practically socialized today. I think that what they did was surrender.

At whose expense is this going to be? Most of the taxes are paid by the poor. We have found when these things get started they just grow like a wildfire. We are entering into a partnership with OEO and I think the history of the welfare mess that we are in in this country today is that anything that the federal government touches is the "kiss of death". I know in our District the majority of lawyers oppose it and we feel that it is wrong, it's immoral, and I would certainly oppose it.

MR. TRACY: Let me say this, and I assume that the new committee will do the same thing in the same general fashion that the Special Committee on Availability of Legal Services did, and that is we went outside of Omaha and Lincoln, and we went to all the local Bar Associations, and we said to them, "Either *you* do it or the *state* Bar is going to do it. If you want to do it yourself and satisfy the requirements that the Federal Fathers are going to put on us, then *do it yourself*. You don't have to be in the state program."

If you go back into the Bar Association Minutes and see the earlier reports that have actually been adopted by this House, you will see that this is the kind of state-wide programs that our committee went into when we went out into the small towns and in the

small areas. What we found out was that, frankly, all we got from the lawyers was "No, we don't want to do that, because we are taking care of these people ourselves."

The fear that I have is that you will continue to prevail and will prevail so long until the federal boys come in and hire these lawyers *without* us, and *that*, to me, is when we lose the battle. I think we have to be there *now* and with this control.

MR. CURTIS: Of course under that argument, Howard, you could argue that we have to go ahead and regulate *all* private industry, maybe even all private property because if *we* don't, the federal government will pre-empt us.

Now if the metropolitan areas want to have it, fine. But when you appropriate state moneys and federal money, then you are using force to put all of us into it, and that is what I am against.

CHAIRMAN OVERCASH: Any further discussion?

CHARLES F. GOTCH, Omaha: I might make this comment in regard to Legal Aid experience in Omaha. As a general rule, legal aid services in Omaha has worked our very well. The practicing lawyers find it a convenient organization to send people who are *not* going to generate any fees, people who have domestic relations problems, bankruptcy problems, misdemeanor problems, without any ability to pay for legal talent, or they have been over-reached by credit agencies—they have had credit cards sent to them when they don't qualify for credit—things of that nature. As a general rule I think the experience of the lawyers in Omaha has been that they do a good service for the indigent and they get along quite well with the practicing lawyers. There have been some situations where the federal government has felt that the Legal Aid Society should get into areas that are controversial. But on the whole I think our experience with the Legal Aid Society in Omaha has been very good. If it is run the way it is run in Omaha, I don't think that the lawyers in out-state Nebraska would find it objectionable.

The Legal Aid Society in Omaha is going to ask for federal funds and through the—well, Al Ellick could probably tell you better than I could . . .

MR. ELLICK: The Omaha Bar provides about \$1,000, United Community Services provides about \$32,000, and the federal government, OEO, provides about \$150,000. So they have got about a \$185,000 budget which I think is going to be increased the coming year with further OEO funds.

CHAIRMAN OVERCASH: Any further discussion?

TOM BURKE, Omaha: The only thing I would add to what Charlie said is that I think now Legal Aid is reaching people who before did not have any representation. I think this is the thing that the gentleman was talking about, whether or not in his area they are actually performing the service that the people who need the service don't have it today.

In Omaha we've found that we are now reaching out and representing these people through Legal Aid, and that was not being done before.

CHAIRMAN OVERCASH: Any further discussion?

MR. ELLICK: I would like to make one further comment, if I may. I am a little nervous here about going on record with a recommendation that we go to the legislature and ask for funds when it appears that we are not terribly sure whether or not those funds would be matched by OEO or the Department of Health, Education and Welfare. I am certainly in favor of a state-wide Legal Aid program. I know Warren Urbom's Committee and the present committee have done a fine job in going throughout the state to determine that such a program is needed.

The recommendation of the committee says, "It is the feeling of the committee that a state-wide plan should be adopted which would afford at least remuneration for cost of legal services rendered." Now, is *that* what we are voting on, or are we going to vote on approving that we specifically go to the legislature and ask for funds? If it is the latter, then I frankly don't feel, from what I have heard today, that we're quite ready to do that. We should know what amount we are talking about and what kind of a presentation at the legislature we would make. I have some hesitancy that our Bar Association should jump off here and adopt the resolution without knowing specifically what we are going to ask for.

CHAIRMAN OVERCASH: It was my impression that the motion that I would put to you of Mr. Myers includes the specific recommendation that we go to the legislature for appropriations. Am I right, Mr. Myers?

MR. MYERS: That is correct.

CHAIRMAN OVERCASH: That is a part of the motion as it now stands.

MR. ELLICK: Then, Mr. Chairman, I would like to move an amendment to the motion, that instead of going to the legislature for funds, we simply approve the recommendation of the report of the Committee on Legal Aid, that the committee feels that a state-wide plan should be adopted.

CHAIRMAN OVERCASH: Mr. Myers, would you be willing to accept that as a substitute or not?

MR. MYERS: Well, personally, I am of the opinion that you've got to start some place. I think we are 'way behind already. I am not here to ram something down the Association's throat, but I do feel that maybe a special committee should be appointed to approach the subject, somebody more versed in the technicalities of matching funds than any member of my committee, or somebody who deals with these things. I think that if we don't move ahead now it is going to be three more years before we get anything concrete done. I hate to ask for an open door, but I don't know any other way to ask for it.

CHAIRMAN OVERCASH: Of course under Mr. Ellick's suggestion the program could still move ahead. As I understand your substitute, all you would do is omit a specific action for funds, but I assume that would be like the tail on a dog, if they could work out a state program.

MR. MYERS: I would be in favor of having it contingent upon the basis that we can acquire matching funds.

MR. ELLICK: That getting funds from the legislature and matching funds from a federal agency is *one big job*. We went through it in Omaha when we got our Legal Aid started here. I think we ought to be pretty specific in what we are doing, and how much we are going to ask for before we adopt a blanket resolution just saying that we're going to go to the legislature for money. That's really my concern.

MR. MEYERS: I would like to ask one question. When you started in Omaha you had to have a fund to start with so that that fund could be matched. That is what we are asking here, as a fund to start with so the funds can be matched. We are asking for no more.

MR. ELLICK: I appreciate that. I am in favor of the program. I think it is a great program.

MR. MYERS: You have to start some place and I think you have to start with the funds first. And if you don't have the funds, you have nothing to match, so I think we need the funds.

MR. ELLICK: I don't think my amendment has been seconded anyway.

CHAIRMAN OVERCASH: I will ask for it, Mr. Ellick. Is there a second to Mr. Ellick's substitute motion? Hearing none, I declare the substitute fails. And if there is no further discussion . . .

MR. SVOBODA: One question first. Is there any limitation on your request for funds? You have set \$40,000, \$100,000?

MR. MYERS: Well, I think the \$40,000 basis was made on the Omaha legal Aid structure. With \$35,000 they came up with \$185,000, and with \$40,000 we figured we would come up with about \$200,000.

CHAIRMAN OVERCASH: Is \$40,000 specifically included? I didn't think it was.

MR. MYERS: It isn't. I think it should be studied more deeply.

CHAIRMAN OVERCASH: The motion, as I understand it, Mr. Svoboda, is that we seek an appropriation. It is not fixed as to amount.

MR. SVOBODA: Will you accept a motion with some fund limitations of any kind?

MR. MYERS: I don't think the legislature is going to . . .

MR. SVOBODA: I am speaking from the Bar Association's standpoint as a recommendation. There's going to have to be some kind of limitation. I fear an open door thing.

MR. MYERS: I'll accept some kind of limitation.

CHAIRMAN OVERCASH: What limitation do you wish?

MR. SVOBODA: He is in a better position to judge than I am.

MR. MYERS: I would like to have it not to exceed something. Would you object to "not to exceed \$100,000"?

MR. SVOBODA: Well, you've raised the ante.

MR. MYERS: Here's the thing: Why should we limit it? If we can get \$100,000, why should we limit it to \$40,000 by our own action?

CHAIRMAN OVERCASH: Do you wish to suggest an amendment to your motion and say "not to exceed \$100,000"?

There was a second to the motion. I assume we had a second. Who seconded it? Then is that amendment satisfactory to you? (Charles Wright indicated agreement) Then the question is upon the motion of Mr. Tracy and Mr. Myers' committees. Those in favor of the motion as amended signify by saying "aye"; opposed the same sign. I declare the motion adopted.

The reports of the committees follow:

REPORT OF THE COMMITTEE ON LEGAL AID

The report of your Committee on Legal Aid again refers you to the report by the Committee on Availability of Legal Services and its findings and recommendations.

Your Committee further refers you to Volume 49, No. 4 of the Nebraska Law Review, pages 877 to 1025, Legal Services Survey Report.

It is suggested that the Association adopt the three recommendations of the Special Committee on Availability of Legal Services with one exception, that exception being that the legislature be approached to appropriate sufficient funds for partial funding of a state wide plan for legal services to the indigent, then two federal sources might become available to pick up the remaining cost. The Office of Economic Opportunity and the Department of Health, Education and Welfare being the two sources of outside funds.

In the overall view of the legal aid situation in Nebraska, we are the only profession who are not now subsidized by federal agencies, to the degree that at least meets the cost of overhead.

It is the feeling of the Committee that a state wide plan should be adopted which would afford at least remuneration for cost of legal services rendered.

The Committee further recommends that the Special Committee of Availability of Legal Services, who by their own recommendation feel that they have accomplished all that they can in this matter, be incorporated in and made a part of the Legal Aid Committee.

Robert R. Camp
Allen J. Beermann
Richard M. Fellman
Edwin C. Perry
Johnson E. Story
Donald L. Wood
Jim Cook
Joseph Daly
Vard R. Johnson
Jack H. Myers, Chairman

REPORT OF THE SPECIAL COMMITTEE ON THE AVAILABILITY OF LEGAL SERVICES

The Special Committee on Availability of Legal Services was formed in 1965 and continued from year to year thereafter. A detailed history of the workings of the Committee may be found in the annual reports contained in the Nebraska Law Review.

The Special Committee was formed with a primary mission of representing [sic] the Nebraska State Bar Association in its participation in the War on Poverty. By direction of Congress, the Legal Services Division of the Office of Economic Opportunity was then in the process by a variety of plans, of subsidizing legal services for persons who were otherwise unable to pay for such services. As you will remember, many legal and ethical questions were raised. It was the mission of the Special Committee to investigate these various issues and to make recommendations with regard to them to the House of Delegates of the Nebraska State Bar Association.

Warren K. Urbom who was the Chairman of the Special Committee from its inception until he was nominated for the position of United States District Judge, did a particularly outstanding job of leading this committee in the performance of its mission. Many, many contacts were made with local Bar Associations. Each local Bar Association was given an opportunity to select between developing its own OEO Legal Services program and participating in a state-wide program. Finally, a plan for a state-wide program was developed in detail and submitted to the House of Delegates and approved.

In the meantime, however, Congress restricted the appropriations for the War on Poverty in general and the Legal Services Divisions in particular. There are no funds available for the government's fiscal year of 1970-1971 for the establishment of new legal service programs. It is not anticipated that any funds will be made available for the establishment of new programs for the year 1971-1972.

Accordingly, the Special Committee feels that it would be an exercise in futility to perform all of the mountains of paperwork necessary to file an application for implementation of the state-wide program at this time. By the time that the funds became available all of the detailed information which the government forms require would be out-of-date.

Therefore, the Committee's first recommendation is that implementation of the proposed state-wide plan for providing legal serv-

ices to the poor through the Office of Economic Opportunity be held in abeyance until Federal funding becomes available.

The Special Committee does not, however, want to leave the impression that it feels that this is not an important area to the Nebraska State Bar Association. On the contrary, the members of the Special Committee feel that it is in the best interests of the members of the Nebraska State Bar Association for this state-wide organization to continue to take the lead in this area. The Committee members feel that the availability of legal services to the poor is less than fully adequate. In many areas low income persons do not know what their legal rights are and do not know how to find out.

It is, of course, very true that throughout the entire state lawyers spend much time advising people who have no ability to pay for those services. However, in order to receive this type of advice the persons first have to find their way to the lawyer. In very few outstate areas is there any method for advising the indigent that legal services can be provided for them.

Therefore, the second recommendation of the Special Committee is that the Nebraska State Bar Association take an active part in developing local legal service offices. The Special Committee believes that this can best be done through the local Bar Associations.

The question of how the second recommendation of this Committee should be implemented is a question of organization of the Nebraska State Bar Association. This is a Special Committee. The primary purpose for which the Committee was originated is now unobtainable by reason of the lack of federal funds.

On the other hand, the Nebraska State Bar Association has a permanent Committee on Legal Aid. The Special Committee believes that its functions should now be undertaken by the permanent Committee on Legal Aid.

Therefore, the third recommendation of the Special Committee on Availability of Legal Services is that it be dissolved and that its functions be undertaken by the permanent Committee of Legal Aid.

SUMMARY

The three recommendations of this Committee are:

1. That implementation of the proposed state-wide plan for providing legal services to the poor through the Office of Economic Opportunity be held in abeyance until federal funding becomes available.

2. That the Nebraska State Bar take an active part in developing local legal service offices.

3. That the Special Committee on Availability of Legal Services be dissolved and that its function be undertaken by the permanent Committee on Legal Aid.

Donald L. Biehn
William D. Blue
Robert R. Camp
Robert B. Crosby
Louis B. Finkelstein
Herbert J. Friedman
Donald E. Girard
Donald W. Pederson
Raymond J. Walowski
Howard E. Tracy, Chairman

CHAIRMAN OVERCASH: We have left over from the morning program a report by Mr. Burke on the Insurance Committee.

REPORT OF INSURANCE COMMITTEE

Thomas R. Burke

Mr. Chairman and Gentlemen of the House: This is not a committee of this House of Delegates. Rather it is a subcommittee that was named by President Bill Baird earlier this year to study our existing insurance program that we offer to our membership, likewise to study the internal insurance situation of the Bar Association.

Serving with me are Jim Hewitt, Fred Irons, Bob Berry, Ted Kessner, and Bob Muchemore.

To date, here is what we've done. We have recommended, and it has been approved by the Executive Council, that we go to the legislature in 1971 and have an increase in life insurance that is made available to members of our Association from \$25,000 to \$50,000. That legislative proposal has already been submitted to our Committee on Legislation and is on its way into the hopper in January.

The second thing we have done is to review the insurance coverage that we have internally on our fixtures, equipment, and all of that type of thing. We are in the process right now of coming up with some recommendations on how those should be revised to afford more adequate and more thorough coverages, and those recommendations will go to the Executive Council probably at their December meeting in Lincoln.

The third thing we have done is to attempt to find out from all the members of the Association just what they *want* in the way of insurance benefits. We did this by sending out a survey questionnaire. We had a tremendous response, I might tell you, as a result of that questionnaire. Burton Berger, your Executive Director, made an analysis of all of that information that came back in. And thank goodness for people like Burton Berger who can do that sort of thing that our committee members didn't have to do it! But all of that information then came back to our committee and we are in the process right now of revamping and coming up with an entirely new package of insurance benefits which would then be offered to our entire membership.

Now it is our aim, as an Insurance Committee, and of course we are functioning under the Executive Council and our recommendations will have to be implemented or not by the Executive Council, but it is our aim to come up with a whole new insurance program which would then be handled by one or two insurance agencies in the State of Nebraska.

It would then be their function to go out for bids, and so on. We are not going to get ourselves in the position of being insurance agents and going out for bids. Rather, this would be handled through selected insurance agencies and here, again, Executive Council's approval would be necessary.

This is what we are doing. We have been very busy since January. •

One other thing, which is a sidelight, we are trying to determine all of the reserves that have been established under your Life Insurance program and how they are committed. Eventually all of this information in report form will be submitted.

This is what we are doing. If any of you have any questions I would be happy to answer them. There is no need for my making any motion regarding our committee because we serve under the President. Does anyone have any questions?

CHAIRMAN OVERCASH: Thank you very much, Tom. I think you can tell, gentlemen, that the Bar Association is gradually evolving a comprehensive program of all the facets that pertain to the lawyer as a professional and as a business man. This is a part of the over-all service that this Association is endeavoring to provide. Tom and his committee have enlisted some experts in this field, they have made other reports to the Executive Council, and they are doing a real fine job.

At this time we will proceed with the afternoon program, and I am going to accommodate two or three out of order.

I will first refer to Report 33, the Advisory Committee, Mr. Young's committee. I understand Mr. Adams is going to make the report.

REPORT OF STATE ADVISORY COMMITTEE

Charles Adams

Mr. Chairman, Members of the House: This is the report of the Advisory Committee for 1970.

Committees on Inquiry

There are 21 Committees on Inquiry, being one for each Judicial District.

In 8 Districts (being numbers 5, 7, 9, 14, 15, 19, 20, and 21) there has been no necessity of committee action.

In Districts 1 and 11 charges have been investigated and dismissed for lack of merit.

Minor matters have been adjusted satisfactorily without formal charges or hearing in Districts 2 and 6.

In District 3 (Lincoln) one matter which was carried over from last year is still pending. Charges were filed in 6 matters, of which 2 have been dismissed for lack of merit, 2 are under investigation, and 2 are proceeding upon formal complaint.

In District 4 (Omaha) charges in 8 matters were carried over from last year, 4 of which were withdrawn and 4 dismissed for lack of merit. Of the 12 matters in which charges were filed before the Committee on Inquiry upon the charges filed, and final disposition is under consideration by the Committee.

Charges are being investigated in one case each in Districts 8, 10, 16, and 18.

In District 12 the publication in a local newspaper of an advertisement, consisting of the name of the attorney, identifying him as an Attorney at Law, and listing his telephone number and address, was deemed to be objectionable under Canon 27. The Chairman of the Committee informed the attorney of the impropriety of the publication, which was discontinued, and no further advertising has been done.

In District 13 the Committee on Inquiry met to consider charges that respondent's course of action was a violation of the rule against representing conflicting interests. The attorney yielded to the judgment of the Committee and withdrew from the litigation.

In District 16 charges in one matter are being investigated. Charges in one matter were referred to the Advisory Committee.

In District 17 the only activity of the Committee was to comply with the request of lawyers for opinions of the Committee as to ethical factors involved in situations presented.

Code of Professional Responsibility

During the year last past there has been a fundamental revision of the ethical standards relating to the practice of law in this State.

The 1969 Report of this Committee set forth in detail the status of the program of the American Bar Association for the reexamination and modernization of the ethical profession which had taken the form of a Code of Professional Responsibility (Preliminary Draft January 15, 1969).

At its Annual Meeting in Dallas the House of Delegates of the American Bar Association on August 12, 1969, adopted the Code (Final Draft July 1, 1969) to become effective January 1, 1970, as of which date the Code took the place of the Canons as an instrumentality of the American Bar Association.

The effectiveness of the Code to establish authoritative and enforceable standards required implementation by the States. This House of Delegates at its Annual Meeting on October 29, 1969, approved the Code and directed the officers of the Association to petition the Supreme Court to amend Article X of the Rules Creating, Controlling and Regulating this Association by substituting the Code for the Canons.

Petition was filed accordingly. A thorough canvass of the membership was made, and after formal, open hearing, the Supreme Court on March 10, 1970, granted the Petition and made and entered the following Order amending Article X of the Rules to read as follows, to-wit:

Effective May 1, 1970, the ethical standard relating to the practice of law in this state shall be the Code of Professional Responsibility of the American Bar Association in effect January 1, 1970, together with such amendments and additions thereto as may from time to time be approved by the Supreme Court except DR2-103 (D) (5).

This exception related only to the subject of group legal services. I may say parenthetically that our Court felt that that should not be adopted at this time, and instead they referred it to the Judicial Council for further study and recommendation. So that is the end of the quotation from the Court's rule.

The Code of Professional Responsibility consists of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules.

The Canons (9 in number compared with the old Canons of which there were 47) are statements of axiomatic norms and are the general concepts from which the Ethical Considerations and Disciplinary Rules are derived; the Ethical Considerations are inspirational in character and express desirable objectives; and the Disciplinary Rules are mandatory in character and state the minimum level of permissible professional conduct.

Each member of the Nebraska State Bar Association has been supplied with a copy of the Code in its final form. Meetings of the Advisory Committee are being arranged to be held as early as possible at which the Committee will dispose of three applications, now pending for advisory opinions, and will give consideration to the practices and procedures of the Committee in relation to the changes, if any, indicated by the Code.

Note: Useful aids in the interpretation and application of the ethical rules now in force are: Opinions on Professional Ethics, American Bar Association Committee, 1967; Informal Opinions, ABA Committee, Vol. 1 and 2; Henry S. Drinker Legal Ethics, 1963; Raymond L. Wise, Legal Ethics, 2d Ed. 1970, (correlating the new rules with the opinions and informal decisions of ABA); Opinions, New York State Bar Association Committee on Professional Ethics, and Problems and Recommendations in Disciplinary Enforcement, adopted by ABA House of Delegates. That's the committee headed by Retired Justice Tom Clark referred to in American Bar News, September 1970.

The report, Mr. Chairman, is respectfully submitted by the members of this Committee:

Charles F. Adams
William J. Baird
Thomas F. Colfer
Lester A. Danielson
Bert L. Overcash
Lloyd L. Pospishil
Raymond G. Young, Chairman

I would like to move that this report be received and made a part of the record. It is not a report containing any recommendations. After that motion is disposed of I would like the privilege of the floor for one further moment.

CHAIRMAN OVERCASH: You have heard the motion. Is there a second?

PRESIDENT BAIRD: I second it.

CHAIRMAN OVERCASH: Those in favor signify by saying "aye"; opposed "no". The motion carried.

You have the floor, Mr. Adams.

MR. ADAMS: Mr. Chairman, I would like to ask President William J. Baird to escort to the podium Raymond G. Young.

If you will cause him to face the audience, I should like to say, gentlemen, I present to you the Chairman of Advisory Committee of the Nebraska State Bar Association, Mr. Raymond G. Young, a former President of this Association and the Chairman of this committee since the integration of the Bar in the year 1937. His has been a labor of love, and a tremendous inspiration and contribution to the Nebraska State Bar Association and all of its members. The only reason I am giving the report instead of Mr. Young is the fact that his voice is not up to par, and he asked me to do the reading, but I would like to present to you and have you greet Ray Young.

. . . The audience arose and applauded . . .

RAYMOND G. YOUNG, Omaha: I am completely overwhelmed. I am very proud of this integrated Bar and of what it has accomplished. And otherwise, this is a complete surprise to me. I had no idea I was expected to make a speech, and I am not going to do anything further than to say "I thank you very much."

PRESIDENT BAIRD: And he says this is the last time he is going to have Mr. Adams make the report of the committee.

CHAIRMAN OVERCASH: Mr. Young, I want you to know that the entire Bar is indebted to you for a lifetime of service.

At this time I would like to call on Mr. Wright, who will report on Item 40, the Section on Taxation. He is substituting for Mr. Chevront.

CHARLES E. WRIGHT: Jeff Chevront had to hold down the fort in Lincoln while Tom Davies was here today, but he asked me to give this report:

REPORT OF SECTION ON TAXATION

On December 5 and 6, 1969, the Section on Taxation presented its 27th Annual Institute on recent tax developments at Ogallala and Hastings.

The Section then presented a program on the Tax Reform Act of 1969 at the Mid-Year meeting of the Bar Association in June.

I believe we had nearly 200 attorneys who attended this program. Because the Section presented this program at the Mid-Year meeting, we will not have an outstate tax institute this year.

However, the 8th Annual Great Plains Tax Institute will be held November 30 - December 1, 1970 at the Nebraska Center in Lincoln. As you know, this Section, together with representatives of the Nebraska Society of C.P.A.s, makes up the planning committee of this institute. We feel that this institute, under the joint sponsorship of the State Bar Association and the Nebraska Society of C.P.A.s, has grown into one of the finest tax programs in the Midwest.

We feel that this year's program is outstanding. Dr. Hilary Seal, a consulting actuary from New Haven, is speaking on private pension and profit-sharing plans. Tom Troyer of Washington is speaking on capital gains and losses. Edwin S. Cohn, the Assistant Secretary of the Treasury will be the banquet speaker. The program topics will emphasize the effect of the Tax Reform Act of 1969.

The increase in the number of lawyers attending last year's institute over the number attending in prior years, was most gratifying. However, this program needs the continued support of the Bar and I urge all of you to encourage lawyers who are interested in taxation to attend.

The two new Section members, with terms expiring in 1973, are Warren Dalton and John North.

Jeffre Cheuvront, Chairman
Jim Shamberg
Charles E. Wright
Donald Sass
Allan J. Garfinkle
Robert Veach

Now, if I might take about five seconds of your time, we are not going to have a traveling outstate institute this year, in the year 1970. I would just like to have a show of hands, and we are particularly interested in the outstate lawyers, if you think it would be worthwhile sometime later in the spring, probably after tax season, if we would present an outstate institute at two suitable locations out of state. Last year we ran into bad weather in Ogallala. I hope it was due to the weather. The attendance was rather disappointing. We did have a fairly good attendance in Hastings.

I think the Tax Section is perfectly willing to continue these programs if you, and again I am addressing this to the outstate lawyers, feel it is worthwhile. So whether you are outstate or not,

I would like a show of hands if you think this should be continued in 1971, or if we should let the Great Plains Institute serve as our sole educational institute in this area. Frank!

FRANK J. MATTOON, Sidney: Mr. Wright, I appreciate the fact you are asking the question *after* the tax season, but one of the primary things this year, of course, will be an analysis of the Tax Reform Act, and when you put that qualification in it I would have to say "No", I don't think it would be of benefit. However, I would like to go on record as saying that I think we still ought to continue with the outstate Tax Institute as it has been in the past. I regret the fact there was a poor attendance in Ogallala last year. However, I think that is probably an exception rather than the rule.

MR. WRIGHT: Thank you, Frank, and I will carry that back to the Section.

Now could I have a show of hands if you think we should continue this, just for my own edification. Thank you!

I also take it, then, that if we are going to have it you would much prefer to have it prior to completion of tax season than after tax season.

There is one other thing we should consider. The Internal Revenue Service has their traveling Institutes early in the month of December outstate, which run I think more closely to filling out the forms and such, and we do run into some conflict with them, but we might give some consideration to something shortly after the first of the year if this wouldn't interfere with the Farmers' returns, and things like that. At least we'll talk it over at our next meeting.

SECRETARY TURNER: Can you report the new officers?

MR. WRIGHT: The new officers are: Allan J. Garfinkle, Chairman; Donald Sass, Secretary. The hold-over members will be Jim Shamberg and Jeff Cheuvront.

CHAIRMAN OVERCASH: As you all know, as a part of this dues program, the reorganization and all the other matters the House has been interested in, the over-all objective is to provide more service to the lawyer. I think we should bear in mind in connection with all of our activities, What can we best do for our lawyers?

At this time I would like to call on Mr. Vinardi in connection with Item No. 34, Mr. Welch's report.

**REPORT OF TRUSTEES OF THE DANIEL J. GROSS
NEBRASKA STATE BAR ASSOCIATION WELFARE AND
ASSISTANCE FUND**

Joseph J. Vinardi

Thank you, Mr. Chairman. Gentlemen, the report of the Daniel J. Gross - Nebraska State Bar Association Welfare and Assistance Fund is set out on Pages 35 and 36 of the Program. It calls for no action on the part of this body, except perhaps to accept it as presented. I will not take the time to read it, and if the Chair would allow me that prerogative, I merely wish to state that Mr. Welch has asked me to inform this body that the committee will continue to function in the manner in which it has functioned, and that it is very happy to report that it has done good in making disbursements to the widows and children of deceased attorneys in the past year totaling some \$1,855, just under \$2,000.

If there are any worthy cases that any of you gentlemen, or any lawyers in the State of Nebraska wishes to call to the attention of the Trustees, they will be more than pleased to receive that and will investigate them thoroughly and act accordingly.

CHAIRMAN OVERCASH: Thank you very much, Mr. Vinardi. It won't be necessary to act because your report was included in the blanket motion this morning.

We have had reference throughout the morning to various legislative matters. I want to advise you that Mr. Carter is here, our Legislative Counsel, who has been retained by the Executive Council for the new year and the new session. I think he is here to answer any question or give you any information you wish. Would you like to make a statement, Ed?

ED. F. CARTER, Lincoln: I am happy to talk if you have time.

CHAIRMAN OVERCASH: Come right up here. We were very successful, gentlemen, at the last session of the legislature. I was Chairman of this committee for a couple of sessions and I didn't have any paid assistants, and we went feebly along and tried to do a job for the lawyers but we didn't do as good a job as is now being done. In part, in great part, I think it is due to the fact that we have had the good sense to hire somebody to do some work for us. Ed!

EDWARD E. CARTER, Jr., Lincoln: Gentlemen, I would like to take just a moment maybe to build backfires and excuses for a year from now because I think the upcoming session probably is going to find us in a different light than the preceding sessions have.

We have been pretty lucky for two sessions. The legislature has agreed with our judgment on many matters, and our batting average wasn't too bad. A part of what goes with a good batting average is that people notice it and want you to go to bat for them. We are starting to field already inquiries from all kinds of sources, saying, "Will the Bar Association support this? Will you appear on that for us?"

It is a session that is going to be of particular interest, I think, to you and one which will probably leave us with some divergent views on how legislatively we should proceed.

If the Constitutional Amendments are passed it seems to me that we are going to be faced with a large number of bills on the subject of judicial organization. If the Amendments are passed, I am certain we will have a bill to have county judges riding the circuits. With this will probably go bills to have the prosecutors and public defenders doing the same thing. We will have bills to abolish J.P. Courts and maybe replace them with something else.

Everybody's viewpoint is a little bit different on these things, and I think it means as we go into this legislative session we are probably going to be more interested in appearing on those matters than other items which might otherwise take our time.

You know, when something goes to the legislature, somebody can say, "The lawyers ought to be interested in that." It's a law, so I suppose this applies. We are going to have some difficulty holding the areas down to those things that are of particular concern to us.

I think as the legislative session progresses we who are supposed to appear for you would like to have the benefit, either by way of telephone call or a letter, or whatever, of your feeling either in support of or in opposition to these various bills. That is not to say our Association position will always be one hundred per cent what *you* might prefer that it be, but many times the lawyer who is not appearing before the legislature thinks of the reason why the legislation is good or not good, and I would encourage you to contact us early so that we might use your thinking in developing the program.

I am hopeful that our program will not be extensive in number of bills, because I don't see any way we can avoid appearing on the bills that relate to the organization of the courts, and I think they are going to be many.

The Crime Commission has already commenced the process of redoing a great deal of our judicial process. There are bills coming relating to all of the courts, applying the "beyond a reasonable

doubt" concept to juvenile courts, all kinds of things where we have to make a decision as to what is Bar Association function and what is not, and having made that decision, then try to appear in favor of the things that are best for the judicial system.

I think it is going to be difficult, and I don't anticipate that we will come back a year from now with maybe quite as pretty a won-loss record as we've had, but I think there's more guts to what we're going to be approaching this session. I look forward to it as a challenge, and I certainly hope a year from now the Association will have been able to hang together as well as they have in the past because I think our position is important to the State at this point, for if there is any one group that should be listened to on matters of judicial reform it is certainly the Bar Association, and I am sure we now have a legislative plan where they will at least listen.

RUSSELL E. LOVELL, Scottsbluff: I would like to ask Ed a question. Is there any scuttlebut or propaganda to revive this tax on legal services that they've tied on that one bill again?

MR. CARTER: No, but there wasn't any before the committee hearing where that got tied on. I think it will back in one form or another. I am sure the bill for executors and administrators fees will be back.

RICHARD A. KNUDSEN, Lincoln: Ed, in the course of our practice we run across problems in some statutory interpretations, and so on. Is your committee set up so that we could write to you about these things to see whether anything could be done to correct it, or are you interested in getting into this?

MR. CARTER: As a matter of fact, many people have done that, and some of them we have been able to resolve by sending them to the Revisor of Statutes and let him take care of them as Revisor's bills. Some of them, if the Legislative Committee or the Executive Committee felt it was outside the province where the Bar should be functioning, we dropped them. But many of the recommendations we have used in the past have come about by this manner, and I would suppose that I have in the file now twenty proposals that came about by this approach. Sometimes between now and January 1 the committee will consider them and will sort some of them out to act upon.

MR. KNUDSEN: You have the method to get them introduced as a bill, your committee does it?

MR. CARTER: Yes.

CHAIRMAN OVERCASH: Any other questions? If not, may I call your attention, and Mr. Turner advises me, that the Executive

Council has arranged that the Bill Digest will be sent to the lawyers in the next session of the legislature, the same as in the past.

SECRETARY TURNER: It is a subscription proposition.

CHAIRMAN OVERCASH: Now we will proceed with the remaining items on our agenda. We have quite a number to go through. I don't know how many reports will be necessary.

Number 26, the Special Committee on Federal Criminal Justice Act. There was no report printed. Is Mr. Kutak or any member of the committee here who desires to say anything?

HAROLD L. ROCK, Omaha: Mr. Chairman, Mr. Kutak asked me to advise the Chair that a report would be forthcoming before the Minutes are reported here, and the only recommendation he has is that the committee be continued, at least pending whatever the reorganization of the Bar will need for that committee.

CHAIRMAN OVERCASH: Thank you.

SECRETARY TURNER: Do I understand, Harold, that he is submitting a report to go into the Minutes of *this* meeting, to printed with the proceedings?

MR. ROCK: Yes sir, if that is possible, or whatever arrangement he has had before. I know he has always been late. If it is the will of the House, that is what he would propose to do.

SECRETARY TURNER: Will it contain recommendations?

MR. ROCK: No sir.

CHAIRMAN OVERCASH: Thank you.

No. 27, Report of Special Committee on Rules of the Road—Mr. Healey.

SPECIAL COMMITTEE ON RULES OF THE ROAD

Patrick W. Healey

Mr. Chairman, Mr. President, Distinguished Delegates: It is my pleasure to report that the committee hasn't done a great deal this last year. I think that is all right, however. We conceive our function to be that of monitoring and working with various proposals that have been in the hopper for comprehensive revision of the Rules of the Road. A couple of years ago the Legislative Council had in mind getting that done, and never got around to it. This last year the State Safety Council, with the cooperation of the State Safety Coordinator's office, had the plan to get a revision prepared

with federal funding and they never quite got it done, but it is a high priority item, I understand, for this coming year. I think the committee should continue to exist for the purpose of working with such an effort, if it does get under way. To that end I would recommend a continuation of the committee.

CHAIRMAN OVERCASH: No. 28, Report of Special Committee on Water Resources. There was no printed report. Is there any oral report?

REPORT OF SPECIAL COMMITTEE ON WATER RESOURCES

Ralph Fischer

Mr. Chairman, Mr. President, Mr. President-Elect, Members of the House: On your program it announces me as Richard S. Harnsberger. I am not Professor Harnsberger, of course. I am Ralph Fischer from Beatrice, and I am representing the Chairman of this committee. My report is short.

Your Special Committee on Water Resources reviewed the case of *Brummund v. Vogel*, 184 Neb. 415 (1969) for the January, 1970 issue of the State Bar JOURNAL. The review consists of an original report on the case by the committee, a dissenting opinion by one member, and an answer to the dissent by the chairman. This review highlights important issues concerning the foundation and nature of water rights in Nebraska and the confusing aspects of this state's dual system wherein both valid riparians and appropriators have rights to use water in our streams. This is perhaps an esoteric area to many of you, to many it is also interesting.

Your committee also reviewed and had opportunity to comment on a work of the Nebraska Soil and Water Conservation Commission to keep abreast of legal matters considered by them and to report these to the interested members of the Bar, as we have in the past.

We recommend that this committee be continued and this report be received into the record.

CHAIRMAN OVERCASH: Thank you, Mr. Fischer. It won't be necessary to act on this matter because there is no recommendation other than the continuation of the committee.

CHAIRMAN OVERCASH: We have covered Items 33 and 34. Item 35, report of Special Committee on Automobile Accident Reparations, Mr. Bruckner.

**REPORT OF THE
SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT
REPARATIONS**

M. J. Bruckner

Last spring I was having quite a conversation with our Chief Justice at a Bar meeting one evening when he told me that he had recently spoken at a county Bar meeting in one of the more populous counties in the northern tier of Nebraska, and they left to his discretion the subject matter, so he spoke on Keaton-O'Connell. Prior to making his speech he asked the lawyers in attendance whether they knew what Keaton-O'Connell meant, and not a lawyer there knew what he was talking about.

This is a little bit frightening when Keaton-O'Connell probably presents the greatest invasion on the rights of litigants in my history as a lawyer and perhaps the history of everyone here.

This special committee was formed in 1958 because members of the Tort Section anticipated that Keaton-O'Connell legislation would be proposed at the 1969 session of the Nebraska legislature, and the committee was formed at that time with the name of Keaton-O'Connell Special Committee, subsequently changed last year to conform to the same special committee that was adopted by the American Bar Association. When originally formed it was formed for the purpose of providing a watchdog during the 1969 session of the Nebraska legislature.

For the edification of those who have not followed it very carefully, Keaton-O'Connell was originally proposed in 1965 by two Harvard-oriented professors as a panacea for protection on the highways and to the automobile accident victim. It didn't receive any action until 1967, and at that time Keaton and O'Connell, or one or the other of them, had prevailed on a young Massachusetts Congressman to introduce their proposal in the Massachusetts legislature. Interesting enough, the Massachusetts House passed this particular bill containing approximately 600 pages after substitute for another measure. It was passed without a single committee hearing and with less than a full day of debate. It was subsequently defeated in the Massachusetts Senate, but this gave Keaton and O'Connell the publicity that they needed, and subsequently editors and authors around the country, and such empirical authorities as LOOK Magazine and Sylvia Porter began endorsing this proposal.

I think at this time it became apparent to the Bar Associations at least the major Bar Associations around the country, that there was a real problem.

It was on the basis of this information that we recommended to this House the formation of this Special Committee as a watchdog in the legislature.

Well, nothing came about in the legislature. We thought that Nebraska was a prime target because we have only one House, and if they could shove it by one House and prevail on the Insurance Commissioner to endorse this, they might have it here. It never happened. So the committee has continued in that guise as sort of a watchdog. There really wasn't much to do this last year until I visited with Chief Justice White.

At that time it became apparent to me, at least, and I think also to the other members of the committee after discussing it with them, that we had an education problem. The education problem consists first of educating our own members about what Keaton-O'Connell is and what these various proposals contain.

So I might, before making our recommendation, tell you that Keaton-O'Connell has not died with the defeat in the Massachusetts Senate in the 1967 session of the legislature of that Commonwealth. It was reintroduced and passed this year in limited form. For your edification, if you have not read this program, we have printed a précis of the section of that bill which relates to Personal Injury Protection Coverage. In essence it means that no matter who is at fault, they collect a certain amount of money up to certain limits. I think I can state without fear of contradiction that the original Keaton-O'Connell plan as proposed by these two gentlemen contained certain sections that, if examined carefully, would shock the conscience of Adolph Hitler. But it points out that there is a real need for education. I have had occasion, because I have taken an interest in this, to speak at various Knife and Fork Clubs and luncheon groups on Keaton-O'Connell legislation, and the common theme that results from these speeches is, Why hasn't the Bar Association taken upon itself an education program at an earlier date? This is not a matter that only affects lawyers. It affects every citizen of the State of Nebraska and every citizen of this country.

For the young gentleman who was back here earlier who was opposed to any form of government intrusion on the rights of the poor and the rich and other people, I might add that the Department of Transportation of the federal government is currently preparing a report for Congress and for the President with certain recommendations with respect to automobile insurance and automobile reparation problems. And of course if we get a federal Automobile Insurance Bill, I submit that we may have problems. I can't predict that because I don't know what the report contains.

So at this time it is the recommendation of this committee that this Bar Association undertake immediately to educate its members by making available to them the various studies undertaken by the American Bar Association, The American Trial Lawyers Association, the Defense Research Institute, and other organizations, and by engaging in studies and meaningful discussions of the effect which these proposals will have on the general public and on the members of the Bar Association. I might add that I would hope that we could, perhaps by the mid-year meeting in 1971, get ourselves into a position where this Association can take an official position on automobile accident preparation. The American Bar Association has taken an official position, I think in either 1968 or '69, after long and careful study. I am not recommending that we adopt that, necessarily, but I think we should all examine it. I would have my recommendations to make right now except for the fact that I don't think I have the time to go into it carefully with you, and I don't think anyone here is necessarily prepared to take an official position at this time.

So you have the recommendation and, naturally, we recommend the continuation of this Special Committee.

SECRETARY TURNER: Could an article on that be written for the January issue of the Bar JOURNAL?

MR. BRUCKNER: I would be glad to do it.

SECRETARY TURNER: You're elected!

MR. BRUCKNER: It will be a biased article.

CHAIRMAN OVERCASH: You have heard the recommendation of Mr. Bruckner. It is included in the printed report. Is there a second for his motion?

CHARLES F. GOTCH, Omaha: I second the motion.

CHAIRMAN OVERCASH: Any discussion?

RICHARD A. KNUDSEN, Lincoln: Jim, could you tell us briefly what the American Bar's recommendation was?

MR. BRUCKNER: Basically to retain the present system of automobile accident reparation, and that is the "fault concept". We are dealing here with people who want to eliminate fault in automobile accident reparation; in other words, anybody collects who has an injury resulting from an automobile accident. Well, you really have that now if you have a substantial health and accident policy with disability provisions. You don't need it in your automobile. And, really, anyone collects.

The American Bar Association recommended the retention of the present system with recommendations for the adoption of comparative negligence statutes in various states. One of the problems that we have in many states and one of the reasons there is no reparation in many cases is that they will have a strict contributory negligence statute as opposed to our comparative negligence statute. I think Nebraskans can hold their heads rather high due to the fact that we seem to 'way out in front of the pack. The model system being recommended is that which has been adopted by the legislature of Wisconsin, but it is a comparative negligence statute. It just lets a few more people in. But basically they want it as it is now.

CHAIRMAN OVERCASH: Thank you.

MR. SVOBODA: May I ask, does the Bar Association have a prepared format talk? I was asked to give a talk on this subject but I didn't have the time to assemble it. Is there some format type of talk that could be published . . .

MR. BRUCKNER: George, I'll bet your office belongs to the Defense Research Institute. They have it. If you have anyone in your office belonging to the American Trial Lawyers Association, they have it.

That's why I am suggesting that this Association make these things available for *all* lawyers throughout the state. You can buy them for five bucks and I think it is a good investment for anyone here to make. I don't know that the American Bar Association has the materials. Al Schatz was writing for some of that and thus far hasn't received them. But these two organizations have published it and you have in those two organizations the view of the defense Bar and the view of the plaintiff's Bar, and they are quite similar.

CHAIRMAN OVERCASH: Any further questions? Are you ready for the question? Those in favor of the motion signify by saying "aye"; opposed the same. The motion is carried.

The report of the Committee follows:

REPORT OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATION

In 1965, Robert E. Keeton and Jeffrey O'Connell published "Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance." In essence, it provided for the elimination of the fault concept in automobile accident reparation. Initially, it did not receive wide acclaim. However, in the 1967 ses-

sion of the legislature of the Commonwealth of Massachusetts, a bill encompassing the entire proposal was passed by the House of Representatives as a substitute measure for an insurance reform proposal. Of major significance was the fact that the bill which was comprised of more than 600 pages had not received a committee hearing and was debated for less than one day on the floor of the House of Representatives prior to its passage. It was subsequently defeated by the Senate during that same session of the Massachusetts legislature. Nevertheless, the publicity which followed aroused editors and columnists throughout the country, many of whom endorsed the basic tenets of the proposal without having the benefit of meaningful debate. These editorialists aroused three of our major bar associations, the American Bar Association, the American Trial Lawyers Association and the Defense Research Institute and meaningful study and debate began fermenting within each of these and other bar associations. After lengthy and thorough consideration, these three major bar associations representing lawyers from every state in the union and the plaintiff, as well as the defense bar, all recommended retention of the present, time tested fault concept along with programs for improving the present system.

Public opinion polls conducted by the major pollsters in behalf of some of the major automobile insurance companies clearly indicated that the public preferred the retention of the present fault system.

Nevertheless, the advocates of no-fault automobile accident reparation continued their efforts. In the fall of 1968, it was rumored that a no-fault automobile accident program would be offered to the 1969 session of the Nebraska Unicameral. Hence, at the 1968 annual meeting of the Nebraska Bar Association the formation of this special committee was recommended by the Tort Section of the Nebraska Bar Association and approved by the House of Delegates as a watchdog for this type of legislation. The special committee was prepared to act, but it did not become necessary as a no-fault bill was not offered during the 1969 session of the Nebraska legislature.

However, it is quite apparent that the forces who favor the elimination of no-fault in automobile reparation are still hard at work.

In 1970, the Rockefeller-Stewart no-fault-no responsibility plan was introduced but received no action by the New York legislature. The Federal Department of Transportation has been studying the entire auto reparation and insurance system and has issued a series of preliminary reports. These are expected to culminate

soon, with a final recommendation by the Department of Transportation to the Congress and the President.

On August 13, 1970, Massachusetts adopted a "limited" no-fault plan when Massachusetts Governor, Francis W. Sargent, signed Senate Bill 1580 into law. The law goes into effect January 1, 1971.

The law adds an additional coverage to the customary Massachusetts compulsory automobile insurance, called "personal injury protection" coverage. Features of this coverage are (Section 2):

1. Persons insured:

- a. the named insured,
- b. members of his household,
- c. authorized operators, whether in the insured vehicle or injured by another vehicle which does not have personal injury protection coverage,
- d. passengers (including a "guest occupant"),
- e. pedestrians struck by the insured's motor vehicle

2. Persons excluded:

- a. persons entitled to workmen's compensation benefits,
- b. persons operating motor vehicles
 1. while under the influence of alcohol or narcotic drugs;
 2. while committing a felony or avoiding lawful apprehension or arrest;
 3. with the specific intent of causing injury or damage

3. Coverage: (benefits)

- a. medical and related expenses
 1. "necessary" and "reasonable"
 2. insured within two years
- b. "actual" lost wages and salary or "actual" diminution of earning power
- c. payments made to others for services the insured would have performed for himself or his household

4. Limits of Liability:

- a. \$2,000 per person (per accident)
- b. no aggregate limit

5. Territory:

That of the pre-existing compulsory law—on the ways of the Commonwealth and in any place to which the public has a right of access

6. No cause of action in tort, unless:

- a. a plaintiff in a motor vehicle accident may not recover in an action of tort for pain and suffering, unless the reasonable medical expenses exceed \$500, or unless the injury consists in
 - 1. death;
 - 2. loss of body members;
 - 3. "permanent and serious disfigurement";
 - 4. loss of sight or hearing, as defined in the workmen's compensation law; or
 - 5. a fracture

7. Exemption:

Owners, operators and occupants of a motor vehicle covered by personal injury protection benefits are exempt from liability to the extent of the benefits paid to anyone receiving such benefits pursuant to the coverage.

One of the advantages which the proponents of "no-fault" claim is a reduction in rates now being charged for automobile liability insurance. Most actuarial studies belie this claim. Nevertheless, in order to impress on the public that the new concept of insurance would result in a rate reduction, the Massachusetts legislature ordered an automatic 15% reduction in all automobile insurance rates as soon as the bill was signed into law by the Massachusetts Governor. This resulted in an announcement by several major automobile insurance carriers that they were ceasing insurance sales in the Commonwealth of Massachusetts. Hence, the Massachusetts law has thus far produced nothing but chaos.

Your committee is disturbed by the lack of communication and apparent lack of concern about the effect which the "no-fault con-

cept" would have upon the citizens of the State of Nebraska. It is our feeling that the basic injustices which are inherent in these plans would shock the conscience of the average citizen. Some of the members of the special committee have had the opportunity to speak to various civic groups concerning the proposals for no-fault automobile accident reparation, and it is generally apparent from these meetings that once the citizens are properly informed about the basic tenets of the proposals, they do not want them. It is also apparent that the citizens expect the lawyers, and in particular, our bar association to take the leadership in properly informing the general public of the dangers and the advantages, if any, of such a system.

In spite of the need for action on our part, the Nebraska State Bar Association, to our knowledge, has not taken upon itself the responsibility of informing the general public, the legislature, or for that matter, its own members about the various no-fault proposals.

Therefore, it is the recommendation of this committee, that the bar association undertake immediately to educate its members by making available to them the various studies undertaken by the American Bar Association, the American Trial Lawyers Association, the Defense Research Institute and other organizations, and by engaging in studies and meaningful discussions of the effect which these proposals will have on the general public and on the members of this bar association.

For obvious reasons, your committee also recommends the continuation of this special committee.

M. J. Bruckner, Chairman
Albert G. Schatz
Howard Tracy
Frank L. Winner

CHAIRMAN OVERCASH: Item 37, Report of Special Committee on Law Complex. Mr. Wilson was unable to be here today. Is there anyone else on his committee who desires to say anything?

THOMAS M. DAVIES: Mr. Chairman, I could just report to the group that this has been a very active committee and that it going into the legislature to try to get a new building for the University of Nebraska Law College. So the fact that Dick Wilson isn't here doesn't mean that it hasn't been an active committee.

I would like to say that your officers have met with representatives of the Supreme Court and with the University of Nebraska on this, and, in effect the University of Nebraska has said, "You

are not among our priorities, but if you want to organize your own legislative program and go in and establish yourself as a priority, we won't be against you." Don't you think that's what they said, Bill, in effect?

So if you gentlemen will help us and help our Legislative Committee when the times comes in the legislature, I think we can get a new Law School building. You are going to have to sit on your legislator. And here are some of the things that you should say. We'll get this ammunition to you. I don't know how much money we have spent in the State of Nebraska on medical education, and we just have a small percentage of those kids that stay in Nebraska. Creighton and the University of Nebraska Law Schools, I think we have at least 70 per cent or maybe higher from the University of Nebraska who stay in the state and go outstate and are in Lincoln and Omaha, and Creighton furnishes a very high percentage of the young lawyers that stay in Omaha. We've got to sell this to the legislature, that here they haven't put out a penny for the legal profession and now it is about time that they appropriate a paltry, and I say "paltry" because it is compared to what the medical profession has had, \$3-million or \$3.5-million that we need for a new building.

CHAIRMAN OVERCASH: I want to second what Tom just said. Bill and I were at the luncheon. The Chancellor invited a number of us to a luncheon and I thought we made a real strong case. Didn't you, Bill?

PRESIDENT BAIRD: I thought so.

CHAIRMAN OVERCASH: I thought we convinced him, too.

FRANK J. MATTOON, Sidney: I would like to ask one question. There have been a lot of rumors going around about the possible loss of accreditation of the Law School. Is there anything to that, or is this just rumor? Tom, do you happen to know?

MR. DAVIES: Well, I don't think it is immediate, but I think if we just let the thing limp along, yes, we'll be faced with it.

CHAIRMAN OVERCASH: It is wholly inadequate over there.

MR. MATTOON: This loss of accreditation kind of alarmed me a little bit.

CHAIRMAN OVERCASH: We'll proceed then with No. 38, Report of the Special Committee on Bar-News Media. Is there anyone here on that committee?

REPORT OF SPECIAL COMMITTEE ON BAR-NEWS MEDIA

James W. R. Brown

Mr. Chairman, Members of the House: Paul has asked me to give this report, and since this is a relatively new committee I thought I would give just a little bit of background.

In 1963 the American Bar Association entered upon a project to establish minimum standards for the administration of criminal justice. The first chairman of the central committee in charge of that project was Judge Lumbard of the Second Circuit, and then in 1968 it became Warren Burger, our present Chief Justice, and presently it is Judge Devitt of the United States District Court in Minnesota. This project covered the entire scope of the administration of criminal law, including standards for law enforcement agencies, prosecutors, defense counsel, pre-trial proceedings, trial proceedings, sentencing, appeals, and so forth.

To assist in that project there were seven advisory committees, and these advisory committees have submitted some 16 or 17 sets of standards for adoption by the American Bar, and many of them have been adopted.

One of these Advisory Committees was the Fair Trial and Free Press Committee. It was set up in 1964 and worked diligently and set up standards which were approved by the American Bar in its February 1968 meeting. The ABA also recommended that voluntary cooperation between the Bar and the media be initiated at the state level as means of protecting the rights of fair trial and free press. Pursuant to that recommendation, this Association appointed a committee of three in October of 1968. The Press Association also appointed three members and the Broadcasters Association three members. These nine committee members, or joint committee, worked together for more than a year and had a large number of meetings at which there was some very lively but serious discussions, and the result was that in January of this year we arrived at what we felt were acceptable guidelines that would accommodate the two constitutional rights that we are involved with, of fair trial and free speech and free press.

On January 30, 1970, the Broadcasters Association approved the guidelines. On April 17 the Press Association did likewise. And at the mid-year meeting, June 12, 1970, this Association approved those guidelines.

Now the media have been very, very interested in this project, and they are interested in not simply setting up the guidelines but implementing them and educating the people involved as to the

proper procedures. I think a rather tangible evidence of that interest is the fact that the WORLD HERALD published 4,000 sheets showing the guidelines in full, and 11,000 billfold type cards which summarize these.

The purpose of these billfold cards was this: It was to be sent to every lawyer, every law enforcement official, every county attorney, all of the news media personnel, so that they would be advised with respect to what are acceptable guidelines or acceptable procedures with respect to the reporting and disclosure of information relating to pending or imminently pending criminal litigation.

Our job then is not completed, at least in the committee's opinion, and as a part of the guidelines the committee recommended that there be established, and I will quote from the guidelines, "a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate, and make recommendations with respect to complaints and to seek to effect, through educational and other voluntary means, a proper accommodation of the constitutional correlative rights of free speech, free press, and fair trial."

My own feeling is that this was a Bar-initiated program. I feel that we are only part way done, and I think that it is very important that we carry on through in two respects. One of them is to educate ourselves and to help the news media educate their members with respect to what is proper procedures in these areas that may, for instance—and this has been suggested by the media representatives—hold an institute on this subject. I think in that kind of institute it would be a two-way learning process. I know my own experience has been this, that being exposed to the practical everyday problems that they have has helped me to be a little more practical and a little more realistic in developing guidelines for them to follow in the reporting and disclosure of these matters.

In accordance with that feeling, it was our committee's recommendation that the Association continue this committee to carry out the functions set out in the last paragraph of the guidelines, which I just read. I so move.

CHAIRMAN OVERCASH: Thank you very much, Mr. Brown. You have heard the motion. Is there a second?

THOMAS R. BURKE, Omaha: I second it.

CHAIRMAN OVERCASH: Is there any discussion?

HAROLD L. ROCK, Omaha: To avoid any problems with Mr. Moldenhauer's Committee on Law Economics, I would say, noticing on Page 23 in the recommendation the last two words call for a "free trial", and I think Mr. Moldenhauer might raise an objection to that.

CHAIRMAN OVERCASH: Is there any other discussion? The House members will recall that at the June session Mr. Douglas presented these conclusions that had been arrived at. They have been published and distributed. This was a very important and sensitive area of public relations, and I think the committee is to be congratulated for accomplishing a very fine job.

All in favor of the motion respond by saying "aye"; opposed "no". The motion is carried.

The report of the committee follows:

REPORT OF THE SPECIAL COMMITTEE ON BAR-NEWS MEDIA COMMITTEE

On October 30, 1968, the Nebraska State Bar Association with representation from the news and broadcasting media formed a joint engagement for the study of the standards relating to fair trial and free press. The Committee was composed of three members each from the Bar Association, the News Media, and the Broadcasters Association. The intent of the Committee was to explore the possibilities of agreeing upon voluntary guidelines for the application of the so-called Reardon Report to be used in Nebraska. Shortly thereafter the nine man committee met for the purpose of establishing our goals and our schedule.

Since our initial meeting the members of the Bar Association have met several times and the entire nine man committee has met on numerous occasions. A recommended voluntary guideline schedule was approved by the joint committee after a great deal of discussion and study. On January 30, 1970, the Nebraska Broadcasters Association had formally adopted the voluntary guidelines that the joint Committee had proposed. The action was taken by the Broadcaster's Board of Directors; approval was unanimous. On April 17, 1970, the Nebraska Press Association at its annual meeting formally adopted the Committee's voluntary guidelines. The action came without opposition. On June 12, 1970, the Nebraska Bar Association House of Delegates at the mid-year meeting unanimously approved the voluntary guidelines.

The Omaha World Herald is bearing the cost of printing an initial order of approximately 11,000 copies of the billfold-sized

fair trial-free press guidelines and approximately 4,000 copies of a letter-sized version. The card and the letter-sized will be distributed to all members of the Nebraska State Bar Association, Nebraska Press Association, Nebraska Broadcasters Association and to all law enforcement officers in this State.

The Committee has now completed all of its primary functions. It is the recommendation of the Committee as well as the recommendation of the joint Bar-News Media Committee that a permanent committee be retained to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive and re-evaluate and make recommendations with respect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional, correlative rights of free speech, free press, and free trial.

Therefore, this Committee recommends that the committee be continued in order to carry out the functions outlined above.

Paul L. Douglas, Chairman
James W. R. Brown
William G. Line

CHAIRMAN OVERCASH: I think we are now down to Item 41. We are getting to the Section reports. Is there any report of the Section on Practice and Procedure?

SECRETARY TURNER: Have we had 39?

CHAIRMAN OVERCASH: No, pardon me. No. 39, Report of Section on Real Estate, Probate and Trust Law. Mr. Simon!

REPORT OF SECTION ON REAL ESTATE, PROBATE AND TRUST LAW

Ray R. Simon

Mr. Chairman, Gentlemen: The undertaking of the Section on Real Estate, Probate and Trust Law was the program for our annual meeting. I think if you have examined the program you will note that it will actually have extreme interest to all members of the Bar, wherever they may practice.

The Chairman has time and again repeatedly today emphasized the fact that the Association should contribute to the lawyer, and I think this program will be of practical importance to every member of the Bar.

We are doing something a little different this year. We have solicited the assistance of all of the speakers in preparing, in instances, summaries of their remarks, in others actual instruments which relate to the topic which they are discussing.

I think it is proper at this juncture to say that the Section has had the assistance of the Committee on Continuing Education, Jerry Strasheim's committee. I think it is proper, too, to point out the significant aid we had from Gene Spence and Harold Rock.

I think that generally summarizes the activities of the Section. There is no additional standard this year proposed.

I might give you a prospective view of an area of significant importance with which this committee will be dealing, and I would think probably at the mid-year a report will be made, and that is the subject of the Uniform Probate Code. As you know, the American Bar Association last Fall approved of this Code. The desire is that it be adopted generally throughout the country, and undoubtedly the committee will have a recommendation to make at the mid-year meeting. I draw it to your attention simply because from time to time there have been various articles in the AMERICAN BAR JOURNAL, in the PRACTICAL LAWYER and in other periodicals on this subject, and you might give it attention the next time you see one.

CHAIRMAN OVERCASH: Thank you very much, Mr. Simon.

PRESIDENT BAIRD: Mr. Chairman, may I make one remark to supplement Ray's report. First, this Section has done a tremendous job in lining up what we think is a very interesting and valuable program tomorrow. Also, hopefully, if the DAILY RECORD works all night tonight, as they supposedly were doing last night, we will have a Real Estate Manual ready at the Registration Desk, which will be down on the main floor tomorrow morning, prepared by Nebraska lawyers and containing, I believe, eleven articles at this point, three more articles or four are at the printers but probably won't be printed tonight. The Manuals will be sold for \$10.00 at the direction of the Executive Council, \$5.00 to law students. I think you will find them a very valuable tool to those who do buy, and I hope we all will purchase. Our names will be taken and within the next few weeks the remaining three of four articles will be sent to us as soon as they are printed.

CHAIRMAN OVERCASH: Thank you.

GEORGE F. JOHNSON, Superior: Mr. Chairman, I have a question. Did the Section do anything about the new Probate Fee Schedule?

MR. SIMON: No, they did not. As a matter of fact, we didn't believe we had sufficient time. I notice Washington and Dodge County, for example, recently adopted a new schedule. We just were unable to correlate sufficiently to come back with any recommendation. We did examine the report of Mr. Moldenhauer's Committee, and generally it was thought to be acceptable.

CHAIRMAN OVERCASH: Ray, I think you have done a great job on this program. I had the unfortunate responsibility last year of being Chairman of a Section and putting on a program, and wait until you get that job, gentlemen! That takes some real time!

MR. SIMON: But it is pleasure when you've got a lot of help.

CHAIRMAN OVERCASH: It sure is!

We'll now proceed to Item 41, Section on Practice and Procedure. Is there a member of that Section here? Pass.

No. 42, Report of Section on Tort Law.

REPORT OF SECTION ON TORT LAW

Joseph P. Cashen

Gentlemen, this report will be short, of necessity, because very little was done.

I was interested in the remarks that he had with respect to having his Section have charge of the Bar program. Thanks a helluva lot!

First of all, the Tort Section during the last year hasn't been too active. We did review some of the materials on Law Economics and Law Office Management as far as setting up a relative values schedule, and in so doing it appeared that the relative values as assigned on a dollar basis were fairly well in line, and no revision was requested.

There was no action as far as the legislature was concerned, not being in session.

We have been informed by the Executive Council that the Tort Section will have charge of the 1971 annual meeting. We are at present time arranging for meetings in order to formalize plans in that connection and the specific areas covered. If there are any suggestions from any area of the Bar that would be appropriate, we would be more than happy to consider them and give them such consideration as they warrant. Thank you.

CHAIRMAN OVERCASH: I remember when this Section was suggested for the program next year, we knew we would have a good program because Joe would be in charge of it.

Item No. 43, Report of Section on Insurance, Banking, Corporate and Commercial Law—Mr. Haggart.

**REPORT OF SECTION ON INSURANCE,
BANKING, CORPORATE AND COMMERCIAL LAW**

Virgil Haggart, Jr.

What I have got written down here, George, probably won't sound at all like what I am going to say. I think our Section has the longest name, and I hope we've got the shortest report.

As Bert has already suggested, I think we spent ourself on last's year's program. The result has been that the Section has been relatively inactive this year.

The one suggestion which we have received only recently for Section consideration and action is a review of the 1969 Revision of the Model Business Corporation Act, which is a rather comprehensive revision. I can't claim that I know its contents in full, but I have leafed through the booklet, and it is thick. We would, I think, propose to review these revisions for the purpose of making any suggestions toward revision of our Nebraska Business Corporation Act to the 1973 session of the legislature so that we will have an opportunity to do the thing thoughtfully and thoroughly.

We have had consultation with Howard Moldenhauer's Committee on Legal Economics and Law Office Management. We have received one inquiry from the Connecticut Bar Association concerning a Corporate Practice and Form Manual, and we were pleased to advise them that there was no such thing in Nebraska.

I propose, sir, that Ralph E. Nelson of Lincoln and myself be renominated for a second term on the Executive Committee, if there is to be such. I am in a little bit of quandry knowing just what bylaws apply at the moment. I would hope to have a Section meeting shortly after the first of the year so that we can get out of our present state of lassitude and get back into operation again. Thank you.

CHAIRMAN OVERCASH: Thank you very much.

Item 44, Report of Young Lawyers Section.

REPORT OF YOUNG LAWYERS SECTION**Donald R. Treadway**

Mr. Chairman, Mr. President, Members of the House: The Young Lawyers Section annual meeting was held September 20 in Lincoln. There are six members of the Executive Committee of the Young Lawyers Section, of which one is elected by the Committee to act as Chairman. The Young Lawyers Section includes all members of the State Bar which have not reached their thirty-sixth birthday, with the exception of the members of the Executive Committee who were elected to the Executive Committee prior to their thirty-sixth birthday, of which I am one.

Two of the six members of the Executive Committee are elected each year for three-year terms. This year the Section elected Greg Beal of Ogallala and Steve Olson of Omaha to replace the outgoing members, who were Jeff Cheuvront of Lincoln and myself of Fullerton. I might insert here that the election was a spirited and competitive one. (Laughter)

Also at our annual meeting the Bylaws were amended substantially, I might add, to provide for elections by Districts or geographical areas. One district comprises Douglas-Sarpy Counties, one district comprises Lancaster County, and the third district comprises all other counties. Each district shall now be equally represented by having two lawyers from each of the three districts on the Executive Committee at all times. It is noted here that the State Bar representation is approximately in equal proportions to these three districts.

The Executive Committee elected Con Keating as the new Chairman for the succeeding year, and the committee now consists of Jeff Jacobsen of Kearney, Con Keating of Lincoln, both on their third year, Fred Kauffman of Lincoln, and Richard Hoch of Nebraska City and presently in the Governor's office in Lincoln, in their second year, and Greg Beal of Ogallala and Steve Olson of Omaha in their first year.

Each year the Section, in conjunction with the University of Nebraska College of Law, sponsors two programs, namely the Bridge-the-Gap program in June, and a September seminar on topics of interest in the even-numbered years, and a seminar on new legislation in the odd-numbered years.

Each of the Executive Committee has primary responsibility for one program during his three-year tenure.

The Bridge-the-Gap program was a two-day program in June held at the Nebraska Center for Continuing Education, with Con

Keating in charge. We had 62 young lawyers registered, which we consider very good, considering the large number of new lawyers going into the military service. A handbook of very practical use was given each of the new lawyers in attendance, which is always done and which we feel this handbook is of great help during their first years of practice.

The receipts totaled \$762.00. On disbursements, the Center use and meals totaled \$372.75, and printing and miscellaneous totaled \$395.66 for a deficit of only \$6.41. We try to go right by the board on the Bridge-the-Gap program.

On September 20 and 21 we and the University of Nebraska College of Law sponsored the seminar in Lincoln on expanding concepts of legal responsibility, which include such areas as new developments in products liability, suits against governmental entities, professional malpractice, truth in lending and consumer class action. We had 175 registered from 48 different towns throughout the state. The net profit to the State Bar, I might add, will probably be around \$700.00. I also might add, a total net profit of \$1,382.00 was turned over to the State Bar Association on the 1969 legislative seminar, at which we had a considerable representation throughout the state.

I represented the Young Lawyers Section of the Nebraska State Bar at the Section meeting of the American Bar in St. Louis on August 6 through August 10, which was immediately before the ABA regular meeting.

The New Legislation Program John Gradwohl and I chairmanned in September, 1969, was entered in the Award of Achievement competition in the Young Lawyers Section of the ABA and took third of three places in the Awards to Young Lawyers Sections of states under 3,000,000 population. Mississippi, with their Legal Aid program instituted after hurricane Camille, won first place, and that was an extremely good program, I thought. Iowa won second place with their Young Lawyers Section Newsletter.

I have had the pleasure of serving on the Public Relations Committee of the Young Lawyers Section of the American Bar Association during the past year.

Respectfully submitted,
Immediate Past Chairman
Executive Committee, Young
Lawyers Section

I move, Mr. Chairman, that this report be made a part of these proceedings. I would also like to yield the floor at this time, if I may, to Con Keating, the present Chairman, who has a proposal to make.

CHAIRMAN OVERCASH: That is fine.

CON M. KEATING, Lincoln: Mr. Chairman and Members of the House of Delegates: As this year's Chairman of the Young Lawyers Section I would like to make a motion at this time allowing the Young Lawyers Section of the Nebraska Bar Association to charge a \$2.00 membership fee for all members who are eligible as Young Lawyers. This probably will exclude Joe Cashen over here who just turned thirty-seven. But I would like to make this motion. If there is any discussion I will be glad to answer any questions and tell you why we need to have it.

CHAIRMAN OVERCASH: Con, is that the matter you wrote to me about?

MR. KEATING: Yes it is.

CHAIRMAN OVERCASH: This is a very active group of young lawyers and I think we ought to be proud of them.

Is there a second to the motion of Mr. Keating?

MR. TREADWAY: I'll second the motion.

CHAIRMAN OVERCASH: Any discussion?

GEORGE E. SVOBODA, Fremont: May I ask, will this be in addition to their regular Bar Association dues?

MR. KEATING: Yes, it would be. The reason that we have asked for this \$2.00—two reasons, I think, that are apparent that we want the \$2.00 for—we have some mailing problems that we would like to be able to pay for our mailing expenses right out of the Young Lawyers Section. Secondly, we seem to have a problem with the young lawyers of Nebraska identifying with the Young Lawyers Section as such, and I can't think of any better way to identify than having to pay \$2.00 for a membership. (Laughter)

However, we do have some thoughts as to things we would like to do in the future. And that is, I think the Young Lawyers can serve a real function, for instance, making some speeches in the high schools through the state. Being younger lawyers, not like the older members over thirty-six, I think possibly we identify better with the students in high school. We like to get people who are considered members of the Young Lawyers Section so we could call on them if somebody out in Ogallala or Gering asked us to assist them in maybe a Law Day program, speaking at a high school, something like this. This is the only reason we have asked that we have the \$2.00.

MR. SVOBODA: Would this be voluntary?

MR. KEATING: This would be voluntary.

MR. SVOBODA: I second the motion.

CHAIRMAN OVERCASH: I don't know of any problems under the reorganization that would prevent that, but I am not fully informed.

PRESIDENT BAIRD: Mr. Chairman, I noticed when this came up, under Section 8 of our new Rules under Fees it says, "Nothing herein contained shall be construed to limit the power of the Association, or of any of its Sections or Committees, to assess registration fees or attendance fees for meetings, institutes, or continuing legal education sessions, as may be approved or determined from time to time by the House of Delegates or the Executive Council."

CHAIRMAN OVERCASH: It is appropriate. Now are you ready for the question? All in favor signify by saying "aye"; opposed "no". I declare the motion carried and the group is authorized.

Mr. Turner suggests, and I think the record should show, that this fee or this charge is not a part of the resources and assets of the Association and will not be a part of our budget.

Item No. 45, Report of Nebraska State Bar Foundation. Anybody here to report?

SECRETARY TURNER: I believe, Mr. Chairman, that Mr. Wilson, who is President of the Foundation, intended the article which appeared in the October issue of the BAR JOURNAL to be in substance the report of the Foundation.

CHAIRMAN OVERCASH: We now get to the end of our program, close to the end of it. At this time I want to solicit every member of the House to bring up to the attention of the House any matter that you desire to have considered. Is there anything that has not been brought up that you wish brought up?

In this connection, I want to call to the attention of the House that under the new Rules of organization effective January 1, it will be necessary for certain committees to be appointed. I am not familiar with the Rules in detail. I haven't studied them. I suggest that each one of you study the Rules, and I also suggest in that connection that you write to me as to any particular committee or activity that you are particularly interested in. There will have to be some committees appointed and I assume that there will be a transition period when we will have to assemble some committees before the House meets again. We will gradually acclimate ourselves to the new Rules, and I think there should be some machinery established so that, effective January 1, the House can do whatever it is required to do under these Rules.

PRESIDENT BAIRD: Mr. Chairman, I think that is right and I would like to make a motion that the House authorize the Chairman of the House of Delegates to appoint such special committees as interim committees which the new Rules may call for the House of Delegates to appoint, give the authority to the Chairman to make such interim appointments pending the next meeting of the House, which will be next June. Does that cover it?

THOMAS DAVIES: I'll second that motion.

CHAIRMAN OVERCASH: Is there any discussion?

THOMAS R. BURKE, Omaha: Is the only thing, Bert, that you anticipate the naming of committees, or might there not be other action that would be required in the interim?

CHAIRMAN OVERCASH: Well, I don't know. I haven't studied the Rules, but I think it ought to be broad enough that we can do whatever we need to do. If you want to amend the motion and include any other action that the House may have to take, it would be agreeable to me.

PRESIDENT BAIRD: I do.

CHAIRMAN OVERCASH: Is that agreeable to you?

MR. DAVIES: Yes.

CHAIRMAN OVERCASH: In other words, gentlemen, we have asked for this responsibility and let's discharge it! We will meet again in June. At that time whatever committees I have to appoint, if this motion carries, I will appoint. At that time I will, however, ask the House to review those committees and to whatever extent the House should act on them, the House will act. But I think it will be important for us to be organized to do what we are supposed to do.

Is there any discussion of this? Those in favor of the motion signify by saying "aye"; opposed "no". The motion carried.

I want to urge each one of you to let me know what activity or parts of the program you are particularly interested in because I think we are going to have to enlist the services of the House as a whole.

George, is there any other matter to bring to the attention of the House?

SECRETARY TURNER: I think the President has a statement to make.

PRESIDENT BAIRD: Mr. Chairman, I apologize for talking so much. I will have to lay it to the prerogative of office, I guess. I simply would like to remind everyone that, as the program indicates, tomorrow noon at our annual Association luncheon we will be privileged to hear from the distinguished President-Elect of the American Bar Association, Mr. Leon Jaworski, and I know we will find his message of interest. So I urge you all to get your tickets and attend that.

Then at the annual banquet tomorrow night our speaker will be the well known humorist, the "Sage of Osage" from Osage, Iowa, Carl F. Conway, who was out here last in 1959 and had the audience in the aisles. I understand that he is even better now than he was, so I can guarantee it will not be a dull, deadly evening, at least from that point on, when I get through and he takes over. So I urge you to come to the banquet tomorrow night and bring your good wife.

SECRETARY TURNER: I would like to add to that, that I wish you would read your Program carefully as to the topic that Mr. Conway uses. It is "Estate Planning for the *Indigent*". One lawyer, upon looking at the Program, said "I don't think I'll go to the dinner because I don't think my wife is interested in estate planning." You remember, gentlemen, when he was here in 1959 his topic was "Trial Technique in Default Cases".

CHAIRMAN OVERCASH: Does anyone else have anything to suggest?

GEORGE E. SVOBODA, Fremont: I have to apologize also, but I don't have a good official reason like the President.

There's one thing that bothers me. We are going to have a mid-year meeting. I recall, being a new member, I was quite apprehensive about the fact that we didn't have a quorum for quite a long while.

CHAIRMAN OVERCASH: That's right.

MR. SVOBODA: Now that we have increased responsibilities, I don't know what the Chairman can do or officers can do, but there are people who come from all over the state, and some right from Omaha and Lincoln that don't, and some from as close as I from other districts that don't. Somehow if this point could be impressed upon these people to attend, not only have we increased responsibility, either by publishing their absence in the report today by name and to indicate "Your district was not represented" or some other means because I think we have a kind of challenge from the Supreme Court to have this House of Delegates take on added responsibilities, and if we don't show up at the mid-season

meeting and have a quorum come at 10:30 or 11:00 o'clock, it doesn't speak well for the House. I just make this comment so it will be in the record, and that those who are not here be urged by appropriate means to be here.

CHAIRMAN OVERCASH: George, I think that is very timely and, as Chairman, I will do what I can. I think I will get out a special letter, but I think each of you should make it a point *now*, you are the representative of the lawyers in your district, you should make it a point to communicate with them, inform them about the Bar program. You know, for several years now we have been going through a transition and a reorganization period and we have heard a lot of comments about "The Bar Association is run by the establishment." I wish you would go home with the thought that *you* are the establishment from now on.

Anything else?

ALFRED G. ELLICK, Omaha: Mr. Chairman, do the same members continue on the House of Delegates? There is no new election?

CHAIRMAN OVERCASH: Not that I know of.

SECRETARY TURNER: Not until next year. This year we had the even-numbered districts; next year we will elect in the odd-numbered districts. That is the present system. I will have to study the new Rules and Bylaws to see. There will be some difference.

MR. SVOBODA: Are we four-year members now or not, according to the Bylaws?

SECRETARY TURNER: No.

CHAIRMAN OVERCASH: I think in all fairness, gentlemen, we have got to face this: I don't think anybody should be a member of the House who doesn't care to assume responsibility. Now, I am not inviting any resignations, but I think we've got to get this membership on the basis that if you are a member of the House, you are willing to participate in it. It is not an honorary assignment. And in some way we have got to get to our members that this is a working job now, an important responsibility. You are the governing body of the Bar in many respects. The Executive Council is going to be an agent, to some extent, of this body. I think we've got to get home to all of our lawyers the status and the nature of this membership. I think if we do we can carry on this program that has been well started this year.

MR. BURKE: Bert, I would suggest to you, as Chairman, that in our next Attorney's Newsletter that goes out of Burton Berger's office that goes to the membership, those are the people you want to let know "the following districts were not represented at the annual meeting of the House of Delegates" and list the men who did not appear—unless they were in the hospital, or something, you know.

CHAIRMAN OVERCASH: Of course, there are some of them who are absent. I've had letters from some of them who couldn't be here for one reason or another, and we can't always be present. Nevertheless, in some fashion, we have got to bring it home to the lawyers that they were not represented at the meeting.

Is there anything further to come up?

SECRETARY TURNER: I would suggest that it might be dangerous to publish the districts not represented. There may have been members of the House come in after even the second roll call that I didn't get, and I would hate to stigmatize a fellow who was actually here by saying that he was not.

MR. BURKE: Then perhaps a statement that in the *future* such information will be made available.

SECRETARY TURNER: That would be all right.

RUSSELL E. LOVELL, Scottsbluff: Next time I would suggest that we have them sign a roster when they come in so we can be sure we get everybody.

SECRETARY TURNER: That isn't a bad idea!

MR. LOVELL: When I come from Scottsbluff and these fellows from Omaha and Lincoln can't make it, I think they should.

SECRETARY TURNER: Well, in the American Bar Association each member of the House of Delegates must sign in or his seat is considered vacant for that session. So I think perhaps you have the solution to it.

CHAIRMAN OVERCASH: I want to congratulate and thank each one of you. I think this has been a very interesting and profitable meeting. I don't remember in the years that I have been a member of the Association when so much has been really accomplished as in this last year. I hope that this is an indication that the Bar is going to move forward and accomplish what this House has been working for for several years and make the Bar Association more valuable to every member of the Bar.

If there is nothing else, I'll declare the meeting adjourned. There will be no further meeting of the House of Delegates at this meeting of the Association.

. . . The session adjourned at three forty-five o'clock . . .

NEBRASKA STATE BAR ASSOCIATION

THURSDAY MORNING SESSION

October 22, 1970

The opening session of the Seventy-First annual meeting of the Nebraska State Bar Association, convening in the Hilton Hotel, Omaha, Nebraska, was called to order at ten o'clock by President William J. Baird of Omaha.

PRESIDENT BAIRD: Gentlemen, may I call to order the Seventy-First meeting of the Nebraska State Bar Association.

As the first order of business may I ask you all to rise while we ask Dr. Reuben T. Swanson, President of the Nebraska Synod Lutheran Church of America of Omaha to give the invocation.

INVOCATION

Dr. Reuben T. Swanson

Let us bow our heads in prayer. Acknowledging, O God, that there can be no justice except by following Thy will, we pause to invoke Thy blessing.

Father God, as in yesterdays Thou didst declare to the Prophet Amos that justice should roll down like waters, we pray that You would help us to likewise declare and decree that there must be justice for all people. We confess that we have contaminated and adulterated it. We have trifled with it. Forgive us, O Lord, we pray.

We ask that this day as we deliberate concerning the affairs with which we are concerned, that Your will might be in our minds and that we might become sensitive to it. Help us to remember that under Your fatherhood there is a brotherhood among and between all peoples.

Give to us that sensitivity, that understanding that leads to the acceptance of all, regardless of their estate. We are grateful to You, O God, for our Country in which we can express our convictions, even to the point of dissent, where there is freedom that may ring true as long as we would preserve it by recognizing the rights of others.

So help us, O God, that we might this day sharpen our insights, perceive our responsibilities, and commit ourselves to the fulfillment of the truth and justice that You would have us fulfill. In Your holy name and for Your sake we pray. Amen.

PRESIDENT BAIRD: As the first order of business on the program this morning we are privileged to hear the Address of Welcome by Mr. Jack W. Marer, President of the Omaha Bar Association.

ADDRESS OF WELCOME

Jack W. Marer

Mr. President, and Gentlemen of the Association: Appearing here before you today follows the established practice for the President of the Omaha Bar Association to welcome you to Omaha and to these meetings. Since I am the current President of the Omaha Bar Association, this pleasant task is mine.

First, I would like to say we are all indebted to William J. Baird, President of the Association, for successfully moving the convention here to the new Omaha-Hilton. This was a monumental task, done at almost the last minute, since the Hotel officially opened only a month ago.

Based upon the promises made by my friend, Paul Gaeta, Executive Manager of this Hotel, to Mr. Baird, to me, and to others, we are sure you will enjoy your stay here in these beautiful and comfortable surroundings.

Since you met last year, the Omaha Bar Association has been engaged in a new and expanded program, with enlarged purposes which we hope will create an improved image for not only the lawyers in Omaha but for all of you.

On February 26, 1970, we amended the constitution of the Omaha Bar Association to broaden our purposes, responsibilities and duties and to become active in the area of social action. Since that time we have become deeply involved in many projects, and we have been called upon by the community to lead several important programs.

It would take far too long to tell you about all of them in detail, but I would like, Mr. President, to mention several because I believe they demonstrate there is a need in the general community for strong leadership in civic affairs. We believe lawyers are peculiarly and particularly trained and qualified to accept said responsibility.

On August 17, 1970, Police Officer Minard of the Omaha Police Department was killed in his line of duty as the result of an explosion. Seven other police officers were injured in that same unfortunate event. This city was aroused by this senseless act and it desired to respond for the family of Officer Minard. Under the leadership of the Omaha Bar Association, with the assistance of several other groups, the creation of the Minard Family Foundation was announced by us. We established the necessary tax-free corporation with which all of you are familiar, and provided all of the legal talent to do that without cost. As of this date there is in that trust fund a little over \$52,000 which will be used over the years for the support, maintenance, and education of the children of Officer Minard and for Mrs. Minard, as needed. The membership of the Omaha Bar Association, by resolution, has agreed to provide without charge all the necessary legal services for this Foundation so long as it remains in existence. We like to feel this community responded so magnificently, because the fund raising and the program were sponsored and led by the Omaha Bar Association and because of our continued interest in that trust. This is the response which I find in the many, many complimentary letters which I have received as President of the Omaha Bar Association for our activity in this program.

I am sure you have read since February 1, 1970, we instituted what is commonly called a pre-trial release program, whereby persons charged with crime may be released on their own recognizance by a judge upon the recommendation of our Association. This program is primarily funded by the United Community Services of Omaha, and a contribution by the Omaha Bar Association for this year. To carry the round-the-clock work, we have employed law students from Creighton University. The program has been successful and is being used more and more each day—and provides a sadly needed public service.

We have a lawyer referral service which is supported financially by the Omaha Bar Association. We have been asked to participate in a study of a regional community correctional center, more commonly referred to as a jail.

Recently we became involved in the proposed reorganization of the Separate Juvenile Court in Douglas County. A special committee was appointed to make that study. It produced an exhaustive and comprehensive report which has been given wide circulation.

Through the efforts of our Association, the Omaha WORLD HERALD now publishes on each Friday evening the decisions of the Nebraska Supreme Court filed that day.

We were about to enter into a public relations program to be funded by our Association and had actually received bids and suggested programs from ten public relations firms when Mr. Baird announced the selection of Mr. Berger as the Executive Director of the State Bar Association. Because of his employment and because of his proposed work, we decided to withhold our action in this area so that we could and would coordinate our efforts with the State Bar Association.

We agreed to provide to one of our high schools within the last few days courses in law, including the necessary preliminary education for the study of law, and to point out the importance in our daily lives of the need for law. This will require the services of about ten lawyers during the entire school year.

In a few days we will announce the results of a poll we conducted among all the lawyers in Omaha covering District and Municipal Judges who will be on the ballot in November for re-election. This referendum included the Clerk of the District Court. This referendum will express the preference of lawyers for these offices, and we sincerely hope the public will accept our recommendations, as they have done in the past.

Our activities have become so great and varied, we found it necessary to employ a lawyer on a part-time basis as our Executive Secretary, whose duties include the coordination of the efforts of thirteen standing committees and nine sections similar to the sections of the State Bar Association.

The new programs in which we are engaged are not the result of the efforts of any one person and did not come about quickly. Some of these were given impetus during the terms of my two predecessors, Seymour L. Smith and Ray McGrath, the two immediate Past Presidents of our Association. I have taken this time, Mr. President, to explain our goals because we believe what we do here in Omaha is for the benefit of all lawyers in Nebraska.

On August 10, 1970, Chief Justice Warren Burger presented to the annual meeting of the American Bar Association, held this year in St. Louis, a far-reaching program. He urged the speeding up of trials, both civil and criminal, in the Federal Courts and pointed out the unhappy and unfortunate results from trial delays. His program for the Federal Courts deserves our attention at the state level. In my official capacity I have found these to be focal points of criticism of our courts, our judicial system, and of lawyers generally.

While I have been serving as President of our Association I have come into contact with the general public in many ways and I have had the opportunity to listen, and I have made it a point

to listen. I regret to inform you I am shocked by the attitude of the average person toward our profession. I can only say bluntly *it is not good*. We must take affirmative steps promptly to turn around this opinion and to create confidence in the public in our profession.

It has been a pleasure to speak to you this morning on behalf of our Association. We hope you will enjoy the business sessions, and that our hospitality will be flowing with libation, with delectable food and with warm friendships.

PRESIDENT BAIRD: Thank you very much, Mr. President.

For the response it is my privilege to present one of our rising younger lawyers from the middle of the state, the son of a former President of this Association, Mr. Thomas W. Tye of Kearney.

RESPONSE

Thomas W. Tye

I would like first of all to thank the President for giving me the opportunity to respond to the wonderful words of welcome given to us this morning by Jack Marer. I had not talked with Jack about his comments and this was the first time I had heard them this morning, but it is very interesting to note that a few of the things I had to say I think are very pertinent to what Jack has talked about this morning.

When Bill called me and asked me to respond to the opening remarks this morning, I began scratching my head a little bit and thinking, "What is a response? What has been done in the past? What are my duties and functions in this particular area?"

So I started looking through the Nebraska LAW REVIEW to determine what previous responders had said, and it is quite interesting to note, Jack, particularly in your remarks this morning pertaining to Officer Minard and to your later remarks with reference to the general standing of law and order today, justice, lawyers, Bar associations, you know we have been talking about this for years. Back in 1939 and in 1943 the general topic of discussion with reference to those speakers of the Bar Association in those years was respect for law. In fact, in the Twenty-Second annual meeting of the Nebraska Bar Association back in 1921, if you will go back and look at your LAW REVIEW, there is a very interesting article or speech given by the Honorable Kimbrough Stone, who at that time was Judge of the United States Circuit Court of Appeals in Kansas City, Missouri. The topic of his discus-

sion was respect for law. Isn't it interesting that we have been talking about this since 1921, and look at the situation we are in today!

I do think, members of the Bar, that it is time we stopped talking about this and do something about it, as Jack has mentioned, and that the Omaha Bar Association is doing. As we all know, the members of the Bar Association have followed quite closely the activities of the Omaha Bar Association and in many cases have patterned some of the things that we have done in the State Bar Association after those things that have been accomplished by the Omaha Bar Association, and they should be commended for what they have done and the active programs that they have.

As Jack mentioned, we are here in new surroundings and new facilities, and this is most pleasant. On behalf of the lawyers of the State of Nebraska I commend the Omaha Bar Association for offering us this fine facility here in Omaha where we can meet in very comfortable surroundings. I assure you, from being here yesterday and last night, that the food is good, and those things that go with it are also exceptional.

I would like, then, on behalf of the Bar Association to thank the Omaha Bar Association for their fine hospitality. I am sure it will be exceptional, as usual. I am sure that most of you will attend this evening for cocktails, sponsored by the Omaha lawyers, which I believe is in your program.

I leave you with this one last thought, if I may: In the 1921 article of LAW REVIEW when Judge Stone was talking about respect for law, he stated as follows: "Civilization cannot exist without law. Law is useless unless actively effective. The great agency which makes law effective is a Republic and its respect for law is by everyone. There now exists in this country the need to *enforce* respect for law."

I charge you with this, and ask that our Association continue with these efforts individually, as well as an Association.

PRESIDENT BAIRD: The next item on the program is the Address of the President.

ADDRESS OF THE PRESIDENT

William J. Baird

This presentation is required by Article I, Section 3, of the present Bylaws. Our new amended Rules and Bylaws which will take effect January 1, 1971, completely eliminate this customary practice. I prefer to think that the fact the Rules were changed in this respect following *my* President's speech is but sheer coincidence.

My conception of the purpose of an address by the outgoing President is to apprise the membership of what, if any, changes have taken place during the year so far as concerns Association affairs. I would, therefore, like to discuss briefly with you the areas in which the officers feel our Association has taken substantial strides forward, then suggest some areas where improvements can definitely be made.

One of the most important innovations which has taken place has been the appointment of an Executive Director. This is a culmination of efforts which began in 1967 when a special committee was appointed to investigate the desirability of creating such a position. The study was undertaken with no thought of replacing or curtailing the duties and responsibilities of our Secretary-Treasurer, but rather with a view to determining whether or not it would be feasible to create the new position in order to supplement those duties and responsibilities and to develop programs and activities on behalf of the Association which simply cannot be undertaken by the Secretary-Treasurer in his dual capacity as Clerk of our Supreme Court.

I would like to digress a moment at this point to pay tribute to the invaluable assistance I have received all year from George Turner. I share the feelings of past Presidents for the last thirty-five years or so, that the task of heading the Nebraska Bar Association would be made immeasurably more difficult were it not for the great wealth of knowledge and experience possessed by George which he freely makes available to each President.

After an exhaustive study the special committee unanimously recommended that the post of Executive Director be created and filled, and that separate quarters be obtained for the office. The House of Delegates in the succeeding two years accepted and approved the recommendation and urged the Executive Council to implement it by taking action, with the result that effective last January 1, Burton E. Berger was employed on a full-time basis with new quarters established for the Executive Director at 1019 Sharp Building in Lincoln.

The assumption of the additional financial obligations incurred by the Association as the result of this step inevitably involved a close scrutiny of our financial resources in order to determine what could be accomplished. To that end, the House of Delegates at the annual meeting one year ago directed the Chairman of the House to appoint a special committee to work with a committee of the Executive Council with a view to adopting, for the first time in history, an honest-to-goodness, realistic budget which would pro-

vide for the expenses of the office of the Executive Director and which would eliminate any expenditures made in the past considered unnecessary.

This special committee diligently undertook its assignment and proceeded on the premise of attempting to formulate a budget which would accomplish the desired objectives within the limits of our existing dues structure. Complete and detailed information was furnished the Committee as to past expenses for annual meetings, American Bar Association meetings, and all other facets of the Association's activities. A thorough study of the problem made it apparent that even after paring a considerable number of expenditures customarily made in the past, the income generated by our \$30.00 - \$15.00 - \$5.00 per year dues simply did not produce sufficient funds to make possible the continuation of those present activities of the Association deemed essential and the introduction of those new and expanded facilities and activities deemed desirable.

The special committee, therefore, produced a proposed budget for the House of Delegates which was predicated upon a new dues schedule of \$50.00 - \$25.00 - \$10.00 per year, and the House of Delegates at its Mid-Year meeting last June unanimously approved it and recommended its adoption by the Executive Council. The Council, in turn, unanimously adopted the budget to become effective in 1971, provided the necessary approval of the increase was obtained.

This situation posed a somewhat formidable problem. Being a Bar Association integrated by Rule of Court, any change in the dues structure could only be effected with the approval of our Supreme Court which feels that the decision should not be made without the membership first having the opportunity to express its feelings. The conclusion was therefore reached by the Council that the monumental task be undertaken of presenting Petitions to the entire active membership of over 2,500 members whereby each could signify his consent to the proposed increase by signing a Petition, or signify his disapproval by refusing to sign. I would like to publicly express at this point my deep appreciation to the countless number of Nebraska Lawyers throughout the State, too numerous to attempt to mention by name, who devoted untold hours of tedious labor in circulating the Petitions throughout the membership. I would be remiss if I did not formally acknowledge here my special indebtedness to Tom Davies, our President-Elect, who willingly assumed the onerous burden of organizing and conducting our Petition drive.

The success of this cumulative effort is manifest in the result. Approving signatures of over 62 per cent of the active members

residing in Nebraska were obtained. The Petitions, together with a motion for approval, were filed with the Court which directed that the matter be formally presented to the Court sitting in special session after notice to all members of the opportunity to be heard. The hearing was held October 13, just nine days ago, and I am most pleased to be able to report that on October 19, just the day before yesterday, I received official notification that the Court has approved our new dues structure, commencing next year.

Of equal significance to the future of our Association is the result of the efforts of the last three years of the Special Committee on Reorganization which culminated in a completely revised set of Rules for the Nebraska Bar Association being presented to the Supreme Court at the October 13 hearing, together with a Petition filed on behalf of the Association requesting their adoption.

We have been an integrated Bar since September 20, 1937, and have operated quite efficiently under the original Rules. However, it was felt that after the lapse of over thirty years a thorough examination should be undertaken. The fruits of the labors of the Reorganization Committee were not to effect drastic changes in the internal structure of the Association, but they do have the effect of placing more authority and responsibility in the hands of the House of Delegates, the elected representatives of the membership. They also provide for strict budgetary controls and for the office of Executive Director, matters previously discussed.

The result of the October 13 hearing on the proposed Revised Rules was that the Court suggested several changes which, not surprisingly, were readily acceded to by the Committee.

I am, therefore, equally pleased to be able to report to you at this time that the amended Rules, with such changes, have been adopted by the Court, and they too will become effective January 1, 1971.

To continue on the plus side of the ledger so far as Association affairs for the past year are concerned, I should mention that in February the Court granted the Association's request to adopt as the guidelines governing the conduct of Nebraska lawyers the American Bar Association's new Code of Professional Responsibility replacing the old Canons of Professional Ethics. This was accomplished following another formal hearing before the Court in special session, after notice to all members with opportunity to be heard. At the same time, and after the same procedure, the Court adopted a new Rule requested by the Association permitting Nebraska lawyers to take advantage of the then recently enacted Nebraska Professional Corporations Act, and to incorporate their law practice, if they choose, within the confines and limits prescribed by the Rule.

Before leaving the subject of the Court I should like to state that we are indebted to it for permitting the officers of the Association to inaugurate a practice which, to my knowledge, has never been used before in our Bar. That practice is to request and hold an informal meeting with the members of the Court when Association problems arise in which the Bench and Bar are mutually interested, and which can be freely and properly discussed and the guidance and counsel of the Court solicited. This happened upon two different occasions this year, and while certainly care must be exercised so as not to take advantage, I commend the continuation of the practice to future officers of the Association in the interests of achieving closer and even more harmonious relationship within our integrated Bar.

One of the pleasant aspects of assuming the Presidency of the Association for this year of 1970 has been that by sheer coincidence several projects, such as the Special Reorganization Committee's project, which represent the ingenuity and efforts of Presidents serving the past few years, ripened into fruition this year so that I can stand up here now and take the credit for them.

One such project was the result of the efforts of a special committee created several years ago called the Bar-News Media Committee. It was composed of representatives of the Bar Association, of the news media, and the Broadcasters Association, and its purpose was to investigate the possibilities of applying in Nebraska the principles of the Reardon Report. After two years of intensive study and numerous joint meetings, the Committee evolved a set of Voluntary Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. These Guidelines have been unanimously adopted by each of the three Associations concerned, and wallet-sized copies furnished the members of each group as well as all law enforcement officers. This represents an excellent step forward in the direction of better administration of justice.

Another special committee was created during the year to deal with a subject of extreme interest and importance to the lawyers of Nebraska. This is the Special Committee on a New Law Complex for the University of Nebraska. The patent inadequacies of the present antiquated physical plant of the Nebraska Law College have long been recognized and have been the subject of discussion and recommendations for several years in the reports of our Committee on Cooperation with Law Schools and on Admission to Practice. The need for new facilities is so vital the Executive Council concluded it warranted the creation of a Special Committee to devote itself exclusively to working toward the desired objective. While this is, of necessity, an extremely complicated, long-range

project, when it is finally completed successfully it will be to the credit of the Bar Association to have had an active part in the drive to finally achieve this much-needed improvement to the State University's facility for educating and training future lawyers.

Finally, a Special Insurance Committee has recently been appointed at the direction of the Executive Council to make a thorough investigation of the present insurance programs of the Association. This Committee is diligently proceeding to perform its function and has already taken a poll of our membership as to preferences toward expanded coverage in all phases of our present program. I confidently expect that the results of the efforts of this Committee and the recommendations which will be made will be a substantial benefit to each of us.

This, then, constitutes a brief resume of some of the areas in which we feel our Bar Association has made progress during the past year. Much remains to be done by the organized Bar in making it a more effective force for the correction of defects in our present administration of justice process. The machinery by which our laws are administered, especially our Court system, is under attack today as never before in the history of this country. A certain amount of this criticism appears to be justified.

Chief Justice Burger, in his address opening the Annual Meeting of the American Bar Association in St. Louis last August, pointed this up most graphically when he said, "In this supermarket age we are like a merchant trying to operate a cracker barrel corner grocery store with the methods and equipment of 1900." He went on to point out what was wrong with our legal machinery and made a number of remedial suggestions.

Some of the most glaring defects mentioned by the Chief Justice, such as the clogged dockets in our Court System, are, fortunately, not particularly applicable to our situation in Nebraska today. Nonetheless, we as lawyers must continuously strive to bring about constructive changes and improvements in our system to meet the challenges posed by the complexities of modern-day society. A specific example of a worthwhile innovation, as was mentioned by Mr. Marer, is the pre-trial release program just introduced into the Municipal Court of Omaha and the District Court of Douglas County under sponsorship of the Omaha Bar Association. The program involves the release of persons accused of certain crimes on their own recognizance after a careful check is made and reported to the Court, which satisfies itself that the circumstances warrant such a release. I suggest that consideration be given by our State Bar Association to the possibility of assigning to a present committee or to a new special committee the task of exploring the situ-

ation with a view to ascertaining whether or not such a project should be undertaken at the state-wide level by the Association.

There is presently pending in the Senate a Bill (S.3936) to give effect to the Sixth Amendment right to a speedy trial for persons charged with offenses against the United States, and to reduce the danger of recidivism by strengthening the supervision over persons released on bail, probation or parole. Such a committee as I suggest for us might well include in its investigation a study of the need for similar legislation in this State with respect to Section 13 of the Bill of Rights of our State Constitution guaranteeing the right to trial without unreasonable delay.

Turning now to our internal affairs, I think the operation of our disciplinary machinery can and should be improved. An exhaustive report on this subject has recently been released by the Special Committee on Evaluation of Disciplinary Enforcement of the American Bar Association. It is gratifying to note that compared with a large number of our sister states many of the criticisms leveled in this report are not applicable to our disciplinary rules. For example, many disciplinary agencies have no subpoena powers or authority to compel testimony of witnesses and respondents. Our Rules do provide this power.

At the same time, a number of the shortcomings pointed out by the report are prevalent here. One of the most glaring is the failure of the disciplinary agency to take the initiative in instituting complaints against lawyers for unethical conduct. Under our Rules, the Committee on Inquiry in each of the twenty-one District Court Judicial Districts must first handle all complaints of unprofessional conduct made against a member of the Association. For the most part this function of the local Committees on Inquiry is performed adequately. But the same Section 3 of Article XI of the Rules makes it *mandatory* upon the Committee to undertake the necessary investigation, even though no complaint has been filed, where the Committee "has information of conduct appearing to be unprofessional".

I think it is here that we can stand considerable improvement. The effective policing of our own ranks is possibly the most important method by which we can combat the unfortunate image of the legal profession held by too large a segment of the public. Yet too often the complaint is heard even among our own lawyers that the local committee will not do anything about activating the disciplinary machinery against a lawyer whose conduct in a given matter is widely suspected or believed to have been unethical. I, therefore, urge all of us who are charged with the responsibility of serving on these Committees to re-examine the duties which are

thereby imposed, and to have the courage to act, however distasteful it may be, when circumstances call for investigatory action to be taken. It is not a fair burden to impose on an individual lawyer to say that he should take the initiative and file a complaint against his colleague. It is the responsibility of the group of lawyers comprising the Committee on Inquiry, in their official capacity, to take that initiative.

Finally, I would like to urge that continued efforts be made to effect a better liaison between the State Association and the district and local Associations throughout the State. Excellent progress has been made in this direction during the past year as the result of the fine cooperation and assistance given by the regional Associations in connection with the dues Petitions. I hope I am not assuming too much when I offer the opinion that a feeling of renewed interest in Association affairs is beginning to take shape throughout our membership, and this is a most healthy and desirable sign. The more of us who will participate actively, the stronger will be our Association and, in turn, the greater benefits will thereby be reaped by each of us as members.

This, gentlemen, concludes my report. I would like to say it has been a real privilege to serve as President of the Nebraska Bar Association this year, and I thank you for it.

Next item on the program is the Report of our Secretary-Treasurer, George H. Turner.

REPORT OF THE SECRETARY-TREASURER

George H. Turner

Mr. President and Members of the Association: The books of the Association were audited as of the close of the fiscal year, August 31, showing an excess of receipts over disbursements of approximately \$3,000. The Association as of now is in good financial condition, and the full detailed audit will be published in the proceedings of this annual meeting.

In conclusion, I wish to announce the designation of new Officers of the Association made by the Executive Council. Announcement was mailed out to the full membership. No opposing candidates filed for the office of President-Elect, who is James A. Lane of Ogallala, or for Member-at-Large of the Executive Council, who is A. C. Sidner of Fremont.

PRESIDENT BAIRD: The next item on the program is the Report of the Executive Council, which will be brief.

This is another procedural item which will be eliminated by the revised rules, namely the Report of the Executive Council.

REPORT OF THE EXECUTIVE COUNCIL

Since virtually all the results reported by the President in his Address have been processed through the Council, a separate report of its activities is about as essential as an appendix.

However, it does give me the opportunity to formally express my indebtedness to the thirteen members of the Council who have unfailingly responded to their responsibilities during the past year. The Council met officially a total of five different times, twice in Omaha, twice in Lincoln, and once in Grand Island. Notwithstanding that the members must come from all corners of this State, the attendance was 100 per cent for at least three of these meetings, which is a good indication of the sacrifice made and the dedication to the job given by the members of this Council.

In addition to the formal meetings, on several occasions the Council was polled either by telephone or mail when issues arose which had to be handled prior to the next meeting. The average one of us who has not served on the Council has no conception of the number and variety of problems which must be considered and disposed of by this body. Even though certain of its responsibilities under the new revised Rules will be vested in the House of Delegates, the Executive Council, as the administrative and executive organ of the Association, will continue to be the group on which will depend whether or not the operations of the Association function smoothly and efficiently.

That constitutes the Report of the Executive Council.

Next I would like to call on a past President of this Association, Mr. John J. Wilson of Lincoln, to report on the American Bar Association.

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

It is a pleasure to report the activities of the American Bar Association of the past year. It is impossible at this time to take your time to give all of the steps and the matters that were prepared by different members of the lawyers of the United States and reported on at the St. Louis meeting.

Everybody thought that St. Louis would be a very difficult city to have a meeting in August. The temperature was hot, but I was informed by the Registration Desk that the largest membership registration of the American Bar Association was had in St. Louis in August. So that shows the interest of the lawyers attending this

National meeting. Heat, location, made no difference. The next meeting of the American Bar Association will be held partially in New York City and, when that meeting adjourns, it will be renewed in London. There are a lot of big plans made for that meeting, or both meetings, and I think anyone who is interested should now make up their mind as to whether or not they are going because reservation of hotels is necessary, and if you want to go you must make up your mind now or you will be refused admission or registration.

The new officers of the American Bar Association are Edward L. Wright of Little Rock, Arkansas as President, Mr. Leon Jaworski of Houston, Texas, who will address you this noon, and William A. Spawn of Atlanta, Georgia, as Chairman of the House of Delegates.

The House of Delegates voted unanimously to adopt the recommendations of a Lawyer Disciplinary Enforcement. That has been a committee study by past presidents and active members of the American Bar Association. They have done a magnificent job. The report will be available in the issue of the American Bar Association JOURNAL, and all of us should read it.

The House adopted three additional Standards for Administration of Criminal Justice. This is another committee that has worked diligently over the years trying to bring the administration of criminal justice forward.

It has just been recently announced that Attorney General Mitchell has accepted the offer of the ABA to report in advance its opinion of professional qualifications for candidates of the Supreme Court of the United States. Heretofore, the President has made his announcement without any recommendation or study by the committee who reports on Circuit Judges and District Judges. But now there will be a secret poll taken by this committee. No announcement will be made. The report will be made back to Attorney General Mitchell and he, in turn, will report to the President, and maybe we will get away from some of the criticism that has been raised by lawyers over the political appointment made to the Supreme Court of the United States.

There were two changes in the Constitution which might be of interest. One is to enable law students to elect their *own* delegates to the House of Delegates. Another one was to discontinue the endorsement of a membership application by a member of the ABA. Now any member entitled to practice law can send in his own application without the endorsement of a member of the ABA.

The Uniform Laws Committee had five proposals before the House of Delegates. One was amendments of the Consumer Credit

Code, which were adopted. The other four were all deferred. The Uniform Consumer Sales Practice Act, Uniform Divorce and Marriage Code, and that, incidentally, has been under study since the first meeting of the Uniform Laws Commission in 1890. They came up with a uniform bill which may have difficulty in ever receiving approval because of the differences in the fifty states, and that was deferred until the February meeting. The Uniform Jury Selection and Service Act was deferred, and the Uniform Control of Dangerous Substances Act was deferred.

Gentlemen, it has been a pleasure to represent you at the American Bar Association, and I am sure your new representative will have the same pleasure and will do you a good job. I say, again, I appreciate the opportunity for thirteen years of being a member of the House of Delegates by action of this Association.

PRESIDENT BAIRD: Thank you, Jack, for a very interesting report, and I would like to express to you on behalf of the Nebraska State Bar Association our appreciation at the pride that we take and the credit which you have reflected on our Association in serving us so well as our representative to the ABA.

I will call next for the report of the House of Delegates, and to give that I'll call upon our hard-working Chairman of the House, Bert L. Overcash of Lincoln.

REPORT OF HOUSE OF DELEGATES

Bert L. Overcash

On behalf of the House of Delegates I want to thank and congratulate President Baird on the many accomplishments of his term as President. He and the members of the Executive Council have given the House of Delegates every possible cooperation and assistance.

The many important accomplishments of this Association during the past year, as reported to you by our President, involve matters actively supported and promoted by the House of Delegates.

It is the conviction of the House that we now have a fully democratic organization with adequate means and facilities to carry on the program of this Association. The House has sought the increased responsibilities under the reorganization, and the members at the meeting yesterday indicated that they mean to discharge those responsibilities.

I think it appropriate to remind all of you to work with and through your respective House members in increasing the effectiveness of our organization.

As reflected in the printed committee and section reports, the House yesterday examined all facets of problems facing the members of this Association. I shall not review the substance of these reports. They encompass the economics of the practice of law, the machinery and resources to provide legal aid, measures to protect the public interest, and provision for technical assistance to the practicing lawyer.

Among the activities reported to the House is the development of a comprehensive package insurance program which will be available to the members of the Association. A particularly satisfying development has been the activities of the Young Lawyers Section of the Bar, and the interest and enthusiasm which they have engendered in Bar matters.

In the area of legal aid, the House, after considerable discussion, decided to support state legislative measures that will permit this Association and its members to operate this program and avoid a federal take-over in this field.

The House approved the recommendation of the Judiciary Committee that proposed Constitutional Amendment No. 4, permitting the assignment of retired judges to temporary duty, be supported by this Association.

The House anticipates that the next session of the legislature will face many questions relating to the administration of justice, particularly if constitutional amendments are passed pertaining to judicial reorganization. In this area the Bar has distinct and unique public responsibilities and competence, and we intend actively to participate in the consideration and resolution of these matters.

All of us realize that we are living in troublesome and changing times. Our Association is undergoing a transformation designed to modernize and bring up to date the facilities and machinery for administering justice. I am sure this program will have the support of the members of this Association, and the House of Delegates realizes that it will have a large part in making this program a success.

PRESIDENT BAIRD: Gentlemen, one of the nicest customary practices we have at this opening session of the annual meeting was inadvertently overlooked by the printer, but we are nonetheless certainly going to go through with it. This is the presentation of Certificates of Award to those distinguished members of our Association who have withstood the rigors of this practice of law for fifty years. We have this year sixteen such members, and I would like to read their names to you, and then later we will ask them to come forward, those who are present.

Those who are the recipients of this honor this year: Mr. B. H. Bracken of Minden

Judge Robert C. Brower, a former Justice of our Supreme Court, Lincoln

Bayard T. Clark of Falls City
Arthur J. Denney of Fairbury
George A. Farman, Jr., Ainsworth
Thomas A. Hepperlen, Lincoln
Orren E. Jerner, Lincoln
Samuel M. Kier, Lincoln
W. H. Line, Loup City
Edward K. McDermott, Omaha
William P. Mullen, Grand Island
John L. Riddell, York
Victor E. Spittler, Omaha
Phillip F. Verzani, Ponca
Elmer F. Witte, Pawnee City
John O. Yeiser, Jr., now of Grand Pass, Oregon

Will those of you gentlemen who are present please come forward and to my left over here and I will ask Tom Davies, our President-Elect, to lead you to the rostrum so we can make a presentation. Meanwhile, while you are, I would like to read what this Certificate says:

This is to certify that Robert C. Brower, (in this case) has been admitted to the practice of law before the Supreme Court of Nebraska for more than fifty years. This certificate is issued by authority of the Executive Council of the Nebraska State Bar Association in recognition of the recipient's long and faithful service as a lawyer. Witness the signatures hereunto affixed, dated this Twenty-Second Day of October, 1970, and signed by the President and Secretary.

Tom, will you bring our honorees forward.

Mr. Brower, it is an honor. (Applause)

It is a real pleasure to present this certificate to Judge Brower, and I would be happy to turn over to you the microphone.

JUDGE ROBERT C. BROWER: Well, I hadn't prepared anything to say. I appreciate this honor.

I was listening to the remarks of the President and of the other officers at the opening of this session, and I was thinking over the fifty years and what a tremendous improvement has been made on the Bar of Nebraska largely through the offices of this Associ-

ation, and I note that they intend to make further improvements, and it will always be necessary that certain improvements be made as we go along.

I thank you very much for this honor, and I assure you that it will not be necessary to take the time of this Association to confer an honor in the *next* fifty years.

MR. DAVIES: Mr. President, Mr. Bayard T. Clark.

PRESIDENT BAIRD: It is a pleasure to present to Mr. Bayard T. Clark his certificate, and I will also ask him to give us some words of wisdom from the depths of your experience.

BAYARD T. CLARK: Gentlemen, I certainly do appreciate the honor bestowed on me as a Fifty-Year member. I want to say that I have enjoyed the practice of law throughout the fifty years that I have had the privilege of doing it.

I also want to again remind the members of the Bar that I don't know of any group of people or any profession who really get along better than the members of the Bar. I hear the doctors fighting, I hear others fighting, but we as members of the Bar get along. We fight *other* people's battles, but we get along ourselves. How many time have I been in court and fight like the devil for our clients, but when the session is over we go over to the hotel or some other place and have coffee and we just get along wonderful.

I hope for future management of the Bar that they have learned something from this, from what I am telling you, and I hope that all members of the Bar from now on, as they have in the past, get along. Fight the other fellow's battles but, for God's sake, get along yourselves! (Applause)

MR. DAVIES: Mr. President, Mr. George A. Farman, Jr.

PRESIDENT BAIRD: It is a pleasure to present to Mr. Farman your certificate.

GEORGE A. FARMAN: I appreciate this honor the same as the others that are receiving it today. I never thought I would reach it, but I guess youth prevailed.

MR. DAVIES: Mr. President, Mr. W. H. Line.

PRESIDENT BAIRD: It is a pleasure to present to Mr. Line his certificate. Would you care to use the facility, sir? We would be glad to hear any words of wisdom, or otherwise.

W. H. LINE: I am afraid I am lacking in that. I appreciate the honor, the same as the others, and thank you very much.

PRESIDENT BAIRD: Thank you, sir. It is a pleasure.

MR. DAVIES: Mr. William P. Mullen.

PRESIDENT BAIRD: All these gentlemen coming here seem so young. If I ever make fifty years of practice I'm sure I won't look like they do. It is a pleasure to present to Mr. William P. Mullen his certificate.

WILLIAM P. MULLEN: Thank you very much. Sometimes you don't know exactly who to thank. I have had several serious illnesses, and I am still apparently in fairly good shape. So I think I would have to thank the Lord and thank my wife for pulling me through all of them. The one thing that I always felt deeply grateful for was that when I was a young man a lot of the older lawyers gave me a lot of assistance and aided me along the way. I think that is one thing that older lawers should do more often, tell younger lawyers a few of the tricks of the trade. I thank you very much.

PRESIDENT BAIRD: Thank you, sir.

I will now call for the report of the Judicial Council, and it is a pleasure to present a long-time Justice of our Nebraska Supreme Court, the Honorable Edward F. Carter to make his report.

REPORT OF JUDICIAL COUNCIL

Honorable Edward F. Carter

The Judicial Council has met from time to time throughout the year as its work demanded. The attendance of its fourteen members has been excellent and absences have been noted only when important business commitments could not be put off. The dedication of our members to the work of the Council has been outstanding and has resulted in the participation of all members in all matters that have been before it.

The work of the Council covers such a broad field that it is almost impossible to discuss the range of its activities in a manner that would be of any real benefit to this group. Most of our work is assigned to subcommittees who do the research and report its findings to regularly called sessions of the Council. This method of handling has tended to fix responsibility for getting the work done and to bring out the precise question being considered. We have on occasion appointed non-member lawyers to serve on these subcommittees, particularly lawyers experienced in the area being considered. We have never had a lawyer refuse such an assignment and all have made contributions to the success of the Council in making a proper disposition of its work.

The travel expenses of the members of the Council are paid by this Association. Such expenses have been paid only to those members who travel long distances to attend our meetings. No member

is paid for the work that he does; in other words, the work is a contribution to the profession of the law and the proper administration of justice in this State.

The Judicial Council was established by rule of the Supreme Court in 1939. The first meeting was held on November 11, 1939. It is interesting to note the membership of the Council at its first meeting as shown by its minutes: L. J. TePoel, Loren H. Laughlin, E. F. Carter, Robert R. Moodie, H. G. Wellensiek, Cloyde B. Ellis, Fred T. Hanson, J. Leonard Tewell, H. L. Blackledge, and Robert R. Hastings. Dean L. J. TePoel was elected Chairman and Loren H. Laughlin, Vice Chairman. George H. Turner was designated as Secretary. Mr. Turner and myself have been associated with the work of the Council since its beginning.

Many capable lawyers and judges have served on the Council since its was organized 31 years ago. After serving on the Council for 31 years, and about to leave it as of January 7, 1971, I feel obligated to pay my respects to the many lawyers and judges who have devoted their time and talents over the years to the improvement of our practice and procedure. Too often the work that has been done by these men has gone unnoted. But the things that they have accomplished do not just happen. It is the result of hard work, unheralded and unnoticed. They expect no praise and seek none, but I publicly commend them for what they have done. They are truly professional men of the law and their accomplishments are proof enough of this fact. I have known them all and I wish I could commend each one for his contribution to the profession and the proper administration of justice in this State.

PRESIDENT BAIRD: Thank you very much, Your Honor. I might mention for the benefit of our visiting out-of-state guests, our esteemed Judge Carter is going off the Bench and retiring January 1 next and we are going to miss him.

Next on the program is our Announcement as to Group Life Insurance. Is there a Mr. Richard Bosse in the room? Mr. Richard Bosse is the General Agent for the John Hancock Mutual and handles this for us. We will be very pleased to hear his report to see if we are still solvent.

ANNOUNCEMENT AS TO GROUP LIFE INSURANCE

Richard Bosse

As the administrator of your group life insurance fund, I am happy to report that during this past year we were successful in enrolling fifty new members of your Association into this group life

insurance program. It is interesting to note also that the John Hancock has had your plan in effect for twelve years January 1, this year.

We have also amended your master contract this year to an open enrollment date on a quarterly period. Prior to this time they were on an every six-month period, or semi-annually. The quarterly period now is January 1, April 1, July 1 and October 1.

On June 1 this year the Association received a dividend of \$42,000. We disbursed this money to the June 1 billing. Those of you who are insured possibly noted a reduction in your premium. We thought that this would be a more effective way and also cut administration costs, by simply showing it as a reduction.

Additional dividends were disbursed to the beneficiaries of deceased members and also those who terminated in 1969.

Also an additional check was just recently presented to the Association for \$1,700. So all these accumulated dividends would total \$48,400 for the past year from John Hancock.

During this past year we also reproduced a new updated brochure. It is my understanding that much study is under way, as Mr. Baird indicated earlier, and it is recommended to your Group Insurance Committee the possibility of increased benefits to you as well as your employees and to new members of your Association. Again, these recommendations, from our understanding, are presently under study.

Respectfully submitted,

Dick Bosse, Administrator, Group Insurance Fund

PRESIDENT BAIRD: Thank you, Dick. We do appreciate the good service that you are giving our Association on these matters, Dick.

Our next item is the report of the Nebraska State Bar Foundation, and I will once again call on the President of the Foundation, Mr. Jack Wilson.

REPORT OF NEBRASKA STATE BAR FOUNDATION

John J. Wilson

Mr. President, about five years ago at the authorization of the House of Delegates a Bar Foundation was formed, with Past Presidents, the President, and the President-Elect as Trustees. It is managed by ten of these Past Presidents as Directors.

I want to report that I think our Foundation is in excellent condition. We have distributed to the subscribing members Annotations to Volumes 1 and 2 of Torts.

We are having prepared annotations by the professors at Creighton University of Volumes 1 and 2 of Trusts. Volume 2 should be ready for distribution sometime after the first of the year, and we hope before the next annual meeting that Volume 1 will be distributed. This is a work that is detailed and expensive, and unless a Foundation or some other organization undertakes this work, it would never be done.

Restatement of the law is a very important text that most lawyers use. With these Annotations it saves tedious hours of doing research on the matters on which you are checking through the Restatement.

There is a report of the Foundation in the October issue of the Nebraska Bar JOURNAL. This is detailed and too long to read at this time, and since all of you receive a copy of this I wish, if you have not already read it, that when you go home you do read the report of the Foundation.

I do not like to make that a part of my remarks because it would have to be copied into the annual report. But this is a report of the details, the purpose, and the manner in which it operates.

At the present time we have sixty-two Fellows. They have a pledge to pay \$1,000 at the rate of \$100 a year. We have five Sponsor members at \$50.00 a year. We have 71 Sustaining members at \$25.00 a year. We have 120 Subscribing members at \$25.00 a year. We have 120 Subscribing members at \$10.00 a year. We have 18 who have made contributions but not on a pledge basis; 9 deceased members who have made contributions. And last week we received a memorial of \$15.00 from a deceased lawyer's family. There has been printed a list of all of the contributing members as part of this report in the October issue of the Bar JOURNAL. Every member of the Association *should* be listed in that list *next* year, whether it is \$10, \$25, \$50, or \$1,000 member. Certificates have been furnished to the Sponsors, Sustaining, and Subscribing members, and plaques suitable for hanging on the wall have been mailed out and distributed to all of the 62 Fellows. These certificates that you receive through the mail are suitable for framing and hanging on the wall. They call attention to your clients that you are a part of a Bar Foundation.

As of October 1, we had \$25,000 invested in federal interim credit bank bonds; we had over \$4,000 in our savings account; and about \$2,500 in the checking account.

We have some stocks that members have contributed to the Foundation in payment of their \$1,000 or towards the payment of their \$1,000. Many lawyers have stocks that were purchased at a reduced rate that are too expensive to sell. But here is a great opportunity to become a Fellow by turning that stock over to the Foundation, which many have done.

I think all of you should be a member of the Foundation, and as it grows different uses will be made of this money. We have wealth of around \$35,000, and we have been spending it on these Annotations. Last year we ended up with a profit of \$1,629 over our expenses. This year we should have a greater net return because there will not be the expense on the Annotations that we have had in the past. We have contributed to the cost of editing the Annotations of Restatement of Trusts. There will be some printing costs and mailing costs.

We have set up a table outside of this room where we have the plaques to show you, the certificates that you will receive, and we would like to have as many of you join in helping your Bar Foundation, which not only helps you, but makes you a worthwhile lawyer, you have something to sell to your clients that you are supporting a Foundation, and we just hope that you will help come with us and join in your contribution.

There isn't a lawyer in this room that can't spend at least \$10.00 a year toward this Foundation. It is a tax-deductible Foundation, and what better way is there to help *you*, help the Foundation, and help the Nebraska State Bar Association.

PRESIDENT BAIRD: Thank you very much, Jack. I had the opportunity to read your report in the Bar JOURNAL which arrived just two or three days ago, and it is excellent. I would like to add my urging to Jack Wilson's to any of you who haven't joined the Foundation in one classification or another to do so. It is a very, very commendable thing, not only to further the interest of our profession but to get the personal benefits that he related in these Annotations and Restatements that come out.

Now as the final item of this morning's program we have the sad but inevitable responsibility to pay homage to those of our brethren in the legal profession who have passed away during the past year. To give the report of the Committee on Memorials, I will call on its Chairman, Mr. Farley Young of Lincoln.

REPORT OF COMMITTEE ON MEMORIALS

Farley Young

Mr. President: Your Committee on Memorials, consisting of Mr. Robert H. Beatty, Mr. Julius D. Cronin, Mr. Frederick M. Deutsch, Mr. Barlow Nye, Mr. Marvin G. Schmid, and Farley Young as Chairman, respectfully submit the following memorial:

We pause in our busy session for a few moments to consider how frail life really is. Yesterday our brothers sat next to us in these meetings. Today they are gone, but the memory of their deeds and their loyalty to our profession will remain with us always.

The scythe of "Father Time" has no respect for age. Some are permitted to live many years, but others have met an untimely death. Our list bears the names of many of our younger associates. We never know who will be next to leave our ranks. We can only live from year to year to practice our profession and to improve our system of government and better our way of life.

These men who have left us devoted their lives to their clients and the betterment of their communities. They were all proud to be advocates of our form of justice and freedom. They were champions of our form of government and have given everything in their power to preserve our way of life, not destroy it as some would wish to do. These men were competent and worthy lawyers who tried to maintain an orderly society under law. They leave us a challenge to strengthen our form of government and our system of justice, to preserve it but never destroy it.

May we stand in solemn reverence as I read the long list of our departed friends and associates.

John O. Anderson, Alliance
Sara Mullin Baldwin, Chillicothe, Ohio
W. G. Birginal, Sargent
Charles M. Bosley, Palisade
Donald J. Burke, Omaha
Robert S. Calkins, Lincoln
Ralph O. Canady, Hastings
Yale H. Cavett, Bayard
Guy L. Clements, Elmwood
Albert L. Cockle, Omaha
James J. Connolly, Omaha
J. Howard Davis, Lincoln
T. F. Donelson, Omaha
M. L. Donovan, Walnut Creek, California
William L. Dudley, Stapleton

Clark B. Evans, Wisner
John Ferneau, Auburn
Arnott R. Folsom, Lincoln
Charles A. Fryzek, Omaha
H. Madge Garnett, Plattsmouth
Paul F. Good, Omaha
Thomas I. C. Hughes, New York, New York
Evert M. Hunt, Lincoln
Merwin O. Johnson, Van Nuys, California
Thomas J. Keenan, Geneva
George W. Kern, Omaha
Homer L. Kyle, Lincoln
Oliver M. Llewellyn, Hastings
Hugo J. Lutz, Lombard, Illinois
Bruce K. Lyon, Grant
E. J. McCarthy, South Sioux City
Oscar V. McCracken, Bellflower, California
David B. Massie, Clay Center
Donald P. Miller, Sun City, Arizona
Milton A. Mills, Osceola
Emmet L. Murphy, Omaha
R. E. Powell, Lincoln
Fred H. Richards, Jr., Fremont
William A. Rundle, Jr., Kansas City, Missouri
Walter B. Sadilek, Schuyler
Fred J. Schroeder, Curtis
Orlando A. Scott, Silver Spring, Maryland
Clarence C. Sherwood, Orleans
Former Chief Justice, Robert G. Simmons, Lincoln
Calvin H. Taylor, Long Beach, California
Former Judge, Arthur C. Thomsen, Omaha
Arthur M. Tillinghast, Lincoln
Keith K. Turner, Union
Louis E. Uden, Hasting
Frank E. Van Cleave, Beaver City
Robert B. Waring, Geneva
F. E. Watters, Omaha
Thurman G. Weddel, Springview
D. P. West, Syracuse
T. F. A. Williams, Lincoln
John D. Wilson, Philadelphia, Pennsylvania
James M. Winter, Lincoln
Bruce G. Young, Chicago, Illinois

Mr. President, I move that this be made a part of the records of this Association.

PRESIDENT BAIRD: It will be so received. Thank you very much.

Be seated, gentlemen. Thank you, Farley, very much, for that very moving tribute to our departed colleagues.

Gentlemen, this concludes our program this morning. Before adjourning may I remind you that at our annual Luncheon which will be held right next door at twelve-fifteen we will be honored by being addressed by the Honorable Leon Jaworski, President-Elect of the American Bar Association. And at your annual Banquet this evening our speaker will be Mr. Carl F. Conway, the noted "Sage of Osage", Iowa. I certainly hope and recommend that all of you attend both functions. At one-thirty this afternoon we will commence our Institute on Real Estate which I think you will find most interesting. Gentlemen, we now stand adjourned.

. . . The session adjourned at eleven-thirty o'clock . . .

ASSOCIATION LUNCHEON

October 22, 1970

The annual Association Luncheon was presided over by President Baird.

PRESIDENT BAIRD: Gentlemen, we are honored today by having as our guest speaker the Honorable Leon Jaworski, President-Elect of the American Bar Association who will take over the presidency next August in London. I think that fact in itself testifies to the astuteness of our distinguished guest, who managed to run things in such a way that he comes on and takes over when go to England. One thing I have learned and marveled at the last few years in rather close contact with Bar Association affairs is the high degrees of outstanding qualifications and the stature that is demanded of the lawyer who assumes the presidency of the American Bar Association. He must be able not only to adequately represent our National Association in meetings all over the world—when I called Mr. Jaworski's office several weeks ago to confirm this date, I learned that he was then on his way back from an assignment in the Far East—but he must also command the respect of no less than the Congress and the President of the United States with whom he has frequent contacts in his official capacity.

Our next President fulfills these exacting requirements in every measure. Were I to detail to you a complete list of his credits, I would encroach substantially on his allotted time. So suffice to say that Leon Jaworski is the senior partner of the Well-known Houston law firm of Fulbright, Crooker, Freeman, Bates, and Jaworski. He

holds the honorary degree of Doctor of Laws from Baylor University. He is a past President of the State Bar of Texas, a past President of the American College of Trial Lawyers, a past President of the Houston Bar Association, a past President of the Texas Civil Judicial Council.

He is a member of the Board of Directors of any number of corporations, including the famed Astrodome Corporation of Houston. He is the past President of the Houston Chamber of Commerce, a past President of the Rotary Club of Houston, a past President of the Houston Chapter of American Red Cross.

He has been the recipient of any number of civic awards. In military service he was a Colonel in the Judge Advocate General's Department during World War II. He served as Chief of War Crime Trials, section of the U. S. Army and in that capacity personally prosecuted the first major war crimes trial in the European Theatre.

He has been a special assistant to the United States Attorney General, Special Counsel to the Attorney General of Texas.

He is a member of the Board of Elders of the First Presbyterian Church.

Well, gentlemen, I could go on, but may I simply say that our distinguished guest today is a "goldurn big shot". It is with extreme pleasure that I present the Honorable Leon Jaworski.

"THE CHALLENGE AND THE RESPONSE"

Honorable Leon Jaworski

President Baird, Senator Hruska, and the Other Distinguished Gentlemen who are on the dais and all of you gentlemen, each distinguished in his own right in the audience: I am truly grateful for your generous remarks, President Baird. They actually are typical of the graciousness that has been extended to me ever since I landed in Omaha yesterday. I am just as sorry that I can't stay longer with you than this afternoon.

To say that I am greatly pleased to be with you is not the simple expression of an amenity by any means. I have many reasons for enjoying this opportunity of visiting with you and sharing a few moments with you.

I am pleased, first of all, because so many of your members have been very active in the work of the American Bar Association. George Turner, seated over here to my right, has been a stalwart who has labored in the vineyard of the American Bar for many

years, and there is no more esteemed member of our Association than he. John Wilson, who has represented your Bar in the House of Delegates has rendered notable service to our Association. Of course even in the Sections very significant work has been done, and I am not trying to cover all of them but I recall very well the work of Richard Wilson as Chairman of the Special Committee on Atomic Energy Law, still serving in that capacity; also the work of Robert Muchemore who was serving as Vice-Chairman of the Insurance, Negligence, and Compensation Law Section; and also there are doubtless others. In any event, the American Bar Association owes a considerable debt of gratitude to the work of these gentlemen, and I am here to acknowledge it publicly

I am also greatly honored that there is present today the illustrious Senator Roman Hruska. I want to say to you gentlemen that I had long admired his service to our nation before I became personally acquainted with him. When the National Commission on the Causes and Prevention of Violence was constituted by President Lyndon Johnson, we were thrown together to work on that Commission. I had a first-hand opportunity to observe his work. Now, here was a man who had many duties of statesmanship who did not want this appointment. I happen to know that the President prevailed on him to serve and, as a good soldier, he said to his Commander-in-Chief that he would serve. But the work was very demanding. It meant that in addition to all of these duties he also had to devote days and evenings to the work of this Commission. I can say to you that I thank the President of the United States for this gentleman being on our Commission because, as you probably know, it was not a Commission that was unanimous in its views by any means. And when we came to write one of the most important chapters that could have been written by any Commission in history of this nation, the chapter dealing with the question of disobediences, of lawlessness, of civil disobediences, if you please, it was through the leadership of this gentleman, and I was happy to join him in doing all I could, that there was written into the Commission report that such disobediences and such lawlessness was erosive of the rule of law and must be condemned without extenuation.

So I have many reasons for being happy to be with you, not the least of which is to also honor the work of this fine Senator of yours.

You are familiar, also, with the work that he has done in the Criminal Justice Act, and most recently we again had to rely on him to have that updated and to bring it into a form that, again, is not only fair to the citizen and fair to the accused, it is also fair to the legal profession.

In preparing for this address I did want to select something that was germane to an interest of your Bar Association, and there occurred to me the story of the gentlemen who appeared and made an address of considerable length. At the end an elderly lady came up to him and she said, "You know, you were superfluous, simply superfluous," to which, taken aback some little bit, he said, "Well, you know, I have in mind publishing that posthumously," and she said, "Oh great, the sooner the better! The sooner the better!" I hope you are not going to feel quite that way about this effort of mine.

What I want to do, I really seek today to share with you some thoughts on a problem in the administration of the law which is of special concern to society in these times. I am not sure that it isn't as grave a problem as we have facing us, and I particularly embrace the opportunity of speaking to you about it because the State of Nebraska has taken very important strides just recently in facing this challenge. I refer to the matter of criminal corrections in *all* of its aspects, including the administration of sentencing laws and the nature and quality of correctional services. The legal profession is called on more today than ever before to exert leadership in creating much needed improvements in the administration of justice, and it is in my judgment not only our high prerogative, it is our responsibility to respond with constructive action.

As you learn from perhaps some notices that came to your attention in days gone by, I did have the privilege of serving on the National Commission on Law Enforcement and the Administration of Justice which commonly has been referred to as the President's Crime Commission. It began its work in 1965 and worked assiduously for thirty months. It made a number of major findings, as you will recall, and a number of recommendations concerning the administration of criminal justice, ranging from the problems of prevention of crime and its detection by the police to the matter of sentencing and correction. Not long thereafter, as I mentioned a few moments ago, I had the further opportunity of serving along with your distinguished Senator Hruska on the National Commission on the Causes and Prevention of Violence. This Commission undertook to make findings and recommendations concerning the whole variety of violent and incendiary behavior that has so sorely plagued our national community in the last decade or so.

The problems of criminal law administration and the matter of violence each unto themselves are extremely complex and of course multi-faceted. But one important problem was confronted by both Commissions, connecting the administration of criminal justice with the question of violence. This is the matter of the justness and the effectiveness of the policy and practice concerning the sentencing,

the supervision, the punishment, and rehabilitation of criminal offenders. I frankly confess and this is not a very fine confession to make, but it is a true one, that it was not until I had the exposure to this phase of the crime problem in my service on these Commissions that I began to appreciate its full dimension. And I fear that there were many of our citizens who similarly were deficient in their appreciation of it, as was I and I fear that maybe there are a number of members of the Bar who lack a full appreciation of it, as I lacked it.

In the administration of criminal justice, correction is, in a profound sense, the "pay-off". As Mr. Chief Justice Burger has recently said in his address to the American Bar Foundation: "We should stop thinking of criminal justice as something that begins with an arrest and ends with a final judgment of guilt. We must see it as embracing the entire spectrum, including that crucial period which begins when the litigation is over and the sentence is being carried out. It is here that the success or failure of our society will make itself known."

No matter how effective our procedures for detection of crime and enforcement of the criminal law may be, no matter how fair or efficient our procedure for adjudication of guilt, the criminal law cannot be more effective in the long run than the quality of the correctional procedures which are brought into play, once conviction has been secured. The quality of these procedures not only affects the particular individuals who are convicted of crime, but also those who may be influenced *not* to commit crime; that is, those whom we are trying to deter away from crime and violence. What we must never forget—and we must never forget it—is that every inmate of our prisons is due someday to mix and mingle again in our society, bar a few.

The problem of criminal corrections assumed significance in the deliberations of the National Violence Commission, as the Senator knows, because it became readily clear that so much violence with which we are afflicted can be attributed indirectly, if not directly, to failures in our correctional system. The fact is that most crimes of violence are committed by recidivists, repeaters, people who have previously committed some sort of crime. In many instances the original crime was also one of violence, so that we encounter not only repetitions of crime but repetitions of violent crime.

As our President Nixon noted in a memorandum to the Attorney General almost a year ago now: "Today, at least 40 per cent of all offenders released from custody eventually return to prison. The FBI Uniform Crime Reports for 1968 show that 82 per cent of a

sample of offenders arrested in 1967-68 had been arrested previously. The FBI report also shows that 67 per cent of persons charged with burglary, 71 per cent charged with auto theft, and 60 per cent charged with armed robbery had been arrested at least twice in the preceding seven years. For those under 20 years of age, the repeater rates are even higher."

Violent recidivism represents not merely the occasion for further conviction and sentencing but also a failure to achieve the correctional result aimed at in the first conviction.

To say this, is no necessarily to criticize the officials charged with the responsibility or managing our correctional systems. On the contrary, perhaps the most informed criticism of our present correctional system comes from these very officials who know only too well the manifest inadequacies of the resources which they are given. Rather, the criticism is addressed to the community as a whole, and particularly to those of us who assume the special responsibility of the administration of justice. The criticism is offered in the constructive hope that we will focus more attention and more effort on this vital aspect of the administration of justice.

If you will pardon a personal reference, it has been my privilege to be part of such an effort at the national level through the ABA Special Committee on Crime Prevention and Control, the chairmanship of which I relinquished to the eminent lawyer, Edward Bennett Williams, when I assumed my present office.

One of the by-products of the work of ABA in the field of crime prevention and control has been the creation of a Special Commission of the American Bar Association on Correctional Facilities and Services, created by the very distinguished immediate past president of the American Bar Association, known to many of you, Mr. Bernard G. Segal. And when the American Bar Board of Governors implemented the proposal by resolution it stated that the purposes, and this isn't a complete statement but this is a condensation of it, of the four-year Commission, and I am quoting now, "are to inventory correctional services and studies as they currently exist, and on the basis thereof to recommend and implement specific measures of improvement, including the further development of correctional measures alternative, *alternative* to incarceration and correctional institutions. The work of the Commission shall be undertaken in cooperation with the state and local Bar Associations, organizations in the correctional field, and other interested groups. Such associations and others are encouraged to create committees or other components to collaborate and cooperate with the Commission." This is the end of the quote.

And today, my friends, I am pleased to acknowledge on this occasion, and I mean greatly pleased, the action of the American Bar Board of Governors taken only last week in the selection of Robert J. Kutak of your Bar as the Vice-Chairman of this distinguished Commission.

The over-all plan of the Commission calls inter alia for sponsorship jointly with the Law Enforcement Assistance Administration and the University of Nebraska College of Law on the National Conference on Correctional Law Reform. It will involve leaders in the program for correctional reform from each of the states. In fact, it is hoped that the Attorney Generals of each of the states will be in attendance.

The creation of the American Bar Association's Special Committee on Crime Prevention and Control and its Special Commission on Correctional Facilities and Services is a recognition by the ABA of the special responsibility and special opportunity of the Bar in regard to this very vital matter. We have a special responsibility because, as Chief Justice Burger stated, the American Bar Association "accepts the concept that criminal justice embraces the correctional process." We have a special opportunity because only the legal profession has a communications network and a set of working relationships that extend from the nation's capital to every city and town across the country. The legal profession at the national level is making a major effort to devote that network and those working relationships to the cause of strengthening the correctional system in every state and in every community.

In this effort the American Bar Association will be helped and inspired by the example of Nebraska. You are well aware of the important work of the Nebraska legislature in enacting a revised corrections code, the Treatment and Corrections Act of 1969. That code, as you know, creates for this state the legal framework of a system of corrections that can be effective from the point of view of society, and fair and constructive from the point of view of the sentenced offender. In my judgment it strikes a good balance between the rights of society and the rights of the individual. As many of you doubtless know, the Nebraska act is based in significant part on the Model Penal Code, itself a drafting achievement in which the Bar played a significant role.

I am advised that further effort is going forward in this state to strengthen its correctional system and to give other states the benefit of its experience. There is pending a proposal before the Law Enforcement Assistance Administration under which the Nebraska experience, in revising its corrections law, can be made available to other states in the form of an explanatory handbook.

If the experience of Nebraska in revising its correction code can be translated into a "how-to-do-it" book, it will greatly help in the national effort to which I have referred. I commend this project to your attention and trust that many of you will lend your efforts to bring it into fruition.

There are other immediate steps with which the Bar of this state might well concern itself. It is most important that we improve not only corrections law but also corrections facilities and services, because as most of us know, the best law in the world will not work without the means to do so. A vital aspect of improving corrections is facilities and services at the local level. As the Crime Commission warned over three years ago: "Lack of community treatment facilities for misdemeanants and juveniles means the neglect of one of the most important lines of defense against serious crimes, since many persons with juvenile or misdemeanor records graduate to graver offenses. Lack of probation facilities also may mean that many minor and first-time offenders who would be more suitably and economically dealt with in the community, are instead institutionalized. And lack of supervision, particularly through parole, means that the community is being exposed to unnecessary risks and that offenders are going without assistance in reestablishing themselves in jobs and schools."

Many of you are acquainted with an effort now going forward to create a regional correction facility and service centered in this very city. It holds the potential of becoming a model program for emulation throughout the nation. Coordination of local correctional services and facilities begins with the recognition that in virtually all localities throughout the country there is a bewildering proliferation of agencies and authorities concerned with the administration of correctional services. Every city of significant size has its own separate jail and jail services, in many instances duplicating or overlapping those provided at the county level in the very same locality. Generally speaking, local jails are inadequate in physical facilities, and are almost invariably lacking in adequately trained personnel and adequately developed educational and vocational training programs. Similarly, there are divisions and sometimes conflicts of responsibility as between state government and local government concerning the diagnosis, classification, and treatment of offenders. These divisions of authority and responsibility are reflected in multitudinous agencies that exist in the area of probation, diagnosis, detention, work release and parole, even though the techniques used in these services are often comparable, and even though the facilities which are needed in which to conduct them are substantially the same, and even though the individuals being processed, that is, the offenders, are the same individuals.

It would be premature, it would be presumptuous on my part to comment on the specific proposals being developed to meet this problem in this state. Whatever the merits of these proposed programs it is clear that the practical administration of corrections, particularly at the local level, should be a matter of the most serious concern to every member of the Bar. To recall once again what every experienced lawyers knows, it does very little good to create a system on paper that is not backed up with the necessary resources to make it a reality. Furthermore, it does very little good to provide facilities and services at one or the other governmental levels unless they can be coordinated with facilities and services at other levels as well. It is to be hoped that the proposed experiment in the coordination of correctional services now going forward in the Omaha area can be successful. More specifically it is to be hoped that the members of the Nebraska Bar might lead the development of similar regional arrangements in the central and western parts of this state. If the State of Nebraska, through the leadership of its Bar, could produce a workable plan for regionally coordinated administration of correctional services and facilities, it will have made a great contribution not only to the administration of justice, but also to the cause of federalism, through the preservation of state and local responsibility in this important area of the law.

Perhaps one final thought ought to inspire all of those who concern themselves with the law of corrections. The population involved in correction, convicted offenders, is a very unattractive and unpopular sector of the community. Their conduct has been morally repugnant, it has been legally offensive, it has been socially destructive. Yet, convicted criminal offenders cannot be *wished* into being made better individuals. They must be dealt with authoritatively and they must be dealt with effectively. Hence the legal profession, as the exponent of law, has no choice but to concern itself with corrections. In doing so, it is also our duty to make correctional services procedurally fair and functionally effective. Above all, the Bar should help make the correction process subservient to the rule of law, seeking by example to reeducate those who have proven themselves to be in need of that kind of education and example. So, proud of what you have already done, I commend this most important problem to your continued attention and professional concern.

The challenge I have shared with you today is one that very Bar Association, duly mindful of its responsibilities, must face. You have responded with a good beginning, and we will follow with great interest the steps that come next.

THE INSTITUTE PROGRAM RESIDENTIAL LENDING

William Fitzgerald

My remarks today will be confined primarily to the residential single-family home construction or home financing as I see it in the State of Nebraska.

In today's mortgage market there are too many potential home buyers who have a big misunderstanding as to the availability of long-term home mortgage funds. In fact, many home buyers or potential home buyers have concluded that because of the higher rates now being charged there actually are no funds available. Actually, in our area, this is certainly not true. In fact, if anything, there is more than sufficient amount of single-family home funds available for long-term financing.

The cost of this money, of course, is high, the reason being that we have to be able to get a return on this money that is comparable with other investments in the long-term mortgage market. In fact, in some cases we are not getting as high a return on single-family home loans as we might be able to get by putting our money out elsewhere.

Now that we are aware of the availability, I would like to outline the types and some of the features that are involved in the single-family home loans that we are dealing with in our area.

The conventional mortgage, this is the old traditional kind of Cadillac or prime-rate borrower, and this was true because of the fact so often your conventional home buyer was putting down 25 or 30 per cent of his purchase price and looking for terms maybe not to exceed twenty years. Well, this was true ten years ago. Today the conventional home buyer is an individual who is looking to borrow up to 80 per cent of purchase price with terms up to thirty years.

The vast majority of home buyers, however, did not fall into this strict conventional loan. They are looking for something with even more liberal terms. This, then, falls into the program which Bill alluded to a minute ago, and that is the MGIC insured home loan. In this case the borrower is looking to borrow up to 90 per cent of purchase price with terms up to thirty years.

The MGIC happens to be one private insurance company that insures the top 20 per cent of the loan to the lender. There are other firms. It just so happens that MGIC was first, and their initials have become rather synonymous with the 90 per cent home mortgage.

The premium for this private insurance is paid by the borrower and it is paid in addition to his regular interest rate and any origination fees which may be charged. The lender is protected by this insurance in the event of foreclosure. The private insurance agency has the ability either to pay off the loan in full at foreclosure, total principal and interest to the lender, or if they have the option to pay off the top 20 per cent of the principal remaining at foreclosure and leave the lender with title to the property for their own disposal.

It is interesting to note here that over the last three years in the majority of these foreclosures we have found, and other lenders also in our area, that the private insurance company has paid off the top 20 per cent of the loan and left you with the real estate. The reason for this, quite frankly, they have found that they are losing more by taking over title to the property, spending the money to update it, and then paying the fees necessary to dispose of the property.

The conventional mortgages, the 90 per cent, and the standard 80 per cent that I have just discussed, have some relatively new features in our area of the country here and some old features, and I would just like to take a second and review these particular items.

The origination fee I believe I mentioned. This is a one-time fee charged at the initiation of the loan by the lender with the intent to increase the yield to the lender over the long term of the loan. But in addition to that the origination fee is also charged at this time to give us an immediate income. The need for the immediate income has become quite necessary in the past three or four years, with rates having increased as rapidly as they have which, in turn, we as lenders are not able to increase our over-all loan portfolio nearly as rapidly. So the origination fee has become rather predominant.

A call clause is a new feature being used in quite a few conventional mortgages today. The call clause simply states that in the event of transfer of title of this piece of property, the lender has the right to demand payment in full on this loan. This transfer title could be by an ordinary sale or a land contract sale.

In the event there is a man who wants to assume the loan, this call clause gives the lender the right to review him and if they feel he is qualified, or as qualified as the original maker, then they could go along and accept the loan. If not, they have the call clause which gives them the right to get the loan paid off.

In addition to that, a new benefit to the lender of this call clause has been the ability to re-negotiate the terms of the loan when a

new buyer comes along and wants to assume a loan after two or three years that it has been on your books and possibly increase the rate or, in many cases, extend the term of the loan for the borrower, which keeps his payment down and at the same time possibly increases the rate to the lender.

Prepayment penalty has become fairly common in our area. A standard one that many of the Savings and Loans are using is the one per cent penalty for the first five years of the loan, which means in the event the loan were to be paid off we would have the right to demand a one per cent prepayment penalty of the remaining balance at the time the loan is paid off. Prepayment penalties vary from lender to lender. Some have closed options or no options, others don't charge any at all.

A new type of note being used, which I see quite a bit being used, is an escalator note. I'm sure when you hear "escalator" you think of nothing but going up. The escalator note itself, and I will an example here, where we are talking of, let's say, an 8-1/4 per cent rate today to a borrower, we might guarantee this rate for a period of three years, after which time the lender has, at his option, the right to increase this rate by any portion of half of one per cent, or whatever rate he happens to negotiate at the time he set up this loan. The benefits in this to the borrower are, normally when we are negotiating an escalator type note, we give him a rate that is a quarter of one per cent under the then going rate. So the example I just used, the 8-1/4 per cent, then on today's market we would be talking with a customer on a straight fixed rate note at 8-1/2 per cent, so he gets the benefit for three years of being under today's market, and at the end of the three years we have the right to increase by 1/2 of one per cent at the sole option of the Association. He is gambling that rates will probably not go up and therefore we won't increase and we in turn are looking to the future and seeing there is a possibility rates will continue to increase and therefore we want this option to go up somewhat higher.

There is another benefit in this escalator type note to the lender, and that is in the event you have a delinquent loan customer who maybe has the ability to pay but for some reason continues to be a continual delinquent, if you have that escalator clause you are in a position to give him a 30-day notice and request that he either get his account current and keep it current, if not you are going to raise the rate up to the maximum allowable under his note. And this has a little leverage.

The variable rate note is another type note begin used, but not too extensively. The variable rate note is where you use a barometer to tie the present rate you are signing up the note at to. This

would allow the note to go up and down, based on whatever this barometer is. Some of the barometers being used are the average cost of savings in a lending institution, or possibly the local prime rate of a local commercial bank. This is a real difficult one to tie to because, as you can see, when you are dealing with a local bank prime rate, possibly they are dealing in a short term market, you are dealing in a long term mortgage, and therefore this variable rate mortgage can have a tendency to fluctuate quite a bit. So there is not too much being used.

The usury rates, as we all know, in the State of Nebraska are 9 per cent today to an individual, and I bring this up only because of the fact there are a few states around the country that we have all seen here in the past two years that have had real difficulty attracting home mortgage funds into their state because they are tied with usury rates of 7 and 8 per cent. Now a couple of times during the past eighteen months rates on home mortgages in our state have gotten very close to the 9 per cent. In fact, I am sure many of you have had some clients that have contacted you, possibly not about a home loan but just about some type of financing that he needs in his individual name, and he has been unable to put the deal together because of the 9 per cent usury rate. I throw this out because with the legislature starting again fairly soon I think it would do all of us well to give some thought to the possibility of perhaps an increased usury rate or even elimination of same.

Another area that we've gotten into in our State is leasehold interest financing on single-family properties, and this has been used primarily in our area on second family homes. Small lake developments have popped up around Lincoln and Omaha and other areas of the State, and much of this is on leased ground. We are financing these homes as a second home, but normally the lease must run a considerable number of years longer than the note that is being signed, backed by the mortgage on a leasehold interest.

These are some of the features covered in the conventional mortgage. Next in the single family area we have FHA insured mortgage, of which a real large percentage of the home mortgage financing today is done in the FHA area. The FHA loan allows the borrower to borrow up to 97 per cent of the first \$15,000 and up to 90 per cent of \$10,000 thereafter. For example, if a man were purchasing an \$18,000 home today he would need a down payment of only \$750. Or if it were a \$25,000 home he would need a down payment of \$1450. The term of the FHA loans currently is running thirty years.

We all have heard a lot of whispers about FHA's rate dropping to 8 per cent. Today it is currently 8-1/2 per cent with 1/2 of one per cent fee in addition to that, which pays for the FHA insurance.

The term almost synonymous with the FHA loan is the discount fee. The discount fee is a fee charged at origination to improve the yield, again, on the loan to the lender. The reason for this is because the FHA rate is a regulated rate by the FHA. This discount, again, is determined by the yield at which we can put our money out in the investment market on a long-term basis.

Discounts locally are running 1 point to the buyer, 2 points to 3-1/2 points to the seller. The FHA regulations stipulate that one per cent service fee is the maximum that is allowed to be paid by the home purchaser, and the balance of any discount must be paid by seller or any other party. I am not sure who they allude to when they mention the other party; I haven't seen too many realtors willing to throw in any portion of *their* fee to help pay this discount. But possibly there might be some relatives or friends that would be willing to do this.

FHA insurance protects the lender to the extent of paying the loan off in full in the event of foreclosure, principal and interest. An interesting point here, we have many home borrowers on FHA loans after they have had that loan for a period of a few years that for some reason have a feeling that this 1/2 of one per cent FHA insurance premium they are paying is providing them with health and accident or life insurance or home fire insurance. I am sure some of you men have run into that question by clients of yours.

We have had the FHA-VA loan, which is simply a liberalized FHA loan that is made to any veteran who does not qualify under the standard VA loan. The VA loan is a loan made to any qualified veteran who has served more than six months in the service. The VA loan allows the veteran to borrow up to 100 per cent of his purchase price, the terms thirty years. Discounts on those loans are very comparable with the FHA loans. The VA guarantee protects the lender up to a maximum of \$12,500 loss in the event there should be a foreclosure.

A couple of items with reference to loan processing today on single-family homes. It normally takes, from time of application to close, about a week to ten days to close a normal conventional home loan. In asking our Loan Setup Department why it could possibly take up to ten days, they indicated that sometimes the borrower's attorney takes too long in rendering an opinion. I just thought this group would appreciate hearing that.

Closing costs run \$60 to \$100, depending. These are for abstracting, recording, inspection fees, credit reports, attorney's opinions with reference to lender's opinion.

This has been a summary of the types of home mortgage loans that we have available in our state. I think you will agree, in hearing the liberal term "terms available" that practically any interested home buyer should be able to find a loan to fit his needs. I would like to stress again the availability of long-term home mortgage funds in our great State of Nebraska.

MODERATOR OTIS: Our next panel member is Mr. Thorne. "Chick's" company, Bankers Life of Nebraska, makes loans in just about every state in the union. They have been out of the residential market for a number of years. All of their lending is devoted to income-producing properties.

INCOME PROPERTY LOANS

Charles H. Thorne

First I want to allude to the professional mortgage banker. These people are responsible for the greater majority of the production, origination of income property loans in the country today. The activity that they partake in will relate to my comments, just as well as if they were representing the insurance company out of the home office. Matter of fact, in a recent Investment Seminar at Michigan State the students were so enamored over the participation and the prospects of negotiating these great divisions of profit that they overlooked the reason that they were there in the first place, and that was to learn basic income property financing. I am going to stick pretty much with the basics here today. It is a lot of fun to package these sophisticated loans, but the end result cannot be any better than the basic underwriting criteria that went into the original package.

To support this, I have a survey here that was completed within the last few weeks on how insurance firms view the market:

Question 1: We will commit long-term capital ten years or longer on fixed-return basis. Answers from 117 out of 178 requested, 62 per cent, Yes; 38 per cent, No. In other words, there is a long-term market for a contract rate.

Given the proper credit and legal ability to do so, we would grant 100 per cent financing on a straight mortgage basis with no residual benefits to us: Yes, 23 per cent; No, 77 per cent. In other words, 100 per cent financing still has to incorporate some kind of residual kicker to make it inviting to the insurance industry today.

All long-term capital investments must contain some participation features: Yes, 43 per cent; No, 57 per cent.

Well, if I just reflect on that as a preliminary to my comments, I think we will understand that we are dealing now with the basics.

In every mortgage loan request the lender is faced with the responsibility of assigning or recognizing the market value of the real estate.

The loan underwriter in his analysis will review in detail all of the significant steps that are necessary to arrive at a proper market value estimate. You will give different weight to the indication of value from the cost approach, from the market approach, and/or from the income approach.

For loan purposes, however, and this is the establishment of the loan amount, the interest rate, and the loan term, we will classify income property into three broad categories as follows:

First, the general-use or multi-purpose properties. This type of security is bought and sold for investment purposes without the owner generally contemplating occupancy or use. Apartment houses, office buildings, retail stores are examples of such general use properties. Property within this classification could be further refined. For instance, under apartment buildings we could define garden or high rise; under retail stores you could have your central business district store, your strip or your outlying shopping center.

Second, limited-use or business purpose properties are those in which a definite allocation for rental charges can be established for comparative purposes. Motels, hotels, bowling alleys, and theaters are good examples.

Third, specific-use or single-purpose properties are those in which the rental base cannot be separated from the profit of the enterprise using it. Grain elevators, large industrial plants, oil refineries, churches and large hospitals are all examples of this specific-use property.

We are dealing in most loan situations with the first two classifications, that is, the general-use and limited-use properties, and therefore are most concerned with the economic approach in establishing our market value. We will want to review vacancy and occupancy ratios. We want to interpret what the expense factors for the operation of the building may be. In my experience we have noted that in lease situations in which the lease did not incorporate a tax-stop that the owner of that property has sacrificed extensive market value because of this shortcoming.

Finally, the net income is capitalized into an indication of economic value. For example, I believe most of you are aware that in buying common stocks the security analyst will equate a corporation's net earnings to the market value of the stock by a multiplication factor. We have commonly heard that a given issue is selling at 10 or 12 times its earnings per share. In the capitalization process we are not using the multiplier, but instead the reciprocal dividing the net income by this reciprocal, which we call the cap rate to arrive at the indication of value.

With the completion of our market value estimate we have a basis for making a "real estate loan" based on a loan to value formula, in this State 75 per cent loan to value. The easy answer might be, "All right, let's just apply the legal formula. Let's make the deal." However, from the loan underwriter's viewpoint, the maximum loan amount is more directly related to the relationship of debt service to the net income producing potential of the property.

The debt service is a dollar amount representing the periodic payment of both principal and interest necessary to amortize the loan during the loan term. If 100 per cent of the net income is applied to debt service, we have then established a net income to debt service ration of 1 to 1.

Normally we are not able to precisely predict the gross rents nor expenses, and as a consequence the net income is at best a studied estimate. It is, therefore, necessary to establish a more conservative relationship between the net income and debt service. In many types of properties we would expect to see the net income cover the debt service by, say, 1.2 and 1.5 times.

For instance, in apartment financing it is not uncommon to have a debt coverage of 1.5 to 1. Both the loan analyst and the borrower are interested in the split between the debt service and the margin that would be applied representing the borrower's equity or return on invested capital.

The significance of the equity return to a given owner will vary with the financial requirements and the owner's relative tax position. We have seen some situations in which ownership may accept a rate of return less than the mortgage interest rate when it is obvious that that equity exposure, risk exposure, is greater. Generally this will occur where a borrower wants to use the depreciation to shield other income. At the other extreme are investments involving a more volatile income flow, such as motel financing in which equity returns can run in several instances to 20 or 25 per cent. In such cases the equity can be returned to the developer in, say, a four to five year period.

Even though the real estate may provide the primary security, there could be an economic reversal that would interrupt the flow of net income to cover the mortgage debt service requirements. We then logically look to either the financial strength of the borrower or, in situations involving leased property, to the credit position of the occupant-lessee.

Where ownership is occupying the property, an exhaustive analysis of the business must be accomplished. This means not only a review of the financial records of the business but also an evaluation of management and a close look at the product line or services rendered, giving consideration to the competitive factors involved. When we review financial statements, to me, this means five to ten year spread sheet on the income, preferably accompanied by audited financial statements.

The application of the loan proceeds should be reflected in a pro-forma balance sheet and estimated future earnings of the company examined in light of the increased debt service requirement.

The underwriter has the responsibility of interpreting the degree of reliance placed on the owner's credit. If this is a paramount factor, he will want to limit the corporation's financial activity by inserting limiting covenants in the mortgage.

In situations in which the mortgagor is a dummy or shell corporation, that is, where the mortgage real estate constitutes the major assets of such corporation, the stockholders would not be personally liable for the corporate debt. The lender can tie in ownership by requiring the major stockholders to co-sign or personally guarantee the note.

If such property was leased to others, the personal financial strength of a principal owner could be brought into the picture by requiring him to execute a master lease or house lease for all or part of the property. The owner would, in turn, sublease to the tenant or tenants. We've used this in financing medical clinic buildings in which one of the tenants was going to be the owner, and he is going to sublease to the several other doctors. Wanting to pinpoint his credit to our deal, we had him sign the master or house lease and then he subleased to the others.

We have now established a second source of security for our mortgage debt; that is, the financial strength of the property owner, either as an occupant-owner or owner-lessor. In the first instance we were doing a retail, an income property loan, based on the real estate, and now I am telling you we have beyond that the considerations that we can apply to the ownership and the financial standing of the property.

Finally, a third situation may exist where the mortgaged property is fully leased on a basis that enables the loan underwriter to completely discount the financial position of the property owner and, in some cases, even a critical analysis of the real estate security. An example would be a loan request on property under a long term net lease to an unquestionably strong tenant. In processing such a submission the major consideration is the review of the lease agreement determining the tenant's obligation to cover all expenses and contingencies of every nature and a mathematical assurance that the lease rental income will amortize the debt during the lease term.

In most loan requests involving leased property, we will *not* have a net lease, however. The underwriter must interpret the contribution that the lessee makes to the over-all security of his investment. The form of lease used, its terms and conditions, must be reviewed as well as the lessee's financial ability to meet the contractual obligations thereunder.

There just isn't any way to determine who does what to whom in a lease that runs 50 to 60 pages without a studied review of that lease agreement. We accept that responsibility in our Loan Department, even though we have the privilege of routing this down for further review by our Law Department. We like to pinpoint the significant conditions and clauses that we feel should call for the attorney's studied review.

We have assumed, up to this point, that our loan request is secured by a first mortgage loan against the fee and all real estate improvements located thereon.

The Lessee, Leasehold Estate and Chattel Mortgage: Because of the limitation of development land in many metropolitan cities, as well as the tax consequence of a land sale, this would be where you would have a purchaser who has held his land for even a generation, a number of years, we are seeing a reluctance on the part of many land owners to pass title to the developer who is assembling a tract for a new enterprise, a large commercial center, or office building, or shopping center. The fee owner may agree, however, to a long-term ground lease, usually with rents on a net basis that will represent a fair return on this current land value. Such ground rents are fully deductible to the ground lessee. The owner-lessor pays full income tax on the lease rents but he has retained title and avoided any taxes that would have been related to the sale of the land.

A mortgage secured by such land parcel is generally an excellent risk and is known as a mortgage against the leased fee. An interpretation of the ground lease must be made with special attention

to rights of the lessor to acquire title to the leasehold improvements in the event of non-payment of the ground rent. The ground lease will generally provide for the construction of specific improvements within a specified time and allow the lessee to mortgage the improvements. In this case, such mortgage to the lessee is known as a leasehold mortgage and constitutes a further type of mortgage security for our analysis. Bankers, I think, was one of the first major companies in this State doing extensive leasehold mortgage financing. We have, for a company our size, I think, quite an investment in the State of Hawaii, for instance. Many of the investments are on a leasehold basis. The total, off the top of my head, would be approximately \$10,000,000. We feel that we know how to underwrite a leasehold mortgage.

If the fee owner will subordinate the ground rents called for under the lease, the loan underwriter may consider the land value as additional security to his leasehold mortgage. If rents are not subordinated, the leasehold mortgagor can look only to the improvements and provide for the ground rent charge as an added expense in making his economic analysis.

The Chattel Mortgage or Security Agreement: This is important to us in many situations involving property improvements of a personal nature that are necessary for the continued operation of the real estate that we have a first lien on. A good example would be your motel investment in which you would not want to foreclose and find out that someone else is walking away with the furnishings that would be necessary to continue that operation.

We have discussed innumerable variables that will exist in even the simplest mortgage loan request. The pressure from the borrower to obtain the maximum loan amount and longest amortization period at the lowest possible rate will, in most instances, be in conflict with the lender's position in making certain that the loan terms are consistent with the physical and economic limitations of the property.

In correlating all of the significant factors we obtain, we often face inconsistencies between the loan amount that we would recommend based on the "real estate" value of a certain property and the loan amount that would appear justifiable to the specific owner-mortgager, recognizing that the existence of a strong occupant-lessee would justify a further alteration of the lease terms.

The investment decision related to mortgage lending is complex. Short cuts involving the arbitrary use of bench marks or rules of thumb may be expedient, but I think expediency has a way of coming home to roost. We like to insist on market data. When we make

an investment we think that bench marks can lead you into a proximity of the proper loan amount or interest rate or loan terms, but there is no substitute for equating a specific loan to the facts surrounding the market place.

We must interpret each loan request as a unique investment opportunity. We must evaluate all of the data relating to the real estate, its use and income producing potential as support to our estimate of its market value.

We must interpret ownership's contribution to the mortgage security and take into consideration the further significance of the occupant-lessee in case the property is under lease to others. Finally, we must use our experience and judgment to reach a decision as to the proper loan amount, interest rate, and loan term.

MODERATOR OTIS: After Bankers have issued their commitment and it is mailed out to the borrower, who then takes it to his attorney to review, the next step in the transaction is to find the "friendly banker" who will make the interim construction loan.

It is my pleasure to introduce to you at this time Mr. Stelling, who has been in the commercial banking business for fifty years and, in my opinion, is an expert in the interim construction loan field.

INTERIM CONSTRUCTION LOANS

Albert L. Stelling

My assignment here is to finance the real estate transaction and to tell you something about financing the interim period as the real estate transaction is created or brought into being, with some reference to the legal aspects of it. That is kind of the wet-nurse operation of the deal. You see, we have nothing to do with the conception of it nor with the gestation period, but now all of a sudden this infant should be born and then the banker comes into play, and he is the wet nurse to help bring it into being.

This might involve the sale of a property, the subsequent occupancy of that property by a tenant and purchaser with a long-term commitment in hand from an investor who will make the long-term loan. These are quite frequently brought to us by mortgage bankers who arrange the initial putting together and then need credit for the purpose of closing the transaction, getting the title transferred to the purchaser, getting the tenant in possession and triggering the disbursement of the loan proceeds from the investor who will make the long-term loan but not until all the technical requirements of the commitment have been fulfilled and perfected.

This triggers a host of legal questions that we need to examine carefully, the majority of the borrower, corporate entity, partnership entity, what-have-you, and are all the commitment conditions properly fulfilled, and are they performable? Can they be performed? Can they be satisfied?

So in going through a transaction of this kind we do have a very heavy responsibility of examining the complete legal perfection of all of the instruments, which is a bit of a chore. I recall one loan we had one time that was supposed to pay off in 120 days but it didn't. Some technical problems developed. The examiner raised some questions about it, didn't say much but he came back eight months later and that loan was still on our books. He wanted to know, Why didn't we demand payment? Why didn't we collect? Why didn't we ship it to the investor? All those things. I went through all the legal documents and explained what we might have to do in various kinds of eventualities, the legal resources available to us. He finally concluded with a shaking of his head, and he said, "My, my! You sure burn a lot of legal incense for the purpose of collecting a few nickles of interest."

In financing the construction and creation of a real estate transaction where the transaction involves an existing property, the sale and occupancy by the tenant is relatively simple. When construction is involved and a new set of improvements need to be built it gets a bit more complicated and a little bit more laborious. This can be done basically on two broad concepts of legal technique.

One is to finance by way of the receivables due under the construction agreement, and advancing the credit to the contractor who has the contract and who can collect his money when he has perfected his job. That is one method. That is what we call contract receivables financing.

The other method is by the more normally used conventional construction mortgage route. In that instance we take a mortgage on a bare piece of ground, but with a set of documents in hand that requires the construction of a set of improvements in accordance with the blueprints and specifications that become inherent, a part of the total transaction. This triggers the requirement of reciting in the mortgage that the funds to be loaned are to be advanced for the purpose of constructing certain improvements on the property and the advances of loan proceeds shall be handled under the terms of a building loan agreement.

By this method we have a valid and subsisting first lien on the real estate, and the execution of the building loan agreement has one very significant statement in it that is important to us and it

is important that you attorneys should be aware of. It starts out with these words: "The borrowers agrees to take and the lender agrees to make a loan in the principal sum of "X" dollars." Significantly, it must be a firm agreement to advance all of the money to make the loan to that borrower, but it has got to be done under and pursuant to the provisions of the building loan agreement, and there are a host of requirements in that connection. These are important, because on it depends the soundness of our loan and the ability to collect it in due course.

The requirements are:

- (1) To build the improvements.
- (2) In complete accordance with the blueprints and specifications it must complete.
- (3) No changes in the drawings or specifications are permitted without the prior written consent of the bank.
- (4) The application for advances of loan proceeds must be made in writing at the times agreed upon, usually monthly, but coordinated to the progress payments that have been stipulated in the construction agreement.
- (5) The borrower deposits the necessary equity money with the bank to be paid out with the loan proceeds so as to assure sufficient funds in hand to pay the total cost of the total improvements.
- (6) We agree with the borrower that the building loan agreement may be recorded if it has legal significance. Now, in Nebraska it is immaterial. In some states it makes a decided difference. It has the effect in some states of either prohibiting the filing of mechanics liens or making all mechanics liens subject to the construction law.
- (7) It agrees to a specific set of schedule of items that may be used, of items that must be paid for with the proceeds of the mortgage loan, and those consist of architect's fees, the interest during construction, the taxes on real estate during construction, the cost of builder's risk insurance, the commitment fees for the long term loans, surveys and testing fees, service charges and commitment fees for the interim financing.

Incidentally, I would like to touch on this a little bit off-hand about this business of service charges and commitment fees for interim construction financing. Some people have the notion that this is just a grab of some easy money, and that we kind of measure that by what we maybe think we can stick the guy for, what the tariff will bear. That is not the case. This has a very solid base for establishing the commitment fee, both as to size and the reason for it.

The commitment fee, No. 1, is for the reservation of funds to be available for this borrower from the date we sign the contract, but which funds do not draw interest until they are actually advanced to the borrower and actually employed. So the commitment fee pays for the reservation of those funds that must be kept, then, in short term investments in the bank, 90-day bills, 6-month bills, and the short term government portfolio. The service charge is for the purpose of making the periodic inspections to see if the progress of construction is in relation to the amount of funds advanced and that the entire project is staying in a sound economic balance, and that the funds used are in ratable proportion with the progress made on the improvements. So there is a real reason and also a very legitimate purpose in the assessment of construction fees and commitment fees in construction loans. Incidentally, the prime rate is not really applicable to a construction loan because prime rates contemplates 90-day notes, or 120-day notes, on which you are assured of payoff at the end of that period. Whereas in a deal of this kind, a construction loan that runs for sixteen to eighteen months at times, or a year, you are in a locked-in position and you have no choice. After you have made the first advance, you are in that deal until the job is finished. You can't call your money at the end of 90 days or 120 days. You are in a locked-in credit which commands a rate above the prime rate, plus the fact that you've got a lot of collateral agreements to handle and service, which commands additional compensation above the prime rate.

This building loan agreement also requires evidence of satisfactory title, inspection fees that may be paid out of the mortgage proceeds, the construction costs to the general contractor, and miscellaneous contract work that is not under the general contract, such as site work, landscaping, and so forth that might be required in the long term investment but were taken out of the general contract by the owner because he felt he could do them better himself, or cheaper himself, or do them with other people.

Those are the complications of the construction financing that gets into a heavy portfolio documentation which I will not take the time to review in depth. The remaining articles in the building loan agreement require the borrower to also furnish a continuation search in connection with each advance so that we would be protected against intervening mechanics liens that might be filed or judgments that show up in the record that could be against the owner, it could be against the project, or it might be against one of the contractors on the job, which could put the transaction in jeopardy. So we need to know monthly the status of that title, that it is perfectly clear and in good condition to proceed. Com-

pliance with the laws and zoning ordinances and surveys all need to be kept in mind and in hand.

Then we have one significant item in this building loan agreement that I would like to call to your attention, which is in Section 10 that has a built-in power of attorney conveyed to the bank, which recites in part, and I think these words are significant and you may sometime have occasion to counsel one of your clients on it, but if at any time the construction is halted or abated or doesn't proceed appropriately, with appropriate speed, then the bank has the right to take possession and enter upon the premises and employ workmen to carry out the project. It says, "For this purpose the borrower hereby constitutes and appoints the bank its true and lawful attorney in fact in full power of substitution in the premises to complete the project in the name of the borrower and hereby empowers him," and so forth and so on. We need that in order to have the power to keep a project moving so it can ultimately be delivered as intended.

On the end of that construction job there are many other things, such as a performance bond on the contractor, the final or closing stoppel certificate which assures that the borrower got all of the proceeds of the loan and that it is a valid and subsisting first lien.

Now in all of this we feel a very heavy responsibility to supply the credit necessary to keep construction things moving that are needed by the community so that the community has the necessary facilities which it needs for growth and for the accommodation of the public. When we do this properly, it contributes to the prosperity and promotes progress of civilization.

We also have the moral responsibility to be constructive in our decisions, giving service and support to every project that needs credit that in our judgment is economically sound, a necessary facility for the mortgagor or owner to enable him to provide the need and beneficial facilities for the community for which it is planned. This we try to do to the utmost of our capacity in endeavoring to supply the credit needs of our community which reaches beyond Omaha into all of Nebraska and roughly into 500 communities scattered in ten states.

In conclusion, there are some lines, if I may, and this will only take 30 seconds, there are some lines that I think are pertinent particularly in this day and age that are appropriate for us to think on and take into heart. They come from the pen of Abraham Lincoln. They go like this. It is entitled "Property Is the Fruit of Labor". (Quoting): "Property is desirable, is a positive good in the world. That some should be rich, shows that others may *become* rich, and hence is just encouragement to industry and enterprise.

Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own house shall be safe from violence when built."

CHAIRMAN SIMON: Let me at this time turn the meeting back to Mr. Otis, who will give us a few of the questions that you have propounded.

MODERATOR OTIS: Mr. Stelling, I have a question here: Could an assignment of the performance bond and labor and material bond be sufficient to protect the lender, thus eliminating the need for a power of attorney?

MR. STELLING: This is a real good question and it is a sharp question. I think I would have to tell you that the answer is "No", but I would like to explain a little bit: No. 1, the assignment of the performance bond is not really applicable because in our construction financing we already contemplate and have in hand what we call a dual obligee performance bond which runs in favor of the bank as well as the owner, so we've got the same rights to proceed against the surety as the owner has under our dual obligee form. It names us as an obligee as well as the owners, so we don't need an assignment. We've already got the bond in hand and have power to act under it. But the reason we would not accept, or on account of this bond the reason we would not give up our power of attorney in the building loan agreement is because it may be necessary to move in immediately and protect the property against damage, wear and tear, the weather, vandalism, what-have-you, and if we did not do that we would stand the risk of losing some of the protection of our bond, for the reason that we did not exercise reasonable diligence in protecting the property and mitigating the loss for which the surety finally became liable.

Now that is my answer on the question. Let me go one step further and say this, that when a default of this type occurs we, as a matter of practice, call that to the attention of the surety immediately, and if the surety will take the deal in hand and proceed and do what is necessary, we allow them full course to go ahead and do the necessary things. But if they do not, if they sit back and say, "Well, we are not going to do anything. We're not sure this guy defaulted." They'll say, "You get a judgment against us and then we will pay." Well, we can't wait that long. That is the reason we have to have the power of attorney to proceed immediately.

MODERATOR OTIS: We have one more question: Is it legally possible for an insurance company to make a 100 per cent loan?

MR. THORNE: A real quick answer is obviously "Yes". The Nebraska State Insurance Code has three different sections that could qualify. In one instance you would have to have an appropriate lease to an established credit. In another instance you would have to have real estate development failing within, I think, a three-mile limit of a metropolitan area. I think the third case would be what we call our wastebasket—if the Commissioner isn't here—in which you can qualify about anything. But these all have 5 per cent limitation.

CHAIRMAN SIMON: Gentlemen, we turn now to the subject of the Shopping Center Lease. Our speaker, Mr. Benjamin Pollack, is associated with the firm of Lord, Day and Lord in New York. He is a member of the New York Bar Association, New York City, County of New York. His legal education comes from Columbia University. He is a lecturer for the Practicing Law Institute. He has been a visiting lecturer at Michigan State University. He has been a lecturer at the University of Arizona, at the University of Wisconsin. His name appears frequently in the activities of the Joint Committee of the American Law Institute and the ABA.

THE SHOPPING CENTER LEASE

Benjamin Pollack

Our time is limited, so we obviously can't cover all of the clauses that go into a shopping center lease. I have one article that counts them and there are sixty-three. Ordinarily when I give a lecture on shopping center leases it takes several hours.

You do have the reprint of that article in *THE PRACTICAL LAWYER*, May 1970 issue. I am going to cover a few of the clauses, I hope, in depth rather than try to cover the whole waterfront and just touch the highlights, because I think you get much more out of it.

In this article in *THE PRACTICAL LAWYER*, I did omit mention of one clause, and that is a clause which requires the tenant to sign an estoppel letter for the benefit of the mortgagee. At the time I wrote that I didn't think that it was that important or that unique to the shopping center lease, but I'll mention it before we are through.

Since I can't cover all of these things I do want to give you some mention of sources for reading which I think are extremely important. I would say that a very good one is an article by Jack Morris called "The Shopping Center", and it is published by the Illinois Institute for Continuing Legal Education in Chicago. The volume it is in is called "Illinois Real Property, II". Another is a

book, the only hard cover book that I know of that is really encyclopedic in nature is by Gruen and Smith. It was published in 1960. It is a little outdated, published by Reinhold in New York. It is not easy to get hold of except through the publisher, but it has a great amount of information. If you want to educate yourself in shopping centers, if you should get a client who is either a developer or a tenant, you have got to educate yourself somewhat in the background of shopping centers because I think it is impossible to work on a lease without knowing something about what the shopping center is all about.

A shopping center lease is drawn against a background of the mortgagee's requirements. Remember this, that the shopping center lease we are talking about and the one that is difficult and interesting is the one that is drawn when the shopping center is still a gleam in the developer's eye. It probably hasn't progressed very far at all. So there are myriad problems that the developer faces, and out of caution and out of fear he has got to put a lot of protections in that lease, and the tenant has to be sympathetic with that because he doesn't know how far the mortgagee is going to go. If there is a ground lease involved he doesn't know how far the ground lessor is going to go. So these lease clauses must be drawn with those in mind.

The classic way of starting a shopping center is, of course, for a developer to get a piece of land by option or by long-term lease or by purchase, and then look for his major tenants, department stores if it is big enough, and his satellite tenants, the well-rated smaller stores, and then go after his financing. Now, that sets up a certain number of problems, remembering that this whole process takes anywhere from three to five years. I don't know of any shopping center that was completed in less time than three years from start, and most of them you can count on, particularly the regionals or large centers, about five years.

The other way which I say is in contrast to the classic way of developing a shopping center is for a combination of department stores, and this applies only to regionals, and when I say "regional" I mean a shopping center with 500,000 square feet or more of store space, and what happens is that the two department stores get together, they buy the land, they find the land, they buy it, they get it rezoned, they engineer it, and sometimes they even build a stretch of road. Then they hand the whole thing to a developer on a silver platter. This is really a great boon to him because it saves the developer two years or so before he has reached that point. But the important aspect of this way of doing it is that the shopping center is owned partly by the developer who develops the satellite stores, partly and separately by the department stores.

So in the typical case where you have two department stores you will have three owners, and possibly three separate mortgages. Then a so-called reciprocal easement agreement or an operating agreement must be entered into which will have the effect of making this whole thing an integrated center so that everybody in sight will be protected. The three principal owners will be protected against one another and the sub-tenants will be protected. They will have use of all the parking areas and they will be protected in their possession.

The leases when you have a situation like that, I am talking about the space leases for the smaller tenants, are a little bit different. There are other considerations, at least additional considerations, and also there is a little more research and looking into what the small tenant should do in order to make sure that his possession is safe. What he wants to do, of course, is to protect his possession against a termination of a ground lease or a foreclosure of a mortgage. One of the problems is that in many states, I don't know how it is in Nebraska, but where a mortgage is superior to a lease and it is foreclosed, there is no way in the world you can stop the lease from being cut off and the sub-tenant is just out of luck. But of course there are ways of overcoming that by appropriate agreements that everybody makes at the outset, providing for subordination, attornment, and acceptance of the attornment. The sub-tenant attorns to the mortgagee. Whether that covers the sub-tenant in the protection of his space in case a stranger buys in at a foreclosure sale, I don't know and I haven't been able to find any cases.

Generally speaking, if it's a good tenant certainly the purchaser at the foreclosure sale will not want to kick him out. But there are situations in some states where the sub-tenant is not protected, unless in the procedure for the judicial foreclosure it is possible to publish the terms of sale on which the purchaser is going to buy and say, "You must recognize all these small sub-tenants because that is the condition in the mortgage." It is possible that that will be honored, I don't know. I have been looking for a case to cover the situation. If anyone knows of one I'll be delighted to have it.

Before a shopping center lease with any tenant, large or small, is completed and signed it must be cleared with the mortgage lender. They generally run to a pattern but they have their unique rules and regulations, their unique criteria. They are not always sensible in the eyes of the people they deal with, but you can, by following certain general rules, knowing what the mortgagee is looking for, play it pretty safe.

Then in addition to that, you put a provision in your lease saying, "When we finance this shopping center, if we get a mortgagee

who wants a change in this lease, the tenant agrees to comply with that change, then of course the tenant puts some saving language in there, provided it doesn't increase his burdens" and so forth and so on.

If you have this reprint, I am going to talk about the clauses of interest to the mortgage lender. It is on Page 43. Bear in mind that the mortgagee is concerned about possibly having to become the landlord by foreclosing and taking over the shopping center, and he does not want to inherit any obligations that are going to require him to pay out any money. He also wants to make sure that none of the leases have any provisions in them which will give the tenant an "out", which will let the tenant reduce his rent, which will let the tenant cancel his lease, and so forth.

In connection with that I ought to call your attention to it, if you haven't already seen the cases, but more and more the courts in various jurisdictions are departing from what we used to know as the rule of independent covenants. Years ago you used to think of the covenant to pay rent as inviolate, and nothing that the landlord could do by way of breach of lease could give the tenant the right to stop paying the rent, and yet in recent years a number of cases have been decided which have said, "We are going to construe a lease, not as a grant of real estate subject to conditions, we are going to construe it as a *contract*, and the breach by one party will excuse performance by the other." Those are contract principles. So there are a number of cases which in recent years have said, "Well, the tenant is excused from paying rent." Some of those are collected in an article I didn't mention to you. It is printed in an article entitled "Drafting Shopping Center Leases" and it is in the Summer, 1967 issue of the JOURNAL of the Section on Real Property, Probate and Trust Law of the American Bar Association. That was written by the Lease Committee of that Section, about twelve men, and I was one of them. We made a complete study of the shopping center lease. I wrote three sections of it, and the one dealing with the changing attitude of the courts was written by me. There are about half a dozen cases there. That was written in 1967 but since then there have been more cases. Quite soon there will be an article published which will bring the thing up to date and give a real critique of that whole problem.

Now, what clause is the mortgage lender interested in? He is interested in any clause that gives the tenant the right to perform where the landlord has breached, and to deduct the cost of his performance from the basic rental, the minimum rent—like any other clause which looks toward the reduction of rent, even for a limited period, the mortgagee just abhors it. He does not object to taking

those expenses out of percentage rent, and that is a common way of doing it.

He objects to any clause giving a tenant the right to cancel the lease, surrender the premises, or suspend payment of rent, except of course in the case where there is taking by eminent domain where the taking is large enough to prevent the store from being reasonably useful for the conduct of the tenant's business, and also where the premises are destroyed by fire.

He objects to clauses that give the tenants exclusives or restrictions on the sale of merchandise by other stores of the shopping center, and the reason for that is that in many jurisdictions a breach by the landlord of that restriction against allowing other tenants to go into competition with this particular tenant, can result in a cancellation of the lease by the tenant, and this is another thing that the mortgagee abhors.

There are many leases, and I have seen many of them and drawn them myself, requiring the landlord to build an addition to the store if the tenant achieves a certain volume over a certain period of time. And that looks all to the good. The reason why a mortgagee objects to that is that if he ever has to take over the property he may have to spend the money to build that addition, and he doesn't contemplate that he is going to have to spend any money.

Also there is another gimmick about that spending money. There is one lease which was decided, I think, in Massachusetts where the tenant had the right to perform for the landlord if the landlord breached. There was an obligation on the part of the landlord to build an addition to the store. The landlord didn't do it. The tenant paid out the money, and the court held that the tenant had a lien on the property, and it turned out also that the lien was superior to the mortgagee's lien, so there was hell to pay. The courts say that that gives the tenant an equitable lien on the real estate. There are some jurisdictions where security deposit gives the tenant an equitable lien on the real estate, and if the mortgagee takes it over, the landlord has absconded, the mortgagee *may* be responsible for the return of that deposit. Also there are some instances where the deposit is said to be a lien on the real estate. In some cases where the deposit is not returned, that tenant has lived off that deposit for a period of time without paying any rent, and of course the mortgagee is unhappy about this. He loses income.

You occasionally will see in a lease an option to purchase the shopping center. Mortgagee does not like that. For one thing, depending on when it was given, if the lease preceded the mortgage,

it is possible that the option is a lien superior to the mortgage and in some jurisdictions life insurance companies or banks are not permitted to make a loan where there is an option, because the option may be a prior incumbrance and they don't have a first lien. I've always wondered about that, but there are some decisions to that effect.

Another objection to an option to purchase is that the leasehold estate of the tenant may merge with a fee, if he buys it, and that will kill his lease and kill the obligation to pay rent in this continuous fashion, so there is a lowering of the security because there is that much less income assured because the rent obligation is gone.

Another problem is that some landlords don't want to be committed to use the insurance proceeds to restore the property after a fire. This whole business of whether or not the landlord is going to restore premises after a fire or other casualty, let's say a flood, which is generally not insurable, presents an enormous problem and may very well end up with a termination of the lease because if the mortgagee won't let the landlord use the proceeds of the fire . . . well, if there are no proceeds, that's it; if there *are* proceeds and the landlord doesn't have the money with which to restore, the tenant is going to be there without a store.

If you ever represent a tenant, look out for that because I have had leases presented to me where the landlord's attorney, not wittingly, I don't think he realized what was in the lease, but if you analyzed the lease carefully the tenant could have been in the position of having to pay rent, or partial rent, depending on the extent of the damage for the rest of the term, and no obligation on the part of the landlord to restore. If the tenant wanted to put the store back into condition so he was able to carry on his business, he would have to do it himself at his own expense.

I remember one case I had with a developer down in Pennsylvania. He just didn't believe that was in his lease. So he called in other counsel and he shook his head and said, "I don't know what some of these landlords will do!" But there it is. That is a possible danger. I don't know whether it is done deliberately, but you want to look out for it.

Also of course condemnation provisions, giving the tenant the right to cancel the lease, or sometimes if a lease says nothing about an award in condemnation the tenant *may* sometimes get a hell of an award because if the rental value has gone up since he rented his premises, he gets the difference between the rent reserve and the rent for value for the balance of his term and for any renewals. So if you have a number of tenants without condemnation clauses, or with inadequate condemnation clauses, the mortgagee can suffer. So that is another thing that a mortgagee looks out for.

Now the subordination clauses . . . well, I have already mentioned that.

Let's get onto another topic. One of the things that is unique in the shopping center lease is the description of the premises. It is not like an office building where you can say it is the Third floor or the northwest section of the Fifth floor as outlined on the map or sketch attached, nor can you give a street number. But when the shopping center is still on the drawing boards, the only thing you can do is to have an accurate site plan attached to the lease, and then that site plan should show the outline of every building, all the parking areas, everything that is essential to the shopping center, and a shaded area showing the specific store being leased. That, of course, should be in recordable form because it becomes important, particularly where you have some clauses in the lease that you want the world to be put on notice of. A correct description which makes the location of the premises ascertainable is awfully important.

There should also be attached to the lease as a separate exhibit a legal description of the entire shopping center, and in that connection the lessor should be careful not to include more than he really intends to. Sometimes you'll see a plot plan which says "reserved land" on the outlying outskirts of the shopping center, and if he ever builds on it without limiting the shopping center to the area that he first intends it is possible that some of the clauses that are involved in the leases given in the original section will apply to the new section. Particularly important, of course, are the restrictions. If in the first section there is a restriction against another clothing store, clearly does that restriction apply when a shopping center is expanded? Does it apply to the expanding part? That would depend entirely on how the whole thing is worded. But if nothing is said about it, there is a darned good chance that it *will* apply, and there have been cases to that effect. The premises should be described. Incidentally, the shopping center developers have long ago given up leasing land and building. They lease the store to be erected at a given spot because they want to reserve the underlying land for whatever reason. They may need it one day for tunnels or for conduits, sewers, or whatever. There has been certainly in my experience one case where no one ever thought of it but later when they needed to go under a store, and the land and building were leased to them, they had to pay the tenant off. So today when you represent a lessor, just keep the land for the lessor.

What is very important is the dimensions of the property, of the store. This is not just casual or trivial, because most shopping

center leases are leased on the square-foot basis, so much per square foot. The description will say Store X by Y containing 10,000 square feet. Then the minimum rental is calculated on the basis of 10,000 square feet. Then there is another provision, very commonly, which I will come to a little later, if we ever reach it, whereby if the tenant constructs his own store at his own expense, the landlord will give him an allowance based on the square footage, \$7.00 a square foot, or whatever.

If you describe a store as 100' x 50', let's say, and the rent is based upon that number of square feet, and it turns out that there is a shortage, as there was in a case that I had where we leased 10,000 square feet and we were short about 100 square feet. This made a difference. It was \$3.50 a square foot so we had 100 square feet times \$3.50 for fifteen years. That is nothing to sneeze at. Of course, also when you get your allowance you get so much less, if it is \$7.00 a square foot, then it depends on the exact measurements, so that every lease should provide that after the store is built exact measurements should be taken, and *those* are fixed as running from the exterior wall to exterior wall, and the center of interior wall to the center of interior wall. So if you are in the middle of a whole line of shops the side measurements, width, runs from center of wall to center of wall, and of course the front and back measurements run from the outside of the walls.

Another thing that is very important to shopping center leases is the right to use the common area, the parking area, which is the life blood of the shopping center, and yet there was one decision—I don't know what state it was in and I can't remember where, the court held that parking was not necessarily an appurtenance to the lease, and unless it was granted to the tenant he didn't have it. That seems wrong, but there it is.

Now what some landlords have done, the lease promulgated by the International Council of Shopping Centers and this is the form they suggest, has this provision regarding the common areas. They say the tenant will be given a revocable license to use the parking areas and any other common areas, access roads, etc.

The reason they put that broad provision in there was that the attorney for the landlord wanted to save for the landlord the right to make changes and build into the parking area, taking away parking slots, etc., so if he gave them just a license it could be revoked at any time. That was really charging at the tenant with a much more powerful weapon than he needed to because in order to save for the landlord the right to make changes in the parking area, you just need to say so. It is contained in many leases. But to give the tenant only a revocable license I think is just plain

wrong, and I think in the next issue of that lease they are going to change it. There is no reason why the tenant shouldn't be given the right to use the parking area, in common with others, and the landlord should reserve the right to make reasonable changes. You can argue about how extensive his changes can be, and that is, of course, a subject for argument.

The site plan should be drawn to scale and it should be drawn by an engineer. It should be virtually a survey of the property showing all the things on it. And there the landlord must be careful if he expects to make any changes at all or add to the shopping center. As I said before, he has got to be careful to delineate just what this particular tenant is getting, what he is interested in, and what changes he may want to make.

The tenant always objects to that, but they can compromise it along these lines, and the landlord will generally go along: He will say that the change will not be substantial, that he won't reduce the parking space below a given ratio or minimum number. The ratio that is generally accepted as a satisfactory minimum is 5.5 cars per thousand square feet of leasable area. They used to express it in terms of three to one, that is, square feet of parking space to one square foot of store area, but in recent years they have changed that to 5.5. Some studies have indicated that that is no longer a minimum, that you can get along with less than that. That is a matter for bargaining in each instance.

Another thing that the tenant wants in that clause is to say that if there is a change in anything shown in the site plan, it won't interfere with the visibility of his store or the access to it, or it won't result in more than a lateral shift of, let's say, more than two or three feet one way or the other. If you look at the clause prepared by most landlords, they can make any change they want. The tenant is interested in keeping his same position in relation to, let's say, "X" Department Store. He can say so, and he does say so in the lease, his relative position to Sears, or whoever it is should remain unchanged. Those things are subject to bargaining, and there is no reason why it can't be done.

Now let's get to construction of the store. There are two methods under which the store premises are built. One called the turnkey method is one whereby the landlord builds the whole store and the tenant just puts the key in the door and installs his fixtures and merchandise, and he is ready to go. The other one is called "shell and allowance", where the landlord supplies only a shell. And that usually consists only of a roof, more often than not, no concrete floor slab but only studs for the sidewalls, and that's it. The only thing, actually the studs for the sidewalls will show where the

store is, and the tenant picks up from there. The tenant installs everything. He not only builds the walls and the floor and the hung ceiling, but he installs all the electrical work, the air-conditioning, etc., and the landlord gives him an allowance for that.

Most allowances, in my own experience, run from about \$5.00 to \$7.00 per square foot. But I have heard of them going as low as \$2.00 and as high as \$10.00. Mostly the tenants do not have enough money out of that allowance. They have got to shell out of their own pockets and it does cost them something.

This gives rise to questions, for example, on a condemnation where the tenant has spent some money which has not been reimbursed but say he is out \$10,000. What happens on a condemnation? Does he get an award for the unamortized portion of that investment in the improvements? I think he should. This sometimes takes landlords by surprise. They hadn't expected it. But I think it just must be in. The tenants must insist on it.

One of the very important things about this work is that you'll have attached to the lease a landlord's work letter, which provides in prose a description of what the landlord is going to do, and then the tenant's work letter, which describes what the tenant is going to do. These work letters are very often ignored by lawyers. They are drawn by engineers. Lawyers don't draw them, and engineers fancy themselves lawyers, or they can't resist the temptation to put substantive terms of a contract in there. You will find provisions saying the tenant will pay for this right open on the blueprint, but certainly, right in the body of the description of the work. I have had to correct it many times. The engineer just felt that he could go ahead. A tenant's lawyer, nor a landlord's lawyer, either should not ignore this but should read it very carefully to make sure that there aren't in it substantive terms, like for example I've seen provisions for indemnification which don't belong there, and similar items. So the work letters must be read very carefully. Sometimes when they get into some very technical stuff you need to have an interpretation by an engineer.

But what is very important is the conditions laid down to attainment of the allowance. Sometimes the conditions are so rigid they are almost impossible of compliance. I don't say you'll never get your money back, but you sure have a long wait trying to comply with all those provisions.

These provisions center around satisfaction of the landlord with the work done, and unless you cut that down by making it "reasonably satisfactory", or "similar in quality to class and work done in other parts of the shopping center", that kind of thing, the landlord has the right of course to insist that the word "satisfactory" means to his complete and utter satisfaction.

Then there is this business of getting waivers. Most of these leases require waivers from contractors and subcontractors, waivers of liens. People forget when they let out a contract for constructing a store to require the waiver of liens and they forget to require the contractor to require his subcontractor to waive liens. The tenant can well find himself in the position when the work is all finished, not being able to get waivers, even though he can show receipts for everything he has paid. The leases call for more than that, they call for releases of all claims on the part of subcontractors and contractors. I think they go somewhat too far. But before a tenant enters into a lease which lays down conditions for the reimbursement to him of the money that he has laid out to build this store, he should make damn sure that he doesn't have an impossible set of conditions to meet. If you argue about it long enough you can get the landlord to be reasonable about it. One way of doing it, I suppose, would be to say that you are entitled to interest on it. I don't know.

The commencement of the term: The commencement of the lease is a kind of tricky thing. Landlord will present the tenant with a lease which says, "The term begins on the earlier to happen of the following: (a) The day on which the tenant opens for business; or (b) 30 days after the landlord notifies the tenant that the premises are ready for his occupancy."

There is a large gap that has to be bridged there, because the tenant should lay down a number of conditions to the commencement of the term. Actually the larger tenant, the major tenants, do have it in their leases and they get away with it, but the small tenants just don't have the bargaining power, I guess. My small tenants do get it because I just insist on it, and there is no reason why the landlord shouldn't give it.

For example, here are some of the conditions for the commencement: That one or more major tenants have non-cancelable leases for ten or more years and will be open, or will open simultaneously with the tenant.

That brings to mind a case. Years ago I represented a chain. It was the first shopping center lease I drew, and I wasn't as wise as I am now. My client opened. He was the first store and the only store for several weeks open in this shopping center, and in order to comply with the lease he just had to be open. Well, we finally made a settlement, and the landlord relieved him of the minimum rent and allowed him to pay only a percentage of his sales during that period.

But a tenant is entitled to have a substantially complete shopping center with the major stores in there, or more about to go in,

and a certain percentage of the satellite stores completed and occupied on the day that *he* opens. As a matter of fact, many developers try to have what they call a "grand opening". Sometimes it is a grand opening, where the thing is large enough, of one section, and then they have another grand opening of a second section, feeling that they get the benefit of a double opening, double publicity, etc. It is foolhardy for a tenant to move in, with all the expense of operating a store without the shopping center being at least decently complete.

This business of requiring leases of major tenants that are non-cancelable and have at least ten years to run is a very, very tough problem. The department stores just don't want to give it, except in rare instances, but when they own a shopping center or a third of a shopping center, they enter into an agreement, a so-called operating agreement, in which they agree with each other that they will remain open for a minimum number of years, so the small tenant from that standpoint is a little better off than in the case where the department stores are tenants of the developer.

There have been a number of cases, there was one in Tennessee about two years ago where Miles Shoe had a store and the lease said, "Landlord represents that there are in this shopping center the following tenants occupying the following number of square feet and each tenant has a lease for ten years." They mentioned J. C. Penney and a couple of others. J. C. Penney got out, and I have forgotten who else it was, I think it was Food Fair, and Miles Shoe began to lose money. Their sales fell drastically, so they just moved out and wrote the landlord a letter saying that this shopping center was not what it was. In litigation the courts went very far, they strained to give the small tenant a break, and they said, "What that lease meant was that the landlord represented that the major tenant would remain in possession and conduct his business for at least ten years. That isn't what the lease said, but the courts drew that implication because they felt this was only fair to the small tenant.

So when you represent a landlord, just be careful that you leave no such implication. In fact, it may be a little hard to sell your leases but if you want to be safe on that point you simply must say that there is no representation made that any one of these tenants is obligated to remain in or will remain in. There are a number of cases to that effect. There was one in Texas, Texas Variety Stores to the same effect, where the courts went very far to construe the language to mean that the landlord was representing that this would be a shopping center where the main tenants would remain in possession and conduct their businesses.

Our time is running out. Let's skip to continuous operation clauses. That is one of the most important clauses in the lease. By continuous operation is meant that the tenant is obligated to run his store usually during the same store hours as the main department store. Sometimes it is during the hours daily that the Merchants Association fixes. But the language is sometimes so carefully and so strongly drawn that the tenant can hardly close for a minute without being in breach. There are some cases, one in Illinois which fixes the measure of damages in a case like that. For example, there is one case where tenant under a clause like that, where he just couldn't close his store for a minute, took inventory, and the landlord took the position that he had to take inventory at night and on Sunday. The tenant said, "That costs me double overtime. I don't want to spend the money. I am better off closing on a Tuesday afternoon than working through the night." The court upheld the landlord. So that is another thing to look at.

I had an experience many years ago. The landlord kicked because when the president of a national chain died, all the stores closed for the last two hours or so. Believe it or not, this one landlord out of about \$300 kicked like hell. Well, we handled that by not answering the letter. But you can see how some landlords act.

Of course I talk about the toughness of the landlord. There's no one tougher than the major tenant, the chain department stores. An interesting thing is when you get a local department store, high credit and in the business for many years, they are much more liberal and lenient in the way they will deal with a landlord, and they will give continuous operation clauses for twenty years without batting an eyelash, whereas the department store chains, well, they'll probably stay in but they just don't want to bind themselves to it. This problem of continuous operation, then, is one that the small tenant will just have to get used to. Most leases now are willing to say that you can close on national holidays, maybe even state holidays. But actually, most retail stores would like to be open on holidays when people have the time to shop. So that doesn't do them much good.

There has been a trend of opening on Sundays, where the law allows, and even where the law doesn't allow. The cop gets paid off every Sunday, of course, but there are many stores that just stay in business on Sunday because it is a fine shopping day. I think that is about all on continuous operation.

The Merchants Association, which is unique to a shopping center, there the major tenants will not, as a rule, agree to join the Merchants Association. The Merchants Association, as you know,

is usually an unincorporated association; sometimes, depending on the jurisdiction, a corporation is used. They've just got to be careful not to make any profits so they don't have any taxes to pay. The provisions in the lease leave a great deal to the Merchants Association, but they should provide for some democratic way of setting the thing up, they should provide the nature of the organization and the vote that each tenant will have. In one shopping center—I won't mention where—the major department store, because of the way the shopping center was set up with voting rights, etc., the major department store ran the whole center. They fixed dues and everything. A candy chain that I represented, a small store, was paying a relatively small rent, found that the common area charges for the first year were as great as its minimum rent, something unheard of. In most places the common area charges run from as low as ten cents, which you don't see very much any more, to the highest I've seen is fifty-five cents, depending on the part of the country. It is now, I guess, somewhere around forty or forty-five cents as a minimum.

The Board of Directors of whatever organization there is enact a lot of rules and regulations. Generally they are very good and they perform a fine function. They provide for special events. They provide for advertising, for circus shows and all sorts of things just to bring the people into the shopping center. It is expensive, but the question is whether the payments are paid to the Association or to the landlord.

There have been several decisions to the effect that where the dues are payable to the Association, the landlord can enforce them for a breach of the lease because it is a contract for the benefit of a third party. That is a little surprising, but it is quite definite. The latest decision was about a year ago in New Jersey, and there are others. So the obligation to join and pay dues to the Merchants Association is an enforceable one. But there in that case the court said, "It is all fair and reasonable, there's nothing onerous or overreaching, so we'll enforce it."

The Rausch Company has recently put something into its leases. They start with a, let's say, 20 cents a square foot payment. Then they have a separate assessment for the opening, that is the grand opening. It takes a lot of advertising, that sort of thing. There's a special assessment for that. Then every five years it is raised, the dues may be raised in accordance with the cost of living index.

ASSOCIATION DINNER

THURSDAY EVENING

October 22, 1970

The annual Association Dinner for Members and their Ladies was held in the Grand Ball Room, President Baird presiding.

PRESIDENT BAIRD: Several years ago our Bar Association started what I think is a very nice custom of presenting two awards at the annual dinner. One to a lawyer, one to a layman, each of whom have done an outstanding job in the past year in the interest of furthering the administration of justice. Tonight it is my extreme pleasure to present the President's Award to the Honorable Paul J. Hickman, Presiding Judge of the Omaha Municipal Court. I would like to ask Judge Hickman to come forward.

Judge, I might say, you probably don't even remember this but you were appointed to the Bench in 1965 at the time that I had the privilege of serving as President of the Omaha Bar Association, and in that capacity I had the privilege of making a few remarks at your swearing-in ceremony in Court Room No. 1 in the old City Hall. Do you remember that? I remember at that time saying that the appointment of Judge Hickman to our Bench received the complete approbation of all the Omaha lawyers who knew that he would be a credit to the Bench. The fact that he is here tonight is mute testimony to that fact.

Judge Hickman is being honored because of his work in being instrumental this year in making possible a new pre-trial release program which was sponsored and inaugurated by the Omaha Bar Association. This is a procedure whereby persons accused of certain crimes can be released on their own recognizance before trial after investigation and after the court is satisfied that their background is such as permits and warrants such release. This is not a matter of coddling criminals in any way, shape or form, but it is a fine step forward in making more effective our judicial system.

Judge Hickman, among other things, and I think this still goes on, holds himself ready every night of the week for a phone call from the jail where the apprehended persons or arrested persons have been screened, and then the Judge has to decide whether the investigation is such as to entitle them to such a release.

Judge, it is a pleasure to present this plaque to you, this award, which reads: The Nebraska State Bar Association's President's Award is given to a member of the Bar "in recognition of an outstanding contribution to the furtherance of public understanding of the legal system and confidence in the profession. We are proud to

present this award to you for your contributions in this regard. Your cooperation with the Omaha Pre-Trial Release Project, leading to the successful use of this procedure in the Municipal and District Courts in Omaha, has resulted in the increased confidence in the legal system by the citizens of this state. Many homes and families have benefited, and the administration of justice has been enhanced by the innovative procedure of permitting persons accused of a crime to be released prior to trial on their own recognizance, where previous investigation so warrants. By this award we express to you our appreciation for your dedication to the highest ideals of our profession." Congratulations, Judge.

JUDGE PAUL J. HICKMAN: President Bill, I would like to accept this beautiful plaque, not only on behalf of myself but on behalf of the other distinguished members of the Bar here in Omaha who were instrumental in setting up this program. I look at this table and I would say the first one is Jack Marer, President of the Omaha Bar Association, and his Executive Council, Lawyers Larry Myers and Sam Jensen, and soon to be lawyers, the senior law students at the Creighton University School of Law. These are the men who put the program together, did the research, and they should share in this honor that I am receiving tonight. Thank you very much.

PRESIDENT BAIRD: Next it is my pleasure to present the Award of Merit to a non-lawyer who has done so much in this same area. Tonight we are very pleased to be able to present this award to Mr. Maurice L. Sigler, who is the Director, Division of Corrections of the State of Nebraska, more popularly but somewhat erroneously known as the Warden of our State Penitentiary. Mr. Sigler, would you stand please.

Before presenting the award, I would like to give you a little background of our honoree. He has no idea from whence this came, but I am going to read in part from a quotation from a newspaper from Cincinnati, Ohio, dated October 15, 1970:

"Nebraska Director of Corrections, Maurice L. Sigler has been named President-Designate of the American Correctional Association. Previously the Nebraska Director has served as President of the Wardens' Association of America, President of the Southern States Prison Association and for thirteen years has been on the Board of Directors of the ACA.

"Sigler came to Nebraska in June, 1959, as Warden of the State Penitentiary. In 1963, with the merger of the penitentiary and the reformatory, he became Warden of the State Penal and Correctional Complex, and in 1967 was appointed Director of the Division of Corrections.

"Before coming to Nebraska, he served fourteen years with the Federal Bureau of Prisons, was Warden of Louisiana State Prison six years, and spent one year doing special work with the Florida Corrections Department."

It is a special delight, Warden Sigler, to be able to present this award to you, which I think will be self-explanatory and which reads as follows: "The Nebraska State Bar Association's Award of Appreciation is given to an individual not a member of the Bar in recognition of his outstanding service in helping to create better public understanding of the legal profession and the system of law and justice under which it operates. We are proud to present this award to you for your service in this regard. Your development of innovative rehabilitation practices to improve educational opportunities and work training programs, along with the work release program now in operation in our state, has contributed greatly to public confidence and our system of justice. All of our citizens have benefited from the increased efficiency in the operation of our correctional institutions and the betterment of society resulting from your efforts. By this award we express to you our appreciation for your dedication to the ideals for which this award stands." Congratulations!

MAURICE L. SIGLER: Mr. President, Distinguished Guests, Ladies and Gentlemen: I am greatly honored, and I am extremely grateful to the Nebraska Bar Association for giving me this award. But as I accept it I do so with humility because I know that there are many people in our state who could well be standing here tonight. I consider this a great honor.

I am pleased too that the Association saw fit to select somebody from the field of correction. I will try in the next two or three minutes to tell you why.

I have just in the past week, as you have just heard returned from our annual conference, the American Correctional Association Congress, we call it. This was our Hundredth Anniversary. We started it out on the hour and to the day of the birth of this organization. This is a great opportunity for us to look back and take a look at what we have done in the past hundred years and take stock of ourselves today and to look forward to future programming.

It was a common opinion among us that corrections over the past hundred years, for the most part at least, have lived in isolation. We have worked alone, we've stayed apart, and consequently we left the public in the dark and they didn't understand or know anything about our policies and our practices. As a result, we

haven't gotten much nor have we made much progress, unfortunately, in that first one hundred years. But there is a ray of light.

Most of you in this room, in fact all of the lawyers and I suppose most of their wives, are familiar with the State of the Judiciary speech of Chief Justice Burger. In that speech he devoted almost his entire time to corrections, pointing out that they are low man on the totem pole from the standpoint of this whole spectrum of criminal justice, and requesting and pleading with the people in his profession and the government to give more attention to this very important facet of its part in our system of criminal justice, requesting that they help build it up, that they help build better facilities, that they help recruit and train better people.

I was very pleased today to note that your President-Elect in his speech in essence requested you, the Bar Association of this State, to cooperate more with corrections in the future. But I must say right here that this part he didn't know too much about because I have enjoyed the complete cooperation and support of all facets of the Bar since I have been affiliated with, first, the penitentiary as Warden and then as Director of Corrections. In fact, most of the progress we have enjoyed in this state in our area of work is the direct result of lawyers working with us and doing, in fact, most of the work.

I would like to give you just two examples. One was mentioned by the President, the Work Release Bill. This was adopted in 1967 and it was offered by some members of this Association, strongly supported by news media, and was enacted into law. This law gives many prisoners an opportunity to readjust themselves while they are still under our custody. This law is such a fine piece of legislation that jurisdictions all over the country as far away as New York have literally copied it and are using it today in their system and enjoying the fruits of your labors.

In 1968 this same group of lawyers sat around our dining room table nearly every Sunday afternoon and Sunday evening for at least three months drawing up another piece of legislation, known as the Nebraska Corrections and Treatment Act. This was introduced into the legislature in 1969 and was enacted into law. And for the first time we have goals and means to go by in developing treatment programs for the offenders in this State.

In 1971, in the spring, there is going to be a National Conference on Law Reform held in Lincoln, Nebraska. This is a result of this bill, and this law of ours, 1307, will be used as one of the models in an attempt by this group of people to establish laws and reforms to be used by all the correctional systems in our country.

I might add right here that this idea did not come from correctional people but from lawyers.

We still have a long way to go in our business. This was vividly pointed up to us in our studies in our National Centennial Congress just now. But we have much hope in the future. If you people will continue to be involved, as you have in the past few years, we feel that the future of corrections generally is bright. We are certain, with this help, that we are going to do a better job in fulfilling our obligations not only to the offenders but to our society.

PRESIDENT BAIRD: Now, ladies and gentlemen, we have reached the point in our program that I have been eagerly awaiting for one entire year, the opportunity to present to you our distinguished speaker of the evening. He is Mr. Carl F. Conway of Osage, Iowa.

Our speaker was born in Garner, Iowa. Then after he grew up, finished his education and settled down to practice his profession, he moved to a *small* town, Osage.

He is a distinguished speaker and lecturer of renown, not only in the Middle West but all over the country. He is past President of the Iowa State Bar Association and a former member of their Board of Governors.

ESTATE PLANNING FOR THE INDIGENT

Carl F. Conway

President Baird, our Distinguished Judges, and many Distinguished Guests, Members of the Nebraska Bar, Ladies and Gentlemen: It is a real pleasure for me to be back here again tonight in Omaha and speak to you. I was here, some of you may remember, about 1959, and at that time I thought I had solved all of your problems but I find now that you are in even a worse mess than you were then. So I want to try to help you, if I can, in our discussion tonight.

I want to say, first of all, that I feel a great kinship with the people of Nebraska. Sure we are across the river from you, but basically our people are very much the same. We dress the same as you do, we speak the same language, wear the same clothes and are interested in the same things. I think the essential difference now is that you have a lot better football team than we have. And if time permits I will get into that later.

I do want to extend greetings to all of you. I am sincere when I say this. It is a real pleasure to be back. It is seldom that I am invited back any place I have been in such short a time. And to see some of my old friends, George Turner, I have known George, I'm not sure, it seemed to me like just before the Civil War. He is "Mr. Nebraska Bar." He has been out to Iowa many times. We love George and June. We are always glad to have them.

When I was here last, Joe Tye was your President, and a good president he was, so I have to pay a little tribute to Joe and to all the others I have met since that time.

Speaking tonight about "Estate Planning for the Indigent," I have had a little criticism since I arrived here and some said, "Well, why talk law? The ladies aren't interested in law. Why not get your teeth into something that will challenge the whole group?" So I have decided at the last minute to change, and I am going to add to that just four other topics, namely, "World Peace," "Einstein's Theory of Relativity," "Creeping Inflation," and "Crime in the Streets." I would much rather cover a limited number of topics and handle it definitely than to have you go away all confused, and this way when we finish you will know as much about these things as I do, which I hope will be good. But time permitting, I'll get into those.

May I say, first of all, I do appreciate the kind introduction. I have been a little embarrassed because having been here before people still say, "I don't like to bring this up, but where in the world is Osage?" Actually in northeastern Iowa. We are up on a direct non-stop flight New York City to San Francisco. It is Flight No. 13, if you are interested, and it goes to Chicago, Osage, and Ogallala, and then San Francisco. They do not land in Osage. You have to come in by parachute, but we are delighted to have you any time, you jump right after you leave Chicago. We are the only airport I know of with inner-spring mattresses on the runways. So if you do come in we will be delighted to see you. May I just say this by way of caution, please do not come in during the duck-hunting season. We have got some guys that will shoot at anything. And another thing, if you do come in be very, very careful of that Congregational Church steeple. You can get hung up on that without any trouble at all.

We have a delightful little town, a county seat town. We are very proud of it. I have spent my entire practice there in Osage. I think one thing we have that is very dear to me, and I know in Omaha you probably have it on a bigger scale, we have in our town one Stop and Go light, which is right in the heart of town. But it is, I think, the truest colors of any Stop and Go light I have

ever seen. My office is right near there and I love to go down and just watch the lights change—when times are slack. A few years ago I was in New York City at the American Bar meeting, and I was intrigued, I didn't go to any of the meetings, I watched the Stop and Go lights. But one thing I don't like about the city lights, we don't have at home, you have it here in Omaha. You have Walk and Don't Walk. To me, that takes all the initiative away from people. We just figure, just let them get out and get hit and they'll know when they can walk and when they can't walk.

Another thing I must mention that my home community is noted for, we are very proud of this, our Mitchell County Fair. We do have a tremendous Fair each August. It was unfortunate when New York had its World Fair we had our Fair on at the same time. We caught a lot of people coming from the West and they just stopped there. I'll tell you this with all frankness, I want to be fair, that New York Fair I think did have the better exhibits. On the other hand, I think in Mitchell County we had the nicer rest rooms. So it all depends on what you are looking for in a Fair.

I never give a talk but it seems like I have trouble getting to the topic, but I am interested in public relations. I work with lawyers. I always like to get into a little philosophy, if you could call it that because that's what I think of it. One thing I think that we should try to do is to be more understanding of each other. I don't care whether we're talking about Nebraska or Iowa or wherever it happens to be, we should be more understanding.

Sometimes grave things can happen on misunderstanding. I shudder when I think of what we almost suffered the night of that famous ride of Paul Revere. This came to me very straight, and it could have meant a change in the course of history. But that night the light almost didn't occur because Mrs. Revere and Paul had a terrible argument and she said, "I don't care who is coming, it's my night to ride the horse." And I think, supposing she had stood fast, where would we have been tonight? We wouldn't have been here.

Then I think of Thomas Edison, our great inventor, and the first night he came forth with his masterful invention and his wife woke up in the middle of the night and raised the devil. She said, "Tom, I can't sleep with that damn light on." And yet that electric light changed the course of history. And that's the thing we have to do is learn to change as history goes on.

I don't need to talk to this group at any length, but courtesy means so much. Sometimes we are so thoughtless. I had this happen one time during a trial and was embarrassed by it. I had a

good trial, a good case, two men on the other side. We got about half way through the trial and my client said, "Carl, I want to get another lawyer in here to help you.

I said, "Joe, we don't need another lawyer. The case is in the bag. We are doing fine. Just don't worry about it."

He said, "No, I want another lawyer."

I said, "Why do you want another lawyer?"

He said, "Well, on the other side when one of them is up there talking the other guy is sitting back thinking." He said, "While you're up there talking, nobody is doing any thinking."

I thought, how true that is, that to lose faith in someone, to show a lack of courtesy.

We have so many domestic problems, and to show you the answer, one man came in one day and he was having trouble with his wife, so he came in one time and was complaining about it. Here was his expression to me. He said, "You know, I thought we had everything patched up." He said, "My wife yesterday ran away with my best friend. Gad, how I miss him!"

So again a lack of courtesy can upset the harmony in any home.

We had this happen once, and I hope you will pardon these personal references, but I know more about me than I know about you, and that is the reason I give them. Some time ago I was seriously ill. I am on the Board of Directors of one institution at home, and this has happened to other men I know, but they sent me a get-well card. They said, "The Officers and Directors of the Savings and Loan Institution wish you a speedy and complete recovery." Then the Secretary added, "The vote was 4 to 3."

Well I often think, and I think I quoted it when I was here before, about my grandfather on taking advice. We should take advice from our peers, our elders, our fellow lawyers, our judges, and not be full of mind about things. My grandfather, I think, gave me two of the best pieces of advice I have ever had. He was a grand old fellow. As I told you before, he was quite a drinker. In fact, he was a drunkard, which I don't like to say about any relative, but he was. But he was very smooth about it. My grandmother never even knew he drank until one night he came home sober.

He's that kind of a fellow. He said, "Carl, there's one thing I would like to do, just find out what my capacity is for drinks." He said, "The only trouble is, I pass out just before I get there."

But he was an optimist. I am not here to talk to you about my relatives. He was really an optimist. He got married, actually, several times. The last time he was 83 years of age and he insisted on buying a home near the school.

He was the fellow who told me these great sayings, and I want to give you a few now. He was a great hand to sit there by the woodshed and whittle. He said, "Son," he always called me "son," he said, "Son, there are two great lessons in life." He said, "One of them, never whittle towards yourself." "And the other," he said, "never spit against the wind."

And I have thought how basic those things are and yet they are just as true today as they were fifty years ago.

So when we have a chance to learn, let's learn and you won't have to take advice from anyone else.

We must learn to adapt to changes. And this is a changing world. You are changing yourself here in your Bar Association. We're changing in Iowa. Everyone changes.

We had to do this in our practice, again a personal experience, and I don't want this publicized particularly. We have a two-man office. We had a tremendous library, so much of a library that we just couldn't afford to keep it up. So we decided we had to make some changes to change with the times, so we did. We remodeled the library. We revamped it. We remodeled it and put it into two public rest rooms with mechanical devices. Well, last year, 83 per cent of our income came from the rest rooms. So we were able to shift with the tide and meet this changing situation, one of the ways of going ahead paying these terrific bills and not get any good out of the library.

I would like to, if I may, talk a little law before I get into Estate Planning. But this is interesting. Some people say, "Law is so dull. What do you see fascinating about it?" This is one of the most interesting cases I have been in. It's the case of *Sahab v. the Government of Afghanistan*. Sahab was my client. His grandfather died over in Afghanistan, leaving a will in which he said he left all his possessions to his legitimate grandchildren. Sahab was a grandchild, and that is where the problem comes in. This isn't anything shady at all, but the question was raised, "Was he a legitimate grandchild?" And here is where we get into the problem area. When his parents were married, and they were married, they went to what amounts to the Justice of the Peace, and he was not home. He was down at the Fair. The Fair was playing there then, and he was down riding the merry-go-round. So they went down to the merry-go-round and they said, "We would like to get married in the worst way." They said, "Would you marry us?"

He said, "I won't stop because I've got four tickets left," but he said, "You get on the merry-go-round and I'll marry you as we go around." This is all-important. So during the ride around the merry-go-round they all got on and he married this couple. And Sahab was born later as the issue of that marriage.

Then when his grandfather died, the issue was raised, "Was Sahab a legitimate grandchild, because was the marriage legal?" In other words, the Justice of the Peace there had jurisdiction only up to the line. Now it turned out that the merry-go-round was right on the line. And that is where our problem area comes in. Now, were they married on one side of the line or the other? Or partly on one side and partly on the other? Nobody knew, so the court there took a very wise decision, I think. They rested their decision. They held for my client, and they premised it on two things: The usual presumption of legitimacy, and the other, they said, "Where a line is in dispute or the jurisdiction is in dispute and there is an offense committed right near that line, either, say murder or marriage, then the official taking jurisdiction within a hundred yards could go ahead and it is legitimate." So in that case they said, with that reasoning, he was legitimate and we won the case.

An interesting thing that you will be interested in as lawyers was that I had it on a contingent basis, and the bulk of his grandfather's estate was 3,000 camels, and if you think a thousand camels around the office don't make a mess! So when you get into something like that, you can't say that the law is dull or that nothing ever happens.

Some people say this, particularly about people in Omaha and Lincoln, I know most of you Nebraskans practice the same way we do in the smaller areas. We get to the city occasionally, but the people in the city say, "How do you people in the smaller towns practice? What is your schedule?" I will give you ours. I don't say it is perfect, but it is one we use, and it's very effective. We start out at 8:30 in the morning with calisthenics. The secretaries have to do it, and the attorneys too. We go through a brisk half hour of calisthenics until you feel like you can lick the world, and then we take a nap. Then from 9 to 10 we dictate, mainly to creditors. Then there is a coffee break. Then after the coffee break, I usually go down to the courthouse where I shoo pigeons. We have a real problem there, I'll tell you, with our pigeons, not only with the lawyers but with the judges. We don't care so much about the judges, but the lawyers are trying to take care of the situation. Anyway we tried this in our office, years ago, to show you how we experiment, we adopted in Iowa a few years back a Uniform

Commercial Code. People said, "The people aren't going to go for this. They won't like this Uniform Code."

I said, "Well, let's give it a try." So in our office what we did, in our reception room we took out all of our literature except the Uniform Commercial Code, and PLAYBOY Magazine, which we always have. Then we took tests, and we found out that 82 per cent of the men who came in there with their wives picked up the Uniform Commercial Code. So we do try to keep abreast of the times, as I know you do here.

I can't emphasize too much the importance of lawyers and judges being alert. I got so excited the other day I was all unstrung. My wife became ill. She was upstairs and I called the doctor and he rushed in with his bag. I said, "I don't know what it is, Doc, but it is serious. You better get up there." So he got up there and he said, "Carl, have you got a hammer?"

"Yes." So I gave him a hammer. Then he said, "Have you got a chisel?"

I gave him a chisel and he said, "Have you got a screw driver?"

I gave him a screw driver, and I said, "My gosh, Doc, she must be in terrible shape. What is it?"

He said, "I don't know yet. I can't get my bag open."

I think so many of the problems we have are due to misunderstanding. We had—and here I go back to Osage again—a farmer was in the hospital the other day. He had been hurt in an accident and they had no room to put him in except the obstetrical ward. So they put him in there, and he saw the ladies around there, and they were taking their medicine and pills, and after he had suffered about as much as he could take, he said, "Nurse, can't you get me one of those pills?"

The nurse said, "No. those pills are for labor."

He said, "Well, that's the hell of it! Everything for labor and nothing for the farmer."

Another thing, I always like to encourage people to do your fair share of the work. I know that you do. I do back home. My Bar does. There are always some people who don't do their fair share, and yet the idea is Don't do any more, either.

I heard a cute little story that you will enjoy, if I may digress for a moment, about the blacksmith who fell in love with the village school teacher. He was a real short fellow and she was quite tall and gangling. She went by his anvil every day as she

went to school and they would talk and talk. Finally, as you might believe, they fell in love. So he proposed to her and asked her if she would marry him. She said, "Yes." He was just beside himself and he said, "May I walk to school with you?"

She said, "Yes, I guess you may." So they started to walk to school, and they went about a block or two and he said, "May I kiss you?"

She said, "No, not in public."

So in another two blocks or so he said, "May I kiss you now?"

She said, "No, not in public."

So they went a little farther and he said, "Now may I kiss you? We are getting close to school."

She said, "No, I told you you can't kiss me."

He said, "Well, then, I'm going to put down this darned anvil."

Now we get back to the punch line. The first time he kissed her he stood on the anvil. So now you know the whole story. Well, I will try to regroup now. On persistence, rather than be taken aback and to instill in you the idea of persistence, we had a fellow in high school there who was a javelin thrower. He was very persistent. He would throw that javelin, and he would throw it and throw it, but he never won anything. He was tempted to give up, and the Coach kept telling him, "John, don't give up. Just stay in there and pitch!" So he kept on trying and trying, and one day he accidentally backed into another javelin and won the broad jump. So that shows you what persistence will do.

Speaking about being fair-minded, we do have many judges here tonight and there's one thing we must do and that is to be fair-minded, regardless of our positions. This happened in Des Moines, one of the few things that didn't happen in Osage. This happened in Des Moines. Two judges were coming downtown in the morning and both of them were arrested for speeding. The question was, "Who is going to try us on these cases?" So they decided, "Well, we'll try each other."

So one judge said, "O.K. I will take your plea, then we'll reverse our positions and you take mine." So the first judge got up and said, "You're charged with speeding. How do you plead?"

The other judge said, "I'm guilty, Your Honor."

He said, "I appreciate your honesty. Ten dollars and costs!"

So they reversed positions and the Judge said, "You're charged with speeding. How do you plead?"

He said, "I'm guilty Your Honor."

He said, "I appreciate your honesty. Fifty dollars and costs."

The Judge said, "Fifty dollars and costs! I only fined you \$10.00!"

He said, "Well, this is the second case we have had like this today."

I always like to talk about legal analysis because to me a lawyer isn't worth his salt unless he can analyze. I know that in my last talk to you I talked about analysis. I would just like to add this one thought tonight. Sometimes we don't stop to think things through and the solution is right at hand.

In my own case, I had always hoped that I could reach the point where I was making \$3,000 a year. But I got up to \$2,980 and \$2,975, and that was as much as I could get. I started to analyze the thing and I thought, "Carl, there must be some way to solve this. And when I solved it, it was so simple that I kicked myself all over. I just took in a partner who had been making \$6,000 a year. Of course, he wasn't very happy, but if you just put your mind to it, you can really do it.

A lot of times adversity—I think we should overcome adversity. We used to get a big laugh out of it in Des Moines, and it is true: Our Supreme Court complained there about not having adequate pay, and they still do this, I think, to some extent. They stay in the State House overnight rather than go down to the hotel or motel. They had an indoor bed there and a couple of them stayed there. We had a rather sad case. One judge didn't get his bed tied down properly at night and it flew up and banged him into the wall. He wasn't seriously hurt, but actually his opinions were better *after* that than they had been before. Anyway, well, I covered that point.

Sometimes, I know, we get frustrated. We do all we can and we feel like we haven't accomplished anything worthwhile. We had another fellow I know of, and I don't recommend this or condone it at all, but he was a married man and he had a lady friend that he used to call his "Wednesday night gal" because on Wednesday night he went out with this gal and, as you might know, eventually his wife found out about it and raised the roof and divorced him. So he went ahead then and married this gal. Then he went practically beside himself—he didn't know what to do with himself on Wednesday nights.

That, I think, kind of brings us up to date on some of those things. Now I think maybe we should get into Estate Planning. Actually, this came to me yesterday, and may I correct an impression now. One of the men expressed a little interest or concern for fear that my talk "Estate planning for the Indigent" might be misinterpreted, and people might think that I was making fun of those with limited or no assets. That was not the idea at all. But the reason I have gotten into this field is because no one else *has*.

We have all kinds of estate planning devices, ways to save money, and so forth, but what about the indigent, the poor man? Doesn't he have a right, a constitutional right, to say who shall pay his debts? Now I believe he *does* have. And I cite to you the case of my grandfather who had his own will, and here is what he put in his will: "I give and bequeath all of my property to any individual who will assume and pay all of my just debts." Then he went on, "I further specifically provide that my assets shall not be disclosed to anyone, including the federal government, until those debts are fully paid." Well, you can see what it did. It threw out a challenge. Of course I had known my grandfather for a long time. I remember when I was a boy he would say, "Carl, would you like to go fishing?"

I would say, "No, grandpaw, let's go down to the bank and count your bonds." At that time he had quite a few. Anyway, when he was gone, I thought, "Well, I'm going to go ahead. This is kind of a grab-bag thing. It's a shot in the dark. You agree to pay the debts before you know what the property is." So I decided that he had debts of about \$10,000. When they opened the estate I got a snow shovel and his whittling knife. That's all I got out of the thing. I mention it to you because if you have clients in that position, you may decide to use a similar clause, and I don't think you can improve on this: Keep them in the dark. Don't let them know what they're going to get until the lessee pays the debts.

I think on estate planning, for you ladies who feared a long dissertation, that will kind of cover that. It isn't too complete but at least it will give you some idea of where to go from there.

I mentioned earlier, and I would like to mention now, and compliment you folks here in Nebraska, not only on your Bar Association, because I do think you have a splendid Association, I know you have, but also on your football team. And I am serious about that. You have a tremendous team. I went to the University of Iowa, so I'm more familiar with that situation than I am with Iowa State. Of course, you are more familiar with Iowa State because of the Big Eight. In Iowa we have had, you might say,

an in and out season. The opening game we played at Oregon State and lost 21 to 14. That unfortunately was played in the rain, wet ball, wet grounds. The next Saturday we played Southern California, and, unfortunately, that was a dry day and the game was 48 to 0. As one of the fellows said, "The game could have gone either way, but it was a little hard to see." The turning point came when the referee blew the opening whistle. A lot of our people were critical about that game, but I was just thankful that no one was killed. Then we played Arizona, at night down there, and lost by one touchdown. We lost, actually, through a misunderstanding. A fellow ran back a kick 97 yards and they beat us one touchdown. What happened was that our fellows thought that he was a long gone friend from Iowa and they just waved at him rather than tackle him, until it was too late to do anything about it, so that ended that.

Then the highlight of the season came when we played Wisconsin, and this game my wife and I saw, and we managed to win that 24 to 14. So the following week we played Purdue and I think the boys were a little overconfident after one consecutive win, and Purdue beat us 24 to 3.

So our season hasn't been really the best, but we hope it will be looking up. Seriously, I do think Iowa State does have an improving team. They did get shellacked at Colorado, but that was one of those games where practically everything Colorado did was right, and everything Iowa State did was wrong. They're much better than they looked against Colorado and I think they will do reasonably well in the Big Eight. I don't classify them with Nebraska and Colorado, of course, but we are hoping that our Big Ten team will shape back up one of these years.

Let's see if I have anything else to bring you.

I think that is just about going to cover everything I've tried to tell you. I'll just cut it short because time is getting late.

I think what I've tried to do is alert you to some of these problems and possibilities. It is a little bit, I think, like the cross-eyed discus thrower. He didn't set any records, but he kept the crowd on their toes. My job was not so much to enlighten you as to keep you off the streets.

May I just close by saying that I have gone into quite a bit of athletics. May I give you a personal example of perseverance again? This is about our high school team. I played high school football, never played college, but I played high school, right end. You may have seen some of the games. They recently have retired my number, 13%. We went into the final game unbeaten, the two

teams, and we were all set of course to tear loose against Clear Lake. We got down to just one minute to go and we pulled our favorite play. The boys said, "Carl, you take the ball." We pulled a triple lateral off a double reverse, followed by a forward. You don't see that much any more. Boys aren't very fast. We did that and it wound up with me catching my own pass. A beautiful play! I can remember hitting the 50 yard line, the 40, the 30, the 20, the 10, on the goal line just as the gun went off. Under the rules then, as under the rules now, we were entitled to try for the extra point. They said, "Carl, go back and get the extra point," so I hit it right between the cross bars! There you would think, starting from the 10-yard line we had no chance in the world, and we scored against all those odds. Well, we lost 131 to 7. But the point I want to make is just keep trying and plugging away the way we did and you are going to score. You're going to come through!

That's all I have to tell you except that Mrs. Conway and I have thoroughly enjoyed being here. She was not able to be with me the last time. Your hospitality has been exceptional. We have enjoyed this beautiful new hotel, and we have enjoyed very, very much our return visit. Thank you so much.

FRIDAY MORNING SESSION

THE REAL ESTATE TRANSACTION AS AFFECTED BY TITLE VIII OF THE 1968 CIVIL RIGHTS ACT

Kenneth F. Holbert

Before I begin a reading of my prepared remarks, let me explain briefly a little bit about the Department of Housing and Urban Development so that you can understand the relationship between equal opportunity in housing and how it happens to be a part of this major federal agency.

As you know, the Department of Housing and Urban Development is located at 7th and D Streets in the City of Washington in a new building made of concrete, with not quite as good acoustics as this room, but adequate, I would say. Our neighbor across the street is the Department of Transportation, which is made up of all the various agencies, such as the Aviation Agency, the Highway Department, and so forth.

The Department of Housing and Urban Development consists of several agencies that were formerly independent, which were pulled together in 1955 and constituted into a new Department.

The Secretary of the Department is Mr. Romney; the Under-Secretary Mr. Van Deusen. The various departments include Metropolitan Planning and Development, which has the responsibility for 701 Planning Grants, which allots sums of money to local councils of government who have the responsibility for metropolitan-wide planning, which includes water and sewer grants, beautification, and a number of other things, including the New Communities Act, which sets aside sums of money for developers who wish to create entirely new towns.

One of the things which they are able to do is to provide guarantees for the assembling and purchase of land for creating and developing new communities and the sum of money which can be set aside for the guarantee of this kind of activity is up to \$50-million per community.

Their bread-and-butter activity, the basic thing which they do is to provide assistance to local communities for their water and sewer needs. This is a very basic kind of federal assistance, and it is extremely necessary for communities which are expanding and which require additional basic facilities for the needs of the local population, the basic needs.

But the thing which they do which is fairly imaginative is to assist in the planning and development of the water and sewer needs of that community.

The Assistant Secretary for that Division is Samuel Jackson, a native of Kansas from Topeka, who is the General Assistant Secretary for the Department, and in addition carries the responsibility for Metropolitan Planning and Development.

A second Division, also headed by the Assistant Secretary, is that of Research and Technology. It is this Division which is responsible for what you have heard about under the name Operation Break-Through, which is designed to provide new techniques and new technologies as a part of changing the concepts of housing from the traditional 2 x 4 brick and mortar arrangements to new uses which involve plastics, modular construction, and the like.

Currently Operation Break-Through is engaged in developing ten prototype sites where production will be undertaken using the new methods of modular construction, using factory built construction where the construction may be accomplished through manufacturing techniques, which are accomplished right on the site, or which involve all site construction and the transportation of the resulting units to the site. Operation Break-Through will first develop these prototype sites and will have them occupied by citizens as a means of demonstrating the kind of life styles which will result as changes in building codes are accomplished.

One of the states that has already moved to modify their State Building Code is California where a new law permits the construction of modular homes without reference to local community building codes, as long as the state requirements are met.

A third Division of HUD is the Housing and Mortgage Credit Division, which is subdivided into a great number of branches. The two principal ones include subsidized housing, which involves the traditional FHA 221-D3 and D4 operations and US, unsubsidized housing, which is the more traditional form of housing which bears the federal guarantee as far as the mortgage is concerned.

Then there is the directly subsidized Division which involves publicly assisted housing, which is normally handled through the local housing authorities of a community.

There are, of course, many other Divisions of HUD, but just to give you a laundry list of some of the things which are handled through the Department of Housing and Development, let me just run through a number of them.

I mentioned the basic sewer and water facilities, which are handled by Metropolitan Planning and Development, College Housing, Comprehensive Planning, Group Practice Facilities for Doctors, the Home Mortgage Insurance Program, which I've just mentioned, Home Ownership for Lower Income Families, which involves the 235 and 236 Programs, the Insured Property Improvement Loans, Title I, which you are obviously familiar with, the Low-Rent Public Housing, Model Cities, which involves direct grants to communities to change the character of a particular portion of a city, the Neighborhood Facilities Grants, the New Communities Grants, the Nursing Homes Grants, Open Space Land and Urban Beautification, Public Facilities, Public Works Planning, Rent Supplements, Rent Housing for Lower Income Families, Rental Insurance, Mortgage Insurance at low, below market interest, Senior Citizens' Housing, Turnkey Housing, Urban Renewal, and Urban Renewal Demonstrations.

Now, added to *that* laundry list is the Equal Opportunity Division of the Department of Housing and Urban Development. As a result of the passage of the 1968 Civil Rights Act, particularly the Title VIII section, there was created in the Department of Housing and Urban Development a new Assistant Secretaryship for the purpose of administering the various laws relating to Equal Opportunity. They include Title VI of the 1964 Civil Rights Act Executive Order 11063, which provides for equal opportunity by executive order, Title VIII of the 1968 Civil Rights Act Executive Order 11246, which has to do with equal opportunity in em-

ployment on federally-assisted construction, and the Internal Equal Opportunity Requirements under a separate Executive Order. The Assistant Secretary for this Division is the incumbent, Mr. Samuel Simmons, for whom I work.

The Equal Opportunity Division, as I have just indicated, has several segments, one of which has to do with housing opportunity, or, stated differently, the administration of Title VIII of the 1968 Civil Rights Act passed in 1968 during the spring.

My responsibility is, therefore, the administration of Title VIII on the national scene, and, as I will develop a bit later, that involves a number of new programs which I hope you will be familiar with at the conclusion of these remarks.

I welcome this opportunity to come to Omaha and share with you some reflections of mine on the impact of Federal civil rights legislation on an important corner of the lawyers' world: that is, real estate transactions.

Looking back over the last decade and one-half, the historian has little trouble in finding legal landmark after legal landmark that reveal the belated efforts of this nation to give minority people some measure of "equality under the law".

From *Brown v. Board of Education of Topeka, Kansas* to *Turner v. Fouche*; from the Presidential Order prohibiting discrimination in the Armed Services to S.2453, passed by the Senate on October 1, 1970, which will give cease and desist powers to the Equal Employment Opportunity Commission, the legal mandate is, at least, unequivocal: race discrimination is against the law. Five major Federal civil rights laws, numerous Federal court decisions, plus some State and local anti-discrimination legislation tell us so. Schools, public facilities, the ballot, the jury box, jobs, Federal aid programs, and finally shelter, all fall within the scope of the law's protection.

With all this "progress", why, then, is the national still besieged with racial tensions that could tear it apart?

As Justice Douglas pointed out two years ago in his Concurring Opinion in *Jones v. Mayer Company* (a few copies of which I have on the table here): "Today the Black is protected by a host of civil rights laws. But the forces of discrimination are still strong." No better example of this comes to mind than the subject of the Court's attention in *Jones v. Mayer*: the housing market.

But first let us go back a few generations.

One of the many badges of slavery was the legal inability of the slave to own and transfer realty and personalty. As the his-

torian W. E. B. Dubois has pointed out: "Slaves were not considered men . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property . . ." (Dubois, *Black Reconstruction in America* 10 (1935)).

The anti-slavery amendments to the Constitution and the ensuing civil rights legislation enacted following the Civil War sought to give the ex-slave the basic rights of citizenship enjoyed by White Americans. Commenting on the Civil Rights Act of 1866, Justice Stewart, writing for the Court in *Jones v. Mayer* put it this way: "Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to go and come at pleasure and to buy and sell when they please—would be left with a mere paper guarantee if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the nation cannot keep."

There is, unfortunately, substantial evidence that the promise has not been kept. For the change in legal status wrought a century ago by the Slavery Amendments and the ensuing Federal civil rights legislation has provided no passport to an open housing market for minority families, no passport to their enjoying that fundamental right which is the essence of civil freedom—the same right to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

Initially, white communities, anxious to contain the expanding ghetto, following the migration of Black people from south to north, from farm to city after World War I, tried ordinances which forbade Blacks from occupying houses in blocks in which the greater number of houses were occupied by white persons. This overt discrimination was finally declared unconstitutional by the Supreme Court in *Buchanan v. Warley*, 245 U.S. 60 (1917). Nevertheless, a variation on this theme was tried in the form of an ordinance which forbade any Black to establish a home on any property in a white community or any white persons to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city to be affected." This, too, eventually reached the Supreme Court which invalidated it in *Harmon v. Tyler*, 273 U.S. 668 (1927).

In both cases, it is interesting to note that the rights being protected were *property rights*, the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race. It was not until 1930, in *Richmond v. Deans*, 281 U. S. 704 (1930), that the Supreme Court held that a Black person, barred from occupancy of certain property by the terms of an ordinance similar to that in *Buchanan*, was entitled to injunctive relief in Federal court because *his civil rights* under the 14th Amendment were being abridged.

When the legality of the racial neighborhood ordinance came under attack, the proponents of segregation turned to their lawyer who turned to the ancient concept of covenants. Covenants running with the land prohibiting the sale of the property to Black persons enjoyed widespread use, particularly in the North. In 1940 it was estimated that 80 per cent of the residences in Chicago were covered by such covenants. Between 1917 and 1948, when the Supreme Court decided *Shelley v. Kramer*, 334 U. S. 1 and *Hurd v. Hodge*, 334 U. S. 241, no less than the highest courts of 15 States and many lower Federal courts had held these covenants enforceable. Indeed it was not until 1953 in the case of *Barrows v. Jackson*, 346 U. S. 249 that it was settled that damages could not be recovered from a defendant who had refused to honor such a covenant.

Nor did this trilogy of Supreme Court decisions end the use of the covenant. The real estate Bar devised various devices not requiring judicial enforcement to freeze out minorities: there are covenants preventing the sale of property without the consent of the original owners of the undeveloped tract; covenants requiring consent of adjoining owners before land can be sold for building; covenants requiring adjoining owners to agree to a sale or forfeit \$500; covenants requiring acceptance by a board of a community club before purchase into the neighborhood is permitted; covenants forming part of a cooperative ownership of building or apartment governed by a directorate dedicated to excluding minorities; covenants among brokers; covenants among mortgagees; reversion clauses providing that sale to prescribed minorities make title revert to the prior grantor resulting in the buyer acquiring an unmarketable title; covenants giving the original owner of the tract option to repurchase the property; covenants dealing with income limitation and occupant density, and so on and so forth.

This list is only partial. Nor is it necessary that a given device successfully pass judicial scrutiny. Valid or not, they are effective as delaying tactics.

And, needless to say, nothing prevented the landlord, the subdivision developer, the multiple listing service or the lending insti-

tution *even without a covenant* from excluding minorities from the vast housing market which exists outside the ghettos.

Finally, the record would not be complete if I failed to mention that for many years Federal policies and practices in housing reinforced bigotry in the housing market. For many years, for example, the Federal Housing Administration's Underwriting Manual warned that "if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial groups." FHA appraisers lowered their valuation of properties in mixed or transition neighborhoods. The Manual recommended the inclusion of racially restrictive covenants to keep out "inharmorous racial groups."

And while FHA has long since prohibited the issuance of mortgages on home and multifamily properties encumbered by racial restrictions, it, along with the Veterans Administration, Public Housing and Urban Renewal, have together played a major role, often unwittingly, in reinforcing and increasing the separation between Black core cities and the white suburbs. For these Federal programs have combined to make possible, in the fact of continued Black migration northward, the creation of the suburban "white noose" around our core cities.

The effectiveness of this "white noose" is again attributed to the lawyers' ability to manipulate the variety of land use controls available to most municipalities (zoning, perhaps being the most important) to fence out "low and moderate income families"—a disproportionate number of whom are minorities. The result is that the federally-assisted housing programs designed to benefit these income groups are virtually excluded from non-ghetto communities, and we find that in 1967, 95 per cent of the inhabitants of our nation's suburbs were white.

Few, then, should have been surprised by the finding in 1968 of the Presidential Commission on Civil Disorders after its thorough investigations and hearings in the aftermath of the 1967 riots that—"Our nation is moving toward two societies, one black, one white—separate and unequal."

That Commission, and others before and since, have described the evils of discrimination and warned of their consequences. Society as a whole is harmed. Separation breeds misunderstanding. The latter, fear and social hostility. Minorities, in particular are disadvantaged. Restricting people to over-crowded ghettos adversely affects their health, their chances for a quality education, for jobs moving to suburbia, for equal access to municipal services, to grass, trees and, in general, a decent and attractive community.

I am reminded of a quotation in a book on Clarence Darrow by Irving Stone of Mrs. Gladys Sweet, the Black wife of Dr. Ossian Sweet who described what she had in mind back in 1925 when she sought to buy a house in Detroit for her family. She said: "I had in mind only two things. First, to find a house that was in itself desirable; and second, to find one that would be within our pocket-book. I wanted a pretty home, and it made no difference to me whether it was in a white neighborhood or a colored neighborhood. Only I couldn't find such a house in the colored neighborhood."

Most of you will remember the tragic results following the location of that home by Gladys Sweet: the gatherings of the mob; the attack by the mob; the defense by Dr. Sweet; the death of a member of the mob; the trial of seven weeks; the acquittal by the all white jury; and also, the second trial and the second acquittal with the defendants represented by Clarence Darrow.

In 1968 Congress passed the first and only Federal fair housing law. The law contains two titles, Title VIII and Title IX, which together comprise a comprehensive attack on the institutions, on the ways of doing business, on the system, if you will, that denies the Black man, and other minorities, as Justice Stewart wrote, "the freedom to buy wherever a white man can buy, the right to live wherever a white man can live."

Now, let me turn aside for a moment and go with you step by step through an analysis of Title VIII in order to give you an idea of the range and the extent of its coverage. The Civil Rights Act of 1968, Title VIII, entitled Fair Housing provides that it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. It places the authority and responsibility for administering the fair housing provisions on the Secretary of HUD. Title VIII directs the executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner affirmatively to further such purposes. It also directs the Secretary of HUD to administer programs and activities relating to housing and urban development which he directs in a similar manner.

The sections begin with 802, which provide definitions, as statutes normally do, as to what the Secretary means, what a dwelling means, what a family includes, what is meant by a person, and here you should note that a "person" includes "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries." Other definitions include those for "to rent," what is meant by "discriminatory housing practices," and the definition of a "State."

The action provision of the statute relate to those provisions found in Section 804, where it is stated:

SEC. 804. As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin. (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin. (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination. (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

The next Section, Section 805, relates to discrimination in the financing of housing. It states simply that it is a violation of the law for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him . . .

Let me just turn aside for a moment and describe a case which we currently have under investigation which involves the effort by the owner of a sixty unit apartment to secure financing. This person who is seeking refinancing is, in itself, a corporation. They seek to refinance an existing mortgage, which is carried currently by a major insurance company, and when the application is presented there is a denial of the application on the ground that the apartment development is in a "transitional neighborhood." We have this matter under investigation, and we will be pursuing this

matter in the next few days. But it is interesting because it represents one of the few instances where the complainant is not a person of a minority group but is a person who is white, seeking merely to do business with a company that he has been accustomed to seeking financial assistance from. But the reason for the turn-down of his application for a mortgage, according to the information we have to date, is based on the fact that the neighborhood in which the apartment is located is a transitional neighborhood.

Of course we recognize that there may be other circumstances which relate to this turn-down, but the significance of the particular instance which I cite has to do with the broad application of this statute.

There is further a prohibition in Section 806 of this statute as relates to brokerage services. This short paragraph states that it is unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin.

If time permits I will describe a bit later one of the first cases which was brought under that Section by the Attorney General against the West Side Suburban Real Estate Boards in the City of Chicago, based on their exclusionary practices as it relates to admission to the services and the membership of the West Side Suburban Organization.

Of course there is an exemption which relates to religious organizations, associations, and societies, as is normal in the Civil Rights Statute, such as Title VII or this Statute, Title VIII.

Two other points. In Section 809 of the Statute there is a provision for the calling of conferences by the Secretary with arrangements being allowed, although I might add that funding might not be available for calling conferences where the Secretary may pay travel and transportation expenses for persons attending such a conference. Thus if some section of this Bar had an interest in calling a conference as relates to real estate practices in the State of Nebraska, it is possible that such a conference might be called with the financial assistance of the Department of Housing and Urban Development.

Now let's talk about the enforcement under the statute. There are three means of enforcing the provisions of this statute. Section 810(a) relates to the right or the responsibility of the Secretary of the Department to receive what we call administrative com-

plaints from private individuals, and the statute simply states that a person "who claims to have been injured by discriminatory housing practice or who believes that he may be irrevocably injured by a discriminatory housing practice that is about to occur may file a complaint with the Secretary. The complaint shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint, the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice." Then of course the statute provides that the Secretary has to notify the party charged and if he decides that, based on his investigation, the dispute merits conciliation, efforts are made by informal means to try and resolve that dispute. But beyond the effort at informal resolution there is provided the individual who initially brings the charge or complaint the right to take his matter to an appropriate federal district court and seek resolution of the matter there.

In connection with *that* right, an individual who takes a matter to the federal court may do so without the filing of any cost, and he may request to the federal district court the appointment of an attorney to represent him. The statute further provides that the court may, in its discretion, provide for attorney fees to be paid to the complainant who brings the action in the federal court as well as the costs, which I have already mentioned.

This Section also provides that the Secretary may refer complaints to a state body where there is a fair housing law in that jurisdiction, and of course we do that in some states.

There is a second method of enforcing this statute. It relates to Section 812(a). The statute says that the rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory practice occurred: Provided, however, that the court shall continue such civil case brought pursuant to this section or section 810(d) from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice...

In other words, a suit may be brought in the federal court by an individual without initially advising the Secretary that he feels that he has been the victim of a discriminatory housing practice.

Most of you understand that housing, when it is available, may not remain on the market for any considerable period of time. This is particularly true of apartments and single family residences. So this section of the statute provides a means for an individual to go to an attorney and file immediately a suit seeking a temporary restraining order to hold the property or to freeze the property, to take the property, in effect, off the market. Later the court in its wisdom may decide to remand the case to the Secretary and ask the Secretary to try to resolve the dispute between the parties before a trial.

But the opportunity is provided in this statute for any citizen, and the other definitions which I've already related, may bring an action in the federal court without reference to any administrative process. Try at this point to make this distinction, because some of you have had experience with Title VII of the 1964 Civil Rights Act that relates to employment which provides that the individual complainant must first file his complaint with the Equal Employment Opportunity Commission before he has any right to take his complaint to a court. This provision clearly makes it possible to avoid the administrative process altogether and take this matter, if he wishes, directly to the court.

The third method, and before I go to it let me add just one other point in terms of emphasis, because of the interest of the Bar in this particular aspect of the statute. One of the things which the court can do is to grant as relief as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees. My experience has been that courts take a fairly generous, or, let's say, wholesome attitude in making that kind of judgment.

The third method of enforcing Title VIII is that provided in Section 813(a). This relates to enforcement by the Attorney General of the United States. It provides that whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other

order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title.

I might add that in connection with all of the rights protected by Title VIII there is, undergirding the exercise of the option on the part of the citizen, a special provision in the statute which says that the interference in the use of the right is prohibited by the law, and this is prohibited by Title IX, which is described as "prevention of intimidation in fair housing cases." In other words, there is a separate section of the statute which prohibits any interference on the part of an individual who wishes to seek to assert his rights under either Title VIII of the Civil Rights Act, or any of its Sections. I draw this to your attention particularly because sometimes in trying to advise clients they adopt an attitude which says, "Well, I'm going to do what I want to do, and the parties can like it or lump it." But I would suggest that if you have the occasion to be involved in a fair housing case that you certainly advise your client that he exercise some discretion as to what actions he takes as it relates to the complainant because of the prohibitions in this section.

Now, that is essentially a walk-through of the provisions of the provisions of Title VII. Now let me describe briefly what form of action we undertake in connection with the processing of cases from an administrative standpoint.

We have developed a complaint form, and we have established offices in ten major cities throughout the United States, which we describe as our Regional Offices. As you know, HUD is currently engaged in establishing a large number of additional offices throughout the United States for the processing of all of this business, both hard ware and soft ware, and wherever the HUD office is located from the standpoint of a regional office, there is also an Equal Opportunity segment, your nearest office here being the Regional Office in Kansas City, which was just recently established.

In addition, there are Regional Offices in Denver, in San Francisco, in Fort Worth, Atlanta, Philadelphia, Chicago, New York, and Seattle. These offices each have a component of Equal Opportunity personnel who are responsible for the receipt, investigation, and conciliation of administrative complaints.

Now throughout this discussion I have not made reference to the Office of General Counsel of the Department of Housing and Urban Development. I think it would be useful at this time to point out the responsibility of that office as it relates to this statute, as well as all of the other matters which HUD is engaged in accomplishing.

The Office of General Counsel has a particular role in the administration of Title VIII, in that the complaints which we process from the administrative side which failed to be solved through the application of, if I may use the phrase, jawboning, those cases are then referred to the Office of General Counsel for transmittal to the Department of Justice. The Department of Justice then is charged with the responsibility for initiating action under Section 813 as a pattern or practice.

To make sure that there is no overlap between the activities of the Department of Housing and Urban Development and the Justice Department, we maintain liaison with their Housing Section so that we are aware of any matters which they are investigating or litigating, and they are of course aware of any matters which we are investigating or conciliating.

There is no value in a presentation of this kind if there is inadequate time for questions, because I know I am moving fairly rapidly and I am perhaps touching on matters which you would like to direct questions, so let me rapidly now conclude.

The things which we have successfully handled to date through the administrative process can be noticed by these examples.

In Virginia, settlement was reached with a major developer, whose operations are state-wide, growing out of a novel discriminatory scheme using a reversion clause in the contract between defendant and builder. The settlement agreement, reached after negotiation, provided for appropriate record keeping, reports, and monitoring of the developer's operations throughout the State as well as \$3,500 in damages to the complainants. This is not through the litigation process but through the negotiation process.

In New York the settlement reached with a Brooklyn landlord provided for offering of vacant apartments to complainant until complainant had found housing which suited her need, provided for a written apology, a report covering the race of and actions taken respecting all applications for apartments over the next year and notification to tenants, brokers, salesmen, and applicants of the landlord's nondiscriminatory policy.

In Biloxi, Mississippi, settlement was reached with a major real estate firm providing for nondiscriminatory language in advertising and \$500 in damages to the complainant.

In Houston the respondent agreed as part of the settlement to sell two lots of the complainant's choice in a subdivision for the same price and under the same conditions as those allegedly denied the complainant on account of his race. Record keeping and reports to HUD were also required.

In Aurora, Illinois, the settlement required a real estate management firm to take specific steps to notify prospective tenants of its policy of nondiscrimination, to keep records respecting race of all prospective tenants, and to pay \$250 to a nonprofit organization of the respondent's choice engaged in fair housing activities.

Let me mention a case which I think you may find of interest because if you represent cities and communities as a part of your practice you should be aware that zoning matters are also subject to the concern of one or more of the laws which I have made reference to.

The 1866 law, Title VIII and Executive Order 11063 in the recent case of *Kennedy Park v. The City of Lackawanna*, the federal district judge held that both the 14th Amendment and the Federal fair housing law are violated by local zoning ordinances blocking a predominantly black project in a white neighborhood where such action had the inevitable effect of furthering and maintaining racial residential segregation in Lackawanna, New York. In that particular case the court required as a part of its order, after treating the history of discriminatory housing practices in the community in a 99-page statement, found and ordered the City Council and the Mayor to permit this subdivision to tap the sewer which, according to the city, was already impacted and overburdened; further ordered the city not to issue any additional permits to tap this sewer until this subdivision had been completed.

The case involving Southern Alameda Spanish Speaking Organization of the so-called "SASSO" Case in California, in this case a referendum zoning had defeated the construction of a proposed low-income housing project in a white area. The court, in holding that plaintiffs might prove their case without regard to the voters' motives, pointed out: "Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually, if not always, are members of minority groups."

I will pause at this point and simply say that I appreciate this opportunity to just very lightly touch on the various arrangements which are built into new statutes now dealing with the problem of housing opportunity.

I will have the opportunity, I trust, in discussing some of your questions, to add to your store of citations concerning this particular area of fair housing law.

MODERATOR ROCK: Thank you very much for coming out all the way from Washington to enlighten us on this. I am sure it will be a reference we will refer to if we ever get involved in our Nebraska LAW REVIEW where these proceedings are recorded.

Our next speaker is the Referee in Bankruptcy for the United States District Court for the District of Nebraska. I know all of you know him, and I need not go through his credentials; however, I was so surprised by some of these things: He graduated cum laude from the University of Nebraska. He is a member of the Order of the Coif. All of these things came as sort of a surprise.

He has served as minority counsel to the Senate Sub-committee on Improvements in Judicial Machinery. Of course he was law clerk to Judge Van Pelt; formerly chairman of the Junior Bar Section of our Bar Association, and has been a discussion leader and lecturer at many Referee in Bankruptcy Conferences.

He has contributed, previously, to our Evidence Manual, and this time to our Real Estate Manual, an intensive study of the many nonconsensual liens that are possible in Nebraska, and the Committee was so impressed with that that we decided to ask him to point up the highlights or discuss some of the things he came across in preparing his article.

I give you Jerrold L. Strasheim, our Referee in Bankruptcy.

THE REAL ESTATE TRANSACTION AND NONCONSENSUAL LIENS

Jerrold L. Strasheim

I heard one fellow say just the other day when I was listening to a talk, after the introduction, "I can hardly wait to hear myself speak." But, to begin with today, I am going to offer you a choice, a very simple choice. In the program, "consensual" in the "Non-consensual Liens" is spelled "consensual," and in the real estate book it is spelled "consensual." So I am going to let you choose whichever spelling of that word is correct, because I am not sure that I know. But I would call that discrepancy to your attention.

The subject matter that we have today—"Nonconsensual Liens"—I don't suppose is the kind of subject which is likely to incite people to strong passion or to bring them to their feet shouting for one side of a particular question or the other. I should say, actually, that what I have to say I don't regard as the gospel and I don't feel all that strongly about it. I am going to be telling you some things about certain areas of the law as to what I think the existing rules are. I am going to have a couple of statements in

some areas where I think some changes should be made. If I sound too adamant when I go to those points, let me just remind you of the old story, and it is an old story, of the school teacher who was being interviewed in hill-billy country in Tennessee by the School Board. She wanted the job pretty badly and they were giving her the third degree, and she had managed to give the right answers to every question until near the end of the interview one of the School Board members suddenly asked her, "Now one thing we've got to know, when you teach our children are you going to tell them the world is round or that the world is flat?"

She thought for a minute and she said, "Well, you tell me, sir. I can teach it either way."

I am certain that if there are disagreements as to some of the things I say, and for the most part they are based on research just for the purpose of the Manual, I would be willing probably to tell the other version of the story. And I would make that plain at the beginning. What I have to say is, of course, my best judgment as to what the law is, and my best judgment as to what the law should be.

As I am sure we all have some knowledge, there is a virtual hodgepodge of nonconsensual liens which at one time or another may create rights in real property. These liens fall, generally, I think, into three general categories.

First, there are the liens which are acquired in judicial proceedings, those acquired by judgment, by attachment, by execution, and, using the word "lien" very loosely, by *lis pendens*.

The second general category relates to those liens obtained by statutory fiat—and perhaps with the automobile we pronounce that "fee-at" I am not sure of that. But, in any event, examples of these kinds of liens are mechanics liens, federal and state tax liens, and such things as old age assistance liens.

The third general category that we have to deal with are certain kinds of liens and interests which compete with liens which defy generalization. They don't fall into either of the two categories I have already mentioned, so they are put into a third category as a general catch-all. Examples here are the interest of an owner in real estate or an encumbrancer of the real estate, the interest, the interest that he acquires in personal property or which is attached to the real estate; or, perhaps, the interest or right of the United States under Section 3466 of the Revised Statutes which gives the United States priority of payment in a great variety of insolvency situations.

Now, needless to say, neither the time that we have today nor I think your endurance would permit me to discuss each and every one of those liens in all three categories. So I have had to select some of those liens to discuss, and in the process of selection I have reached a sort of compromise.

The first group of liens I am going to talk about are those obtained in judicial proceedings, and the reason I am going to talk about them is because I am interested in them.

The second group of liens I am going to talk about are tax liens, and I'm trying to talk about those because I think maybe that would be where your interests lie. And, fortunately, I think we will see that the two do sort of go together and there is a relationship between the two.

First, in the category of the judicially acquired liens, let's consider the judgment lien. If you would bear with me for a moment I would like to refresh your memories as to the very basic rules which relate to the creation and the perfection of judgment liens.

The creation of a judgment lien is a simple thing. When I speak of creation, I refer to the bringing into being of rights which are good as between the plaintiff and the defendant, or, if you would, the judgment creditor and the judgment debtor.

Under the Nebraska Statute 25-1504, a judgment of the district court constitutes a lien on the "lands within the county where the judgment is entered." Under 28 U.S.C.A., 1962, a judgment of the United States District Court constitutes a lien to the same extent.

Judgments of lower Nebraska courts are not liens, so all of our judgment liens are created in either the District Court or the United States District Court. A judgment of one District Court or the United States District Court can be transcribed to another District Court in a different county, and judgments of lower courts can, of course, be transcribed up to judgment courts in the same or in other counties. And when they are transcribed, I might say, they become liens from the date of transcription, the same as if the District Court had then entered the judgment.

These are the basic rules relating to the creation of judgment liens. There are, of course, special statutes, special rules that relate to domestic relation type judgments, and I am not going to talk about those today.

Occasionally we do have a question concerning the creation of a judgment lien. For example, one of the questions which may arise is, "What kind of a judgment will create a lien? Will only a money judgment create a lien, or will an equitable decree for the payment of money, for example, in an accounting case, also create a lien?"

There is authority in Nebraska to the effect that under some circumstances, and frankly it isn't quite clear, it is cited in the Real Estate Manual, that an equitable decree may have the effect of a lien.

Also a question may arise as to the kinds of interest in real property which will be subjected to a judgment lien.

For example, does a judgment lien attach to fraudulently conveyed property in the hands of the transferee? There is a case in Nebraska, *Whitfield v. Clark*, and I am not going to bother with the citations because they are all in the Manual, *Whitfield-Clark* said "No, a judgment lien does not attach to fraudulently conveyed property." Does a judgment lien attach to an equitable interest in property? For example, the interest of a vendee under a land contract? There are several cases in Nebraska which say "No, it does not attach to an equitable interest." So we do have these kinds of questions, but in the main the creation of a judgment lien is a very elementary thing with which we are all familiar.

The perfection of a judgment lien I think depends upon rules which are just as simple but perhaps not so widely known. By perfection I am referring to the immunization of the judgment lien against subsequently acquired interests of third parties, or at least some third parties.

In many jurisdictions the perfection of a judgment lien is by means of making a filing or recording in the office equivalent of that of our Register of Deeds. We don't have that requirement in Nebraska. Here we do have a requirement which is somewhat akin to perfection, which is imposed by some old cases and not by the statutes.

This requirement is that the judgment lien be properly indexed either on the judgment record or the general index. Absent such indexing, the judgment lien is unperfected. That is, it is subject to defeat by at least some third persons. The *German National Bank v. Atherton* case is one of a group so holding.

Not to belabor a somewhat obvious point but let me just illustrate what I mean when I am talking about the creation as distinguished from the perfection of a judgment lien.

If we assume that I obtain a judgment against Jones who owns Blackacre—good old law school Blackacre—in the same county we all know that the rendition of the judgment under the Nebraska statutes creates the lien on Blackacre, and this lien is enforceable as against myself and Jones. But if, after the rendition of the judgment, the clerk fails to make the proper entries in the indexes, either the judgment index or the general index, then Jones sells

the property to a third person, that third person, assuming he does not have actual notice or knowledge of my judgment lien, will have rights to Blackacre which are superior to mine. There are three or four cases in which this very thing has happened. Usually the failure to index the judgment lien results when there are several defendants, and some of the defendants are put in the index and others are not.

But with most liens, the really important questions concern the priority of those liens, and I think this is true with respect to judgment liens, at least they are the more complicated questions, because even if we perfect our judgment lien it doesn't mean that we necessarily have superior rights to those of everyone else, it means that we have done all we can to maximize our rights. And it is in the area of priority which I think we are going to find some rules which may not be so well known to us, although perhaps they are.

One of the rules I am talking about has to do with the priority as between a perfected judgment lien and an earlier unrecorded mortgage or deed. I should say, as an aside, to give credit where credit is due, that much of this law concerning the priority of judgments came to me by way of Rod Stolling, who apparently dug it out of the statutes several years ago. At times Rod and I have talked and he has been very helpful in passing this on.

Let's restate the problem again. We have a perfected judgment lien and we have a prior unrecorded mortgage for actual consideration. If the judgment lien were a mortgage we might think, at least assuming we take the mortgage and record it, it would have priority over the unrecorded mortgage, and we might think that hence if we get a judgment lien which is indexed and there for everyone to see on the indexes of the clerk of the district court, the judgment lien will have priority over the unrecorded prior mortgage. But this is not the law.

Under the general recording statute Section 76-238, the language is as follows (paraphrasing): Earlier unrecorded conveyances are "void as to all creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded."

The Nebraska Supreme Court interprets this language to mean as follows: If we have a judgment lien, and if we have a writ of execution issued and we proceed to sale, you have to record the deed from the execution sale before the mortgagee holding the unrecorded mortgage records his mortgage. He can come in and record that mortgage after the execution sale, so long as he does it

before the purchaser at the execution sale records his deed. This is, I think, considerably less protection than I used to think existed. I might just put it in that way. The case in question is *Omaha Loan & Building Association v. Turk*.

Another interesting rule having to do with the priority of judgment liens which I think is perhaps not as well known has to do with the priority of a perfected judgment lien perpetuated beyond its original life when it comes into competition with subsequently acquired conveyances or interests. Before, we were talking about antecedent unrecorded conveyances, now we are talking about subsequent conveyances.

Under 25-1515 I am sure we all know the basic life of a judgment is five years. But we can perpetuate the judgment lien for so long a time as we have writs of execution which are, in the language of the statute, "sued out" at less than five-year intervals.

So, keeping my example going about Jones, if I obtain a judgment against Jones, a district court judgment, and Jones owns Blackacre, I might be led to believe that so long as I keep "suing out" writs of execution at less than five-year intervals, as provided in 25-1515, my perfected judgment lien will have priority over subsequent mortgages, deeds, and the like. But I suggest to you that this very likely is not so. Third persons, at least those who do not have actual, and I am distinguishing actual from constructive, who do not have actual notice of my judgment lien, may be able to acquire superior rights in Blackacre even though I keep issuing my writs of execution at less than five-year intervals.

Section 25-1542 must be read with Section 25-1515, and the somewhat, to me at least, confusing language of that statute is as follows: "No judgment . . . on which execution shall not have been taken out *and levied* before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor to the preference of any other bona fide judgment, creditor or purchaser." Section 25-1515 says we can perpetuate the lien by having executions "sued out," which the Supreme Court has said is identical with having them issued, that is what it means, and 25-1542 says if we don't have the execution *levied* within the first five-year period, the lien shall not operate to the preference of any other bona fide judgment, creditor or purchaser. I think what the language means is that we are not going to hold subsequent creditors or purchasers to constructive notice from the case records in the office of the clerk of the district court, although the language is really somewhat confusing.

So if I get my judgment against Jones, if within the first five-year period I have a writ of execution issued, and then I wait a

total of eight years, and Jones makes a conveyances on Blackacre to a bona fide purchaser, and I use that term to mean someone who doesn't have any actual knowledge of my judgment lien, I think 25-1542 may mean that the bona fide purchaser has rights to Blackacre which are superior to mine. This is not only the gist of the statute, but I think it is reinforced by some cases, the most recent of which is *Hein v. Rawleigh*, a case decided in 1958.

In other words, my judgment lien against Jones may have priority against third persons only for the first five years, if all I do is comply with 25-1515.

I have tried to figure out why that would be the rule, and I don't really know why. Perhaps some of you would wonder why that is the rule or you might know. The only explanation behind the rule that I can come up with has to do with the provisions of a statute dealing with the records in the office of the clerk of the district court and the duties of the sheriff. It is in, actually, the clerk of the district court, Section 25-2212, and I am going to be referring to that several times today. That statute says that whenever the sheriff makes a levy on real property, he is supposed to record a statement of the levy in the encumbrance book in the office of the clerk of the district court. So if the execution is issued but not levied, the sheriff does not record the statement. If it is levied also he would record the statement. Maybe the thought is that people should be able to rely upon the absence of any statement in the clerk's office of a levy within the previous five years. I really don't know. I don't know why they shouldn't be bound by the case indexes in the clerk of the district court's office, but that is the only possible explanation I can come up with for that particular rule in the statutes.

I might also just mention the rule which is more likely to be familiar to some of you with respect to purchase money mortgages on after-acquired property. I think we all know that a judgment lien in Nebraska does attach to after-acquired property. There are two or three cases at least so holding. But where the judgment debtor has given a purchase money mortgage on the after-acquired property, in other words where he buys it and gives the mortgage back, there is authority in Nebraska, and I think authority elsewhere, that the purchase money mortgage has priority over the judgment lien, even though the mortgage is not recorded, even though the judgment record is on file at the time the purchase money mortgage is obtained, and the purchase money mortgage is not recorded until some time later, and I say "later," the court doesn't indicate for how much longer you can delay the recording, perhaps forever. The case here again is *Omaha Loan & Building Association v. Turk*.

At a somewhat later point in this paper, if we are all still awake, I am going to return just briefly and refer, not to the contents but to the fact of these rules of priority with respect to judgment liens, because they now have a bearing on the priority of tax liens, particularly the federal tax lien. Our local law is dealing with the priority of judgment liens.

Before I turn to tax liens I would like to discuss, however, the other basic judicially acquired liens because there are some interesting gaps in the statutes, in my view, which perhaps should be the subject of legislative action.

I'll first take up attachment and execution liens, and I think in the balance of this paper on these liens I am going to follow the same general pattern as I did with respect to judgment liens. I'll talk first about the creation, next about the perfection, and finally about the priority.

Attachment, if you will let me refresh your recollection again, is a provisional remedy which enables the plaintiff to acquire a lien on the defendant's property and hold it for application against any money judgment the plaintiff might recover. There are also jurisdictional implications in quasi in rem situations, but we need not bother with those here.

Attachment has a limited availability. You have to have a specific statutory ground and in most cases you have to post bond.

Execution is the process of the court which after judgment enables the plaintiff to have defendant's property seized and sold so that the proceeds can be applied in satisfaction of the judgment. Execution is usually available as a matter of right. Where the judgment obtained by the plaintiff constitutes a lien, the writ of execution functions only as an order of sale. But if the judgment does not constitute a lien, for example if the real estate in question is in a different county than the judgment, or if the interest of the defendant in the real estate is of a nature so that the judgment lien will not attach to it, again let's take up the equitable interest of the vendee under a land contract, repeating, if the judgment lien does not constitute a lien then the writ of execution functions both to create a lien and as an order of sale to enforce the lien. So the creation of both the attachment lien and the execution lien are by levy; that is, by some act symbolizing seizure of the property.

The method necessary to create an attachment lien, that is, the method of levy, on real estate is spelled out in the statutes, Section 25-1008, and what is spelled out is quite a ritual. The statute includes the requirements that the sheriff go to the premises with

two residents of the county, that an appraisal be made, and that a return be made on the appraisal. The sheriff has to post a copy of the writ of attachment at the premises if nobody is there or leave a copy with the occupant if somebody is there.

In contrast to the attachment situation, the execution levy is totally unregulated by statute. I can't find anything in the statutes that says what the sheriff has to do to levy a writ of execution. I don't know what he does. I don't know whether he does the same thing. I have talked to some lawyers who have said that the sheriff does about the same thing as he does when he levies a writ of attachment but I am sure he doesn't have the appraisal part. I suppose, perhaps, he goes to the premises.

I myself see no reason why any levy on real property, whether it creates an attachment or execution lien, or whether it functions only as an order of sale, should not be accomplished by the simple act of the sheriff making an endorsement on the writ, plus recording whatever statement of levy he has to make in the clerk's office. In a very loose sense, the sheriff doesn't leave the court house to create a judgment lien, and I don't know what he does at the premises which is really of any value. If we are worried about giving notice to the occupant, it may be that he has to go out there, but certainly I don't see any reason for the ritual that we go through. If we are worried about the value of property being attached, the attachment situation, it would seem to me that that could be handled the other way. I merely make that suggestion, and it may be that some of you would disagree and I, of course, would be interested in your comments.

When we are talking about the attachment lien or the execution lien, we have similar questions arise as they do with respect to judgment liens but the answers are different. Judgment liens simply do not attach to the same kinds of property as execution and attachment liens. You will remember that the judgment lien doesn't attach to fraudulently conveyed property in the hands of a transferee. If you levy a writ of execution or a writ of attachment on that property, the lien *does* attach. The case is of *Westervelt v. Hagge*. You will remember that the judgment lien doesn't attach to equitable interests. The attachment lien and the execution lien *do* attach to equitable interests if those equitable interests are coupled with possession. Here again we have the vendee under the land contract, if he is living on the property, the attachment or execution lien would attach to that interest if a levy was made. But the creation of these liens, subject to all of these problems, the creation of the attachment and the execution lien is by levy.

The perfection of these two liens is regulated by overlapping and very confusing statutes. I think the problem here is that we've

got two statutes, at least in some areas, which deal with the same subject and a lawyer is likely to find one of them and not look at the other one, and it could be that some court would come along and say that you should have complied with both of them.

To begin with, I refer to Section 25-2212, which says that the sheriff has to record a statement of the levy in the office of the clerk of the district court. I take it that that statute relates to a levy which is made in the same county as the district court is located.

I take it, again, that if the sheriff doesn't record the statement, although the statute isn't explicit on this point, the attachment lien is, in the terms I have been using, imperfect; that is, subject to defeat by at least some kinds of interests that third persons might acquire.

Also pertinent with respect to the perfection of these liens is Section 25-533. It deals with real estate levied on which is located in a different county, which of course our statutes expressly authorize in many places. Under that statute the sheriff in the county where the levy is made is to record a statement in the encumbrance book in the office of the clerk of *his* district court.

Now, that is entirely consistent with 25-2212. But if we go to Statutes 25-1043 and following, they also deal with attachment of real estate in a different county, not execution but solely attachment, and they say that the sheriff has got to record a statement in the miscellaneous records in the office of the Register of Deeds in the county in which the levy is made. So if we have a situation in which attachment is levied, keep in mind that in the execution situation we can always avoid this problem by transcribing judgment, and that, of course, is the usual practice. In the attachment situation if you want to levy on real estate in another county, you've just got to levy. That is the only way you are going to create the lien. And in that situation we've got two statutes. One says the sheriff has to make a recording in the office of the clerk of the district court, another says that he has got to make a recording in the office of the Register of Deeds. I'm sure we'll all agree there is no reason why he should record it in both places. That is what I had reference to when I said a lawyer might find one of the statutes and not the other, and some court may come along and say, "You've got to comply with both." They might say the opposite, too, frankly. I think the opposite would be the more reasonable solution to the problem.

But it would seem to me that here, again, some legislative action should clarify these overlapping statutes, and make it clear what is to be done in the attachment situation.

One last point: What if the attachment or execution levied on real property has issued from the United States District Court? And of course it can issue attachments or executions on real property. How does the United States Marshall perfect the attachment or execution lien? Where does he record a statement of the levy? The answer is nowhere. There is a hiatus in the Nebraska statutes, and I don't know what he would have to do to record a statement of that levy, and I don't know what the rights to the attaching plaintiff would be as against a third person in another county who had no knowledge that the real estate had been attached.

So here, again, I think we ought to amend the statutes to provide that whenever the sheriff should record a statement of the levy, the United States Marshal may do so.

Again, turning to the question of priority, let me just say this: The priority of attachment or execution liens follows in many areas the same path as does the priority of a judgment lien. In certain respects, for example, when it comes into competition with a tax lien, the priority of an attachment lien may be considerably less than that of a judgment lien, but it has the same inability to prevail over a prior unrecorded conveyance, for example.

I am going to mention briefly *lis pendens* and my impression of it as it exists in Nebraska. *Lis pendens* was a device at common law in which a party could institute a creditor's suit and describe in the pleading some property which was the subject matter of that dispute, and if the property was described in the, I don't know whether it was called a petition or a complaint—I get equity practice somewhat confused—but if you describe the property, and if process was eventually served on the defendant, the property was held under the doctrine of *lis pendens*, which very loosely we can call a lien, subject to the outcome of the litigation.

The creditor suits were instituted basically for two reasons: One, they might want to reach property which could not be reached at law; otherwise they might want to reach property which had been fraudulently conveyed, and what they could do by describing the property in the complaint and having process served was to lock the property into the litigation.

I think we've still got these common law rules in Nebraska. We have a statute dealing with *lis pendens*, and that, if anything, reinforces the common law rules.

The statute is 25-531, and in its first sentence I think it reinforces these common law rules. It says: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending

no interest can be acquired as against the plaintiff's title." We think of *lis pendens* as more of a device where we take a notice and we go over to the Register of Deeds' office and file it, and of course that is in that statute. The effect of filing a notice of *lis pendens* in the Register of Deeds' office, so far as I can tell, is limited to advancing to an earlier point of time the date the lien arises, instead of arising, if we call the *lis pendens* interest or right a lien, the date that lien arises if no notice is filed, it seems to me is when the summons is served or service is accomplished in another way. If we file our notice the lien relates back and dates from the time the notice is filed.

One interesting fact here relates to the priority of the *lis pendens* lien, if you will let me call it that. Judgment liens, execution liens, attachment liens, all three do not have priority over prior unrecorded conveyances, as I have said several times, unless the purchaser at the execution sale records *his* deed before the prior unrecorded conveyance is recorded. The *lis pendens* lien *does* have priority over prior unrecorded mortgages or prior unrecorded conveyances.

I don't know which is the better policy. I wouldn't hope to suggest which is the better policy, but it seems to me that if our judgment lien is not going to have priority over prior unrecorded conveyances, there is no reason why the lien of *lis pendens* should, but it *does* by explicit statutory language in Section 25-531.

Here, again, let me point out that there is a federal statute, 28 U.S.C.A., 1964, which authorizes the filing of a *lis pendens* with respect to actions in the United States District Court whenever state law so authorizes. And here, again, state law makes no provision for the filing of *lis pendens* in connection with an action from the United States District Court.

Well, now that I've spent all the time, let me turn to the subject that I said I wanted to discuss because it would more likely be of interest to you than to me. I have reference here to tax liens, and I am going to devote most of my attention to the federal tax lien, which was recently modernized by the Federal Tax Lien Act of 1966.

I should perhaps make certain you are aware that there is more than one federal tax lien. I am going to be talking about the general federal tax lien but there are also special federal tax liens for unpaid gift and estate taxes, which are a completely different sort of thing than the tax lien I am going to be talking about.

Before I turn to this subject I should say that I regard the Federal Tax Lien Act of 1966 as one of the most difficult statutes to understand. When I was most recently trying to understand it

I thought back and remembered a year or two ago there was supposedly a private interview with one of our football players at the University of Nebraska and they asked him about one of his great big huge teammates who was amazingly strong, and they wanted to know whether he was very intelligent. The response of this player, supposedly made in private, was, "If he were any dumber he would be a plant." I have the feeling when I read this statute that I am very much like a plant because it is a very difficult statute to understand, but I am going to give you my understanding of it.

The creation of the federal tax lien results automatically when a taxpayer after demand refuses or neglects to pay a tax for which he is liable. The lien is not enforceable until the Internal Revenue Service makes a demand for payment, but if we have the lien it relates back and dates from the time the tax is assessed. The assessment itself is a non-public administrative act. It consists of an entry on some records in the Office of the Internal Revenue Service. So the creation or the existence of the tax lien may be, and often is, a secret both from the taxpayer and from third persons who are likely to deal with them.

When the tax lien is created it extends to all property and all rights to property, whether real or personal, belonging to the taxpayer, and it will reach after-acquired property.

At one time the tax lien, secret though it was, prevailed over all subsequently acquired liens and interests, including those of a bona fide purchaser or encumbrancer for value. But for many years now the law has protected some but not all of subsequently acquired interests.

Section 6323(a) of the Federal Tax Lien Act of 1966 states as follows: "The lien imposed by Section 6321(a) shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof has been filed." And then the Tax Lien Act and the Nebraska statutes provide machinery for filing notice of a federal tax lien in the office of the Register of Deeds. There was an amendment to our statutes, which was required by the Federal Tax Lien Act of 1966 passed at the last session of the legislature.

Now let us assume that on July 1 a tax liability is assessed against Jones, who is still the owner of Blackacre. Subsequently the Internal Revenue Service demands payment but Jones doesn't make it. Jones may not know it, but in accordance with the rules I've just stated, all of his property, including Blackacre, is encumbered by a federal tax lien, and that tax lien dates back to July 1, 1970, when the assessment was made. If on July 2, 1970, after the

assessment creating the tax lien, a creditor of Jones had obtained an attachment lien on Blackacre, most of us would have no trouble reaching the conclusion that the tax lien has priority over the attachment lien.

The attachment lien, I ask you to note, is not one of the liens protected until the tax lien is filed, those liens or those interests or those of a purchaser, a security interest, mechanic's lienor, or a judgment lien creditor, so the attachment lien doesn't fall into one of the four protected classes.

Where we have first the tax lien, which was created, then an attachment lien, the priority is determined on a simple first in time, first in right basis.

But suppose, instead of having been obtained the day *after* the tax lien, in which case the tax lien has priority, the attachment lien had been obtained the day *before*. Then does the principal first in time, first in right control?

The obvious, if not beguiling thought is that the first in time, first in right rule again applies. But of course with Uncle Sam in the picture this is not the case. Here again the tax lien has priority, even though the attachment lien was obtained first. This is because of what has come to be called the doctrine of the inchoate and general lien, or just the inchoate lien doctrine, which is a judicially invented doctrine, one created by the Supreme Court of the United States.

Under the inchoate lien doctrine an apparent competing lien is eliminated from the competition unless it is choate. This elimination takes place without regard to whether the competing lien, or the would-be competing lien, arose first or later; in other words, without any regard to chronology.

The Supreme Court also sets the standards as to what requirements must be met for a lien to be choate. It now appears that these requirements, and this was for many, many years in considerable doubt but it now appears that there are three requirements, although merely to state them doesn't tell us a great deal. These requirements are that the lien be specific (1) as to the identity of the lienor, (2) as to the property subject to the lien, and (3) as to the amount of the debt secured by the lien. The lien must be specific as to these three things, and "specific" really means fixed beyond change, as the Supreme Court interprets it.

In our example, the tax lien has priority because in the Supreme Court's view the attachment lien is inchoate in that it does not meet the third of the requirements. The attachment lien is not,

according to the Supreme Court, specific as to the amount of the debt secured. It can become specific as to the amount only if the plaintiff obtains judgment, and of course he hasn't done that in our example. The liens are only one day apart.

Now if the competing lien had been a Nebraska tax lien instead of an attachment lien, it probably would also suffer defeat as inchoate. These are the most vulnerable type liens. The Supreme Court usually would reach the conclusion, and I don't mean to be hard on the Supreme Court but I think these decisions are somewhat questionable, the Supreme Court would find our state tax lien was probably lacking in specificity as to both the property subject to the lien, because the lien would attach to property in general, like the federal tax lien, and there wouldn't be any actually seized, and also as to the amount of the debt secured by, if there was anything left in the levy process to be determined.

Here, again, let me emphasize that the liens we have been discussing in competition with the federal tax lien, the attachment lien and the state tax liens, do not fall within any of the four classes of interests to which the Section of the Tax Lien Act refers that I have read to you. That is Section 6323(a). You will recall the language of that. It said that the tax lien is not valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until the notice has been filed. So if we fall into one of these classes, the standard is supposed to be not when the lien arises but when there is a tax lien filing, or when notice of a tax lien is filed.

Suppose, therefore, in our example that the lien competing with the tax lien for priority is a real estate mortgage. Under the definitions of the Tax Lien Act, this mortgage would constitute a security interest. Does the doctrine of the inchoate lien affect the priority of such a competing lien? In other words, one of the four classes of special interest?

Certainly it can be argued that the literal language of the statute says that the tax lien shall not be valid as against such a lien until there is a filing, and this should preclude the application of the doctrine of the inchoate lien. In other words, it should be a simple matter: Was the tax lien filed before the lien was acquired?

Let me here make another reference to a specific example, as I have been doing. Let's assume, again, the tax lien created on July 1, 1970, and suppose that not until August 1, a month later, 1970, is there a tax lien filing. Suppose that before the tax lien filing, perhaps even before the assessment creating the tax lien, Jones mortgaged Blackacre to Smith. Does the tax lien take priority over

the mortgage if the mortgage is regarded as inchoate? Before the Tax Lien Act of 1966 a mortgage which was regarded as inchoate, did suffer defeat at the hands of the tax lien in the example I have given you. And the mortgage would be regarded as inchoate if it covered either after-acquired property or if it covered future advances. The covering of after-acquired property would be regarded as fatal, in that the property subject to the tax lien was not specific, and that might be just to the extent of the after-acquired property, the future advances would be regarded as indicative of inchoateness, in that the amount of the debt secured by the lien was not fixed. And this was true whether the future advances were optional or mandatory.

But the Tax Lien Act of 1966 makes some changes in these rules, and it does so in order to permit a good deal of commercial financing which could not be safely practiced under the previous laws. Some of the most far-reaching advancements have to do with personal property as collateral, and of course in this session we are not dealing with those; we are confining ourself to real estate.

But what the Tax Lien Act of 1966 does, to some extent, is codify the doctrine of the inchoate lien. It doesn't ever use that name, but it does codify some parts of the doctrine. Also in other parts, however, it qualifies the doctrine, or it relaxes the doctrine, and it sets this general pattern: The general rule is that if your lien is inchoate you are still going to lose to the federal tax lien unless you can bring yourself within the boundaries of one of the specific transactions which are now validated under the Federal Tax Act of 1966.

In the example I have given, where we have a mortgage given before the tax lien filing, that mortgage would have priority now, under the present legislation, to begin with, and we are going to talk some more about some additional priority it might have if at the tax lien filing on August 1 the mortgage was protected under Nebraska law against a subsequent judgment lien. Now here we are back to the question as to what priority a judgment lien has in Nebraska. And I suppose that if we have recorded the mortgage, and if it is a one-shot transaction, there can be no question but that it would be protected as against a subsequent judgment lien. It is interesting to speculate, however, if we have an unrecorded mortgage because, as I said, in Nebraska you can prevail over a subsequent judgment lien if you just get to the Register of Deeds' office before the purchaser at the judicial sale. But, in any event as I said, the mortgage before the tax lien filing will prevail if (1) it is protected under Nebraska law as against a subsequent judgment lien; and (2) to the extent at the time of the tax lien filing the mortgagee had parted with money or monies worth.

Now in the example I have given there has been no reference to after-acquired property, and I should say that the mortgage would be inchoate and suffer defeat insofar as there would be property acquired after the tax lien filing.

What this really is, then, is a sort of application of the inchoate doctrine, because we're not permitting after-acquired property, and too, we're saying that we are going to grant the priority only to the extent that the mortgagee had parted with monies worth, so that precludes future advances.

There are, however, some sections which would give priority to certain kinds of future advances, and so when I say it precludes future advances we should understand that that means just *some* future advances, others are granted priority, and this will permit us to engage in some kind of commercial financing.

To begin with, the priority accorded the mortgage which was before the tax lien filing would extend to any disbursements made for a maximum of 45 days after the tax lien filing, if the disbursements were covered by a written agreement, it had to be in writing, as for example, the future advancements clause in a mortgage, and, again, if in addition these disbursements are protected under Nebraska law as against a subsequent judgment lien. So here we are again back to state law.

Moreover, going a step further, the mortgage would be accorded priority as to disbursements made without reference to the 45-day limit if the disbursements were made pursuant to a certain kind of written agreement, one that called for the construction, improvement, or destruction of real property. The theory here is that once we have started the work we want to have it finished, so we are going to protect the payments to the mortgagee to make sure that the project gets finished. The requirement is, however, with respect to all of these future advances, that they be protected under local Nebraska law, and of course I think we have a statute, I don't recall the citation of it and I do not have it here in my paper, that would protect future advancements insofar as the mortgage is protected.

There are one or two other areas, you remember I said that the Tax Lien Act of 1966 in part restates and in part qualifies the doctrine of the general and inchoate lien. There are some other areas which I will just mention in which the Tax Lien Act does this, eliminates some pitfalls which perhaps you didn't even know existed.

Before the 1966 Act, if you had a lien contract situation, a tax lien against the vendor would prevail as against the vendee, or at

least was held in several cases to prevail as against the vendee who was making payments all these years, so long as the vendee didn't have title. By some process of reasoning the courts decided that this was an inchoate kind of transfer, similar to an inchoate general lien, it was imperfect and incomplete. Under the Tax Lien Act of 1966 these rules are eliminated. The tax lien now does not take priority over the interests of the vendee under a land contract if at the time of the filing of the tax lien the contract is valid under Nebraska law as against subsequent purchasers. You'll note that this is a different standard. The mortgages had to be valid as against judgment liens, just as valid as against subsequent purchasers without actual notice. In other words, you have to record your land contract to be protected as against the federal tax liens.

Considerable improvement was also made under the Tax Lien Act with respect to mechanic's liens.

I have noticed my watch. I went on a little longer than I thought I would. I think probably the balance of the paper that I have can just as well be omitted. I am worried about being like the little boy who thought he could spell "banana" but he didn't know exactly when to stop. So I think maybe I'll just sit down at this juncture and conclude the paper here.

FRIDAY AFTERNOON SESSION

October 23, 1970

The Third session of the Institute on Real Estate was called to order at one-thirty o'clock by Chairman Ray Simon.

CHAIRMAN SIMON: Contributing a great deal to our program, materially so, and to the Manual, he really correlated all of the efforts of the contributors, and himself contributed was Gene Spence of Fidelity Title. Gene will Chair this third session of the Institute. Gene Spence.

MODERATOR GENE P. SPENCE: Thank you. Before we start the afternoon session I would like to remind you that there are outlines that all of the speakers have compiled in the back of the room which you can pick up as you leave. Also at the back of the room there are pads and pencils, and any questions you may have on any of the subjects this afternoon, if you will write them out and present them to me, the speakers will be happy after the ten-minute recess to answer those questions.

This afternoon our first discussion will be on "The Condominium and Real Estate Transactions." We are very fortunate to have

one of the well-known experts in the field of condominiums here with us from Transamerica Title in Denver, Colorado. He is their Senior Vice-President—Gerald Groswold.

I now turn over the podium to Gerry Groswold.

THE CONDOMINIUM AND THE REAL ESTATE TRANSACTION

Gerald F. Groswold

The modern concept of condominiums is, in fact, a result of the sophistication of an ancient concept. Condominiums have existed since the days of the Roman Empire in various and sundry forms. However, prior to 1961 very few persons had even heard the word "condominium." Since that time this concept has sustained substantial significance in the real estate industry.

Since ancient Rome, condominiums have existed in various forms. Colorado, for instance, probably has the first condominium in North America. Those of you who have had the opportunity to visit Mesa Verde National Park have had an opportunity to see this rather unusual phenomena. In about the year 1000 the Indians in the southwest part of our state began the construction of the cliff dwellings. These remained their place of primary residence for approximately 250 years. While I seriously doubt that the Indians living in the cliff dwellings considered themselves condominium owners, that is probably what, in fact, they were.

In ancient Rome a condominium owner was a person of substantial prestige enjoying luxury housing. The cliff dweller was participating in a housing concept that was conceived of necessity and dedicated to survival. The modern condominium owner fits somewhere between those two extremes.

One of the basic reasons for the popularity of condominiums today is at least in part due to the fact that individuals desire to maintain the advantages of land ownership coupled with the desire to be free of the inherent problems of individual house ownership.

The inception of the modern concept of condominiums was undoubtedly the passage of the Housing Act of 1961, amending Title II of the National Housing Act by the addition of Section 234. That Section authorized FHA insurance on family units in multi-family structures.

The original Act was amended in 1964 and is now known as Mortgage Insurance for Condominiums. It is somewhat ironical that the legislative enactment which prompted the boom in condo-

miniums has failed to be the source of substantial financing in their areas. It is probably due to the fact that the FHA restrictions are considerably tighter than those that are imposed by commercial lending.

As a result of the impetus that was provided by Section 234, condominium ownership is now providing a modern concept of real estate development in a manner that fits logically in today's rising land costs and the continually climbing costs of construction and maintenance.

Let us examine this old concept with its new innovations. Webster defines the word "condominium" as a joint sovereign or joint rule of a county or region by two or more states. Black's Law Dictionary defines it as joint or co-ownership. Obviously these definitions fall substantially short of what we are going to be discussing.

The ownership of a condominium unit or apartment is the fee simple ownership of a single unit in a multi-unit structure. The owner acquires the fee title to a cube of air, together with an undivided interest in the land, the building, and other general common elements; and he will probably or possibly acquire the right to the exclusive use of a limited common element, like a balcony or a patio.

At this point it is perhaps advantageous to distinguish a condominium from a cooperative, and other forms of real property ownership that are similar. The normal cooperative can exist in two forms, they are basically the same, can be ownership of land by a corporation, and the individual's rights in the ownership of the land represented by a stock certificate coupled with the exclusive right to use and occupy his particular unit. The same concept can be applied where a group of individuals go together, acquire title to a multi-unit structure as co-tenants or co-owners, and couple that with the exclusive right to use and occupy.

At least in the State of Colorado the concept of cooperatives has been used relatively infrequently. To my knowledge there are only two cooperatives in our state. This is probably due to some significant disadvantages that flow from cooperative ownership. In a cooperative the individual owner is unable to finance his own unit. The financing must be accomplished through the vehicle of a blanket mortgage. You can then couple that with the problems that flow from the defaulting co-owner, who either fails to make his mortgage payments or promptly and properly pay his portion of the taxes. You can categorize in the area of cooperatives the concept of a row house, or the planned unit development concept which our former resident counsel, Bert Isbell, used to call "almost condominiums."

Statutory enactment is necessary for the creation of condominium ownership. Interestingly enough, both the State of Colorado and the State of Nebraska adopted their statutes at about the same time. They were adopted, I think, both of them in 1963. Your statute appears at 76-801, and our statute appears in our Colorado Revised Statutes 118-15-1.

There is a significant difference between the two statutes and yet what I am going to say today about condominiums is equally applicable in both states.

The Nebraska statute has twenty-three sections and covers ten pages of your statute book. The Colorado statute has five sections and covers one and three-fourths pages.

As you go through the outline and as I speak today, I am going to have a semantics problem. I am going to use some words that are not familiar to you because of the language of your statute. The outline refers to and I will refer to a "declaration." When I say a "declaration," I mean a "master deed" under your statute. I will refer to a "condominium complex," and when I use the word "complex" it is the equivalent of the word "regime" under your statute. I will talk about a "management association," and under your statute that will be a "Board of Administrators."

It is interesting that the two statutes were adopted at virtually the same time, when you consider the significant difference in the development that has evolved under them. It is my understanding that there have been relatively few condominiums constructed to date in Nebraska, although apparently the activity is increasing. I can only guess, but I would guess that in the State of Colorado we now have somewhere between 12,000 and 15,000 condominium units. They range in size from a unit in a six-unit structure that sold initially for about \$8,000, up to a two-story unit in a twenty-three story high-rise that sold initially for \$119,000.

As I say, statutory authorization is necessary for a condominium development. It is necessary for a series of very valid reasons. You must suspend restraints on partition, suspend the effect of the rule against perpetuities, and rules against unreasonable restraints on alienation. In addition, in order to get effective condominium development, it is necessary to provide for the separate assessment and taxation of the individual units.

The creation of a condominium comes from a series of documentations. They are basically three in number. They are the declaration or your master deed, a map or, as your statute calls them, plans, and the conveyance or the deed that transfers the interest from the developer to the individual owner.

In the course of discussing the condominium itself I'll cover those three areas, touch on the creation of our management association and some of the problems that we have run into there, and touch a little bit with regard to the financing of a condominium.

The master deed accomplishes the submission of the real property to which it relates to the condominium regime. It condominiumizes the property and renders it susceptible of being split up into a series of air cubes with appurtenant rights.

Your statute defines "common elements" and these are those things which are necessary for the continued existence, the stability or the existence of the structure in which the condominium units are located. Your statute also refers to "limited common elements." There is a word problem here that I am probably going to run into later on. In Colorado a "limited common element" is a part of the *general* common element. Your statute calls them "common elements," and then breaks them according to general common elements and limited common elements. The definition of a "limited common element" under both statutes, however, is basically the same. It is a part of the structure which is owned by all of the owners, the exclusive right to use and occupy having been set over to fewer than all of the owners.

One of the best examples of a limited common element is a patio or a balcony that is immediately adjacent to and accessible only from the unit to which it is appurtenant. The master deed will provide for the identification or the creation of the common elements and the limited common elements. It should also provide for a description which is convenient for title purposes.

Prior to the time the Condominium Act was adopted in Colorado we had the creation of one of these "almost" condominiums. Because the developers, because the lawyers working on it, and I was involved, were not sufficiently sophisticated in the concept, we managed to create a situation which is still going on today. The legal description for a unit in that particular condominium is one full legal length page single-spaced. After we suffered through that, and we're still suffering with it because this particular complex has or will have about 2,500 units in it, we finally started to get a little bit smarter and figured out that in the master deed or the declaration it is possible to create a description that is almost like a lot and block description in the subdivision. You can describe the unit in the master deed and identify that any conveyance which describes the unit by its identification number in an identifying name is sufficient to convey not only the air space but the interest in the common elements and any appurtenant limited common elements. You wind up with a much more abbreviated description which is perfectly adequate for title purposes.

The master deed should make provision for separate assessment and taxation of each unit. This is imperative, at least for purposes of some kinds of financing, and we will touch on that in a minute.

You need to provide for the nonpartitionability of the general common elements. You can provide for restrictions upon the use or occupancy of the property. Interestingly enough, you have that, at least in part, by reason of statutory enactment.

In Colorado we consistently provide for reciprocal easements or encroachments. A condominium is a process of subdividing property both horizontally and vertically. In so doing, errors can be made or buildings can settle. It is therefore necessary to provide for the existence of easements to allow a unit to encroach into general common elements or another unit, and for general common elements to encroach into the units themselves.

In the outline I have identified administration and management, and I will skip it for a moment and come back to it because of the distinction under the statutes.

It is common to provide for a reservation of access in favor of the Board of Administrators to allow them to make necessary repairs. If, for instance, a pipe breaks that's in a wall that's in a unit, it is necessary for someone to be able to get in and repair. Damages done in the course of that kind of repair are customarily a common expense to be borne by all owners.

In Nebraska you have a statutory provision for the revocation or amendment of your master deed. I don't remember the numbers, but your statute provides that a given percentage of the owners in a complex can agree to terminate the condominium ownership, execute a document so stating, and they have waived the regime. In other words, they have taken it out of condominium ownership and converted it back to a co-tenancy relationship. We don't have that advantage in Colorado, and our approach has been to require that all of the owners and all of the lenders join in the revocation or substantial amendment of the declaration.

You can provide for additions, alterations, or improvements that will be subsequently constructed, in other words, constructed after the initial completion of the building and its initial sales. In so doing we need to anticipate the ability or the necessity for the payment for such construction.

It is necessary to provide for the assessment of common expenses. Common expenses are those expenses that are attributable to the operation of the entire project. It can include a whole series of things: Insurance premiums, it can include the cost of heat, light

and will certainly include the cost of heat and light or air-conditioning in any common area, such as common corridor or a common lobby.

The provision for assessment of common expenses is generally done on an estimated basis for the anticipated needs over a period of time, levied on a monthly basis or payable on a monthly basis.

Master deeds are normally written in such a way as to create a lien upon the property, the individual unit for the common expenses of that particular owner. These are normally secret liens. In other words, they are not identified on the record at the time that they come into existence. In the course of creating such a lien, care has to be taken in order to preserve the financability of the project and the sale of the individual units. You have got to be careful that you provide that the lien for common expenses will be junior to not only the real property taxes but also the lien created by the first mortgage or the first encumbrance.

Under your statute it is created as being subordinate. Interestingly enough, your statute provides that the lien for common expenses is subordinate to *any* mortgage interest. This is different from the practice in Colorado. Normally it is only the first lien, the first mortgage, the purchase money mortgage that is given the priority over the lien for common expenses.

Provisions need to be made for the manner in which that lien can be foreclosed. Colorado is a public trustee deed of trust state and provides for a non-judicial foreclosure. When we get to this kind of a lien, which is not really a statutory lien, we run into some difficulty relative to foreclosability. We have to foreclose the lien on common expenses in the same manner that we would foreclose a mechanic's lien or a mortgage.

The subject of insurance is a subject that warrants substantial consideration by anybody involved in a condominium development. Finally in Colorado we are getting to a point where insurance on condominiums is relatively easy. You use normally a master policy, which in effect insures the entire complex, and then through the vehicle of endorsements attribute individual insurance coverage. This is available now in Colorado, not only on the basis of casualty insurance but also on the basis of liability insurance. Anyone developing a condominium or exposed for the first time is well advised to get hold of a good casualty insurance man and spend some time ferreting out those kinds of insurance that are available. It took a while in Colorado to develop a realistic insurance program for condominiums. They have now finally gotten the job done.

In Colorado we use an association, a management association or a Board of Managers. The outline is perhaps a little bit misleading because it refers to the existence of the association as an attorney in fact. When I said, when I stated that what is applicable in Colorado is readily applicable in Nebraska is not detracted from because of the existence of the non-profit corporation used in Colorado as the Board of Managers, as opposed to the Board of Administrators that arise in Nebraska. It is a representation of the owners of the units, and as such has certain authorities. In Colorado, because we use a separate corporation, we irrevocably appoint the management association as attorney in fact for the owners, so that a dissenting owner can be compelled to act through the vehicle of the utilization of the power of attorney. You get to virtually the same place because you have statutory authority which allows three-fourths of the owners of the condominium units in a regime to perform basically the same act. They can compel the other owners to act. The question of the ability to act arises when repairs or maintenance become necessary, when the use of insurance proceeds becomes necessary either for reconstruction or, in the case of obsolescence, where it is concluded that you will destroy, obviate the condominium regime.

The master deeds should make provision for personal property that can be used for common purposes. For instance, if you have a pool you will probably want some nice lawn chairs, and so forth, around. You may need a lawnmower if you are lucky enough to have a lawn. There are various items of personal property that may be necessary and they should be provided for in the master deed or in the declaration.

There are some other provisions that can be included. One of them, a right of first refusal. This is a vehicle that has been used first in Colorado. It was used substantially when we began our condominium development. We now find that it is falling into disuse. We are not compelled by our statute to include it, and you are not either. It's the obligation of an owner of a unit to offer the unit for sale to the Association before he can sell it outside. I said that wrong because that's not really mechanically the way it works out, but that is the gist of it. He can go out and get a bona fide offer, but when he gets the bona fide offer he must offer his unit to the Association, and the Association has an opportunity, a period of time within which they can purchase.

If you build in a right of first refusal, be careful to exempt the declarant. We had a very embarrassed attorney in the northern part of Colorado who managed *not* to do so and discovered that after his developer had sold the first of thirty-six units, he had to get

that first purchaser's consent for the sale of the second one, and it went on and on until he was working with thirty-five other people in trying to sell his units.

If you provide for a right of first refusal, consider the fact that *normally*, at least in Colorado, the declaration or the master deed prescribes that any conveyance made without compliance with the first right of refusal is void. Accordingly, you have got to create a vehicle so that you can get a record marketable title. The way we've done it in Colorado is to provide that the Board of Managers or the Board of Administrators can execute a document, a certificate in recordable form which becomes *prima facie* evidence of the fact of compliance with the first right of refusal.

We have evolved in Colorado as a result of a couple of rather sad experiences a concept that I call, for want of a better name, an "expanding condominium." It is the ability to enlarge a condominium complex by supplements to a declaration and a map. If you are familiar with the concept of the planned unit development, you will recognize where we borrowed the theory on which we've built this system. It's the process of starting out with a complex that is relatively small and being able to expand it to include additional buildings, utilizing the same Board of Administrators, utilizing the same basic condominium declaration, and just sort of tacking things on as the project expands.

I say that we evolved it through some rather sad experiences. One of the decisions that a condominium developer has to make when he begins his project is what his market is. How many condominium units can he sell in the particular area where he is going to develop them? And this can be a very difficult decision. He doesn't know whether he can sell 10 units or 40 or 400. When you start a condominium project if you overcommit in terms of the land that is submitted to the regime, you have cast the developer in a position where he *has* to go forward, he will have to develop 400 units but he may wind up owning half of them, and that can be a very expensive and difficult thing for a developer to do.

By using an expansion concept you can allow the developer to begin on a relatively small scale, test his market, adjust to his market if he needs to, and continue with his development as his sales will allow him.

In the process of the preparation of the master deed you may conclude, particularly if you have an expansion concept, that it will be necessary to reserve in the developer certain rights with respect to the land committed to the regime that he will need on down the line. It may be necessary, for instance, to reserve the

right to grant to subsequent owners of units built on adjacent lands a non-exclusive right in common with others to use certain specific general common elements, things like sidewalks or a swimming pool, various other items.

These are basically the things that the master deed or the declaration will cover. I have run through them fairly quickly only because of time commitments. The master deed is the basic document upon which the condominium regime will be built. It should be drawn carefully, after careful consultation with the developer as to what his anticipated development is. Be sure you understand how far he wants to go in terms of condominium development, what amenities are to go with the sale of any given unit. Is he going to build related recreational facilities, a swimming pool, a club house? Does he anticipate being able to use *that* club house with subsequently developed condominium units? It is a matter of knowing and understanding the entire project prior to the time of attempting to draft the master deed.

The second document that brings the condominium regime into existence is a map or the "plans," as referred to in your statute. Your statute lays out generally what those plans are supposed to be. The plans should not be prepared, in my opinion, until the structure being planned or mapped has been substantially completed.

We have a condominium development in Colorado where it's a multi-building development. There are maybe twelve or fifteen buildings, a total of 294 units to be constructed. They managed to prepare the map almost before they had dug the first foundation. They prepared the map and located definitively units that were not even built. They hadn't even started digging the hole in the ground. You can guess what happened! They managed to mislocate every building except the first building. They mislocated one by as much as thirty feet! Recognize that the map in a condominium development is just like a subdivision map, it locates the unit, it identifies the property being sold. So we wind up with an individual owner who owns a cube of air, but the cube of air is literally that—it's sitting out in front of his building somewhere while he is occupying property that is, in fact, a general common element. When the error was discovered, we concluded the only way to correct it was to go back to all of the owners, all of the mortgagees and, in effect, accomplish a reformation of each of the conveyances and encumbrances.

As I said, a condominium map is literally a subdivision map, with one single additional feature. It subdivides not only horizontally but vertically, but it is a subdivision map in the sense that

it is a tool by which you accomplish an incorporation by reference for purposes of the description of the property that is to be conveyed.

One suggestion, you might check with local authorities relative to requirements of the county or planning commission, if you have such a thing, relative to their required approvals. We've run into a real can of worms in Colorado because some counties say that this is a subdivision map and must go before the planning commission, other counties say, "Go ahead and file them. We really don't care." Interestingly enough, the ones that are using the formal procedures are predominantly the mountain counties.

In Colorado, and I expect of necessity in Nebraska, a condominium map is going to consist of three distinct parts. The first part will be what I call a location map. It will locate the building specifically in relation to the perimeter of the property committed to the regime. It identifies the relative location of the building on the property.

Second, there will be plans depicting the location of each unit on each floor within the building itself, identified in relation to the relative location upon the land. So we take a map and we locate the building in relation to the exterior of the property, and then we take another map and we locate the units on each floor in relation to the exterior of the building, so that you begin to build your process of incorporation by reference.

The third part is a datum plane. It is nothing other than an evaluation. It identifies the upper and lower limits of the cube of air being conveyed by the condominium conveyance. In Colorado we customarily also identify the relative location, size of any limited common elements, and the units to which they are appurtenant.

A condominium map does not have to be a particularly pretty drawing. It can actually be a stick drawing. You are specifically interested in identifying particular property. You don't have to worry about putting all of the fancy gingerbread and so on that appears on the front of the building. They can also be fairly complex.

We have a condominium in Afton known as the Fifth Avenue, the working plans of which were so complicated that when the architect went back in to assist in the preparation of the condominium map, he found a room that he didn't even realize he had designed. In order to create a condominium map on that particular unit they had to prepare what was, in effect, an isometric extraction of the condominium building itself. It is a very interesting

building in the sense that there are very few floors that run all the way through the building. There are a whole series of various kinds of levels, and the isometric approach was the only way that we could, with certainty, identify the relative location of each of the individual units.

The association of co-owners in Nebraska is apparently a relatively informal thing. It does not assume a corporate entity's position, but you need to worry about the preparation of the bylaws which, by your statute, are required to be attached to the master deed. We do not in Colorado record the management association bylaws. We don't because the owners are members and they are presumed to have knowledge of them, and you've got the attending problem of the possibility of amendment of the bylaws. It is necessary for someone, every time the bylaws are amended, to remember the fact that they probably ought to record that amendment. In Colorado the bylaws are a standard form, a non-profit corporation, and would assume that probably the same guideline would be applicable in your state.

In addition, it is normal to provide that the Board of Administrators can adopt rules and regulations. People going into a condominium ownership have been described as being those individuals who have all of the advantages and disadvantages of home ownership, coupled with all of the disadvantages of being a tenant. You've got various things that need to be regulated, use of the swimming pool, perhaps uses of parking areas, particularly if there are guest parking areas, and various other things that are logically covered through the adoption of rules and regulations.

Being in the title insurance business, I threw into the outline a title insurance consideration area. To my knowledge in the State of Colorado there has only been one condominium that has been developed and sold on an abstract basis. Our company was not involved in it. I seriously question that the abstractor properly prepared the abstracts in the sense that he is dealing with undivided interests and in order to prepare a logical abstract at least, if not a correct abstract, on undivided interests, it seems to me that you have to abstract *all* of the undivided interests rather than just one particular interest. The net result is that a condominium abstract, at least in our state, is going to be an abstract of the entire condominium project.

In dealing with a title company relative to the development of a condominium, the first suggestion I would make is to give them an opportunity and the responsibility for reviewing the master deed and the plans prior to the time that they are recorded. You might as well get them on the hook before you go through the pro-

cess of recording. It is always easier to correct something if they feel it is necessary to correct it and can convince you of it *before* you record rather than after.

With regard to a title commitment on a condominium unit, we have seen them written in various ways. I have a pretty strong feeling as to the way in which a title commitment should be written on a condominium. I do *not* think that it is proper to make an exception of the master deed or the declaration under Schedule B of the Title Policy. Schedule B is that part of the policy that starts out by saying, "The following are the things against which this policy will not insure," and if you except the master deed you are excepting that basic document which creates the thing that you are trying to insure. The way that we handle them is to describe the unit, identify it Unit A, somebody's condominium, "according to the map thereof filed for record, and according to the master deed recorded a certain day, book, and page," and we then follow that statement with a phrase which says "subject to the terms, provisions, and obligations of the master deed." In so doing we are not excepting out the very thing that we are attempting to insure.

Financing in the condominium concept can be a problem. In Colorado we've found two basic sources for financing, both on a construction level as well as on a permanent level. They've come from Savings and Loans and National Banks. Only one institution lender has made condominium loans in Colorado. It was Metropolitan Life, and they loaned on a particular condominium development in the snow mass at Aspen area. But with that single exception we've had to rely on the financing sources of the Savings and Loans and the National Banks.

In Colorado they sell condominiums on kind of a strange basis. They sell them to people who can *really* afford them, and I strongly suspect that many of the condominium loans that are made in our state are loans that are made with a security instrument on the condominium unit sort of as an afterthought. It's probably a loan that they would have made on an unsecured basis anyhow.

In dealing with construction financing on a condominium, I think that the lender's interest and the developer's interest is best served if you treat the condominium construction loan as an apartment house loan. Don't try to condominiumize it first and then construct it. You are going to run into all kinds of difficulties. Get the building built before you commit it to condominium development. It has an advantage from the point of view of the lender because he might feel that he wants the option of either going with an apartment house or going with a condominium.

If you use that route be careful to make provision in your construction loan documents for partial releases of units as sales are accomplished.

So far as permanent financing is concerned, in Colorado we draw a distinction between the first and second or following mortgages. The first mortgage—we require it to attain priority over the lien for common expenses. We don't worry about the second mortgage. We provide that the owner *can* put on a second encumbrance, but if he does so we do provide that the second mortgagee agrees to release any interest that he has on proceeds from casualty insurance in the event of any destruction to the building.

Permanent lenders in our state are beginning to put a provision into their deeds of trust which provides that the failure to pay common expenses is an event of default under the mortgage. This allows them to be sure that the unit will not be sold to an undesirable second borrower in the event of a foreclosure of the common expense lien.

In addition, in Colorado the master deeds normally provide that if the lender will give the Board of Administrators notice of the fact that he has an encumbrance on a condominium unit, that the Board of Administrators is obligated to give the lender notice of the fact of any default in the payment of common expenses, and also allow him the right to cure that default.

There are various ways in which we can attack the second part of our problem, the real estate transaction as it relates to condominiums. Before I do so I think it is logical to comment on at least a couple of developer problems that you should be aware of.

In Colorado we have had an attempt of developers to retain the right to the management in a condominium. This is perhaps a problem that you won't be faced with because of the lack of a separate entity acting as the managing agent. But if you find a developer doing so, you want to be careful of the impact of his attempted retention. We currently have three lawsuits going against condominium developers, and they will evolve around sort of an assertion of improper profits that have flowed from the management operation.

Realize also that if you have a rental agency or a rental pool locked into a management contract, and this will probably evolve most often in a recreation condominium as opposed to primary residential living, you have got to worry about the Securities and Exchange Act. There have been a series of cases that have indicated that if there is a tie between a rental agency or a rental pool and the sale of the unit, you aren't selling real property, you're selling a security.

There is a case that came out of Hawaii. It is the Hale Kaa-napali Motor Hotel Development Company. I got so intrigued trying to learn to pronounce the name that I forgot to write down the citation, but with a name like that it ought to be easy to find. It's a situation where there was government intervention as a result of the sale of an unregistered security, and the security was a condominium unit. You have not only the problem of governmental intervention, but you have the possibility of civil liability for damages, or possibly even rescission for the failure to register.

Be also aware of the fact that condominium units, like any other real property, fall within the purview of the Interstate Land Sales Act. That is sort of the SEC of the real estate business now, and it is necessary to accomplish a registration under that Act if you are going to be selling condominium units interstate. The regulations are not specific or very explicit. The only indication that we've gotten is that probably the advertising media used for purposes of sale will be sufficient to draw you into the Interstate Land Sales Act. I am not conversant with your newspapers here, but if you advertised in the DENVER POST for the sale of a condominium in Colorado, you are probably within the purview of the Interstate Land Sales Act.

Let us consider for the few minutes remaining the real estate transaction itself as it relates to a condominium. Recognize that you are dealing with a piece of real property. There are various considerations, depending on who you represent. If you represent the developer you should take into consideration the adjustments that will have to be made for purposes of proration with respect to taxes that have probably not been assessed, and for common expenses that can only be estimated at best and probably guessed at.

The formal contract would not be a significantly different contract, with a couple of exceptions. In Colorado we have great difficulty where we don't have a map of record to which we can refer for purposes of a legal description. As a matter of fact, we have a statute that says it's a criminal act.

Most condominiums in Colorado have been developed on a pre-sale basis. They go out and sell the unit ahead of the commencement of construction. At least they sell as many as they can. They've got a problem there of trying to deal with a unit which is a piece of real property where they have to refer to a map that is not of record. Customarily they've handled it by attaching a small sort-of-scale drawing of the building and the unit and identifying in the legal description that the property to be conveyed will be located substantially as identified.

If you've got problems and commitments as to completion dates in your contract you may want to retain the right to amend the master deed prior to the time of its recording but after the time that the contract has been executed. The project may change somewhat, and you may want to consider the right to be able to adjust because of the changes.

You've got to worry about the developer using the purchaser's funds to cover construction costs. It obviously has some real advantages for the developer, but there are some tricks from the purchaser's point of view.

We have one development in Denver that now has 75 buildings either complete or under construction. Only eight of those buildings, and they were the first eight, have had construction loans. The balance of the construction has been paid for by purchaser's funds.

If you are representing the purchaser you'll have the interesting problem of reviewing the entire project, the master deed, the map or plans as well as the deed that is intended to be used for conveyance. It will cover all of the things that we have been talking about, but it also needs to cover some economic ramifications that you should consider for your purchaser: The purchase price. What is the down payment? What is going to happen to the down payment? Are there periodic payments under the contract and, if so, are those funds going to be used for purposes of construction? Is it going to be a financeable unit? And what are the estimated common expenses? You also need to consider the possibility of additional expenses that might be incurred from future developments, such as the construction of a swimming pool or a recreational hall. You need to worry about any restrictions on either use or resale, including the existence of a right of first refusal.

Worry about your purchaser if he is going to buy two units in a single structure with the idea of combining them. The only way he can combine them is to punch a hole in the wall, and when he punches a hole in the wall he is cutting through a common element that he, in fact, does not own. If you anticipate combining units, consider the possibility of creating the doorway as a limited common element when the regime is first created. By so doing you can retain the ability to combine units or to separate them and deal with it as a limited common element as opposed to a general common element.

The lender will be concerned about financability. He will have to be able to obtain and retain a first lien which has priority over the lien of common expenses. If it is a Savings and Loan which

is obligated to escrow funds for payment of taxes and insurance, he has to be certain that it will be separately assessed so he can identify the funds to be retained. He will want to know that the separate interests can be insured so that he can get a loss payable clause on the insurance policy on the unit on which he is making his loan. He will want to be able to cure defaults of his borrower, and he will want to be able to call the loan for non-money defaults.

Once the unit has been sold, you are faced with the possibility of the real estate transaction representing a resale, and resale activity in condominiums in Colorado is almost as good as original sales on new developments. You've got problems of proration. On occasion there is required a security deposit for common expenses. You've got the problem of prorating common expenses because, unfortunately, all of the units won't be sold on the first of the month. The seller has the obligation of complying with the first right of refusal. The contract, other than these particular areas, can be very much similar to a regular sales contract on any kind of a piece of real property.

The purchaser in the resale transaction will have to call for evidence of compliance with the first right of refusal. He will want evidence of payment of all currently assessed and due common expenses. He doesn't want to get stuck with a big common expense bill. And he will want the transfer of the full interest of the seller, the nonpartitionable interest, and the seller has to sell his entire interest.

There is one basic matter to be remembered, and I leave you with one basic thought. It is one that I had trouble learning, lawyers in our state have had trouble learning, but I think as we learn it and begin to remember it more and more often condominiums are easier to deal with. A condominium unit is a *real property transfer*, the sale or the encumbrance is a real property transfer, and real property laws apply. When we really get into trouble in condominiums it seems to be because people are trying to use some kind of concepts that flow from personal property law as opposed to real property law in their application.

Nebraska is apparently beginning in a condominium development area. I won't wish you the great hoards of people that we have attracted, but I will certainly wish you well in what can be a very intriguing form of real estate development.

... Recess ...

MODERATOR SPENCE: We have one additional question for Mr. Groszold, a request to go into more amplification on SEC security regulations and the citation on the Hawaiian case. I believe

you said you didn't have the citation on that. If you can amplify in three words or less we would appreciate it.

MR. GROSWOLD: I won't try to amplify in three words or less. I've got some material that I can go into the subject a little bit deeper. I won't lay claim to the material. We have a lawyer in Denver by the name of Bob Fowler who has sort of become the guiding light in the impact of SEC registration problems as they relate to condominiums.

You've got at least a two-level problem. You've got to worry about your own state law as well as the federal law. The problem revolves around the concept of a rental agency or a rental pool, and one of the first cases, as I understand it, came out of the sale of individual orange trees in an orange grove in Florida. They sold the tree, the land upon which it sat, and concurrent with the sale entered into a management agreement. It was an investment device. The guy who was selling off his orange grove was going to manage the orange grove. He was going to take good care of your tree, and you got your share of the proceeds. It was deemed to be a security, a salable security, and the problems that flowed from the failure to register. They built from that into the condominium concept.

I don't have the citation on the Hale Kaanapali case, unfortunately. If you can't find it, let me know and I can track it down for you but unfortunately I don't have it. The problems that flow are problems that flow from governmental intervention, which is what the Hawaii case was. They entered into an arrangement whereby in their sales contract on condominiums the purchaser agreed to enter into a management contract with the developer, whereby the developer would take charge of the rental of the unit. It was an investment device. The purchaser intended to occupy the unit maybe two weeks out of the year, but he wanted somebody to rent it and make money for him the balance of the year. The two were tied very closely together. There was governmental intervention, and what they finally did was to cancel all of the existing purchase contracts, restructure the condominium, and start over again, and didn't even talk about a rental pool or rental agency until after all of their sales had been completed. They have now gone through the process of entering into a rental arrangement, but the rental arrangement came after the fact, not as a part of the package.

The other problems are problems that flow from offers or sales of unregistered securities under Section 12(1) of the Securities Act of 1933. This is an area that I don't feel very comfortable in. There are problems of civil liability for damages, and the attending prob-

lems that flow from rescision. The rescision problems get really pretty difficult if you consider the fact of the sale, a borrowing used for purposes of payment of part of the purchase price, and a subsequent rescision. As I say, the suggestions, the practical approaches to avoid the necessity of registration is avoid a rental agency or rental pool in the development state, and offer and sell real estate only. Don't try to sell a package whereby "You had better buy this unit because, if you do, we'll keep it rented for you, and it is going to pay for itself and you're going to make all kinds of money." The problem is keeping the two separated.

MODERATOR SPENCE: For our second session this afternoon, and we are running late, Ted Kessner is from the law firm of Crosby, Pansing, Guenzel & Binning in Lincoln. He was one of the authors, I believe, of the Act on Trust Deeds and he also was responsible for the test case that was run on trust deeds in the State of Nebraska. We asked Ted if he would come down and visit with us on the trust deed as a security in real estate transactions because there seems to be a lack of trust deeds in use in this state, and the feeling was that perhaps the reason is that no one knows what the hell they are or *how* to use them, and perhaps if we get a little more knowledge on the subject we can make use of them with our clients.

He says he is a member of the National Association of Teacher Attorneys, which is an interesting one, and he is the author of "The Real Party In Interest Rule" for the *LAW REVIEW* in 1960, and "The Federal and State Laws and Regulations Affecting the Movement of Wheat" for the College of Agriculture. And it is obvious that any man that can tell us how to move wheat knows a lot about trust deeds, and this is one of the reasons that he wrote the law, I am sure.

He is a teaching associate at the University of Nebraska. He has been a lecturer of Commercial Law at the University of Nebraska, and is President of the Lincoln Legal Service Society.

THE TRUST DEED AS SECURITY IN THE REAL ESTATE TRANSACTION

Theodore L. Kessner

I must say first of all, Gene, that the resume was sent to you with a caveat that it was for the interest of use with clients, not with fellow lawyers. And with reference to the membership in the National Association of Teacher Attorneys I have just returned from there. We have *two* conventions a year. I have just returned

from the Fall conference, and it was held in the Bourbon Orleans Hotel on Bourbon Street in New Orleans. So there's a little bit of class in that organization.

Trust deeds, rightfully, should be talked about and discussed by lawyers in Nebraska because I am afraid they are grossly misunderstood.

The comment was made to me earlier this week when someone had seen the program for this meeting that they had an estate with a trust problem in it and they were interested to see what I was going to talk about. This is not estate planning because I don't know anything about that.

I am not sure that I know much about trust deeds but, as Gene said, our office was instrumental in the preparation of the law and lobbying for it, as well as the test case which went to the Supreme Court that we will talk about a little later on.

For Gerry's purposes I would also indicate that I also wrote the Nebraska Condominium Law, and by writing a five-page, twenty-three section law, I probably could charge more money than they did in Colorado for the one and one-half page law.

The trust deed probably is misunderstood because it is a new concept in real estate security, and that is what we are talking about, a security document. The cute wrinkle of the trust deed is the extrajudicial power of sale, the ability to obtain the security pledge for the loan without the necessity of a judicial foreclosure. And this is, as you recognize, a new concept in real estate security transactions in our state. A long, long time ago Nebraska placed itself in the column of being a lien theory state in real estate security. It was interesting when we did the research for this law for the legislature that the first case in which Nebraska's courts declared that we are a lien theory state, this is, title doesn't pass by a mortgage document, was reported in Nebraska and it involved a loan, I believe, made in 1858. So that at the first opportunity Nebraska jurisprudence stated that a mortgage is nothing more than a security document giving the lender a lien only and no title interest. This, of course, is also voiced in our statutes and has been a part of the Statute 76-251, which says, "Every deed conveying real estate which by any other instrument in writing (which would be the note) shall appear to have been intended only as security in the nature of a mortgage, though it be absolute." Though it be an absolute conveyance in terms, it shall be considered as a mortgage merely. So that we have, historically in Nebraska, taken the position that even though our standard mortgage forms use the words "grant, bargain, sell, and convey," and mortgage usually on the end of that, and even though these are the same words that

we use in our warranty deed form, notwithstanding all of that the lender only gets an equitable lien interest. And under the lien theory the title remains, of course, in the borrower, and upon default we must judicially extinguish his interest in the property, including the filing of an action, the obtaining of service, the contesting of the issues, and then judicially selling the property to satisfy the indebtedness. This continuous involvement of the judicial process takes time and costs money.

This is the area that we started out to change by the preparation of the Nebraska Trust Deeds Act. The concept of an extrajudicial sale of security of course is not a new one. We do it all the time in personal property. Chattel mortgages are foreclosed regularly by public sales, but not involving the judicial function of extinguishing the borrower's rights in the property. Nor is the extinguishment of a borrower's interest in real estate given for security new in many other states. In 1964 when we did the research for the preparation of this law, we found some thirty-three states who at that time permitted trust deeds with extrajudicial powers for sale. It is a very commonplace thing, and these states are both the so-called lien states and title theory states, so we set upon the preparation of the Nebraska law.

As indicated, our interest in the law started out like most everything we lawyers do, I guess, for money. We were employed as lobbyists for the Nebraska Mortgage Association, and yesterday on one of the programs here some of the people who had been leaders in the Nebraska Mortgage Association for a long time appeared and talked about money and mortgage interest, and so on. The purpose of this Association, if they didn't voice it to you, has been to get a climate to induce mortgage money into the state. And one of the things that they deemed would assist the climate to induce this mortgage money to flow in here from elsewhere was to somehow shorten the period between the time of default and then getting the security.

We first tried to do this by amending the stay periods, and as you know in Chapter 25 we've changed the stay periods and in some instances it is no longer nine months, it is three or six depending upon the remaining maturity of the loan at the time of the decree. But that they didn't feel was enough. So the effort was made to prepare and have enacted a Nebraska Trust Deeds Act, a comprehensive statute which permits trust deeds and, that important element, the extrajudicial power of sale.

The comment has been made that the law is one that has not been used a lot, and probably as we go through the sections of the law it will become readily apparent why some lenders will not use it, or have not, at least to this point.

The sources of the law are many. I drafted it. I am not particularly proud of all of the sections of it. It could be improved, but those of you who have done legislative work recognize that there is a give-and-take process in this law. I think credit must be given to Hal Bauer, a Lincoln attorney who was then in the legislature who was the introducer of the bill and worked diligently for its passage. It was a new concept, and it took some doing and some compromise to get the law enacted.

The law, I need not read section by section to you, is and was intended to be a comprehensive enactment; that is, covering all of the things we deemed necessary to permit the trust deed with extrajudicial power of sale to be used in our state, recognizing that up until that time our jurisprudence said clearly, "You can't do this!" In trying to find out *why* we couldn't do it, we kept running into some walls. There is no constitutional prohibition. There is no basis for the decision in Nebraska except that they said it, and the cases that followed it just followed it. So we just set about to draft what we deemed to be a rather comprehensive legislative enactment which would permit the use of trust deeds with powers of sale in Nebraska.

The law is found in Chapter 76 starting at Section 1001 and the following sections. I don't know how many pages it takes up or how many sections it is, but in the first instance there are of course the usual definition sections.

One section that might be of interest to this group is the qualifications of a trustee. The trustee under the Act can be an attorney member of the Nebraska State Bar Association, specifically must be a member of our Bar Association, a real estate broker who is licensed, a bank or savings and loan association authorized to do business in this state, a trust company, a licensed title insurance company—Gene, we put that in there for you, I guess.

The sense of the documents, as you've picked them up back there, the theory of them is three parties: the trustor, the person who is borrowing the money and making the conveyance as a security, that's one party; the trustee, and that is of course the party who in a sense holds the security during the term of the loan; and the beneficiary, who is the person for whose benefit the security is given. There are the three parties.

Because of the pressures of other interests when we had this law before the legislature, it is permissible for one party to be both the trustee and the beneficiary in some circumstances. And those are when the trustee is either a savings and loan association, bank, or trust company. So you don't need really three clearly identifiable parties in those areas. This happened to be one of the areas of most interest by other lobbyists in our bill.

The law provides for the appointment of a successor trustee, if that is necessary. I think if you have read that section you will note that the intent of the law was to play down the role of the trustee in the transaction. Throughout the whole scope of the law we tried to continue this as really a borrower-lender type relationship and inserted the trustee in there for purposes of realizing on the security only. Therefore, the lender can quickly substitute another trustee if he desires without reason or any particular effort on his part. He can simply appoint a new successor trustee, and the new successor trustee automatically assumes all of the rights, powers, and authority of the old trustee. It is not necessary to get his acquiescence or his resignation, or any of those things. He is simply out once the beneficiary elects to remove him. The form for doing this is provided in the law. I said, one thing we tried to do throughout the law was to leave the lender and the borrower in the predominant positions rather than the trustee as a predominant person.

Section 76-1005 is the most important, or the gut part of our Act, and that is the one that permits the power of sale to be conferred upon the trustee. This is the departure. This is what we went after. The Act says that you can explicitly give to the trustee the right to sell the property, as provided by the statute under those conditions, upon default. He can do this without the use of judicial process. He doesn't need to file an action in any court to obtain this authority. He must simply conform with the conditions of the Act. And, as I stated, this is a departure from all that we have had before this time.

The trustee has to be expressly given this power. It is not one that automatically flows from the use of a trust deed, and as a matter of fact the trust deed can be foreclosed as a mortgage, in the same manner as a mortgage, if the lender decides to do so at the time of the default. The power of sale does not have to be exercised. It can be foreclosed.

The Act then goes on in several sections to discuss the way in which the power of sale can be exercised. Some of the forms are in the Act. Some of them I have put together for use in presenting the law to both the legislature and the court and those forms are around.

There must, first of all, be a notice of default. The notice of default is a form, as it suggests, that the borrower is in default. He has in some way violated his obligations to perform, either the payment of interest or principal, or taxes or whatever, and he is now in default of his agreements under the trust deed and is subject to foreclosure or power of sale execution. This notice of default

is filed of record, and after not less than four months from the time it is filed of record there can be a notice of sale.

This four-month period is probably one of the practical prohibitions against the use of this law by some lenders. As you see this law, there is now a default, a notice of default given, a four-month time span elapses and then the power of sale can be exercised. I would anticipate that those people who use this law, or at least contemplate using it, would like to see that shortened down to get in and get their security because this is the kind of document that is going to be used for low equity loans in most instances, I am sure.

The notice of sale then is given after this elapse of four months. The notice of sale is published for five weeks, I believe it is, in a legal newspaper, and the sale must be not more than thirty nor less than ten days after the last publication, a kind of notice like you would have in a sheriff's sale.

The statute provides that the notice of sale and the notice of default, or the right to receive them, can be claimed by other than the original parties, like people who have advanced money for second security purposes, and so on, simply by filing a request for this notice with the Register of Deeds. When the trustee goes about exercising his powers he has to include them in the notice provisions. This makes certain that anyone with a subsequent interest, be he a subsequent purchaser of all or part, or a subsequent lender with a second or subsequent security interest, he too is included in the notice provisions of the law so that we then have the right to give the notice of default and then the notice of sale and then the public sale. The statute provides the sale is to be a public sale, conducted by the trustee, or his attorney, we inserted in the law because we knew that attorneys would be doing most of this. The provisions for the conducting of the sale are very simple and probably need little, if any, discussion.

Once the trustee has sold the property, he then conveys it. There is no sheriff's sale, there is no sheriff's deed, there is no confirmation. The trustee exercises his statutory and contractual rights to sell the property. Interesting, in that the whole trust deed statute, at least the comprehensive ones that we found, were the recitals that once the deed is given this is evidence of compliance with all of the sections. And I suppose as we get into the use of these trust deeds and the sale of property by trustees and the attempts by trustees to convey to new purchasers, we lawyers as title examiners are going to be confronted with the problem of, What do we want to see in order to make certain that marketable title has been transferred by the trustee to the new purchaser? We try to cover that in the law by saying that these recitals in the deed, that you

did give notice of default, it was mailed to everybody who was entitled to it, the notice was published, and so on, we say in the statute that these recitals should be evidence of compliance and you shouldn't have to look beyond that. I suppose it depends upon how technical or stuffy, if you will, we want to be when we are title examiners whether we are going to accept this and foul up the works of a trustee's conveyance.

The statute provides for the disposition of proceeds, very similar to mortgages. You pay the costs, the trustee's costs, and then you pay the rest of it to the lender, and anything that's left goes to second lien holders or to the borrower, whichever the case may be.

The trustee's fees are not specified in the law. I think in the form that I have that has been used on several occasions, we do provide a fee, and it's about equal to that of the sheriff's fee in a regular mortgage foreclosure action.

Section 76-1012 is the biggest problem that we have in the law, and I say first of all that it is a result of legislative compromise before the unicameral in order to get the law enacted. One of the questions asked quite often is, Why don't lenders use this law more often? We have a problem with acceleration, and I'll state it to you very frankly. As you know, in a mortgage or the usual note situation, if the borrower defaults and doesn't pay his payment today, you can declare a default and if your document is properly drawn you can declare with that default an acceleration and the whole amount is then due and payable. Now that is the way that we draft our trust deed note and trust deed as well. But the law says that he gets a 30-day grace. He can be in default, and notwithstanding the fact that you give him notice of default he can restate his current position within 30 days after that notice of default by simply picking up the amount of the installment that he is in default, rather than the whole accelerated amount. That is the important flaw of the law. It is possible, then, for a guy to run 30 days behind. And I would suggest that this is one section of the law that will be examined closely by the legislature in the subsequent sessions that are ahead. This section did provide four months until last year, and we now have changed it down to only one month, so we are getting there. All we need to do is to provide that the four-month period is the right time to cure the default, but redefine the default so that it is the *whole* obligation if the borrower accelerates, rather than just the installment that he defaulted on. That is one of the real problems with the law as it now stands.

The law provides for the obtaining of a deficiency. As you know, in the foreclosure of mortgages we can no longer get deficiencies

in the equitable action to foreclose. We must file a separate action and determine the deficiency amount. Likewise, under a trust deed if, after you have sold the security you are still short, you can sue for a deficiency.

The right to obtain a deficiency is rather limited. You must bring your actions within three months of the sale, a new statute of limitations inserted here for this kind of action. And when you bring it the court decides what the fair market value of the property was as opposed to what you sold it for, to prevent some sort of a conspiracy among the trustee and a purchaser and a lender to buy at a distorted low price and then come in for a deficiency, so the courts deficiency is based upon the difference between fair market value and the balance of the indebtedness.

The sections then provide for reconveyance when there is not a default; of course, our primary concern is what you do *with* a default. Assuming the loan runs its regular course, the statute provides that the trustee then reconveys, as opposed to releasing the mortgage he reconveys, and in the event of subsequent transfers by the trustor or the borrower during the term of the mortgage or the trust deed, he can convey to person or persons entitled thereto rather than naming the parties and it doesn't affect the title to the land.

There are other sections which provide for filing of documents with the Register of Deeds, and so on.

As I indicated, it is an effort at a comprehensive Act to permit something that was not permitted before. When we got this passed by the legislature, the next thing was, Was it valid? Of course we had to institute a test case to determine this. An action was brought in the District Court of Douglas County to find out whether the law was valid. The Court here, Judge Burke, ruled that it was, and in order to have a case of record, the case was appealed to the Nebraska Supreme Court and the case is *The Blair Company v. American Savings Bank* in 184 Nebraska, 557. The opinion was rendered in June of 1969 and was rendered by Judge Boslaugh. The citation again 184, 557. The Court affirmed Judge Burke's decision that the law was valid.

I think it is well taken to give you two quotes from the opinion. The first one, after declaring the law valid, the Court said (quote): "The plaintiff further contends that in any event a trust deed cannot be foreclosed by a trustee's sale, since an extrajudicial sale is void as between the parties in Nebraska," and the Court then cited cases including the one in Nebraska. "One purpose of the Nebraska Trust Deeds Act was to change this rule and to permit a sale of

property by the trustee under the conditions set out in the Act. Specifically, then, meeting and treating the problem of an extra-judicial sale and saying that if done in accordance with the Act it is all right with the Supreme Court."

The second quote takes a little bit of the flavor out of that one (quote): "We of course are concerned only with the validity of the legislation and not its wisdom." (Laughter)

So there you have both the law and the judicial declaration about its validity.

Of course, as I've indicated at the outset, the effort was to shorten up the period of time between default by the borrower and realization of security. That period of time is too long, according to most mortgage lenders, particularly in the low equity areas of home loans of small value, and I think the Act will be used more and more and more, particularly if we are able to get this matter of acceleration taken care of. I personally don't think that matter is absolutely fatal to the use of the law. I have used the law in loan situations, used it for security purposes both as first and second security in loans of approximately a million bucks for our clients, and used basically the forms that were passed out here. Those forms were used in the presentation of the law to the legislature. They were used in the test case so they have at least passed that far. I am not afraid to use them for my clients. However, I must, my partners tell me, give some sort of a disclaimer as to the validity of the forms. Don't sue me if something happens after you use my forms that are passed out here today.

There are other things that we could talk about this law. The hour is late. Some of the things that you might think about very quickly: A receiver of rents, I don't see any different problem in using a trust deed than in a mortgage. I think it can be handled the same way. The right to additional borrowings, an open end, as it were, note—no problem, nothing different between the trust deed and a mortgage.

The problems that I see in the use of this law in the relatively near future are the problems of artificial creation or something that we, as attorneys in representing clients and in examining abstracts might insert into this process.

I ask you, because of my particular pride and interest in the law, to give it a fair trial. I think it has a place as a security document. It certainly is as good or better in many areas as a land contract that we are using, probably much better in most instances than a land contract. And in many instances it is better than or at least equal to a mortgage. So I ask you to give it a fair trial and

use it, and I think we will find that it is an added element to the law of Nebraska in real estate security.

The next speaker is Ron Hunter.

THE TAX ASPECTS OF THE REAL ESTATE TRANSACTION

Ronald W. Hunter

I don't know how many of you have outlines, but I have a short, snappy title: New Importance to the Installment Sale Method of Reporting Gain from the Sale of Real Estate Because of the 1969 Tax Reform Act. And all it boils down to is that I want to talk about the installment sale method of reporting and I'm trying to find an excuse to do so.

The Tax Reform Act of 1969 was passed and it has to be the most revolutionary, the most complex, and the most ambiguous tax law ever passed in the history of the United States. It is absolutely impossible. I feel sorry for us attorneys who have to advise clients because it is absolutely impossible. It's contradictory. I did go to a Tax Institute in New York and I left several days early because I wasn't getting anything out of it. You almost have to dig it out yourself. It is really a mess!

The Tax Reform Act of 1969 made so many changes, and I am only going to briefly mention two of the changes, but these two changes I believe will make the installment sale method of reporting income much more important than it has ever been in history.

The first major change is a substantial revision in the rules regarding the recapture of depreciation. Now what does all of that mean? Well, this whole talk proceeds on the assumption that you represent a seller. The seller has a building, for instance, on which he has been taking depreciation. He has been taking what is known as accelerated depreciation or fast depreciation.

The most typical type of depreciation that we are all familiar with is the old straight line method of depreciating an asset. It works something like this. Presumed that you have an asset, a building that cost \$22,000, it has a useful life of twenty years. At the end of that twenty-year period it will have a salvage value of \$2,000. The mathematics are these. Subtract the salvage value of \$2,000 from the cost of \$22,000 and you have a balance of \$20,000. Now divide the useful life, 20 years, into the remaining \$20,000 and you are entitled to take a depreciation deduction of \$1,000 per year for the life of twenty years. That's conventional straight line depreciation.

If your clients are following the straight line method of depreciation, you have very few problems. But there are other methods of depreciation known as the accelerated method of depreciation, which you are entitled to take, instead of 100 per cent cost less salvage, you can take 125 per cent, 150 per cent, and 200 per cent. Two hundred per cent is frequently referred to as a declining balance method of depreciation. With the exception of residential rental property, 200 per cent depreciation, under the new tax law, is pretty much a thing of the past.

What Congress is worried about is this excess depreciation, the difference between what you could have taken under a straight line method, and what you took as depreciation after 1969 on one of the accelerated methods, this extra depreciation, as it is known in the tax law, this additional depreciation.

Here has been the gimmick, of course, and a very obvious gimmick. You would use a fast method of depreciating the assets so you could show losses, paper losses, in the early years of the asset, normally the first eight years, and then you would sell the asset and you would have a nice capital gain, taxed in the maximum bracket of 25 per cent. Well, the government now has a recapture law. We had a recapture law before the 1969 Tax Reform Act, but it is not anything nearly as severe as the new law. The new law says that when your client sells that asset he recaptures as ordinary income *all* excess depreciation or additional depreciation that he has taken after 1969. Now, remember, he recaptures *at once*, in the year of the sale. Now I think you can begin to get the picture of what is going to happen.

Assume the asset is sold in 1975, and there has been five years of excess depreciation taken. Your client will have bunched in one year a mass of ordinary income which is that recaptured excess depreciation.

With the income tax brackets proceeding upward in the manner that they do, you could have a very, very substantial tax. In fact, it could be a catastrophe.

This is the first reason why I think the installment sale method is going to become extremely important as a method of reporting the gain. If there is any way that you can take this big block of ordinary income that you receive in the year of the sale and scatter it out over a period of years so you won't have as much in each year, you obviously will be in a much lower income tax bracket. That is one case where the installment sale is going to become more and more popular.

As I spell out in the outline, there is an exception in the recapture rules, a very major exception, and that is the exception for residential rental property, which has a basic definition in the code. Residential rental property is basically an apartment house or a type of rental property. The law provides that if you sell residential rental property and if you sell it, for instance, during the first 100 months after 1969, then if you've taken this so-called accelerated or additional depreciation during that 100-month period, you will still recapture as ordinary income in the year of sale all of that additional depreciation. But now here is the break you get on residential rental property; that is, apartments, and so forth.

If you make the sale, for instance, 120 months after 1969, and you've taken 120 months of additional depreciation, you are entitled to a credit of 1 per cent per month for each month after the first 100 months. So a sale 120 months after 1969 would give you a credit of 20 per cent, 120 months less 100 months leaves 20 months times 1 per cent equals 20 per cent. This means that you can take the additional depreciation which you would otherwise recapture and subtract 20 per cent of it, and you would only have to report 80 per cent of that recaptured depreciation. Well, you can follow it through logically, if you make the sale 150 months after the passage of the 1969 Tax Reform Act, 50 per cent, only one half is recaptured. You will see in the outline where I've set up a chart that shows where, at the end of 200 months after 1969, there is no additional depreciation recaptured.

Always in a recapture, the recapture can never actually exceed your gain from the sale. Now you get into another problem where you have taken additional depreciation, both after the passage of the Tax Reform Act and additional depreciation before the passage of the Tax Reform Act. First, you look to the depreciation after the passage of the Tax Reform Act. If deducting that additional depreciation, that recaptured depreciation you still have some gain left over, then you go back and see if you have some pre-Tax Reform Act recapture, and if you do and you compute it under the rules as they existed before the 1969 Tax Reform Act you have to recapture it also as ordinary income.

So you can see that this recapture could be an absolute nightmare for your client, but it would apply if your client had any method of depreciation in excess of straight line or in excess of 100 per cent depreciation.

Now let's move into the next provision, the next big change in the law, and that is the change in the taxation of capital gains under the 1969 Tax Reform Act. I am giving such a tremendous oversimplification of this problem that it is very likely to be mis-

leading. All I am trying to do is generally, very generally, illustrate the point.

At some of the Tax Institutes they are spending one solid day on the new method to tax capital gains, and when you get done hearing these presentations you are just about as confused as when you began because it is complicated.

To start with, under the 1969 Tax Reform Act, and your client sells real estate, it is *extremely* important to keep the capital gain under \$50,000. The reason is this: The new tax law does not change significantly the taxation of a capital gain \$50,000 or under. Under the old law you would tax a capital gain like this as you do for capital gains under \$50,000 under the present law. First you take the capital gain, cut it in half, add it onto your ordinary income, your salary income or your dividends or your interest income, and then that is taxed at the ordinary rate. Now you have a choice under the old law, and as you do under the 1969 Tax Reform Act, you have the choice of instead alternatively taxing the entire capital gain at a maximum bracket of 25 per cent. You can see if you use the installment sale method of reporting and you are able to take that big capital gain and pull it out over a period of years and keep it under \$50,000 a year this has to work for your benefit, because you will find yourself in the bracket that you are pretty much accustomed to under the old law; that is, maximum 25 per cent on a capital gain, with an exception of another new tax concept I will mention in a moment.

Now, taxation of capital gains over \$50,000, and this is where the oversimplification really begins. In my chart I show in the year 1970 the maximum capital gain rate at a rate of 29-1/2 per cent. Then I have a new category called "Possible Full 'Minimum Tax' Rates." Now what does that all mean? Congress was very concerned about the various tax gimmicks that were being used for the purpose of avoiding income tax, and they introduced a whole new revolutionary concept in tax law.

It is known—you can call it anything you want to—it's in effect the concept of tax preferential income. Here is very generally how it works. You compute all of your tax, we will say, on this column, if you want to imagine a column on the left, and you get all done with your computation and you have your regular income tax. Now when you have that all done, then you go to the right-hand side, so to speak, and you determine all of the tax preferential income that you have had for the year. What is some of this tax preferential income? With a capital gain there is one-half that theoretically escapes tax. Well, not only theoretically, it *does* escape tax. So what happens, you take the untaxed portion of the capital

gain, the untaxed one-half, and that is tax preference income and it goes over to the right-hand side.

There are some other items that are entered. There is a new concept called the excess investment interest, the accelerated depreciation that you took in excess of straight line, a bargain element in stock options, excess bad debt deductions of financial institutions, and there are eight categories altogether, the bargain element in stock options and some types of depletion. But all of this tax preference income is added up. Now you've got a total. Now what you do is take a new \$30,000 exemption, so to speak, call it an exemption or call it a deduction, anything you want to, and that \$30,000 is subtracted from all of this tax preference income. In addition, you've computed your income tax over here on this side. So now if there is any excess of this tax preference income left over after you have subtracted the \$30,000, you reach over and you pull that income tax over and you subtract *that*. Now if there is still some excess of tax preference income left, that is subject to a minimum tax of ten per cent.

Now I have thrown into my capital gain rates here a possible full minimum tax rate for tax preferential income of 5 per cent. If you add 5 per cent to 29-½ per cent in 1970 it is conceivable that you can have a total possible capital gain rate of 34-½ per cent. In 1971 it could jump to 37-½ per cent and in 1972 and thereafter it could be as high as 40 per cent; that is, a 35 per cent maximum capital gain rate, and the 5 per cent possible full minimum tax rate.

So that means if your client makes a sale of real estate and has a big gain in excess of \$50,000, it is possible that up to 40 per cent of it could be taxed at the capital gain rate. So you can see that the capital gains have lost a lot of their luster if you start getting over \$50,000 in any one year.

This means that again we come back to the importance of the installment sale as a method to attempt to scatter those capital gains out and have them over a period of time, so you don't have them bunched up in the year of sale.

Before going into the installment sale method of reporting, there are some other alternatives that should be considered, at least these are things that we are considering, and that is using a tax-free swap of like property under Section 1031.

I had intended in this talk to spend a lot of time on Section 1031. It gets so complicated that it is hard to give a talk about it from a podium because you have to use examples, and so forth. But 1031 swaps, two-party swaps, three-party swaps, even four or five-party swaps, are very, very hard to work out. But if you can work them out, they give your client a tremendous advantage because it is a tax-free exchange of real estate.

Something else I think will become more and more popular, depending on interest rates, depending on cash flow from the property, on ease of finance, and so on, will be, instead of selling because if you sell you'll recapture the depreciation and you will realize a large capital gain, is to keep the asset, do not sell it but re-finance it, get a high mortgage against it and use borrowed money, and use your cash flow to amortize out your mortgage. Of course you'll be realizing some income as you get your cash flow.

Another one which is sort of a part-way solution is to consider switching from an accelerated method of depreciation to a straight line method. If you switch from double declining balance to straight line, you can do it without the consent of the Commissioner of Internal Revenue. If you switch from any other type of an accelerated method of depreciation, you get approval from the Commissioner under Revenue Procedure 67-40, which is quoted in your outline.

Now, what is an installment sale? Here we go. I think this is the ultimate solution. An installment sale is typically a land contract, a small down payment, with the balance payable over a period of years. This is the general format of an installment sale, a sale of real estate, small down payment with the title passing and a purchase money mortgage back. That is typically the same format as an installment sale. But there are two very essential conditions which have to be met before you can qualify the installment sale as an installment sale under Section 453 of the Code.

First of all, and this is the one that has caused a lot of problems, the seller must not receive any more than 30 per cent of the total selling price in the year of sale. Now that sounds like a very simple statement, and it is, but this is the most the Internal Revenue Service has to work on when they are trying to disallow you to use the installment sale. If they can get you over 30 per cent, they tax the entire gain in the year of sale and, furthermore, they can recapture all of that depreciation as ordinary income in the year of sale. So you really have to be careful on this point.

The next point is, and this is where we as lawyers are involved in the transaction, we've got to make sure that we do not violate this provision: The next and the second condition is that the seller must specifically elect the installment sale method of reporting on his income tax return. This is where the accountant gets involved. The accountant when he files a return will make the election. The election is not complicated. It normally provides that the seller hereby elects under Section 453 of the Internal Revenue Code to, in effect, reflect a gain on the installment sale method of reporting, or language something like that, and we set out all of the

figures that you need to show how you arrived at your figures. But that is the accountant's job. But if we foul this thing up and get over 30 per cent in the year of sale, the election by the accountant doesn't do a whole lot of good.

Now to actually run through a hypothetical of how an installment sale works. Let us assume that in the year 1970 the seller sells a farm, a 320-acre farm, no buildings on it, for \$190,000. How does the buyer pay for it? Well, there is a mortgage on the farm for \$20,000. The buyer assumes the mortgage of \$20,000. Also the buyer makes a down payment of cash of \$40,000. That's \$60,000, subtracted from \$190,000, and that is \$130,000 to be paid. That \$130,000 is paid in five equal installments over a period of five years with interest at 6 per cent on the unpaid balance.

The farm has a tax basis, its cost, of \$80,000. A real estate salesman arranged the sale, and we have to pay him a commission of \$10,000. Here we go. We've got to determine first of all the gain that is realized here, and you compute this gain whether you're using the installment sale method of reporting or whether you reflect the entire gain in the year of sale. The same procedure: You take the selling price of \$190,000. You subtract the selling expense of \$10,000, that commission you paid to the salesman. That leaves \$180,000. You had a tax basis on the farm of \$80,000. So you subtract the tax basis of \$80,000 from \$180,000, and you've got a gain of \$100,000. Now if you do nothing more, if you simply go ahead and file your tax return and do not elect to use the installment sale method of reporting, that \$100,000 gain would be taxable in the year 1970. It's over \$50,000. You would pay in the higher brackets because of it.

Now there is a way to avoid it, and that is the installment sale method. But under the installment sale method, now you are going to use it, you have to determine the so-called contract price. What is the contract price? The contract price is what you, the seller, are going to receive. You receive the down payment, and you are going to receive payments over a period of years. The down payment was \$40,000 cash, and you are going to receive another \$130,000. As a result, the contract price is \$170,000. You do *not* include the mortgage which was assumed. So now you are going to receive \$170,000, you've got a gain of \$100,000. If you are going to be reporting that gain over a period of years, actually it will be six years, the down payment year and then the five years thereafter, a portion of that gain each year will be taxed. Now how do we determine what that proportion is? Well, what we do, we take \$170,000, the contract price, divide it into the gross profit of \$100,000; \$170,000 into \$100,000 is 59 per cent. That means that out of

every dollar of principal payment that you receive, 59 per cent of it, or 59 cents, will be gain, either long term or short term, depending on the holding period; 41 cents out of every dollar, or 41 per cent, will be tax-free. It is a return of your basis coming back to you.

Now I have prepared a chart. You have an outline. In 1970 you receive a payment of \$40,000. Of course it goes without saying that we have no problem with the 30 per cent rule because 30 per cent of \$190,000 is \$57,000, so you are 'way under the installment sale. That \$40,000 that you receive, it is too complicated to figure out how much of that is gain. Fifty-nine per cent of it is gain. So as a result \$23,530 would be, and I might say I got that figure by using the exact percentage, 58.824 per cent if you are trying to multiply 59 per cent times that, \$23,530, which is, in essence 59 cents out of every dollar out of that \$40,000 is gain, and would be reported in 1970 as capital gain or ordinary income, depending on your holding period. The balance, or the 41 cents out of every dollar, the \$16,470 is tax-free. It's a return of basis.

The next year you receive a payment of \$26,000. Five divided into \$130,000 is \$26,000 of principal. In addition, you receive interest income, but that is reportable as ordinary income. Now you take that \$26,000 payment, you've got to break it up again: 59 per cent of it is capital gain, either long term or short term; 41 per cent is return of capital. You keep this up, doing this every year, in '71, '72, '73, '74, and '75. So finally in 1975 you have realized over a period of years \$10,000 of capital gain. Now you can see where you had to be better off by having that gain under \$50,000 a year. Well, first of all, it is taxed in the maximum bracket of 25 per cent. The chances are very probable you will not be subjected to tax preference income because it's probably going to be under \$30,000 plus your other tax.

Now we have a problem with the recaptured depreciation under the installment sale method of reporting. You remember how we had that big mass of recaptured depreciation in the year of sale? Well, if we use the installment sale method of reporting, we can take that big balance of ordinary income and we can scatter it out over the period of years that we are reporting the capital gain. Here is where the Internal Revenue Service and tax practitioners have quite a disagreement. The Internal Revenue Service has taken the position that you must, if you've got recapture and you've got the installment sale method of reporting and they've taken this position in proposed regulations, they say that you've got to use that entire gain, that 59 per cent that we talked about, you've got to use that entire gain each year to absorb that ordinary income,

that recaptured income. And finally, when you have, and say it takes three or four years to do it, whatever it takes, finally after you have used all of that gain to absorb that recaptured depreciation, so to speak, then you are entitled to report gain for those last couple or three years. In other words, the Service is saying "Out of the gain, you've got to recapture the depreciation first."

Many tax practitioners can violently disagree with the Internal Revenue Service on this, and I know tax practitioners that are just simply not following the proposed regulation. What they do instead, they say, "This doesn't make any sense." It seems more fair and reasonable that you allocate on a prorata basis the recaptured depreciation over the entire payout, so you'll have each year a certain amount of long term capital gain, if it is over six months, well, first we start out this way, first recapture depreciation out of a payment each year, then capital gain, then return of basis, and so clear to the end you are recapturing depreciation instead of having to use up all of the gain in the early years of the sale. Now, we don't know where this is going to come out. We are still in proposed regulations but I know that tax practitioners are ignoring the regulations.

We've got another problem, and that is the imputed interest. I think most of you know how we got into this mess of imputed interest. Tax practitioners thought it was quite a clever thing, if you represented a seller, not to charge any interest in the transaction because if you charged interest to the buyer, that interest on the deferred balance was ordinary income. So you got together with the buyer and you would say, "Here is what we are going to do. We'll increase this sale price by an amount necessary to cover that interest that you otherwise would pay us." Congress didn't like this and they passed Section 483, the imputed interest section. That, of course, precedes the 1969 Tax Reform Act. All that says is that if the seller and buyer do not provide for at least 4 per cent in the contract of sale, then there will be an amount equivalent to 5 per cent coming out as imputed interest. So what looks like gain to you, and which you would get capital gain, will be actually taxed as ordinary income for interest, imputed interest, interest imputed to the sale.

I guess you can begin to see here what we have in an installment sale coming out. It is possible you would have four tiers of income out of each installment sale. You might have some imputed interest if you haven't provided for at least 4 per cent, recaptured depreciation, capital gain, return of tax basis.

Now we get down to the problem of where we are going to do battle with the Internal Revenue Service because this is about the

main thing they have to try to knock your installment sale out, and that is receiving the maximum in the year of sale of 30 per cent of the total selling price. Here are some of the problems. First of all, when you sell this farm for \$190,000, you got back an obligation of the buyer of \$130,000. Let us presume that it was a note and purchase money mortgage back for \$130,000 payable in a five-year pay out, equal principal payments, 6 per cent interest.

Are you going to get a promissory note? Normally in tax law when you receive a note, the law is you have got to report that note to the extent it has an ascertainable fair market value. There is an exception to this in Section 453, the installment sale provisions. That note you receive back is received for purposes of determining whether or not you have received more than 30 per cent of the total selling price in the year of sale. Obviously it has to be because otherwise there couldn't be such an animal as an installment sale. So as a result you ignore that note that you get back. All right, now you had that mortgage in that hypothetical. You remember, for that \$190,000 selling price it was paid by the assumption of a \$20,000 mortgage, \$40,000 in cash, and \$130,000 back. Now how about that \$20,000 mortgage that was assumed by the buyer as a part of the selling price? Can that be counted as a payment in the year of sale? Well, first of all, this distinction that we learned in law school between the assumption of a mortgage and taking subject to doesn't mean a whole lot in tax law on this particular point. It is clear that that \$20,000 mortgage that the buyer assumed is not counted in determining whether or not we receive more than 30 per cent in the year of sale, with *one very major exception*, and I have underlined that in the outline. If that mortgage assumed, or taken subject to by the buyer, exceeds your tax basis in the property, then to the extent that that mortgage assumes your tax basis that excess is deemed to be a payment in the year of sale. Now there is a very good reason for this. If you didn't have a rule like this, the clever seller would go out and put a high mortgage against the property before he sold it and he would take that cash and put it in his pocket, the buyer would assume the mortgage, and it would be a wonderful way to get some cash out of the property tax-free. So the rule is if that mortgage assumed or subject to exceeds your basis, to the extent of the excess it is deemed to be in payment in the year of sale for purposes of the 30 per cent rule.

Now we have some other problems. Always in a sale, and I just went through a closing yesterday and we had this problem come up, the buyer assumes liabilities of the seller. Now if the buyer assumes liabilities of the seller and pays those liabilities in the year of sale, your seller has problems because that does count toward the 30 per cent rule.

For instance, if the buyer assumed the seller's unpaid interest, taxes, mechanic's liens, seller's attorney fees, or other expenses owing at the time of the sale, and *pays* them in the year of sale, these amounts would be deemed to be a payment in the year of sale for purposes of the 30 per cent rule.

I put a note in the outline that if these expenses are only *assumed* and not paid by the buyer in the year of sale, the chances are very probable that that would not be included to determine if you had violated the 30 per cent rule. I cite a case there called *Katherine H. Watson*, which is an old tax case.

Let's take the next one. Payments before the year of sale, for instance your client receives option money before the year of sale, he receives an earnest money deposit. If that money is credited towards the purchase price, even though he received it *before* the year of sale, that is included as a payment in the year of sale to determine if there is a violation of the 30 per cent rule.

Now here is one that somebody is really going to get trapped on, and that is the problems caused by imputed interest. What happens, you have a situation where you fail to provide for at least 4 per cent simple interest on the unpaid balance. Along comes the Internal Revenue Service and they impute 5 per cent. So what the Internal Revenue Service does, they see that selling price of \$190,000, and by using present value tables that are spelled out in the regulation they can determine that there is a certain amount of unstated interest in that selling price of \$190,000. Say, for instance, it was \$30,000. The Internal Revenue Service says, "Well, the selling price was not \$190,000. It was \$160,000 because you have to deduct off the unstated interest." Remember, when you are working with the 30 per cent rule, you are working with 30 per cent of the selling price. So if you have a deduction from the selling price for the unstated or imputed interest, 30 per cent of \$160,000 is a whole lot different than 30 per cent of \$190,000, and you may unwittingly have a violation of the 30 per cent rule. So I guess the lesson one learns is to be awful careful about low interest rates when you have an installment sale election.

Now the selling price itself. The selling price includes the down payment, the amount you are going to receive, and any mortgages assumed. In our case \$190,000: a \$20,000 mortgage is in that total selling price; the \$40,000 cash down payment; and the \$130,000. You do not deduct the selling expenses in determining the total selling price. The total selling price is just exactly what it says, the total selling price, *except* if you have imputed or unstated interest, then the rules change. You don't necessarily have to receive a down payment in the year of sale to still qualify for the install-

ment sale method of reporting. In fact, you don't have to receive any payment in the year of sale. But do not do as taxpayers have done, receive no payments in the year of sale, received all of the payment the next year in a balloon, and then tried to use the installment sale method of reporting, which in essence would be a shift of the income from the year of sale to the next year. They had some reason they wanted to have that gain in the second year. The Internal Revenue Service says, "You don't do that." The Code itself says you don't have to have a payment in the year of sale. But the Service has come out in Revenue ruling 69-462, and it says that you must have at least two payments in two years. For instance, if you didn't have a payment in the year of sale you could have a payment the next year and the year thereafter, and you could use the installment sale method of reporting.

In the outline I have a provision called "A Goof." What happens if a party, by accident, exceeds the 30 per cent limitation in the year of sale. Well, there is a case on this, the *Lewis M. Ludlow Case*, a Tax Court Case of 1961. It involved a tremendous gain as I recall, something like over a million dollars. The closing was held in this case on December 29, 1955. The next day, on December 30, 1955, the mistake was discovered in which the seller had received more than 30 per cent in the year of sale. I assume that there was near panic. On December 31, the next day, the amount was wired from the seller to the buyer which would bring the amount received to 30 per cent or under.

The seller went ahead and used the installment sale method of reporting when he filed his return.

A few years later the Internal Revenue Service came along and said, "We don't care. You didn't correct that mistake. You received more than 30 per cent in the year of sale. You were not entitled to use the installment sale method of reporting, and the entire capital gain is taxed in the year of sale."

The case went to the Tax Court. With three judges dissenting, the Tax Court held that the seller had not received more than 30 per cent in the year of sale. It is one of those decisions of mercy that says that the parties really didn't intend to make a mistake—nor do they seldom intend to make a mistake—but the Court said it just wouldn't be fair. So the Court said they hadn't really received more than 30 per cent in the year of sale.

The only bad thing about this case is that it is such a perfect fact situation that it is questionable as to how much applicability it might have to another fact situation.

For instance, in this case if you had discovered when you did your return on March 1, 1956, the next year, "We goofed," I think you might have problems in convincing the Tax Court that really there was automatically created, because of this unintentional mistake on accounts payable by the seller to the buyer and therefore not more than 30 per cent was received in the year of sale. But I know whatever occurs you know that is exactly what your argument is going to be because you're getting pretty desperate at that point.

Now to get to the second condition for the installment sale, and we're almost to the end. The first was that you didn't exceed 30 per cent of the total selling price in the year of sale. The second is that you make a timely election. Now, the Code and regulations are silent as to when the seller has to make the election to use the installment sale method of reporting.

I know that in 1957 when I first started working with tax law and when we filed returns or advised clients there was only one rule as far as we were concerned, and you made that election on that first return, and that return was timely filed. We would have had heart failure to think that you could do it any other way. Perhaps there was case law that we didn't know about but we never bothered to look it up.

It happened, historically, that had been the position of the Internal Revenue Service; that is, you had to file a timely filed return and it had to be the first return for the year of sale. There was a Revenue ruling on it that came out in 1953. Many courts disagreed with the Internal Revenue Service and you had a whole mass of decisions come down. They were sympathy type decisions in which the Court, in essence, said, "It just isn't fair." So as a result, some of the decisions have allowed taxpayers to retroactively elect the installment sale method of reporting, even on a return filed late by a taxpayer who is admittedly negligent. I cite the *BACA Case*, a 1964 case. There were a dozen decisions on this and to try to reconcile them is very difficult.

The Internal Revenue Service finally out of utter frustration issued Revenue Ruling 65-297 in 1965, and the Service was using this Revenue ruling as a sort of interim stopgap measure until they could get some regulations, which still, to my knowledge, haven't come out. In essence, what this Revenue ruling says is, "Go ahead, follow these cases," and then they list all the various cases. And finally in the Revenue ruling you have the feeling that the Service just throws up their hands and says, "Go ahead. There are some cases where you obviously can't." You couldn't use a retroactive election on a late filed return or a negligently filed return if the

Statute of Limitations would run and would bar the government from collecting its tax. Or, I would say another situation would be where you on your return had taken a position contrary to an installment sale method of reporting. I would assume, I haven't looked this up and I'm speculating on this, that if you had elected to report the entire gain in the year of sale, I think you would have a hard time changing.

If you have a problem on this matter the thing you ought to do is tear into that Revenue ruling, read it, and start reading the cases because they turn on some very fine, small issues that you can only get by reading.

NEBRASKA STATE BAR ASSOCIATION
Statement of Cash Receipts and Disbursements
Year ended August 31, 1970

Receipts:

Active members' dues		\$64,205
Inactive members' dues		6,130
Institute on new legislation	\$ 2,591	
Less expenses	<u>1,209</u>	<u>1,382</u>
Reinstatements		70
Sale of evidence and probate books		629
Interest on treasury bills		510
Loan repayment from Great Plains Tax Institute		500
Harold Diers and Co. donation		500
Miscellaneous		3
Orient and Spanish tours		<u>935</u>
		<u>74,864</u>

Disbursements:

Salaries	19,124	
Payroll taxes	1,050	
Printing and stationery	1,876	
Office supplies and expense	925	
Telephone and telegraph	191	
Postage and express	3,601	
Directory	1,830	
Officers' expenses	256	
Newsletter	243	
Executive council	1,325	
Executive director	4,689	
Judicial council	307	
Nebraska Law Review	9,077	
Nebraska State Bar Association Journal	<u>\$3,288</u>	
Less receipts for advertising	<u>519</u>	<u>2,769</u>
Committee on public service	4,176	
Less receipts for pamphlets	<u>211</u>	<u>3,965</u>
American Bar Association meetings ...		4,610
Young lawyers section		8
Mid-year meeting		524
Annual meeting, 1969	8,332	
Less exhibit space	<u>585</u>	<u>7,747</u>

Committee on inquiry	269		
Committee on legal education and continuing legal education	16		
Advisory committee	84		
Committee on law complex	20		
Committee on reorganization	1,467		
Committee on legislation	635		
Tax institute	1,847		
Less reimbursements and registration receipts	440	1,407	
Carried forward		\$68,015	74,864
Brought forward		\$68,015	74,864

Disbursements, continued:

Creighton Law Review	1,800		
Law day U.S.A.	740		
Insurance	139		
Maintenance expense	327		
Auditing	500		
Dues and subscriptions	100		
Section on real estate, probate and trust law.....	263		
Nebraska District Judges Association	250		
Annual meeting, 1970	418		
Miscellaneous	122		72,674
Excess of receipts over disbursements			2,190
Balance at beginning of year			16,184
Balance at end of year (note 1)			\$18,374

Notes:

- (1) The association receives dividends in respect to a group insurance contract. The dividends, income on related investments, cash balances and investments have been segregated from the operating funds of the association. At August 31, 1970, segregated cash and investments amounted to \$41,997. During the year ended August 31, 1970, investment income amounted to \$2,073, and the dividend received with respect to the group insurance contract amounted to \$1,174. Also, a claims stabilization reserve fund is maintained with the insurance company.
- (2) The association adopted a retirement program for employees during November, 1967. No provision has been made for funding this obligation.

ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely	Omaha	37. 1936	*J. G. Motherhead	Scottsbluff
2. 1901	*William D. McHugh	Omaha	38. 1937	*C. J. Campbell	Lincoln
3. 1902	*Samuel P. Davidson	Tecumseh	39. 1938	Harvey M. Johnsen	Omaha
4. 1903	*John L. Webster	Omaha	40. 1939	*James M. Lanigan	Greeley
5. 1904	*C. B. Letton	Fairbury	41. 1940	*E. B. Chappell	Lincoln
6. 1905	*Ralph W. Breckenridge	Omaha	42. 1941	Raymond G. Young	Omaha
7. 1906	*E. C. Calkins	Kearney	43. 1942	*Paul E. Boslaugh	Hastings
8. 1907	*T. J. Mahoney	Omaha	44. 1943	*Robert R. Moodie	West Point
9. 1908	*C. C. Flansburg	Lincoln	45. 1944	*George L. DeLacy	Omaha
10. 1909	*Francis A. Brogan	Omaha	46. 1945	Virgil Falloon	Falls City
11. 1910	*Charles G. Ryan	Grand Island	47. 1946	*Paul F. Good	Omaha
12. 1911	*Benjamin F. Good	Lincoln	48. 1947	*Joseph T. Votava	Omaha
13. 1912	*William A. Redick	Omaha	49. 1948	Robert H. Beatty	North Platte
14. 1913	*John J. Halligan	North Platte	50. 1949	*Abel V. Shotwell	Omaha
15. 1914	*H. H. Wilson	Lincoln	51. 1950	*Earl J. Moyer	Madison
16. 1915	*C. J. Smyth	Omaha	52. 1951	Clarence A. Davis	Lincoln
17. 1916	*John N. Dryden	Kearney	53. 1952	*George B. Hastings	Grant
18. 1917	*F. M. Hall	Lincoln	54. 1953	Laurens Williams	Omaha
19. 1918	*Arthur C. Wakely	Omaha	55. 1954	J. D. Cronin	O'Neill
20. 1919	*R. E. Evans	Dakota City	56. 1955	John J. Wilson	Lincoln
21. 1920	*W. M. Morning	Lincoln	57. 1956	Wilber S. Aten	Holdrege
22. 1921	*A. G. Ellick	Omaha	58. 1957	Barton H. Kuhns	Omaha
23. 1922	*George F. Corcoran	York	59. 1958	Paul L. Martin	Sidney
24. 1923	*Edward P. Holmes	Lincoln	60. 1959	Joseph C. Tye	Kearney
25. 1924	*Fred A. Wright	Omaha	61. 1960	Flavel A. Wright	Lincoln
26. 1925	*Paul Jessen	Nebraska City	62. 1961	Hale McCown	Beatrice
27. 1926	*E. E. Good	Wahoo	63. 1962	*Ralph E. Svoboda	Omaha
28. 1927	*F. S. Berry	Wayne	64. 1963	George A. Healey	Lincoln
29. 1928	*Robert W. Devoe	Lincoln	65. 1964	Floyd E. Wright	Scottsbluff
30. 1929	Anan Raymond	Omaha	66. 1965	Harry B. Cohen	Omaha
31. 1930	*J. L. Cleary	Grand Island	67. 1966	Herman Ginsburg	Lincoln
32. 1931	*Fred Shepherd	Lincoln	68. 1967	M. M. Maupin	North Platte
33. 1932	*Ben S. Baker	Omaha	69. 1968	George B. Bolland	Omaha
34. 1933	*J. J. Thomas	Seward	70. 1968	C. Russell Mattson	Lincoln
35. 1934	*John J. Ledwith	Lincoln	71. 1969	Charles F. Adams	Aurora
36. 1935	*L. B. Day	Omaha	72. 1970	Wm. J. Baird	Omaha

ROLL OF SECRETARIES

1. 1900-06	Roscoe Pound	Lincoln	4. 1910-19	A. G. Ellick	Omaha
2. 1907-08	George P. Costigan, Jr.	Lincoln	5. 1920-27	Anan Raymond	Omaha
3. 1909	W. G. Hastings	Lincoln	6. 1928-36	Harvey Johnsen	Omaha
			7. 1937-	George H. Turner	Lincoln

ROLL OF TREASURERS

1. 1900	Samuel F. Davidson	Tecumseh	6. 1914-16	Chas. G. McDonald	Omaha
2. 1901	S. L. Geisthardt	Lincoln	7. 1917-22	Raymond M. Crossman	Omaha
3. 1902-03	Charles A. Goss	Omaha	8. 1923-37	Virgil J. Haggard	Omaha
4. 1904-05	Roscoe Pound	Lincoln	9. 1938-	George H. Turner	Lincoln
5. 1906-13	A. G. Ellick	Omaha			

* Deceased

ROLL OF EXECUTIVE COUNCIL

1. 1900-04	R. W. Breckenridge	Omaha	14. 1911-11	Benjamin F. Good	Lincoln
2. 1900-08	Andrew J. Sawyer	Lincoln	15. 1912-15	C. J. Smyth	Omaha
3. 1900-02	Edmund H. Hinshaw	Fairbury	16. 1912-12	William A. Redick	Omaha
4. 1903-06	W. H. Kelligar	Auburn	17. 1913-15	W. M. Morning	Lincoln
5. 1904-07	John N. Dryden	Kearney	18. 1913-16	J. J. Halligan	North Platte
6. 1905-08	F. A. Brogan	Omaha	19. 1914-14	H. H. Wilson	Lincoln
7. 1907-10	S. P. Davidson	Tecumseh	20. 1915-17	Edwin E. Squires	Broken Bow
8. 1908-09	W. T. Wilcox	North Platte	21. 1916-16	John N. Dryden	Kearney
9. 1909-11	R. W. Breckenridge	Omaha	22. 1916-17	Fredrick Shepherd	Lincoln
10. 1910-12	Frank H. Woods	Lincoln	23. 1917-17	Frank M. Hall	Lincoln
11. 1910-10	Charles G. Ryan	Grand Island	24. 1917-18	Anan Raymond	Omaha
12. 1910-19	Alfred G. Ellick	Omaha	25. 1918-18	A. C. Wakely	Omaha
13. 1911-13	John A. Ehrhardt	Stanton	26. 1918-22	Fred A. Wright	Omaha
			27. 1919-19	R. E. Evans	Dakota City

28. 1919-22	Geo. F. Corcoran	York	99. 1946-48	Paul F. Good	Lincoln
29. 1919-20	L. A. Flansburg	Lincoln	100. 1947-48	Joseph T. Votava	Omaha
30. 1920-20	W. M. Morning	Lincoln	101. 1947-48	John E. Dougherty	York
31. 1920-27	Anan Raymond	Omaha	102. 1947-55	Lyle E. Jackson	Neligh
32. 1921-21	Alfred G. Ellick	Omaha	103. 1948-49	Robert H. Beatty	North Platte
33. 1921-23	Guy C. Chambers	Lincoln			
34. 1922-24	James R. Rodman	Kimball	104. 1947-50	Frank D. Williams	Lincoln
35. 1923-26	E. E. Good	Wahoo	105. 1947-50	Thomas J. Keeney	Geneva
36. 1924-26	Robert W. Devoe	Lincoln	106. 1948-51	Laurens Williams	Omaha
37. 1924-24	Fred A. Wright	Omaha	107. 1949-51	Joseph H. McGroarty	Omaha
38. 1925-28	Paul Jessen	Nebraska City			
39. 1925-27	Clinton Brome	Omaha	108. 1949-54	Wilber S. Aten	Holdrege
40. 1927-29	Charles E. Matson	Lincoln	109. 1948-49	Abel V. Shotwell	Omaha
41. 1927-28	Fred S. Berry	Wayne	110. 1949-55	Paul L. Martin	Sidney
42. 1928-29	Robert W. Devoe	Lincoln	111. 1949-55	Joseph C. Tye	Kearney
43. 1928-30	T. J. McGuire	Omaha	112. 1949-51	Earl J. Moyer	Madison
44. 1928-34	Harvey Johnson	Omaha	113. 1950-60	Harry A. Spencer	Lincoln
45. 1929-31	E. A. Coufal	David City	114. 1950-55	Paul P. Chaney	Falls City
46. 1929-20	Anan Raymond	Omaha	115. 1950-59	Paul Bek	Seward
47. 1930-32	Paul E. Boslaugh	Hastings	116. 1950-52	Clarence A. Davis	Lincoln
48. 1930-30	J. L. Cleary	Grand Island	117. 1951-55	Barton H. Kuhns	Omaha
49. 1931-33	W. C. Dorsey	Omaha	118. 1952-57	Thomas C. Quinlan	Omaha
50. 1931-31	Fred Shepherd	Lincoln	119. 1951-52	George B. Hastings	Grant
51. 1932-34	Richard Stout	Lincoln	120. 1952-53	Laurens Williams	Omaha
52. 1931-32	Ben S. Baker	Omaha	121. 1953-64	J. D. Cronin	O'Neill
53. 1933-35	Barlow F. Nye	Kearney	122. 1954-57	Norris Chadderdon	Holdrege
54. 1933-33	J. J. Thomas	Seward			
55. 1934-36	Chas. E. McLaughlin	Omaha	123. 1954-56	John J. Wilson	Lincoln
56. 1934-34	John J. Ledwith	Lincoln	124. 1955-56	Wilber S. Aten	Holdrege
57. 1935-35	L. B. Day	Omaha	125. 1955-58	F. M. Deutsch	Norfolk
58. 1935-37	James M. Lanigan	Greeley	126. 1955-64	Clarence E. Haley	Hartington
59. 1935-38	H. J. Requarte	Lincoln			
60. 1935-38	Raymond M. Crossman	Omaha	127. 1955-58	R. R. Wellington	Crawford
61. 1935-40	F. H. Pollock	Stanton	128. 1955-64	Alfred G. Ellick	Omaha
62. 1935-41	T. J. Keenan	Geneva	129. 1954-55	Jean B. Cain	Falls City
63. 1935-39	Walter D. James	McCook	130. 1955-57	Hale McCown	Beatrice
64. 1935-37	Roland V. Rodman	Kimball	131. 1956-62	C. Russell Mattson	Lincoln
65. 1936-36	J. G. Mothersead	Scottsbluff	132. 1956-58	Barton H. Kuhns	Omaha
66. 1936-36	James L. Brown	Lincoln	133. 1957-59	Paul L. Martin	Sidney
67. 1937-39	David A. Fitch	Omaha	134. 1957-60	Richard E. Hunter	Hastings
68. 1937-39	Raymond G. Young	Omaha	135. 1957-64	John R. Fike	Omaha
69. 1937-41	M. M. Maupin	North Platte	136. 1957-64	Thomas F. Colfer	McCook
70. 1937-41	Golden P. Kratz	Sidney	137. 1958-63	William H. Lamme	Fremont
71. 1938-42	Sterling F. Mutz	Lincoln	138. 1958-61	Carl G. Humphrey	Mullen
72. 1938-42	Don W. Stewart	Lincoln	139. 1958-60	Joseph C. Tye	Kearney
73. 1940-46	George N. Mecham	Omaha	140. 1959-65	Charles F. Adams	Aurora
74. 1940-42	Abel V. Shotwell	Omaha	141. 1959-61	Flavel A. Wright	Lincoln
75. 1940-42	Frank M. Colfer	McCook	142. 1959-60	Thomas C. Quinlan	Omaha
76. 1941-43	Virgil Falloon	Falls City	143. 1960-61	Hale McCown	Beatrice
77. 1941-43	Joseph C. Tye	Kearney	144. 1960-63	Ralph E. Svoboda	Omaha
78. 1941-47	Earl J. Moyer	Madison	145. 1960-67	Herman Ginsburg	Lincoln
79. 1937-37	C. J. Campbell	Lincoln	146. 1960-65	James F. Begley	Plattsmouth
80. 1938-38	Harvey Johnson	Omaha			
81. 1939-39	James M. Lanigan	Greeley	147. 1961-64	George A. Healey	Lincoln
82. 1940-40	E. B. Chappell	Lincoln	148. 1962-65	Lester A. Danielson	Scottsbluff
83. 1942-45	Fred J. Cassidy	Lincoln			
84. 1941-41	Raymond G. Young	Omaha	149. 1962-65	Floyd E. Wright	Scottsbluff
85. 1942-48	Max G. Towle	Lincoln	150. 1962-68	John C. Mason	Lincoln
86. 1942-42	Paul E. Boslaugh	Hastings	151. 1961-70	Vance E. Leininger	Columbus
87. 1942-45	John E. Dougherty	York			
88. 1942-49	Yale C. Holland	Omaha	152. 1964-69	Fred R. Irons	Hastings
89. 1943-45	Robert R. Moodie	West Point	153. 1964-66	Wm. J. Baird	Omaha
90. 1941-45	B. F. Butler	Cambridge	154. 1964-66	Tracy J. Peycke	Omaha
91. 1943-46	Frank M. Johnson	Lexington	155. 1964-70	W. E. Mumby	Harrison
92. 1944-49	Floyd E. Wright	Scottsbluff	156. 1964-65	Hale McCown	Beatrice
93. 1945-50	John J. Wilson	Lincoln	157. 1963-	Harry B. Cohen	Omaha
94. 1945-48	Robert B. Waring	Geneva	158. 1965-70	Bernard B. Smith	Lexington
95. 1944-46	George L. DeLacey	Omaha	159. 1965-67	Robert D. Mullin	Omaha
96. 1945-47	Virgil Falloon	Falls City	160. 1966-68	Paul P. Chaney	Falls City
97. 1945-49	Leon Samuelson	Franklin	161. 1966-	M. A. Mills, Jr.	Osceola
98. 1946-48	Harry W. Shackelford	Omaha	162. 1966-68	M. M. Maupin	North Platte
			163. 1966-67	George B. Boland	Omaha
			164. 1966-69	Leo Eisenstatt	Omaha

165.	1967-69	C. Russell Mattson	Lincoln	170.	1970-	A. C. Sidner	Fremont
166.	1968-70	Charles F. Adams ...	Aurora	171.	1968-	A. J. Weaver	Falls City
167.	1969-	Wm. J. Baird	Omaha	172.	1968-	Charles E. Wright ...	Lincoln
168.	1969-	Bert L. Overcash	Lincoln	173.	1966-	Thomas R. Burke	Omaha
169.	1969-	Alfred Blessing	Hastings				