

1969

## Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1968

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*Nebraska State Bar Association, president*

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PRESIDENT C. RUSSELL MATTSON



**NEBRASKA STATE BAR ASSOCIATION**

**HOUSE OF DELEGATES**

**WEDNESDAY MORNING SESSION**

**November 6, 1968**

The pre-convention meeting of the House of Delegates of the Nebraska State Bar Association, convening in Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at nine thirty-five o'clock by the chairman, Leo Eisenstatt of Omaha.

**CHAIRMAN EISENSTATT:** I now ask the meeting to come to order. This will be the 1968 annual meeting of the House of Delegates.

The first thing I would like to do is welcome today to our meeting those delegates who are here for the first time. I would like to explain to them, as well as to other members of the committee, a review of how I hope we will proceed today.

In front of you is a calendar which will come up in the course of the proceedings for approval and, hopefully, we will be able during the course of the day to conclude all the business on that calendar.

The format that we used last year, which I think had general acceptance, was to cover by blanket motion those reports which do not require any particular action by the House. I might tell you two errors have been discovered on that. Under "Standing Committees" we have listed Legal Aid twice, so cross one out; and on the last line we have 1968, and it should be 1969.

Now, there are many matters here that are carry-overs from before, and those are items which are coming up this afternoon. If any of the new members would like any elucidation on some of the background of those matters, I'll be happy, or one of the other members of the House will be happy, to go over it with you.

I now ask the Secretary to call the roll—Mr. Turner!

**SECRETARY-TREASURER GEORGE H. TURNER:** We have a quorum present.



CHAIRMAN EISENSTATT: A quorum being present, I declare the meeting validly called to order and organized.

Now do I hear a motion approving the calendar which is in front of you for adoption as the agenda or order of proceedings today?

FRED R. IRONS: I so move.

CHAIRMAN EISENSTATT: Do I hear a second?

BERNARD PTAK: I second the motion.

CHAIRMAN EISENSTATT: Is there any discussion? All those in favor signify by saying "aye"; opposed the same sign. The motion is carried.

The next order of business will be the report of the Secretary-Treasurer. Mr. Turner!

### REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman and Members of the House: For the first time this year we were able to get the complete audit to every member of the House of Delegates before the annual meeting. You have all probably examined it. You note that the receipts for the year were \$68,244; the disbursements, \$69,212; and excess of disbursements over receipts, \$968.

Now, I should explain that that is not quite as bad as it looks. You may recall that the Executive Council authorized a loan of \$500 to the Great Plains Tax Institute which is repayable January 1.

I move the adoption and approval of the report.

CHAIRMAN EISENSTATT: Is there a second?

MR. IRONS: I'll second it.

CHAIRMAN EISENSTATT: Is there any comment? All those in favor signify by saying "aye"; all those opposed the same sign. The motion is carried.

The next order of business is the blanket motion on the committee reports.

Next will be the committee reports that are to be covered by the blanket motion. As in past years, I contacted every standing and special committee and asked them to state whether or not they wished to present their committee reports. The committee reports that were received in time were included in your printed program.

I heard from all of the committee chairmen, and the formal blanket motion covers all those whose reports are printed in the program and who indicated there was no need to have them make a special presentation.

I would now like to merely summarize for you what is contained in the reports, and I have some comments that might be appropriate for the members of the House. These are not necessarily in the order in which they appear in the blanket motion.

**THE LEGAL EDUCATION AND CONTINUING LEGAL EDUCATION COMMITTEE:** Mr. Strasheim stated that the most important factor in that committee report was the Central States Conference on Continuing Legal Education, which involved representatives from Minnesota, North Dakota, South Dakota, Iowa, Wyoming, Montana, and Nebraska which gathered together for the purpose of exchanging data and material. Strasheim's committee recommends that our state committee continue to pursue these possibilities.

The Bridge-the-Gap was held in June and the Institute of Wills and Trusts was held in September. The committee asks that all sections and committees coordinate with it in order that it might have a better idea of the continuing legal education program that is going on in the state, and asks that the recommendation be made to Mr. Strasheim that he take the initiative and contact the various chairmen of local bar associations. I am sure he can rely on them to give him the information.

**THE JUDICIARY COMMITTEE** states that an institute for judicial nominating commissions was held in January, sponsored by the American Judicature Society, the Nebraska Law School, Creighton Law School, and our Association. The committee goes on record as favoring legislation if necessary; if not, that budgetary allowances be made to provide each Justice of our Supreme Court with a law clerk. That will be a matter that will probably come up later in the day. I think we will need to have a special resolution, which I will present to you later this afternoon, to help the Supreme Court secure budgetary allowances for law clerks.

**LEGAL AID** merely reviews the statistics in Lincoln and Omaha, and there is a recommendation that local bars, other than Lincoln and Omaha, be encouraged to set up legal aid offices.

There is not much to **THE LEGISLATIVE COMMITTEE** report, mainly because the committee has not received legislative proposals. The report states that several proposals were submitted to the Executive Council but the committee had not yet received back any action thereon. I would like to call to the attention of the House the fact

that the Association has adopted a legislative policy dealing with the handling of legislation, all of which must be approved by the House of Delegates or, under special circumstances, by the Executive Council and funneled through the Legislative Committee, so I think our committee chairmen and section chairmen should be advised of that.

**PUBLIC SERVICE:** Seventy-five per cent of their budget—if you read George's report this varies from \$6,000-plus a year—seventy-five per cent of their budget was devoted to Law Day, and they state that Law Day is now being reorganized and conducted on a year-round basis. Sam Jensen was chairman last year for the state and Ted Houston will be chairman in 1969. They have many 60-minute radio spots which the committee has prepared and titled "Mark Middleton, Attorney-at-Law," which was distributed to 25 stations in the state. They produced a 15-minute video tape involving a child custody case, which has been shown on KMTV in Omaha and the two Lincoln stations, KOLN and KGIN, and the six-station educational network in Nebraska. Special awards were presented to the deans of the two law schools at the midyear meeting. They secured four film strips from the Missouri Bar on lawyer-client relationships and these have been shown. They hope to get more budget so they can do more work. It appears to be a very active committee.

**AMERICAN CITIZENSHIP** does not know what its purposes and functions are and it wants direction. That, I think, will probably come up when we get into the Reorganization Committee.

**COUNTY LAW LIBRARIES** states that the district judges in 1967 set up a check-list for each district judge to follow in controlling or supervising the law libraries. The committee polled the judges throughout the state, and this report is contained in the printed program.

**ROCKY MOUNTAIN MINERAL LAW FOUNDATION** has a kind of special purpose report and I am just making reference to it in passing.

**PUBLICATION OF LAWS:** This committee continues to cooperate with the Nebraska Law School in the investigation and use of electronic data processing of Nebraska statutes. By December of this year all statutes will be available on electronic tape for research projects. The bar is encouraged to present problems to aid in the furtherance of this project.

I might state that our law school has been working in conjunction with the ABA Committee on Electronic Retrieval and has been engaged in research along that line, and the law school is

looking for lawyers to send them problems involving statutory research so that the students and the programmers at Lincoln can get some experience and, hopefully, will be able eventually to use a computer to provide it with better indexing, and so forth. They also hope to help the Legislature in its processing of laws.

**COOPERATION WITH LAW SCHOOLS AND ON ADMISSION TO PRACTICE:** Steps are being taken to implement the provisions of L.B. 429 of the last legislature permitting the Supreme Court by rule to authorize law students to engage in limited practice. The law schools have submitted a form of rule to the Court and it will be acted upon soon, we understand.

**LAWYER REFERRAL:** Lincoln and Omaha are the only two cities with this. The ABA has drafted new standards and practices for lawyer referral which require the sponsoring bar association to be responsible that each member of the panel be qualified to render the service, and that specialized panels be set up for particular fields of law. There are some statistics in there that you might refer to.

**MEDICO-LEGAL JURISPRUDENCE:** It states they have had continued cooperation with the State Medical Association, and the prime matter of consideration appears to be malpractice litigation and liability. They put on a trial demonstration at the state medical meeting.

**OIL AND GAS LAW:** Five bills were introduced and passed at the last legislature. The chairman states in the report that our state legislation on oil and gas is in excellent condition, and he also states that oil and gas production in the state is at a low ebb.

**RULES OF THE ROAD:** The committee is attempting to prepare a statute for the 1969 Legislature for a comprehensive revision of the rules of the road and is working closely with the Legislative Council of the Legislature.

**WORLD PEACE THROUGH LAW:** It doesn't do much but is merely a conduit for the activities of the American Bar Association committee on the matter. If anybody is interested, they have material on this particular subject which they can give to members of our association for special projects and speeches.

**THE DANIEL GROSS TRUST:** It is not a committee but it is always included in our program. They have not been making any payments, at least they didn't last year, to any lawyers' wives, widows, or children. Apparently there is no need for such a trust at this time. Anyhow, they are accumulating their money and they make a report every year.

**ADMINISTRATIVE AGENCIES:** The committee is drafting legislation pertaining to the administrative agencies for the 1969 legislative session, and they are reviewing all state administrative agencies to determine whether or not they have complied with Section 84-909, which requires rules to be filed with the Secretary of State. They are also working with the Attorney General to set up some proposed rules which will be put into effect for any agencies that have not adopted rules on their own, pursuant to the statute. The committee recommends that, upon adoption of these rules, there be a special book to be included in the *Lawyers' Desk Book* to cover this matter.

There were two committees that did not submit reports, either in the printed program or to me: Military Law and Inter-Professional Relations. I mention this only to bring it to your attention. It may be that the Committee on Reorganization will give some consideration as to what they should do.

Not having heard any request by members of this body or from the committee chairmen themselves, it is now in order for us to consider our blanket motion, which is before you. Do I have a motion to adopt the blanket motion?

FRED R. IRONS: I so move.

THOMAS R. BURKE: I second it.

CHAIRMAN EISENSTATT: Any discussion? All those in favor signify by saying "aye"; all opposed. The motion is carried.

### BLANKET MOTION RE COMMITTEE REPORTS

RESOLVED that the following committee reports be received, approved, adopted and incorporated in the proceedings of this meeting as filed and as shown in the printed program:

#### STANDING COMMITTEES

- Committee on American Citizenship
- Committee on Continuing Legal Education
- Committee on Judiciary
- Committee on Legal Aid
- Committee on Legislation
- Committee on Public Service

#### SPECIAL COMMITTEES

- Special Committee on Administrative Agencies
- Special Committee on Cooperation with Law Schools  
and on Admission to Practice
- Special Committee on County Law Libraries
- Special Committee on Lawyer Referral

Special Committee on Medico-Legal Jurisprudence  
Special Committee on Oil and Gas Law  
Rocky Mountain Mineral Law Foundation  
Special Committee on Publication of Laws  
Special Committee on Rules of the Road  
Special Committee on World Peace Through Law  
Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund

That all of the special committees listed above be continued; that all committees continue to carry out during the ensuing year the charges and responsibilities heretofore given them and report to the House of Delegates at the midyear and annual meetings of 1969.

The following committee reports were approved under blanket motion.

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

The committee has devoted a substantial portion of its work to the program for the Annual Meeting and the Estate Administration Manual which will be distributed at that meeting. This work of the committee has been in cooperation with the Section on Taxation and the Section on Real Estate, Probate and Trust Law. Many individuals from both the committee and the two sections have made substantial contributions to the program and the manual, but Deryl Hamann, who was appointed chairman of a joint committee comprised of members of the committee and of the two sections, deserves recognition for his outstanding contribution.

One significant new venture of the committee concerns the Central States Conference on Continuing Legal Education Committee. Harold Rock, former chairman and now a member of the committee, attended a meeting of representatives from Minnesota, North Dakota, South Dakota, Iowa, Wyoming, and Montana held in Minneapolis this past spring where groundwork was laid for a cooperative effort for the exchange of information, television presentations, and booklets in cooperation with programs of mutual benefit to those states. The value of this cooperative effort would appear to be considerable. **It is recommended that the committee continue to pursue the possibilities suggested by this conference.**

As has been true in past years, the committee cooperated with the Committee on Medical-Legal Jurisprudence in presenting a program this past spring.

It may be noted that various sections of the Association continue to make available outstanding programs on legal education and continuing legal education.

Once again the Bridge-the-Gap Program was presented by the Junior Bar Section in Lincoln in June 1968 and was well attended and well received. Also, an institute on will and trust drafting was presented by the Young Lawyer Section in Lincoln in September 1968, the attendance at the institute exceeding substantially the attendance at similar institutes in recent years.

The Tax Section will again hold its December tax institutes this year in Sidney and Grand Island. Also, the Tax Section is again co-sponsoring the Great Plains Federal Tax Institute to be held in Lincoln in December.

There are other legal education and continuing legal education activities being presented throughout the state on which the committee does not have information. This situation underscores the recommendation made by the committee at last year's annual meeting, which again is made at this meeting. **This recommendation is that the committee be used as a coordination center, and information center, for all legal education programs or continuing legal education programs that are carried on in the state.** Those responsible for putting on such programs, should be charged with informing the committee, the chairman of the committee, as to the particulars of such activities. This is not to suggest that the committee be given control over—but only information concerning—legal education.

Jerrold L. Strasheim, Chairman  
A. Lee Bloomingdale  
Thomas R. Burke  
Warren K. Dalton  
David Dow  
James A. Doyle  
John M. Gradwohl  
Henry M. Grether, Jr.  
Deryl F. Hamann  
John C. Mason  
John E. North  
Harold L. Rock  
Flavel A. Wright

#### REPORT OF THE COMMITTEE ON JUDICIARY

Although the Committee on Judiciary had two called meetings during the past year, at neither meeting was there a quorum of the committee present.

Several matters mentioned below were considered by the committee through correspondence between the chairman and the members of the committee. Participation by the committee members through this procedure was excellent. All matters referred to the committee were satisfactorily handled in this fashion.

The chairman of the Committee on Judiciary actively participated in the Institute for Judicial Nominating Commissions held January 29, 1968, at the Nebraska Center in Lincoln. This institute was jointly sponsored by the American Judiciary Society, the Nebraska Law School, the Creighton Law School and the Nebraska State Bar Association. The institute was well attended and much favorable comment on the value of such educational programs was received.

The committee received for its consideration from the President of the Association a suggestion that the Association go on record as favoring legislation providing the services of a law clerk to each member of the Supreme Court. The consensus of the Committee on Judiciary was that although specific legislation is not necessary, support should be given to the budget of the Supreme Court when it is presented to the Budget Committee of the 1969 Legislature in order that the services of law clerks may be made available to the members of our Supreme Court. This suggestion was made to the Executive Council of the Association with an appropriate recommendation on March 19, 1968.

At the request of Senator Roman Hruska, who is a member of the U. S. Senate Committee on Judiciary, the Committee on Judiciary reviewed the provisions of the Judicial Reform Act of 1968 (U. S. Senate Bill No. 3055) and favorably recommended upon it, following which the Nebraska State Bar Association, through its president, forwarded an endorsement to the Senate Judiciary Committee. This legislation referred to the removal and retirement of federal judges, judicial survivorship benefits, conflicts of interest, selection of chief judges, membership on judicial councils and selection of district judges for service on the Judicial Conference. It was introduced by Senator Joseph D. Tydings, chairman of the Senate Committee on Judiciary.

The Committee on Judiciary reviewed a complaint received by one of its members having to do with incomplete court records in certain litigated cases. The complaint was made that in some cases injustice is done to litigants through the failure of counsel to complete the court's records of litigation. For example, a judgment which has been satisfied through payment to the plaintiff is in some cases not released of record. The Committee on Judiciary con-



cluded that this situation does not call for additional legislation or rules of court, but would be best handled through direct action involving the practitioner whose negligence created the problem. In other words, these complaints should be referred to the local committee on inquiry.

James N. Ackerman, Chairman  
Auburn H. Atkins  
Chauncey E. Barney  
Bryce Bartu  
C. M. Bosley  
Thomas F. Colfer  
Gerald F. Fischer  
Harold W. Kay  
Clark O'Hanlon  
Kenneth M. Olds  
Carlos E. Schaper  
George E. Svoboda  
Ralph E. Svoboda  
Richard N. Van Steenberg  
Joseph T. Vosoba

#### REPORT OF THE COMMITTEE ON LEGAL AID

The Lincoln Legal Service Society in Lincoln, Nebraska, has been in operation for approximately one and one-half years, with over 800 individual personal interview records on file and over 350 files opened indicating some type of legal service rendered. Plans are being developed to open and staff neighborhood offices.

The Omaha Legal Aid Office has continued to provide excellent service within the Omaha area.

Your committee refers you to the report of the Committee on the Availability of Legal Services, and also to the recommendation made in the Legal Aid Report last year. In substance, the report and recommendation are to encourage local bar associations to survey, make, and implement plans for local legal aid offices.

It is your committee's belief that the only practical way to handle legal aid is for local bar associations to plan for the needs of their particular communities.

Robert R. Camp, Chairman  
Allen J. Beermann  
P. J. Heaton, Jr.  
J. H. Myers  
Edwin C. Perry  
Johnson E. Story  
Donald Wood

### REPORT OF THE COMMITTEE ON LEGISLATION

During this off legislative year your committee met at the midyear bar meeting and considered legislative proposals. As all proposals were submitted to the Executive Council for a decision as to action in the legislative session beginning January 1, 1969, and as none of the proposals have been delivered to this committee by the Executive Council, we have not acted further.

However, we stand ready to proceed as soon as we receive authority from the Executive Council to do so.

Julian H. Hopkins, Chairman  
H. D. Addison  
William B. Brandt  
John M. Brower  
James W. R. Brown  
Edward F. Carter, Jr.  
Patrick L. Cooney  
James F. Green  
William Grossman  
Virgil J. Haggart, Jr.  
John J. Higgins  
William H. Mecham  
Jess C. Nielsen  
William J. Panec  
William J. Ross  
Donald C. Sass  
Floyd A. Sterns  
Otto H. Wellensiek  
Malcolm D. Young

### REPORT OF THE COMMITTEE ON PUBLIC SERVICE

Approximately 75 per cent of our budget for the past year was devoted to Law Day USA. As a result of intensive planning, recruiting and organizing, the program was significantly expanded and is now being conducted on virtually a year round basis. The expansion, which occurred in all phases of this activity, was particularly notable in the participation of the mass media. Thus Nebraska newspapers carried 186 news stories, 32 pictures, 17 editorials and two special columns. The *Daily Record* of Omaha used an entire issue for the observance. The radio and television stations likewise increased their coverage.

Our Law Day chairman for the state, Soren S. Jensen of Omaha, was appointed in the summer of 1967 and had all prepara-

tions well under way by early fall. We are deeply indebted to him for his effective leadership. His vice-chairman was Tedd C. Huston of Broken Bow. We are pleased to report that Mr. Huston will serve as state chairman for 1969.

We continued to produce original 60-second radio spots under the title "Mark Middleton, Attorney at Law." These are prepared in sets of five spots and are distributed to a network of more than 25 radio stations throughout the state. Each script is carefully reviewed by a panel of attorneys after it has been written by our public relations counsel. These messages dramatize the counsel given by the fictional Mr. Middleton on legal problems of everyday interest to laymen.

Early in 1968 we produced our first 15-minute videotape for television. We had been working on this project for two years. Produced in the television studios of the University of Nebraska, this program dramatized a child custody case. All of the actors were volunteers from the Lincoln Community Playhouse. The script was written by our public relations counsel and was reviewed for accuracy a number of times by our committee prior to production. The show was produced at a cost of only \$500.00. A commercial production with professional talent would have cost many times that amount.

The premiere showing was on Station KMTV in Omaha as a Law Day feature. It was subsequently used on Station KOLN-TV and KGIN-TV from Lincoln and shortly thereafter was telecast over the six-station educational television network of the state. The purpose was to bring to the public in dramatic form a better understanding of the services a lawyer and his staff perform for the client, with particular emphasis on the extent and nature of the work behind the scenes on behalf of the client. From the audience response we have received, we believe that we should not only continue but increase our efforts to utilize this medium in presenting an appealing and believable visualization of the lawyer at work.

The awards program, which has been a public relations activity for several years, did not result in the presentation of an award in 1967. However, upon the recommendation of this committee, special awards were presented at the 1968 midyear meeting to Dean James A. Doyle of the Creighton University School of Law and Dean Henry M. Grether of the Nebraska University College of Law.

Four film strips produced by the Missouri Bar Association with reference to various aspects of lawyer-client relationships were purchased for use in Nebraska. They have been shown before the

Omaha Bar Association and the Lincoln Bar Association and are now available for use elsewhere in the state.

Our public relations counsel represented the committee at the National Institute on Bar Public Relations in Chicago in February of this year. He made a presentation on the highlights of this conference at a meeting of our committee shortly thereafter.

Our committee is an active and interested group. We desire to broaden the scope of our services whenever budgetary considerations will permit. We are eager to work toward improved relationships between the bar and the mass media in Nebraska and to be of greater assistance in advancing the public relations activities of local bar associations throughout the state. We also are hopeful of continuing and extending the use of television to reach the vast audiences which are available through that medium. Finally, we would like to establish an exchange of information and ideas with public service and public relations committees of bar associations in our neighboring states. We are convinced that important benefits can be realized through an expanded program designed to achieve these objectives.

The committee therefore recommends that its program be expanded in accordance with the foregoing suggestions to the fullest extent permitted by the budget of the Association.

Milton R. Abrahams, Chairman  
Claude E. Berreckman  
Frederick S. Cassman  
Lawrence S. Dunmire  
Richard L. Edgerton  
Dale E. Fahrnbruch  
James R. Hancock  
Soren S. Jensen  
Richard A. Knudsen  
Edmund D. McEachen  
Robert A. Nelson  
Allen M. Overcash  
Charles Thone

## REPORT OF THE COMMITTEE ON AMERICAN CITIZENSHIP

A meeting of the committee was held in conjunction with the midyear meeting held on June 14, 1968, in Lincoln. At this meeting, the question was raised by those attending as to what the functions of the committee are relative to responsibility and purpose within the framework of the Bar Association.

Various areas of responsibility were discussed regarding what the Bar Association intended in the absence of positive direction. Past responsibility has been limited to promoting public interest in Law Day and County Government Day, these being the functions of the Committee on Public Service of the Bar Association and the American Legion respectively. It is felt by the committee that a more direct purpose should be delegated to this committee.

**We recommend therefore, that the Bar Association give this committee direction as to its functions and responsibilities and that Nebraska lawyers continue to exercise their individual and collective efforts in promoting interest in the maintenance of good government on a local and national level in conjunction with Law Day and County Government Day, particularly in the promotion of the theme "respect for the law."**

Jack L. Craven, Chairman  
Everett A. Anderson  
Rollin R. Bailey  
Glenn A. Burbridge  
Wendell P. Cheney  
Sarah Jane Cunningham  
Donald E. Endacott  
Fred R. Irons  
Richard L. Kuhlman  
Francis D. Lee  
Lewis R. Leigh  
Howard W. Spencer  
Clyde R. Worrall

#### **REPORT OF THE SPECIAL COMMITTEE ON COUNTY LAW LIBRARIES**

The 1967 Annual Meeting of the District Judges Association adopted a resolution recommending that the following steps be taken by each district judge with reference to the county law library for each county in his judicial district.

1. a. Make an inspection of the library as soon as possible after opening each term of court;
- b. File a report of findings and recommendations with the clerk;
- c. Direct the clerk to file a copy with the county board and the governing board of the library.

2. If no governing board has been established, then create a committee or board consisting of (a) one district judge as chairman, (b) the clerk of the district court as secretary, (c) the county judge as vice-chairman and (d) the county attorney and (e) some other county officials or attorneys as members of the committee.

3. Admonish the library board or committee to establish rules for the operation of the library.

On May 17, 1968, one judge for each of the districts, except Douglas (4) and Lancaster (3) Counties, was requested to advise your committee (1) whether any of these recommended steps had been taken, (2) whether there was any intention to follow up these recommendations, and if so, when, (3) whether the governing boards or committees have been established for the county law libraries in the counties of his judicial district, and if so, who they are or how they are selected and (4) whether formal library rules have been established for any of the libraries in his jurisdiction. Responses from only 9 of the 20 districts were received.

Following is a report of the survey:

FIRST AND SECOND JUDICIAL DISTRICTS—no response.

THIRD AND FOURTH JUDICIAL DISTRICTS (Lancaster and Douglas Counties)—no inquiry made.

FIFTH JUDICIAL DISTRICT—Judge Zeilinger advised that he proposes to discuss these recommendations at the next meeting of the District Judges Association.

SIXTH JUDICIAL DISTRICT—Judge Flory states that Dodge County has an excellent library run well by the local bar and no formal proceedings are needed. There is no county law library in Washington County. A formal organization of a county law library in that county does not appear feasible now. The other counties will be split out of the Sixth District January 1, 1969.

SEVENTH JUDICIAL DISTRICT—Only the Saline County library is at all satisfactory. Establishment of a library board will be discussed at the next county bar meeting. The library is maintained by the clerk of the court. No special rules are established.

EIGHTH AND NINTH JUDICIAL DISTRICTS—No report received.

TENTH JUDICIAL DISTRICT—Judge Chadderdon reports he has inspected libraries of each county in the district. No formal findings or reports have been deemed necessary. All of the libraries have a governing board for their operations.

ELEVENTH JUDICIAL DISTRICT (Hall County)—Judge Weaver reports that they have an excellent library. The board consists of the district judge, county judge, workmen's compensation judge and two attorneys, selected by the Hall County Bar Association which contributes to the upkeep. There are no formal rules except for check-out of books. The checkout record is maintained by the Compensation Court. The bailiff keeps books on shelves and keeps pocket parts current and watches for return of books. New purchases are based on approval of the Bar Association.

TWELFTH JUDICIAL DISTRICT—Judge Sidner advised that the only reports are on finances and are made by the court clerk to the county board. The Buffalo County Library Board is composed of district judge, district clerk as secretary, and the Bar Association appoints the remaining members. Sherman County does not have a county law library.

THIRTEENTH JUDICIAL DISTRICT—Judge Stuart reports that the recommendations of the District Judges Association have been generally carried out in Lincoln and Dawson Counties, although specific inspection reports have not been prepared by the judge nor filed. Both counties have maintained county law libraries for some time with functioning county law library boards and although they have improved neither library is adequate or complete. Contributions to the costs of these libraries are made by attorneys and counties involved. The libraries have been increased to the point where the rooms available became inadequate in both counties. Additional space is being made available. The county boards of both counties are cooperating fully and great improvement is made in these libraries. Logan and McPherson counties have no practicing lawyers and no libraries.

FOURTEENTH JUDICIAL DISTRICT—No response.

FIFTEENTH JUDICIAL DISTRICT—Judge Smith reports that Holt County has a fine library which is being expanded. This is supervised by the clerk of the district court under the judge's supervision and also by the county attorney, who keeps the library up to date. This library is available to lawyers in adjoining counties which do not have adequate libraries. Holt County expends about \$2000 per year. Brown County established a library in 1961 and is expending approximately \$800 per year. This library is managed by the district judge, county attorney and one other attorney. Rock and Keya Paha attorneys are encouraged to use this library. Keya Paha County library is small. Local attorneys maintain their own library. Rock County is small and has a law library which is not very adequate. The judge has encouraged the county board to spend around \$150

per year and it is hoped that the library can be expanded. Boyd County Law Library is small and inadequate. The county is without adequate funds to expand the library at this time. Wheeler County, being small with a light load, maintains only *Nebraska Reports* and statutes at the library. There is only one practicing attorney.

SEVENTEENTH JUDICIAL DISTRICT—Judge Feidler reports that the county law library for Scotts Bluff County has been moved to the new Scotts Bluff County Library. Specific rules have been established for the use of the books composing the county library. By order of the court it also makes the books composing the county law library available to the named members of the Scotts Bluff County Bar and the Morrill County Bar, who are named in the order.

EIGHTEENTH JUDICIAL DISTRICT—No response.

NINETEENTH JUDICIAL DISTRICT—Judge Kuns reports that there are libraries in Cheyenne, Kimball, and Keith Counties. In the new Cheyenne County Courthouse a large library room was provided between the offices of the district judge and the county judge. The shelving in the library room is now filled and additional volumes are to be shelved in the district judge's office. The local bar members each contribute \$25.00 per year and have a committee of three members including the county attorney who supervise the library with the advice and consent of the district judge. The county provides the balance of the costs of the library. The deputy clerk of the district court unpacks books and inserts supplements for a small fee paid from library funds. Kimball County includes \$2000 in its county budget for its county law library maintenance and its library committee pays the clerk of the district court to unpack and shelve books and keep pocket parts current.

TWENTIETH JUDICIAL DISTRICT—No response.

William H. Meier, Chairman  
Joseph Ach  
Dixon G. Adams  
John O. Anderson  
John Elliott, Jr.  
Mark J. Fuhrman  
David E. Gregory  
Jack R. Knicely  
James A. Lane  
Harry N. Larson  
Russell E. Lovell  
William H. Norton  
W. A. Stewart, Jr.



### REPORT OF THE TRUSTEE OF THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

The Rocky Mountain Mineral Law Foundation was organized in 1955 to promote research and continuing legal education in natural resources law. In this, the 14th year of its existence, the Foundation is recognized by those concerned with natural resources law as the outstanding source of research material on this subject, particularly with respect to public lands, and its annual institutes attract leaders in the field as speakers and as registrants.

The 14th institute was held in Flagstaff, Arizona, where the registrants were the guests of the Arizona Bar, the Arizona Mining Association, the Coconino County Bar Association and especially Northern Arizona University, although there is no member law school of the Foundation on the University campus of Northern Arizona University.

During the past year, the Foundation has expanded the distribution of its publications which include the annual institute proceedings, the *Gower Federal Services* (oil and gas mining and outer continental shelf), *American Law of Mining*, the *Oil Law of Federal Oil and Gas Leasing*, *Rocky Mountain Mineral Law Review* and the *Water Law Newsletter*. In addition, the Foundation has entered into a contract with the Public Land Law Review Commission to conduct a legal study of federal oil and gas leasing under the direction of Professor Joseph Geraud of the University of Wyoming College of Law. The Foundation is completing revision of the popular *Landman's Legal Handbook* which was originally published by the Denver legal staff of the Continental Oil Company in 1957. Three papers were presented by the Water Law Section providing an introduction to the subject, which, together with the basic papers on surface water law presented at the last institute will permit development of more advanced subjects at future institutes.

Richard H. Bate joined the Foundation as executive director in October, 1967. Mr. Bate practiced law in Denver, Colorado, for seven years before accepting this position and the entire Executive Committee has enjoyed working with him during the past year. My term as a member of the Executive Committee expired in July of this year. The experiences of the past year have been interesting and rewarding. I have enjoyed my opportunity of serving the Foundation and hope that my efforts contributed to the success of the Foundation. Present membership now consists of 15 law schools, ten bar associations, seven mining industry associations and four oil and gas industry associations.

Paul L. Martin

## REPORT OF THE SPECIAL COMMITTEE ON PUBLICATION OF LAWS

During the past year this committee has continued to cooperate with the University of Nebraska College of Law in the investigation of the use of electronic data processing with the Nebraska statutes. Work is progressing on computer retrieval with regard to statutory research problems. This has been found to be especially helpful in the drafting of legislation and is being accomplished more quickly and less expensively as experience is gained in the area. By December 1, 1968, all current statutes should be available on electronic tape for research projects. Further studies are being made to determine how the lawmaking process can be tied to the computer capability.

**The committee recommends that the Bar Association, through this committee, continue to study and cooperate with interested agencies on the utilization of electronic data processing with the Nebraska statutes.**

Richard M. Duxbury, Chairman

## 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 14, 1968, at the midyear meeting of the Association. Four members of the committee were present. The committee respectfully reports:

1. Dean Grether of the University of Nebraska College of Law reported on steps being taken to implement the provisions of L.B. 429 of the 1967 Legislature, whereby the Supreme Court may by rule or order authorize law students to engage in limited practice on terms and conditions to be prescribed by the Court. Dean Grether will make a further report on the matter at the next committee meeting.

2. The committee again took notice of the condition and inadequate design of the physical facilities of the University of Nebraska and Creighton law schools, and again recognized the need for the rehabilitation and expansion of their physical plants.

3. The present rules for admission to practice were reviewed and no changes were recommended.

4. The committee feels it serves a purpose in its availability for advice and assistance regarding matters of admission to prac-

tice and relations between the law schools and the bar. It is accordingly recommended that the committee be continued.

Charles E. Oldfather, Chairman  
David Dow  
James A. Doyle  
Julian H. Hopkins  
M. A. Mills, Jr.  
Robert D. Mullin  
Benjamin C. Neff, Jr.  
John E. Newton  
Marvin G. Schmid

REPORT OF THE  
SPECIAL COMMITTEE ON LAWYER REFERRAL

Lincoln and Omaha continue to remain the only two cities in Nebraska having a lawyer referral service. The following statistics relating to the Omaha operation for 1966 and 1967 may be of interest:

|  | 1966    | 1967    |
|--|---------|---------|
| Number of active referrals .....   | 565     | 436     |
| Number of cases closed .....   | 240     | 256     |
| Total fees collected .....   | \$9,584 | \$9,557 |
| Average fee per closed case (approx.) .....  | \$ 40   | \$ 37   |
| Highest fee collected .....  | \$ 800  | \$ 500  |
| Number of closed cases in which the fee<br>lected exceeded the minimum of \$7.50 ..... | 98      | 87      |

The American Bar Association Committee on Lawyer Referral Service has drafted a "Statement of Standards and Practices" for lawyer referral services. This statement was approved by the House of Delegates of the ABA in August of this year and will be included in the new manual to be made available in the near future to all referral services throughout the country. The new standards are unique in at least two important respects: (1) They place upon the sponsoring bar association the responsibility to see to it that each member of the referral panel is qualified to render the service sought, and (2) they encourage the establishment of specialized panels based upon experience, education, and training in the particular fields of law involved. It is hoped and expected that the adoption of these standards by referral services throughout the United States will benefit both the public and the legal profession by generally upgrading all referral programs. This

is an important goal in view of the increased emphasis on making legal services easily available to everyone regardless of ability to pay or previous acquaintance with an attorney.

Alfred G. Ellick, Chairman  
John R. Dudgeon  
Richard R. Endacott  
William W. Graham  
Charles A. Nye  
Donn C. Raymond  
Arnold J. Stern  
Frank B. Svoboda

### REPORT OF THE SPECIAL COMMITTEE ON MEDICO-LEGAL JURISPRUDENCE

This committee is continuing its conferences with the Medical-Legal Committee of the Nebraska State Medical Association directing attention to a joint medico-legal plan for screening medical malpractice actions. As a result of litigation, amendments to an application to a hearing panel have been proposed but have not reached final form.

Our last conference with the State Medical Association committee was to be held in Lincoln after their Association meeting was concluded. A conference was held with some of the members of their committee, but because the Medical Association was unable to have all of the members of their committee present, further action was deferred until the Midwest Clinical Convention which will be in Omaha in the latter part of October.

At that time we plan to have a joint meeting of our two association committees with not only the medical malpractice plan on the agenda but also three other projects: (1) a survey of state statutes with respect to the responsibility of the physician on a utilization committee and his liability for such service; (2) a survey requested by the American Medical Association listing casualty and liability insurance companies servicing medical malpractice coverage; and (3) a plan for greater coordination and understanding between our two associations.

This committee conducted a trial demonstration for the state medical meeting last year, and plans are being made for a similar demonstration this year.

**Our committee is continuing to carry on its work for the betterment of both of our associations, and it is the recommendation of this committee that it should be continued.**

Harry L. Welch, Chairman  
Ivan A. Blevens  
Charles M. Bosley  
Joseph P. Cashen  
Kenneth Cobb  
Charles E. Kirchner  
Joseph H. McGroarty  
Robert D. Mullin  
Judge William H. Riley  
Thomas W. Tye  
Charles E. Wright

#### **REPORT OF 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:

During the last session of the Nebraska Legislature, five legislative bills recommended to the House of Delegates were introduced in the Legislature, passed, and signed by the Governor and have become law. With this legislation added to prior acts of the Legislature, the committee feels that the statutes of Nebraska relative to oil and gas law are in excellent condition and no amendments have been recommended to the members of the committee for attention at this time.

During the last year, activities of the oil and gas industry in Nebraska have been at a low ebb. Production has been curtailed with nearly all of the production now being obtained by secondary recovery measures. Many fields have been completely depleted. Recently there has been considerable activity in leasing areas in western Nebraska and the committee hopes that additional exploration within the near future may increase the general activities of the industry.

Unless there are new major discoveries of oil in the state, the activities of the committee may be limited, but the members feel that there should be a group of interested lawyers active in the practice of oil and gas law to consider any advisable statutory changes or legal developments, and **we, therefore, recommend that the committee be continued for another year.**

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

# **REPORT OF THE SPECIAL COMMITTEE ON RULES OF THE ROAD**

Since the Legislature at its 1967 session indefinitely postponed L.B. 71, which included a comprehensive revision of the rules of the road along with a number of other subjects, this committee has been devoting its attention to cooperation and attempting to prepare a statute for the 1969 legislative session devoted to a comprehensive revision of the rules of the road.

The committee is working closely with the Legislative Council which has an assignment to prepare a statute along these lines and it is our expectation that a bill will be prepared which our committee will carefully scrutinize and which the Bar Association can support in the 1969 session of the Legislature. We would recommend the continuation of the committee.

Patrick W. Healey, Chairman  
 John O. Anderson  
 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**

We have continued to cooperate with the ABA committee, receiving material upon this subject and making speakers available when requested.

In 1957 the American Bar Association determined that world peace through law was mankind's best hope for world peace. Regional conferences in Africa, Asia, America, and Europe developed an international consensus on legal steps for world peace.

World conferences at Athens in 1963, Washington in 1965, and at Geneva in 1967 dramatically demonstrated that international agreements can be obtained for the resolution of disputes by peaceful and legal means. An updated Global Work Program outlining research and action projects for the development of international law and a comprehensive World Charter for the Rule of Law have been undertaken through voluntary cooperation by lawyers, judges, legal scholars, and law students in 128 countries.

The World Association of Judges was organized bringing the distinguished prestige of supreme court judges throughout the world in support of the Center and its objectives.

The Center maintains national committees in almost every nation of the world to promote its objectives at the national, state, and local levels.

The Center Secretariate at Geneva, Switzerland, serves as a world law center for the international legal profession.

#### CENTER SERVICES

Mobilizes and coordinates the activities of the legal profession throughout the world to building law and legal institutions for world peace.

Serves as a worldwide clearinghouse for communication and information.

Promotes a Global Work Program of specific projects for the development of international law as a basis for world peace.

Holds regional and world conferences on world peace through law.

Publishes research, bulletins, and journals on developments in international law.

Sponsors the World Association of Judges, World Law Day, computerization of law internationally, and World Legal Information and Reference Service.

Organizes local, state, and national committees in 128 countries promoting the rule of law internationally.

Represents the international legal profession with governmental and international organizations.

Promotes special projects and services for lawyers, judges, legal scholars, and law students throughout the world.

Provides you with the opportunity to make a personal contribution to world peace.

**This is a special committee appointed for the purpose of co-operating with the ABA Committee on World Peace Through Law, and it is therefore recommended that the committee be continued.**

J. C. Tye, 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 §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.

The fund has total funds in the sum of \$12,354.03, and securities, an itemized list of which is attached hereto and made a part hereof.

The total cash receipts for the year were \$9,235.07, and the total disbursements were \$7,277.45, leaving a net on hand as of June 30, 1968, in the First National Bank of Lincoln in the sum of \$1,957.62. With reference to cash receipts and disbursements, a list of the same is attached hereto and made a part of this report.

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

DANIEL J. GROSS  
NEBRASKA STATE BAR ASSOCIATION  
WELFARE AND ASSISTANCE FUND

SECURITIES:

First National Bank of Lincoln Safekeeping Account

LIST OF STOCK CERTIFICATES

42 shares of Standard Oil of California  
75 shares of American Natural Gas Co. of New Jersey,  
common  
30 shares Allied Stores Corp., common  
40 shares General Motors Corp., common  
25 shares Northern Natural Gas Co., Cum. Pref. stock  
30 shares Pacific Lighting Corp., Dividend Pref. stock  
50 shares Union Electric Co., common  
3 \$100 Allied Stores Corp. Convertible Sub. Debenture  
Bonds  
2 shares Standard Oil of California, common  
1 share Standard Oil of California, common

50 shares Union Electric, common  
 2 shares Standard Oil of California, common  
 1 share Standard Oil of California, common  
 5 shares Union Electric, common  
 45 shares Allied Stores Corp. common  
 2 shares Standard Oil of California, common  
 100 shares Columbia Broadcasting, common  
 100 shares American General Ins. Co. common

## DEPOSITS:

|   |            |
|---|------------|
| First National Bank of Lincoln                      |            |
| Certificate of Deposit Balance as of 6/30/68 .....  | \$7,162.70 |
| First Federal Savings & Loan Association of Lincoln |            |
| Balance as of 6/30/68 .....                         | \$3,233.71 |
| First National Bank of Lincoln                      |            |
| Checking Account Balance as of 6/30/68 .....        | \$1,957.62 |

CASH RECEIPTS AND DISBURSEMENTS  
FOR YEAR ENDING JUNE 30, 1968

RE: Daniel J. Gross—Nebraska State Bar  
Association Welfare and Assistance Fund

On Hand—June 30, 1967

|                                      |            |
|--------------------------------------|------------|
| First National Bank of Lincoln ..... | \$1,513.53 |
|--------------------------------------|------------|

## Receipts:

|  |          |
|--|----------|
| National Cylinder Gas Co.<br>sale of bonds ..... | 6,614.78 |
|--|----------|

## Dividends:

|                                       |           |
|---------------------------------------|-----------|
| Northern Natural Gas Co. ....         | \$ 140.00 |
| Pacific Lighting Corp. ....           | 135.00    |
| Allied Stores Corp. ....              | 100.50    |
| American Natural Gas-New Jersey ..... | 146.26    |
| Standard Oil of California .....      | 130.00    |
| Union Electric Co. ....               | 94.50     |
| General Motors Corp. ....             | 162.00    |
| American General Insurance Co. ....   | 135.00    |
| Columbia Broadcasting Co. ....        | 50.00     |

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1,093.26

## Interest:

|                          |       |
|--------------------------|-------|
| Allied Stores Corp. .... | 13.50 |
|--------------------------|-------|

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\$9,235.07

## Disbursements:

|  |            |            |
|--|------------|------------|
| American Genl. Ins. Co. Stock Purchase .....   | \$3,787.75 |            |
| Columbia Broadcasting Co. Stock Purchase ..... | 3,486.40   |            |
| Postage .....                                  | 3.30       |            |
|  |            | <hr/>      |
|  |            | \$7,277.45 |
|  |            | <hr/>      |
| On Hand—June 30, 1968                          |            |            |
| First National Bank of Lincoln .....           | \$1,957.62 |            |
|  |            | <hr/>      |
|  |            | <hr/>      |

### REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE AGENCIES

The Administrative Agencies Committee has been primarily involved in two projects. The committee members are presently drafting proposed legislation pertaining to administrative agencies for the 1969 legislative session. These proposals will then be reviewed by the entire committee and submitted to the Committee on Legislation for further action.

The committee has also engaged in a review of all state administrative agencies to determine whether they have adopted rules of practice and procedures as required by Section 84-909, and have filed the same with the Secretary of State as required by Sections 84-902 and 84-905. The committee discovered a number of significant state agencies, before which members of the bar often appear in adversary proceedings, which have not complied with these sections. These agencies have been so advised, and an effort is being made to effectuate compliance.

The committee, working in conjunction with the Attorney General's office, has also drafted a set of proposed rules of practice and procedure for all administrative agencies which have not adopted rules on their own initiative.

It is the committee's recommendation that upon the adoption of rules of practice and procedure by nearly all of the state administrative agencies, that these rules be compiled for reproduction in the Nebraska Lawyers Desk Book. If such a reproduction would be too lengthy, then it is recommended that a synopsis or condensation be furnished to all members of the bar so that they might know which agencies have adopted rules of practice and procedure and where these rules might be obtained upon request. A frequent complaint reaching this committee from members of

the bar has been their inability to ascertain what rules of practice and procedure have been adopted by, or are applicable to, particular agencies.

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

Samuel Van Pelt, Chairman

CHAIRMAN EISENSTATT: The next order of business, Item No. 8 on the Calendar, is the report of the Advisory Committee. Mr. Raymond G. Young, I understand, is ill and Mr. Baird is appearing in his place.

## REPORT OF ADVISORY COMMITTEE

Raymond G. Young, Chairman

WILLIAM J. BAIRD: Mr. Chairman, Mr. Young expressed his regret at not being here. He asked me to present the report of the Advisory Committee, which does not appear in the printed program for the reason that it is impossible for us to get current statistics from the 20 different Committees on Inquiry in time for the printing of the program.

### COLLABORATION WITH AMERICAN BAR ASSOCIATION PROGRAMS

In addition to performing the familiar and customary functions to which the Advisory Committee is committed by Rules of the Supreme Court, including the interpretation of the Canons, defining the application of them, reviews of records, rehearings and advisory opinions, the committee has responded to the request or direction of competent authority to collaborate in the program of the American Bar Association which looks to the critical re-examination and the comprehensive revision and modernization of the standards and principles of professional conduct. It is believed that a proposed code of professional responsibility, designed to take the place of the Canons, will be ready for submission to the American Bar Association and its members for action in 1969.

The Advisory Committee prepared and submitted to the American Bar Association an analysis of the Nebraska disciplinary procedures.

In June 1968 the chairman participated in a two-day meeting at Denver of the ABA Special Committee on Evaluation of Disciplinary Enforcement.

The members of the Advisory Committee and Messrs. Thomas Davies of Lincoln and Alfred Ellick of Omaha have been designated a Special Committee to study the recommendations of the ABA Committee on Evaluation of Ethical Standards preparatory to formulating a report and plan for the tentative drafting of the new standards, which, as mentioned, is expected to be forthcoming next year.

#### REVIEWS

One record, consisting of 400 pages, was reviewed by the Advisory Committee after it was examined and studied by all seven members of the committee. A partial rehearing was had and testimony was taken. The case is still pending.

The review which was pending at last report was disposed of and report made to the Supreme Court.

#### MEETING

The committee held an all-day meeting, attended by all seven members, in Omaha on September 26, 1968. A record by the Committee on Inquiry for District No. 2 was reviewed, partial rehearing had, and additional evidence was received. This case is awaiting final determination by the Advisory Committee.

#### SUPREME COURT

In the Supreme Court judgments were rendered as follows: One disbarment, one censure and reprimand, two suspensions for one year, and one denial of rehearing upon application for reinstatement.

#### COMMITTEES ON INQUIRY

Districts in which no action by committees on inquiry has been required are 1, 8, 12, 13, 15, 18, and 20.

In District 2 formal hearing in one case resulted in recommendation of discipline. This is a case now before the Advisory Committee for review.

In District 3 (Lincoln), at time of the report last year charges were pending in two matters. In one of them there has been a dismissal after formal hearing; in the other, two hearings have been had and the matter is still pending. During the year charges were filed in nine matters: One dismissed after formal hearing; six dismissed without formal hearing; two are pending.

In District 4 (Omaha), charges pending at the last report in six matters were dismissed for lack of merit. Since October 1, 1967, charges filed in 36 matters have been disposed of as follows: 13 were dismissed as without merit; one was withdrawn; four held in abeyance because of pending litigation; and 18 are now pending.

In Districts 5, 6, and 16 controversies were amicably disposed of without formal action.

In Districts 7, 9, and 19 charges were withdrawn while before committees on inquiry for investigation.

In District 10 charges were filed in one case. A special investigator was employed and a thorough investigation was made. Revocation of respondent's license was applied for. The Supreme Court entered judgment of disbarment.

In District 11 controversies in two matters were amicably adjusted without the necessity of formal hearings. They have no cases pending in this district.

In District 14 the Committee on Inquiry found a violation of Canons 27 and 28 in the improper use of legal stationery. The respondent acquiesced in the finding and the matter was adjusted accordingly.

In District 16 charges are pending before the Committee on Inquiry in one case.

In Districts 17 and 19 informal investigations showed charges to be without merit and to require no formal action.

#### ADVISORY OPINIONS

It has long been the policy of the Advisory Committee to limit the rendering of opinions to situations in which a lawyer seeks the opinion of the committee as to the ethical propriety of a course of action in which he desires to engage.

The committee has been careful to refrain from expressing an advisory opinion as to the correctness of the conduct of a lawyer other than the inquirer, or where the facts or the acts inquired about have transpired or have been accomplished as distinguished from being contemplated or prospective, or in any case where it seems likely that the matter may come before the District Committee on Inquiry (Rules XI, 3-7) and subsequently before the Advisory Committee for review (XI, 8).

Several advisory opinions were rendered in response to official requests.

Opinions were expressed on several questions of possible conflicts of interest.

An opinion was rendered that a legal aid society may, under proper circumstances, install posters in city buses informing poor people how to contact the society for legal assistance, provided that the posters are dignified in tone and do not mention the name of any individual lawyer.

The committee passed upon the propriety of the publication by a bar association or lawyers' referral service of newspaper articles as a matter of public information on the desirability of obtaining legal services.

#### PUBLICATION

On the matter of publication of advisory opinions there has been quite a bit of discussion as to the fact that possibly this should be done. It has been decided that such of the advisory opinions as the committee deems to be appropriate for general distribution shall be published from time to time. Opinions already designated for publication, which will probably be in the *Nebraska State Bar Journal*, are being processed presently.

It is likely that once the Canons have been revised or the code of professional responsibility promulgated and adopted, a more convenient and appropriate method of distribution of advisory opinions may be adopted.

Mr. Chairman, I move the adoption of the report of the Advisory Committee.

CHAIRMAN EISENSTATT: Do I hear a second?

CHARLES F. ADAMS: I second it.

CHAIRMAN EISENSTATT: Any comments or questions?

CHARLES F. ADAMS: Mr. Chairman, may I be permitted to make an additional comment, with your permission, Bill?

MR. BAIRD: Certainly.

MR. ADAMS: I think there perhaps has been some area of misunderstanding about the procedure whereby a license can be surrendered and a judgment of disbarment rendered. You will notice in the report that Bill Baird just gave you in District 10 "revocation of respondent's license was applied for." That was by the respondent himself—herself in this case. The Supreme Court will entertain a request for revocation of license, but only under

circumstances whereby a judgment of disbarment may be entered rather than merely a cancellation or having your name stricken from the rolls without further explanation or reasons behind it, the reason being, of course, that application for reinstatement then must follow a record that there was some misconduct on the part of the person who applied to have his license revoked.

I would like to inquire, Mr. Turner, if that is a correct statement of the Court's procedure.

SECRETARY-TREASURER TURNER: That is correct, Charles. The person involved must state that he is under charges, that the charges are true, and he consents to a waiver of the normal disciplinary proceedings before a committee.

MR. ADAMS: Thank you for that clarification.

CHAIRMAN EISENSTATT: I might state, just in passing, that the Committee on Reorganization is discussing a plan whereby some of these opinions can be brought to the attention of the members of the Association for their guidance.

All those in favor signify by saying "aye"; all opposed. The report is accepted and filed.

Next is the report of the Committee on Crime and Delinquency Prevention, Chairman Vitamvas.

## REPORT OF COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Gerald S. Vitamvas

Gentlemen, basically the Committee on Crime and Delinquency Prevention made a three-pronged report. The first two are really the only ones involving a positive action by this House, I believe. All three are just seeking direction as to how active the committee *should* be during the forthcoming session of the Legislature, because being in the Capitol Building and watching what the Legislature does I am fully familiar with the fact that there will be a number of bills that will come up that nobody has ever anticipated that involve criminal matters, and it should be clearly delineated *how* active this committee should be and, when it sees something that really needs attention, what it should do about it.

Of the first two propositions, No. 1 refers to one section of the Nebraska Statutes. This particular item was adopted two years ago. Legislation was sought and the bill somehow failed to get introduced into the Legislature.



Briefly, the repeal of the provision sought, and I have it here and can read it to you, is 83-455. I quote: "The Department of Public Institutions, with the approval of the Board of Pardons, may transfer any person sixteen years of age or over from the Boys Training School, because of incorrigibility, to the Nebraska Penal and Correctional Complex for its custody and care for a term not to exceed two years."

We think this provision may be bad, it may be dangerous, so this is the reason for the report.

On the No. 2 angle of the report, and this has run into a little bit of controversy, the committee had not intended particularly that it be controversial but information came to the committee that legislation was probably going to be introduced at the next session of the Legislature concerning the county attorney system. We felt as a committee that the Bar Association should not sit back but should take some positive action either one way or another. So we put this in a positive form of approving the theory at least, and there is nothing specific at this time, but the theory at least of a change in the county attorney system.

I have been advised, subsequent to the submission of the report, and I might add at this time that when the report went to the various members of this committee there was not a single response. The suggestion was made that if the committee members that were not present had any dissent they should communicate with me. No dissent was received and none has been received from any of the committee members to date. Several county attorneys have protested. Several have indicated favorable action; they concur.

I am advised that the county attorneys are studying the matter and they are going to come up with something before the day is over at their meeting.

However, I do not feel that this committee report should necessarily be delayed awaiting their action, but that is a matter which this House should take care of.

If there are any questions or discussion I would be glad to attempt to answer them.

**HAROLD L. ROCK:** Mr. Chairman, I would like to ask the chairman of the committee about the first portion of his report asking for the repeal of Section 83-455. Were there abuses, or what is the feeling of the committee? As I understand it now, if someone did become obstreperous at the Training School they could be sent

to the Penal Complex until they calmed down without any further adjudication by a court; it would be left up to the administrative agency for the prison.

MR. VITAMVAS: That is correct.

MR. ROCK: If 83-455 is repealed, I assume that they would be reluctant to do that because he was sentenced to . . .

MR. VITAMVAS: I think it would eliminate the possibility of doing that.

MR. ROCK: In other words, he would have to come back and be sentenced for something that would put him in the Penal Complex before he could go there, rather than just have the discretion in the warden, or whoever it is that handles those matters . . .

MR. VITAMVAS: Well, it is not the warden. Specifically it is the Department of Institutions, with the approval of the Board of Pardons. Now this is not the situation. You have a statute which permits a sheriff, for instance, if he has a prisoner, say, on a county jail sentence, or a prisoner awaiting trial, he can put him in the penitentiary for safekeeping. Now here is a boys training school which, while it is a part of the Department of Institutions, is not really a penal complex at all theoretically.

MR. ROCK: It is a modified or light confinement place; in other words, it doesn't have all of the restrictions that somebody might need, and I suppose the committee's concern was that some child would be placed in there by some fiat of a pardon board.

MR. VITAMVAS: In the Penal Complex, yes. This is not an easy proposition because some of these boys that are at the Kearney Boys Training School are 16, 17, or 18 years old and physically, at least, they are not a little pat-on-the-head type kids. They may be 200 pounds. So there is a real problem there, but if you are going to have disciplinary action to the extent of putting somebody in the Penal Complex it should be a crime and it should be punished as a crime, because you can have kids in the Boys Training School who may be there for delinquency, which doesn't even amount to a crime, let's put it this way, or at most a misdemeanor.

MR. ROCK: The whole purpose of the juvenile court in placing these kids, as you say the 250-pound child, in the Boys Training School is to avoid the kind of a record that he would get going through the penitentiary otherwise. This way you can put him in the penitentiary if he requires that kind of care without charging him with a felony.

MR. VITAMVAS: Well, this has happened.

MR. ROCK: That's right, and it has worked out, has it not? My point is, why are we trying to erase this possibility? Why require him to be charged with a felony?

MR. VITAMVAS: Let's put it this way as a practical matter. There has been one situation at least where a boy was transferred from the Kearney School to the reformatory and then to the penitentiary, and then he assaulted the guard. What do you charge him with?

MR. ROCK: Charge him with assaulting a guard, I assume.

MR. VITAMVAS: Well, is he properly confined in the penitentiary? How about escape? There is no crime for escape from the Boy's Training School, but if he escaped from the penitentiary, then what?

MR. ROCK: I would charge him with escape from the penitentiary, I assume.

MR. VITAMVAS: Well, the problem is, if he is an inmate of the penitentiary it seemed to the committee very simply that if you are going to confine someone to the penitentiary it should be pursuant to a violation of criminal law and a conviction by a court in the criminal process rather than the juvenile process. You can do what you want to with it, but this is our thinking.

MR. ROCK: Thank you.

JAMES M. KNAPP: Jerry, I have a question. If my recollection of last night's election is still accurate, would the upgrading of the Board of Pardons and Parole perhaps alleviate the question? As I understand the statute, their permission is required. It seems to me that you have ignored the collateral evil in this, and that is you are asking the State School at Kearney to maintain incorrigibles when it might help the non-incorrigibles, if they were moved out and moved out rapidly, as our law now provides they can be.

MR. VITAMVAS: This is true. I won't argue with your proposition at all. This may be perfectly well, but as for me personally I wouldn't want to be going to the penitentiary to serve time in the penitentiary of up to two years without having been convicted or having the opportunity of having been tried by a criminal court.

WARREN K. DALTON: Jerry, to look at the bad side of it, a kid could go to Kearney for being a truant and then end up in the penitentiary by a purely administrative action.

MR. VITAMVAS: Well, this is what I said earlier, Mr. Dalton.

MR. DALTON: So it seems a little severe to me.

JAMES F. BEGLEY: Jerry, I would like to make a comment on your Recommendation No. 2, the district attorney system. I have been a county attorney for about 12 years . . .

CHAIRMAN EISENSTATT: Excuse me, the chairman has made a point in a request. Let us complete our discussion on Recommendation No. 1 and then we will call on you.

Are there any other comments on the recommendation of the committee to repeal 83-455?

May I ask the chairman if there is a draft of legislation repealing the statute that has been prepared by your committee?

MR. VITAMVAS: No, but this is no problem on a repeal.

CHAIRMAN EISENSTATT: Well, we do have our procedure to follow if this is adopted. The Committee on Legislation should be advised and a draft of the bill submitted to them.

Is there any other comment on No. 1? All right, now we'll discuss the second recommendation.

MR. BEGLEY: I have been a county attorney for some time, as I say, too long, and my mind is open on this district attorney system. The first time I had heard about it was when I read in the *Omaha World Herald* a couple of weeks ago that this report was coming down.

I don't believe that any poll has ever been taken through the County Attorneys Association to determine what their attitude is on this proposition, and I believe these are the fellows who are most closely related to this thing and that their opinions and ideas should be given some consideration. I do know, and I found out this morning, that they have had a committee of about nine members working on this. They have had two or three meetings. The committee is making a recommendation of the County Attorneys Association at the present time. The recommendation is that the present system be retained, although the committee is split on this. The County Attorneys Association is now discussing this matter and this question and will take some action on it.

It would be my recommendation that until such time as we have *their* recommendation we take no action here. We shouldn't get at cross purposes between the House of Delegates and the County Attorneys Association on this question.

I do have one further comment to make on this. If you will read it, it says "The District Attorney shall handle criminal matters, but you still retain a county attorney to take care of civil matters." This seems to be doing away with the county attorneys and not doing away with them. But in my opinion, and I think most county attorneys feel this way, if you are going to do away with the county attorney system and set up a district attorney system, let the district attorney have full authority, with his deputies in the various counties.

If it is in order, I would like to move that action on Recommendation No. 2 be delayed until the report is received from the County Attorneys Association this morning.

CHAIRMAN EISENSTATT: I think Mr. Sullivan would concur.

JOHN J. SULLIVAN: I would second that motion.

CHAIRMAN EISENSTATT: For purposes of the record, with your approval I would like to break this into three parts. I would like a motion approving the printed report as it appears on pages 17 and 18, except for Recommendations No. 1 and 2, which we will cover in separate motions. So I would like now to have a motion to approve the report of the Committee on Crime and Delinquency Prevention as it appears in the printed program on pages 17 and 18, except for Recommendations 1 and 2. Will you move that?

MR. VITAMVAS: I will so move.

CHAIRMAN EISENSTATT: Do I have a second?

THOMAS R. BURKE: I second it.

CHAIRMAN EISENSTATT: Is there any discussion on that motion?

MR. BEGLEY: I rise to a point of order. Was my motion ruled out of order? I thought there was a motion on the floor which was seconded.

CHAIRMAN EISENSTATT: I may be out of order parliamentarily, but what I asked for was approval of this House to take this up in three parts: The report as it appears; Recommendation No. 1; and then the one on No. 2 in a separate motion, so it can be ruled on separately.

MR. BEGLEY: I withdraw my motion then.

CHAIRMAN EISENSTATT: Thank you. Excuse me for breach of parliamentary procedure.

Is there any discussion on the initial motion? All those in favor signify by saying "aye" . . .

HAROLD L. ROCK: I am sorry, I don't understand what the vote is on now. I thought you accepted one and two and were talking about three.

CHAIRMAN EISENSTATT: No, we are handling Nos. 1 and 2 in separate motions because they require legislative action.

MR. VITAMVAS: There has been no acceptance of any motion.

CHAIRMAN EISENSTATT: We are voting on accepting the report as it appears, but without recommending one and two. All those in favor signify by saying "aye"; all opposed. The report will be accepted and included in the minutes of the meeting.

Now do we have a motion on the floor that the Association seek the repeal of Section 83-455, Revised Statutes of 1943, to eliminate the authority by administrative action to transfer juveniles at the Boys Training School to the penitentiary.

MR. ROCK: Mr. Chairman, I move that we refer that back to the committee for further study, in view of the changes in the Parole Board that seem to have come about by the recent election, the thought being that there are checks and balances and perhaps a committee *would* decide that the new checks and balances in the Parole Board would be sufficient to remove their objection to the present statute.

JAMES B. KNAPP: I second that.

CHAIRMAN EISENSTATT: The motion is that it be referred back to the committee for further study. Any discussion?

LLOYD W. KELLY: Mr. Chairman, it seems to me that the feeling of the committee is that there may be some illegal incarceration of juveniles in the penitentiary or correctional institution. I can't for the life of me see how any changes in the parole or pardon system is going to affect the legality of this. For that reason I would be opposed to sending it back to the committee.

CHAIRMAN EISENSTATT: I see one problem in sending it back to the committee. It would be a question whether or not it would ever be presented, if it *was* the committee's desire that it be repealed, or that it would get the approval of this House for the coming legislative session.

MR. KNAPP: Mr. Chairman, I agree with Mr. Kelly, this might seem to be an apparent effect, but the real effect of this might well

be to require more felony charges against current inmates of the school at Kearney. I don't think that is what you want. At the present time I would think this Association and the committee should have a great deal more information before recommending this. I think we ought to know what the feeling of the officials at the various institutions is. I do think the real effect of the bill will be to end up in more felony charges, rather than protecting these young people.

WARREN K. DALTON: Mr. Chairman, this is approximately what I said earlier but I'll say it again. If I am going to go to the penitentiary, I don't want to go by action of either the Pardon Board or the administrative head of the Department of Institutions. I would much rather go as a result of a sentence of the court. And I have some feeling that I would extend this rule to the present inmates of the State Industrial School. If we are going to send them to the penitentiary maybe we had *better* charge them with a felony and convict them of it before we send them there. I frankly don't see any reason for sending this back to the committee to consider whether the Pardon Board can sentence people to the penitentiary, or should be allowed to, or shouldn't be—the penitentiary or the reformatory either one. I am opposed to sending it back.

LEO CLINCH: Mr. Chairman, I would like a little clarification. I am interested in these 250-pound truants that we are sending down there, and if he becomes obstreperous while he is in there isn't there a present statute that would provide that if he becomes obstreperous while he is there he can be taken back to court and charged with a felony and then sent to the penitentiary? Are there present laws providing that procedure?

MR. VITAMVAS: Well, not unless he violates a criminal law of the state. If his conduct consists of a criminal violation in and of itself, yes, he can be charged. But the precise point that you raise there is a two-pronged point: one, the original offense for which he is committed—if that amounts to a crime, and then he goes to a juvenile court as opposed to a criminal court, I would doubt that you could take him back and try him for that crime. But if he commits a new crime while he is in the Boys Training School and it is a violation of the criminal law, certainly then he can be charged and convicted of that crime through the normal criminal laws.

MR. CLINCH: Then the second question I would ask: At the present time are the officials of Kearney using this present statute allowing them to transfer from Kearney to the penitentiary as a

club over the inmates in Kearney and saying, "If you are not good, if you don't behave, we are going to ship you out of Kearney." Is that one of the reasons for the repeal of this?

MR. VITAMVAS: No, basically the reason for the repeal of this is, to be quite blunt, if we have a boy who is going to Kearney on a delinquency charge and then he winds up in the penitentiary and he brings habeas corpus against Sigler, the warden of the penitentiary, where do we go?

MR. CLINCH: In order to repeal this law, what do we have in Kearney to use as a preventative for these kids not to get obstreperous? Is there any means of stopping it?

MR. VITAMVAS: From what I read in the newspapers, the situation at Kearney is that the facilities are inadequate for the people that they have there. It may need some legislative action to provide facilities on the site of the Boys Training School. I don't know. The sole thing as far as the committee is concerned, and to put it to you bluntly, is, What would the U.S. Supreme Court or our State Supreme Court say about a habeas corpus brought by a kid in the penitentiary who had been committed originally to Kearney on a juvenile complaint?

MR. CLINCH: I think that answers it. Thank you.

JOHN J. SULLIVAN: Maybe the chairman of the committee can answer this: If we do away with this law permitting the transfer of these individuals, what are we going to have to do with them out there? In other words, it appears to me that if we are going to knock out this law there ought to be some additional procedure recommended, some procedure which can be taken to get them out of there. If you are trying to rehabilitate them and you have a trouble maker, then you've got to have some way to get him out. This way, all we are doing is eliminating the manner of getting him out of there without proposing anything in the alternative. This is the problem that I wonder about.

HAROLD L. ROCK: Mr. Dalton, of course, raises the two most interesting arguments. One is his own incarceration, and I hope that will never happen. However, if he is convicted and incarcerated in the federal system the judge doesn't say, "Now, you go to this training school," or "You go here or there." He turns you over to the Attorney General and you go where he puts you.

MR. VITAMVAS: Oh no, no!

MR. ROCK: It may be in one facility or another. In the State of Nebraska today we don't have that kind of enlightened system.



Now it is true that there is a possibility that a maverick Board of Parole and a maverick Director of Institutions could say, "All right, we'll arbitrarily throw this nice tow-headed lad into the State Penal Complex just to show him that we're on top." But I doubt if that would give you results. I think it is more a bugaboo than a reality. I appreciate the committee's concern about whether or not the law is constitutional, but I think we can let that take care of itself rather than try it by committee.

I would call now for the question, unless there is further debate.

JAMES F. BEGLEY: I have one question. What would you do with this juvenile who has been convicted of a felony and has been committed to Kearney? That happens. There are juveniles who are convicted of felonies and then sent to Kearney. My judge has done it! And this is in the statutes. Now, you've got to make some provisions for him. If you take this out, what hold have they got over him?

MR. VITAMVAS: I don't think we can take care of all the situations of where a judge will ignore the law, because I think in most criminal cases the criminal statute says "shall be punished by one to five years in the penitentiary" or something "on conviction." We run into this; he suspends the execution of the sentence, places him on probation, and commits him to Kearney. This is a different situation.

CHAIRMAN EISENSTATT: The question has been called for. Do we understand the motion? The motion, as I recall it, is that Recommendation No. 1 of the committee's report, which appears on page 18, that Section 83-455 be repealed, be sent back to the committee for further study and recommendation to the House or the Executive Council. I would ask that that be added, just in case any action should be forthcoming in order to get it into the 1969 Legislature. Is that the motion? All those in favor please signify by saying "aye"; all opposed the same sign. The motion is lost.

That being the case, I presume we should now entertain a motion to approve the recommendation of the committee that Section 83-455 be repealed.

LLOYD W. KELLY: I so move.

HARRY B. OTIS: I second it.

CHAIRMAN EISENSTATT: The matter having been discussed, I now ask all those in favor of the motion please signify by saying "aye"; all opposed. The motion is carried.

The second recommendation of the committee, appearing on page 18, I would now entertain a motion with respect to it.

JAMES F. BEGLEY: I would renew my motion, that action on this recommendation be delayed until the report is received on the action of the County Attorneys Association.

JOHN J. SULLIVAN: I second that motion.

CHAIRMAN EISENSTATT: Any discussion?

JOHN B. CASSEL: I would like a clarification, if I may, on what you mean by "the district attorney being a state officer"—employed by the state? Paid by the state?

MR. VITAMVAS: This is the general theory, yes, be paid by the state primarily.

MR. KELLY: Appointive or elective?

MR. VITAMVAS: The thing about it is, it puts them in the same situation. No recommendation was reached on the appointive or elective, because we don't know what form the bill will take. This would put it similar to the district judges who are really state judicial officers. They are paid by the state. Understand our position, this is not a phase of the report that we're real gung ho for. What we are trying to do is toss it before the House to get some idea of which way to jump.

MR. CASSEL: I would like to suggest the elimination of the words "being a state officer," if we adopt it, but if we were to adopt the proposal as it now is, it would seem that we're bound by that particular clause, and I would hate to see our Association be bound by that particular phrase.

MR. VITAMVAS: That would have to be a substitute motion, wouldn't it?

HOWARD H. MOLDENHAUER: It appears to me, as Mr. Vitamvas just said, they have no recommendation for legislation, but I think the Bar might be derelict if legislation was introduced in not studying it and taking a position.

I would like to amend the motion to read that the Committee on Crime and Delinquency Prevention be instructed to study any legislation so introduced and make a recommendation to the Executive Council, and that the Executive Council be authorized to take a position on behalf of the Nebraska State Bar Association with respect to such legislation.

CHAIRMAN EISENSTATT: Does the mover of the original motion accept the amendment?

MR. BEGLEY: No.

CHAIRMAN EISENSTATT: Is there a second to the amendment? The amendment fails for want of a second.

Is there any further discussion on the original motion? I now call for the question. All those in favor of the motion please signify by saying "aye"; all opposed. The motion is carried.

[The report of the committee follows.]

### **Report of the Committee on Crime and Delinquency Prevention**

This committee held one meeting in conjunction with the mid-year meeting of the Association. The committee was again concerned with the transfer of juveniles from the Boys Training School to the Nebraska Penal and Correctional Complex. A repeal of Section 83-455, R.R.S. 1943, will eliminate the authority to do this by administrative action. This recommendation was approved by the House of Delegates at the annual meeting in 1966. Legislation was drafted and submitted to the Committee on Legislation, and an attempt was made to secure the introduction of the bill. No bill was introduced so the committee again recommends that an attempt be made to accomplish this.

Information directed to the committee indicated that legislation may be introduced at the next legislative session to modify the county attorney system. The majority of the committee felt that a district attorney system for the processing of criminal and juvenile matters, with the district attorney being a state officer, possibly with a district co-extensive with the judicial district, should be favored. The county attorney would be retained as a county officer to handle civil matters for the county. It was felt that this Association should take a stand on such legislation should it be introduced.

The committee was advised that the Commission on Uniform State Laws was preparing a proposed uniform juvenile court act. A copy of the proposed act has been received, but the committee has no recommendation at this time.

The committee was also concerned with the action it should take with reference to legislation which may be introduced during the forth-coming session of the Legislature. It seeks direction in those areas where an act is introduced on which the Bar Association is interested and which falls within the concern of this committee.

It is therefore recommended:

1. The Association seek the repeal of Section 83-455, R.R.S. 1943.

2. That the Association support legislation, if introduced, for the adoption of a district attorney system for the processing of criminal and juvenile matters with the district attorney being a state officer and the county attorneys being retained as county officers for handling civil matters for the county.

3. For such other direction as it deems feasible in regard to legislation relating to crime and delinquency which may be introduced at the next session of the Legislature.

Gerald S. Vitamvas, Chairman  
 Bernard J. Ach  
 Donald L. Brock  
 Harold E. Connors  
 Melvin K. Kammerlohr  
 John H. Keriakedes  
 Alfred J. Kortum  
 Richard L. Kuhlman  
 Walter J. Metejka  
 Richard E. Mueting  
 Clark G. Nichols  
 W. W. Nuernberger  
 Elizabeth Pittman  
 Walter D. Weaver

CHAIRMAN EISENSTATT: The next item is the report of the Special Committee on Availability of Legal Services, Warren K. Urbom, Chairman. Is he present?

#### REPORT OF SPECIAL COMMITTEE ON AVAILABILITY OF LEGAL SERVICES

Warren K. Urbom

This committee was formed in 1965 for the purpose of studying the question of providing some kind of state-wide system for providing free legal service to the people who cannot afford to pay for it.

In 1966 this House approved our recommendation which authorized us to proceed to study the problem further and to negotiate with the Office of Economic Opportunity for setting up a state-wide system.

Basically the system which we recommended and which you approved was the engaging of full-time lawyers to work for a non-profit corporation established by the Nebraska State Bar Association, and these full-time lawyers then would provide throughout the State of Nebraska free legal services to the indigent, funded basically through the Office of Economic Opportunity, although participated in of course by the Nebraska State Bar Association.

A part of that recommendation which you approved in 1966 was that we would make an effort to get local communities to establish their own local programs for handling their indigent problem. For two years now the committee has done that by going throughout the state making personal appearances and otherwise with local groups in an effort to get them to move in some direction for providing for the indigent.

To date we have seen no activity, in the sense that there has been no local program formed. One four-county area has approved a local program, and, at the last word I had, it had not yet made application to the Office of Economic Opportunity but was supposed to do so. They may have done so since I last heard, which was just before this report was submitted. There has been some interest in other areas.

We have run into these two basic attitudes: (1) some outright strong resistance to the whole idea; (2) one of interest but no enthusiasm sufficient to warrant the setting up of a program nor to give any strong help to the State Bar committee in establishing a state-wide program.

We are, then, in our judgment at a kind of impasse where you need to provide us with some guidance as to whether we should continue to press local groups to establish local programs for handling the problem of the indigent—and understand this relates to civil matters primarily and perhaps wholly under most local programs—or whether we now should abandon the whole idea, or whether we should set a deadline on the local groups for establishing a local program, and if they do not establish local programs to proceed with a state-wide program whereby the State Bar Association would set up a state-wide program for handling the problems of the indigent without cost to the indigent.

This is the question we pose to you. Where do you want to go from here?

We do that through two recommendations: (1) that continued efforts be made by the committee to encourage local bar associations to formulate a local plan through the Office of Economic Oppor-

tunity, or otherwise, until March 1, 1969, at which time the committee would formulate a state-wide plan, excluding only Omaha and Lincoln, because they already have their own programs, and excluding those areas where it has been affirmatively demonstrated that no real need exists for any type of plan.

Now, stopping with that for a moment, we recognize that when we say there is a burden there to show affirmatively a negative proposition, we grant that that is a difficult thing to do, but our view is that when local areas have made a thorough and extensive study of their local situations and have concluded that there is no need for any program, we want to be in a position to give credence to that suggestion and carve out that area so that it is not touched by the State Bar plan. On the other hand, if they have simply ignored the problem without a study or have taken an action without a real study as to whether there is a need in their local area, then we would propose to include that area within the State Bar plan. That is the gist of this thought about an affirmative demonstration that no real need exists.

The second recommendation we have is that thorough exploration be made with the Office of Economic Opportunity to determine whether a judicare program might be acceptable for the entire State of Nebraska, except Omaha and Lincoln, which already have local programs in effect; and if the incorporation of judicare in some form has some prospects of being approved, the state-wide plan to be formulated by the committee include such judicare features as are deemed advisable by the committee.

Let me explain for a moment the difference in the judicare program from what we have been talking about. We have been talking about the hiring of full-time lawyers to handle the problems of the indigent. Under the judicare program the local lawyers, practicing attorneys, are utilized and they are paid at a nominal figure for representing the indigent, being paid by the same non-profit corporation funded basically through the Office of Economic Opportunity.

So the question is whether to use full-time lawyers or the lawyers already established in the community who would be paid in part.

The judicare program has been put into operation in Wisconsin and in some counties in Montana, and the last word we had from the Office of Economic Opportunity, and this is not very recent information—I have requested recent information but have not received it—the latest word we have is that the Office of Economic

Opportunity will not consider any further judicare programs until the Wisconsin plan has been studied thoroughly enough and has been in operation long enough so that it can decide whether it is a good program.

So with respect to the second recommendation, we don't know whether the Office of Economic Opportunity would let us establish a judicare program, either on a local basis or on a state-wide basis. We simply don't know, but we are asking for permission to find out, to keep pressing the OEO to let us, and to consider at least instituting perhaps in some areas of Nebraska, perhaps all over Nebraska except Omaha and Lincoln, a judicare program as opposed to a full-time lawyer program. We do this primarily because we think we detect in some local communities in Nebraska some affirmative interest in a judicare program but affirmative opposition, or at least no enthusiasm whatsoever, for a full-time program, based principally on the idea that in a particular local community (however you describe "local community" whether it be a county, a city, a series of counties) there is no justification or ability at least to justify the hiring of a full-time lawyer to serve that geographical community.

I might point, for instance, to the area around Cherry County where distance is great and numbers of people are few. There seems to be a strong feeling that to hire a full-time lawyer to serve a geographical area big enough to encompass enough people to keep a lawyer busy all the time would mean that you have such a large geographical area that he would spend all his time traveling instead of representing indigents. This is why we seek to bring some judicare features into the whole idea.

Now, what we really want from you is an expression of what you want us to do from here. We bring it to you pointedly by asking, first of all, let us go until March 1 to get local communities to set up their own programs, and if they do not, tell us you want a state-wide plan; and, No. 2, give us the authority to get some judicare features built into this if we are able to do so.

CHAIRMAN EISENSTATT: For the purpose of the record, Mr. Urbom, I would now entertain a motion that the report of the Special Committee on Availability of Legal Services, as it appears on pages 41 to 44 of the printed program, be adopted, with one addition that the special committee be continued for an additional year, which would, I think, cover your request at this time.

MR. URBOM: I so move.

CHAIRMAN EISENSTATT: Do I hear a second?

HAROLD L. ROCK: I second the motion.

CHAIRMAN EISENSTATT: Is there any discussion? All those in favor signify by saying "aye"; all opposed. The motion is carried.

MR. URBOM: Now, Mr. Chairman, I move the adoption of the Committee's Recommendation No. 1 appearing on page 44.

CHAIRMAN EISENSTATT: I think that has already been covered. We have accepted your report.

MR. URBOM: Oh, I thought it was everything except the recommendations.

CHAIRMAN EISENSTATT: No.

[The report of the committee follows.]

### Report of the Special Committee on the Availability of Legal Services

#### SUMMARY OF PURPOSE AND ACTIVITIES OF COMMITTEE PRIOR TO REPORT OF AUGUST 18, 1967

In late 1965 this committee was constituted for the purpose of grappling with the subject of how best to provide legal services for the indigent. In October 1966, the House of Delegates granted the committee authorization to make further studies of the precise needs of various areas of Nebraska and to establish through negotiations with the Office of Economic Opportunity a plan within the broad framework as follows:

- A. The Nebraska State Bar Association would form a non-profit corporation for the operation of the program, the directors of which would consist both of laymen and lawyers. Wherever feasible, the directors would be representatives of the areas and deprived groups principally served by the plan.
- B. The entire State of Nebraska would be covered and served by the plan, except those communities having in operation federally funded local programs for providing legal services to the poor. Encouragement would be given to local communities to establish local programs, and the state-wide program would withdraw from a local community establishing a local program, except in an advisory and coordinating capacity.
- C. Applications would be made to the Office of Economic Opportunity for funds up to 90 per cent of the cost of the



program, 10 per cent to be provided by the Nebraska State Bar Association.

- D. Legal services to the poor would be directly provided by attorneys admitted to the bar of Nebraska employed full time by the corporation. Such attorneys would staff community offices throughout the state so situated as to be able conveniently to serve all areas of the state not reached by a local program. Part-time and full-time paid secretaries and typists would be utilized.
- E. Central administration of the state-wide plan would be by a full-time administrative director, employed by the corporation, and such full-time assistant administrative directors as would be required. The director or one or more of the assistant directors would work closely with the University of Nebraska and Creighton University schools of law, compiling memoranda and educational materials, preparing and sponsoring legislative proposals, and conducting orientation programs for lawyers employed by the corporation for providing direct legal services to the poor.
- F. Private practitioners could participate in the plan on a voluntary basis, contributing time to the administration of the program and conducting research services. Additionally, private practitioners would be paid to handle one side of cases involving two poor people.
- G. All legal matters for those qualified, including persons confined to the Nebraska Penal Complex, would be handled, except:
  - (1) Cases involving criminal matters in which an attorney for the defendant has been appointed by the court
  - (2) Cases from which a private practitioner could expect to earn a fee without substantial expense to the client, probably including contingent fee cases and probate of estates.
- H. Intensive use would be made of students at University of Nebraska and Creighton University schools of law, wherever practicable.
- I. A lawyer referral service would be maintained for problems not covered by the plan or persons not eligible to receive free legal service.

As reflected in the committee's report of August 18, 1967, the major effort of the committee during the year covered by that report was toward encouraging local bar associations to establish

local programs, to the end that any local area having such a local program would not be covered, other than on a supplementary basis, by the state-wide program and the control of each local program would be in local hands. For that purpose, personal appearances by one or more members of the committee were had with members of the bar associations of the counties of Hall, Custer, Sherman, Howard, Greeley, Valley, Saunders, Dodge, Washington, Madison, Jefferson, Thayer, Saline, and Fillmore, as well as those counties included in the Fourteenth Judicial Bar Association, the Western Bar Association, and the Southeast Nebraska Bar Association. No local plans, however, were actually established.

#### ACTIVITIES OF THE COMMITTEE SINCE AUGUST 18, 1967

As in the preceding year, the committee's work has been directed toward local bar associations. Continuing requests have been made that these local associations study and determine the local needs for legal service among the poor and the establishing of a specific plan for meeting those needs. The specific developments during the past year are:

1. Blue Valley Legal Service Society. This group was incorporated in September, 1967, for the basic purpose of providing legal services to the poor in Fillmore, Jefferson, Thayer and Saline counties through the legal services program of the Office of Economic Opportunity. Through the Blue Valley Community Action Program an application was nearly completed, but apparently will not be submitted to the Office of Economic Opportunity until sometime in October or November 1968.
2. Southeast Nebraska. One meeting with the Southeast Nebraska Bar Association in Auburn and a later meeting with selected representatives of that association in Auburn have resulted in a determination that an effective program would require the participation of Otoe County with the First Judicial District. A meeting with representatives of the First Judicial District and Otoe County is scheduled for September 5. The chairman of the committee will attend.
3. Fourteenth Judicial District. Following a survey through the welfare agencies of the several counties involved to determine the extent of the need for a legal services program, the Fourteenth Judicial District Bar Association has continued to take interest in and to study the extent of the need. The diligence of the association has been noteworthy. The committee has been informed that at the annual meet-

ing on February 28, 1968, of the Fourteenth Judicial District Bar Association, extensive oral reports were made and it was resolved that the members of the local committee would continue to investigate the need for a program for another year, at the end of which time further action would be taken.

4. Northwest Nebraska. Although the Honorable Robert R. Moran has been active in endeavoring to establish a local program in Sioux, Dawes, Box Butte and Sheridan counties and the Dawes County Bar Association and the Sixteenth Judicial Bar Association have expressed interest, we have not been successful in having a personal meeting with those groups.
5. Northeast Nebraska. Considerable communication has been had with the Madison County and Platte County Bar Associations, but the prospects of the formation of a local plan in the near future appear remote.

#### RECOMMENDATIONS

The committee has proceeded with its work for the past two years with the conviction that every reasonable opportunity should be given to each local bar association to formulate a plan which would permit the fulfilling of the need in its area, thereby retaining local control of the individual program. In those two years no local program has been established.

A persistent thought prevails in many areas of Nebraska that the need for a program is not sufficient in scope to justify the engaging of a full-time lawyer to handle the problems of the poor within a geographical area small enough to permit such a lawyer to spend his major time in practicing law rather than in traveling. Accordingly, the appeal in these areas of a system of judicare, whereby local practicing lawyers would represent the indigent and be paid at a modest rate from funds provided primarily by the Office of Economic Opportunity, has been considerable. This kind of plan is to be contrasted with the proposal earlier made by this committee and adopted by the House of Delegates by which full-time lawyers would be employed to handle nothing but legal problems for the indigent. The attitude of the Office of Economic Opportunity has been basically that no judicare plans would be approved in Nebraska, at least until further experience with that kind of plan has been tested in Wisconsin. It is possible that by now the Office of Economic Opportunity would be willing to consider the judicare arrangement for all or selected areas of Nebraska.

**It is the committee's recommendations:**

1. That continued efforts be made by the committee to encourage local bar associations to formulate a local plan through the Office of Economic Opportunity, or otherwise, until March 1, 1969, at which time the committee would formulate a state-wide plan, excluding only Omaha and Lincoln and those areas where it has been affirmatively demonstrated that no real need exists for any type of plan;
2. That thorough exploration be made with the Office of Economic Opportunity to determine whether a judicare program might be acceptable for the entire State of Nebraska, except Omaha and Lincoln, which already have local programs in effect, and if the incorporation of judicare in some form has some prospects of being approved, the state-wide plan to be formulated by the committee include such judicare features as are deemed advisable by the committee.

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

**CHAIRMAN EISENSTATT:** The next item on the program is the report of the Special Committee on Water Resources, Richard S. Harnsberger, Chairman. He is not here but has sent in his report. This is a new committee that was formed by the President just a few months ago. His report, which is not in the printed program, is as follows:

## **REPORT OF SPECIAL COMMITTEE ON WATER RESOURCES**

**Richard Harnsberger, Chairman**

On January 18, 1967, the Nebraska Legislature unanimously passed Resolution 5 which directed the State Soil and Water Conservation Commission to develop a state water plan. The State Water Plan will cover many areas of natural resources law, and contemplated studies include trans-basin diversions, ground water regulation, drainage district simplification, integration of stream

and ground water, protection of industrial and municipal supplies, preferences of use, marketability of water, quality control and pollution abatement, flooding and soil erosion, navigation, hydro-electric power, fish and wildlife habitat, recreation, and application of the one-man, one-vote rule to various situations.

At the present time more than 500 local districts in Nebraska have overlapping duties regarding natural resources, and many conflicting laws must be dealt with by attorneys. A principal purpose of the legal studies connected with the State Water Plan will be to examine and attempt to clarify contradictory statutes.

Because lawyers and their clients are vitally interested in these matters, and in order to render a valuable public service in helping with both basin and state-wide comprehensive planning, the Executive Committee of the State Bar Association created the Special Committee on Water Resources in July of 1968. The committee met at Lincoln on October 12 and discussed various aspects of the State Water Plan at some length with Stanley Cohen, staff attorney for the Soil and Water Conservation Commission. It thereafter was decided that one of the committee's activities will be to review studies prepared by the commission's legal staff and keep the commission informed regarding problem areas which come to the attention of committee members.

Attorneys representing irrigators, municipalities, counties, drainage districts, irrigation districts, soil and water conservation districts, watershed conservancy districts, and other government units have a special interest in these matters. We therefore will try to keep members of the Bar informed of developments by publishing brief articles in the *Nebraska State Bar Journal*. In addition, we will prepare notices concerning what information is available and where it may be obtained.

The committee knows there is widespread interest and would be glad to receive suggestions regarding how to make our efforts as effective and worthwhile as possible.

It is respectfully submitted by the chairman and his committee.

I move the adoption of this report and that it be included in our proceedings, with the additional provision that as a special committee it be continued. Do I have a motion to that effect?

LEO CLINCH: I so move.

CHAIRMAN EISENSTATT: Do I hear a second?

CLARK G. NICHOLS: I second it.

CHAIRMAN EISENSTATT: All those who favor signify by saying "aye"; those opposed. Carried.

No. 12 is the report of the Committee on Procedure by Norman Krivosha.

## SUPPLEMENTAL REPORT OF COMMITTEE ON PROCEDURE

Norman Krivosha

The Committee on Procedure has heretofore filed a report of its activities during the past year, which is found on page 23 of your program previously delivered to you. As that report indicated, a subsequent meeting was to be held at which time some final action was to be taken. I will not go over the initial report but will devote my time now for the purpose of supplementing that report as a result of the meeting held following the filing of the earlier report.

Let me take just one moment in regard to the earlier report, and perhaps this ought to be directed to the chairman of the House of Delegates or to the Executive Council, or to whomever it should properly go: Each year now the Committee on Procedure has recommended that a study be undertaken with regard to civil procedure in Nebraska. Our procedure is antiquated, it is outdated, it ought to be examined and revised. It now appears, however, that to expect to undertake so large a project on a voluntary basis will not prove to be very successful, and for that reason I would urge the members of the House of Delegates in particular to look at our recommendation on allocating funds for the purpose of hiring some people to begin a study on this matter of civil procedure in the hope that we could bring about a complete recodification that would update our procedure.

As the initial report indicates, several specific statutory matters were considered, and recommendations made. The first is with regard to residency requirements of persons in the service seeking to adopt children. What with a military establishment such as the Strategic Air Command here in Omaha and other similar military establishments within the State of Nebraska, persons are often stationed here for a number of years. Nevertheless, because of their military status and their own election, they remain nonresidents. We recognized this defect several years ago and amended our divorce statutes to grant limited residency to service men seeking divorce. Your committee recommends that similar action be taken with regard to adoptions, and recommends that the following statute be adopted:

43-112. Persons serving in the armed forces of the United States Government, who have been continually stationed in the State of Nebraska for such period of one year shall, for the purposes of seeking to adopt a child in any county court in the State of Nebraska, be deemed residents in good faith of this state, and such county in which he is stationed at the time of the filing of the petition for adoption.

It is your committee's feeling that such action will eliminate an inequity which has heretofore existed and is in the best interests of the state.

You will further recall that for the past several years your Committee on Procedure has recommended that some changes be made with regard to the settlement of claims of minors and the procedure to be followed. In particular, concern was expressed about requiring, in small settlement cases, the filing of a bond for long periods of time, and the further requirement that annual accountings be made. It was felt that in some instances the cost of the bond premium and the annual filing would use up a fair portion of the funds which otherwise should properly be used for the benefit of the minor. In past years this House of Delegates has adopted the recommendations of the Committee on Procedure, but the statutes have not been drafted or introduced. Apparently one of the problems suggested is divesting the county court of exclusive jurisdiction in guardianship matters.

Therefore your committee now recommends that a different look be taken at the problem. Without attempting to resolve the question of the guardianship, your committee now recommends that the authority to approve the settlements remain in the county court as has been the case in the past. However, your committee further recommends that the statutes be amended to provide that on all claims up to \$200.00 the signature of the parent without court approval would be sufficient. That is as it now exists. On claims of at least \$200.00 but less than \$1,000.00 the county court would still be required to approve the settlements, but no bond or annual accounting would be necessary. It is the committee's feeling that the risk involved here is so minor as compared to the costs incurred that it would justify taking such action.

There are many instances where parents are entrusted with \$1,000 of a minor's funds and we don't concern ourselves about bonds and accountings. We think this would likewise justify such action. Similar statutes have been adopted by other states in even larger amounts.

Then, with regard to claims of more than \$1,000.00 but less than \$3,000.00 the county court, in its discretion, could require the bond and annual accounting. Here, again, the county court could make

some determination, depending upon the assets of the parents or the status of the parents, their position in the community, and how important the county court thought it was that a bond be required or that annual accountings be made. As you well know, in many of our counties either you have the problem of not being able to find the parent to make the annual accounting because they have moved to California, or they are making application asking for authority to buy a bike or a car or some other thing, or it really doesn't make a great deal of difference.

The county court would continue to approve the settlement, but would make its own requirements with regard to bond and annual accounting.

On all claims above \$3,000.00 the bond and accounting would become required and mandatory. The feeling of the committee here was that once you got beyond \$3,000.00 there were sufficient assets involved to both require greater protection for the minor and justify the spending of bond premiums and costs for annual accounting.

Perhaps what it would do is give us an opportunity to test it out and to see what the situation is. At the time we inserted the \$200.00, obviously there were many claims in that range. There are no settlements involving \$200.00 any longer. It seems to me that something ought to be done to recognize that.

It is hoped that this change will result in this recommendation's meeting the concern with regard to divesting the county court of jurisdiction and will permit the statutes to be introduced and adopted. Though it was initially the intention of the committee to draft each and every section of the proposal, upon closer examination it was determined that there were a host of related statutes which likewise would require some amendment, and rather than attempt to do it in a haphazard manner, the committee has not attempted at this time to recommend the specific language but would ask the House of Delegates to approve the concept and instruct the Committee on Procedure to draft the proposed legislation and submit it to the Committee on Legislation and, I suppose, to the Judiciary Committee.

The last matter which I would like specifically to take up is a proposed amendment to the Dead Man's Statute. You will recall that several years ago this matter was discussed by your committee, and it was recommended that an examination be made. In cooperation with the University of Nebraska College of Law, and in particular a senior law student, Leon Hahn, an examination into the Dead Man's Statute was made. A very comprehensive investigation



was prepared by Mr. Hahn, and submitted to the Committee on Procedure. The report indicated that the Dead Man's Statute had its birth in the English common law and its specific purpose was to exclude parties to a proceeding, or those who had a pecuniary interest, from making false statements for their own benefit. Though this disqualification had its birth in English common law in the Eighteenth Century, it was specifically abrogated by statute in England in 1851. That is to say, England no longer has the Dead Man's Statute.

Influenced by this change, most of the United States passed statutes similarly removing this disqualification for interest. However, rather than completely abolishing it, as is the case in England, statutes continued the disability where one of the parties in the suit was the estate or representative of a deceased person. Such statutes now exist in 32 states.

In recent years the noted authorities in the field, particularly McCormick and Wigmore, have attacked the Dead Man's Statute as no longer a necessary part of American jurisprudence.

After study, it was the opinion of the committee that some change at least should be made in regard to the Nebraska Dead Man's Statute insofar as it pertains to actions arising in tort.

The Nebraska statute was initially adopted in 1877 and has remained practically unchanged since that time. As you will recall, it prohibits persons having a direct legal interest, when the adverse party is the representative of a deceased person, from testifying to any transaction or conversation.

In 1958 our Supreme Court in the case of *Fincham v. Mueller* held that an automobile accident was a transaction. As a result thereof, where one of the parties to an automobile accident is killed as a result of the accident and suit is brought against his estate, the other party is precluded from testifying as to what transpired on the theory that their automobile accident was a transaction and is barred by the Dead Man's Statute.

However, as noted by Judge Carter in his dissent in the *Fincham* case a transaction means one in which

each is an active participant; a mutual transaction between the deceased and the surviving party. It does not prohibit the survivor from describing an event or physical situation or the movement or actions of a deceased and the surviving party. It does not prohibit the survivor from describing an event or physical situation or the movement or actions of a deceased person quite independent and apart and in no way connected with or prompted or influenced by reason of the conduct of the party testifying.

It is quite obvious that in matters not involving tort, the parties to a transaction can anticipate problems which might arise and can reduce their agreement to writing, thereby precluding the necessity of such testimony. That is to say, if Grandpa tells his grandson that if he stays on his farm and works he'll leave him the farm, it isn't very difficult or a great requirement to say to him, "Please go put it in writing and now everybody can know it can happen."

Not so in a tort action. How can one enter into an agreement with the entire world as to automobile accidents they might have in the future. Likewise, under our present situation great inequities arise. Where two persons in a car are involved in an accident and the driver of the second car is killed, each party may testify as a witness for the other, but neither may be a witness for himself. The distinction apparently is on the basis that each is not a party to the transaction, but merely an observer. It is difficult to see how such a fine distinction can be drawn. If we are concerned about people lying and the inability to bring out the truth, then it seems to me that the passenger is under the same kind of restriction, and yet we don't involve ourselves in that.

The distinction between an active participant and an observer makes little sense in the contest of other than personal transaction, and no sense in the automobile accident situation. If we are concerned about the truth, how do we prevent falsehoods by permitting passengers to testify for the other, but not permitting the party himself to testify, on the basis that this is a transaction included within the meaning of the Dead Man's Statute. Several techniques, such as the right of cross-examination, rebuttal testimony, introduction of physical evidence, the necessity of proving by a preponderance of the evidence and the fact determination made by the jury are procedures available to the estate, and provide a fairly sufficient protection against fraudulent or perjured testimony. In weighing one against the other it would appear to promote greater justice by excluding tort actions from the Dead Man's Statute than to provide that one might not be able to recover because there were no eye witnesses or the physical facts were insufficient to sustain the burden. Likewise, a surviving defendant may be deprived of his only defense. Obviously the situation works both ways.

The committee, therefore, recommends the following amendment to the Dead Man's Statute—but before I read it let me say that what we have attempted to conclude at this juncture at least is not to abolish the Dead Man's Statute, though I think the committee might properly continue to look into that, but at least to recognize that an automobile accident was not within the contemplation of

the Legislature in 1877 when they adopted the Dead Man's Statute and ought not to be a part of that statute because there isn't any way in the world that the victim can avoid the consequences of the Dead Man's Statute in advance. If we are concerned about that sort of thing, then it seems to me it makes about as much sense to say that no party to a transaction, or no party to an accident can be permitted to testify because obviously they are going to lie. Now, it's true they are both here and they can lie back and forth, but let's not let either one of them testify and we'll just resort to physical facts and other eye witnesses.

The statute would read as follows:

25-1202. No person having a direct legal interest in the result of any civil action or proceeding other than those arising in tort, [that is the only change there] when the adverse party is the representative of the deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation.

This is exactly as the statute now reads except for the words "other than those arising in tort."

I think, as lawyers it is incumbent upon us at some juncture in our practice to set aside our concern about whether we are plaintiff lawyers or defendant lawyers and concern ourselves about the litigant and the matter of promoting justice and permitting litigants to have their day in court and not worry about whether or not we are going to be able to win lawsuits or lose lawsuits on the basis of whether or not persons in an automobile accident where one has been killed will be permitted to testify.

Mr. Chairman, on behalf of the Committee on Procedure I move the adoption of the committee's report as well as this supplemental report. I so move.

THOMAS A. WALSH: I second that motion.

CHARLES F. GOTCH: Mr. Krivosha, was there any thought taken as to a distinction necessary for intentional torts as opposed to unintentional?

MR. KRIVOSHA: There was no consideration given as to whether it was an intentional tort or an unintentional tort, and I think for the principal reason that the party upon whom the tort

is committed, whether it is intentional or unintentional, still had some difficulty stopping it long enough to get it reduced to writing. We had talked, quite frankly, at first about matters of automobile accidents and using that kind of language until we recognized that in the area of products liability conceivably there could be a death as a result of a tort action in a products liability situation, and it was felt that it was better to simply talk about tort action as opposed to trying to make other distinctions.

CHAIRMAN EISENSTATT: Any other questions?

HARRY B. OTIS: Have other state supreme courts construed this statute the way ours has in bringing in an automobile accident as a transaction? Are we unique in that regard?

MR. KRIVOSHA: I'm looking. As far as I am aware, and there may be some I am not aware of, Nebraska is the only one that has held an automobile accident to be a transaction. Warren, were there others? There are. O.K.

VANCE E. LEININGER: I would like to inquire whether the committee considered the effect of the amendment to the Dead Man's Statute in actions involving fraud or deceit, for example, defamation. Those are tort actions.

MR. KRIVOSHA: The committee, quite frankly, did not consider that in a tort action. I suppose you could have a situation where one of the parties might be deceased. I guess what we were thinking about is where, as a result of a specific transaction, a death arose, and it would be difficult to imagine how that might happen in a fraud or deceit action, but I . . .

MR. LEININGER: You could have an action involving a written contract that would also involve misrepresentation or fraud and deception of the contract that would be more akin to a contract action than it would to a tort action, actually, from the standpoint of admissibility of evidence.

MR. KRIVOSHA: I think that is a very good point, as a matter of fact, and the committee had not considered that and perhaps what we are talking about is an exclusion in which, as a result of this particular tort action, the death results. My problem is, to be quite candid with you, I have difficulty with the whole Dead Man's Statute. But assuming that it has some place, maybe we ought to be thinking about at least excluding it in actions arising out of tort where, as a result of that specific tort action, one of the parties is killed. The language is not so limited.

ROBERT C. MCGOWAN: Would you limit it by excluding from this transaction any alleged oral statements of the deceased? You would still have your automobile accidents that you would be limiting it to.

THOMAS A. WALSH: Why not just say "of all unintentional" before "torts"? or "negligent" torts.

MR. KRIVOSHA: Well, that's fine. I think we've got to start somewhere. I, particularly this morning, am in a very compromising mood, but what I am concerned about is that you could of course have an intentional tort, you could have an assault and battery in which there would be a death. No? Well, I guess the instances are not enough for us to be concerned about; I would agree there.

MR. WALSH: This has to go to the Legislative Committee anyway. I am wondering if it couldn't be called to their attention.

MR. KRIVOSHA: I am perfectly willing to accept an amendment to include unintentional torts. Certainly that would be a start, and I think anywhere we start from is better than no place.

CHARLES F. GOTCH: I would suggest that we have a resolution to the effect that we recommend that the statute be amended to exclude such things as automobile accidents, but that the language be studied so that cases such as this gentleman just mentioned would not be inadvertently acted upon.

MR. KRIVOSHA: That is perfectly acceptable so far as I am concerned. I think what I would like to see happen is at least to have the House make *some* recommendation that the Dead Man's Statute be amended to exclude *automobile* accidents from transactions in whatever appropriate language might be necessary, and I would amend our report to encompass that suggestion and amend my motion to adopt the report with that change in it.

CHAIRMAN EISENSTATT: Now your report, Mr. Krivosha, covers a legislative recommendation with respect to the Dead Man's Statute and one other.

MR. KRIVOSHA: Residency requirements for adoption by persons in the military service, and the change in the settlement of claims of minors. Well, that wouldn't be statutory—your question was about statutes. There is the other matter about a recommendation of employing law students to begin work on a comprehensive examination of our civil procedure.

CHAIRMAN EISENSTATT: Are we ready for a vote on the motion? Does the House understand the motion being voted upon?

VANCE LEININGER: May I inquire, it has been amended to incorporate this?

CHAIRMAN EISENSTATT: The motion now before the House, as the Chair understands it, is that the report of the Committee on Procedure, appearing on pages 23 and 24 of the printed program, be adopted with the supplemental addition to that report covering legislative recommendations on the amendment of the Dead Man's Statute, the residence requirement in adoption matters, the changes in settlement of minors' claims, Section 38-122, and the initiation of a study to recommend changes in Nebraska civil procedure, and that the Bar appropriate sufficient funds from which to hire law students. Under our present rules, of course, the expenditure of funds would be wholly under the authority of the Executive Council. Have I correctly stated the motion as it now stands and as amended?

MR. KRIVOSHA: Yes sir.

CHAIRMAN EISENSTATT: All those in favor please signify by saying "aye"; all opposed. The motion is carried.

[The report of the committee follows.]

#### **Report Of The Committee on Procedure**

The Committee on Procedure met during the midyear meeting of the Nebraska State Bar Association and at that time took up a number of matters to be placed on an agenda of study. Included in the proposed matters were questions involving the procedure for the settlement of claims of minors; an examination of the Dead Man's Statute; an examination of residency requirements for adoption in Nebraska; and an examination of the entire rules of civil procedure, including the changes made by recent federal amendments.

Further, at the meeting papers were distributed to the members of the committee for their examination. These papers had been prepared by members of the law school of the University of Nebraska. They included a paper on change of venue by Paul M. Conley and a memorandum on proposed changes in the Nebraska Dead Man's Statute, prepared by Leon Hahn. The committee agreed to set as a date for future meetings, the date of September 14, and October 12.

The committee thereafter met on September 14, and during that meeting voted to recommend to the House of Delegates and to the Legislative Committee a statute which in effect would amend

Section 38-122 to provide in essence that on claims up to \$200.00 the signature of the parent would be sufficient; on claims more than \$200.00, but less than \$1,000.00, approval of the county court would be required, but no bond or annual accounting would be necessary; on claims of more than \$1,000.00 but less than \$3,000.00, the county court in its discretion could waive the requirement for either a bond or accounting, or both, and on claims in excess of \$3,000.00 both a bond and annual accounting would be required. The exact language is to be worked out and submitted to the committee during its meeting to be held on October 12, and thereafter submitted to the House of Delegates.

The committee further adopted a resolution suggesting that the Dead Man's Statute in Nebraska be amended to exclude negligence cases. The exact language was again to be prepared and submitted to the committee during their meeting on October 12.

The committee then discussed the matter of residency requirements in adoption matters. It appears that servicemen stationed in Nebraska for long periods of time are ineligible to adopt children in Nebraska, due to the fact that they continue to maintain their residency elsewhere. It was suggested that a statute similar to the divorce residency statute be adopted in which residency at a military installation for a period of one year would be sufficient to establish the requisite residency requirements. The exact language is to be prepared for approval by the committee on October 12.

The committee further agreed to consider the adoption of Federal Rule 11 at its meeting on October 12. This rule would eliminate the necessity of verifications on pleadings similar to the practice adopted in the federal court.

The committee then devoted the balance of the meeting to considering the over-all problem of re-examining the rules of civil procedure and considering amendments in the Nebraska discovery rules as made by the recent federal amendments.

**The committee recommends that the Bar appropriate sufficient funds with which to hire law students to work with members of the Bar to study and recommend changes in the Nebraska procedure.**

The committee intends to meet again on October 12, to finalize the various procedural changes set out above and to make final recommendations for submission to the House of Delegates. A supplemental report will be submitted to the House of Delegates at the time of the annual meeting on November 6.

Norman Krivosha, Chairman  
D. Nick Caporale  
Kenneth H. Elson  
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  
C. Thomas White

**CHAIRMAN EISENSTATT:** May I ask your indulgence to take Item No. 17 out of order. Mr. Bruckner, the chairman of the Tort Law Section has another meeting going on which requires his attention. Mr. Bruckner!

## **REPORT OF TORT LAW SECTION**

### **M. J. Bruckner**

Mr. Chairman and Members of the House of Delegates: The Executive Committee of the Tort Section reported to this House at the 1967 session that the program for the 1967 annual meeting of the Bar Association was being produced through the joint efforts and cooperation of the Nebraska Association of Trial Attorneys and the Tort Section of the Nebraska State Bar Association. It is now our pleasure to report that the program was highly successful.

Although we do not have comparative figures, we believe that the program was also a financial success. This was due in large part to the fact that the following out-of-state lawyers did not charge anything for their appearance except their plane fare and hotel expense. They are: Thomas F. Lambert, Boston, Massachusetts; Moe Levine, New York; Orville Richardson, St. Louis, Missouri; John Shepherd, St. Louis, Missouri; Burr Markham, Minneapolis, Minnesota; and John Shamberg, Kansas City, Kansas.

There have been some recent developments in two areas of tort law which we believe merit the concern and attention of every member of the Nebraska State Bar Association. They are the State Tort Claims Act and the Keeton-O'Connell Plan.



A State Tort Claims Act is presently being considered by a legislative study committee under the chairmanship of Senator Roland Luedtke of Lincoln who, incidentally, is a lawyer. We are advised that a bill providing for a State Tort Claims Act will be introduced at the 1969 session of the Nebraska Legislature.

In the spring of 1968 the Nebraska State Bar Association was invited to appear before the study committee to present its views on the proposed State Tort Claims Act. Thus far, this Association has not taken an official position on this legislation; has not made an official appearance before the study committee; and has not even shown that it is aware of the proposal. I might say in this regard, in all due respect, that Russ Mattson did appear, but I think Russ felt inhibited by the fact that he wasn't authorized by this Association to take a stand in behalf of the Association, so in his appearance before the study committee he had to state that into the record.

This legislation is extremely important to every member of this Association as well as every citizen of this state. Therefore, the Executive Committee of the Tort Section unanimously recommends that the House of Delegates adopt a resolution directing the President to appoint a committee with full authority to represent the Bar Association on the State Tort Claims Act before the legislative committee and the legislature, and with full authority to actively support the type of legislation it deems best.

The Executive Committee of the Tort Section unanimously recommends that the House of Delegates adopt a resolution directing the President to appoint a special committee to study the Keeton-O'Connell Plan and similar proposals and with full authority to present its views as the views of the Bar Association on these proposals.

The following members comprise the Executive Committee of the Tort Section:

|                               |      |
|-------------------------------|------|
| A. A. Fiedler, Omaha          | 1969 |
| Frank B. Morrison, Jr., Omaha | 1969 |
| Frank L. Winner, Scottsbluff  | 1970 |
| M. J. Bruckner, Lincoln       | 1970 |
| Kenneth Cobb, Lincoln         | 1971 |
| Howard E. Tracy, Grand Island | 1971 |

Our new officers will be elected at a meeting on Friday. Following that meeting a supplemental report will be submitted to your chairman.

Now I guess I move the adoption of the report first.

CHAIRMAN EISENSTATT: Do I hear a second?

VANCE E. LEININGER: I second the motion.

CHAIRMAN EISENSTATT: Is there any discussion? Are there any questions?

There are two recommendations for the appointment of a committee to deal with two matters, one of which involves legislation that is now pretty close to being introduced.

Mr. Mattson, do you have any comment on that, as far as getting the committee appointed to study this State Tort Claims Act? Is there any problem of getting it done in time?

C. RUSSELL MATTSON: You mean before the legislature?

CHAIRMAN EISENSTATT: Yes.

PRESIDENT MATTSON: I shouldn't think so.

MR. BRUCKNER: Mr. Chairman, if I may, I have two resolutions to offer to this body. It is my understanding that resolutions from sections must be offered in writing, and they are in writing, and after we move on this, the resolutions will take care of that problem. I discussed it with Russ. I am sorry, Chick, I didn't discuss it with you but I didn't have the opportunity.

CHAIRMAN EISENSTATT: All right, there being no questions, are we now ready for the question? All those in favor please signify by saying "aye"; all opposed. The motion is carried and the report is adopted.

MR. BRUCKNER: Now, if I may, I would like to offer these resolutions.

CHAIRMAN EISENSTATT: Go ahead.

MR. BRUCKNER: BE IT RESOLVED that the House of Delegates of the Nebraska State Bar Association direct the President of the Nebraska State Bar Association to appoint forthwith a committee with full authority to represent the Nebraska State Bar Association on the State Tort Claims Act before the Nebraska State Legislature and any legislative study committee, and with full authority to actively support in behalf of the Nebraska State Bar Association the type of legislation it deems best.

CHAIRMAN EISENSTATT: Is there any discussion on that resolution? Does that implement the recommendation contained in your report?

MR. BRUCKNER: That's right.

CHAIRMAN EISENSTATT: What is the second resolution?

MR. BRUCKNER: The second resolution is: BE IT RESOLVED by the House of Delegates of the Nebraska State Bar Association that the President of the Nebraska State Bar Association is directed to appoint a special study committee to study the Keeton-O'Connell Plan and other similar proposals, and with full authority to present its views as the views of the Nebraska State Bar Association on these proposals.

WARREN K. DALTON: I move for adoption.

CHAIRMAN EISENSTATT: Mr. Dalton has moved for adoption. Do I hear a second?

MR. BRUCKNER: I'll second it.

CHAIRMAN EISENSTATT: You are a member of the House so you can second. Any discussion? All those in favor . . .

CHARLES F. ADAMS: I would like to inquire of Mr. Bruckner the area in which this special committee in connection with legislation would function as distinguished from our Committee on Legislation.

MR. BRUCKNER: I think the idea of the resolution is to limit its application to the State Tort Claims Act and, Chick, I am concerned because the legislative study committee invited the Bar Association to take a stand on this very important piece of legislation and thus far it has not, and I wonder whether we ever will. It is going to be before the Legislature next year, and we should be prepared to actively support it, I would think.

MR. ADAMS: Then you find no conflict between this special committee and our general Committee on Legislation?

MR. BRUCKNER: No.

CHAIRMAN EISENSTATT: Do you think, Chick, that we ought to amend it by saying that they cooperate and coordinate with the Committee on Legislation?

MR. ADAMS: Well, those are the thoughts that are on top of my head, Mr. Chairman. I haven't got it formulated.

CHAIRMAN EISENSTATT: I would have the same suggestion, that there be coordination between this special committee and our legislative committee on this. I don't think the word coordination would restrict it in any way, but at least our legislative committee should be aware of what is going on by any segment of this Association.

MR. ADAMS: My thinking was this, that we may be establishing a precedent in creating a special committee to deal with special areas of legislation when our legislative committee, on the other hand, might not be fully aware of what was actually taking place. I believe it is important that our over-all legislative committee be our guiding functionary in all matters of legislation, whether we are sponsoring or whether we are opposing. So would you consider an amendment to the effect that they coordinate their efforts with the general Committee on Legislation?

MR. BRUCKNER: Yes.

CHAIRMAN EISENSTATT: Will the second and the mover of the motion accept the amendment?

MR. DALTON: Yes.

MR. BRUCKNER: Yes.

CHAIRMAN EISENSTATT: I now call for the question as amended. All those in favor signify by saying "aye"; all opposed. The motion is carried.

MR. BRUCKNER: Now I move the adoption of the second resolution with respect to the Keeton-O'Connell Plan.

CHAIRMAN EISENSTATT: We adopted both of them.

MR. BRUCKNER: Oh, you did both? Very efficient!

CHAIRMAN EISENSTATT: Thank you.

Mr. Rock, did Mr. Kutak get his report in yet? The next item is No. 13. Because the report was not included in the printed program we put it on the agenda and Mr. Kutak, the chairman, has asked that the following report be made.

## SUMMARY OF REPORT OF SPECIAL COMMITTEE ON THE FEDERAL CRIMINAL JUSTICE ACT

Robert J. Kutak, Chairman

CHAIRMAN EISENSTATT: The Special Committee on the Federal Criminal Justice Act principally concerned itself with proposed amendments to the act as suggested by experience with the act in Nebraska. The evaluation was made in conjunction with a national study undertaken by the Judicial Conference of the United States and the United States Department of Justice.

Our committee met with Chief Judge Richard E. Robinson, Judge Robert Van Pelt, and Richard C. Peck, Clerk of the Court, to discuss

the practices followed and the impressions gained through the administration of the act. This information was pooled with reports from other federal districts, out of which developed a number of specific revisions of the act which were introduced in the form of a bill (S. 4182) by Senator Hruska this year. It is anticipated that the bill will be passed by the Congress next year. The committee therefore has a continuing and growing responsibility in the months ahead in cooperating with the federal district court and the Bar in the common effort to assure more adequate representation of defendants in criminal cases who are financially unable to obtain counsel.

### **Report of the Special Committee on The Federal Criminal Justice Act**

The Criminal Justice Act was enacted by the Congress in 1964 in response to a growing awareness and concern that the poor were not receiving adequate representation in federal criminal cases. The distinctive feature of the act was that it permitted each district to determine for itself the method by which more adequate representation would be made available while enlarging generally the range of defense services. One highly controversial method, extensively considered, was at the last minute deleted from the bill. This was a system of public defenders. However, the Congress expressly invited the courts to evaluate their experience without this alternative and to advise, on that basis, whether a public defender system would nevertheless appear practicable and economical.

The act has been in operation for three years. It is estimated that more than 60,000 defendants have been furnished representation under its terms. In the process, and in some respects as a result, a major rethinking about the system of criminal justice has occurred. It is now time to measure the impact of the act on the system to determine to what extent the quality of representation has improved. It is time to review and possibly revise some of the provisions of the act so that they will conform to prevailing case law. It is time to probe again the value of a defender system, public or private, as a workable and desirable alternative.

The Judicial Conference of the United States, in conjunction with the United States Department of Justice, recently undertook an extensive survey of the operation of the act. The survey, under the direction of Professor Dallin Oaks of the University of Chicago Law School, will shortly be published as a United States Senate Judiciary Committee document. The findings it contained formed a set of guidelines by which our committee could evaluate the

experience under the act in Nebraska. Our committee met this year with Chief Judge Richard E. Robinson, Judge Robert Van Pelt, and Richard C. Peck, Clerk of the District Court, to discuss the policies and practices of the district.

Mentioning briefly a few of the areas covered in our discussions, it was apparent that considerable confusion exists among the members of the bar as to the limits in the amount of compensation allowable. This was attributed in part to the voucher form, which emphasized the number of hours expended and not the maximum amount provided, and in part to a misunderstanding about the application of the so-called "extraordinary circumstances" rule. One urgent need brought to the attention of the committee was the revision of the panel of attorneys designated by the court. The services other than counsel, provided for under subsection "e" of the act, were considered under-utilized. No problems were reported regarding the continuity of representation, even though the district has wide geographical reaches. Neither had the Miranda type situations presented a difficulty despite the inadequacy of coverage of the act on this point. Lack of familiarity with the act, more than any one other single factor, explains its limited utilization by the bar in this district. One suggestion to overcome this was that a portion of the Bridge-the-Gap Institute for young lawyers be devoted to the act.

The information and observations of the committee were pooled with reports from other federal districts, and from them all a number of specific recommendations for amending the act emerged. These proposals were incorporated in a bill sponsored in the Senate this year by Senator Roman Hruska. They included, among other things, increasing the rate of compensation, revising the standards for excess payments, extending the coverage to probation revocations and appointments made after arrest but prior to arraignment, including the cost of transcripts as a reimbursable expense, and providing compensation when representation is required in connection with habeas corpus and Section 2255 matters which are technically civil in nature. These and other recommendations were supported by the Judicial Conference of the United States during its September meeting this year. It is anticipated that the bill, S. 4182, will be passed by the Congress next year.

The role of the Bar in providing counsel for those persons financially unable to obtain representation in criminal cases is, of course, traditional. The increasing concern about the availability and adequacy of such representation, demonstrated by the Bar's leadership in the development and improvement of the act, is a

tribute to our profession. However, there is much unfinished work lying ahead. The committee looks forward to the continuation of its endeavors to more fully implement the act in this district. Accordingly, it is recommended that the committee be continued.

Robert J. Kutak, Chairman  
Charles W. Baskins  
John C. Baylor  
Robert H. Berkshire  
Patrick L. Cooney  
Gerald E. Matzke  
Donald W. Pederson  
C. M. Pierson  
Francis L. Winner

**CHAIRMAN EISENSTATT:** I now ask that the report of the Special Committee on the Federal Criminal Justice Act be adopted and that the committee be continued. Do I hear a motion?

**ARCHIBALD J. WEAVER:** I'll so move.

**CHAIRMAN EISENSTATT:** Second?

**HAROLD L. ROCK:** I second it.

**CHAIRMAN EISENSTATT:** All those in favor please signify by saying "aye"; all opposed. The motion is carried.

Do we have a representative here from the Real Estate, Probate and Trust Law Section? We will pass over No. 14.

The Section on Taxation, Mr. Thomas Burke. While Mr. Burke is coming up, I think our proceedings should note that several additional members of the House have arrived since the original roll call and that we have been deliberating for the past hour at least with substantially more than the original number.

## **REPORT OF SECTION ON TAXATION**

**Thomas R. Burke**

Mr. Chairman, as chairman of the Section on Taxation, I submit the following report:

1. We have assisted the Committee on Legal Education and Continuing Legal Education in its work—preparing the program for this annual meeting and putting together the Estate Administration Manual. I commend the Manual to each of you and I ask that you give particular credit to Mr. Deryl Hamann who has worked I don't know how many hours on the details of putting that together. It was over two years in the making.

2. We have assisted the Nebraska State Tax Commissioner, in cooperation with the Nebraska Society of CPAs, in

- (a) The drafting of regulations to implement the income tax law—and we find this morning that that probably will turn out to be worthwhile;
- (b) In working out satisfactory procedures to more effectively implement the income tax law.

3. Co-sponsoring the Great Plains Federal Tax Institute at the Nebraska Center for Continuing Education, which this year is scheduled for December 2 and 3, 1968—and once again I urge each of you to plan to attend in Lincoln on those dates. This will be an outstanding institute. It has now, I believe, become one of the outstanding tax institutes in the country and has gained that type of recognition.

4. Sponsoring the Institute on Taxation out-state. We at this time no longer sponsor an institute locally, separate from the CPAs, but we do continue to sponsor an out-state tax institute.

This year the institute will be held on December 13 at Sidney, Nebraska, and December 14 at Grand Island, Nebraska. The program is assembled. The materials are being prepared for the handout, and the committee members are at work urging the out-state lawyers particularly to support this institute. The big problem seems to be in getting the lawyers to turn out, and we are going to make a Herculean effort this year to get these people to the institute so we can have some argument to continue the out-state institute with our Executive Council.

5. In perpetuating the liaison with the Nebraska Society of Certified Public Accountants in connection with their Public Relations Committee—Subcommittee on Cooperation with the Legal Profession.

Your present chairman and secretary, Robert G. Simmons, Jr., will continue to function through the end of this calendar year in order to carry out these institutes.

The new officers will be elected and a supplemental report will be filed with the Chairman of the House indicating those people.

Mr. Chairman, I move the adoption of this report.

CHAIRMAN EISENSTATT: Do I hear a second?

HOWARD H. MOLDENHAUER: I second it.



CHAIRMAN EISENSTATT: Any discussion? All those in favor signify by saying "aye"; opposed. The motion is carried.

Next is the report of the Section on Practice and Procedure. Is Mr. Knapp or a representative here?

## REPORT OF SECTION ON PRACTICE AND PROCEDURE

James M. Knapp

Mr. Chairman, Members of the House of Delegates: The newly elected members and officers of the Executive Committee of the Section on Practice and Procedure for the year 1969 and the year each person's term expires are as follows:

|   |      |
|---|------|
| Kenneth H. Elson, Grand Island, Chairman    | 1970 |
| William P. Mueller, Ogallala, Vice-Chairman | 1971 |
| Warren K. Urbom, Lincoln, Secretary         | 1971 |
| Thomas A. Walsh, Jr., Omaha                 | 1970 |
| Harold W. Kay, North Platte                 | 1969 |
| James M. Knapp, Kearney                     | 1969 |

During the past year your Section on Practice and Procedure collaborated and cooperated with the law schools in preparing and submitting to the Supreme Court the proposed rule of the Supreme Court relative to legal practice by approved senior law students. That rule is now in the hands of Judge Spencer, chairman of the Court's committee. We expect activity or action on that within the next few months.

Although this section was charged with no special program obligation, such as program preparation, by the Association this year, members of the section, both at individual section meetings and through correspondence, have evidenced strong concern with reference to the need for recodification of the Nebraska statutes on practice and procedure.

The section recommends to this House that an immediate and expanded effort by the appropriate committee and/or section be undertaken for the recodification of the Nebraska statutes on practice and procedure in both criminal and civil areas.

In the event this House later today or even next year rules favorably on the recommendations of the Special Committee on Reorganization that you will hear, it would appear that the Committee on Procedure under the Division of Internal Standards would be the body charged with the responsibility of any expanded effort dealing with revision or recodification of our statutes on practice and procedure.

Assuming this House does approve the recommendations of the Reorganization Committee, this section recommends that members of the Committee on Procedure of Division 2 be appointed for terms of office not less than three years. The purpose of this recommendation, of course, is to provide for continuity of membership on this committee which is undertaking what we feel is a vitally urgent task. Frankly, it is the feeling of the members of the current Section on Practice and Procedure that such an undertaking will require at least five to seven years time before completion and adoption in the state.

On the other hand, should this House, for some reason or another, decline to accept the recommendations of reorganization submitted by the Reorganization Committee, then this section recommends that the Section on Practice and Procedure and the Committee on Practice and Procedure be consolidated into one group. The Section on Practice and Procedure and the Committee on Practice and Procedure, for all practical purposes, invariably handle and deal with the same matters and with the same subjects of revisions and recommendations having to do with statutes on practice and procedure.

Again, for the purposes of continuity, the section recommends to the House that the terms of members on any such consolidated committee and/or section be not less than three years.

Mr. Chairman, that comprises the report of the section. We submit it and recommend its approval. I move adoption of the report.

CHAIRMAN EISENSTATT: The Chair inquires whether you can report on your section officers.

MR. KNAPP: I just did at the outset of my report. We took the important part first.

CHAIRMAN EISENSTATT: All right, do I hear a second?

HAROLD L. ROCK: I second it.

CHAIRMAN EISENSTATT: Is there any discussion? All those in favor signify by saying "aye"; all opposed. The motion is carried and the report is adopted.

The next item on the agenda is the report of the Section on Insurance, Banking, Corporate and Commercial Law. The chairman, Mr. Bert Overcash, indicated he would not be present and that the section did not have anything to report. I think the record should show that the officers and Executive Committee are probably the same, but Mr. Overcash will have to be contacted to determine that.

No. 19, the report of the Young Lawyers Section. Mr. Campbell, the chairman of the Young Lawyers Section, was unable to be present and he submitted his report in writing, which I will cover:

### REPORT OF YOUNG LAWYERS SECTION

**William G. Campbell, Chairman**

The business year of the Young Lawyers Section commenced October 18, 1967, under the direction of a six-member executive council made up of William G. Campbell, Chairman; Richard A. Huebner, Vice-Chairman; Donald R. Treadway, Secretary-Treasurer; Glen A. Burbridge, Jeffre P. Chevront, and John C. Gourlay.

The section sponsored two major continuing legal education programs:

1. Bridge-the-Gap Institute held at the Kellogg Center in Lincoln on June 17 and 18, 1968, for the benefit of law school graduates. Thirteen outstanding Nebraska lawyers appeared on the program which was chaired by Jeffre Chevront, a member of the Young Lawyers Section Executive Council. Eighty-one graduates enrolled for the program which represented the largest attendance in the seven-year history of the institute and a 25 per cent increase over the 1967 institute. The registration charge was lowered to \$10.00 in an effort to make attendance as economical as possible for the graduates. With the good fortune of having a large turnout, the section is pleased to report that the institute operated on a break-even basis.

2. The Institute on Will and Trust Drafting held in conjunction with the University of Nebraska College of Law on September 13 and 14, 1968, at the Cornhusker Hotel in Lincoln. The program was chaired by Glen A. Burbridge, a member of the Executive Council of the Young Lawyers Section. Over 300 lawyers from 60 Nebraska communities registered for the event. Attendance was up nearly 100 per cent over prior years. The program was made a part of the annual meeting of the Wyoming State Bar Association and a delegation of approximately 30 Wyoming lawyers chartered a plane at the close of the Wyoming State Bar meeting and traveled to Lincoln.

In addition to the continuing legal education activities of the section, we also cooperated with the Public Service Committee of the Nebraska State Bar Association in providing Law Day chairmen for the state-wide Law Day program carried on by the Public Service Committee. We understand that with the assistance of the Young Lawyers Section, 71 of the 93 counties had chairmen, which represented a new high.

The section accepted the co-sponsorship of the Regional Moot Court Competition together with the Creighton and Nebraska Colleges of Law. The competition will be held in Omaha November 14, 15, and 16. The section will host schools from Nebraska, North and South Dakota, Minnesota, Wisconsin, and Iowa. Eight to ten law schools will send two teams each for three rounds of competition. Larry W. Myers is coordinating the event on behalf of the section. He has enlisted the volunteer aid of over 30 lawyers and judges to assist with the competition.

The section sent two delegates and one alternate to the American Bar Association meeting in Philadelphia as representatives of the Nebraska Young Lawyers Section to the Young Lawyers Section of the American Bar Association.

At a business meeting held September 13 in Lincoln, elections were held to fill two vacancies created by the retirement of the senior members of the committee. Those elected to serve a three-year term were Con M. Keating of Lincoln and Jeffrey H. Jacobsen of Kearney.

I now move that the report be adopted. Is there anything additional, Mr. Turner?

The officers of the committee are:

John C. Gourlay, Chairman, Lincoln

Glen A. Burbridge, Vice-Chairman, Omaha

Jeffre P. Cheuvront, Secretary-Treasurer, Lincoln

Other members of the Executive Council for the coming year are:

Donald R. Treadway, Fullerton

Jeffrey H. Jacobsen, Kearney

Con M. Keating, Lincoln

I don't think the chairman ought to be moving adoption of a report. I retract it. Mr. Leininger, do you move the adoption of the report?

VANCE E. LEININGER: I so move.

CHAIRMAN EISENSTATT: Do I hear a second?

BERNARD PTAK: I second the motion.

CHAIRMAN EISENSTATT: Any discussion? All those in favor please signify by saying "aye"; all opposed. The motion is carried.

I would like to get one more committee report and one other item out of the way before we adjourn. Is Mr. Reddish present? Item No. 20 is the report of the Committee on Unauthorized Practice.

**REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE****Albert T. Reddish**

The report appears on page 24. The recommendations are there.

The one point open in the report was under debt adjustment. The Secretary of State had requested an opinion of the Attorney General with respect to enforcement of the Debt Management Licensing Act which was scheduled to become effective January 1, 1969. I am informed the Attorney General's office advised the Secretary of State that it had rendered its opinion on the Debt Management Licensing Act in 1965 when it gave its opinion that the act was unconstitutional and that it felt no further opinion was necessary. It did approve the form of bond which had been submitted.

The recommendations of the committee are repeat recommendations. The first two are perhaps a result of failure in communication of our committee with the Legislation Committee because we have made these recommendations and they have been approved by the House before:

1. Appropriate amendments of the Collection Agency Act and of Section 28-745, R.R.S., Nebraska, to prohibit simulation of government agency forms as a collection device.

Then a related recommendation:

2. Amending Section 28-746 to prohibit use of provisional remedies to enforce a judgment where simulated court or government agency process has been resorted to, whether or not there has been conviction under Section 28-745.

The third recommendation also is a repeat recommendation, that:

3. The committee's recommendations with respect to conference committees, including their status as standing committees of the Association and the qualifications for membership, be implemented.

This of course is within the scope of reorganization, which is presently being studied, and we have made certain comments on this question and submitted them to Herman Ginsburg on receiving the temporary report of the Committee on Reorganization.

I do move the adoption of the report of the Committee on Unauthorized Practice of Law.

**CHAIRMAN EISENSTATT:** Do I hear a second?

JAMES M. KNAPP: I second the motion.

CHAIRMAN EISENSTATT: Are there any questions or any discussion? All those in favor signify by saying "aye"; all opposed. The motion is carried.

[The report of the committee follows.]

### **Report of the Committee on Unauthorized Practice of Law**

**ESTATE PLANNING.** Last year the committee reported that counsel was retained to investigate two complaints. One involved a mutual fund salesman who has since left Nebraska. The other involved an insurance agent. The investigation has been hampered because the complainant has failed to respond to requests for more detailed information. Field investigation, however, has failed to reveal any overt abuse requiring action.

**SIMULATED PROCESS.** The committee recommends the Collection Agency Act be amended to prohibit use of forms simulating notices of any state or federal government agency, as well as court process. The committee has also suggested to the Secretary of State that the rules of the Nebraska Collection Agency Board be broadened to prohibit simulating of state or federal government agency forms.

Forms simulating court process have substantially disappeared in Nebraska. Foreign firms have, however, resorted to such forms in collection procedures against Nebraska residents. The Secretary of State's office has proved extremely helpful in curbing this activity through informing the foreign firm that it must be licensed in Nebraska to attempt to make collections in Nebraska. The committee continues to believe that Section 28-746 should be amended to prohibit a person who has resorted to simulated process from availing himself of provisional remedies to enforce the debt involved, regardless of conviction of violation of Section 28-745. The committee further believes that Section 28-745 should be broadened to encompass simulating forms of any state or federal government agency.

**DEBT ADJUSTMENT.** The Debt Management Licensing Act is scheduled to become effective January 1, 1969. The Secretary of State has requested an opinion of the Attorney General with respect to its enforcement. This opinion should be released before the annual meeting of the Bar Association.

Meanwhile, the committee continues to study some means of court-supervised debt consolidation, but this has not developed sufficiently to have a program for submission at this time.

CONFERENCE COMMITTEES. The committee continues to believe that conference committees should be standing committees within the Bar Association with appropriate liaison between the conference committees and the Unauthorized Practice Committee. Without such liaison the purpose of such conference committees is defeated.

RECOMMENDATIONS. The committee recommends:

1. **Appropriate amendments of the Collection Agency Act and of Section 28-745 R.R.S., Nebraska, to prohibit simulation of government agency forms as a collection device.**
2. **Amending Section 28-746 to prohibit use of provisional remedies to enforce a judgment where simulated court or government agency process has been resorted to, whether or not there has been conviction under Section 28-745.**
3. **The committee's recommendations with respect to conference committees, including their status as standing committees of the Association and the qualifications for membership, be implemented.**

Albert T. Reddish, Chairman  
Bevin B. Bump  
Joseph C. Byrne  
Salvadore Carta  
Edward F. Carter, Jr.  
Raymond M. Crossman, Jr.  
John P. Ford  
J. Taylor Greer  
LaVerne H. Hansen  
Richard Halbert  
Francis J. Kneiff  
Peter E. Marchetti  
August Ross  
Edward Shafton  
Bernard Sprague  
Ronald G. Sutter  
J. Marvin Weems

CHAIRMAN EISENSTATT: Now Mr. Begley has asked permission to present a resolution with respect to a prior report that has been made, which deals with the report of the Committee on Crime and Delinquency Prevention. I think he has heard from the county attorneys on this matter. Is there any objection to inserting this on the calendar? Hearing none, you may proceed.

JAMES F. BEGLEY: This is in reference to the report of the Committee on Crime and Delinquency Prevention on page 17 and their Recommendation No. 2.

The County Attorneys Association has just passed this resolution:

WHEREAS the Nebraska State Bar Association Committee on Crime and Delinquency Prevention has recommended that the office of County Attorney as it now exists be abolished and that a District Attorney system be established, under which system the prosecutor will be a state official and shall have area jurisdiction co-existent with the Judicial Districts; and

WHEREAS the Nebraska County Attorneys Association has considered this proposal for several years, even before the Bar committee's recommendation, it appears proper that the Nebraska County Attorneys Association make known its position in this matter; now, therefore, be it

RESOLVED that a change from the present system of County Attorneys to a system of District Attorneys would not benefit law enforcement in this state but would, indeed, result in less efficient enforcement of law at a greater cost to the taxpayers: Our state is composed of 93 counties each with their own County Sheriff, County Judge, and County offices, and that to consolidate the office of prosecutor without consolidating the other office is impractical. It should be noted that some of our judicial districts are made up of as many as ten counties and that one prosecutor in such a district could not possibly investigate and prosecute criminal acts in so vast an area effectively. For example, a homicide could take place in one part of the district and the prosecutor could be many miles away. The proponents of the plan answer this by saying that part-time Assistant District Attorneys will be appointed in each county. Of course if this is done, we are back to "so-called" part-time prosecutors.

IT IS FURTHER RESOLVED that if the District Attorney is appointed by a state official, as advocated, it would lodge a tremendous power in this state official. We feel the independence of the prosecutor is as important as the independence of the judiciary, and he should not be controlled by the State House, and his actions and tenure should not be controlled by a state official.

As a whole, we feel that the prosecution of criminal matters is handled in a satisfactory manner by the County Attorneys of Nebraska and that the County Attorney system should not be abandoned because of dissatisfaction with a particular county attorney, rather the Legislature should set a higher minimum salary for the County Attorneys in those counties where the County Board refuses to pay enough to attract worthwhile candidates for the County Attorney's office.

This resolution passed upon motion duly made and seconded by the Nebraska County Attorneys Association at their annual meeting in Omaha, Nebraska this 6th day of November, 1968.

(Signed) Robert E. Sullivan, Secretary

In view of this report, and in order that they might be sure that I not mislead you, Mr. Knowles and the County Attorney from Douglas County accompanied me to see that I gave it to you straight.

I would move that Recommendation No. 2 of the report of the Committee on Crime and Delinquency Prevention be tabled.



JOHN J. SULLIVAN: Mr. Chairman, I would second that motion.

CHAIRMAN EISENSTATT: Did you vote with the majority on that, Mr. Begley?

MR. BEGLEY: Did I? Yes sir.

CHAIRMAN EISENSTATT: O.K. You are in order. It has been moved and seconded that the second recommendation appearing on page 18 of the program, included in the report of the Committee on Crime and Delinquency Prevention, be tabled. Any discussion? No discussion! All those in favor of the motion please signify by saying "aye"; all opposed. The motion is carried. The item is tabled.

Mr. Wilson, how long would your report be? John J. Wilson. All right, we have about five minutes, according to my clock, before the noon hour.

I now call for Item No. 22, the report of our American Bar representative, John J. Wilson. I have asked as a personal matter that this be done for the purpose of better exploiting the activities of the American Bar Association, and that this House have some idea of the crucial items that are going on in the American Bar that directly affect us. So I've asked Mr. Wilson to make an additional report to this House.

### REPORT OF ABA REPRESENTATIVE

John J. Wilson

Mr. Chairman, Members of the House: The American Bar Association is made up of lawyers for lawyers. As of September 30, 1968, the American Bar Association had 134,056 members. This shows a gain of about 7,500 members during the past year. On October 30, 1968, there were 297,285 lawyers in the United States. This shows more than 45 per cent were members of the American Bar Association. Nebraska showed a membership of active practitioners of about 2,400 of which 1,241 were members of the ABA.

There are 27 standing committees and 30 special committees of the American Bar, which are in addition to 20 dues-paying sections. The Young Lawyers' Section has more than 40,000 non-dues paying members.

William T. Gossett of Detroit, Michigan, became the 92nd President of the Association and will address the members of the Nebraska Bar Association at the noon luncheon on Thursday.

Bernard G. Segal of Philadelphia was elected President-Elect.

Barnabas F. Sears of Chicago was elected Chairman of the House of Delegates for a two-year term.

Climaxing one of the Association's most active and eventful years, the 91st annual meeting of the American Bar Association and affiliated organizations sessions attracted more than 6,000 lawyers and judges to Philadelphia last month for a varied program touching the full range of subjects that concern the bar and the nation. Including families and guests of registrants, the over-all attendance topped 13,000.

The meeting provided a colorful showcase of ABA activities. Trends in every field of law were examined in scores of section and committee sessions. Urgent public issues had prominent places on the program, among them urban problems, crime and law enforcement, protest and dissent, public disorders, and improvement of the criminal law process.

It was a meeting with a new look. For the first time most of the professional programs were concentrated in the Philadelphia Civic Center. A fleet of chartered buses shuttled registrants to and from the Center from a dozen center-city hotels. The central location increased the accessibility of more programs for the attendees.

In its four-day meeting the policy-making House of Delegates dealt with more than 100 reports and recommendations from the sections and committees. The delegates approved four additional reports in the *Minimum Standards of Criminal Justice* series, clearing the way for completing that massive five-year project in 1969. Also approved was the significant new Consumer Credit Code drafted by the National Conference of Commissioners on Uniform State Laws for submission to the state legislatures starting next year. Designed to protect the public against credit abuses, it has been called more stringent than the recently enacted federal Trust in Lending Act, and comparable in magnitude to the uniform commercial code enacted in 48 of the 50 states.

In addition, the House heard a discussion of the Group Legal Services proposal, but deferred action on it until next year. On the issue of recognizing the certifying specialists, the delegates were informed of the scheduled release in October of a tentative position report by the ABA panel studying that controversial subject.

The Managing Committee on the ABA Fund for Legal Education reported that 2,700 loans to law students have been made totaling over \$2,700,000. The committee also reported that it received an additional \$50,000 contribution from the American Bar Endowment for the loan guaranty fund.

Association membership is expected to increase by 12,000 during 1968-69 reported the Standing Committee on Membership.

The House voted 112-104 to defer consideration for one year of a proposal that the Association contract with the Continental Insurance Company of New York to establish a bar-related title assurance corporation to issue title insurance to the public only through lawyers. This action was taken in order to allow completion of an American Bar Foundation study of this subject and to await recommendations of a recently formed National Conference of Lawyers and Title Insurance Companies and Abstracters.

The Special Committee on Automobile Accident Reparations reported it has unanimously adopted an outline of study and expects to present a final report containing short- and long-term recommendations.

Six uniform acts recommended by the National Conference of Commissioners on Uniform State Laws were approved by the House including a proposed Uniform Consumer Credit Code. A motion to defer action on the consumer measure was defeated after lengthy debate 112-87. The other acts approved were: The Uniform Recognition of Acknowledgments Act; Uniform Juvenile Court Act; Uniform Child Custody Jurisdiction Act; Uniform Anatomical Gift Act; and the Revised Uniform Reciprocal Enforcement of Support Act.

The ABA Law Student Division totals 13,198 members and its goal for the coming year is 24,000. The division is preparing a series of urban law seminars in major U.S. cities during the spring of 1969 for students interested in serving in legal service programs of metropolitan areas.

*Selected Articles on Federal Securities Law*, a 900-page collection of practical materials, has been published by the Section of Corporation, Banking and Business Law. The hard-cover volume includes 40 articles. Eighty per cent of them have been updated, supplemented, or rewritten to reflect recent changes in the law. Copies are available at \$12.00 per copy, or \$10.00 each for orders of three or more. The book will be made available to law students or to professors for class use at \$6.00 per copy. Orders should be addressed to the Division of Legal Practice and Education, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.

The dues are only \$30.00 per year. Joining of sections is optional. The dues of the various sections vary. Any member of the ABA will be glad to sponsor your membership, and should anyone be embarrassed, remember I am the representative of the Nebraska

State Bar Association to the ABA and will be happy to be your sponsor.

Nebraska is represented in the House of Delegates at this time by four members:

George H. Turner, who is the state delegate and is elected by the members of the ABA in Nebraska;

I am the representative of the Nebraska State Bar Association, and am elected by the members of the Association;

Clarence Davis has a membership of two years as having finished his term on the Board of Governors; and

Louis Shull, elected in Honolulu as a delegate-at-large is now in the armed forces and is stationed in Germany.

I will welcome the opportunity to visit with any lawyer who would like to know more about the ABA and hope that many will contact me for membership. I thank you.

CHAIRMAN EISENSTATT: Does anybody have any questions with respect to what is going on in the ABA and what our representative has done? The report is accepted.

. . . The session adjourned at twelve-five o'clock . . .

### WEDNESDAY AFTERNOON SESSION

November 6, 1968

The afternoon session of the House of Delegates was called to order at two o'clock by Chairman Eisenstatt.

CHAIRMAN EISENSTATT: I would like to call the afternoon session of the House of Delegates to order.

I would like now to go to Item No. 21 on the calendar, the report of the Special Committee on Cooperation with the American Law Institute. Ed McEachen, who is the chairman, is out of town. He has sent his substitute, Justice Hale McCown. Justice McCown, would you present the report of the special committee?

### REPORT OF COMMITTEE ON COOPERATION WITH THE AMERICAN LAW INSTITUTE

Edmund D. McEachen, Chairman

JUSTICE HALE MCCOWN: The Nebraska Bar Association was well represented at the annual meeting of the American Law Institute in May 1968. Those attending as elected and ex-officio

members of the institute were Henry M. Grether, Jr., Dean of the University of Nebraska College of Law; C. Russell Mattson, President of this Association; Flavel A. Wright; Clarence A. Davis; Laurens Williams; the chairman of your committee, Edmund D. McEachen; and myself.

At the meeting a day was spent in discussion of the *Study of Division of Jurisdiction Between State and Federal Courts*, half a day was spent in discussion of *A Model Land Development Code*, a day was spent in discussion of *Proposed Recommendations with Respect to Federal Estate and Gift Taxation*, and a day was spent in discussion of the *Restatement of the Law, Second, Conflict of Laws*, and half a day was spent in discussion of the *Restatement of the Law, Second, Contracts*.

Possibly the most far-reaching action of the institute at this meeting was adoption of recommendations concerning revision of federal estate and gift tax laws, which, if implemented, would result in extensive changes in these laws and basic approaches to federal estate and gift taxation. Representatives of this Association participated in the discussion of this study and in the discussions of the other subjects presented. It is felt that such participation by practicing lawyers, in expressing practical thought and contributing knowledge of the peculiarities of local law in the various states, is of great value to the institute and to the bar.

The institute is continuing its work on the Model Penal Code. Although not finalized, this code has been used in the drafting of revisions of penal codes in a number of states and was extensively used in development of the Criminal Code of the City of Omaha which was adopted in 1967.

For those of you who ever read dissents in Nebraska Supreme Court opinions, you might refer to mine in the condition of the Criminal Code of Nebraska.

Also the studies of this Model Penal Code have been used extensively by the ad hoc committee appointed by the Governor of Nebraska to study crime control and criminal justice, and your chairman has assisted in providing to the committee certain out-of-print tentative drafts of the code for its use.

The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association has continued to work toward continuing education of lawyers, developing study materials and encouraging development and growth of state organizations for continuing legal education, with professional directors and staff. At the present time, well over half of

the states have such organizations, including our neighbors—Colorado, Kansas, and Missouri. Development of such an organization, and further efforts in continuing legal education for members of the Nebraska bar, are matters which your committee believes should receive continuing study by this Association.

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.

Your committee feels that the committee and its work should be continued and that the Nebraska Bar Association should continue to be represented at meetings of the American Law Institute by a liaison member. The *Restatements* and other studies of the institute have enormous impact in the courts and on the laws throughout the nation, and it is most important that this state be represented in the studies conducted by the institute. The committee recommends that the committee and its work be continued.

We respectfully submit the report.

CHAIRMAN EISENSTATT: Do I have a motion to accept the committee's report?

R. L. SMITH: I so move.

CHAIRMAN EISENSTATT: Second?

LEO CLINCH: I second the motion.

CHAIRMAN EISENSTATT: Any questions of the substitute for the committee chairman? All those in favor please signify by saying "aye"; all opposed. The motion is carried.

Do we have a representative here yet to make any kind of report for the Real Estate, Probate and Trust Law Section? All right, that is the last time I'll ask that.

Next we'll go to Item No. 23 for the report of the Special Committee on Legal Economics and Law Office Management, Howard Moldenhauer, Chairman.

#### REPORT OF SPECIAL COMMITTEE ON LEGAL ECONOMICS AND LAW OFFICE MANAGEMENT

Howard H. Moldenhauer

Mr. Chairman and Members of the House: I will not repeat the items in the report, which merely summarize the activities of this committee during the past year. I would mention, however, that

Exhibit A is the report of the special committee which did a study at the request of President Mattson for the Executive Council. This report has been submitted to the Executive Council and I understand they may have taken some action this noon, but that report is purely informative and does not call for action on the part of the House.

The one item which we would like to take up is the study of the subject of professional incorporation. Our committee has spent a great deal of time during the past year studying this subject. As many of you may know, there has been a lot of activity in the courts in connection with the tax implications of professional incorporations, and this has in part precipitated this study by our committee. At the present time there have been four different United States district court decisions, two from the Fifth Circuit, one from the Sixth Circuit, and one from the Tenth Circuit, which have held that professional incorporations are valid for tax purposes, and that the corporation provisions of the tax laws will apply to them.

Also they have held that the Kintner Regulations of the Department of Revenue in these cases were not valid. One of these cases specifically involves an association of lawyers. This is out in Colorado. It is the *Empey* case, which is mentioned in the report. It was argued before the Tenth Circuit on the first of October, and they expect a decision in three to six months. However, in that case amicus curiae briefs were filed by the Kansas State Bar Association, the Colorado State Bar Association, and the Oklahoma State Bar Association, all of them in favor of the validity of the professional incorporation.

At the present time in Nebraska as far as professional incorporations are concerned, there is a 1905 case concerning doctors, and an Attorney General's opinion in 1947 concerning dentists, which seemed to hold that a corporation may furnish services of its member physicians or dentists.

There has been a great deal of consideration of professional incorporations among the medical profession, in large part because of the articles in the *Medical Economics News*, which I understand is sort of the doctors' Bible, and many doctors in the last several months have become extremely excited about the possibility of saving tax dollars through incorporating. And there are some in Nebraska. You will note in the report at the present time there are at least 35 states which, by legislation or rule of court, permit practice by professional incorporations. It is not an unusual thing.

After studying this matter very carefully, the committee drafted a proposed Nebraska Professional Corporation Act, and this act would apply to professional incorporations. I will just briefly summarize it for you because we didn't include a copy of the act, which is rather lengthy, in the report. A copy was submitted to the Executive Council at the June meeting and they evidently did not have time to act on it, so we have decided to bring up the subject here.

The Professional Corporation Act specifically provides that it would not apply to attorneys except upon adoption of a court rule. So the act would apply to other corporations which would be organized for professionals who are required to be licensed to practice their profession. It is deemed helpful because, as it is now, the only restrictions on a professional corporation, or the only provisions which would apply to them, would be the general provisions of the Nebraska Business Corporation Act. Under the Professional Act there would be requirements that every shareholder, officer, and director be licensed to practice his particular profession. There are some added safeguards to the public because of the type of service which is performed. Only one type of service could be performed by the corporation. There would be adequate identification in the corporate name of the professional association. Only those offices designated by street address in the articles could be places where the services could be performed. Added restrictions which are informative to the public and restrictive of those who could have membership—shares could be issued only to those licensed to render services; no person could be an officer, director, or shareholder of more than one such professional corporation; there would have to be a requirement of redemption of stock in the event of death of one of the participants; there would be a requirement of filing of a registration certificate each year certifying that all members of the corporation were duly licensed to practice their profession—additional safeguards which don't appear now.

We have drafted such an act and I have a copy here which I will submit to Chairman Eisenstatt.

In addition to that act, the committee has drafted a proposed rule for submission to the Supreme Court for consideration and adoption. It was decided by the committee that there would be problems for lawyers under the present system to incorporate and that the proper procedure would be to submit a proposed rule to the Supreme Court for its consideration.

I would like to read that rule to you, since under our rules creating, controlling, and regulating the State Bar Association a



recommendation for an amendment not recommended by the Executive Council must be submitted in writing to a regular meeting of the House. I have it in writing here, and unless approved by a vote of two-thirds of the members of the House present, shall lie over and not be acted upon until the next meeting. So, as I understand it, if not acted upon today, this proposed rule would automatically lie over and be taken up at the next meeting of the House of Delegates. But at least this will get the ball off the ground.

Mr. Chairman, should I read this rule? I want to get it submitted properly. The rule is about three pages long, and I prefer to get it to you by other than reading but I don't know of any other way that we can get this information before you.

CHAIRMAN EISENSTATT: Well, is it possible to summarize it?

MR. MOLDENHAUER: I didn't draw it, Leo. Bob Munro of Kearney was very instrumental in preparation of this and I had hoped he could be here today but he couldn't make it.

Ben, are you familiar with this rule? Could you summarize it, or would you rather I went ahead and read it?

BENJAMIN M. WALL, Omaha: I don't think you could fairly apprise anybody by a summary.

MR. MOLDENHAUER: Well, let me read it, since this what our rules provide.

## RULE PROPOSED FOR SUBMISSION TO THE SUPREME COURT FOR ITS CONSIDERATION AND ADOPTION

### I.

#### PROFESSIONAL SERVICE CORPORATIONS

Lawyers may incorporate for the practice of law under the Nebraska Professional Corporation Act, providing that such corporations are organized and operated in accordance with the provisions of this Rule. The articles of incorporation of such corporations shall contain provisions complying with the following requirements:

A. The corporation shall be organized solely for the purpose of conducting the practice of law only through persons qualified to practice law in the State of Nebraska.

B. The corporation may exercise the powers and privileges conferred upon corporations by the laws of Nebraska only in furtherance of and subject to its corporate purpose.

C. All shareholders of the corporation shall be persons duly licensed by the Supreme Court of the State of Nebraska to practice law in the State of

Nebraska, and who at all times own their shares in their own right. They shall be individuals who, except for illness, accident, time spent in the armed services, on vacations, and on leaves of absence not to exceed one year, are actively engaged in the practice of law in the offices of the corporation.

D. Provisions shall be made requiring any shareholder who ceases to be eligible to be a shareholder to dispose of all his shares forthwith either to the corporation or to any person having the qualifications described in paragraph C above.

E. The president shall be a shareholder and a director, and to the extent possible all other directors and officers shall be persons having the qualifications described in paragraph C above.

F. The articles of incorporation shall provide and all shareholders of the corporation shall agree (a) that all shareholders of the corporation shall be jointly and severally liable for all acts, errors and omissions of the employees of the corporation, or (b) that all shareholders of the corporation shall be jointly and severally liable for all acts, errors and omissions of the employees of the corporation except during periods of time when the corporation shall maintain in good standing lawyers' professional liability insurance which shall meet the following minimum standards:

1. The insurance shall insure the corporation against liability imposed upon the corporation by law for damages resulting from any claim made against the corporation arising out of the performance of professional services for others by attorneys employed by the corporation in their capacities as lawyers.

2. Such policy shall insure the corporation against liability imposed upon it by law for damages arising out of the acts, errors and omissions of all non-professional employees.

3. The insurance shall be in an amount for each claim of at least \$50,000 multiplied by the number of attorneys employed by the corporation; the policy may provide for an aggregate top limit of liability per year for all claims of \$150,000 also multiplied by the number of attorneys employed by the corporation; provided that no firm shall be required to carry insurance in excess of \$300,000 for each claim with an aggregate top limit of liability for all claims during the year of \$900,000.

4. The policy may provide that it does not apply to:

- (a) any dishonest, fraudulent, criminal or malicious act or omission of the insured corporation or any stockholder or employee thereof;

- (b) the conduct of any business enterprise (as distinguished from the practice of law) in which the insured corporation under this rule is not permitted to engage but which nevertheless may be owned by the insured corporation or in which the insured corporation may be a partner or which may be controlled, operated or managed by the insured corporation in its own or in a fiduciary capacity, including the ownership, maintenance or use of any property in connection therewith;

- (c) bodily injury to, or sickness, disease or death of any person, or to injury to or destruction of any tangible property, including the loss of use thereof, and may contain reasonable provisions with respect to policy period, territory, claims, conditions and other usual matters.

## II.

A. A copy certified by the Secretary of State of the articles of incorporation of any corporation formed pursuant to this Rule shall be filed with the Clerk of the Supreme Court of Nebraska, together with a certified copy of all amendments thereto. At the time of filing the original articles with said Clerk, the corporation shall file with said Clerk a written list of shareholders setting forth the names and addresses of each and a written list containing the names and addresses of all persons who are not shareholders who are employed by the corporation and who are authorized to practice law in Nebraska. Within ten days after any change in such shareholders or employees, a written list setting forth the information required by the preceding sentence shall be filed with said Clerk.

B. The corporation shall do nothing which if done by an attorney employed by it would violate the standards of professional conduct established for such attorney by this Court. The corporation shall at all times comply with the standards of professional conduct established by this Court and the provisions of this Rule. Any violation of this Rule by the corporation shall be grounds for the Supreme Court to terminate or suspend its right to practice law.

C. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney employed by the corporation to conduct his practice in accordance with the standards of professional conduct promulgated by this Court; any attorney who by act or omission causes the corporation to act or fail to act in a way which violates such standards of professional conduct, including any provision of this Rule, shall be deemed personally responsible for such act or omission and shall be subject to discipline therefor.

D. Nothing in this Rule shall be deemed to modify the attorney-client privilege specified in §§ 25-1201 and 25-1206 R.R.S. Neb. 1943, and any comparable common law privilege.

## III.

Any such corporation may adopt a pension, profit-sharing (whether cash or deferred), health and accident, insurance or welfare plan for all or part of its employees including lay employees, providing that such plan does not require or result in the sharing of specific or identifiable fees with lay employees and any payments made to lay employees or into any such plan in behalf of lay employees are based upon their compensation or length of service or both rather than the amount of fees or income received.

## IV.

Except as provided by this Rule, corporations shall not practice law. Corporations organized and operated in accordance with the provisions of this Rule shall not be deemed lay agencies within the meaning of the Canons of Professional Ethics.

Some of the other benefits or tax benefits are included in our Exhibit "B". There is a discussion in our Exhibit "B" of our report of the ethical considerations, and the committee has determined that there is no ethical problem involved if properly handled. The committee would like to submit this to you for consideration.

With that in mind, Mr. Chairman, I have two resolutions. Since these two things are related and yet they are separate, one is a request for legislation and the other a request for a Court Rule. I would like to submit this resolution:

BE IT RESOLVED that the House of Delegates of the Nebraska State Bar Association hereby approves the report of the Special Committee on Economics and Law Office Management and that the House of Delegates recommends the adoption of a Professional Incorporation Act and that the draft of such act as prepared by the Committee on Economics and Law Office Management be submitted to the Committee on Legislation for implementation.

BE IT FURTHER RESOLVED that the House of Delegates hereby favors the recommendation to the Supreme Court of Nebraska of the new court rule, a copy of which is filed herein, which would authorize attorneys to practice in the corporate form and that the proposed court rule as drafted by the committee be submitted to the Executive Council for implementation.

That is my report. I would like it understood, however, Mr. Chairman, that in moving to approve the report we are not asking for any action on our Exhibit A, since that was strictly an informative matter for the Executive Council.

CHAIRMAN EISENSTATT: You have heard the report . . .

MR. MOLDENHAUER: Excuse me. There is one thing I must say. There is a minority report here by Tom Davies and I would want to call your attention to that because it bears some consideration.

CHAIRMAN EISENSTATT: You have heard the report and you have heard the resolution and a request for action by this House on the recommendations of the committee. Do I hear a motion to adopt the report and to adopt the accompanying resolution?

THOMAS R. BURKE: I so move.

CHAIRMAN EISENSTATT: Do I hear a second?

HAROLD L. ROCK: I second it.

CHAIRMAN EISENSTATT: We have a motion before the House. Is there any discussion or are there questions?

WARREN K. URBOM: Maybe Howard could tell us quickly what the minority report says.

MR. MOLDENHAUER: I think the basic complaint that Mr. Davies has is that the professional incorporation would relieve the individual of his liability, and I think it goes to nonprofessional type of liability because our court rule, at least as far as lawyers are

concerned, is intended to protect the client in the requirement of insurance, and that kind of thing. But I think that in his view it would be unconscionable for a lawyer to avoid a debt by being incorporated.

I think Mr. Munro who was responsible in large part for the drafting of the statute and Court Rule has taken a position that this is really a matter of corporate or partnership law, not a question of ethics insofar as the type of organization under which they are practicing is concerned. That act, incidentally, was an amalgamation of several laws in the Colorado Court Rule, which was adopted by the South Dakota Legislature.

MR. BURKE: Mr. Chairman, could I ask Mr. Moldenhauer a question? This is merely enabling legislation. Is that correct?

MR. MOLDENHAUER: I meant to add that. This is enabling legislation. There are people who oppose this type of thing on the ground that it is in violation of the Internal Revenue regulations. Others have taken the position the regulations have been held invalid by enough courts so that it isn't a legitimate ground.

This would only enable professional organizations to practice in that form if they so desired and if they desire to take their chances with the regulations as they might apply to their pension plans or their own personal tax returns. The committee's feeling is that we should at least have the enabling legislation, since it is becoming quite common in other states and we are really one of the few states now that hasn't done something like this.

LEO CLINCH: Howard, how many members will be required to incorporate?

MR. MOLDENHAUER: There is no restriction on size.

MR. CLINCH: One or two, or do you have to have three?

MR. MOLDENHAUER: I think the act itself provides if there is one, just as in our general Business Corporation Act, they only need one director, or if there are two, you would need only two directors. If there are more than two then you would have to have three directors. But there is no restriction on number, so a solo practitioner could incorporate too.

CHAIRMAN EISENSTATT: Is the rule proposed, Mr. Moldenhauer, contingent on passage of the act?

MR. MOLDENHAUER: As originally drafted the rule provided that they adopt a new Court Rule, a copy of which is filed herein which would authorize attorneys to practice in the corporate form

under a professional incorporation act, and that the proposed rule will be drafted by the committee, be submitted to the Executive Council for implementation. Just about half an hour ago we took out the "under a Professional Incorporation Act" in the event that any objection was made that the adoption of the rule would be contingent on the adoption of the act. I have no objection to leaving it in and have all of this contingent upon the passage of the act, because the act as it applies to lawyers is contingent upon the Court Rule.

CHAIRMAN EISENSTATT: Could you operate under our present Business Corporation Act, under the Rule without the professional incorporation act?

MR. MOLDENHAUER: I see no reason why you couldn't. I think you could under the case in the Attorney General's opinion relating to doctors and dentists.

BERNARD PTAK: Howard, Mr. Davies in his minority report states on the second page, page 35, and I quote, Mr. Chairman: "Practice in corporate form would require the use of subchapter S . . ." Is he correct in this?

MR. MOLDENHAUER: I do not think so. Now we have put this subject—"we" meaning Tom Burke has put this subject on the tax institute for next month—I don't think that that follows, but I hate to speak for Mr. Davies.

MR. PTAK: If he is correct, that might have some limiting effect.

MR. MOLDENHAUER: It would certainly limit it to ten or less lawyers, but in giving it a little more study I don't think . . .

WARREN K. DALTON: Mr. Moldenhauer, subchapter S is an election by the corporation.

MR. MOLDENHAUER: Right.

MR. DALTON: There isn't any way, unless the professional corporation act or the rule requires that the election be made, there is certainly nothing in the Internal Revenue Code that says that a professional corporation has to be a subchapter S corporation, or any other law that I know of.

MR. MOLDENHAUER: That's right. Thank you. My comment really was intended to point up there may be other tax problems, which I would just as soon not get into right now, but that is up to the individual when he makes his decision what type of organization he is going to practice under.

CHAIRMAN EISENSTATT: Keep in mind that the main purpose of this is to enable lawyers and other professional people to take advantage of the beneficial aspects of pension and profit-sharing plans that are not available.

MR. MOLDENHAUER: And it does have the additional incidental advantage of providing the public with a few more safeguards if the professions are operating under the corporate form, particularly the medical profession or the dental profession.

MR. DALTON: May I say one other thing? I have a feeling—it may not be really relevant—that Tom Davies' objections stem primarily from his feeling that this is a departure from tradition and that by incorporating somehow we are leaving the ways that our fathers set out for us. In that connection, this argument leaves me unconvinced, in part because of the fact that one hundred years ago, as I understand it, in many areas lawyers were not even allowed to practice as partners, and in fact this is to some extent true in England today, that a barrister cannot enter into the kind of partnership with solicitors in that country like lawyers can in this country, so the argument for tradition, no matter how well we may buttress it by references to ethical considerations, is not particularly valid in view of the fact that corporations generally today are different kinds of animals than they were one hundred years ago, and they are looked at as different.

I don't have any great feeling that lawyers are going to flock to incorporate, but a corporation which is organized to provide legal services is certainly no more of a threat to the integrity of the bar than the partnership of 150 or 175 partners is to the practice of the profession of accounting, and there are a number of partnerships of that type with partners all over the world practicing accounting today.

CHAIRMAN EISENSTATT: Are there any other questions? Just to clarify the record, we are now voting upon the motion to approve the report, as well as the two resolutions, which were read by the committee chairman. Because one of those constitutes a request of change in the Rules, and insofar as a change in Rules is concerned it only constitutes a recommendation to the court under Article IX of our Rules, I call to your attention the following:

Recommendation to the court for amendments to these Rules, recommended by a three-fifths vote of the Council, may be adopted by a majority of the House present at a regular meeting. Recommendations for amendments not so recommended by the Council must be submitted in writing at a regular meeting of the House and, unless approved by a vote of two-thirds of the members of the House of Delegates present, shall lie over and not be acted upon until the next meeting.

Our record should show that the part of this motion dealing with the Rule has been submitted in writing.

I now ask for a vote. All of those who are in favor please signify by saying "aye"; all opposed. The motion is carried unanimously and therefore the two-thirds requirement has been met.

[The report of the committee follows.]

**Report of the Special Committee on Economics and  
Law Office Management**

The program of this committee during the past year has enjoyed the broad participation of its members who have spent countless hours working on its programs for the betterment of all members of the Association. The committee prepared and submitted a survey questionnaire to all members of the Nebraska State Bar Association concerning law office management practices. The results of this questionnaire were included within an article which appeared in the *Nebraska State Bar Journal*, Volume 17, No. 2, April, 1968. This poll was somewhat different from other polls which have been conducted and has drawn considerable attention from bar groups throughout the country. It has been of considerable assistance to the committee in its various projects.

The committee has studied the advisability of the Nebraska State Bar Association's making available to all its members participation in the American Bar Association Retirement Plan regardless of whether the individual participants are members of the American Bar Association. The report of the committee is attached hereto and marked Exhibit A. At the midyear meeting the recommendation was made to the Executive Council that this report be adopted.

The committee has also given a great deal of study to the subject of professional incorporation. This was precipitated in part by the recent developments in the field and the fact that at least 35 states, either by legislation or rule of court, permit lawyers to practice law within the framework of either a professional corporation or a professional association. This includes our neighboring states of South Dakota and Colorado. In addition, the Court decisions of *O'Neill v. U.S.A.*, 281 F. Supp. 359 (N.D. Ohio, 1968), and *Empey v. U.S.*, 272 F. Supp. 851 (D. Colo., 1967), which dealt with the validity of the Kintner Regulations, have contributed to the advisability of a re-examination of the question of professional incorporation. The committee adopted the attached report which is marked Exhibit B and, at the midyear meeting, recommended its



adoption by the Executive Council. In addition, the committee has recommended to the Executive Council a proposed Nebraska Professional Corporation Act and a proposed court rule authorizing incorporation by lawyers. The committee has recommended that both items be submitted through the proper channels for adoption.

The statute was an amalgam of laws existing in Florida, Massachusetts, Minnesota, and Arkansas and the court rule was patterned after a rule adopted by the Colorado Supreme Court and incorporated by statute in South Dakota.

The committee has received authorization from the Executive Council to prepare a traveling seminar similar to the tax institutes, making presentations on the subject of economics in Eastern, Central and Western Nebraska. Plans are now being made for this seminar.

The committee has also sent delegates to the Third National Conference on Economics and Law Office Management in San Francisco sponsored by the American Bar Association. Your chairman was selected to participate in this conference and, during the past year, your chairman has also addressed the Vermont and Alabama State Bar Associations on the subject of law economics.

The committee is continuing to study the minimum fee schedule and is also considering the adaptation of a filing system for office research, known as the Texas Retrieval System, to meet the needs of Nebraska Lawyers.

The committee is in continuous contact with economics committees of other states and with the American Bar Association and its projects.

**It is the recommendation of the committee that it be continued.**

Howard H. Moldenhauer, Chairman  
Lansing Anderson  
Thomas R. Burke  
Harvey D. Davis  
Thomas M. Davies  
Richard A. Dier  
Kenneth H. Elson  
Clinton J. Gatz, Jr.  
Robert A. Munro  
Robert G. Simmons, Jr.  
Benjamin M. Wall  
James J. Fitzgerald, Jr.

## Exhibit A

REPORT OF THE SPECIAL COMMITTEE OF THE NEBRASKA  
STATE BAR ASSOCIATION CONCERNING PARTICIPATION IN  
THE AMERICAN BAR RETIREMENT ASSOCIATION PLAN

The American Bar Association, at some expense to the American Bar Association, created the American Bar Retirement Association as a separate corporation which qualified as a trustee for the purpose of making available self-employed retirement plans to members of the American Bar Association, their associates, and employees.

The American Bar Retirement Association has offered to make available to members of the Nebraska State Bar Association, who are not members of the American Bar Association, the same privileges and rights of participating in such plans through the American Bar Retirement Association, as members of the American Bar Association now have, with the exception that there will be additional charges made to members of the Nebraska State Bar Association, who are not members of the American Bar Association, who elect to establish an American Bar Retirement Association plan, because of the expense of the American Bar Association in the original establishment of the American Bar Retirement Association and approval of its plans.

This committee has been asked to make an investigation and to recommend to the Association whether the Nebraska State Bar Association should make available such plans through the American Bar Retirement Association.

It is the recommendation of this committee, as follows:

1. Inasmuch as the self-employment retirement provisions of the Internal Revenue Code have been amended effective for tax years commencing after January 1, 1968, to make such retirement plans more desirable to lawyers, it is contemplated that more lawyers will find it desirable to enter into such plans.

2. That the American Bar Retirement Association Plans appear to be very desirable and an efficient method of lawyers setting up their own retirement plans for themselves or associates and their employees.

3. That any participation by the Nebraska State Bar Association in the American Bar Retirement Association will not affect the rights and privileges of any member of the Association to participate in any other type of plan through any other organization, insurance company, trust, etc., but is merely supplemental

to all other methods of establishing a retirement plan available to lawyers. Therefore, the activity of the Association in this respect cannot be any disadvantage to any members of the Association.

IT IS, THEREFORE, RECOMMENDED that the Nebraska State Bar Association enter into an agreement with the American Bar Retirement Association which makes available to members of the Nebraska State Bar Association who are not members of the American Bar Association, the benefits of the American Bar Retirement Association, with the Nebraska State Bar Association to assume only the additional expense of furnishing the information concerning this plan to members of the Nebraska State Bar Association, and with members of the Nebraska State Bar Association who desire to participate in the plan, paying all of the expense incident to establishment of their individual plans, even though this expense may be somewhat larger than the same charges made to members of the American Bar Association.

#### Exhibit B

### REPORT OF THE SUB-COMMITTEE ON PROFESSIONAL INCORPORATION

#### I

#### PRACTICAL CONSIDERATIONS

The most obvious practical benefit from incorporation is the qualification of pension or other deferred compensation plans under I.R.C. §401(a) (the Kintner plans). The Internal Revenue Service has twice lost its battle to uphold its Regulations denying professional corporations the same status as other corporations, and there seems little reason to suspect that it would be successful in Nebraska. There are other areas of benefit, however.

Once a group of professional people has incorporated or otherwise met the qualifications of the Kintner regulations, with the result that the organization is taxed as a corporation or association, the members of the organization, if they qualify as employees, are entitled to the same benefits as any other corporate employees. Some of the benefits are as follows: Members may obtain Social Security benefits. They may participate in tax-deferred retirement, profit-sharing, or pension plans. Premiums on group term life insurance and group medical policies may be deducted by the organization and are not taxable to the employees. The members can receive up to \$100 per week tax-free during a period of injury

or illness under a corporation-financed plan. Amounts paid by the corporation as reimbursement for medical expenses can be tax-free. Up to \$5,000 of death benefits paid to the beneficiaries or estate of an employee can be tax-free. Furthermore, if ten or fewer professional individuals are shareholders in a professional corporation, they may be eligible to make the election to be a "tax option" corporation under Code Sections 1371-1377. By making such an election they can avoid paying corporate tax and treat the income in much the same way as if it had been received by the shareholders individually.

## II

### ETHICAL CONSIDERATIONS

Formal Opinion 303, November 27, 1961, of the American Bar Association effectively disposes of the ethical difficulties which might otherwise be encountered in practicing in the corporate form by attorneys. The opinion authorizes the practice of law in corporate form if five safeguards are allowed. These safeguards are:

1. The lawyer rendering the legal services to the client must be personally responsible to the client;
2. Restrictions on liability as to other lawyers in the organization must be made apparent to the client;
3. None of the stockholders may be non-lawyers, or if stock falls into the hands of a layman, provision must be made for transfer back to lawyers;
4. There must be no profit-sharing plans including employees who are non-lawyers;
5. No layman may be permitted to participate in the management of the firm.

The ABA opinion adequately raises and disposes of all the standard objections made under this heading, and we feel that if the above standards are met, there can be no ethical problem involved.

## III

### PRACTICAL ASPECTS OF ADOPTION

Your subcommittee explored the relative merits of authorizing professional corporations by court rule or by statute, and favors the route of adoption of merely a rule of Court if only attorneys

are to be permitted to incorporate. The Nebraska Business Corporation Act appears to be broad enough and unlimited enough in its coverage to include professional corporations within its ambit. There is some opinion to the contrary, however. It appears that the restraint on professional incorporation of lawyers in Nebraska up to this date has been a feeling that under the present rules of the Supreme Court such corporations might be deemed to be in violation of the Canons of Ethics. The Supreme Court's power to promulgate a rule authorizing professional incorporation appears to be established, see *State v. Turner*, 141 Neb. 508, 4 N.W. 2d 302. The supremacy of the judiciary in the area of defining and regulating the practice of law is clearly asserted by the language of the case.

We have drafted a statute covering not merely the legal profession, but any other profession that might be concerned. Unquestionably, if all professions join in seeking legislation, the project will meet more success.

If both the Court Rule and the statute are adopted, possible questions of who has the authority to act, the Supreme Court or the Legislature, are removed. Your committee, therefore, recommends the adoption of both rule and statute.

#### CONCLUSION

The advantages of incorporation are many. There is no ethical problem standing as an insuperable obstacle. The aid of other professional groups may be enlisted by advocating a special statute.

The committee urges the advocacy of the adoption of a Court Rule and statute authorizing professional incorporation in Nebraska.

#### MINORITY REPORT FILED AS TO THE REPORT OF THE SUBCOMMITTEE ON PROFESSIONAL INCORPORATION OF THE COMMITTEE ON ECONOMICS AND LAW OFFICE MANAGEMENT OF THE NEBRASKA STATE BAR ASSOCIATION

The report of the subcommittee urged the adoption of a Court Rule and statute authorizing professional incorporation of lawyers in Nebraska, which report was adopted by the parent committee. The undersigned member of the parent committee respectfully dissents from this report and recommendation.

The subcommittee should be highly commended for having done a lot of work and for trying to help the members of the legal profession. I respect their integrity and the decision they have made. I just cannot agree with their basic premise.

It is true that lawyers have taken advantage of the corporate form for clients on pension and profit sharing trusts, and have been made unable to do the same thing for themselves. It is also true that notwithstanding the liberalization of the Keogh rules in 1968, that many monetary advantages would immediately flow to lawyers if professional incorporation is permitted. It is true that the great majority of states now permit lawyers to practice law in corporate form.

It seems to me that the committee report oversimplifies the ABA opinion on ethical considerations. Although formal Opinion 303 was issued stating that lawyers could ethically practice as a professional association or professional corporation, "provided appropriate safeguards are observed," the committee expressed "grave doubts" as to the wisdom of the use of such corporations.

It has been questioned whether a corporation which meets the requirements of Opinion 303 can qualify under the Kintner regulations, which among other things require limited liability, centralization of management, continuity of life, and free transferability of interests. Opinion 303 itself questions this.

Most state statutes including Section 12 of the proposed act remove the mutual agency liability while retaining the concept of individual professional responsibility. However, this relieves all attorney-stockholders from personal liability for a business debt of the corporation, or a tort claim, or a claim for malpractice against a fellow attorney-stockholder, or for the embezzlement of an employee or fellow attorney-stockholder. The Colorado Supreme Court met this to some extent by rule, but not adequately in my opinion. To me any such limits on the liability of practicing lawyers are unconscionable. See 75 Harvard Law Review 777 at 793, "Professional Corporations," wherein the author comments on this:

By far the most serious objection to this technique of tax relief is that it is likely to have far-reaching and untoward collateral consequences. While designed simply to secure tax benefits, the statutes, perhaps unwittingly, purport to alter the preexisting manner of professional operations. Compliance with the Kintner Regulations seems to demand that professionals modify their traditional scope of responsibility and liability at least to some degree, and the uncertainty and potential demoralization so entailed for layman and professional alike seem an inordinate price to pay for federal tax relief.

Practice in corporate form would require the use of subchapter S which is a poor vehicle, and which is dangerous because it cannot be controlled. It would also require that the firm or corporate name contain a word such as "chartered," "limited," "company,"

"incorporated," or a like word or abbreviation making it apparent to outsiders that there are restrictions on liability as to other lawyers in the organization.

The outstanding attribute of the private practice of law as a profession is that the individual lawyer stands liable for everything connected with that practice and if he has partners they also assume that liability for him. It is unthinkable that a lawyer should ever take refuge behind the shell of a corporation to defeat legitimate claims against him.

In my opinion, the integrity of each lawyer and the integrity and reputation of the legal profession far outweigh the present monetary advantages of practice in corporate form. This idea has been better expressed by the author in a note in Vol. 110 University of Pennsylvania Law Review 465 at page 472, "The Ethics of Practice Under Pennsylvania's Professional Association Act."

State laws attempting to extend federal tax benefits to local residents have had a checkered history. Pennsylvania's Professional Association Act, insofar as it applies to lawyers, actually encourages members of the bar to tread a narrow line between propriety and impropriety. Instead of sanctioning alteration of the traditional forms in which the law has been practiced, so as to obtain for lawyers some financial benefit under federal tax laws, the states might do better to reinforce the ancient tradition of immediate, intimate, and personal relationship between individual attorneys and their clients, leaving to the federal government whatever tax relief legislation may seem appropriate.

Thomas M. Davies

CHAIRMAN EISENSTATT: We will now proceed to Item No. 24, Statement of the President of the Association—Mr. Mattson.

## STATEMENT OF THE PRESIDENT OF THE ASSOCIATION

### C. Russell Mattson

Mr. Chairman and Gentlemen of the House: In its several meetings this year, the Executive Council has conducted the business affairs of the Association. With the resignation of George Boland from the Council, Muri Maupin was elected to serve this past year in his place.

The Council approved important changes in the disability insurance contract and in the program of life insurance. It authorized execution of retirement contracts with George Turner and Katherine Schultz.

There was granted financial assistance to the Law Student Associations at both Creighton and Nebraska, and the undergraduates

participated in the Student Division Conference at the American Bar Association meeting in August and at the annual American Bar Association Student Conference of the Eighth Judicial Circuit at Sioux Falls.

The Council authorized financial aid to assist in the publication of the *Creighton Law Journal*. The same type of assistance was given to the Young Lawyers Section for representation at the annual conference of that group at the American Bar Association meeting. There was also financial aid given to the Committee on Legal Economics and Law Office Management for participation in a conference in San Francisco held just recently and to the Committee on Continuing Legal Education to attend a gathering in that field in Chicago last month. Expense was provided for Robert Barnett to attend the National Conference of Commissioners on Uniform State Laws that was related to the Uniform Probate Code this year.

Approval has been given for a traveling seminar by the Committee on Economics and Law Office Management. A registration fee will be charged for that seminar. The price of \$15.00 was set for the *Probate Manual* which will be available to you at this meeting in the hope that the expense of publication can be recovered.

To be our statutory members from the Association on the Judicial Disqualification Commission, the Council nominated Guy C. Chambers of Lincoln and Ralph E. Svoboda of Omaha.

To evaluate the proposed changes in the American Bar Association Code of Professional Responsibility, our Advisory Committee, with the addition of Alfred G. Ellick and Thomas M. Davies, has undertaken the study in our behalf in Nebraska. Reference was made to this in the report of the Advisory Committee this morning, and may I tell you the study they have undertaken is presently in confidential form and is 91 pages thick. So they have a tremendous job ahead of them between now and next August to look out for the interests of Nebraska lawyers in this change of the code.

To work with representatives of the press and broadcasters, we have chosen Paul Douglas, William G. Line, and James W. R. Brown. This engagement is to explore whether voluntary guidelines can be accomplished by the bar and media in our state under the Reardon Report on Fair Trial-Free Press.

A Committee on Water Resources and one on Family Law were created as special committees of the Association this past year.

For a lack of petitions, the Council made the usual nominations for election to the House of Delegates, the Executive Council, and the Judicial Council.



We have retained Ed Carter, Jr., to be Legislative Counsel for the Association in the coming session of the Unicameral.

Study has been made of the recommendations for the hiring of an administrative assistant, and application was made to the Supreme Court for a change in Rule IV to obtain an increase in dues. The Court has requested that a poll of the entire membership on this question be made and the approval of the change in Rules will be submitted later to you on the agenda this afternoon.

I would be glad to entertain any questions. Thank you.

**CHAIRMAN EISENSTATT:** The next item of business is No. 25, the report of the Special Committee on Reorganization. Herman Ginsburg, the chairman, is ill and is unable to be with us today. So in his place, Mr. Murl Maupin will present the report of the Committee on Reorganization. I might say that we sent out with notices of this meeting copies of the recommended committee structure change and the auditing and budgeting procedure. If any of you do not have copies, I have some more up here in case you want them during these deliberations.

## **REPORT OF SPECIAL COMMITTEE ON REORGANIZATION**

**M. M. Maupin**

Mr. Chairman, Members of the House: We not only have the misfortune of having Herman Ginsburg, who is chairman of the Reorganization Committee, unable to be here today by reason of some physical impairment, but Joe Tye, who is the vice-chairman of the committee, was detained by reason of the death of a very close friend of his and his family. So I have been requested to submit this report to you on behalf of the committee at this time.

The report is to be found on page 49 of your printed program, and I should like to first call your attention to the fact that there was a typographical omission from it on the second page under the second full new paragraph: The committee has approved the following sections. There was a failure to include the Section on Taxation therein. Some way or other in the final report, as it went to George Turner to go to the printer, the Section on Taxation that had been recommended was eliminated from the report, so the report should be amended to include the Section on Taxation as a sixth section.

For those of you who are attending as members of this House for the first time, I merely say this to you as introductory to the report, that this Committee on Reorganization was approved by your Executive Council last year, with the approval that it be created

as a committee of *this* House, and that report was submitted to this House, and this Committee on Reorganization is a committee appointed by or under the authority of this House.

The essence of the report, without taking the time to read it to you, is simply that the Special Committee on Reorganization of the State Bar Association be continued for further work.

In that connection, and before moving the adoption of the report, I think it is proper to say to you that this committee has been engaged in a great study and a tremendous amount of time has been devoted to reviewing the functions of the Association. The Rules that were initially adopted in 1938 creating the Association as an integrated bar have very substantially never been changed from that time down to the present.

A research, as it were, of the statements that have been made repeatedly over the years by Presidents of this Association shows that we need to review our Rules under which we operate and that we need to explore the fields into which we move at this time in order to render a greater service to the members of the Association. With that suggestion, which has been made repeatedly down through the last several years by men who have had the high honor of filling the office of presidency of the Association, for a study of the matter and for action of the Association to see what they can do to improve the Association and the services that it may render to the public and to its membership, this Committee on Reorganization came into existence. They have been pursuing this work, and the present thinking of the committee is that it is going to take another year or maybe another two years before a finished or a completed report can be submitted to this House for the final approval of this House for submission to the Supreme Court of Nebraska for any recommended or suggested changes and amendments in our Rules under which we operate and for the procedures which we will follow.

So it is upon that basis that the committee asks for its continuance, that it may pursue the work it is now engaged in.

Let me make one other sort of prefatory statement, just informative as I conceive it to be, and that is that the general plan that has been followed by the committee in its work has been to select a given area and, as an example, the first thing that the committee has gone into is the matter of budgetary control and of setting up some type of an over-all long-standing committee of the Association that could counsel with the Executive Council and who could counsel with this House of Delegates in making recommendations for the

use of the funds that the Association comes into possession of through the collection of the members' dues. A great deal of work has been done in that regard in one special area of it, and a report was made to the midyear meeting on that matter and will be up for further consideration of this House this afternoon.

Another field that much time has been spent on is the reorganization of our committee and section structure. That report has been submitted too in a tentative form to the membership of this House.

I mention those two, illustrative of the other fields that the committee proposes to go into, by reason of the fact that it is the consensus of the present membership of the committee, I think, that when, as, and if the final reports of the committee are submitted, it shall have not only the thorough consideration of the working members of the committee but of all those members of the Association who are serving as committee chairmen, or who are serving in their capacity as members of the Executive Council, or of you people who are members of the House of Delegates, that each and every person who is interested in any suggested Rule change or any suggested departure from future procedures may not only be consulted but may have a voice in the final report of this Reorganization Committee; in other words, that the committee's report—I'll use that illustratively for just a moment—the committee's report on the reorganization of the committee structures and section structures is now under consideration and has now been submitted by a subcommittee of the Reorganization Committee to every committee chairman and to every section chairman. This report that has so far been made and is now before you is not intended to be necessarily a final report of the Reorganization Committee. It shall be open to and subject to further discussions, further amendments, and further changes if that be necessary as a result of the further research that is being done with membership affected and concerned.

Likewise, and that is a matter that will subsequently come before you this afternoon, on the Budget and Auditing Committee that we have proposed for the purposes of budgeting our funds, and so on and so forth, I will not go into that in detail at the moment, but it will be a matter that will be subsequently discussed here by the House this afternoon. It has had the attention of the Executive Council, has had the reconsideration of our Reorganization subcommittee that is engaged in that study and will be further reported upon to you.

What I am trying to say to you simply is this, that in doing the work that is being done and making the proposals that are now being proposed, it is the definite effort of the members of the Re-

organization Committee that it be done within the framework of mutual agreement, insofar as it is humanly possible to achieve that, of all of the members of our Association, and to accomplish something that will update and upgrade our Association in keeping with the modern times and not of 30 years ago when we were first organized as an integrated bar.

With those explanatory remarks and with the further suggestion to you that on other matters that will come before you in connection with some of the work of the Reorganization Committee, we will have Charles Wright here from the committee who will be prepared to answer questions or make further explanations. The Chairman of the House attended the noonday meeting of the Executive Council and he will be prepared to explain further to you some of the recommendations.

So I move you, Mr. Chairman, the adoption of our report, amended by inserting the word "Taxation" as a section, for the continuance of this committee. Thank you.

CHAIRMAN EISENSTATT: It has been moved, with that one amendment of the addition of the Section on Taxation. Do I have a second?

HARRY B. OTIS: I second the motion.

CHAIRMAN EISENSTATT: Any further discussion? All those in favor signify by saying "aye"; all opposed. The motion is carried.

Now in furtherance of that report I would like Mr. Wright to come to the podium and give a brief explanation of that portion of the committee's work dealing with committee structure. Charlie, are you prepared to do that? He is going to be speaking to one of the documents which was sent to you with the notice of this meeting.

CHARLES E. WRIGHT: Mr. Chairman, Mr. President, and Members of this House: I don't propose to go into each of the individual committees that are outlined in this memorandum that is dated August 20, 1968. I can tell you what we did and tell you some of the reasons behind it and also touch upon what we hope to do to follow through on this.

The first thing that we did was to examine the committee structure of our own Bar Association and the section structure, and examine from information that we were able to collect the committee structure and section structure of a number of surrounding states. We didn't look at all of them, but approximately 14 other states. We went through them and we compiled a list of all the

various committees that all of the various states seemed to have, including our own. Then we went through and tried to consolidate certain of the committees that we now have and determine which possible committees might be useful to the Association that we do *not* have now, with the idea in mind that we would like to, if possible, reduce the number of committees and organize them into divisions which we felt would better enable them to maintain liaison with the Executive Council and with the House of Delegates.

We went over this entire list on about three separate occasions and tried to refine it down as much as possible. Where we considered combining existing committees of this Association, I don't think we contacted all of the committee members but we made an effort to contact all of the committee chairmen and solicit their views. We received several replies back, and in each instance their comments were given careful consideration and in nearly every instance their comments were included in the present tentative draft of committee and section alignment.

We had no intention of stepping on anyone's toes. We don't mean to imply any criticism of what we presently have in the way of committees. It was just felt that we had a considerable amount of overlap on some of our committees, that their functions needed to be redefined, and this is to date our best effort of what we were able to come up with.

We anticipate that before this is in final form we will get many more suggestions, which we welcome from any member of the Association, any committee chairman, or any section member.

That is really about all I have, unless you think there is anything to be gained by going into specific areas. I will be glad to try to answer any questions that any of you may have. You may notice, for instance, that we are not recommending continuance of the Section on Procedure. I have served on that section before. We also have a Committee on Procedure and we thought that the work of these two groups could very properly be carried on by the Committee on Procedure. We have no intention of being critical of what has been done by the Section on Procedure but we felt that this could very properly be carried on as committee work.

CHAIRMAN EISENSTATT: Thank you, Charlie.

Does anybody have any questions? The Reorganization Committee is most anxious to draw as much attention to these things as it is possible to get, and you as representatives of the entire Association are asked, not to just pass it over but to really think about it and, if possible, carry this to the members whom you represent,

your constituency, so that when the time comes for this to be approved there will be no surprises. Anything the committee may have done that you think is wrong, let's find out about it now, or as soon as possible. I hope you have all read it. I hope that if you have any comments or suggestions or criticisms you will voice them so that the committee can consider them, because it is going to leave this field and go into other areas, and it could very well be possible if there is anything wrong with what we are doing it may not get corrected unless you do give it that kind of attention.

Now, does anybody here have anything to bring up with respect to the committee structure? You can either do it now or you can address communications to Charlie Wright or to the chairman of this committee if you discover them at a later date.

**WILLIAM A. STEWART:** Charlie, could you explain to me what the difference would be here on your Advisory Committee and your Committee on Ethics, why they couldn't be combined into one?

**MR. WRIGHT:** We had quite a lot of discussion about that. We didn't want to tamper with the existing machinery that is set up for the Advisory Committee. However, we had a considerable amount of discussion of that with Mr. Adams and Mr. Baird, and we finally determined that it would be best to leave the Advisory Committee structure the way it is now, with the possible additional function which we felt they were already authorized to do, and which they plan on doing, of disseminating certain ethics opinions to the general membership, which are of interest to the general membership.

Now, and this is partly my own thinking, it seemed to me that we also needed to do a little bit more work in the area of educating lawyers, not only young lawyers but lawyers in practice for a while, working out some better methods of educating in the field of ethics. I'm not being critical of the law schools, but I had very little exposure to that particular topic when I attended school, and what information I have about it now is something that I picked up from reading ABA bulletins or from reading ethics opinions that were promulgated in sister states.

I think the basic idea of the Committee on Ethics, and it doesn't need to be a large committee, is to have educational materials ready to use if the law schools are willing or are interested—to present educational materials in the field of ethics primarily to graduating seniors, in their senior year.

**JAMES M. KNAPP:** Charlie, the Section on Practice and Procedure has already recommended its combination with the com-

mittee, but the new chairman of that section, Ken Elson, has some rather serious questions. Would you make it a point to see him while he is here?

MR. WRIGHT: I'll be glad to.

MR. KNAPP: I have a five-page letter from him and I'll be glad to give you that letter.

MR. WRIGHT: We anticipated that getting this report out would spur some activity on the part of the chairmen and we welcome it. I don't have a copy of his letter now. I don't think Herman Ginsburg, the committee chairman, does, and we would welcome a copy of it. We would be glad to seriously consider any suggestions or criticisms that he has and, if we can see our way clear to do it, incorporate them in our revised draft.

MR. KNAPP: I have one other question. With the exception of your Young Lawyers or Junior Bar Section, the remaining five sections might well be called sustaining law sections. There are three possible areas that weren't touched, either in your committee structure by permanent committees or by sections—Criminal Law, Family Law, or perhaps a General Practice Section. Has the committee given recommendation to the creation of sections such as those, which, to perhaps a large number of Nebraska lawyers, might seem as important as a natural resources section or a commercial law section.

MR. WRIGHT: I think this is well taken. When we went over it we did consider, I know, family law and criminal law special committees or sections, either one; and I think the only reason they are not included is that we didn't seem to be aware that there would be enough interest to warrant either committee or section work on these subjects, but if the interest is there, there is absolutely no reason why they can't be included.

CHAIRMAN EISENSTATT: Are there any other comments, suggestions, questions? We don't have to take any formal action on that, but I would again impress upon you the need for giving this your attention and not just passing over it and forgetting about it after the meeting.

There is one other matter that will have to be considered by this House, dealing with the work of this committee. After several meetings, in late spring the Reorganization Committee prepared a proposed Rule dealing with budgeting and auditing, and the committee forwarded this to the Executive Council with two requests: (1) that the Executive Council consider, to the extent they found

it possible, commencing budgeting and auditing procedures, and (2) the request that there be presented to this House for consideration and action a Rule change covering the budgeting and auditing procedures by the Association. It is, of course, in the nature of a recommendation to the Court. That was mailed to each of you twice. Mr. Mattson, following the request of the Reorganization Committee, mailed this directly in its original form to each member of the House of Delegates. Is that right, Mr. Mattson?

PRESIDENT MATTSON: That is the present House, not as requested originally but the personnel of the present House.

CHAIRMAN EISENSTATT: Then in my communication to you, I sent you a form which contained the Rule as originally proposed by the Reorganization Committee with some subsequent suggestions or changes by the Executive Council. This has been reconsidered again by both the Executive Council and the Reorganization Committee and I now present to the House for your consideration and action the original proposed Rule as presented by the Reorganization Committee.

Mr. Maupin and Mr. Irons particularly, I want to be sure that I am getting the record straight here, the Reorganization Committee, upon reconsideration, accepted some amendments and changes to their original proposal, and also the Executive Council has agreed to some amendments, so we want the House to know that at the present time there is no real dispute between the Reorganization Committee and the Executive Council with respect to the sense and the idea and the terms and conditions, so to speak, of this proposed Rule.

In essence, the proposed Rule provides in Section 1 that there be a Budgeting and Auditing Committee created which would have a continuing existence, that is, rotating membership, which committee would study the income and expenses of the corporation and prepare a budget for the committee, which would then be presented to the Executive Council. The Executive Council would accept that as a recommendation from the Budgeting and Auditing Committee and then would adopt an annual budget of the Association. Then this would, in turn, be submitted to this House for approval. When adopted by the House, it would then become the final budget and, in a sense, would be the basis upon which appropriations and the expenditure of money would be made.

Section 2 of the proposed Rule would provide that once a budget is adopted it would, in a sense, be binding, with some measure of flexibility added, and, after consultation, wherein originally it pro-



vided that the President could authorize a non-budgeted item for not to exceed \$50.00, it was felt this was too low and it is now considered and has been accepted that perhaps \$100.00 would be more appropriate.

It would also provide that the Executive Council, by a vote of two-thirds of its members, could authorize the expenditure of non-budgeted items. Originally it was said not to exceed \$1,500 in any one year. There is now a suggestion that that might or should be increased to \$5,000 in any one year. That would be a cumulative figure. The President's authority would not be cumulative; that would be on an individual basis as to each item that came up, while the Executive Council authority would be on a cumulative basis for each year.

In Section 3 there would be provision that, once it has been adopted, then the Executive Council would appropriate the funds that would be needed to cover the item.

In Section 4 the Executive Council would cause proper books of accounts to be kept and an audit to be prepared by a CPA and that the audit would be submitted to the members of the House, instead of 60 days prior, at least 30 days prior. I think it would be too difficult to get that done in 60 days.

Then in Section 5 the Executive Council, prior to the annual meeting of Association, shall file with the Clerk of the Supreme Court who, in turn, would distribute to the membership, a copy of the proposed budget and the financial statement for the prior year.

Section 6, that the books and records of the Association be kept on a fiscal year to be determined by—I think it was agreed that that probably should be determined by the Executive Council rather than the House of Delegates.

So to get the matter before you, I ask for a motion for the adoption of a Rule as originally presented by the Reorganization Committee, with the amendments as indicated by me, to wit, that the \$50.00 in Section 2 be increased to \$100.00; that the \$1,500 authority of the Executive Council be increased to \$5,000; that in Section 4 the period be changed from 60 days to 30 days; and that in Section 6 the authority to adopt the fiscal year be placed in the Executive Council rather than the House of Delegates.

Is there any question on the motion that I am seeking?

FRED R. IRONS: Mr. Chairman, does that also include the proposed deletions from the various sections?

CHAIRMAN EISENSTATT: No, that proposes that the deletions not be deleted. In other words, it goes back to the original form as presented by the Reorganization Committee with the amendments. That is why I asked both you and Mr. Maupin, as well as any other members of the Executive Council and the committee to tell me whether or not I have correctly stated the result of our further consideration.

HAROLD L. ROCK: Mr. Chairman, that includes the right of this House to modify or change the proposed budget, is that correct?

CHAIRMAN EISENSTATT: Right! The form that I sent you would not have those things stricken out that I put on that form. So I don't know whether you have the one that you got from Mr. Mattson or whether you are looking at the one that I gave you.

MR. IRONS: There are some minor inconsistencies—your 60- and 30-day notice, and that sort of thing, if you don't make them coincide, such as in Section 1 you still have a 60-day notice and you've changed it in another section to 30 days.

CHAIRMAN EISENSTATT: All right, let's talk about Section 1, Fred. What line are you referring to?

MR. IRONS: The third line up from the bottom.

CHAIRMAN EISENSTATT: Then to be correct that 60 days should be changed to 30? Correct?

THOMAS R. BURKE: In Section 1 you are talking about a budget and in Section 4 you are talking about an audit.

CHAIRMAN EISENSTATT: I think those two dates should coincide. Charlie and Murl, do you agree with me?

MR. MAUPIN: I agree with that, yes.

CLARK G. NICHOLS: Mr. Chairman, the 60-day notice in Section 1 is notice of a meeting of the House of Delegates. The 30-day notice in Section 4 is distribution of an audit. I don't see any connection between the two.

CHAIRMAN EISENSTATT: The Section 1 notice is a notice of a meeting including a copy of the proposed budget. All we are saying in Section 4 is that the audit itself also go out at the same time. That is just so we have one mailing and not two. It may deal with different things but at least it will save the cost of postage.

JOHN J. SULLIVAN: In Section 4, as the Rule was originally written, is that 60 days or six?

MR. EISENSTATT: The Rule was originally 60, and that has now been amended to 30.

MR. SULLIVAN: Mine says six.

CHAIRMAN EISENSTATT: Does it? Another running that I made says 60. I am sorry for that.

All right, subject, then, to those amendments, do I have a motion to recommend the adoption of the Rule?

HAROLD L. ROCK: I so move.

JAMES M. KNAPP: I'll second it.

CHAIRMAN EISENSTATT: Is there any discussion? All those in favor of recommending the adoption of the Rule, please signify by saying "aye"; all opposed. There being no opposition, let the record show unanimous adoption.

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NOTE: The Reorganization Committee has prepared a draft of a proposed additional Rule. The Executive Council proposes the deletions and additions as set forth below.

## NEBRASKA STATE BAR ASSOCIATION

### RULE \_\_\_\_\_

Section 1. The Budgeting and Auditing Committee of the Association, consisting of not more than ten members, shall study the income and expenses of the Association and shall prepare and submit to the Executive Council a proposed budget for each fiscal year of the Association. The Executive Council shall, upon receipt of such proposed budget, consider the same and shall thereupon prepare and [submit] *adopt* an annual budget of the Association's receipts and expenditures *and report the same* to the House of Delegates. [for its consideration and approval. Such proposed budget shall not be effective until thirty days after it is approved by a majority vote of the House of Delegates at a meeting, for which at least sixty days notice, including a copy of the proposed budget, has been given. The House of Delegates, by a majority vote thereof, may amend or modify the proposed budget prior to its final adoption.]

Section. 2. After the budget is adopted [by the House of Delegates] no expenditures shall be made by the Association except as provided therein. Provided, however, in case of an emergency, the President of the Association may authorize a non-budgeted ex-

penditure not to exceed [\$50.00] \$100.00 in any one instance. Provided further, that in case of an emergency, the Executive Council may, by a vote of two-thirds of its members, authorize [total] non-budgeted expenditures. [not exceeding more than \$1,500.00 in any one year. No other expenditures shall be made except upon approval by the House of Delegates.]

Section 3. After the budget has been adopted, the Executive Council shall, from time to time, appropriate such funds in the treasury of the Association to the purposes, and in no greater amounts, than are set forth in the budget, *subject to the provisions of Section 2*. The Treasurer of the Association shall disburse the funds so appropriated for the purposes and within the amounts so appropriated. No disbursement or expenditure shall be made by the Association without such prior appropriation.

Section 4. The Executive Council shall cause proper books of account to be kept, and shall prepare an annual audit thereof by a certified public accountant. Such audit shall contain a balance sheet and a statement of operations for the fiscal year involved, and shall be submitted to the House of Delegates for approval at its next meeting; and shall be distributed to the members of the House of Delegates at least [sixty] *thirty* days prior to the date of such meeting.

Section 5. The Executive Council, prior to the annual meeting of the Association, shall file with the Clerk of the Supreme Court, and shall cause to be distributed to the membership of the Association, a copy of the current annual budget, [the proposed annual budget for the succeeding year,] and a financial statement showing a balance sheet and operating statement for the last immediately preceding fiscal year.

Section 6. The books and records of the Association shall be kept, and the affairs of the Association shall be managed on a fiscal year basis. The fiscal year of the Association shall [be determined by the House of Delegates, and until it is so determined, it shall be the same as the calendar year.] *begin on September 1 and end on August 31.*

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WILLIAM A. STEWART, Jr.: Point of clarification: Where on the calendar will be take this budget up, then? At your next meeting?

CHAIRMAN EISENSTATT: Well, first the Court has to approve this. Then the new President is going to have to form a budgeting committee so that by the next annual meeting this

budget can be submitted to the House. Did I understand your question?

MR. STEWART: Well, I was wondering, if you put it up first, then in a later action a new program couldn't be submitted without a change in the budget. I am just talking about the calendar.

CHAIRMAN EISENSTATT: I don't follow you. Tell me again.

MR. STEWART: I was just wondering, if the budget came up first on the calendar and then you later adopted some other program at your House of Delegates meeting, you would have trouble budgeting for it.

MR. IRONS: It would be just like the Legislature; if you didn't appropriate funds to add it to the budget, the program would lapse for want of money.

CHAIRMAN EISENSTATT: Yes, I suppose we'll have that problem from time to time, but the idea is to enforce some discipline. You see, if you sit in the Executive Council now, at almost every meeting somebody comes up with a nickel or dime or a dollar, something like that, and this is going to enforce some discipline on all of these committees and other sources to think about their programs in advance—like, for example, the *Creighton Law Review*. If they were to come to us when this procedure was in operation and we didn't have the money in this budget, we could set it up for the next budget. We hope we won't have so many emergencies, and we hope that we'll be able to stick a little closer to what we've provided for and know just exactly what our money is being provided for. If there is something coming up at the annual meeting I would hope that the Budgeting and Auditing Committee would be prepared to speak on whether or not we can afford the thing, if it came up on the later part of the calendar. Who knows, we may find the whole thing won't work!

I would now like to proceed to the next item of business, No. 26. Let me give some background to Item 26 before I present it.

At the last meeting of the House, it was provided that the administrative assistant post be created and that an administrative assistant be hired and an office be set up, et cetera. A committee of the Executive Council was formed for this purpose. An examination was made of things required, and it appeared that to do an adequate job some additional money would be needed. It also appeared that there were many other things that we were faced with that required additional funds.

We had adopted at the last House meeting, for example, a retirement program for George Turner and Katherine Schultz, which is not being funded at this time—which requires funds, and there are many others.

So based upon this, the Executive Council felt that it was necessary that we have a dues increase. The President of the Association, Mr. Mattson, sent to me as Chairman of the House of Delegates, the recommendation of the Executive Council that Article IV of our Rules be amended to provide that the members' dues be increased as follows:

For members in practice over five years, to be increased from \$30.00 to \$50.00 a year.

For members in practice less than five years, from \$15.00 to \$30.00 per year.

For inactive members, from \$5.00 to \$10.00 a year.

This was the unanimous recommendation of the Council, that the proposal be submitted to the House of Delegates at this meeting and that it be considered, and if approved by this House, that it be submitted as a recommended Rule change to our Supreme Court.

There have been some preliminary exploratory talks with the Court, but I think in order to get the matter up for discussion and to follow proper parliamentary procedure, I hope, I would like a motion. I presume I need it, do I not, Mr. Mattson?

PRESIDENT MATTSON: I would so move the adoption of this recommendation from the Executive Council.

CHAIRMAN EISENSTATT: Do I hear a second?

THOMAS R. BURKE: I second it.

CHAIRMAN EISENSTATT: It has been moved and seconded that Article IV of the Rules of this Association be amended to increase its dues as indicated. Is there any discussion? Any questions?

JOHN J. SULLIVAN: As I understand your preliminary statement, the goodly portion of the necessity for increasing the dues is in regard to this Executive Director . . .

CHAIRMAN EISENSTATT: Administrative assistant.

MR. SULLIVAN: Or administrative assistant that is being proposed.

I have had attorneys in my district ask me, if we are going to increase the dues, what I would say on this. If it is because of the administrative assistant, and I said as far as I knew it was, they said, "Well, what are we doing in regard to hiring him? How much are we paying him? Where is his office going to be? How much is it going to cost?"

Now, to my knowledge, we haven't got any answers to these questions to date, and we are being asked to increase the dues. I think we should have some answers on those questions before this question is taken up.

PRESIDENT MATTSON: May I speak to that, Mr. Chairman?

CHAIRMAN EISENSTATT: Mr. Mattson!

PRESIDENT MATTSON: Following the adoption of a bylaw at your midyear meeting, which you will recall required the Executive Council to hire this administrative assistant and equip him with a staff, and so forth, as Leo said, the Executive Council had this matter under study following the annual meeting last fall until the 15th of June, which I think was the day after the midyear meeting. At that meeting of the Executive Council the studies which had been made by the subcommittee through the winter and spring were given to us.

In answer to the details, this will be covered in my address tomorrow to the membership. We were informed that the initial cost of this program would be \$35,000, the details of which are \$15,000 for salary on average, with the expectation that we would be expected to pay from \$18,000 to \$20,000 for the administrative assistant. It was calculated that a secretary would cost \$4,800 a year; office rent, \$4,200 a year—now. These studies had been made by subcommittees. Charlie Wright, I think, made a very extensive study of the running-of-office expense in Lincoln. Then, items such as postage, telephone, travel, stationery, miscellaneous, were calculated at \$4,800; contingencies, \$4,200; furniture, fixtures and equipment, \$2,000. Then the information was given us that when this program got under way we could expect to pay, or have it cost us, about \$30,000 a year.

This is the background upon which the Council at the June meeting adopted the recommendations of the subcommittee, which were these: That the President cause the creation of a committee or committees to carry out and implement the following:

(a) The employment of an administrative assistant and preparation of a written employment agreement;

(b) Securing office space in the City of Lincoln for the office of the administrative assistant and his staff; and

(c) The acquisition of the necessary office equipment, supplies, and materials.

I am expressing to the membership tomorrow that that has not been done as yet because we do not have the money for it.

Part of the adoption by the Council was this: Of necessity, to implement the above, the Executive Council shall forthwith petition the Supreme Court of Nebraska for an increase in members' dues as follows: \$50.00 for men over five years in the practice; \$30.00 for men less than five years; and \$10.00 for inactive members.

Through a misinterpretation on my part of the word "may," contrary to that recent decision of the Court in which they said the word "may" means "shall," I blundered forth with an informal application addressed to the Court through the Chief Justice, seeking consideration by the Court of this proposed amendment to the Rules. Then it later came to my attention that that "may" referred to "the Executive Council may recommend to the House of Delegates"—that is what this present resolution is for, to carry out probably the true intent of that word "may."

To further carry on the chronology, the Court was furnished copies of this report that I have mentioned so that each member of the Court had it, and I know that the letter of petition which was addressed to the Chief Justice was copied so that each member of the Court had a copy of that. My letter addressed to the Chief Justice was on July 18. The Court, if you remember, at that time was in recess. Then after a visit with Chief Justice White, the matter was placed on—what do they call it?—their consultation agenda and considered by the Court, with the word back to us that before the Court would take affirmative action, as they did once in the past, they request and require a poll of the membership. So that is the history and those are the figures in connection with this.

Upon reflection, and discussion at Reorganization Committee meetings, I see need for money in many other areas to properly carry on the functions and affairs of the Association, and one of the most surprising things that came to my attention as President this year, having had little contact with the Council for about four years, was that on your major committee activities there is no expense provided for you to hold meetings. I think it is unfair to the membership of the committees, and I think it is unfair to the studies that you have under way not to provide your committees with ex-



pense to gather and meet and consider your problems. This is just one other phase that I hadn't thought about except through this recent experience and exposure as President of your Association. And there are several other areas.

This, Sullivan, I hope is in answer to your question.

MR. SULLIVAN: Mr. Mattson, one other question. I appreciate having this information, but one other question: Does this constitute a budget or is this simply an estimate of what it may cost for this administrative assistant?

PRESIDENT MATTSON: This is an estimate of what it might cost.

CHAIRMAN EISENSTATT: Let me supplement that. It is based upon what we consider some informed information. For example, Charles Wright made an investigation of rentals in the City of Lincoln, and we have a several-page report from various real estate men and building managers in the City of Lincoln as to rentals. We also have a survey from the American Bar Association as to what type of salary arrangements this breed of cat, the administrative assistant, requires. There are fringe benefits that have to be provided for. And then, of course, you all know as well as we do the cost of running an office which this would entail, so it is not necessarily just picked out of the air. There was considerable study of the cost, and this would be in a sense a budget but it would be subject to some variation when we actually get into it.

MR. SULLIVAN: Well, I didn't mean to imply that you just picked these figures out of the air. I just wanted to know, if they ask me, so I can tell them that this is an estimate rather than an actual budget that is set up for the beginning of operations.

THOMAS R. BURKE: Mr. Chairman, I think he could also tell them that it will be the House of Delegates, this group, that will set the budget under the action you took just a few moments ago.

JAMES M. KNAPP: Mr. Chairman, briefly, can anyone tell us how much money this increase will raise for the Association per year?

CHAIRMAN EISENSTATT: Yes sir. I am glad you asked! I addressed an inquiry to Mr. Turner on the number of members in the different categories, and based on that infallible source of information, Mr. Turner, we have 1,919—at least we did on the date of inquiry, June of this year—1,919 members in the senior group; 387 in the junior group; and 1,189 in the inactive group. Now, multiplying this 1,919 times \$20.00, which is the senior members, produces

\$38,380; \$15.00 times the junior group, 387, produces \$5,805; and \$5.00 times the inactive group of 1,189, produces \$5,945, for a total increase of \$50,130.

The original, present dues structure, using those figures, produces an income of \$60,230. If you would examine the reports in the prior years you would see how that prior income was expended, and hopefully, with the budgeting and auditing procedure, maybe there will be some saving, and maybe there won't.

MR. KNAPP: It is my understanding that our dues are a good deal lower than many of our neighboring states.

PRESIDENT MATTSON: To the north of us in South Dakota, which can be verified by the President of that Association—he was here this morning—Bob Riter, their dues are \$100 a year.

To the south of us, Kansas, the dues are \$50.00 a year.

I don't know what they are in Colorado. Justice Kelley is in the room. Don, can you tell us what the dues are?

DONALD E. KELLEY: Since I went on the court I quit having to pay, so I'm not sure.

CHAIRMAN EISENSTATT: Charlie Wright, do you know?

CHARLES E. WRIGHT: They are either \$35.00 or \$50.00. They have separate section dues.

PRESIDENT MATTSON: Also, when you register at the Broadmoor for your annual meeting, you lay down \$30.00 across the table, which we have never done until this year when we are charging this \$15.00 for the *Manual*.

In Missouri you lay down from \$16.00 to \$20.00; and in Kansas you lay down \$12.00 just to register to attend the annual meeting, and I am just talking about the annual meeting, not institutes or clinics, that sort of thing.

CHAIRMAN EISENSTATT: Also in Kansas they put on at least two big institutes a year where the minimum charge is \$25.00. Like we are paying \$15.00 for the *Probate Manual*, they would have to pay a minimum of \$25.00 and sometimes more down in Kansas.

PRESIDENT MATTSON: Let me push this in here too for your thinking. As I say, all of these details I am going to cover tomorrow in the address, but in my statement to the House this afternoon I mentioned the retirement contracts that we have with George Turner and Kathy Schultz. I'll tell you the details of the contracts.

With George, if it is a voluntary separation we will pay George \$275.00 a month for the rest of his life. If it is involuntary we are committed to pay George \$550.00 a month, and on his death that will continue to his widow, June, for the balance of her life.

With Kathy Schultz, upon her age of retirement at 65, we are committed to pay her \$400 a month.

None of these are funded because we haven't the money to fund them. So these are things that are out on the horizon that are just not strictly related to the financial problems of the administrative assistant.

CHAIRMAN EISENSTATT: I might say to the membership, with respect to the administrative assistant and his staff, we would not have this problem of retirement again because there an ABA program to which we would or could subscribe where a small monthly or annual payment takes care of this retirement for them.

FRANCIS M. CASEY: Russ, didn't you say that the Supreme Court wants us to poll all of our members and get their vote?

PRESIDENT MATTSON: Yes.

MR. CASEY: Well, then, the monkey isn't on our back.

PRESIDENT MATTSON: Well, only by reason . . .

MR. CASEY: They will probably follow what the majority of the members say, anyway, won't they?

PRESIDENT MATTSON: This is a mechanical problem. As I explained, I misinterpreted the word "may." All this before you now is in compliance with Article IX—I think it is Article IX—in connection with amending the Rules. Recommendations to the Court of amendments to these Rules, recommended by a three-fifths vote of the Council, may be adopted by a majority of the House of Delegates present at a regular meeting.

Well, as I say, I interpreted "may" the other way and went directly to the Court from the Council back in July, and that is when we got the word from the Court, "Poll the membership."

CHAIRMAN EISENSTATT: After the House votes it.

PRESIDENT MATTSON: After the House votes on our recommendation. This is simply to make the prior action legal to change the Rules.

CHAIRMAN EISENSTATT: The question has been called for. All those in favor please signify by saying "aye"; all opposed. The motion is carried. (Unanimously)

It's only three-thirty and I thought we would be here at least until midnight!

I have one additional matter coming under calendar Item No. 27. I mentioned it to you previously. Our Supreme Court is in the process of doing whatever has to be done to secure appropriations for one law clerk for each justice. Our Judiciary Committee has been working with the Court to some extent on that and recommends, as you will remember from the report of the Judiciary Committee—and I think it would be helpful to the Judiciary Committee and to the court if this House of Delegates would go on record urging and recommending that the Legislature provide sufficient and adequate funds to provide one law clerk for each justice of our Supreme Court, and I would entertain a motion to that effect.

HOWARD H. MOLDENHAUER: I so move.

CHAIRMAN EISENSTATT: Seconded?

LEO CLINCH: I second it.

CHAIRMAN EISENSTATT: Any discussion on that? All those in favor signify by saying "aye"; all opposed. The motion is carried.

Is there any other matter that any member of this House wishes to present for consideration of this House. Mr. Adams!

CHARLES F. ADAMS: These are a couple of little house-keeping chores, but I would like to have the record straight. So far as I was able to determine by listening this morning, there were three special committees on which there has been no affirmative action for continuance. Before I proceed to appoint these committees for the coming year, I would like to have authority from the House of Delegates to continue the Committee on Cooperation With the American Law Institute, the Committee on Memorials, and the committee created this summer by action of the Executive Council and President Mattson, the Committee on Family Law. I therefore move the approval of this House to continue these three special committees.

PRESIDENT MATTSON: Include the Water Resources Committee, too.

MR. ADAMS: We have already acted on that, Russ. That was taken care of.

CHAIRMAN EISENSTATT: Do I hear a second?

HARRY B. COHEN: I second that.

CHAIRMAN EISENSTATT: All those in favor signify by saying "aye"; opposed. The motion is carried.

MR. ADAMS: Mr. Chairman, one other that I think this would be in the category of housekeeping chores. I want to pay my tribute to Herman Ginsburg and Charlie Wright and all the other members of this Committee on Reorganization because they have undertaken a tremendous job, and we have had a splendid progress report on what they are doing. We hope they will be able to complete their work perhaps as early as our next midyear meeting, but it is a big, big job. Because of a special request in one of their recommendations to the Executive Council, we have taken action on the matter of budgetary controls.

I would like to offer this motion because the Supreme Court has indicated to us that they do not like to have us submit piecemeal requests for Rule changes, and we feel that it is quite likely that there will be other Rule changes in connection with the program of reorganization, and we would like to submit them all at one time. On the other hand, the action you have just taken with regard to dues we feel is a matter of some immediate urgency.

I therefore move that it be the sense of this House that the action of this House with reference to increasing dues be submitted forthwith to the Supreme Court, and that all other actions taken with reference to other Rule changes be submitted to the Court at such time as the entire Reorganization Committee report can be approved by this House.

PRESIDENT MATTSON: I'll second that.

CHAIRMAN EISENSTATT: I have had a call for the question. All those in favor signify by saying "aye"; all opposed. The motion is carried.

[The report of the committee follows.]

#### **Report of the Special Committee on Reorganization of the Nebraska State Bar Association**

Pursuant to the action of the House at the last annual meeting (1967) and by virtue of the appointment of the membership of this committee by President Mattson, the committee has undertaken a further study of the organization of the Nebraska State Bar Association.

Referring to the report of this special committee to the House at its 1967 meeting, this committee's report included the suggested study of eight specific subjects.

The committee has met five times and will meet on October 5, 1968, and probably will have one more meeting prior to the annual meeting on November 7, 1968. Subcommittees have devoted a great deal of time and study to specific topics assigned to them.

The first three subjects, to-wit:

- (a) Fiscal Management,
- (b) Functions, Scope, and Constitution of Committees,
- (c) Functions, Scope, and Constitution of Sections, Including the Cost of Greater Autonomy for the Sections and their Right to Establish Section Dues,

have been given detailed attention and study. The committee has approved the organization of the State Bar committees into five divisions, to-wit:

- Division 1—Administration,
- Division 2—Internal Standards,
- Division 3—External Relations,
- Division 4—Continuing Studies,
- Division 5—Special Committees.

The constitution of and powers and duties of committees have been approved by this committee and are ready to be submitted to the House as a portion of our final report when the study is concluded.

The committee has approved the following sections:

- 1. Young Lawyers Section,
- 2. Negligence Section,
- 3. Natural Resources Section,
- 4. Insurance, Banking, Corporate and Commercial Law Section,
- 5. Real Estate, Probate and Trust Section.

The constitution of, duties and responsibilities of each section to include separate dues to be charged by each section are still receiving further study by the committee.

The fiscal management of the Association has been given detailed study and will be specifically provided for in a suggested rule creating an auditing and budget committee under Division 1.

Since this is a special committee on reorganization of the Nebraska State Bar Association and its work is not concluded, it is recommended that the committee be continued to study the reorganization of the Nebraska State Bar Association and make further report.

Herman Ginsburg, Chairman  
J. C. Tye, Vice Chairman  
Charles F. Adams, President Elect,  
Ex Officio  
William J. Baird, Ex Officio  
Robert C. Bosley  
John C. Gourlay  
Frank J. Mattoon  
C. Russell Mattson, President,  
Ex Officio  
Murl M. Maupin  
William E. Morrow  
Charles E. Wright

CHAIRMAN EISENSTATT: Any further business? The House is adjourned until after the annual meeting. Under the present rules we have to have a final meeting after the meeting of the Association. Nothing ever happens but we have to have it under the Rules. So I will call you back in at that time. That is shown on your printed program.

. . . The House of Delegates adjourned at three thirty-five o'clock . . .

## NEBRASKA STATE BAR ASSOCIATION

### THURSDAY MORNING SESSION

November 7, 1968

The Sixty-Ninth Annual Meeting of the Nebraska State Bar Association, convening in the Hotel Sheraton-Fontenelle in Omaha, Nebraska, was called to order at ten o'clock by President C. Russell Mattson of Lincoln.

PRESIDENT MATTSON: The Sixty-Ninth Annual Meeting of the Nebraska State Bar Association will now come to order.

First we will have the invocation by Rabbi Isaac Nadoff of Beth Israel Synagogue of Omaha.

### INVOCATION

Rabbi Isaac Nadoff

Our Heavenly Father, we are convened here on this day in the interest of our profession and our calling. We seek Thy divine guidance so that all our deliberations may prove helpful to the establishment of law and justice for all men in our land.

Grant us, O Lord, the wisdom to be guided according to Thy light and in full accordance with Thy will. Help us to concentrate our efforts on the preservation of human dignity and the rights of all individuals, seeking always to pursue only truth and honor in all our undertakings.

Enable us, O Lord, to practice our profession with integrity, with conviction, with compassion. Enable us to perform our tasks in a manner which will reflect credit upon all men and bring glory to Thy name. Thus we will help to create a better society and a better world, and hasten the day of the establishment of Thy kingdom of justice upon earth. Amen.

PRESIDENT MATTSON: Thank you.

Next it is our privilege and honor to have the address of welcome by Seymour L. Smith, who is President of the Omaha Bar Association.

### ADDRESS OF WELCOME

**Seymour L. Smith**

Thank you, Russ, and visitors. I notice that I am billed to give an "address" of welcome but it is going to be more some reminiscences and stories in a very short time. I promised George Turner when I responded to the invitation that I wouldn't forget that I am not to be the principal speaker of the day. I have known times when a fellow was sent out to introduce a speaker and he forgot that.

I want to welcome you all to Omaha. I think many of you who get in here frequently know Omaha better than I do, probably.

I always say I don't have the key to the city, but I don't need the key because, while Omaha isn't wide open, there are a lot of unlocked doors if you just look around a little.

I think of the first State Bar Association I attended in Omaha. It was an out-state lawyer from Lincoln, and what a difference between that day and now, especially in the election of officers for the ensuing year! Everybody came to the address of welcome because they wanted to be seen because they were running for something or had a candidate who was running for something at the election to take place the next day. So there would be buttonholing, contests, and long speeches made in favor of a particular candidate. I see Bob Beatty smiling down there. He and I remember well a particular one. All that has changed for the better.



But we are always glad to have Omaha selected. There used to be a contest whether Omaha and Lincoln should alternate. Some wanted Grand Island or North Platte, but I remember this sentiment always prevailed, "Well," the out-state fellows would say, "we like to come in to the big city. We like to come to Omaha or Lincoln." So they would invariably vote down a selection of any other city.

One of our favorite speakers of those days, and he came during my recollection and before he died to four or five Bar Association meetings, and that was Senator Jim Reed of Missouri. The old senator always had some good stories. He told one about a half-wit that got admitted to the bar in England, and the bar association just upbraided the examining committee for letting *that* fellow become a member of the bar.

The chairman of the examining committee said, "Well, you know the rule: If he answers half the questions correctly he is eligible."

"Well, what questions could *he* answer correctly?"

"We asked two," they said. "The first question was 'What is the rule in Shelley's case?' He said, 'Shelley was a poet,' and of course that was wrong. Then we asked him 'What is a contingent remainder?' and he said, 'I don't know,' and of course that was correct, he didn't know, so we admitted him to the bar."

So while you are with us, have a good time and enjoy yourselves. We are always glad to have you come to Omaha.

PRESIDENT MATTSO: Thank you, Seymour.

The Response will be by Vance Leininger of Columbus, who is a member of the Executive Council.

## RESPONSE

Vance E. Leininger

Mr. President, Members of the Association: I think the President of this Association did me a distinct disservice by asking me to respond to an address of welcome delivered by such an accomplished raconteur as Seymour Smith. I know that I am not up to the occasion. I think they must have had him in mind when whoever wrote the Proverbs in the Bible wrote the words, "A word fitly spoken is like apples of gold in pictures of silver." Seymour, your address of welcome certainly fits that comment.

There is another impossibility in connection with my response this morning. I feel like the old Greek king who was so crafty and

pulled so many mean tricks during his lifetime that when he came to the time when he had to take up the life hereafter he was sent to Hades and was assigned the task of pushing a big stone uphill. He could never get it to the top of the hill. It was too much for him and it kept rolling back, so he would have to start over again, and that was his interminable sentence in Hades.

I think that, in a measure, those of us from out-state Nebraska, the visiting lawyers to Omaha, have that kind of a task because we are forever in the debt of the Omaha Bar and our Omaha hosts for the warm reception we always receive when we come to this city for our annual meeting.

May I also express the appreciation of the wives of the visiting lawyers to the wives of your Omaha lawyers, who invariably extend the welcome mat and show us all a good time.

We are indeed privileged to have our association meeting in the City of Omaha. We are always interested in the progress and the developments that your city evidences when we come to Omaha. We enjoy the pleasant, hospitable, and festive atmosphere that the city and its lawyers provide for those of us who are visitors at these meetings.

In closing, I think it might be appropriate to comment that one of the most remarkable things about our profession is that it is founded on controversy and on an adversary system calculated to resolve those controversies, and yet we get together and we always have a good time when we get together.

Turning again to the Bible, which is a prolific source of quotations, I think it might be fitting to close these remarks with Verse 1 of Psalm 133: "Behold, how good and how pleasant it is for brethren to dwell together in unity!"

**PRESIDENT MATTSON:** Now it is my pleasure to present to you for your acquaintance the gentlemen at the head table, and particularly our visitors.

Bill! would you come up? I am extremely sorry that I did not see the entrance of this gentleman into our midst.

On my far right is Leo Eisenstatt, Chairman of the House of Delegates. You have met Vance and Seymour. You know George.

At my extreme left is Judge L. A. McNally of Salina, Kansas, a district judge who is President of the Kansas Bar Association. Judge McNally!

Then next to Chick Adams, whom I'll present in a moment, is Martin J. Purcell of Kansas City, Missouri, President of the Missouri Bar.

Next to Martin is Francis L. Cudahy of Jefferson, Iowa, President of the Iowa State Bar Association.

At my immediate left is Mr. Robert C. Riter of Pierre, South Dakota, President of the State Bar of South Dakota.

Of course, on my left is Charles Adams, President-Elect.

Now the gentleman whom I did not see come into the room—it is my extreme pleasure to present to you the Honorable William T. Gossett, President of the American Bar Association.

## ADDRESS OF THE PRESIDENT

### C. Russell Mattson

We are in our 69th year as an organized bar, and concluding our 30th year of being integrated. It is well that we examine the "State of the Union," with emphasis upon our activities in the areas that justified the Supreme Court in its order of integration.

This is in the preamble to the Rules:

For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar, there is hereby organized, created and formed the Nebraska State Bar Association.

These axioms are duties that each of us assumed when we were privileged to become licensed to practice law in Nebraska. They are obligations we owe to each other as fellow lawyers, to ourselves, to the public, our clients, and to the courts.

The purpose here is to translate for you the conduct of your Association in its assumption of these duties. It will be an attempt to answer our critics. We have had them with us seemingly since lawyers began.

Many of our activities during the past year bear an inter-relationship to the principles of integration.

First we will look at those things accomplished for the advancement of the honor and dignity of our profession, and the encouragement of cordial intercourse among our members.

We start with the law students and the younger lawyers in our membership. For the first time we have placed student members, without vote, upon the standing committees. From the Law Student Associations of both Creighton and Nebraska we have chosen an undergraduate to serve on each committee. The custom having been established, it is to be carried on in the future.

Having in mind the effect of broadening experiences for the benefit of the undergraduates, we have granted financial assistance to each of the law student associations. As a result of this, both Creighton and Nebraska were represented at the annual American Bar Association Student Conference in Philadelphia. They were also represented at the American Bar Association Student Conference of the Eighth Judicial Circuit held in Sioux Falls. We were happy to learn that for the fourth year in a row Creighton was recognized as one of the outstanding student bar associations in the circuit.

Further, from the aid given by us, both Creighton and Nebraska were represented at the Conference of the Law Student Division at the annual meeting of the American Bar Association in August, and Herbert Knudsen of Nebraska was first vice-president of the National Division.

We made a contribution to the Young Lawyers Section in its effort to finance the Regional Moot Court Competition which is coming on this month, this again enuring to the benefit of the undergraduates. These things we will continue, realizing that the lawyers of tomorrow are in training today at the college level.

Having for many years supported the *Nebraska Law Review*, we granted financial aid to the new venture of the School of Law at Creighton in the project of publishing the *Creighton Law Review*. The first volume came out last spring. As with the Nebraska publication, a copy of the *Creighton Law Review* is sent to each member of the Nebraska Bar.

In our own recognition of the excellence of the law schools, the Association gave special awards of merit to Dean Doyle and Dean Grether at the midyear meeting in June.

Moving to the Young Lawyers Section, we have given financial aid for representation at the annual conference in Philadelphia, again during the meeting of the American Bar Association.

From this section we have had two extremely fine activities. The Bridge-the-Gap program at the Kellogg Center was one of the finest ever held, the attendance having been larger than in the past.

In September the section produced, along with the College of Law at Nebraska, a most informative institute on will and trust drafting. Again the attendance was far above that of most of the past functions of a similar nature sponsored by this section.

Turning now to what is a "housekeeping matter," we have engaged the Association in two retirement contracts. Katherine Schultz, who has been a worthy employee of the Bar for the past 24 years, was granted a contract of retirement under direction of the Executive Council. The terms and conditions of the contract vary according to whether the retirement is voluntary or involuntary. The important feature is that we have contracted a payment to Miss Schultz of \$400 a month, upon retirement after age 65, for the balance of her life.

The other retirement agreement approved by the Executive Council is one with George Turner. George has been our Treasurer for 31 years and our Secretary for 30 years. Under the contract we are obligated to pay George \$275 a month for the rest of his life if the separation is voluntary on his part. If it is involuntary, we are obliged to pay him \$550 a month, with provisions that if June Turner survives George, our contractual payments to her are \$550 a month for the rest of her life. If June does not survive George, then the payments above terminate upon his demise.

Neither of these contracts has been funded. We do not have sufficient money available to fund them as far as the immediate future is concerned.

I would be remiss if there were no observation that the services of both George Turner and Kathy Schultz have been of extreme importance during the past year, as always, to the smooth and efficient operation of our Association. Their contracts of retirement have been richly deserved, and this is small recognition for our appreciation to them for work so well done over the many years. They have been the internal machinery making things click for us as time has moved on.

With a reactivation of the Insurance Committee of the Council under leadership of Fred Irons, we have improved the programs that are of direct benefit to the members of the Association. Under the disability program the available benefits have been increased but, most important, the contract is now guaranteed renewable for each member up to age 70 at the option of the Association as long as our sponsorship continues. The company can never cancel the Bar Association as long as we approve the program. There is also available a conversion privilege to the Individual Guaranteed Re-

newable Policy if a person should no longer be eligible for the Bar program. These are new features and will be of extreme value for us in the future.

Taking advantage of recent legislation, we have increased the individual life insurance available to \$25,000. We have enjoyed rate reductions for the last year and for the current year. In 1967 a dividend of 34.3 per cent was paid to all participants. Under the recent enrollment offering the new features of the life program, we now have in force from expanded and new contracts \$3,890,000 for our members.

For the improvement of our own lot, we have had many activities. Some fall within the range of continuing legal education, and some are inter-related with our own good and our relations with the public in general.

We took an active part in promoting the Western Regional Meeting of the American Bar Association last June in Denver. Our particular interest in this program was its emphasis on farm and ranch law. Since it was a meeting open to all lawyers, whether members of the ABA or not, we lent support that seemingly was well repaid. Second to Colorado, the host, the registration of Nebraska lawyers was the largest of any of the participating states, all of which border Colorado.

Our tax institute will be held again in Sidney and Grand Island in December. We lend support to the Great Plains Tax Institute again, which will be held at the Kellogg Center on December 2 and 3.

At the midyear meeting in June the Section on Commercial Law conducted a seminar on parts of the Uniform Commercial Code, which was presented to the Western Bar in North Platte later that month.

Starting today and running through tomorrow there will be a detailed and in-depth institute on Nebraska probate practice, which should be of benefit to all of us. The Section on Real Estate, Probate and Trust Law has worked hard and long to make this an institute of extreme value. Untold hours of labor have gone into the production of the *Manual*, now available for us in our practice, through the joint efforts of this section and the one on taxation.

For the enlightenment of our brethren in the medical profession, our Committee on Medico-Legal Jurisprudence, with the cooperation of that on Continuing Legal Education, conducted a trial demonstration at the annual meeting of the State Medical Associa-

tion. In the prior year the program we gave the doctors was in the field of estate planning, and some other area will be explored for them in 1969 through the efforts of these committees.

Plans are under way for the Committee on Economics and Law Office Management to conduct a traveling seminar on the subject of economics affecting us as lawyers. Howard Moldenhauer, chairman of that committee, with others from Nebraska, has recently attended a national conference on matters of economics and law office management in San Francisco. The expense for this was approved by the Executive Council, and Mr. Moldenhauer was a participant in the conference. Participation by Jerrold Strasheim to represent us at a National Conference on Continuing Legal Education in Chicago last month was also approved.

The Special Committee on Reorganization has had many meetings during the year. It is working on internal changes in the structure of our committees and sections to provide us with more feasible means of carrying on the functions of the Association. The design will be to do away with overlapping of responsibilities and work, and a report of its activities is found in the program. The committee will continue its labors, and our hopes are that when the work is completed we will have a new and highly efficient operation.

As to the improvement of the administration of justice and the improvement of service rendered the public, we have had a proud record of achievement in the past year.

As you know, the Unicameral in 1967, following the constitutional amendment, adopted the law providing judicial disqualification. It sets up standards and procedures and established a commission for its purpose. The commission has been created, and under the terms of the law two members must be lawyers with at least ten years of practice, nominated by our Association through the Executive Council. Our members on the commission are Guy C. Chambers and Ralph E. Svoboda, both of them eminent leaders of the Nebraska Bar.

With the merit system for selection of judges and our retirement law well under way, and the establishment of the commission for disqualification of judges—a great deal of the success in the adoption of all of them being the result of hard labor on the part of our members in the past several years—we have certainly carried out an obligation for the advancement of the administration of justice in Nebraska.

In January, at the Kellogg Center, we held an Institute for Judicial Nominating Committees. This was under joint sponsorship of the American Judicature Society and the two Nebraska law schools. About one hundred were in attendance. The entire Supreme Court was there. Among the participants were Federal Judge Elmo B. Hunter of Kansas City, Missouri, Chief Justice Theodore G. Garfield of Iowa; and Judge William H. Burnett, Chief Judge of the Denver County Court. The purpose was to discuss procedures in selecting names for submission to the Governor to fill judicial vacancies. The noon luncheon speaker was the Honorable Norbert T. Tiemann, and for future executives of our state we quote these words from his address:

The intent of the merit system was to remove politics from the judicial selection process. Perhaps some governors have not yet fully realized this. But I can assure you that Nebraska's judicial appointments during the next three years will be made on the basis of qualifications, not political affiliation.

Of further interest in his remarks, your attention is called to this:

All of state government, including the judiciary, has traditionally been plagued by an inadequate salary scale. Some improvement was made in 1967, but our judges are still among the lowest paid in the nation...I hope that we can soon close this income gap by legislating additional salary increases for Nebraska judges.

This deserves the full support of the Nebraska Bar. In addition, we have undertaken to propose that the Supreme Court of Nebraska be provided with law clerks for its members. This will take no legislation but it will require our efforts along with those of others to induce the Budget Committee of the Unicameral to make provision for such a program, and we are prepared to do all we can to advance this enterprise. Nebraska is one of five states that do not provide clerks for their Supreme Court, and it is time we joined the other 45.

We also took part in a Traffic Court Conference held at the Center last November, in cooperation with the Nebraska College of Law, the Northwestern University Traffic Institute, and the American Bar Association Traffic Court Program, with the Motor Vehicle Department of the State of Nebraska helping.

We are proud that the Municipal Court of Lincoln was awarded first place in its group of cities nation-wide by the Standing Committee on the Traffic Court Program of the ABA. The award was based upon the degree of improvement and practices in the handling of traffic cases.



We have established two special committees within our framework, each related to the problems of both lawyers and the public. One is a Committee on Water Resources, headed by Professor Richard Harnsberger of the College of Law at the University of Nebraska; and the other is a Family Law Committee headed by Rev. LeRoy E. Endres of the Creighton School of Law. As time moves on, the effectiveness of these functions will be evaluated and perhaps they will be placed into the revised structure as the work of the Committee on Reorganization becomes finalized.

The Committee on Public Service has carried our image well in its usual effective manner. For the first time a 15-minute video-tape presentation was produced for television. It was carried in connection with Law Day on KMTV in Omaha, used later on KOLN-KGIN of Lincoln and Grand Island. Then it was televised over the Educational Network with its state-wide coverage. The 60-second radio spots were continued and used by 25 radio stations over the state. Law Day USA was a tremendous success, with deeper saturation over Nebraska than ever before. The cooperation of the news media was most helpful this year.

We have continued the efforts to expand free legal service to the indigents. The lawyer referral programs in Omaha and Lincoln are functioning well. We hope through activity in the local bar associations that these programs can be extended through Nebraska.

From what has been covered up to now, you can see that a huge vote of thanks is forthcoming to all of the participants mentioned. This covers the many committee and section members, the Executive Council, and George Turner and Katherine Schultz. Of course George and Kathy are paid employees. Bear in mind that most all of the functions of this Association are on a voluntary basis from our members, who have given devoted time and attention to the labors. The only exceptions are Tom Carroll, our public relations expert, who is employed by the Public Service Committee, and for the up-coming year Ed Carter, Jr., who will be our legislative counsel, as he was during the 1967 session of the Unicameral.

There has been no intention in these remarks to overlook the many other committees that have worked hard during the year, and due credit is coming to all of them.

This brings us to the matter of an administrative assistant, which has demanded our attention for the past few years. A review of the record shows that the germ for this project was planted in the praise that Harry Cohen, in his address as President of the Associa-

tion, paid to George Turner. The first official action was taken at the 1966 meeting of the House of Delegates, where the matter was tabled until the next annual meeting. However, President Maupin appointed a committee with Joe Tye as chairman, and a final report and recommendation of that committee was made at the annual meeting of the House in 1967. The proposal that an administrative assistant be hired was adopted. At the midyear meeting of the House of Delegates in June of this year a bylaw was passed directing the Executive Council to appoint such an officer and fix his term of office and compensation.

The functions of an administrative assistant would be to provide quarters for the Association, the necessary staff, the planning, promotion and carrying out of the programs of public relations, legislation, and continuing legal education. He would be expected to coordinate the activities of the sections, committees, and local bar associations. He would work with our officers in the conduct of their activities. He would perform such other services as may be assigned to him by the President and Executive Council, to whom he would be responsible for the administration of the business and affairs of the Association.

The Council, as a committee of the whole, undertook a study of this matter in late 1967. By the June meeting, the day after the adoption of the bylaw by the House, the matter was considered upon a reporting from a subcommittee whose chairman is Leo Eisenstatt. It was the report to the Council that we should be expected to pay a salary of from \$12,000 to \$15,000 a year at the start, with promise of increased annual compensation to \$18,000 to \$20,000 within a stated period for such an employee. Secretarial help would be needed, and in the matter of equipping an office for the Association, with the incidental expense, we were advised that the initial cost of this enterprise would be \$35,000. The possible annual expense would be around \$30,000 when the project got under way.

At the Council meeting action was taken for the President to appoint a committee or committees to secure the employment of an administrative assistant, to secure office space in Lincoln for him and his staff, and to acquire the necessary equipment, supplies, and materials for the operation of the office.

This has not been done as yet, because we do not have the funds with which to do it. Further action was taken that the Council petition the Supreme Court for an increase in dues. The proposal is that the annual dues be raised to \$50.00 for those in practice over five years; \$30.00 for those in the first five years of practice; and \$10.00 for inactive members.

We did petition the Court for a change in Rule IV to accomplish these raises. The Court informed us that before acting upon the request they desired a referendum of the membership on the matter.

The House of Delegates has now approved the application for the amendment to the Rule and, of course, the next move will be to poll the membership on the question. This will be undertaken, and in the meantime efforts will be made by the Council to learn whether the program can be put into operation within the framework of our present finances.

Our annual income approximates \$70,000, and you can see that the projected costs of an administrative assistant would take about half of that amount. The ultimate answer will rest with the members of the Association.

The annual dues in South Dakota to the north of us are \$100.00. In Kansas to the south they are \$50.00. Each has an executive secretary. Our goal is to provide a similar employee for the benefit of our members and for the gains that will flow to us by such an engagement for the future.

In passing, your attention is called to the remarks of Judge Ben L. Baker, a former President of our Association, made during the discussion on adoption of the integrated bar in 1936. Some of you will remember he was opposed to integration. I quote from him out of the proceedings as follows: "In my short career, I have seen the time when the raising of the amount of cash necessary to pay these dues might be a very difficult matter."

The proposal he was talking about was \$3.00 a year. The Court set the annual dues under the initial integration at \$5.00.

The attempt in this address has been to suggest that we lawyers in Nebraska have been trying to do a good job in meeting our obligations on all fronts. Our image certainly should be that of the quantum of proof we so often meet in the trial arena—"Clear, convincing, and satisfactory." We know it will thus continue.

It has been a rewarding and interesting experience to have served as President of the Association this past year. For this, please accept my sincere thanks and appreciation.

Next we have the report of the Secretary-Treasurer, George Turner.

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

Mr. President and Members of the Association: May I first remind you of the luncheon in this room this noon. Our speaker will be Bill Gossett, the President of the American Bar, and for the benefit of the hotel I would urge you to get tickets early because it is a tremendous job to prepare for an affair of this kind and they need to know about how many to expect just as early in the day as possible.

The annual dinner tonight will also be in this room, and again we would urge that you buy your tickets quite early. The speaker this evening will be one of our own, Judge Don Kelley of the Supreme Court of Colorado.

The books of the Association were audited as of the fiscal year ending August 31, 1968, by Peat, Marwick & Mitchell through their Lincoln office.

Their report, which will be published with the proceedings of this meeting, shows a total income of \$68,244.

The largest items of expense have been salaries, slightly over \$14,000; the *Nebraska Law Review*, slightly over \$8,000; the Committee on Public Service, \$5,900; the American Bar Association meetings, \$5,800; and the cost of our annual meeting last year, \$8,231. Total expenditures, \$69,212, or an excess of disbursements over receipts of \$968.

**PRESIDENT MATTSON:** Thank you, George. This is an information report and was adopted and approved yesterday by the House of Delegates.

Next it is my pleasure to present a report by the Nebraska Bar delegate to the American Bar Association, a former President of the Nebraska State Bar Association, John J. Wilson.

**REPORT OF AMERICAN BAR ASSOCIATION DELEGATE****John J. Wilson**

The American Bar Association is made up of lawyers for lawyers. As of September 30, 1968, the American Bar Association had 134,056 members. This shows a gain of about 7,500 members during the past year. On October 30, 1968, there were 297,285 lawyers in the United States. This shows more than 45 per cent were members of the American Bar Association. Nebraska showed a membership of active practitioners of about 2,400, of which 1,241 were members of the ABA.

There are 27 committees and 30 special committees of the American Bar, which are in addition to 20 dues-paying sections. The Young Lawyers' Section has more than 40,000 nonpaying dues members.

William T. Gossett of Detroit, Michigan, who was introduced to you this morning, became the 92nd President of the Association and will address the members of the Nebraska Bar Association at luncheon this noon in this room.

Bernard G. Segal of Philadelphia was elected President-Elect.

Barnabas F. Sears of Chicago was elected Chairman of the House of Delegates for a two-year term.

Climaxing one of the Association's most active and eventful years, the 91st annual meeting of the American Bar Association and affiliated organizations sessions attracted more than 6,000 lawyers and judges to Philadelphia last month for a varied program touching the full range of subjects that concern the bar and the nation. Including families and guests of registrants the over-all attendance topped 13,000.

The meeting provided a colorful showcase of ABA activities. Trends in every field of law were examined in scores of section and committee sessions. Urgent public issues had prominent places on the program, among them urban problems, crime and law enforcement, protest and dissent, public disorders, and improvement of the criminal law process.

It was a meeting with a new look. For the first time most of the professional programs were concentrated in the Philadelphia Civic Center. A fleet of chartered buses shuttled registrants to and from the Center from a dozen center-city hotels. The central location increased the accessibility of more programs for the attendees.

In its four-day meeting the policy-making House of Delegates dealt with more than one hundred reports and recommendations from the sections and committees. The delegates approved four additional reports in the Minimum Standards of Criminal Justice series, clearing the way for completing that massive five-year project in 1969. Also approved was the significant new Consumer Credit Code drafted by the National Conference of Commissioners on Uniform State Laws for submission to the state legislatures starting next year. Designed to protect the public against credit abuses, it has been called more stringent than the recently enacted federal Trust in Lending Act, and comparable in magnitude to the uniform commercial code enacted in 48 of the 50 states.

In addition, the House heard a discussion of the group legal services proposal, but deferred action on it until next year. On the issue of recognizing and certifying specialists, the delegates were informed of the scheduled release in October of a tentative position report by the ABA panel studying that controversial subject.

The Managing Committee of the ABA Fund for Legal Education reported that 2,700 loans to law students have been made totaling over \$2,700,000. The committee also reported that it received an additional \$50,000 contribution from the American Bar Endowment for the loan guaranty fund.

Association membership is expected to increase by 12,000 during 1968-69, reported the Standing Committee on Membership.

The House voted 112-104 to defer consideration for one year of a proposal that the Association contract with the Continental Insurance Company of New York to establish a bar-related title assurance corporation to issue title insurance to the public only through lawyers. This action was taken in order to allow completion of an American Bar Foundation study of this subject and to await recommendations of a recently formed National Conference of Lawyers and Title Insurance Companies and Abstracters.

The Special Committee on Automobile Accident Reparations reported it has unanimously adopted an outline of study and expects to present a final report containing short- and long-term recommendations.

Six uniform acts recommended by the National Conference of Commissioners on Uniform State Laws were approved by the House, including a proposed uniform consumer credit code. A motion to defer action on the consumer measure was defeated after lengthy debate 112-87. The other acts approved were: The Uniform Recognition of Acknowledgments Act; Uniform Juvenile Court Act; Uniform Child Custody Jurisdiction Act; Uniform Anatomical Gift Act; and the Revised Uniform Reciprocal Enforcement of Support Act.

The ABA Law Student Division totals 13,198 members and its goal for the coming year is 24,000. The division is preparing a series of urban law seminars in major U.S. cities during the spring of 1969 for students interested in serving in legal service programs of metropolitan areas.

*Selected Articles on Federal Securities Law*, a 900- page collection of practical materials, has been published by the Section of Corporation, Banking and Business Law. The hard-cover volume

includes 40 articles. Eighty per cent of them have been updated, supplemented, or rewritten to reflect recent changes in the law. Copies are available at \$12.00 per copy, or \$10.00 each for orders of three or more. The book will be made available to law students or to professors for class use at \$6.00 per copy. Orders should be addressed to the Division of Legal Practice and Education, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.

The dues are only \$30.00 per year. Joining of sections is optional. The dues of the various sections vary. Any member of the ABA will be glad to sponsor your membership, and should anyone be embarrassed, remember that I am the representative of the Nebraska State Bar Association to the ABA and will be happy to be your sponsor.

Nebraska is represented in the House of Delegates at this time by four members:

George H. Turner, who is the State delegate and is elected by the members of the ABA in Nebraska;

I am the representative of the Nebraska State Bar Association and am elected by the members of the Nebraska State Bar Association;

Clarence Davis has a membership of two years as having finished his term on the Board of Governors; and

Louis Shull, elected in Honolulu as a delegate at large, is now in the armed forces and is stationed in Germany.

I will welcome the opportunity to visit with any lawyer who would like to know more about the ABA and hope that many of you will contact me for membership if you are not already a member.

PRESIDENT MATTSON: Next we will have a report of the House of Delegates by Leo Eisenstatt, who is Chairman of the House.

## REPORT OF THE HOUSE OF DELEGATES

### Leo Eisenstatt

Mr. President, Guests, and Members of the Association: It gives me great pleasure to report to you today on the activities of the House of Delegates for the past year. I must state, however, that my report will be abbreviated because, in many respects, the activities of the House have already been covered by the report of your President.

The annual meeting of the House was held yesterday, and the various committees presented their reports, and in most cases those reports were adopted.

As in the past year, we had a blanket motion covering the reports of 17 committees as they appeared in the printed program, because no action was taken upon them. These reports as printed in the program will also, of course, appear in the proceedings of the House of Delegates in the *Nebraska Law Review* when it comes out in the near future.

The most important and significant activity of the House was carried out by the Committee on Reorganization, as referred to by your President, Mr. Mattson. This committee has been engaged and has spent a considerable amount of time in viewing, reviewing, examining, and dissecting the activities of this Association in the hope of evolving a new method, structure, and procedure which will make this Association more responsive to the needs of the members and, hopefully, will be able to answer in the affirmative and constructively, "What have you done for me lately?"

At this meeting two major interim reports by the committee were presented, one dealing with budgeting and auditing, which the House of Delegates adopted in its deliberations yesterday, which provides for the creation of a Budgeting and Auditing Committee by the Executive Council, and the provision for handling in a more controlled manner the moneys of the Association and, hopefully, will enable the committees and other activities of the Association to be handled in a more planned manner.

Also presented was a tentative report on the restructuring of our committees and sections, and I urge each of you, when the proceedings of this meeting are published, to examine it very carefully. These tentative suggestions were sent to every member of the House prior to the meeting, as well as every committee chairman, with the admonition that they be carefully studied and critically reviewed. I might point out to those in the audience today, if there are any changes or suggestions, do not hesitate to make them. Our Reorganization Committee has no pride of authorship, and unless comments are made it could very well be that that which has been suggested will become the final format.

Also of significance, adopted at the meeting, was a proposed amendment to increase the dues and, as President Mattson advised, this is vitally necessary in order to provide us with our administrative assistant and the attendant activities that go with it.



We also have many other financial commitments and we, hopefully, look forward to having this rule adopted so that our Association can move forward.

It has been a pleasure to have served you. I seek and look for any help or suggestions from any of the members that might make more effective the activities and functions of our House.

**PRESIDENT MATTSON:** Is the life insurance representative here? Will you come to the podium, please? I present to you Don Early of the John Hancock Company, from Kansas City, Missouri.

## **ANNOUNCEMENT AS TO GROUP LIFE INSURANCE**

### **Don Early**

In the absence of Mr. Walter Black, your co-bar member and administrator of your group insurance program, I have been asked to present a brief resumé of how your group insurance plan has progressed in recent years.

As many of you know, the statutes of the State of Nebraska have been amended during this past year to permit the writing of up to a maximum of \$25,000 on professional associations. Your Insurance Committee, in an effort to keep your plan as comprehensive and up to date as possible, decided to make this \$25,000 maximum available to each of you. I am sure that most of you have seen this little brochure which announced and explained many of the other beneficial aspects of the plan. I would like to reiterate some of the points brought out in the brochure, with particular reference to the net cost of the plan to those of you who have chosen to participate.

Since 1962 your plan has earned dividends amounting to over \$125,000. In some years, of course, the amount returned to each of you has varied greatly, but to give you an example of what this can mean, those of you who belonged to the group life insurance part of the plan from December 1, 1966, to December 1, 1967, have just received 34 per cent of the total money paid into the John Hancock back as a dividend.

In conjunction with this extremely favorable dividend experience, your premiums were reduced by 10 per cent last December and will be reduced another 10 per cent effective the first of this coming December.

We are going through an open enrollment period right now. So far we have had real good success, close to four million dollars of increased benefits, within the last month.

I will be around for most of the rest of the afternoon and will be glad to answer any of the questions you might have or take any applications.

PRESIDENT MATTSON: Thank you, Don.

In the absence of Judge Carter, the report of the Judicial Council will be given by George Turner.

SECRETARY-TREASURER TURNER: This is Judge Carter's report as Chairman of the Judicial Council:

### REPORT OF JUDICIAL COUNCIL

The Judicial Council has held its usual meetings throughout the year. Being a year prior to the regular meeting of the Legislature, we are working on a few legislative changes which we shall submit to the Legislature.

We have a subcommittee working on possible legislation providing for the destruction of court records. We find that many courts are burdened in caring for old court records that can serve no useful purpose. The difficulty arises in determining what records should be kept and those that should not. Certain statutes play their part in making this determination. We hope to propose a statute more precise than any we have heretofore had which will insure the keeping of necessary records and at the same time permit the destruction of many that are causing space problems.

We have under consideration the preparation of a bill dealing with inculpatory statements and confessions, and confrontations, in criminal cases, made necessary by certain recent decisions of the Supreme Court of the United States.

It was suggested to the Council that a bill be prepared providing for a direct appeal from the compensation court to the Supreme Court of Nebraska. This matter is being investigated by a subcommittee of the Council, headed by Harry Henatsch of Omaha.

The Council has before it for its consideration a proposed handbook for members of judicial nominating commissions. This handbook was prepared by Flavel A. Wright at the direction of the Council. It appears that this handbook will be printed and distributed to all members of our judicial nominating commissions.

We again call attention to the fact that we must rely on the lawyers to call our attention to procedural matters that appear in need of correction.

Respectfully submitted,

Edward F. Carter, Chairman  
Judicial Council

PRESIDENT MATTSON: I wanted to give you a little rest from the President's address, because this is a concise rehash, being the report of the Executive Council.

## REPORT OF EXECUTIVE COUNCIL

### C. Russell Mattson

In its several meetings this year the Executive Council has conducted the business affairs of the Association. With the resignation of George Boland from the Council, Murl Maupin was elected to serve in his place.

The Council approved important changes in the disability insurance contract and in the program of life insurance, which you just heard about.

It authorized execution of retirement contracts with George Turner and Katherine Schultz.

Financial assistance to the Law Student Associations at both Creighton and Nebraska was granted, and the undergraduates participated in the Student Division Conference at the American Bar Association meeting in August and at the Annual American Bar Association Student Conference of the Eighth Judicial Circuit in Sioux Falls.

The Council authorized financial aid to assist in the publication of the *Creighton Law Journal*. The same type of assistance was given to the Young Lawyers Section for representation at the annual conference of that group at the American Bar Association meeting. Financial aid was also given to the Committee on Legal Economics and Law Office Management for participation in a conference in San Francisco and to the Committee on Continuing Legal Education to attend a gathering in that field in Chicago. Expense was provided for Robert Barnett to attend the National Conference of Commissioners on Uniform State Laws that was related to the Uniform Probate Code.

Approval has been given for a traveling seminar by the Committee on Economics and Law Office Management. A registration fee

will be charged. The price of \$15.00 was set for the *Probate Manual*, which is available at this institute, in the hope that the expense of publication can be recovered.

To be our statutory members from the Association on the Judicial Disqualification Commission, the Council nominated Guy C. Chambers and Ralph E. Svoboda.

To evaluate the proposed changes in the American Bar Association Code of Professional Responsibility, our Advisory Committee, with the addition of Alfred G. Ellick and Thomas M. Davies, has undertaken the study in our behalf in Nebraska. For your information, this is the proposed new substitute, you might say, for the Code of Ethics. The confidential reports that were sent to us and are in the hands of the Advisory Committee consist of 91 pages of double-spaced typing, and our Advisory Committee has very graciously undertaken the task of studying these changes in the Code of Professional Responsibility.

To work with representatives of the press and broadcasters, we have chosen Paul Douglas, William G. Line, and James W. R. Brown. This engagement is to explore whether voluntary guidelines can be accomplished by the Bar and the media in our state under the Reardon Report on Fair Trial and Free Press.

A committee on Water Resources and one on Family Law were created as special committees of the Association.

For a lack of petitions, the Council made the usual nominations for election to the House of Delegates, the Executive Council, and the Judicial Council.

We have retained Ed Carter, Jr., to be legislative counsel for the Association in the coming session of the Unicameral.

Study has been made of the recommendations for the hiring of an administrative assistant, and application was made to the Supreme Court for a change in Rule IV to obtain an increase in dues. The Court has requested a poll of the entire membership on this question and the approval of the change in Rules was given by action of the House of Delegates yesterday.

#### PRESENTATION OF FIFTY-YEAR CERTIFICATES

Now I would be pleased to have these gentlemen come forward to the podium, if they will: Emmet L. Murphy, Jesse D. Cranny, and Winthrop B. Lane.

In addition to these three fine gentlemen who are recipients of these certificates is Gladys J. Shamp, and Miss Shamp is unable to be present today.

At this juncture it is my pleasure to present to these gentlemen a certificate evidencing their practice in Nebraska for at least 50 years.

I first present the certificate to Emmet L. Murphy, to Jesse D. Cranny, and to Winthrop B. Lane.

I am going to ask them, if they will, to reminisce just a little, as Seymour was wont to do, on the presentation of these certificates.

It has not been my pleasure to have known Mr. Cranny or Mr. Lane, but to those of us who were senior law students on the day of the crash in 1929 and practiced law in the early decades, the name Emmet L. Murphy was a household word in Nebraska—because he was our referee in bankruptcy.

EMMET L. MURPHY, Omaha: Thank you, sir. I don't intend to make a speech. About all I have to say is two things: The only qualification I had for the office of referee in bankruptcy was that I had been bankrupt most of my life so I knew something about it. The other is that anyone who can survive the rigors of the practice of law for 50 years is entitled to something, and now I have it.

JESSE D. CRANNY, Omaha: I was warned by my partner not to make any speech, so I'll follow his warning and simply say "Thank you!"

WINTHROP B. LANE, Omaha: The interesting observations I can make are that when I started to practice law it seemed that the men in those days were very much older than I was, and I thought I would never get to be that old. Well, today there are not over six of those men practicing law in Omaha at this time.

It has been a great pleasure. I look back there and I see Harvey Johnsen who has been here all these years.

I remember one thing during World War I. A member of our law class who graduated that year went out of the classroom and went to France and was hit by a shell in no time and blown to pieces. So there were some sad memories along the line.

I have been pleased with the practice of law, both financially and socially. It has been very good to me. I am very happy to have completed this time. Thank you.

PRESIDENT MATTSON: Thank you, gentlemen. Please accept our congratulations and our wishes for continued good health.

Next on the agenda is the announcement of new officers and any other announcements he may have, by George Turner.

### **ANNOUNCEMENT OF NEW OFFICERS**

**George H. Turner**

Mr. President and Members of the Association: Under our constitution the members of the Executive Council must nominate officers. The membership is apprised of the nominations. Time is given to file opposing nominations, if anyone so desires, which we have never had happen, incidentally.

In June the Council nominated for President-Elect William J. Baird of Omaha; for Member-at-Large of the Executive Council, Charles E. Wright of Lincoln; and for Association Delegate to the House of Delegates of the American Bar Association, John J. Wilson of Lincoln.

There having been no opposing nominations, these are elected.

PRESIDENT MATTSON: Thank you.

In the absence of Barlow Nye this morning, Farley Young will give the report for the Committee on Memorials.

### **REPORT OF COMMITTEE ON MEMORIALS**

**Farley Young**

Mr. President, Members of the Association: The Committee on Memorials, consisting of Mr. Robert H. Beatty, Mr. Paul F. Good, Honorable E. B. Chappell, Mr. Marvin G. Schmidt, Barlow Nye as chairman, and myself respectfully submit the following report.

Annually we pause in our busy lives to reflect upon the passing of our beloved brethren whose names we now find enscribed upon that long sad roster of the honored dead and to pay a lasting tribute to their memory.

Words are futilely ineffective to express our thoughts today as we try to review the past generations through which they passed during their legal careers. We cannot attempt to describe their high standards of professional conduct, their fidelity to their clients, to the courts, to the general public, their loyalty to their brothers, their industry to vindicate the rights of man.

We now eulogize them as lawyers who have contributed so much to advance American freedom and justice for all our people, regardless of race, creed, or social standing. We can now say without fear

of contradiction that our departed brothers did in their short span on this earth, in their chosen profession, do more to achieve our way of life than did any others.

These distinguished lawyers reflect the highest standards of our profession, and we now commend their souls to God, with a prayer that this government under Him may, with liberty and justice for all, continue to pass these trying times.

We will stand in silent and solemn reverence as we read the roll of these fine lawyers. The following deaths have been reported since the last annual meeting:

Ralph W. Adams, Omaha  
Leo Bartunek, Lincoln  
George W. Becker, Omaha  
Hugo V. Carroll, Kearney  
Robert T. Cattle, Sr., Seward  
E. B. Chappell, Lincoln  
Herbert S. Daniel, Omaha  
John Grant Dill, West Point  
Thomas J. Dredla, Sr., Crete  
Francis E. Dugan, New Rochelle, New York  
Joseph H. Friedel, Waseca, Minnesota  
Max Fromkin, Omaha  
William W. Graham, Omaha  
James F. Green, Omaha  
John J. Gross, West Point  
Kenneth G. Harvey, Omaha  
Carl G. Humphrey, Mullen  
Walter D. James, Lincoln  
George D. Keller, Omaha  
Golden P. Kratz, Lincoln  
Bernard J. Larkin, Jr., Omaha  
Miles N. Lee, Broken Bow  
G. Nelson Lyon, Nelson  
Edward H. McCaffrey, Omaha  
E. H. McCarthy, Omaha  
James J. McCarthy, Inglewood, California  
Willard F. McGriff, Gering  
Sherman W. McKinley, Jr., South Sioux City  
Edwin Moran, Nebraska City  
Clarence H. Munson, Manchester, New Hampshire  
Eugene D. O'Sullivan, Omaha  
Samuel Rees, South Pasadena, California  
Merrill R. Reller, Lincoln

John L. Richards, Hebron  
 Dean R. Sackett, Beatrice  
 John W. Schwartz, Kansas City, Missouri  
 Lester R. Slonecker, Long Beach, California  
 Elbert H. Smith, Lexington  
 LaVerne J. Smith, Omaha  
 Carroll O. Stauffer, Lincoln  
 Bernard R. Stone, Omaha  
 James L. Thorpe, Sidney  
 D. Van Donselaar, Sioux City, Iowa  
 Edward L. Vogeltanz, Ord  
 Thomas J. Waldo, Orleans  
 Ronald A. Wilson, St. Louis, Missouri  
 William H. Wright, Omaha  
 Edgar B. Zabriskie, Omaha  
 Otto H. Zumwinkel, Allenspark, Colorado

PRESIDENT MATTSON: Thank you, Farley, for that memorial.

That concludes the business of the morning. The luncheon will be in this room. I hope we can start at least by twelve so that our timing will move into the program this afternoon.

We stand adjourned for the morning session.

. . . The session adjourned at eleven-twenty o'clock . . .

## ANNUAL ASSOCIATION LUNCHEON

November 7, 1968

The annual Association luncheon was held in the ballroom of Hotel Sheraton-Fontenelle, President Mattson presiding.

PRESIDENT MATTSON: First I'll introduce those at the head table: The President of the Iowa State Bar, Francis Cudahy of Jefferson, Iowa.

Next is Martin J. Purcell of Kansas City, Missouri, President of the Missouri Bar.

Of course you know I am happy to present George Boland, immediate Past President of our Association.

Clarence A. Davis to my immediate left, whom you all know.

At my far right is Charles Adams of Aurora, the President-Elect of our Association.

Next is Leo Eisenstatt, Chairman of the House of Delegates.



Next is Jack Wilson, the American Bar Representative.

And of course it is a distinct pleasure to present George Turner, whom many of you know.

Now, is Bob Riter somewhere about, the President of the South Dakota Bar? We have lost him in the shuffle.

For the sake of time we will move now into the address for this occasion so that we can get the institute under way this afternoon.

It is a privilege for me to present to you the speaker this noon. He has a renowned background, with roots in Utah, moving to Texas, to Michigan, to New York. It would take up too much time for me to tell you all about our distinguished speaker. He was general counsel for Ford Motor Company. He had a Wall Street practice.

He is married to the daughter of Chief Justice Charles Evans Hughes. He has a distinguished background in voluntary service to our government, as well as his interests in private engagements.

I am reminded in reading the Mayer book on "The Lawyers" which Carl Ganz so kindly has loaned to me, of the phrase in there that in effect says that the leaders of the bar are not always the presidents of the Association. But it is a distinct privilege for us to have with us today a leader of the American Bar who is also the President of the American Bar Association, the Honorable William T. Gossett.

## ADDRESS

### Honorable William T. Gossett

Mr. President, Other Officers, Distinguished Guests, Members of the Judiciary, Friends of this Great Association of Lawyers: You have honored me and the American Bar Association by inviting me to address this distinguished audience on this occasion and to share with you such a pleasant event at your annual meeting. It is a great privilege to be here.

I appreciate so much that generous introduction, Russ. I remember receiving one not long ago, and then the toastmaster said, "We will now hear the latest dope from the American Bar Association."

First of all, let me pay tribute to the enormous vitalizing influence of this Association upon the objectives and achievements of the American Bar Association, in which Nebraska has given generously of its sons and its unique traditions.

As you know, James M. Woolworth of this city was our President in 1896-97. And Charles F. Manderson, also of Omaha, occupied that position at the turn of the century.

In addition to those two, five distinguished Nebraska lawyers have served on our Board of Governors or Executive Committee: Ralph Breckenridge of Omaha; Thomas W. Blackburn and Ralph A. Van Orsdel, both of Omaha; James G. Mothersead of Scottsbluff; and last but by no means least, our good friend Clarence A. Davis of Lincoln. Let me also emphasize he was a "tight-fisted" chairman of the Budget Committee for a year.

In the House of Delegates, besides Clarence Davis, we have George H. Turner, the revered Secretary-Treasurer of this Association and your State Delegate to the American Bar Association House of Delegates, and Jack Wilson of Lincoln, the Delegate of the Nebraska State Bar Association.

Let me assure you that we value very much indeed the wisdom and good judgment of these gentlemen in the House of Delegates.

In the creative contributions of these and other distinguished Nebraska lawyers to the work of the Association and to the growth of the law in America, there has been a vigorous affirmation of the fundamental doctrine that gives all law its strength and life; that is, the concept of the law in motion—the law as an avenue of progress—while sustaining with equal vigor those principles that make the law a bulwark of stability. The broadest and most constant task of our profession, it seems to me, has been the reconciliation of that apparent dichotomy.

I want to talk with you briefly today about the public obligations of lawyers. Before I do so I was thinking as I came over here by plane about the fact that this was election time. We've just been through a rather traumatic experience, and I was thinking of a story that I told at Lincoln's Inn in London in 1957 when we met over there about the judge who was about to go in to preside at the trial of a case and he received word that the plaintiff's counsel wanted to talk with him. So he invited him into his chambers, had his bailiff do so, and when everybody was assembled he said, "Now, what did you have in mind?"

The plaintiff's counsel said, "Judge, you and I have been friends for a number of years. I know you are running for re-election, and I want to show my admiration and affection for you by making a contribution to your campaign fund. Here's a check for \$1,500." He said, "Of course I know you are a man of character and integrity and that this contribution won't affect your conduct of the case.

You will be just as objective and just as fair to the other side as you would be without this contribution."

The judge took the check, folded it, put it in his pocket without a word and went into the court room, after he had donned his robe, and again when everybody was assembled he said, "Now I have an announcement to make. I have a check in my pocket for \$1,000 from the defendant's counsel as a contribution to my campaign fund. In another pocket I have a check for \$1,500 as a contribution from the plaintiff's counsel." He said, "I am going to refund \$500 to the plaintiff's counsel and then we can try the case on the merits."

We need to restate from time to time, it seems to me, the public responsibilities of our profession, for their specific character changes even though the guiding principles have a longer history than our country itself.

Lawyers, with the clergy, were the learned men of the colonial community. When the First Continental Congress met in 1774 to define the great issues of that time, half the delegates were lawyers. When the Second Continental Congress met to adopt, two years later, the Declaration of Independence, of the 56 signers 32 were lawyers. And in 1787 when the Constitution was drafted, two-thirds of the delegates were lawyers.

For decades thereafter the legal profession represented the most influential of all callings in America. So distinct was the lawyer's position early in our national history that it was one of the most salient facts about the American community.

You will recall that the great French commentator, Alexis de Tocqueville, himself a lawyer and magistrate, writing in his monumental *Democracy in America*, reported at considerable length, as we all know, on the special and exceptional role of the lawyer in the early days of this nation.

But in the century and a quarter since de Tocqueville wrote, our entire social context has changed. We have grown all the way from a small homogeneous agricultural community bounded by the Atlantic and the Mississippi, to a heterogeneous industrial nation spanning a continent and with influences, obligations, and responsibilities circling the globe.

Accompanying this dramatic social evolution has been a corresponding transformation of the structure and organization of the legal profession that serves our society.

I remind you of these developments because they make the lawyer's task of specifying and fulfilling his public responsibility

far more demanding than it has been in the past. The general terms of that responsibility are perhaps easily stated, and were stated not long ago by the controversial figure whom we all know as Mr. Justice Fortas. He said it no less accurately than it could have been stated a century and one-half ago. "A lawyer," he said, "has a special role in our society. He is a professional. He is not merely a practitioner of a difficult, exacting, and subtle art form. He is specially ordained to perform at the crisis time of the life of other people, and almost daily to make moral judgments of great sensitivity. He is the principal laboratory worker in the mixing of government prescriptions. He is an important hand at the wheel of our economy because, as a lawyer, he has a profoundly important voice in business transactions. And, of course, he is the custodian of the flaming sword of individual liberty, justice, and personal liberty, as well as of the public order."

To a certain extent, under the conditions of modern society the social stewardship of lawyers is performed, as you know, through the voluntary association of local, state, and national bars, such as this. As reflected in the titles of components of the American Bar Association, they range from "Individual Rights and Responsibilities" to "World Order Under Law." Our stewardship is also discharged by various forms of organized civic activity, in which all of us participate in one way or another.

In 1964, for example, an ABA committee was appointed to propose minimum standards for the administration of criminal justice. In times of stress such as this, of conflict, or rising crime rates on the one hand and of growing public indignation on the other, it is a crucial test of a civilized society to resist all short-cuts to criminal justice, however loud the clamour and however tempting the pressure, for such conditions call, it seems to me, not for abandoning existing standards but for their improvement. And so we appointed this committee under the chairmanship of Judge Edward Lombard of the Second Court of Appeals of New York.

In February of this year our House of Delegates approved six reports of the Committee on Minimum Standards of Criminal Justice. In August, in Philadelphia, four additional reports were approved by the House. Next January it is expected the committee will make five final reports, thus concluding its work.

But a major objective of that effort, the criminal justice effort, is still ahead of us. It is one thing to arrive at articulate standards, but it is merely an exercise unless those standards come to life and are implemented in the various states. And so a special committee of the Section on Criminal Law has been appointed under the chair-

manship of Mr. Justice Clark to guide the implementation process of all the reports except that on fair trial and free press which, as you know, is under Judge McDevitt of Minneapolis. The committee of Mr. Justice Clark will get under way in the immediate future. In that enormous undertaking of putting into effect those standards of criminal justice around the country we shall need, and I earnestly solicit, your support and active cooperation.

The American Bar Association has also been active in the sensitive process of constitutional amendment. Due in large part to the leadership, as you know, of the American Bar Association, a new amendment, the 25th, was added last year to the Constitution of the United States. That amendment provides, for the first time in our history, a sound constitutional basis for the transfer of presidential powers from the President to the Vice-President, and in the event of the incapacity of the President, and also for filling a vacancy in the Vice-Presidential office. This corrects a situation that has haunted this nation ever since the first time a President died in office back in 1841.

More recently the ABA Commission on Electoral College Reform recommended that the "archaic, undemocratic . . . and dangerous" method of electing Presidents by the artificial device of the electoral college be abolished. The realities of modern life have made the electoral college a mechanism that is far less feasible to carry out the will of the people than likely to abort it. If we change the system and go, say, to a popular vote, then 10,000 votes in Nebraska, or 10,000 votes in Montana will mean just as much as 10,000 votes in the City of New York, where today 10,000 votes in the City of New York could throw a whole block of electoral college votes, 41 of them, to one side or the other.

Accordingly, in 1969 the American Bar Association will give active and concentrated attention to the reform of the electoral college system. We are planning a national conference on the subject late this year or early next year, to which will be invited representatives of other national organizations, the leaders of the executive and legislative branches of the government, along with the news media, and all of those will be asked to participate, among others.

The onerous burden placed upon the machinery for the administration of civil cases in our courts is also in need of improvement in speed, efficiency, and effectiveness. As all of you know, nowhere is this more apparent than in the massive load of automobile accident reparation claims. The problem is bound to increase in the years

ahead. With a total of almost 100 million vehicles on the highways, 9 million new passenger cars and about 2 million trucks are sold every year. In the use of those vehicles almost 14 million accidents occur annually, causing 55,000 deaths and nearly 4 million personal injuries. As a result, about 65 per cent of the cases on our civil jury calendars around the country are automobile accident cases, and in urban areas the average time lapse between filing and trial of a case is about three years, and in some jurisdictions it is five years. Finally, some 30 per cent of the income of all lawyers of the entire legal profession is estimated to be derived from that kind of litigation.

And so with a full knowledge and understanding of the broad implications of such an examination and with an acute awareness of the possible effect that its findings might ultimately have upon our profession, a committee and a commission of the ABA on automobile accident reparations was appointed last year to make a comprehensive study and investigation of the problems inherent in the prompt and fair disposition of automobile accident claims. The committee is being assisted and advised by this commission to which I have referred and is composed, in addition to lawyers, of representatives of the insurance industry, the federal government, state regulatory agencies, and members of the academic world. Its final report and recommendations to the House of Delegates will be filed next January. As a matter of fact, we have just received a 105-page report. I hope they can shorten it before it is presented to the House of Delegates. We trust that the conclusions reached by the committee will be helpful to the state legislatures that will be considering this highly controversial issue, to the U.S. Department of Transportation which, as you know, at the request of Congress is investigating the matter, and to the Congress itself when and if it takes up specific legislation on the subject, as it inevitably will because there is a lot of turbulence and a lot of concern around the country about the issue.

Within the profession the massive task of revising and updating the Canons of Professional Ethics has entered its fourth year under the chairmanship of the committee headed by Ed Wright of Little Rock, Arkansas, and will culminate in the issuance of a draft of a proposed new code of professional responsibility this fall, and a final report with recommendations next summer, we hope. Invitations to examine and comment upon the proposed code are being sent now to judges, deans and ethics teachers, metropolitan newspapers, news media associations, and others who have manifested an interest in the project.

It is a source of great pride to me as a lawyer and as an American that the ABA has become involved and has had the breadth and length of vision to take up such active projects of such scope as those I have described, among others.

But let me remind you that much of the lawyer's social obligations in today's world can be fulfilled only by his acting as an individual. In some cases the responsibility necessarily relates to the lawyer *as* an individual rather than to the profession as a whole.

For example, controversial questions of public policy should not be ignored by individual lawyers, even though for obvious reasons professional societies are unable to take any position on them. The lawyers of this country, as professional men and as citizens, have strong convictions on the vital issues of the day. They *should* have such convictions. But I suspect that sometimes they are reluctant to express them for fear that they might contravert the views of a client or otherwise endanger their professional relationships or security. Let me suggest to you today that such fears are seldom well founded and never are justified.

A lawyer is obviously under some constraint against making a statement that is directly contrary to the primary interests of his clients. Yet no client worth his salt can respect a lawyer who deferentially parrots his views or refrains from expressing disagreement with them in the hope of winning preferment. And no lawyer worth his salt will put much faith in a client relationship that hangs on so slender a thread as that. Said Mr. Justice Brandeis, "A lawyer is a counselor, an adviser. He isn't just a hired man to do the bidding of his clients . . ." And so the traditional intellectual, civic, and moral leadership of the bar requires the conscientious lawyer to speak out on matters of deep public concern, in spite of the short-run advantages, if indeed there are any such advantages of silence.

This is true of all significant public affairs. It is especially true, it seems to me, of those matters to which the lawyer, by training and calling, brings special experience and special insight. Social relations in any viable society are always in a state of flux. It is not the lawyer's function to deprecate this or to view it with alarm. It is his duty, and it ought to be his satisfaction, to serve his community, his nation, and his world as "an adjuster of social relations." And as such an adjuster, he should be, I think, an architect of social peace and social progress, as he has been in this country since colonial times.

It is hardly necessary to remind such a sophisticated audience as this that the work of society gets done today in large measure by business corporations and other large organizations. We lawyers

must advise and guide these entities with independence and integrity, especially in situations where proposed corporate action, while not specifically illegal, would be against the general trends of our society and our deeper aspirations, ethical as well as legal. This is not always easy, of course, but it is always useful and frequently determinative. The test is not whether counsel agrees with the management but whether he risks disagreement to remain independent and veracious. This test the good lawyer meets, and it is he in the long run, it seems to me, who is the worthy lawyer, the effective lawyer.

The profession as a maker of social tools and patterns of action in our time, however, is no less concerned with the *individual* than with the institutions of our society to which I've referred, for I want to emphasize today that the individual is what the law is all about. Institutions exist to serve individuals, not the reverse.

The responsibility of the lawyer to participate in the process of balancing individual rights against those of society is epitomized in that ancient doctrine which we all know as due process of law, which came down to us from Magna Charta through the common law and is embedded in the Constitution of this nation. In the language of the Supreme Court, due process "is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."

Many areas of life today cry out for a sharpened sense of due process on the part of all of us. Equal access to the law is one. A person without legal advice because he cannot afford it is, because of that fact alone, deprived of due process. An unpopular person or somebody serving an unpopular cause can be and often is, because of that fact alone, deprived of due process. An accused who is detained in ignorance of his rights or denied a prompt hearing, because of that fact alone, can be deprived of due process.

The lawyer's continuing responsibility for diligent action with regard to due process goes beyond his professional functions and, indeed, beyond his sworn duty as an officer of the court. It reaches to his character and his convictions. And so, even if every other individual and every institution in our society should forget or subvert due process as the cornerstone of our civilization, the lawyer, alone if necessary, defiant if challenged, resolute if discouraged, should never yield on the right of any man, good or bad, rich or poor, revered or hated, to the benefits of due process and should never relax his demands, his efforts, to enlighten the public about it.



We as lawyers also have another responsibility for the decency of the law, to see to its continuous reform. We live in an imperfect world, of course. The laws of no nation have ever achieved the degree of perfection to which a conscientious bar and an enlightened people aspire. And historically, when laws have been imperfect and ineffectual it has been the responsibility of lawyers to improve them. In the language of Mr. Justice Jackson, "Any legal doctrine that fails to enlist the support of well-regarded lawyers will never have any real sway in this country."

Finally, lawyers must, of course, be deeply concerned with the overwhelming realities of the riots that have occurred in our cities and on college campuses. Mob uprisings, whether on the campus or in the ghetto, are negations of justice, of all that civilized man has striven for over the centuries. As such, they must be dealt with calmly and with restraint but with absolute clarity that criminal justice will not go unpunished and that blackmail and violence will not be tolerated.

This means dealing with such uprisings promptly, effectively, and with determination. And it means bringing to the bar of justice those who have defied the law. A lawful society, it seems to me, has no alternative. No civilization can live in constant tumult and violence. We will either have civil order in this country, or sooner or later we will have massive repressive measures comparable to those of a police state, which would be a catastrophe for all of us, for if this nation or the institutions, public or private, that have made it, for all its imperfections "the last best hope on earth," ever concludes that flouting the law is a right to be exercised at the discretion of everyone or to be governed only by the intensity of his cause, then as a free society we are *finished* and brute force will take over.

Obviously, the law's contribution to order depends, in part, upon the public force. On the other hand, adherence to the law in a free society has never primarily rested upon applications or threats of force by public authority. Perhaps the principal attraction of a political system that seeks order through law is that it promises to *reduce* the amount of force that the state would otherwise be required to employ against its citizens to obtain and preserve order. A legal system is viable when law violation evokes general disapproval in the community. Indeed, to be a functioning system, even a totalitarian society ruled by fear and force must ultimately have behavioral obedience of the masses, that is to say, nonviolent conformity.

To put the matter another way, our vision of the law must not be limited to its prohibitory aspects nor even dominated by them. It is uncongenial to any forward-moving, free society to cast the law wholly or primarily into the negative role of stopping socially undesirable actions by either individuals or institutions. In a democracy the law has an affirmative function to advance human rights, not merely to stabilize them, and to make society a better servant of the individual and not merely to reconcile conflicts between the individual and society.

In those areas of our nation where there has been clear evidence that this constructive effect of the law has not been felt, we must, as a profession, move on to substantive reforms; for example, in laws governing union practices that restrict job opportunities, laws covering building codes and practices, laws governing relationships between consumers and installment sellers, and many others. A lawful society cannot achieve a better society if it is ever content with the legal status quo. It cannot fail to achieve a better society if it is always alert to its own shortcomings, its own imperfections, and swift to remedy them.

If we are to promote trust in the lawful society as the straightest and broadest avenue to a better society, we must be skillful in employing all the machinery of the law, from its application by the city policeman to its codification of economic morality. We must convince the dissident and the deprived members of our society by what we do, not by just what we say, that the law is on their side and not against them. We must so employ it that they will not see the law as rigged to serve others in enforcing rights against them. They must see it as an instrument to protect *them* against injustice, the corrupt landlord, for example, or the cheating installment seller, or the impetuous policeman. Let us remember that laws were instituted among men for a better society, in the first place, for the common good of all men, not just the first, not just the strongest, and not just the uncomplaining.

The social responsibilities in what I have said to you today are gigantic and sweeping. But the heritage of our profession has not been the assumption of small burdens. Carrying out that responsibility is not a price we pay but a privilege we enjoy for membership in a disciplined and noble profession whose social horizons are the horizons of democracy itself. And as democracy moves on, our vision of our public responsibility must broaden.

So as we live out this last third of our troubled but magnificent century, let us work together to fulfill the high mission so vividly summarized by a great lawyer and public servant, Joseph Choate,

when he said, "... if the personal liberty of all, under the protection of equal laws, is the end of government, then lawyers can safely challenge men of other professions to show a larger share in the whole work of human progress."

PRESIDENT MATTSON: Thank you for that excellent address.

## INSTITUTE ON NEBRASKA PROBATE PRACTICE THURSDAY AFTERNOON SESSION

November 7, 1968

The opening session of the Institute on Nebraska Probate Practice was called to order at one-fifty o'clock by Jerrold L. Strasheim of Omaha.

CHAIRMAN STRASHEIM: Let's bring this meeting to order. We are on rather a tight schedule. Let me first assure those of you who know who I am and what I do that I haven't had anything to do with the *Manual* that is being sold, so you can have absolute confidence in it. I had nothing to do with the contents, but I would like to say just one or two words about the preparation of the book.

There are a great many lawyers who put in an unbelievable amount of time and effort in preparing this book which is being sold to you. Those lawyers certainly are to be commended. The name of those lawyers does not appear in the book and I see him in the back of the room, Bob Veach, who filled in and contributed a significant amount in an emergency situation when we needed some work done fast. I would like to single Bob out for what he did. Most of the other lawyers' names will appear in the book, some of the lawyers having written the initial draft and some of the lawyers having checked over the contents.

Perhaps I should also point out that two lawyers, John Zeilinger and Gery Laughlin, did an awful lot of the laborious work of putting the book together, and maybe we could say something about them, too.

Our first speaker today is Howard Moldenhauer. I'll just say that Howard is a partner with Fitzgerald, Brown, Leahy, McGill, and Strom in Omaha, and Howard can tell you the name of his own speech. So I present to you Howard Moldenhauer.

PROCEDURES TO MAKE FAMILY AWARE THEY ARE  
BENEFICIARIES OF PROFESSIONAL SERVICES INSTEAD  
OF VICTIMS OF A SYSTEM PERPETUATED FOR THE  
BENEFIT OF LAWYERS

Howard H. Moldenhauer

There are many aspects to the probate of an estate, and during this institute most of the emphasis will be on the legal and technical problems which will arise during administration. Being lawyers, these are the ones that interest us the most and sometimes we get so carried away with the legal function that we neglect some of the other important aspects. One of the most important of these is the public relations of the lawyer and the image of the profession.

In recent years there have been several attacks upon our probate system, and in many instances we have only ourselves to blame. Many of you will recall the popularity of that often criticized book "How to Avoid Probate," which came out a few years ago. At that time there was a great howl raised by the legal profession that this constituted the unauthorized practice of law by the author. Other members of the profession merely shrugged and said, "There are so many mistakes in this book that it is going to help my practice because people who follow it will get into so many problems that it's going to take a Philadelphia lawyer to untangle them." However, very few lawyers really analyzed the impact of that book in the same manner as they would analyze the legal problems which are brought into their office by the client. Rather than merely level criticism at the author for invading the practice of law, I think we might more constructively ask ourselves *why* the book was a best seller. The fact that it was a best seller and raised so much interest among the general public seems to me to be the critical point, as this may well constitute a condemnation of the entire bar and its probate and administration practices. We must face the fact that so much adverse publicity has been given to the cost of probate that the public is searching for other methods and other solutions.

Last fall in New England I heard a New York lawyer who is very prominent in the probate and estate planning field criticize the American system and suggest that America should adopt the French system of probate whereby the assets do not ordinarily go through the court unless there are specific requests by the heirs or creditors. His reasons were twofold: (1) the allegedly high fees, and (2) the delay in probate.

I would like to suggest that if there are inherent weaknesses in the determination of probate fees, the bar should be the leader in correcting these weaknesses. If the fees are too high they should be lowered. However, if the fees fairly reflect the efforts of the attorney, the responsibility he assumes, and the benefit to the estate, then we must make this clear not only to the heirs but to the general public as well.

If all lawyers properly probate the estate, they will spend an amount of time which is commensurate with the services, and the fee charged will be a fair one. I would further suggest that if the lawyer properly informs the executor and all of the heirs of the services which he is performing, they will consider the fee to be just and fair.

In the past there has been some feeling among some lawyers that probate fees constitute the "gravy" in the practice of law and that they can undercharge for all their other services because they can make it up in the probate fee. I would say that this thinking is of a time long passed. It is not fair to the client, the public, or the legal profession to have to depend upon probate fees to support the other practice of lawyers. Through the work of the Economics Committee, all lawyers have been encouraged to put their entire practice on a paying basis so that probate fees do not constitute a subsidization of all other work which the lawyer may perform.

Each attorney should constantly keep in mind the fact that many people make their first and possibly only contact with the legal profession during the probate of an estate. The impression you leave with those individuals may markedly affect the attitude of the public toward *all* lawyers. In addition, the legal fee which you charge and the manner in which the lawyer handles the fee discussions have a direct bearing upon the image of the entire profession. Just because the fee is set by the court and is customarily based upon a set schedule of percentages, many lawyers tend to ignore the public relations aspect completely. However, it is just as important that the public relations be considered in probate matters as in any other situation. The fact that we have a minimum fee schedule and the fact that the court sets the fee may justify that fee in your mind, but it certainly doesn't necessarily per se justify that fee in the minds of the heirs.

The very well known Prentice-Hall survey taken by the Missouri Bar Association on the subject of attitudes towards lawyers and fees showed that 80 per cent of laymen preferred that their lawyers discuss legal fees in the first interview, or as soon as all the facts of the problem are known, but 36 per cent stated that their lawyers

did not do this. Eighty-eight per cent of the laymen did not want their lawyers to wait until they inquired about the fee, but nearly 20 per cent said that their lawyers "make them ask." Ninety-two per cent of these clients do not want their lawyers to wait until their services are completed to discuss fees, but nearly 20 per cent said their lawyers "make them wait." Seventy-eight per cent of the clients want a full discussion of the basis of the fee, but nearly 40 per cent said their lawyers failed to make adequate explanation.

There is no reason to believe that the situation is any different in connection with probate fees than any other legal matters. Therefore the attorney should not be hesitant to discuss the fee at the first meeting with the client. If he cannot justify the fee on the basis of the services which he will perform, then the fee is not fair.

At the same time, when you discuss the fee, you should explain to the client fully the nature of your services. The Prentice-Hall survey found that the No. 1 factor in setting charges for legal fees in the eyes of the layman is the effort expended by the attorney. This factor is far more important than most lawyers have ever realized, and the client never knows how much effort was expended unless you inform him.

This can be done in many ways. At an early stage in the proceedings the lawyer should not hesitate to go through his check list of services to be performed with the client, explaining all of the work which must go into the probate. Many of these functions are outlined in the Nebraska State Bar Association Minimum Fee Schedule, and there are some check lists included in your *Probate Administration Handbook*. We have been woefully lax in this in the past and it has contributed adversely to the public image of the bar.

I can remember a personal experience a few years ago where a neighbor's husband died in a small town in Iowa and the widow was talking to my mother and complaining about the legal fee, and she said, "Why, I know those lawyers didn't spend 20 minutes on that estate and yet they charged me \$1,500." Now, my mother knew that this wasn't the case, but as far as that lady and all of her friends which she had told were concerned, she had been charged an unjustifiable fee. This was strictly a matter of some lawyer failing to apprise the client of what was going on.

In this connection I might say, ask your wife and your friends some time what they hear about lawyers and lawyers' fees at the bridge table, and you might be surprised to hear the comments by laymen and by widows about probate fees.

As soon as the estate is opened, some lawyers send a letter to the executor or administrator explaining the functions that are to be performed and they send a copy to all of the heirs informing them of all of the procedures. You will find a form of such letter in Section 3 of your *Manual*. The heirs certainly should be informed that they are entitled to know what is going on in the estate and, if they have any questions, they should be encouraged to contact the executor or his attorney.

I was recently involved in a family estate probated out in California, and I was shocked to find that as soon as the petition for administration was filed, all of the heirs received a form letter from some organization telling them that, for a fee, they would supply the heirs with information concerning the estate, such as the amount of assets, when the heirs could be expected to receive these assets, and when the probate would be completed. This is very embarrassing to lawyers and it automatically puts them in a poor light. There was also a suggestion in the letter that the heirs could sell their interest in these assets for a discount, implying that they might be better off with ready cash rather than having to wait until final distribution. I have not heard of this sort of thing in Nebraska, but we should anticipate any such practices and let the heirs know that it is our duty to inform them fully of all aspects of the estate. They shouldn't have to pay a separate fee to any outsider for such a service.

As the administration progresses, consider sending copies of all documents to each of the heirs. One of the most important psychological factors in lawyer-client public relations is the principle that you should keep your client advised at all times. It is easy to make extra copies of correspondence and pleadings and just mail them out to the client. Send him a file folder and let him build up his file just as you are building up yours. Then when he sees the bill he will realize that a great deal of time and effort went into the services.

Another problem which is directly related to public relations is that the public realizes that the lawyer's fee is dependent upon the value of the assets in the estate and therefore we must support these values and justify them to the heirs just as importantly as to the Revenue Service or the taxing authorities.

I have heard many comments to the effect that "That house wasn't worth anywhere near what they valued it at, but the lawyer just wanted to get a higher fee." Every time I hear a comment such as this I feel that the lawyer has failed in his responsibility to the heirs, and again it is a reflection not just upon that lawyer but upon the entire Bar Association.

We also have to be a little careful as to *how* we inform our client. I am familiar with another recent situation where a lawyer in another state as soon as he was referred a probate immediately prepared a well-drafted three or four-page letter explaining to the heirs many of the functions which would be performed in the estate, what assets were in the estate, and his best estimate of the fees, taxes, and expenses. It was a very impressive letter. But in this particular estate the vast majority of assets were in a mutual fund, and the fund was valued by the lawyer at the asked price. One of the heirs called me immediately and said, "Why did he value that fund at the asked price? Why didn't he use the bid price which is all I'll get if we sell that fund?" Then he went on to say, "I think he was just trying to get the assets as high as possible so it would increase his fee."

This is a reasonable and justifiable question, and I think the heirs are entitled to an explanation. There is one in this case because there is an Internal Revenue Service ruling requiring the valuation for federal estate tax purposes for this type of mutual fund at the *asked* price. There is a recent Tax Court decision, *Estate of Wells*, 50 T.C. No. 88, which upheld this regulation, although six judges dissented, so the case is undoubtedly going to be appealed, but here is a perfect opportunity to explain to the heir that this valuation is required by the Internal Revenue Service. So place the blame where it belongs. After all, why should the heirs be mad at the lawyers when they could be mad at Uncle Sam instead.

If a lawyer performs all of his functions, which are more than just the filing of the petition for probate and the inventory, and then sits back and waits for the corporate executor to tell him what to do, he will clearly earn the probate fee. If he gets right on top of the estate and studies the selection of a tax year, selection of an optional valuation date, the effect of each distribution on the distributees, the timely distribution of assets, the most advantageous time for the sale of assets, and the proper treatment of fees and administration expenses, and if he informs the heirs of the reasons for the decisions and the benefits which will accrue to them because of these decisions, then he will have created an atmosphere of appreciation for his services and a recognition of the benefits.

In most estates sufficient savings can often be made to more than justify the probate fee in the eyes of the client. But these savings must be explained to the client so he can fully realize the benefit.

In closing, let me suggest that the profession can no longer ignore the public sentiment concerning attorneys' probate fees, and



it also cannot ignore the opportunity of explaining the benefits of a proper probate and expert legal services to such a large segment of the public. The public is entitled to this, and if we ignore the warning signs the profession must be prepared to suffer the consequences.

**CHAIRMAN STRASHEIM:** The next paper will be by Carlos Schaper of Broken Bow who is a partner in Schaper & Schaper in that community.

### NOTICE TO INTERESTED PARTIES AT VARIOUS STAGES OF PROCEEDINGS

**Carlos E. Schaper**

Mr. Chairman, the topic assigned to me pertains to the implementation of Sections 25-520.01 to .03, R.R.S. 1943, the provisions requiring mailing of copies of published notices to the proceedings for the probate or administration of a decedent's estate. These sections of our statutes became effective on June 5, 1957. The Supreme Court of Nebraska held, *In Re Smith Estate*, 175 Neb. 94, that these provisions are not amendatory but are new and independent legislation and that they are applicable in all cases wherein constructive service is permitted or required.

Prior to June 5, 1957, we did not usually think of estate proceedings as involving parties. However, the Supreme Court of Nebraska held on many occasions prior to that date that administration proceedings to settle the estate of a decedent are proceedings in rem and every person interested in such settlement is a party thereto, whether he is named or not. Any person, whether he is a devisee, legatee, creditor, or the owner of a contingent interest, may appear for the purpose of protecting his rights. (See *In Re Kerns Estate*, 161 Neb. 78.)

Proceedings for the probate or administration of a decedent's estate are, of course, docketed as one case or action, but actually insofar as giving of notice is concerned, the administration of an estate consists of at least three proceedings and these are: (1) The proceeding for opening the estate; (2) the proceeding in reference to claims; and (3) the proceeding in reference to final settlement. In some estates there may be more, and whenever a notice by publication is given, then, insofar as these statutes are concerned, the action giving rise to published notice should be considered as a proceeding in itself.

Determine who would be affected by granting or refusing to

grant the relief prayed for. These are the parties appearing to have a direct legal interest in the action or proceeding and are the persons to whom a copy of the first published notice should be mailed.

In the case of an intestate estate, the parties appearing to have a direct legal interest in the proceeding for the appointment of an administrator are the heirs of the decedent and the person to be the administrator.

In the case of a testate estate, the persons having a direct legal interest in the proceeding for the probate of the decedent's last will and testament and the appointment of an executor are those who will be affected by the probate or the non-probate of the will; that is, the devisees and the legatees named in the will, the heirs at law of the decedent who would inherit in the absence of a will, and the person named in the will to be the executor.

In either case it is not necessary to mail a copy of the published notice to a petitioner, as he would be considered as a party instituting the action or proceeding.

The next phase or proceeding in the administration of an estate is the proceeding in reference to claims. Known creditors have a direct legal interest in this phase of the administration of a decedent's estate. I mail a copy of the first published notice to creditors to the county treasurer, because of the interest of that officer in payment of personal property taxes.

The Supreme Court of Nebraska, *In Re Smith's Estate*, 175 Neb. 94, held that a person having an unliquidated, an unestablished claim for damages against the decedent could not be regarded as having a direct legal interest in or to an estate proceedings within the meaning of Section 25-520.01.

Devisees, legatees, and heirs at law are parties having a direct legal interest in the proceeding in reference to claims. I think this is true because Section 30-1610 provides that when an executor or administrator declines to appeal from a decision on claims, any person interested in the estate as a devisee, legatee, or any heir may appeal from said decision by filing a written application therefor. And the same proceeding shall be had in the name of the executor or administrator as if the appeal had been taken by him.

The final proceeding in the administration of an estate is the final hearing. In intestate estates the parties appearing to have a direct legal interest in the final hearing are the heirs at law, because they are interested in determination of heirship and distribution of the estate.

In testate estates the parties appearing to have a direct legal interest in the final hearing are the devisees and legatees because they are concerned with the distribution of the estate, and if a determination of heirship is to be made, then the heirs at law have a direct legal interest, even though there is no distribution to be made to them because they are interested in the proceedings in reference to determination of heirships.

Spouses of heirs, devisees, and legatees are *not* parties having a direct legal interest in any phase of the estate proceedings. If an interested party is a minor under 14 years of age, it is advisable to mail the notice to him and also to his guardian or father, or if neither can be found, then to the minor's mother or the person having the care and control of the minor or with whom he lives. In other words, handle the mailing as you would service a summons. I think the same principle would apply to incompetent parties.

It is not necessary that the actual notice published in the newspaper be mailed. The statute requires only that a copy of the published notice be mailed. The statutes provide that it shall not be necessary to serve the notice prescribed upon any competent person, fiduciary, partnership, or corporation who has waived notice in writing or entered a voluntary appearance in the proceeding.

The statutes require proof of the mailing of the first publication of notice by the execution and filing of an affidavit within ten days after the mailing of the published notice. The time for filing the affidavit is not jurisdictional. (See Standard No. 67 of Nebraska Title Examination Standards.) The affidavit is jurisdictional, though, and to show acquisition of jurisdiction by the court, the affidavit must show compliance with the statute for mailing copies of the first published notice and, in addition, by specific statutory direction the affidavit must state that the party instituting or maintaining the action and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post office address of any party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing.

The Supreme Court of Nebraska held, *In Re Coleman's Estate*, 179 Neb. 270, a case involving the validity of an order of a county court admitting a will to probate that "all due process can require, however, is that personal notice be given to all those whom diligent investigation and inquiry may indicate could have a direct legal interest in the proceedings whose address can be ascertained. All others must be constructively noticed. This our statute requires."

In that case the affidavit of mailing the notice literally complied with the provisions of the statute and the court said that this gave the court jurisdiction and that the order of the court admitting the will to probate was conclusive against collateral attack.

Even in cases where written waiver of notice and entry of appearance is filed by all of the interested parties, an affidavit is still necessary, although it is sometimes overlooked. It is necessary to show that diligent investigation and inquiry was made to ascertain the names and addresses of parties having a direct legal interest in the action or proceeding.

In summary, whenever published notice is ordered in any phase of the estate proceedings, determine who would be affected by the granting or refusal to grant the order prayed for. These are the parties appearing to have a direct legal interest in that particular proceeding. Comply with the statute by mailing copies of the first published notice to them within five days after the first publication of the notice. Then be sure to file the required affidavit. Phrase the affidavit to meet the requirements of the statute as to diligent investigation and inquiry. Orders entered on the basis of this kind of notice are not subject to collateral attack.

CHAIRMAN STRASHEIM: Our next speaker is William Baird. He is a partner in the firm of Lane, Baird, Petersen, & Haggart.

#### **DUTIES AND LIABILITIES PENDING APPOINTMENT— NEED FOR SPECIAL ADMINISTRATION**

**William J. Baird**

The topic assigned to me is "The Duties and Liabilities Pending Appointment and the Need for Special Administration." I assume until the named executor or the nominated administrator is appointed, he has no official authority and, I think correspondingly, he has no real duties or liabilities, at least beyond presenting the will for probate. So I presume that what we are to discuss here is the duties and liabilities pending appointment of the regular administrator, of the attorney who has been employed to handle the probate proceedings on the estate.

I would like to approach this, I think, from two different angles, first of which is what I consider the ordinary estate, which I think is the majority of those in which we find ourselves involved, and that is where there are no perishable goods or livestock to be disposed of or a sole proprietorship business that needs immediate attention; in other words, where there isn't a need for special administration.

In that case, the period of time that we are discussing is this three-to four-week period that pends between the filing of a petition and the service of process by publication until the regular appointment.

During that period, as far as the duties and liabilities of the lawyer go, I think the basic principle is that so far as the assets are concerned the lawyer should leave them in status quo as much as possible, preserve them for the executor and administrator to take over. As I say, where it is not a case of obvious need of a special administration, of someone in authority to act, in the great majority of cases the assets are not going to suffer by being left, you might say, in limbo for this period of three or four weeks. If there are securities registered in the name of the decedent, they will still continue to pay dividends which can be accumulated. Savings accounts, C.D.s will continue to pay interest. Real estate will stay where it is.

At the same time, in practically every case, and no two are alike, there are going to be matters which must be decided by the lawyer during this one-month period that simply calls for practical common sense judgment. I think in this first month more than any other time in the proceeding the lawyer must exercise sound judgment in meeting practical problems.

For example, if the deceased lived in a house which is now vacant you can't sit back for a month. The insurance has to be checked out to make sure that it is covered now that the house is empty. Some precautions must be taken to guard against vandalism.

There are things like having the post office address changed so that the mail will go either to the lawyer's office or to the named executor, whoever is going to take over. Those are problems which just call for practical solutions.

If the house is to be sold by the executor, oftentimes the real estate man, if it is going to be listed with one, can be called in to take the necessary precautions to protect it during the month.

If it is devised to a particular heir, or one or more heirs and no will contest is anticipated—in most cases we do know whether or not there is going to be a contest over a will—some arrangements can be made with that heir to take the necessary precaution.

I think another area during this month that calls for practical exercise of judgment is in this matter of personal effects and clothing of the deceased. Possibly the deceased lived in an apartment and they want to dismantle the apartment. The heirs don't

want to pay another month's rent. Well, technically, no one has the authority to do anything with clothing and personal effects which are assets of the estate, yet from a practical standpoint I think it is a calculated risk that in most cases the lawyer can see that they are moved out of the apartment.

Another example, you oftentimes run into possibly an out-state relative who is bequeathed in the will a Dresden lamp and she wants to take it back with her. I think in the normal case the lawyer can afford to take the calculated risk of letting her take that lamp with her, being sure to warn her that in the event the will is not admitted to probate and that provision is not carried out, it is going to have to be returned.

So I think, during this first month period, the main job of the lawyer is to exercise practical judgment, as I say, in meeting these problems that arise without the need to put the estate to the expense of having a special administrator appointed.

In many cases, of course, and I think this is more true probably with lawyers practicing in the middle and western part of the state than in the more urban areas, there will be need for immediate attention to be given to the assets of the estate. There will be perishable goods that have to be disposed of or crops or livestock, and there is no one to take charge; or a business, as I mentioned before, with a sole proprietorship and payroll has to be met and there is no one to run it. In those cases, obviously, that is where the statute comes into play for the appointment of a special administrator.

As I think all of us know, that section is 33-17, and it simply provides that the judge may appoint a special administrator to collect and take charge of the estate "where there shall be a delay in granting letters of administration or letters testamentary occasioned by an appeal, or from any other cause."

There are several questions that are raised, due to the rather brief wording of that statute. I think the first one is: Is the statute contemplating a delay beyond the three- to four-week period that it takes for service of process, or can you immediately go in? That question was early answered by our Supreme Court in the case of *In Re Estate of Egan* in 83 Neb. which was a case where the deceased died owning a farm which had not been rented for the current year. He died on March 3. The petition for probate, along with the petition for the appointment of a special administrator, was filed on March 16 and the allegation was made that the regular representative could not be appointed until approximately April 15,

which would be too late to obtain a good tenant. As against contention that the statute was not talking about this kind of thing, it was talking about will contests or some unusual situation that extended delay for a regular appointment to a matter of months, the Court held that any time any reasonable showing that the interest of the estate demanded immediate attention, the Court not only had the authority but had the duty to appoint a special administrator.

The second question that arises under the wording of our statute: Must there be pending a petition for regular administration before you can have a special administrator appointed? Ordinarily we do file them simultaneously, or the petition for the special is filed *after* the original petition. This question, rather surprisingly enough, has not been presented to our Court yet, but I am sure that the Court would apply the same reasoning of the *Egan* case, which is that where the interest of the assets demand immediate attention, a special administrator can be appointed, notwithstanding that possibly a will hasn't been found, that there are no regular proceedings pending.

Another point in connection with special administration on which our statute is silent is: Who should request the appointment? Well, ordinarily that will be the named executor, I think, or interested parties if it is an intestate case. As to who should be appointed, the Court has spoken out quite clearly that if it is a case of a will contest, then the special administrator should be a disinterested third party. In those cases where there is no will contest contemplated or in the fire, then normally I think the named executor would be the logical one, and is the one who is ordinarily appointed so that he can take over, and then will easily change over into the regular administration after the appointment.

Once a special administrator is appointed, then the lawyer must be very careful to protect him and see that everything he does with regard to the assets is covered by court approval and authority. We must remember that this is an emergency thing. A special administrator is appointed without notice to anyone, purely *ex parte*. The statute expressly provides that no appeal can be taken from the order appointing a special administrator, and that is obvious because this is an emergency situation, and it would defeat the purpose if appeals were permitted.

The special administrator cannot be called upon to pay debts. His sole duty is to collect and preserve for the regular representative of the estate the assets which are in the estate and which come into his possession.

There are no limits, of course, to the kinds of situations calling for the appointment of a special administrator. I think probably the most common are the situations where there are livestock or crops or perishable commodities of some sort that have to have someone in authority to act in order to protect them.

If you will excuse a personal reference, we had an interesting one in our office just recently that I think might be of interest.

Last April the deceased died. He was a bachelor. He left an estate of approximately half a million dollars consisting almost wholly of listed marketable securities. His will was such that he gave a great number of monetary legacies to relatives and also to charitable organizations, so many that in order to pay them in full, together with the anticipated taxes and administration expenses, the market price of the securities would *have* to stay at the same level as it was on the date of death. If it were to drop just a few points as far as most of the stocks in the estate were concerned, the estate would come up short.

In that situation, and if you will remember again last May was before the conventions and all of the agitation about a long hot summer coming up with riots, and the like, things were quite unsettled. The vagaries of the stock market certainly no one could predict. It was felt that this is a proper situation in which to go in and have a special administrator appointed with authority to immediately liquidate these securities, which was going to be necessary to carry out the terms of the will, and to do so without waiting the four-month period when the market could change drastically.

We presented it to Judge Troyer of our County Court and he agreed that that was an appropriate time and place for a special administrator, and that was done.

I might say that if we had waited until today when the market is much higher, the estate would have made more money out of the sale. But that brings up another point, actually: Not only the special but the regular executor or administrator is not charged and has no duty to make money for the estate. His duty is to *preserve* the assets. I think it is sound practice not to gamble on the stock market when you have securities in the estate but to liquidate them as fast as possible to insure that the necessary cash funds will be available.

Mr. Chairman, I think my time is running out. Just let me say again in closing that during this period of one month, in the case which is somewhat unusual, where obviously a special administrator should be appointed, I think that the lawyer handling the estate



must just use good common sense in meeting the practical problems that arise to make sure that nothing happens to the assets during that four-week period, but primarily to try to leave them alone as much as possible so that they are available then for the regular to take over. And where a special administrator is called for and is appointed, then be sure to protect him carefully by having the court authorize in advance, if possible, everything that he does.

**CHAIRMAN STRASHEIM:** We have two more speakers in this segment of the program. The first speaker is John Wilson, who is Vice-President and Trust Officer at the National Bank of Commerce in Lincoln, the full name of which is the National Bank of Commerce Trust and Savings Association.

### **RECORDS TO BE SET UP WHEN ESTATE IS OPENED**

**John E. Wilson**

These gentlemen preceding me have given you some of the preliminary details necessary in regard to obtaining information, or at least I thought Don Kelley was going to be here and that he would have already given you some of this information, but there are further talks about giving notice, duties pending appointment, and so forth.

This brings us, then, to the point of record-keeping, which is the title of my subject, records to be set up when the estate is open. This brings us into the mechanical procedures after all the information has been gathered.

As an employee of a corporate organization which deals in fiduciary management, I rather imagine that some of the duties that *we* have could differ from those of individuals within the corporate organization doing different things. Then also we have some large computer machines that print out various pieces of information for us at various times, and consequently some of our records could differ somewhat from those of the individual. Basically, however, the duties are certainly the same, whether it be some corporate organization or an individual, and it leaves us with what I call an abstract form or a check-list to run down after the estate is open.

Here, again, Don Kelley was not here to mention some of the things that are necessary information to gather early, but it is from this information that the various records will be established.

I think it would be well to prepare some type of a tickler system, or if in your own office you have a calendar, that could be marked with the various dates and so forth, because of course this is the

important item in the record-keeping. We could pinpoint certain dates, such as the filing of the Form 56, which is the notice of fiduciary relationship which should be filed as soon as possible; the Form 704, the preliminary estate tax return, which should be filed within two months after date of death or after the appointment; the date the inventory is due, claim date, and so forth. Consequently, I feel that probably the most important record to be set up when the estate is open is the check-list for you to fill out with the necessary information and the dates that the various duties should be performed.

I have several types of check-lists which *we* have used, and I think probably the best way to show this to you would be to review these items and read down one of these lists. I'll skip over some of the items rather rapidly. The first item on this particular list that I have is the date of death. This, of course, is important for many reasons, as many of the subsequent dates are keyed upon the date of death. One other important item probably immediately to gather would be a *Wall Street Journal* or a market sheet showing the securities, the value of the securities upon date of death, and this would be an item then that you could put in your file and keep for the subsequent filing of your inventory and the federal estate tax return.

Then going down my list and looking under the title "General Information," the residence at date of death, the marital status at death, the name of the surviving spouse and any children, name of a deceased spouse and the date of the spouse's death, the employer's name and address.

Very possibly the deceased was a member of a pension and profit-sharing plan within the company. Subsequent benefits would be payable, then, either to the estate or to some named beneficiary. Then of course the bank accounts, where there might be bank accounts, the kind of accounts, and so forth.

Then my next item on this particular check-list that I am following—the preliminary matters actually have been done prior to our appointment but here, again, this is a list that I think each of you might want to use and perhaps give to the executor who is handling the estate: Arranging for the continuation of the business, if necessary, and this will be covered by one of the later speakers; setting up records necessary for the continuance of such a business; then we find the checkbooks, the passbooks, the canceled checks, any bank statements that might have been held by the deceased, any investment records, abstracts, life insurance policies, auto insurance policies, any personal property insurance policies, busi-

ness papers, income tax returns, and so forth, and at this point the filing with the Internal Revenue Service to obtain a tax identification number for the estate.

Further on the check-list, the family information—the name of the surviving spouse, the address, Social Security number. If there are children it would be a good idea at this time of course to obtain their names, addresses, and Social Security numbers for subsequent income tax purposes.

Under personal property: Any cash accounts or savings accounts that might have been held by the deceased, building and loan accounts, any stocks, bonds, life insurance policies, the amount of the policies, the various companies involved, the beneficiaries, and so forth; any jewelry, personal effects, household goods, title to an automobile, assets placed as collateral, notes and mortgages, and any lawsuits or claims which might have been made against the deceased individual.

Then as to real estate: Obtain any necessary legal descriptions along with the abstracts on such property.

Insurance: Life insurance, which will be covered by one of the later speakers, insurance as to property, fire and extended coverage, general liability, household goods, insurance on merchandise, and so forth.

Then under the operations schedule of my check-list we get into the actual gathering of the assets, the securities, stocks, bonds, and so forth, and at this point the necessary records should be kept, perhaps on individual sheets a record of each stock held, the times when dividends are payable on bonds, when the coupons should be clipped, when the income is coming in, and so forth. Also at this time the changing of the mailing address of the securities. We almost immediately transfer the stocks that we get on an estate into our nominee's name, which is convenient for subsequent distribution, either for sale, if cash is to be distributed to the beneficiaries, or if there is a distribution in kind it eliminates any problems on subsequent transfer.

The death certificate: It would probably be necessary to obtain some additional death certificates, and copies of letters of appointment, of course, which are necessary for the transfer of any of the securities.

Football tickets?? I guess this isn't applicable to Nebraska. I don't think Jim Pittenger allows you to transfer your season tickets, but I suppose if you are in some locality where they allow this you

would want to set up some kind of a tickler system to be sure that you renew your season tickets.

I refer to ticklers as a little card file, more or less, with dates on these ticklers so they can be pulled out and used at particular times when dividends are to come in and when payments are due, when real estate taxes are due, for instance, or income tax, any rent collections that might be coming in from property owned by the deceased, stock and bond dividends, as I mentioned previously, any mortgage payments which might either be due from the deceased or due to the deceased, fees, and dates then established if the widow's allowance has been allowed. You will want this set forth so there won't be any delay in any remittances.

Then the next item in my check-list, the legal matters which have been covered to some extent, the amount of the bond, when the premiums are payable. You would want to have this date established, date claim day, the date that the inventory is filed, and then Social Security benefits applied for, when they have been received, any veteran's benefits that might be due to the deceased, if he had been a member of the armed forces.

Then another item, too, I think probably is the payment of the funeral bill, which in many instances you can have a discount on if you pay it early enough. This would be something that you would want to check into immediately. Examine the claims. Have the claims resolved.

Then as I mentioned previously, the filing of the preliminary estate tax return, Form 704, the dates for inheritance tax determination, and then the final account prepared, when the taxes are paid, which must be within 16 months after date of death, the filing of the federal estate tax return.

This gets us down to the discharge and, as I mentioned at the start of my talk, I think probably the most important record that can be set up after the estate is open is the check-list. If you follow down the check-list you won't run into any problems. I have several different types that we have used. We have one little card form which can be readily accessible with some of the information, date of death, and so forth, and then another form which we have used in various instances. If any of you are interested in examining any of these after the talk, I would appreciate showing them to you.

**CHAIRMAN STRASHEIM:** Our last speaker in this segment of the panel is going to be Harold Rock of Omaha. I think most of you know him. He is a partner with Kutak, Rock, Campbell & Peters.

**LIFE INSURANCE PROCEDURES****Harold L. Rock**

Many of you have been to the Omaha airport. It is out that way, and as you go, you go through Carter Lake almost any way you go. The topic I am most qualified to talk about is the probate of the estates of Carter Lake residents who die in Nebraska. We have gotten into some jurisdictional disputes. Sometimes they are found in the river and we don't know where exactly they died, but it has never been raised on appeal.

Not like Mr. Baird's clients. We haven't run into a lot of problems with those \$500,000 all-security estates. If they are found in the river we usually check to see if they've got any good bet slips.

Tomorrow morning I'll have the pleasure of introducing to you Rene Wormser, our main speaker for the program. I hope many of you will be here to hear him. I would hope, too, that we can get started shortly after nine o'clock. He has come a long way. He will be in at seven-thirty tonight and he is pretty busy. I would like to show him whatever courtesy we can in the morning. His topic is one that I have heard him deliver before, "The Problems of the Sprinkling Trustee." It is an administration problem. He has done a great deal of research into the area. He has talked to trust officers across the country, and I know you will enjoy it very much.

If I can just digress for a second, I have a very short topic, really—"Life Insurance Procedures." The reason for asking you to sign those cards out there, if it hasn't been explained to you, is that one section of the book is not completed and will have to be mailed out to everybody. We would also expect that there will be corrections in it. In fact, as I was going through my copy of the book today I noticed one little error on their explanation of Schedule D on the federal estate tax return. There are bound to be omissions and errors. In the same connection, we will send out corrections if you will tell us what you see as you go through the book. Just send it to John Gradwohl or Deryl Hamann or myself, anybody who is listed in the acknowledgement section of the book, or whoever wrote the section, and we will try to get those out.

The check-list that you are hearing about today, and the one you missed from Mr. Kelley, will be supplemented when you get the book. In the book there are beautiful check-lists, some used by firms out-state, some used by Omaha firms, and I think it is a very worthwhile book. I heard some people say that they are going to get one copy for the firm. I would suggest that you get a couple. I hope you will. We've got 2,000. The law students aren't going to

use all those. There will be some requests from out-state. I participated in the evidence outline, and it is a much better book, a more practical handbook, than that one. I don't mean to disparage the *Evidence Handbook*, but I think we are progressing as these books are coming out and I think this is nicer than the last.

On life insurance procedures, you shouldn't run into any complications or any problems. I would first get the policy from whoever has it. Then your ultimate objective is to get the money to the beneficiary. Whether it is the estate or an individual beneficiary, you want to get the money that will pay for the taxes due on the proceeds of insurance, and you want to get the information you are going to need for the returns and for the inventory. I would suggest you get the policy first so you can read it and see what the options are that are available in settlement, whether it is to the estate or to a beneficiary. You might want to check which option you are going to use. We will get into that later. You want to check the beneficiary. You want to see what it provides in accidental death, what it provides by way of double indemnity.

Then address a letter to the home office setting forth the number of the policy, the date of death, and the name of the decedent, and ask them to send you the forms and a 712. I ask for a 712 whether or not I feel that the estate will need it because they set forth everything in that 712. Ask for three copies, if they will send them to you. You will have enough then to distribute later. They set forth the amount of return premium, the amount of interest, and the face amount of the policy, or whatever additional insurance you receive. You'll have all of that set out and you can just use it from there on.

Then from the field office or from the home office you'll get the claimant's form that they all have, and each one is a little different, a physician's form, and sometimes they will just request a death certificate with a raised seal on it, although they are not too careful in my experience about that. If you don't have one they may accept a Xerox copy.

If you are getting it for the estate, you will have to get your letters from administration. If it is for a minor beneficiary you will have to get letters of guardianship to send with it, and in some cases they may send you an inheritance tax release form. I think if you explain carefully to them that it is not necessary, they may not require it.

The 712 you will need if there is an estate tax return, of course, but otherwise you need it just for the breakdown. Eventually a

check will come in either to the beneficiary or to the estate, at which time they will like to have the policy surrendered. I copy the policy on a Xerox machine so I have at least the matters I need, if it is audited, or if you later have to refer to it for some reason it is a simple thing to copy and you have the one page.

The lady, if it is the widow, or the beneficiary, or the estate should realize that unless the will provides otherwise, the executor is entitled to recover from life insurance beneficiaries such portion of the total tax paid as the proceeds of the policies bear to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate under 20.51. It is just nice so that, if it is a person other than someone whose taxes will be paid by the estate, they aren't surprised later when you come to them and say, "I am sorry but you have to bear a rateable portion of the taxes."

I think one of the things we often overlook is the options that *are* available. Sometimes it is just a question of getting the lump sum and many of your clients don't realize that there are options available. I think you ought to look at the policy first and explain to them what the options are, or have the insurance man sit down with them and explain it to them if you have confidence in him. The interest option to a widow who is not in a bracket where she needs large investment protection, or is not willing to accept it, might be a suitable way of having the money paid out to her. She can withdraw it usually in increments of \$100 or more, but she can withdraw almost on demand. She gets daily interest, such as it is. They usually guarantee about 2½ per cent, I believe, and some of them pay from 4 to 4½ per cent. It is one way to take the money out, if it is not readily needed, or if there is going to be a period before it is needed.

Incidentally, in advising your clients before you can tell them that that is not a bad way to set it up, they can always elect to take the money out, and it usually draws interest from date of death. The widow would not have to worry about investing it, and so on. She can take the installment option where they pay it out to her over a term of years or over the term of her life. She may be able to get the exclusion of \$1,000 a year on interest under Section 101D of the Internal Revenue Code. It depends. If she has eight kids and herself and little other income, the exclusion probably wouldn't make a heck of a lot of difference to her. Otherwise, it is there and it is available. The lump sum, of course, is the most common one, and the widow will immediately want to go out and pay off the mortgage on the house that is probably an old mortgage at 4 per cent or something instead of investing it and doing something with it, so you should counsel with her on that too, I believe.

Annuity contracts are slightly different, of course, but the only major difference would be that you would have a special form probably sent out by the insurance company.

Once again, follow up to be sure that whoever is the beneficiary eventually gets the check and that he is not looking to you for it, that everything is cleared up, so to speak, within a reasonable time after the claim has been made.

I believe that covers our insurance options.

CHAIRMAN STRASHEIM: That brings us to our panel. Maybe I should, as we go about this thing piecemeal, mention one other thing about the book, and maybe it was mentioned yesterday, but the book is a nonprofit institution; that is, the fee that is charged you is supposed to just make the book self-supporting. I think you all understand that.

There is one other announcement I would like to make because I just don't know how to circulate the information around the Association. Some of you are familiar—and frankly I am not although I have heard it praised many times—with the film that I know was shown by the Omaha Bar Association, on revocable trusts, and we had Casner, who was mainly responsible for the film, out here personally at the same time.

There are now two more films available, and the information has come to me, as chairman of the Continuing Legal Education Committee. One of the films is on drafting a revocable trust, which complements the film on revocable trusts. There is another film on the irrevocable trust. There are fees for each viewer, as there were for the other one. I meant to bring the letter, but I believe if you have all three of them the fee is about \$10.00 a viewer. It's \$9.00 and some cents. It is basically \$3.00 per film per viewer. Apparently the two new films are going to be booked quite heavily. They are going to give some sort of preference to the responsible individual in continuing legal education in each jurisdiction, which in Nebraska happens to be the chairman of the committee. So if any of you people have organizations or have functions at which you would like the film shown, if you will communicate with me I will write in, as chairman of the committee, and ask that we get the film at the requested time. I can't say that we will get it but I want everybody to be familiar with it. I will send copies of the letter, which just came in, to Mr. Adams, the new President of the Bar Association, and to other dignitaries.

Well, putting that aside, we have now reached the panel part of our program. Let me ask if any of you people want to make some



of the panel members listen to you for a change. Do you have any questions you would like to ask any of these people? I wonder if you would state your name and where you are from.

WALTER HUBER, Blair: I will direct this to Carlos. What effect would there be with regard to an intestate estate with all adult heirs where the first notice was not sent out? Now the estate is ready to close and the proposal is to get a voluntary appearance or a waiver. Is this statute jurisdictional that says it must be mailed within five days to everyone that has a legal interest or who has entered an appearance or filed a waiver?

MR. SCHAPER: It is my understanding that the mailing of the notice within five days is jurisdictional but of course if there is a waiver then the requirement for mailing would be excused, and that followed with an affidavit that all persons interested have either been mailed copies of the notice or have entered their appearance would take care of it, I think.

MR. HUBER: But the waiver will be filed five months after the first notice.

MR. SCHAPER: Well, I don't think that makes any difference. That is just an opinion, but that is what I think. I know I have seen it done.

CHAIRMAN STRASHEIM: Any other questions? Does anyone want to comment?

LAWRENCE E. MURPHY, Lincoln: I want to ask Moldenhauer about what the Bar thinks about the fee schedule on contributions and mortgages. I have asked a lot of lawyers in Lincoln and got some good ideas but I would like to get Mr. Moldenhauer to tell us if in setting fees, contributions which a co-tenant made to taxes and expenses should be deducted from the gross value in figuring the fees. Can you comment?

CHAIRMAN STRASHEIM: Howard?

MR. MOLDENHAUER: I can't answer that offhand, Larry.

CHAIRMAN STRASHEIM: Does anybody here want to have a go at answering it? Howard, why don't you state the question?

MR. MOLDENHAUER: No, but I might suggest that you send that to the Economics Committee and they will get you an opinion on it, I am sure; but I can't tell you offhand.

MR. MURPHY: It's the public relations on the amount of fee the lawyer can set on the value of the assets. I was interested in

what you would say to your clients in regard to the mortgage or the contribution.

CHAIRMAN STRASHEIM: I think some people would like to have the question repeated, Larry.

THOMAS M. DAVIES, Lincoln: When I was chairman of this committee it was presented before the House of Delegates. The presentation was that the mortgage would be deducted. The House of Delegates overruled that, *wrongly*, in my opinion, but I think the way it now stands is that the gross estate goes in without deducting the mortgage. I think you will find the House of Delegates adopted it that way. I think it is wrong.

CHAIRMAN STRASHEIM: We are going to start the second session with a speech by Vance Leininger. Vance is a partner in the firm of Walter, Albert, Leininger & Grant in Columbus, Nebraska.

## GENERAL CLAIM PROCEDURE

Vance Leininger

The topic that has been assigned to me for discussion for the next ten minutes is "General Claims Procedure."

First I want to disillusion any of you who might think this is a way to get paid better for your work. The claims that I am going to talk about are not claims for attorney's fees. Second, I want to assure you that I am not going to impose on a group of practitioners active in the profession a discussion of the routine statutory procedures with which we all are or should be familiar in the handling of claims in decedent's estates.

We all know, or should know, for example, that promptly upon the issuance of letters testamentary or letters of administration there is a notice to creditors which is published and that the court, on its own motion without urging from counsel, fixes a time when all claims have to be filed, a time when there will be a hearing on claims, and they will either be allowed or disallowed, or allowed in part or disallowed in part. Those proceedings are statutory. The county judge has some discretion so far as the time is concerned.

I think I might pause to comment at this time that it perhaps is regrettable that the practice is not uniform throughout the state, but there perhaps are reasons for variations in different geographical areas of the state.

One thing that I think should be mentioned in connection with the claims procedure, while it is prosaic and mundane in most

estates, nevertheless it merits the close attention of the attorney representing the fiduciary because it is in the claims procedure in the state that you lay your record to relieve the assets of the estate on liens which might arise from the estate proceedings. So it is most important from that standpoint, particularly if you have real estate involved. You know that sooner or later someone will be examining the title that evolved through the estate proceeding, and unless the claims procedure is properly handled there may be a lien remaining.

The other thing in connection with the notice facet of claims proceedings—we all know and are accustomed by this time to serving the notices by mail, the notice of publication, the notice to creditors. In some estates where there are many heirs or many devisees where some of them have grown up since the will was prepared, have married, their names have changed, it can be of considerable assistance to a title examiner later on if the discrepancy in names is tied up some way in the notice that is filed or the affidavit of serving the notice that is filed in the estate proceeding. This can save time and trouble later on.

The other thing of importance in this connection, I believe, is that our Court has ruled that a claimant against a decedent's estate with damages arising from a tort alleged to have been committed by the decedent, need not be served with the mailed notice, of the notice to creditors—a case, I believe, that came out of Dodge County. That poses some interesting questions that could arise under unusual fact circumstances. But that is the rule as it now stands, as I understand it.

The statute of non-claim must be watched very carefully to make sure that no meritorious claims are overlooked, particularly if they are subrogated claims that the fiduciary in the estate is entitled to recover on as a result of advancements.

The statute does provide that even though the statute of non-claims has run against a claim, belated claims may be considered under certain circumstances. If an application for leave to file them is filed and granted and good cause is shown, the court has discretion to extend the time for filing belated claims under those circumstances, with certain limitations on the extension which may be granted.

The application to file a belated claim must come within three months of the time originally fixed for filing claims. I have been able to find no authority for the court under any circumstances to consider a belated claim, the application for filing of which has not

been filed within that three-month period of time. If it is filed and if it is allowed, then the court has certain discretion as to how much additional time may be granted.

One of the interesting cases in connection with belated claims is the case of *In Re Estate of Golden*, 120 Neb. 226, a case decided in 1930, and it covers a substantial waterfront of problems in this area. The case is a good one to read because it is sort of like a textbook on belated claims, and while much of the opinion may be considered overture, dictum, under the circumstances involved in that particular case, nevertheless, it contains expressions of the law that our Court has approved, at least as recently as 1930, and the case has been cited a number of times also since then.

In the first place, they said that a belated claim could not be filed, it was improper for it to be filed until leave to file it had been granted on an application properly made.

In the second place, they determined what was an appealable order in connection with a belated claim, and I think I can summarize that for you very quickly. An application for filing a belated claim is filed; it is not granted. That is an appealable order because it finally determines the rights of the claimant or the would-be claimant, that can be appealed from immediately.

On the other hand, if an application for filing a belated claim is filed and granted, that is *not* an appealable order, but the propriety of permitting the filing of the claim may be included in an appeal from the allowance of the claim at a later date. If the claim is disallowed, of course, the fiduciary or the beneficiaries of the estate have no reason to appeal because their rights have not been prejudiced by the disallowance of the claim, but if the claim is allowed, then that creates an erosion into the equities in the estate, and that is an appealable order, and on appeal from that order you can challenge the propriety of the *original* order of the court which permitted the belated claim to be filed.

Now, that is the way this came up, *In Re Estate of Golden*, and it contains a further discussion of what constitutes a showing of good cause in the application for leave to file a belated claim. That has been discussed by the Court and they found essentially this set of circumstances in that case as justifying a finding that the leave to file the belated claim was improperly granted. They said that there was no evidence of fraud, accident, mistake, unavoidable misfortune; that there was no showing of excusable neglect, no showing of diligence on the part of the would-be claimant. The showing made was merely that the claim was just and valid and

should be paid; that it was valid when the decedent died; that his estate is solvent; that the period for filing claims was only three months, whereas it could legally have been 18 months; that the claimants did not know proceedings to settle the estate were pending; that they had no knowledge of the published notice or the order barring claims; and that after learning the facts they promptly applied for permission to file their claim.

Now, the Court didn't find that all of those allegations were true. They found that they did know of the death, that they knew about a sale being conducted by the fiduciary during the pendency of the state, and that the administrator had negotiated with them for repairs to a farm that was involved in the estate and therefore they must have known about the estate proceeding pending.

Finally they said, "The claim against the solvent estate," and this shows how strong this ruling is, "makes a strong appeal to morality, equity, and justice, but the arbitrary bar of the non-claim statute and the peremptory order of the county judge pursuant thereto apply alike to just and unjust claims."

So the statute of limitations that we know of as our "non-claim statute" is rigidly applied, at least as of this date. The order permitting the claim to be filed was unauthorized and it was properly set aside. I commend that case to you if you get into one of these problems on belated claims.

Now, in connection with the processing of claims that have been filed and allowed, the fiduciary has a duty that everyone should remember. The fiduciary has a duty to assert set-offs and counter-claims against a claimant, and the court then has the duty to determine the balance, either owing to the estate or owing from the estate to the claimant. That cannot be waived, apparently, and it is just there. So see to it that the fiduciary asserts any set-offs or counterclaims against any claimants who have filed claims.

Unmatured claims—I will give you just a brief statement on that, claims which are just and owing but not yet due. They can either be processed at their present cash value, upon an order of the court finding what that is, and can be paid immediately, so that the estate can proceed and be wound up; or the fiduciary has the option of continuing to perform the contract according to the original terms of it. But if it is a six- or seven- or ten-year installment contract, and he wants to get the estate closed, he can ask the court to determine the present cash value of that unmatured claim and pay it and get it out of the way.

Hearings, pleadings, and payment—pleadings are usually in the ordinary case the ordinary claim bill with which we are all familiar. I would suggest, however, that where you have unusual claims, claims which may be contingent or claims which may arise from torts of the deceased, that you take the time and the trouble to prepare a pleading more in the style and form that is required in the district court in order to present that claim, and that the fiduciary take the time and the trouble to file written objections which will preserve all possible issues, because the rule that on appeal the issues may not be at variance with the issues in the Court below applies to appeals from the allowance or disallowance of claims. So you have to preserve those issues in the claims proceedings in a probate proceeding in order to have them available for trial in the district court.

I think I have used my allotted time, but I don't want to conclude this without saying something about the importance of determining whether a claim is a "claim" or not within the meaning of the probate statute. We have claims which are obvious and apparent that were in existence on the date of death. Those were obviously claims. They are obviously subject to the statute of non-claim and must be filed within the period allowed by the order of the court.

What about claims which arise directly from commitments of the executor or administrator? There is language in some of our cases to the effect that such obligations of the executor or the administrator come within the category of claims, but we get to the problem that some of them are not accrued, some of them aren't incurred until after the claims day has elapsed. I don't think many of us have ever had the experience of filing an application to file a belated claim for a second year's bond premium, for example, and I don't think that is what is intended, but this is the language in some of our decisions that causes me to raise this question.

The word "claim" includes every species of liability which the executor or administrator can be called upon to pay or provide for payment out of the general fund of the estate. Now, that language has been often quoted with approval by our Supreme Court, and I am sure that it is broad enough to include direct obligations of an executor or administrator incurred in the process of administering the estate, as well as claims which had accrued at the time of death.

On the other hand, we have a more recent decision which is a very interesting one, in which our Court held that with reference to the obligations incurred by the executor—this is the case *In Re Estate of Gifford*, a 1937 case, 133 Neb. 331—the Court held that the

claim or demand against the estate of a deceased person, whether due or to become due, whether absolute or contingent which is required by Sections 36-09, and so forth, to be presented to the county court within the time named therein or be forever barred, is such claim or demand as existed against the decedent at the time of his death.

Now we have these two expressions that have been repeated a number of times in cases decided by our Court. What is the conclusion? The conclusion that I come to is that claims which are "claims" from the standpoint of falling within the original jurisdiction of the probate are not necessarily claims which fall within the ambit of the statute of non-claims. There isn't any question but what obligations incurred by the executor or administrator are subject to the original jurisdiction of the county court and must be allowed either at the time of the final account or otherwise before the executor is home free to pay them.

On the other hand, we do have the case which I've just referred to which says that such claims are not claims which come within the ambit of our statute of non-claims. I might call to your attention—I am sure that everybody in the room is familiar with it—tort claims. There are a number of decisions within the last 20 years to the effect that those must be filed with the county court as claims in the probate proceedings, tort claims against the estate of a deceased person, in order to be considered in the district court. They may not be filed originally in the district court.

By way of closing, I think I perhaps ought to share with you a comment that one of my associates made just recently in connection with an estate. He got all the heirs in and all the devisees in and explained to them what was involved in the estate proceeding, what they might get out of it, the claims procedure, and so on, and asked them if they had any questions. One of them said, "Well, if I had known it was going to be like this, I would just as soon he'd have lived."

CHAIRMAN STRASHEIM: Our next speaker is going to be Richard Endacott. Dick is with the firm of Mason, Knudsen, Berkheimer & Endacott.

### CONTINGENT CLAIMS

Richard R. Endacott

Probably one of the best ways to describe a contingent claim is to cite some examples, the cases of what has been held to be a contingent claim and what has not been held to be a contingent claim.

For example, the courts in several cases have held that a claim against a deceased stockholder in a bankruptcy action is a contingent claim.

Another action which was held to be a contingent claim was an action against the deceased surety on a guardian's bond where the guardian had failed to settle all of his accounts.

Claims which have been held not to be contingent are: Claim on an unmatured promissory note secured by a mortgage; and perhaps oddly, I am not sure, but a liability upon a claim for damages arising from a tort has been held not to be a contingent claim, although the actual amount or the actual liability has not been determined at that time. The court held, as a basis for this ruling, that the actual event, the tort, has already occurred at the time of the filing, and since a contingent claim is based upon future events, a claim for damages arising from a tort is not considered to be a contingent claim.

When should a contingent claim be filed? Well, this depends upon the term "capable of being exhibited." The statutes in 1933 were amended, and one of the sections was amended, and the language "capable of being exhibited" was inserted. The term "capable of being exhibited" has been interpreted very broadly by our courts and simply means that it is capable of being filed in the court. Thus, if you have a claim which is capable of being exhibited prior to claims date, that claim must be filed prior to claims date in order to be allowed.

Section 30-702 in regard to a claim which is capable of being exhibited is a little bit confusing. It says, "If such contingent claim shall become absolute and shall be presented to the County Court or to the executor or administrator at any time within two years from the time limited for other creditors to present their claims, it may be allowed upon due proof, as in the case of other claims."

I am not sure exactly what this means, but it seems to me that, if you have a claim which is capable of being exhibited, it must become absolute and be presented to the court and allowed within two years after claims date.

Secondly, if you have the odd situation, or you can establish a situation, where a claim is not capable of being exhibited prior to claim date, then, at any time that that claim becomes absolute, you have a year after the date the claim becomes absolute to file the claim. As a word of caution, since the court has interpreted "capable of being exhibited" so broadly, I would suggest that if you have any kind of a claim which is contingent and you feel that it can



be considered to be capable of being exhibited, you should certainly file that claim prior to claims date.

If a court determines that you have a contingent claim, it will not allow the claim but will rather order the executor or the administrator to retain sufficient assets so that the claim can be paid at such time as it becomes absolute. Then the question arises: When does a contingent claim become absolute? Well, it becomes absolute simply when the actual liability is determined, and our Court has held that if the liability depends upon the outcome of a case in the district court, then the claim becomes absolute at such time as a judgment is entered in the district court. If you have an unusual circumstance where you have a claim which is not capable of being exhibited, the statutes go on for four or five sessions showing how you can reach these assets, if they have already been distributed to the heirs or the beneficiaries, but Whitford points out that since most claims are capable of being exhibited, these sections dealing with 30-704 really don't have much use.

And finally, the failure to give notice to creditors possibly having a contingent claim for one year after the issuance of the letters can expose the fiduciary or the beneficiary to a claim by that contingent claimant for five years after the issuance of letters. So if you know of anyone who might have a contingent claim, you should certainly send them notice so you will cut off this five-year period.

CHAIRMAN STRASHEIM: Our next speaker is Jerry Matzke from Sidney. He is a partner in the firm of Martin, Davis, Mattoon & Matzke.

## INVESTMENTS BY PERSONAL REPRESENTATIVE

### Gerald E. Matzke

Perhaps you have at some time discussed in your office, as we recently did in ours, whether the executor of an estate is under a positive duty to keep cash funds of an estate invested in interest-bearing accounts or investments. In every estate, of course, it is necessary to collect cash from either the sale of assets or from various accounts, to pay claims, to pay taxes, and of course to pay the attorney's fee.

Often this leads to an accumulation of a rather sizable amount of cash for a sometimes prolonged period of time, particularly if you have any arguments during the course of the probate of the estate.

In the text of the handbook, which apparently only a few of you have, on page 4 the statement is made "It is not entirely clear that

an executor *has* a duty to invest estate funds, and if so, under what circumstances?" I want to partially dissent from that statement or, if you will, just expand upon it a bit.

First of all, there is no case or statute in the State of Nebraska that imposes upon a personal representative a positive duty to keep cash of an estate invested at interest. There are, however, two Nebraska cases that indicate the circumstances under which an executor or an administrator may be personally charged for failing to keep estate money earning interest.

The case cited in the text, here again I am sorry apparently few of you have the text yet, the case cited in the text, *In Re Estate of Wilson*, is a 1915 case. It involved an administrator who filed his final report showing that he had paid out \$4,500 in settlement of a claim against an estate when, in fact, there was no claim filed and the money was still in his hands. The Supreme Court charged him with interest on that \$4,500.

I quote from the opinion, "From the time that he converted that amount to his own use by improperly taking credit therefor in his report . . . ." But the Supreme Court did not charge the executor with interest on that \$4,500 prior to the time that he filed his actually dishonest report because the Court said, "It was not shown that he had actually received interest on it."

A later case, the second case which I want to mention which is not noted in the text, *In Re Hunter's Estate*, was decided in 1935. The citation is 129 Neb. 529, 262 N.W. 41. In *Hunter's Estate* there was an administrator who withdrew \$15,000 from a savings and loan association in October of 1932. This was two months before the semiannual dividend was payable. The trial court found that by waiting two more months the administrator would have realized \$300 more in interest for the estate. The trial court charged the administrator personally with the \$300.

It is curious that in this case the administrator did not appeal this point, and consequently the question of whether the sum was rightfully charged to the administrator was not passed upon by our Supreme Court, though they did mention it in some detail.

The contention was made in the trial court that it erred in not charging the administrator for interest on this \$15,000 after the first of the year. The administrator, after he withdrew the money from the savings and loan association, deposited it in a bank at no interest for awhile, and then he rented a safety deposit box, took it out of the bank, and put the cash in the safety deposit box. You have to realize this was in 1932.

The argument was made, first of all, by those interested in the estate that the administrator was personally liable in taking this money out of an interest-bearing account because he did not obtain an order from the court authorizing him to do so. The Supreme Court disposed of this contention easily. They said the fact that the administrator did not obtain a court order approving his actions in withdrawing the money from the savings and loan did not automatically make him liable for interest where, and then I quote directly, "the transaction was in good faith on his part, without profit to himself and he exercised the care, prudence, and judgment a man of fair average capacity and ability would have exercised in the transaction of his own business affairs."

I think it can fairly and accurately be said that while our Nebraska cases and statutes, the absence of statutes, do not impose upon a personal representative the *positive* duty of keeping estate funds invested at interest for the benefit of the estate, a personal representative may be personally charged with the amount of interest that the estate funds could have earned, first of all, where the personal representative converted the estate funds to his own use—and I think that is pretty obvious—or, second, where the estate funds were invested and earned interest and the personal representative did not report the interest as income of the estate—again that is a matter of conversion and that should be obvious; and, thirdly, where an executor-administrator withdrew estate funds from an interest-bearing account or investment for no valid reason in violation of the prudent man rule.

As all of you are undoubtedly aware, the Nebraska statutory law was changed in 1965 to eliminate the list of legal investments that we were accustomed to prior to that time for fiduciaries and to substitute for it the prudent man rule. In other words, the statute finally, in 1965, said the same thing that this case did in 1935.

It is interesting to note the exact language of the new investment statute, which is Section 24-601. It says in part, "Except as may be otherwise provided by law or by the instrument creating the fiduciary relationship . . ." each executor or administrator "having funds for investment *shall* invest the same in investments of the nature which men of prudence, discretion, and intelligence acquire or retain for their own account in the management of their own affairs, not in regard to speculation, but in making investment of their own funds with a view to probable income as well as probable safety of the capital involved."

In that section of the statute I call your attention to the phrase "having funds for an investment *shall* invest . . ." Undoubtedly

this phrase in the statute requires that a personal representative, if he does no more, should at least consider the matter of investing cash during that practical period of time when he *could* earn interest on it. He at least should consider the matter and not go to sleep at the switch completely on that subject.

Of course if the will provides, as I suppose every properly drawn will should, that the executor has discretion in investing estate funds, then there is no particular problem.

If you don't want to concern yourself with this matter at all, you don't want to bother to ask the county court for even an advisory opinion, you can always safely have your executor or administrator deposit estate cash funds in a savings and loan association. Now, I am not on the payroll of the League of Savings and Loans, but Section 8-318 specifically provides in our statutes that fiduciaries may invest in savings and loan accounts "without an order of approval from any court." Apparently some years ago the savings and loan associations were significant and powerful enough to have the legislature give them that little phrase in our statute which protects administrators and executors in case they want to take cash funds during the probate of an estate and place them at interest in a savings and loan association.

**CHAIRMAN STRASHEIM:** Our next speaker is James W. Brown, again a partner in the firm of Fitzgerald, Brown, Leahy, McGill & Strom.

### **EFFECT OF AUTHORITY GRANTED PERSONAL REPRESENTATIVE BY COUNTY COURT**

**James W. R. Brown**

I think maybe to put that in its proper perspective we might just take a moment and review in our minds the position that a personal representative holds. He is going to be administering all of the wealth that that decedent was able to accumulate during his entire lifetime, so it is a very important position, and the rules with respect to his conduct should be strict accordingly.

We also might just look at three of the principal relationships that he bears. The first is that the personal representative is an officer of the probate court. He is simply assisting the probate court in its constitutional function of administering estates.

Secondly, and this is particularly true of the executor, he is the personal representative of the decedent, there to carry out the desires of the decedent as requested in the will.

Thirdly, there is his relationship to the creditors and the beneficiaries. He is a fiduciary and a trustee with respect to those persons.

Now I might add another word with respect to the attorney for the personal representative. He occupies two of these three relationships. First of all, he is of course an officer of the court and is assisting in the function of the probate court. Secondly, our Supreme Court has said that he is also a fiduciary toward the creditors and the beneficiaries, and in this connection I would like to read a quotation from the opinion of our Supreme Court, *In Re Estate of Rhea*, 126 Neb. 517:

The administrator and his attorneys are officers of the court and both are fiduciaries in their relation to the heirs. An administrator is a trustee, and property of the estate in his hands is trust property. He is both the personal representative of the deceased person and the trustee for the heirs and creditors. An estate in his hands is under the immediate control of the court.

That brings us, with that background, to the specific problem here, and that is the effect of orders of the court relating to his conduct.

Frequently a personal representative has an important decision to make with respect to action taken. For example, there may be the question as to whether or not to compromise a claim that is due the estate and, if so, for what amount; whether or not to invest funds and, if so, into what form of investment; whether an asset should be sold and at what price; whether money needs should be borrowed; whether property should be leased; whether certain expenses should be incurred in connection with the administration; allowance of fees for the personal representative and for his counsel. These are examples.

Our statutes provide certain procedures in some of these instances. For instance, statute 30-410 specifically provides for compromising claims, with the approbation of the county court. Then, as we all know, there are procedures set up for the mortgaging and sale of personal and real property, and those procedures would be followed.

There are other decisions which are not specifically covered by the statute. In connection with these decisions, the personal representative—remember he is an arm of the court—is entitled to get the advice and assistance of the county court, and our Supreme Court has said that in some instances he has a duty; and of course our statute sets out, in a number of instances, procedures that he should follow to get particular kinds of advice and order from the court.

I might just read a quotation from the opinion, *In Re Estate of Nilson*, 126 Neb. 541:

The administrator had the right to and was required to make a final report, have his account settled and approved, obtain order of distribution, and be discharged by the court. He had the right, and it was his duty, to ask for directions from the county court as to the disbursement of money in his hands.

Now, then, what is the effect of applying to the court and receiving an order with respect to a particular act? Does this protect the personal representative against any attack with respect to his account? The answer, of course, is that it does not. These orders are not final orders, and our Supreme Court has pointed out that all such orders, for instance with respect to investment of property or sale of an asset, were interlocutory in nature and are subject to review upon the allowance of the final account of the personal representative. I think that that is perfectly reasonable.

For instance, you take a situation where the personal representative comes in and applies for an order of the court to sell an item of personal property. Let's say that he has a sale and specifies that he can sell it for \$5,000. The court grants an order authorizing him to do so. On the submission of his final account, one of the beneficiaries comes in and points out to the court that this item of property was worth \$7,500, that the executor sold it to a business associate of his, and it was a matter of clear evidence that the item *was* sold at an inadequate price. In that situation, of course, the executor's account should not be approved with respect to that item.

In this connection I might just quote a couple of the opinions of the Supreme Court. First, *In Re Estate of Wilson*, the court stated—this is in 97 Nebraska at page 783.

It will be observed that the controversy relates entirely to the accounts of the administrator and is between the administrator and the estate. We have observed no final order of the court discharging the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only, and not final orders. The county court, therefore, had complete jurisdiction over the accounts of the administrator until his final discharge.

And then in a very recent case, *In Re Estate of Sass*, 182 Nebraska, the court stated:

Orders of a probate court adjusting or correcting accounts of an administrator, made while he was acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge.

Just as a couple of examples, for instance—in the Sass estate the administrator was appointed in 1952, an accounting was filed

and designated as a final account in May of 1965. An order was entered and it was designated a decree on final account, which recited that it approved the account, but it also reflected that the administrator had certain assets in his hands, that certain expenses had yet to be paid, that assets would have to be sold or funds obtained in some way to pay those. The order was entered, I believe, in May. In September of that year, which is long after appeal date from the entry of what was designated the "decree on final account," the beneficiaries filed a petition for the removal of the administrator. They filed objections to the accounting. They filed a request for a true accounting, and also claimed waste and negligence and asked for distribution with interest.

The court there pointed out that the decree showed on its face that there were still things to be done, assets to be sold, amounts to be paid, and that it was not a final decree, and pointed out that orders of this kind were interlocutory and were subject to revision at any time until a final order was entered.

The court said, and I quote: "Without dispute, the petition filed herein in the county court and the district court stated a cause of action which, if proved, would warrant appropriate relief for breach of the administrator's fiduciary duties during the whole 14-year period of his administration."

Another example, *In Re Estate of Lehman*, 135 Nebraska: Here there was a situation where executors' fees had been allowed and paid and partial distributions made. My recollection is that each of these actions was taken pursuant to notice also. All parties received notice. On final account, objection was made to these actions by the executor, and again the court held that those orders approving those actions were purely interlocutory and were subject to review upon final account.

The case here that I just mentioned from Kansas involved the sale by the executor of some corporate stock. There again an application had been filed and an order received. The sale was made at book value of the stock, and then on final account the executor was charged with a deficiency for the reason that it was an inadequate price, and the beneficiaries in that case pointed out that while the price had been at book value, the evidence was that the stock had paid a dividend equal to 50 per cent of that price for several preceding years. The sum total, of course, is simply this, that orders of this nature are not final orders, are not absolute protections at all to the personal representative, and that must be kept in mind.

Then what, you may ask, is the effect and what is the purpose of them?

First of all, let's take it from the standpoint of the court. The county court is charged with the administration of estates, and this is a method, and a good one, for the court to be kept informed with respect to what is being done in the probate of these estates. It also provides him an opportunity to control and thus properly perform the court's duty in the matter of probate.

From the standpoint of the beneficiaries and the creditors, it protects this procedure of getting orders, protects them from improper action. I think where there is no improper motive at all on the part of the personal representative, the very fact that he has to set down the reasons for an action which he contemplates is very helpful in having him arrive at a proper conclusion. I think also when he knows that the action he is going to take, or is preparing to take, will be screened by the court, this might eliminate a number of questionable actions that might otherwise occur. Also it serves the beneficiaries and creditors in this respect. It makes a record of the actions that have been taken and the reasons which the personal representative has assigned for those actions.

Now with respect to the personal representative himself, again I repeat it forces him to be circumspect in arriving at important decisions, and he is occupying an important position in the administration of the estate. Secondly, it permits him to get the benefit of the experience and the knowledge and the know-how of the county court, and that is particularly true in counties such as Douglas County and in Lancaster County. I realize that that may not be too important in some of the smaller counties where perhaps even the county judge is not a lawyer. Also, and this is quite important, it provides some protection to him where he is acting in good faith and where he has taken the proper steps to arm himself with adequate information, and then he makes an application to the court and gets approval for that act. It certainly will go a long way to protect him, again as a practical matter, not as an absolute legal thing but as a practical matter—will protect him in many instances against charges of improper conduct, and he will have a much easier time getting his account allowed.

**CHAIRMAN STRASHEIM:** Our next speaker is Jeffre Chevront, a partner with Tom Davies in Lincoln, Nebraska—Davies & Chevront.

## **CONTINUING SOLE PROPRIETORSHIP OF DECEDENT**

**Jeffre P. Chevront**

The topic assigned to me is "Continuing the Sole Proprietorship of the Decedent." I think we should make it clear that here we



are talking about a true sole proprietorship and not a one-man corporation.

An executor, in my opinion, of an estate containing a sole proprietorship as an asset of that estate, is on the horns of a dilemma. He first has an obligation to preserve and conserve all the assets of the estate. This means that he not only must preserve and conserve the business but he must conserve the remaining assets.

I think generally we can agree that a business is much more valuable as a going concern than it would be if we were just to liquidate it and distribute, sell all of the assets of that business individually. However, the continuance of this business by the personal representative may expose him to personal liability for any losses, even though he may have acted in good faith and have run the business in a proper manner.

Nebraska has no statutory provisions for the continuance of a sole proprietorship. There are no Nebraska cases directly on point, although the Nebraska Supreme Court has held that a representative cannot conduct farming operations on borrowed money nine years after being appointed administrator.

An interesting case is *Anderson v. Lamme* in 174 Nebraska. Here the administrator of an intestate estate took over and managed a cafe for about 19 months until it was sold. I think the only reason he did run it was so it could be sold as a going concern. This question of his authority to actually continue the business was never raised. I think one of the reasons it was never raised is that he made money on it. The question could have come up if he had not. But the question came up as to his fees as administrator, and the Supreme Court authorized and approved the allowance of an extraordinary and additional administrator's fee for the continuance of this business.

Whitford has stated that a representative may procure authority from the county court to conduct the business for the purpose of winding it up. However, he cites no authority for this.

Scott, Bogert, and *Restatement of Trusts* generally agree that in the absence of any authority in the will, the representative cannot carry on the decedent's business. One or two of them go so far as to say that the carrying on of the business is in effect a breach of trust. They do state, with some qualification, that the representative might be justified in carrying on the business for the purpose of selling it as a going concern. The real threat here of the administrator or executor in continuing the business is the possible liabilities to which the representative exposes himself.

There are several general rules as applying to different situations where there is no testamentary authority to continue the business. First, if the business is carried on without testamentary authority, and is carried on not merely for the purpose of winding it up, the representative is personally liable for any losses that are incurred. Second, if the business is continued with the consent and approval of all interested persons, then the representative is not liable for any losses that may have occurred because of the continuance of the business. However, this rule is not unanimous, and there is some conflict of authority as to who are the interested persons. Does this just mean the beneficiaries or does it mean both the beneficiaries and the creditors?

Also, if the business is carried on—this is the thing that bothers me about Whitford's statement—if it is carried on solely for the purpose of winding it up, there is a split of authority across the country on this. Sometimes the representative might be liable, sometimes not. An Illinois case held that an executor who carried on the business for the purpose of winding it up was personally liable for losses sustained by making sales on credit without security. This was even when there was an authorization in the will and yet he was just carrying it on to wind it up in order to sell it as a going concern. I think this case might not be valid now because of the changes in our business atmosphere toward credit. This is a 1906 case.

But I think the case does point up the danger that an executor or an administrator is exposing himself to. If he makes money everyone is happy, but he doesn't gain anything except perhaps a small additional fee for running the business. If he loses, they are going to be after his skin.

If the executor is authorized under the will to conduct the business, the general rule is that he is not liable for any losses in the absence of bad faith, misconduct, or such negligence as would be a breach of trust. Again, the courts are not in accord on this and so they are not unanimous as to the above rule. However, I think if you go through the cases of the various jurisdictions that have held the executor liable when he is authorized by the will, most of them contain facts that would show that he probably would be guilty of some type of misconduct or some type of breach of trust.

Again, if the will does authorize continuance, this language must be very, very clear. I think there is general agreement on this.

A general authorization to sell, invest, and re-invest is not sufficient to authorize the executor to continue the business. The author-

ization must specifically state that the executor has the power to do this. An example of the proposed clause in this regard can be found on page 51 of the *Annotated Administrative Provisions*, which were prepared by John Gradwohl and Don Endacott, the materials distributed at the Fall Institute on Wills and Trust Drafting in September of this year.

I have adopted a clause that is somewhat like one that is found in a small book we've got in our office, on page 471 of a book by James Johnson called *A Draftsman's Handbook for Wills and Trust Agreements*.

I think an executor continuing, or attempting to continue a business, faces problems other than just this mere personal liability he may have. There is a question, of course, on the priority of claims that may arise out of the continuance of this business. We have a question as to whether the debts of the business incurred while it is being carried on by the executor are only chargeable against the business assets or whether they are chargeable against the assets of the estate other than the business assets.

You've got a problem of priority between lifetime creditors and business creditors. Some of the cases have held that business debts are chargeable only against business assets. As between lifetime and business creditors there is no general rule, although a majority of the decisions appear to favor the lifetime creditors over the continuance of business creditors.

However, some of the claims that have arisen out of the continuance of the business have often been allowed as expenses of administration and in effect given priority over the lifetime creditors.

The executor continuing the business should be concerned over the possibility of exposing himself to liability for torts committed by either himself or by any of the employees of the business.

A California decision has held that an executor continuing a decedent's business is personally liable in regard to workmen's compensation, that an employee of this business was the employee of the trust company which was acting as executor and continuing the decedent's business.

I am afraid I have just been throwing out a series of horrors here, or things that can happen, but I am sincerely concerned over the possibility of the personal liability of an executor or administrator who does continue the individual sole proprietorship.

So far as any recommendations of what can be done are concerned, I suppose the main thing is to attempt, if you have to

continue the business for the purpose of winding it up for sale, to obtain the approval of the county court to continue it. I don't know whether the court really has authority to grant this, and I seriously doubt it. I suppose the other alternative is to obtain the consent of all the beneficiaries and all the creditors that will consent by telling them that this is going to increase the value of the estate if the business can be sold as a going concern, and I suppose the main thing is to just get rid of it as fast as you can.

**CHAIRMAN STRASHEIM:** Our next speaker is Robert E. Johnson. He is the Trust Officer of the First National Bank of Omaha.

### **CLOSELY HELD CORPORATE STOCK IN ESTATES**

**Robert E. Johnson**

As I was glancing over what I had prepared for this today I felt the one thing I could say about handling closely held stock in estates, and the one problem that runs through the whole thing, is cash and liquidity. Everything that is in this paper ends up relating to cash and liquidity, because that is the serious problem that the executor is going to face when he has stock in a closely held corporation that is one of the major assets of the estate.

The other point that I allude to here is one that has been very well covered by Jeff, and that is the problems the executor has regarding his exposure to liability. The problem that you all know the executor confronts is that many times, as soon as the executor suggests "What we are going to do with this business is wind it up real fast and sell it," we are running right into the problem of possibly selling something that is earning a lot more money than we could receive if it were re-invested in stocks and securities and the things that a fiduciary feels much more comfortable in having.

Today we are seeing an ever-increasing number of estates which own stock in closely held corporations, and we think this trend will continue. Our improved standard of living and the emergence of leisure time industries have created new opportunities for the individual who wants to be his own master.

The administration problems are complex in an estate holding closely held stock. These estates lend themselves well to imaginative estate planning. Our experience has been that this planning has all too often been inadequate because the deceased was reluctant to take the necessary steps which had been recommended to him.

In these few minutes I hope to mention some of the administrative problems involved in handling estates owning closely held stock, and in so doing strongly emphasize the importance of pre-death planning.

#### CLOSELY HELD STOCK AS AN INVESTMENT

The executor is bound by the duties and restrictions of established law. It is well settled that trust funds should not be used in speculation nor subjected to the risks of trade. In addition, the fiduciary has a duty to diversify the investments of trust funds so as to spread the investment risk.

Applying these principles to an estate which holds closely held stock, the executor may find an obligation to very quickly distribute the stock to individuals, if they are the beneficiaries, or to sell or liquidate the business if the estate is to be held in trust. This may appear to be an unwise course of action in some circumstances, yet one imposed by law if the instruments fail to give the executor sufficient authority to act otherwise.

Your client may feel, in planning his estate, that his controlling interest in a close corporation is one that should be retained. He may feel that it is in the best interest of his family that the business be continued after his death. Stock in a closely held corporation seldom can be sold for a price commensurate with its earnings. So if the executor sells it, the proceeds invested in marketable securities may bring in far less income than would have been realized if ownership in the company had been retained. The retention or sale should be based on ordinary business judgment, but the fiduciary may not be in a position to exercise such judgment unless the will gives him sufficient authority to do so.

#### MANAGEMENT RESPONSIBILITIES

With such authority, the executor should be prepared to determine the extent to which active participation in management of that company is desirable. The fiduciary may determine that it is essential for the protection of the beneficiary's best interests to have immediate representation on the board of directors. On the other hand, where it is clearly evident that qualified management and supervision are producing satisfactory results, the fiduciary may confine his activities to that of a principal stockholder, keeping close observation of the management of the business. Even when the business is held only temporarily in an estate, the executor may have to assume active management responsibilities. The death of the owner or principal stockholder may have dealt a severe blow to that business.

## LIQUIDITY PROBLEM

The Internal Revenue Code gives the executor some special powers for solving this problem of raising cash in estates holding stock in closely held corporations. Section 303 permits the redemption of stock in certain situations without the distribution's being treated as a dividend. This can be a bonanza in terms of getting liquidity for the estate. The basic requirement is that the stock held by the estate must be at least 35 per cent of the value of the gross estate or 50 per cent of the taxable estate. The redemption must take place within three years after filing of the estate tax return. You may redeem an amount no greater than the aggregate of the death taxes (not just federal taxes but also state taxes) plus administration expenses and funeral expenses (but not other debts of the estate).

Several important considerations will affect the executor's decision as to whether or not he should use these tools. The executor may face a dilemma in the valuation of the corporate stock. Since it cannot be less than a certain percentage of the estate, he may not be able to claim the lowest possible value for the stock and still meet the requirements.

Then there is the control problem. When you start redeeming stock, you are varying the proportion of control in the corporation. Someone who previously had what you thought was a minority interest may turn out to have control of the company after the 303 redemption. If the company has a line of credit with the banks, they are going to be very interested in the withdrawal of cash to redeem stock.

## DISTRIBUTION OF APPRECIATED PROPERTY

The purchase of its own stock by a corporation may offer an opportunity to pass on appreciated property without the corporation's realizing a taxable gain. In such a situation, the estate will acquire a new basis, so that the appreciation in value will go untaxed.

Let me illustrate the importance of carefully selecting the asset to be distributed by the corporation in a stock redemption. The corporation may own the building in which it operates, and it may have a low cost basis for the property. If the property is distributed in a redemption, it takes on the new cost basis of the stock held by the estate. The estate as the landlord can receive rental income as a means of providing income for the widow. This could be a good alternative to high dividend pay-outs, which might otherwise be

*necessary* for the widow's benefit but *unwise* from the corporation's standpoint. The widow will receive the advantage of depreciation resulting from the new cost basis. The corporation will benefit from the deduction for rental payments.

#### TEN YEAR PAYMENT PROVISION

Another help in solving your cash problem, though of dubious value, is Section 6166 of the Revenue Code. That section permits the payment of the estate tax over installment periods of from two to ten years.

Because of the time limitation, I am not going to go into the requirements in some of the technical aspects of this section of the code. I merely would say that I think it is of very dubious value. I think an executor who uses this section without a very compelling reason may be doing the wrong thing. He will be incurring interest penalties. He will be facing the problem of a tremendous amount of paper work in filing the necessary forms each year to satisfy these requirements, which I am not going to detail. He is also going to extend the period of the probate if this deferral is over the period of ten years, and I would say that, alluding again to what Jeff had earlier said, the problems which the executor faces in delaying this estate and possibly holding this business, and the possibilities that the value of that business will decline over that period of time and that possibly you would not even end up with enough assets to pay the taxes, I think would pose very serious problems to the executor, and especially if it could ever be shown that the immediate sale of the business would have produced the necessary funds.

As I say, I think that you, as the lawyers for executors, should be very, very careful before you allow an executor to delay an estate merely to elect this Section 6166, installment payments.

#### IMPROPERLY ACCUMULATED EARNINGS

The executor may decide to accumulate earnings in order to have a Section 3030 redemption within three years after the filing of the estate tax return. If the corporation faces accumulated earnings problems, and the motive for accumulating surplus is to enable the company to redeem the stock of a majority shareholder, you may be faced with the problem of compounding the accumulated earnings problem. Hopefully, plans will have been made during the client's life to make sure that the purchasing company will have adequate liquid funds to purchase the stock, and will then be left with adequate liquid working capital and not have to run such risk of running into accumulated earnings problems.

### PROBLEMS RELATING TO SUBCHAPTER S CORPORATIONS

I would like to mention a few problems relating to Subchapter S corporations. The unique problems relating to Subchapter S corporations are complex and have far-reaching results and from the standpoint of an executor can be extremely serious. I would suggest that if your client is planning on going into a Subchapter S corporation you should, I think, make sure that he is in the hands of an accountant who is aware of all of the problems and who can sit on top of his problems and follow them, because if you don't, the Subchapter S traps and problems can be very, very serious to your client, and they can be very serious for the executor.

I think from the standpoint of the executor, the executor has 30 days after he is appointed to decide whether or not he is going to continue the Subchapter S election. This is very short time, and I think in most cases the executor merely assumes that if it was good enough for the deceased, it is good enough for the estate, so he goes ahead and makes the election.

I would like to suggest that the very serious problem is that you already have the problem of liquidity; if you continue the Subchapter S election you are going to be taxed on the proportionate share of the income whether or not it is distributed and you are going to compound the liquidity problem. It may be extremely important to the other stockholders to continue the election, but the executor, I believe, should not consent without using this as a bargaining tool and bargaining for the rights which are important to the estate and the widow, and in particular the right to have dividends paid to pay the taxes on the income which is going to be taxed to the estate. Unfortunately, because of the time limitation it must all be done within 30 days after the appointment of the executor. It may prove to be as difficult to accomplish as trying to cover this subject in ten minutes.

CHAIRMAN STRASHEIM: Our final speaker before the panel is Robert G. Simmons of Wright, Simmons & Hancock in Scotts-bluff.

### SALE OF REAL ESTATE IN INTESTATE ESTATES OR WHERE NO POWER OF SALE IN WILL

**Robert G. Simmons, Jr.**

My subject is "The Sale of Real Estate in Intestate Estates or Where No Power of Sale in Will."



This, by its terms, excludes the subject which would be more interesting, perhaps, and would be subject to another paper of equal importance, and that is whether there is a power of sale inside the will, because our Court has held that if a reasonable construction of the will charges the personal representative with the duty of dividing the estate and to do so requires the sale, the power is implied. (*The Estate of Manning*, 85 Neb. 60) That is outside the scope of this particular subject, and we won't go into it any further than to call your attention to that possibility.

I might say in starting off that when I was assigned this subject I thought it was rather elementary and I thought I knew all this and wondered why they wanted such a subject, but I thought you were entitled to more than my off-the-top-of-the-head opinion, and it was kind of humbling to find out there were quite a few things that I didn't know, and these other papers indicate the same thing.

There are three statutory procedures for three situations provided for in the Nebraska statutes. Sections 30-901 to 30-907 and Sections 30-1001 to 30-1003 apply to the situation where a contract of sale was entered into by the decedent prior to his death where it is necessary that a deed be obtained after death. Sections 30-901 to 30-907 in this instance provide for the purchasers to apply to the district court of the county in which the real estate is located for an order directing the executor or administrator to convey such real estate. A petition must be filed setting forth the facts. The district court shall fix a time and place for hearing, shall order a notice of the pendency of the application and time and place of hearing and publish for three successive weeks in a newspaper *in the county where the executor or administrator was appointed*.

At the time of the hearing all persons interested may appear. If, after the hearing, the court is satisfied that the petitioner is entitled to a conveyance, a decree shall be entered authorizing the executor or administrator to execute a conveyance thereof to the petitioner. The right of appeal is available to either party. If no appeal is taken within the time provided, the executor or administrator shall execute the conveyance according to directions contained in the decree. A certified copy of the decree shall be recorded with the deed in the office of the register of deeds in the county where the land is situated which gives the authority for the executor or personal representative to proceed.

This procedure is not a substitute for specific performance and if the court shall find any doubt upon the subject whatsoever, as to the right to specific performance, the court shall dismiss the petition

without prejudice to the rights of petitioner, who may thereafter prosecute a proceeding for specific performance.

Sections 30-1001 to 30-1003 involve contracts for the sale of real estate executed by the decedent during his lifetime and is the procedure for application by the personal representative for authority to grant a deed. There also an application may be filed in the district court of the county in which the land is situated. Heirs at law, devisees or other legal representatives of the decedent, must be made defendants. If there is more than one contract they can all be joined in one proceeding even though there might be different persons involved for different tracts. The court, after giving notice to the parties and finding no objections, may proceed upon determination that the consideration has been paid and authorize the personal representative to execute a deed for and on behalf of the heirs at law, etc.

The principal statutes on this subject, however, are those statutes under Sections 30-1001 to 30-1145 which provide for the sale of real estate when the personal estate of a deceased person in the hands of a personal representative shall be insufficient to "pay all his debts, with the charges of administering his estate," (30-1101) or "when the testator shall have given any legacy by will that is effectual to pass or charge real estate, and his goods and chattels, rights and credits shall be insufficient to pay such legacy together with his debts and charges of administration, . . ." the personal representative may apply to the district court for license to sell the real estate (30-1126). The procedure for the sale when it is insufficient to pay debts and expenses for administration and the procedure where there is a specific legacy is the same although the authorization is in different sections of the statute.

The question arises concerning the significant problem when the personal estate may be sufficient to pay debts and the "charges of administering the estate," exclusive of estate and inheritance taxes, and whether or not the authority contained in the statutes is broad enough to authorize a sale for the purpose of obtaining funds with which to pay estate and/or inheritance taxes. Doubt on this subject really does exist, for in the case of *Naffziger v. Cook*, 179 Neb. 264, the Supreme Court of Nebraska, citing another problem, actually states and holds that the provision for payment of debts and administration expenses excludes payment of the federal estate taxes as a part of the administration expense. It appears, however, that these sections have been used and title has passed. Conscientious title examiners, when the purpose has been for obtaining funds for the payment of estate taxes. Perhaps the legislature

should be asked to clarify the subject, but nevertheless the answer seems to dwell in the realm of jurisdiction, and the fact that once the court has entered an order under these sections it is not subject to collateral attack.

In *Fischer v. Minor*, 159 Neb. 247, the executor in his application filed a statement which was inaccurate both as to the assets which he received and the debts to be paid. No fraud or collusion was found to be involved. The facts indicated, however, that even if the correct facts had been submitted, the debts, expenses of administration, etc., exceeded the personal assets in the possession of the personal representative. The Supreme Court held, however, that the allegations were sufficient to give the district court jurisdiction and the order of the district court is final and not subject to collateral attack. It is therefore suggested that the probabilities are that if an allegation is made, the federal estates, etc., are a portion of the expenses of administration and if the court issues an order based thereon, that it will be final and not subject to collateral attack and good title will be conveyed by the sale.

Another problem, however, arises when it is merely desirable and not necessary to sell the real estate. It appears that on only a few occasions in recorded cases has the court been required to pass upon the subject, and in each case they have found that the license to grant to sell under these sections does not apply unless the personal assets are insufficient to pay the debts and expenses of administration or legacies. It would appear that if the court entered an order it probably would be subject to collateral attack, but we suggest that the rule concerning immunity from collateral attack applies in the absence of fraud or collusion and that an application made to court which was knowingly not true for this purpose would probably be in the realm of fraud and collusion.

The procedure under these sections is to file a petition in the district court *in the county in which the personal representative is appointed*, as distinguished from where the land is located, setting forth the amount of the personal estate in the hands of the representative, the debts outstanding, description of all the real estate owned by the deceased (whether desired to be sold or not), condition or value of the respective portion of the lot, and a statement that the real estate proposed to be sold is not exempt from sale by reason of being homestead or any other reason.

On filing of the application the district court shall examine the same and if it appears that there is not sufficient personal estate in the hands of the personal representative to pay the debts and expenses of administration, and the court finds that all persons

interested in the estate have not consented to the sale, the judge shall thereupon make an order directing hearing at a time and place specified, not less than four nor more than ten weeks from the time of such order. Notice of hearing shall be personally served upon all persons interested in the estate at least 14 days before the time appointed for hearing, or notice shall be published in the legal newspaper three successive weeks, the notice setting forth the filing of the petition, the time and place of hearing, relief sought, and further that at such hearing a determination be made with reference to whether the land is exempt from sale by reason of homestead or any other cause.

If, however, all persons interested in the estate shall signify in writing their assent to such sale, service of a copy of the notice shall not be require and the judge of the court may forthwith make an offer of sale.

If upon hearing the court issues such an order authorizing the sale, it is a conclusive adjudication that the land ordered to be sold is not exempt by the reason of being the homestead or any other reason. If the hearing is postponed for any reason, it may be continued from day to day—except, if objections are filed and the petition is not heard on the date originally set, hearing cannot be had until five days after notice by registered United States mail shall be mailed to the objector or his attorney.

If objections are filed on the grounds that the land is exempt from sale by being the homestead or otherwise, the hearing time and place, notice, etc., may be in chambers in any county other than the county where the executor or administrator was appointed; that the hearing on the petition shall be held in the county where the estate is being administered unless there is a stipulation providing for a different time and place.

The court, however, can in the absence of filing of objections hear the matter in chambers. But the same shall be recorded in the office of the clerk before sale shall be made. The court, before granting the license, may require the personal representative to file an additional bond, or if he finds that the bond of the executor or administrator is adequate, the judge need not require an additional bond.

When the sale is held, the proceeds shall be deemed as if they had originally been part of the personal property of the deceased and subject to the executor's personal bond, etc.

If any persons interested in the estate give bond to the court in such sum as the court shall direct sufficient to pay the debts

and expenses of administration, the court shall refuse to grant license.

The license to sell shall direct the personal representative to sell, and if more than one piece of property is to be sold for this purpose, shall direct the order in which the tracts or parcels shall be sold. If any part of the real estate has been specifically devised, the court shall order parts that descend without specific device to be sold first.

The sale must be held within one year, but this can be extended by the trial court on good reason being shown.

The sale must be held in the county in which the lands are located as distinguished from the county in which the proceeding was brought or the county in which the personal representative was appointed, which of course may be different. Notice of sale must be given for three weeks in the county in which the real estate is located. The sale must be between 9:00 A.M. and sunset.

The personal representative and the guardian of any minor heir is disqualified from purchasing, although the guardian may purchase for the benefit of his ward.

The executor may give credit, not exceeding three years and for not more than three-fourths of the purchase money. Therefore, installment sales under the Internal Revenue Code are permitted. The balance may be secured by a mortgage or bond. The court must approve the arrangements.

The sale must be confirmed. It is not necessary to wait ten days to present the matter to the court for confirmation.

Before making sale, the executor shall take an additional oath to comply with the orders of the court, etc., and provide for a bond if the court orders an additional bond. If notice is given, the sale may be adjourned from time to time not exceeding three months. In case of adjournment, notice shall be given by a public declaration of the time and place and, if the adjournment is for more than one day, further notice shall be given by posting or publishing as originally required.

The same procedure may be used to sell the interest of a deceased in a contract for purchase of land.

The sale of the land under these circumstances is subject to all charges thereon by mortgage or otherwise existing at the time of the death of the deceased. In case the deceased is personally obligated, the amount secured by any mortgage or for any such

charge, the court shall not confirm the sale until the purchaser shall execute a bond to the personal representative guaranteeing the payment of such charges. There is an exception to this, however, where the situation of the real estate is covered by an old age assistance lien or any other lien arising under the Public Assistance or Relief Laws. Under these circumstances the property may be sold either subject to or free from such lien as the district judge in his discretion shall determine will best serve the interest of the State of Nebraska.

Apparently the personal representative need not be one appointed in the State of Nebraska. If a foreign representative, the application is filed in the district court of the county in which the real estate is located. He needs to file an authenticated copy of his appointment. The court determines whether an additional bond other than that filed in the domiciliary estate should be required and may make other requirements such as a bond to guarantee the surplus.

If the sale of the real estate provides a surplus, the surplus of the proceeds of the sale remaining on final settlement of account shall be considered as real estate and disposed of as the real estate would have been disposed of.

The court has the discretion to charge costs against the objectors.

There is a limitation of five years to challenge the proceedings except in the event of minors. There is a special statute, Section 30-1142 providing that irregularities shall not affect the validity of the sale. If the personal representative was licensed by the district court having competent jurisdiction, gave a bond which was approved by the judge or the clerk of the court, if the court required the bond and took the oath prescribed, gave the notice and time of the sale as prescribed and the premises were sold at the time and place set forth in the notice, and the sale confirmed by the court, the challenge to the validity of any person claiming adversely to the title of the deceased shall not affect the validity of the sale so far as the interest of the deceased is concerned.

If a personal representative fraudulently sells any real estate under the provisions of these sections, he shall be liable for double the value of the land sold.

Various devices and schemes have been used by persons in the use of these statutes to comply with them and still obtain the advantages of a private sale instead of a public sale and the advantages of sale by the personal representative with the consent of the heirs prior to the completion of the estate.

One of the devices used to arrange for private sale instead of a public sale is to negotiate with a private purchaser exactly as if the personal representative was authorized to sell at private sale and, on agreeing with the purchaser, will provide that the personal representative will proceed with the proceedings described, and that the license as issued will be offered under the terms in which credit could be described as approved by the court, and that the purchaser will on that occasion bid a sum of not less than \$\_\_\_\_\_. No guarantee could be made that the sale price will not be higher, but at least there will be a guarantee of the minimum.

Likewise, the heirs at law have been known on occasion to appoint the personal representative or some other person, their attorney in fact, and proceed to sell the premises prior to completion of the administration of the estate by private negotiations with a provision that the deed and purchase price shall be placed in escrow until the completion of the proceedings. Variations of this in which portions of the purchase price may be used for the payment of debts and expenses of administration are also known to have taken place.

CHAIRMAN STRASHEIM: Now we have our panel. We are a little behind time. Do we have questions? This is a good chance for free legal advice.

THEODORE J. FRAZIER, Lincoln: How about giving notice to taxing authorities?

CHAIRMAN STRASHEIM: To whom are you addressing your question, Ted.

MR. FRAZIER: Both our claim experts.

CHAIRMAN STRASHEIM: That would be Vance and Dick.

MR. ENDACOTT: Internal Revenue, State Tax Commissioner . . .

CHAIRMAN STRASHEIM: Internal Revenue, state tax commissioner, local county treasurer, any taxing authority, maybe the Department of Labor.

MR. ENDACOTT: I only did it to the local authorities.

MR. LEININGER: I think that is customary.

. . . The session adjourned at five-ten o'clock . . .

**ANNUAL ASSOCIATION DINNER****November 7, 1968**

The annual Association Dinner was held in the ballroom of the Sheraton-Fontenelle Hotel, President Mattson presiding.

**PRESIDENT MATTSON:** We welcome all of you to the annual banquet of the Sixty-Ninth annual meeting of the Nebraska State Bar Association.

I want to thank Ernie Priesman for the organ entertainment tonight. Ernie, thank you.

We are highly pleased to make two presentations this evening: One is the Certificate of Merit. Upon recommendation of the committees which screen these matters and upon approval of the Executive Council, we make a presentation this evening, and I will ask Paul Jensen, president of the Nebraska Broadcasters Association, to step to the podium.

We have had excellent cooperation from the broadcasters for many years. You well know of our radio spots. You know of the 15-minute video tape presentation which was used extensively in connection with Law Day. We have another one of those on the drawing board. For the excellent cooperation and assistance of the broadcasters, we make to them, through Paul, this:

The Nebraska State Bar Association's Award of Appreciation is presented to the Nebraska Association of Broadcasters in recognition of the outstanding service which has been given by its member organizations in helping to create a better understanding of the legal profession and the system of law. While we are especially grateful for the cooperation we have received each year in our Law Day USA observance on May 1, we wish also to recognize the public service time which has been given to the presentation of "Mark Middleton, Attorney at Law," informational programs which have been produced for both radio and television. In working together to promote a better understanding of law and justice, we have a partnership which is vital to the democratic way of life.

We hope this award will indicate our respect and appreciation for your participation.

**PAUL JENSEN:** Thank you very much. President Russ, Members at the Head Table, Ladies, Distinguished Members of the Nebraska Bar: Speaking on behalf of the Nebraska Broadcasters Association, we are deeply appreciative of this recognition this evening. We, the broadcasting fraternity, are regulated, as you well know, by the Federal Communications Commission and are expected to do a certain amount of public service programming and promotion on all of our radio and television stations.



Some people have the erroneous idea, however, that we are expected to do a certain amount for each organization. In truth, each station makes its own promises to the Commission as to what its responsibility will be in a license renewal period in the way of public service, and they pick and choose what they think is most important for the area that they cover and the needs of their own particular community. They do not guarantee to the Commission that they will give the State Bar Association "X" number of programs or "X" number of spots in a calendar year, nor do they do that for any other organization.

But I bring this up for the simple reason, if there is one unique thing, as far as the Broadcasters Association as a whole is concerned—there are not too many organizations such as the State Bar where, as an association, we can collectively cooperate with another group state-wide to promote better understanding. Since most of the things that we do are of a very ethnic nature within our own communities, we are delighted that as an association we can collectively help promote, through "Mark Middleton" and through Law Day announcements, and such, a better understanding by the populace, the people we serve, of the profession that you are in, and law and the citizen, and citizen and the law.

My only suggestion to you is that you ask us to do more in the next 12 months. We will be ready and willing to assist in any way we can. Thank you.

PRESIDENT MATTSON: Now I'll ask Judge Carter to step to the podium.

In connection with this award, it is a little difficult for me now because for over 25 years I have given a lecture to kids on the court system, and I know well how Judge Carter has earned this award. I don't know whether I can even read it to you or not, Judge, but I am going to try.

The Nebraska State Bar Association's President's Award is a recognition for a member of the Bar whose participation in public service has been outstanding.

We are proud to present this award to you for the contribution you have made to the furtherance of public understanding and confidence in the legal profession. No honor we could confer would compare with the appreciation which has come to you from the generations of boys in Nebraska who have shared your lifetime enthusiasm and concern for their development as good citizens.

The Nebraska Boys' State, one of the first in the nation, has been in no small measure a product of your dedicated service.

By this award we express to you our affection, our respect, and our appreciation.

I almost did this at Boys' State last spring, I'm honest with you, because I was going to tell those 15-year old kids going into their senior year in high school about the problems of dissent and disrespect for the law, and then I realized those were not the kids I should tell that to. As I say, I had tears in my eyes up there that day.

Well, now, could I call on Bill Gossett for a few words?

### REMARKS

William T. Gossett

This is a complete surprise to me. I thought I had said my few words today at the luncheon, but it is very good to say a few more with the ladies present.

I remember a story that I told at the meeting last week, based upon the recognition that we had lost a former First Lady to a foreign man of some repute, and I reminded the audience that this lady, somewhat younger—although I didn't think the man was very old, as I look at the world today, but he was a little too old for Jackie Kennedy—and I reminded the audience that his name is Aristotle and that she calls him "Arie," which reminded me of a story.

I think we need something in a light vein at the moment.

It reminded me of the story of the Englishman who inquired of his friend what had happened to old 'Arry. He said, "I 'aven't seen him around for some time."

He said, "Well, old 'Arry left us. He went off to Africa." He said, "As a matter of fact I heard that old 'Arry had taken up with a chimpanzee."

He said, "A chimpanzee?"

He said, "Yes."

He said, "A male chimpanzee or a female chimpanzee?"

"Oh," he said, "a *female* chimpanzee." He said, "There's nothing queer about old 'Arry!"

Which, in turn, reminds me of the story of the older man who was going to marry the younger woman and he went to his doctor and said, "Doctor, you must make me young. I'm going to marry this young thing and I must be somewhat younger than I am now."

The doctor said, "When is the wedding?"

He said, "In three months."

"Well," the doctor said, "here is a prescription for some pills. Take one of these every morning."

So he got the pills and started taking them. He arrived at the night before the wedding and he didn't feel any younger and he had quite a few pills left so he just took all the pills in the bottle.

The next morning they couldn't get him awake. They pommelled him and slapped him and finally rolled him off on the floor and said, "You must get up! This is your wedding day."

He rubbed his eyes and stretched and said, "All right, I'll get up but I'm not going to go to school."

Let me tell you what a great privilege it is to be here. My wife and I have visited a number of bar association meetings during the past few months and, as a matter of fact, during the past year, since I have been President-Elect, and we have never met a crowd of people more charming or more gracious than you have been. We have never met a more enthusiastic, harder-working bar. It really warms the cockles of our hearts to be with you tonight.

PRESIDENT MATTSON: Now it becomes my very pleasant prerogative to present to you the President-Elect of your Bar Association who, come late tomorrow afternoon, will be the President of the Nebraska Bar for the ensuing year.

Chick was born in Hooper, so he is a native Nebraskan. Some of his education was at Lincoln High School. His A.B. was from the University of Nebraska, 1925. He has an LL.B. from the College of Law in 1927. I know you have the 25 bucks; didn't you get the Doctor of Jurisprudence thing?

After a few years of private practice in Lincoln, Charlie moved to Aurora where he has been in practice constantly since. He is presently a member of the firm of Adams & Carstenson.

He is a member of the Supreme Court Judicial Council and of the Advisory Committee on Ethics and Discipline of the Nebraska State Bar Association, a former city attorney of Aurora, a Fellow of the American College of Probate Counsel, a former county attorney of Hamilton County, a past district governor of Rotary International, a past president of the Nebraska Republican Founders Day, which should be of interest this week, and he is a past grand master of Masons of Nebraska.

He has had many honors and activities in the Bar Association itself, and it is my distinct privilege and pleasure to present to you now Charles F. Adams.

## REMARKS

### President-Elect Charles F. Adams

President Russ, President Gossett, Distinguished Guests, Ladies and Gentlemen: I rather enjoyed listening to Russ read that. It is just the way I wrote it, but it sounds perilously like an obituary. The only thing he didn't tell you was that I am a notary public.

But I do deeply appreciate the honor which you have conferred, and I hope that I can measure up to the responsibilities that will be mine in the months ahead. It promises to be a year of more than usual activity for our association. We will have a legislature in session, but more than that we are in the process of restructuring our association in line with the recommendations of our Special Committee on the Reorganization of the Bar. When this is finally implemented we expect to have, among other things, a full-time assistant for George Turner, new office quarters for the association, and a comprehensive realignment of the sections and committees of the association.

You have given me more than a year to prepare for this task, but I wish you would remember that Russ Mattson was deprived of his normal period of preparation, as he assumed this office one year ago and one year earlier than scheduled. He has done a tremendous job, and it will be very difficult for me even to approach Russ' record of achievements in service to this association. However, I intend to do my best, and with your continued help we shall hope for some measure of success.

Thank you so much.

PRESIDENT MATTSON: While I have been using this [gavel], it is my pleasure now to present to you the gavel indicative of your office as President of the Association.

PRESIDENT-ELECT ADAMS: Thank you, Russ.

PRESIDENT MATTSON: I might have to borrow it from you later.

Now it becomes my extreme pleasure to introduce to you the speaker of the evening. We have had a slight acquaintance over the years, not of recent vintage.

Don, of course, is a native of McCook, a graduate of the College of Law in the Class of 1930, and I am happy to see so many of the Class of 1930 here tonight. Thank you for coming.

Don was County Attorney in Red Willow. He was on Walt Johnson's staff as Assistant Attorney General of Nebraska, and after about 15 years of practice in Nebraska moved to Colorado, where he has had a distinguished career carrying on his distinctions out of Nebraska, both in public and private law. Don was City Attorney of the City and County of Denver from 1959 to '61. He was the United States Attorney for Colorado from 1953 to 1959, which I know you will recognize as the Brownell-Eisenhower period. Don was a Colorado State Senator for the period from 1963 to '67, and chairman of the very important Judiciary Committee in the Forty-Fifth General Assembly. He was one of the last Justices of the Supreme Court of Colorado to be elected, because after his election—I don't think *because* of his election—Colorado came under the enlightened merit system.

Among the Justice's civic activities is the American Cancer Society—he served as chairman of the board and of the executive committee. He is a member of St. John's Cathedral. He has in parentheses "Episcopal." He is a Shriner, a Rotarian, and, I will mention, a member of Phi Delta Phi and, incidentally, a member of Delta Upsilon—incidentally.

He is a member of the American, the Colorado, the Nebraska, and the Federal Bar Associations and has held offices in most of them.

There is one thing on this biographical sketch that has been of extreme interest to me: He is a member of the Governor's Commission on the Status of Women.

JUSTICE KELLEY: *Wives.*

PRESIDENT MATTSON: With no further ado, I want to present to you the Honorable Donald E. Kelley, Justice of the Supreme Court of Colorado, our speaker of the evening.

I'm sorry, he asked me if I told you what he was going to speak about. I think it is about 45 minutes. No, the topic is "The Lawyer's Response to the New Left."

## THE LAWYER'S RESPONSE TO THE NEW LEFT

Honorable Donald E. Kelley

Thank you, Russ. I am glad that our association has been such that you were able to retain your composure.

Mr. President, Mr. Gossett, Honored and Distinguished Justices and Judges, Guests at the Head Table, Ladies and Gentlemen: I am really quite nervous. I don't know whether you can tell it out there or not, and I missed part of what your distinguished President was saying, but it seems to me that whoever he was talking about hasn't been able to hold a job very long.

I might add there, Russ, in connection with this being one of the last justices to be *elected* to the Supreme Court of Colorado, that I got a certificate from the Bar Association for my efforts in trying to get the amendment passed by the legislature and for the work that I did while I was campaigning for myself working on the amendment. I know now why a lot of good men wouldn't try for the Supreme Court before we got the amendment. It is a horrible job campaigning state-wide, as some of your Nebraska judges well know. Well, I guess only one of them, really. But in Colorado we had no districts and it was a state-wide campaign.

Naturally I am very, very honored to be here. Even some of the members whom I previously knew have told me that *they* were honored to have me here. I am especially grateful to them for their courage to say that *before* my talk. I haven't made very many speeches, but I have made enough to know the futility of public speaking. Nevertheless, I am undaunted.

I have a little confession I am going to make because of the presence here tonight of the daughter of perhaps the most universally respected Chief Justice of the United States Supreme Court, Charles Evans Hughes. Mrs. Gossett is the daughter of that distinguished jurist. If my memory is right as to the year, in 1941 I was before the United States Supreme Court representing the Secretary of Labor of the State of Nebraska and making what I hoped was a convincing argument. In the course of it I quoted a United States Supreme Court decision, and Chief Justice Hughes leaned forward and said, very gently, "Mr. Kelley, are you quoting from one of our opinions?"

I said, "Yes, Your Honor."

He said, "Mr. Kelley, we are presumed to know what is in our opinions."

Well, let me say this to you that if any of you come before the Supreme Court of Colorado, you need not indulge in that presumption.

I was advised to make a light and frothy talk. I was advised to make a humorous one, and George told me that the main ingredient

was to be brevity. Well, if I tried to be funny it would be tragic. If I get any laughs during my speech I am going to think that maybe my hairpiece has flipped, or something.

I might say it's too late for you to go to show now; it's too early for the night clubs, so when I see you stand up and leave I'll know it's time to quit.

I am going to open this talk with a quotation:

I hope I am over-wary, but if I am not there is even now something of ill omen amongst us. I mean the increasing disregard for law which pervades the country, the growing disposition to substitute the wild and furious passions in lieu of the sober judgment of courts, and the worse than savage mobs for the executive ministers of justice. This disposition is awfully fearful in any community, and that it now exists in ours, though grating to our feelings to admit, it would be a violation of truth and an insult to our intelligence to deny accounts of outrages committed by mobs from the everyday news.

The date? January 27, 1838. The place—before the Young Men's Lyceum, Springfield, Illinois. The speaker—the first major speech by Abraham Lincoln.

Mr. Lincoln was talking about hangings of gamblers, Negroes, whites, and alleged murderers, the burning of churches, destruction of printing presses, shooting of editors, and the burning of obnoxious persons at pleasure and with impunity.

Without suggesting that conditions extant are as evil today as they were in 1838, I do suggest that recent developments in the United States present a grave and serious challenge to the stability and continuity of the American tradition of freedom and social progress under law.

Communism, with its goal of world domination, coupled with our domestic problems of racial strife and student unrest, does not allow much room for domestic tranquility unless, of course, one chooses to shut his eyes and mind to the situation.

Lawyers as a class are generally more concerned with public matters than the public at large, and this is as it should be. By training and by everyday involvement they become aware of the values of a government by law. They instinctively understand the contrasts between liberty under law and totalitarianism. But in spite of all this, we as lawyers tend to accept what we have as a fee simple, forgetting that we may lose it by adverse possession or the foreclosure of the mortgage, as it were. Also, but for the maintenance of a system of independent courts, we could lose it by superior force. In short, we can lose our freedom by default, by apathy.

During my stint in the office of United States Attorney, I had the good fortune to come in contact with the Communist Party, U.S.A., a most abhorrent and revolting—no pun intended—subject matter. By 1954 it completely dominated the International Union of Mine, Mill, and Smelter Workers headquartered in Denver, was trying with some success to organize students and faculty at the University of Colorado, and to worm its way into the work force of the large C.F.&I. plant in Pueblo. The grand jury indicted the top seven Rocky Mountain Communist Party leaders, and it was for the violation of the Smith Act, charging a conspiracy dedicated to teaching the duty and necessity for the violent overthrow of the government.

As a result of this experience, I learned something about the structure of the Communist Party, its doctrines, and the strategy and tactics designed to accomplish its ultimate objective—our burial.

There were similar prosecutions in many other jurisdictions, both under the Smith Act and the National Labor Relations Act. As I recall, they were all successful at the trial court level, some were affirmed in the court of appeals, but few survived the supreme test.

At the time, I felt somewhat bitter over the situation because, in order to tie the local defendants into the conspiracy, it was necessary to uncover secret agents who had been in the party for many years. With these individuals reporting every action to the F.B.I., the government knew exactly what to expect at any given time and who to grab in the event of a national emergency. It had taken months and sometimes years for these agents to gain sufficient stature to reach that level in the party structure where they could be of real value. Now it would probably take even longer to replace these agents.

As it turned out, however, my fears were ill-founded. Actually, the prosecutions had a very wholesome effect, in that every local party member was suspicious of every other local party member—"You just can't trust nobody," was the lament.

Now let us turn back the clock for just a moment. You will recall that when World War II began, Germany and Russia were allies. At this particular point in time the Communist Party, U.S.A., was concentrating its propaganda efforts on keeping the United States out of the war. It was an "unjust" war. Next you will recall that Hitler decided he did not wish to *share* Europe with Russia. Russia then became an ally of Great Britain, France, and the other governments in exile. The C.P.U.S.A. immediately reversed its field. Suddenly the conflict became a "just" war and the *Daily*



*Worker* and other party propaganda organs urged us not only to give aid to Russia and England but to enter the war on the side of Russia and England.

Now I am not going to suggest to you that there is any parallel to be drawn between the unjust war then and the unjust war in Vietnam about which we frequently hear, but I do suggest that it is the type of situation which the communists are quite capable of exploiting to the fullest. I might even suggest that they *have*.

From the time of the Dennis prosecution in New York, the Alger Hiss exposé, and other adversities suffered by communists, recruitment of new members, particularly among the young, was reduced to a minimum. Without the constant infusion of new blood, any organization will wither and die, and this is especially true of the Communist Party. That is why, in my opinion, the most important position in the structure of the Communist Party is the organizer.

In short, as a result of this situation, the party was in the process of dying for lack of new blood. Unfortunately, something happened to breathe new life into what could have been a beautiful corpse. Out of the racial strife at home and the Vietnam War there evolved, developed, or came into being what is known as the "New Left." The New Left, as I understand it, is not a political organization as such, but it is most certainly a political force of considerable vitality.

One manifestation of this force appears in the form of Students for a Democratic Society. The name is somewhat misleading. They are not necessarily "students" and instead of being "for a Democratic Society," their objective is to destroy it. There seems to be some affinity and coordination between the S.D.S. here and the Activist students in Europe. Whether this is structural or coincidental has not been documented to my knowledge. The philosophy of the New Left is the same wherever it is enunciated.

You are all familiar with the disaster which the student Left Activists caused in France. You know what S.D.S. did in Berkeley and at Columbia. They were not swallowing goldfish or conducting panty raids or any other modern version of those ancient and honored traditions. I would like to bring home to you rather graphically that these were not student pranks but something about which we, as citizens, *must* be concerned. It cannot be a passive or academic concern, either, if we wish to preserve our system.

This does not presuppose that none of the complaints of the New Left have any merit. We must listen to the complaints sympathetically and work toward correcting acknowledged inequities.

Now, for just one moment I would like to take you to France during the recent revolt of the French students. You would have seen emblazoned on a large banner outside the largest high school in Marseille these delicate but descriptive words, and I quote, "Humanity will not be free until the last capitalist has been hanged with the innards of the last bureaucrat"—end of quote. It was Mark Rudd, one of the S.D.S. leaders at Columbia, who is reported to have said, "As much as we would like to, we are not yet strong enough to destroy the United States, but we *are* strong enough to destroy Columbia." Well, not yet.

Dr. Sidney Hook, Professor of Philosophy at New York University, a Columbia graduate and one of the most knowledgeable men in this country on communist doctrine, has personally investigated and researched S.D.S. and their complaints against "the establishment." I would like to quote a few lines from a lecture he gave on "Academic Freedom and Academic Anarchy" at the Institute for the Comparative Study of Political Systems and Ideologies at Boulder this summer.

I refer to this society as the so-called Students for a Democratic Society because it seems to me their actions show that they no more believe in democracy than the leaders of the so-called Non-violent Coordinating Committee are believers in non-violence. Actually, the leaders of the S.D.S. make no bones about their real political convictions. At Columbia they put up signs in the building they occupied reading, "Lenin won, Castro won, and *we* will win." If these men are their heroes, they certainly are not *democrats*.

—and, Leo, that is a small "d".

Further, the Students for a Democratic Society have declared their willingness to collaborate with any totalitarian group to further a particular cause. No genuinely democratic society will make a united front with those who wish to destroy democracy.

In manifesto after manifesto the leaders of the S.D.S. have declared that they want to convert the university into an instrument for revolution. They are frank enough to acknowledge that to do so they must destroy the university as it exists today.

I might add that the New Left feels the same way about government and the business establishment as it does about the universities.

I presume that we in Colorado have had a somewhat more intimate view of S.D.S. than you have had in Nebraska. In October S.D.S. held a national conference at C.U., Colorado University. Before talking about the conference, however, I would like to give you some local background. Colorado University has a rather large percentage of liberal professors. The percentage of out-of-state

students is high. The *Denver Post*, our largest daily, is, in my opinion, philosophically left of center. One of its editorial writers, Lawrence Weiss, is regarded as very liberal. Now, this liberal foundation that I am laying is to allay any suspicion that my views may be biased by my conservative Nebraska background.

On Wednesday, October 16, 1968—this was during the S.D.S. conference—in the center of the editorial page of the *Denver Post*, over the by-line of Larry Weiss appeared this headline in bold print, "S.D.S. Is Marxist Group Trying for Revolution." Then Weiss opened his editorial with *this* paragraph:

The conference of the Students for a Democratic Society in Boulder last weekend was one of the most open meetings ever held by a revolutionary movement. This was not entirely voluntary however. The Board of Regents allowed the meeting to be held at the University only on condition that its meetings would be open to the press and to the public.

I might say parenthetically that even so they kept the electronic recording devices out, in order to avoid a riot after having this understanding.

I have the feeling from my limited knowledge of the subject that Mr. Weiss has analyzed the S.D.S. with great perception and accuracy, but there may be others who are more knowledgeable on this subject who will disagree with what he says.

Mr. Weiss continues:

Scores of visitors took advantage of the opportunity and heard the revolutionary talks first-hand. It was often vague, confused, and highly theoretical talk, but the revolutionary intent was unmistakable. The S.D.S. is, in fact, a loose coalition of young revolutionaries. Not all of them are students, but most of them are working toward revolution, or talking about it from college campuses.

The coalition has a heavy Marxist orientation. Most of the college chapter representatives at the Boulder conference appeared to agree that the troubles of the world are rooted in the capitalist system and the imperialism they say is necessary to sustain the capitalist system. To say that S.D.S. has a Marxist orientation, that its members are profoundly influenced by the thinking of the Nineteenth Century German philosopher, Karl Marx, is not to say that S.D.S. members *are* communists. Most of them reject the rigid discipline and tight organizational structure of the Communist Party and the party line.

After discussing the various particular classifications the various delegates fell into, Mr. Weiss pointed out:

S.D.S. has developed a hard core of professionals to work for the revolution. Some of these young people have had experience in strike situations and in conflicts with the police. Some have made visits to communist countries abroad. Some are well schooled in revolutionary strategy and tactics.

—and of course this is a communist specialty.

These professionals, scattered among campuses and factories throughout the nation, are now on the job working to turn the discontent which has been growing in America into revolutionary channels.

I suggest to you that so far as the communist conspiracy is concerned, and so far as the danger to this country is concerned, it is immaterial whether or not the S.D.S. and the others embraced within the New Left are card-carrying members of the Communist Party. The Communist Party is organized and disciplined in such a manner that it contemplates the use of the masses. Overthrowing the Russian Republic of perhaps 80 million people was accomplished by a Communist Party of less than 50,000. The masses had not been indoctrinated. They were merely unhappy with the status quo. The communists, in my opinion, will find no resistance in its use of the New Left.

I am sure that some of the things I have said are alarming, but I assure you that I am not an alarmist. I am not suggesting that the communists, with the aid of the New Left, are going to take over the government tomorrow or at *any* time. What I am trying to convey is the thought that our educational system has broken down. For young people to come out of middle and upper income homes of this country, which is where they are coming from, during a period of its greatest affluence, with the idea that our governmental structure, our economic system, and our universities all need to be destroyed, is cogent evidence of failure.

In our favor is the fact that there are only 7,000 dues-paying members on 300 campuses out of a total of 7 million students. According to Gene E. Bradley, Vice-President of National Strategy Information Center, Inc., "Collaborating with active sympathizers, the 1,000 members who might be termed hard core have shown a capacity to mobilize between 100,000 and 300,000 students, depending on the issue."

I know it is comforting to be assured that our establishment, as it is called, is not to be destroyed immediately, but until we reverse this defection of youth, small percentage-wise though it may be, we will continue to have ghetto agitation, anti-Vietnam marches on the Pentagon, draft opposition advice, harassment of industrial recruiters, and campus riots.

The American Bar Association recognized the threat of communism when the House of Delegates in August, 1962, unanimously created a standing committee to "study, make report and recom-

mendations, plan and give effect to programs of education on communist tactics, strategy, and objectives, and encourage and support our schools and colleges in the presentation of adequate instruction on the contrasts between communism and liberty under law."

In response to this mandate, the Committee on Education About Communism and its Contrasts with Liberty Under Law, the committee to which the above mandate was delegated, undertook three primary projects: (1) A program of bar activities to encourage state, county, and local bar associations to sponsor activities on the local community level paralleling its activities on the national level; (2) a teacher-training institute project encouraging and supporting universities and colleges in the conduct of summer institutes for the further education of secondary teachers in the contrasts between communism and liberty under law; (3) a continuing research project on communist strategy and tactics in consultation with scholars at various universities' graduate centers, specializing in the study of ideology, propaganda, strategy, and world affairs.

You may ask why this is relevant to the S.D.S. problem, inasmuch as they have rejected both party structure and party discipline. I think a reasonable answer to this is (1) Marxism dominates all New Left philosophy. Marxism begins and ends with violence. It is anarchy. The pattern is the same for leftists of any of this ilk, for a minority of revolutionaries to exploit legitimate grievances and wrest power away from the majority who seek to build and not to destroy. (2) In order to condition our youth to resist the blandishments and false doctrines of S.D.S., the same educational processes are required as those required to meet and turn back communism.

The ABA Committee on Education About Communism, in my opinion, has been only moderately successful in its creation of teacher-training institutes for the re-education of high school teachers. We have one in Colorado, the Institute for the Comparative Study of Political Systems and Ideology, which was established in 1965. Our Committee on Education About Communism, at the suggestion of the ABA, with encouragement and assistance from Frank R. Barnett, and the determined prodding of Dr. Edward J. Rozek, brought it into existence. Dr. Barnett is president of the National Strategy Information Center, Inc., and has worked very closely with the ABA committee. Dr. Rozek, a Polish freedom fighter who has experienced communism first-hand and is also one of the most learned scholars on Soviet foreign policy, is the director of the institute, a professor of political science at the University of Colorado.

The institute is privately financed, primarily by Colorado businessmen, corporations, and foundations. And incidentally, the Norgren Foundation, which is of interest to the Willeys, is one of the large supporters of this institute. It has grown from an initial student enrollment of 28 in the first year to 75 this past summer. In fact, many applicants were rejected because of the lack of funds. The students received full scholarships, which includes books, room and board, and transportation.

Now I've got to substantiate, in view of the fact that we have top representatives of the ABA here, my statement that the ABA has been "moderately" successful in its establishment of teacher-training institutes. I do not have the exact count but there are approximately 15 of them besides the one at Boulder.

On its face it is apparent, at least to me, that only a few of the social studies teachers in the thousands of high schools in this country are going to get the retreading necessary for them to be able to effectively teach our youth the contrasts between contemporary totalitarianism and liberty under law. In my opinion, there should be at least one such institute in each state to retread those now teaching in the high schools, and every college or university that turns out a teacher should offer a comprehensive course of study in this field. To insure that every potential or prospective teacher will take the course, the local bar association in each college or university community should have a program designed to whet the appetite of those future teachers to insure that they will enroll in the course.

Dr. Hook, whom I mentioned previously, and incidentally has taught at all four of the institute sessions at Boulder, advises that:

The citizens of the United States cannot know too much about communism in its classical and deviate forms, but such knowledge cannot be acquired by occasional news reports and background stories or by instruction in six easy lessons. Memories of historical events are short, and our hopes and wishes for the future may blind us to the present. The systematic study of communism, therefore, is easily as important as other subjects and *more* important than some of those to which students devote months in eight years of high school and college. After all, the outcome of the Cold War is likely to be more fateful for our institutions, traditions, and values than some of the wars of the past whose details they are expected to learn.

The research projects which are carried on in probably a dozen graduate schools, such as the Center for Strategic Studies, Georgetown University, and the Hoover Institution on War, Revolution, and Peace at Stanford, by their study in depth of the propaganda, shifting tactics, strategy, and world affairs can be of great service

to the government, to business, and it can also furnish materials for the colleges and universities to keep current their courses.

Dr. Rozek, because of what he regards as the lateness of the hour, suggests:

One of the first things that seem to be required is some organized activity that seeks to educate the educators to influence the opinion-makers to discover what the causes of the spiritual melees are from which we have suffered so much and for which we shall suffer more unless the climate of thought and action changes.

Following up on this thought, Dr. Rozek advises, "It is impossible to over-estimate the role of teachers, clergymen, and newspapermen in this endeavor to preserve the democratic way of life."

Now, the Nebraska Bar Association does not have a committee on education about communism, if my reading of your reports is correct, but it does have a committee on Americanism. Your committee in its annual report asks for direction. I do not think it would even be necessary to amend its name in order to assign to it the responsibility of working with the ABA committee to meet the New Left challenge in Nebraska. Dr. Rozek has advised me that he would be willing to consult with your committee. He even volunteered the services of Charles Stevenson, that Golden automobile dealer, who single-handedly raised the funds each year to finance the institute at Boulder.

After the Board of Governors created our committee, its chairman sought help from the ABA through Frank Barnett. If you should decide to release the pent-up energies and enthusiasm of the Americanism Committee on this sort of project, we in Colorado would be very willing and anxious to share our experience with you. It might be feasible for the Institute for the Comparative Study of Political Systems and Ideologies to conduct a second session, and these are three-week sessions during the summer, for Nebraska teachers, clergymen, and newspapermen—sponsored, of course, by Nebraskans.

Incidentally, I think I should tell you that one of the early benefactors of our institute is an Omaha businessman who, with the advice and consent of his attorney who happens to be sitting out here tonight, made a substantial contribution to the institute at Boulder. We are grateful to Omaha businessman, Ed Owen.

Let me conclude—and I am sure you will—with this summarizing thought: There exists in the world today a political force, the New Left, made up in part of college and university students from middle and upper middle class families of this country. They embrace a

strange and un-American philosophy which seeks to solve all problems by force rather than reason. If the freedom which is ours as the result of centuries of struggle and bloodshed is to survive, we must dedicate ourselves (1) to understand their grievances and to solve them by reason, if they are just; (2) to reclaim those individuals who are not beyond redemption; and (3) to see to it that the high schools and colleges of this country offer comprehensive and effective courses on the contrasts between liberty under law and totalitarianism, to the end that an understanding of communism and its ramifications will not only insure permanency of our democracy, but will strengthen it.

PRESIDENT MATTSON: Don, I know I express the sentiments of each person in the room in sincere thanks to you for this excellent message.

Before closing I want to relate an experience of one of our fellow lawyers which I learned today. I am not going to name him.

He was called to the hospital by a client who was ill, in bed, and under an oxygen tent, hardly able to talk. But after a little visiting the lawyer got down trying to hear what was being said by the client, and all of a sudden the client asked for a piece of paper, so he handed him a piece of paper. The client scribbled something on there, gasped a little, and became extinct. In the excitement the lawyer called the nursing staff and the doctors, and the poor client had expired.

The lawyer went home and forgot about that piece of paper until he got home, and he reached in his pocket and he thought, "He wrote me a message that certainly must have been of importance." He read the message and it said, "You are standing on my oxygen tube."

There is no application! This has nothing to do with Justice Kelley's remarks. I simply wanted to end this on a note of levity.

Thank you all for being here, and we are adjourned until tomorrow morning.

## FRIDAY MORNING SESSION

November 8, 1968

The second session of the Institute on Nebraska Probate Practice was called to order at nine-fifteen o'clock by Chairman Harold L. Rock of Omaha.



**CHAIRMAN ROCK:** I have great pleasure this morning in presenting to you a member of the New York Bar, a partner in the firm of Wormser, Koch, Kiely & Alessandroni in New York.

The man we are going to hear from today has been a lecturer, a teacher, an author. He is chairman of the Advanced Estate Planning Panels of the Practicing Law Institute.

He was born in Santa Barbara, California, some time ago. He graduated from the Columbia University School of Law in 1920 and has been admitted to practice since that date, just short of 50 years.

One of his first works was an article entitled "Your Will and What Not to Do About It." This was in 1938 before many people were thinking about estate planning. Mr. Wormser is probably the founder of estate planners, if you can use that word. I am sure he is known to most of you by his works and by the articles you have run across in your estate planning.

I now take great honor in presenting to you Mr. René Wormser.

## **THE ADMINISTRATION OF SPRINKLING TRUSTS**

**René A. Wormser**

Thank you, Harold, for that very pleasant introduction. I would like to contrast one like that with an introduction which my distinguished brother got one time when he was to speak, and the chairman of the meeting happened to be a Yale man, and he took advantage of the opportunity to extol the great virtues of Yale men.

He said, "The 'Y' in Yale stands for 'yearning'," and he explained for 20 minutes the 'yearning' of Yale men for great things in life.

"The 'A', he said, "stood for 'achievement'," and for ten minutes he recited the achievements of Yale men.

"The 'L' stands for 'learning'," and he spent another five minutes on the learning of great Yale men.

"And the 'E' is for 'enterprise'," and he spent ten minutes on "enterprise".

Finally he introduced my brother who got up and said that he was very happy the chairman hadn't attended the Massachusetts Institute of Technology.

I am very happy to be in Nebraska and particularly in Omaha. I have an antecedent in this area. I am going to read you something from a diary kept by my grandmother on their trip from Iowa to

California in 1866: "Tuesday, May 15, 1866: One of our best mares got a sore foot. It was unfit for traveling and left her at Omaha." So perhaps something descended from my family is still in Omaha.

It is a very interesting diary. I wish I could read more. This is only a piece of it, but it has other fascinating entries, like:

Thursday the 28th: Left camp at noon. Traveled only a few miles to find good grass. The wounded very ill, and kept us from traveling further. Warm weather. Camped near river. No wood. Here we found remains from a train which was burned some time ago by Indians. Twenty-six soldiers were killed. One man found a wrist with an arrow in it.

At that time I imagine Nebraska was not what it is today.

So I am very happy to be here, except I didn't get the courteous reception that I got in one city where I lectured, because in that hotel there was the conventional Bible, and on the flyleaf was written: "If you are ill, read page 298. If you are homesick, read page 492. If you are lonely, call Caledonia 59238."

This subject of sprinkling trusts has interested me enormously. It started really 'way back when in my first writing and talking on the subject I became convinced, as pretty much everyone was at the time, that we were in a rapidly changing world, and of course it has been changing with great rapidity in recent decades. So I became convinced, in estate planning, that probably the most important precept to observe is to create maximum flexibility, and the most flexible mechanism we have, of course, is the trust. So from that, more and more I tried to design and take over other people's designing of more and more flexible elements in the trust mechanism. Out of this sprang the sprinkling trust, which is a delightful and beautiful mechanism and I think possibly not even today used as much as it should be.

It has, of course, fantastic advantages. It affords all sorts of ways of beating the tax collector, something which is essential in the United States. If you lived in the Congo you wouldn't have to worry about it; they would just eat the tax collector. But we have to use more sophisticated methods.

So the sprinkling trust, like any trust, can save successive death tax impacts and can save gift tax in the sense that instead of a parent in a group making a taxable gift to a child, the trust can pay it out direct to the child without a gift tax impact.

Of course income tax can be saved through various methods, one being an allocation of income to lower income tax bracket beneficiaries, and another is by accumulating income and thus

imposing a smaller tax impact on it and later, with care, under the throw-back rules, distributing it with some leverage. And, finally, the income tax saving involved using a principle which I can illustrate by the story of the two Boston dowagers. If you know the people of Boston, you will know the type of person I am talking about.

One met a dowager friend of hers in Paris and found she was beautifully dressed and full of jewels and what-not, and said, "My heavens, you look perfectly marvelous! You look so well-to-do. What have you been doing?"

She said, "I've become a prostitute."

The other one said, "Well, thank heaven! I thought you were eating capital."

Well, the principle of eating capital now comes into play a great deal in estate planning, and we have it typically in what we call the A and B trust, where the A trust is a marital deduction trust in which the trustees have the right to distribute the principle to the wife or for her benefit, or she has the right to draw; and the residuary trust, the B trust, is a sprinkling trust in which the income can be paid to the wife, or within a group, or accumulated. So, of course, we advise in those cases to have the wife allow the income to be accumulated in the B trust with two advantages: In the first place, it is then taxed to the trust as a separate taxpayer, and also reinvested, and compounded it increases the fund, which passes tax free at the wife's death. The compensating feature then is that the wife, to make up for the relinquishment of income under the B trust, consumes capital out of the A trust, and she needs to consume of course only the net income, relinquished net after income tax. So she is gradually diminishing the fund which will be taxed at her death.

Then of course the sprinkling trust has the tremendous advantage of social flexibility, in the sense that it really becomes the successor parent and can do all sorts of socially desirable things, which an arbitrary, dynastic, fixed form of trust cannot accomplish.

This is all very well, but when a client comes to you and you suggest the sprinkling trust to him, he worries. I think first we have to solve his problem. He worries about two things: In the first place, granting this function to someone else is depriving his family of complete freedom of administration of their own funds; and the second is whom to select for the sprinkling function. Most often it becomes necessary or certainly advisable to use a bank as an independent trustee to exercise the sprinkling. Very naturally

the client thinks of a bank as a cold institution, and perhaps hasn't had too happy experiences with the teller, or the small bank manager that he has dealt with, and can't conceive of this man administering this important discretionary function. So we have to satisfy the client.

Incidentally, I had a long argument once with Professor Heckerling, who is the Director of the Miami Institute, on the extent to which lawyers are justified in advising clients. It is a very interesting subject. We are going to discuss it this next January. Certainly you should educate your clients thoroughly, as thoroughly as you can. To what extent you should *advise* them, tell them to do something, is another problem. But I think in many cases you can persuade a client to use a sprinkling trust simply by explaining its operation to him in a rather thorough manner, partly by perhaps showing him actual draftings so he can read what the trustee's functions would be and how the trust as a mechanical instrument would work.

I think where a bank is going to be used, or as a matter of fact even where an individual is going to be used, a consultation with that prospective sprinkler is highly desirable so that the client will get an idea how the corporate or individual mind works and how this function would be exercised.

I think also banks should have prepared some statement of principles so they can tell the client or prospective donor, "These are principles which we apply unless you tell us differently." For example, they would always prefer an older generation to a younger generation, that they prefer income beneficiaries to remaindermen, that they would, in almost all cases, do what the parent in a group wanted as against what the children or grandchildren might want.

I think an explanation of the way a bank would administer a sprinkling trust would go a long way to reassure the prospect that there was some security in creating a sprinkling trust.

Then, of course, in an instrument itself things can be done which give him some reassurance. One is naming a primary beneficiary, stating in the instrument that "my wife or my daughter" whoever is his primary beneficiary "is my chief concern."

The second method is to require—and when I say "require" it's with qualifications—consultation. That consultation can be, and usually should be, with the parent in any sprinkling group. Conventionally in many of these trusts, for example, we designate the sprinkling group, the group within which sprinkling may take place,

as "the wife and issue," and on the wife's death perhaps split the trust into parts, one part creating a new sprinkling group for a child and the child's issue in each case. Then the trust might *request* the trustee—it shouldn't be an order because if it is an order it might result in some tax impact on the parent in the group—but a sharply or carefully worded request of the trustee—to consult with the parent in a sprinkling group.

I've discussed sprinkling trusts all over the United States with banks and invariably have found, I know of no exception, that where there are no instructions or special circumstances to the contrary, the bank will always do what the parent in a sprinkling group wants. So there is this protection.

Then, of course, advisors or consultants on the outside could be named. Whether that is always advisable or not is a question.

And, finally, the client himself can insert any instrument or offer by collateral letter, let's say, special guidance and instructions. We'll come to that.

So much for the moment for the client who needs reassurance.

Now let's come to the bank, to the sprinkler. I understand the sales of aspirin to trust officers have increased in recent decades because the problems of the sprinkling trustee are numerous and terrifying.

Sometimes they get as confused as my friend the German wrestler who wrestled a Russian much bigger and stronger than himself, and the Russian had him tied into knots. The German was describing it afterwards and said he was in such pain that he closed his eyes. He said, "Unt den I opened mine eyes and shust above me I see this big behind, and I say to myself, 'By God, I bit it,' unt I did, unt by God it vas mine own!"

I think trust officers really do get into terribly confusing situations. Let's take a very simple one, just the business of distributing per stirpes or per capita. If I had a blackboard here I could make a diagram for you of a family, let's say, consisting of five children, all adults: one unmarried, one married with two children, another one married with ten children, the fourth one married with two children and fourteen grandchildren, another one dead and his son dead but leaving a great-grandchild. Now, how in God's name are you going to distribute that within that group equitably, either on a per capita or a per stirpes basis? I did an article on that subject once and my conclusion was that there was no answer, that all you can do is juggle around in some presumably equitable way and

try to be fair. This is no solution and this is a problem which sprinkling trustees would sometimes have to face.

Then there is the basic problem of protecting one member of the group at the cost of others, because every time you donate a special benefit in a sprinkling function to one member of the group you are taking something away from the others. This creates sprinkling headaches.

A difficult problem: Should success be rewarded? Or should success be penalized by rewarding the man who is *not* successful?

Then you've got the horrible area of fault. What do you do about fault? What do you do about the beneficiary in the group who is an alcoholic and isn't doing well? Should you support him, even though you think it is perhaps of his own doing? The man who is stupid, who is dumb, should he be protected at the cost, or specially benefited at the cost of other beneficiaries?

Worse than that, elements of crime, or close to crime, come into play. One bank reported to me they had a case in which there had been a defalcation. The man had stolen \$10,000 from his employer and the question was, "Should the bank make good that \$10,000 defalcation? If they did, they took it away from other beneficiaries. Also, perhaps they were compounding a felony—a very difficult problem.

The answer, of course, basically in all of these problems, theoretically, is "What would father have done?" Well, you can scratch your head a long time while you try to figure out what father would have done. I'll come to that later also.

I got concerned about these problems, and last summer or starting last spring I corresponded with a vast number of banks in the United States to get their experiences and learn problems they had had and try to conceive what protections could be given to the trustee, what mechanisms could be used perhaps to make the sprinkling job easier.

Well, my first conclusion was that of course good drafting is basically the answer. I am going to read you briefly what I think should be the substantive clauses in a sprinkling mechanism.

In the first place, the trustee's discretion should be as wide as possible within the specific instructions and within the guidance which the donor gives him. But it should also provide that the trustee may accumulate all or any part of the income;

2. That it may pay out part of the principal, or all of it, and thus terminate the trust because, in my great desire for maximum

flexibility, I am increasingly inserting in trusts of any kind some mechanism to enable us to terminate the trust entirely. Who knows whether that might not be desirable at some time?

3. That the trustee may make payments of income or principal to anyone in the beneficiary group or principal to the exclusion of the others, or in equal or unequal shares to all or some within the group.

4. That the exercise of a power at any time shall not prejudice, nor affect in any way, the exercise of such powers at a later time. In other words, there should not be a precedent created by the fact that you pay the dentist bill one year.

5. That no inquiry need be made into the income or capital resources of anyone in the beneficiary group. This is something I shall discuss presently.

Then the trustee should be authorized to require any documentation or proof which he, or it, may request from an applicant, anything which may be deemed necessary or advisable.

The trustee should be requested, but not directed, to consult with any parent in the sprinkling group. I mentioned that.

And, finally, there should be full exculpation of the trustee, except for gross negligence.

Let me come now to exculpation because I think it is the law that trustees cannot be exculpated, cannot be excused from true dereliction. No matter what you say, you can't excuse a trustee from negligence. But the border sometimes is not too easy to delineate, and I think you can help this poor struggling trustee eating aspirin daily by introducing a special exculpation clause of this kind, which I have drafted and used a couple of times. Here is an effort by the grantor of the trust to make the job of the sprinkling trustee easier. Suppose he says:

I realize I have placed a severe burden on the trustee. In effect, it would have to act as it may believe I would have acted in a given set of circumstances. However, I myself could not now determine with certainty how I would act if various conditions faced me. Therefore, I can hardly expect the trustee to act with greater certainty. I must rely, and do rely, on its judgment. And, as I wish it to make its determinations freely and without fear of accountability, except for gross negligence or willful misconduct, I direct that it shall on no account be held responsible for any error of judgment.

I think the poor trustee is entitled to some special exculpation of that kind. Perhaps he is entitled to extra compensation, but that is a delicate subject.

Then of course the grantor can give all sorts of guidance, as much as he wishes. This is a debatable area. I am not so sure that detailed guidance is always desirable because in almost any situation when you specify, you are inclined to limit. If you have given the trustee specific areas in which you wish discretion to be used, perhaps the trustee might be inclined to limit himself to those areas and consequently be unwilling to meet some needy situation which wasn't specifically listed.

Moreover, I doubt whether there is any virtue in general guidance, like "the welfare, support, education of my beneficiaries." These are all ambiguous terms or at least terms without delineation, delimitation. What does "education" mean, for example? When I was at college there was a man, at the time I think 45, who was called the perpetual student. I think he had taken six degrees by the time I got there. So should you keep on paying out for education in a situation like that? What kind of education? Welfare? What does "welfare" mean? Perhaps somebody might come to the trustee and say that it was necessary for his welfare to take a trip to Europe. Health might be improved by spending six months a year in Arizona, and so forth. These are ambiguous terms, and I doubt whether they help very much. I think basically the trustee would be inclined anyway to make payments in these areas within reasonable limits of health, education, welfare, support, et cetera.

But there are enormous areas in which specific instructions *could* be given, if the client wants them. I suggested to one bank that perhaps it might not be a bad idea to submit a questionnaire to the man, to ask him, "Which of these things do you want us to do?" I am going to read a questionnaire of this kind, and it is rather staggering when you think of how many reasons for a special application of income or principal could be made.

Suppose we ask the client:

1. Do you wish the sprinkling trustee to be conservative or liberal in using its discretion?

2. Should any of these grounds for preferential treatment be recognized: Sharp differences in wealth; sharp differences in income or income tax position; the occurrence of a catastrophe or misfortune; a business reversal; financial loss through negligence, through dishonesty, through stupidity, through cupidity, through gambling, through alcoholism; danger of imprisonment through defalcation; a repetition of need occasioned by the beneficiary's own fault; an opportunity to commence a business venture; a desire to expand a business venture; the need for capital in a business; the



wish to buy out a partner or an associate; the desire to launch a profession; the desire to build or expand or remodel a home; the beneficiary has a large number of dependents; the wish to send a child to a private primary or secondary school; to send a child to a private college or graduate school; to protect or care for a handicapped child; to meet the expense of serious illness in the family; to provide support for a daughter or a granddaughter whose husband provides inadequately; to enable a divorce or separation.

3. Should adjustments be made, perhaps by later preferring beneficiaries whose interests have been impaired by a grant to one beneficiary?

4. If a principal distribution has been made to one beneficiary, shall his own issue remaindermen be charged on final distribution?

Should the interests of income beneficiaries be preferred to those of the remaindermen?

Should an older generation be preferred to a younger?

And, finally, should the other resources of the beneficiary be taken into account, and if so, what kind of resources.

The list could be added to almost endlessly. These are the kinds of problems which come to a sprinkling trustee. In my correspondence with banks I have found that many, perhaps all of them have been reached.

Consultation is one protection for the sprinkling trustee. I might say at this point, rather anticipating, that keeping careful records is the best protection a trustee can have. I think an analogy is with the investment power. I don't know of a case in which a trustee has been surcharged for bad judgment in the investment area. I doubt if there is one where it has truly been just bad judgment. They have been surcharged for negligence. In other words, in the investment area if there is evidence, a record has been kept, of careful consideration of a situation, then even though the decision may have been erroneous from the standpoint of even prudence, at least it has been a reasonable conclusion from the trust standpoint.

So if you are going to be a sprinkling trustee or a trust officer of a bank which has a sprinkling power, the most essential part of the whole function, to me, is keeping a very careful detailed record of everything that happens so that you can show that you have taken into account all the necessary steps in arriving at a decision, whether that decision turns out to be wrong from any superior point of view or not.

Initial record keeping is essential, too. Let me read you what one bank stated its procedure was:

When a new *inter vivos* trust is received, or when the bank is appointed trustee under a will, we deem it to be the almost immediate duty of the assigned trust officer to determine as much information as can reasonably be expected to be obtained about the financial circumstances of all persons who are presently interested in the trust and who are eligible to receive either income or principal from the trust. The nature of the information sought will naturally vary with the obvious type of beneficiary with whom we are concerned—whether, for example, he or she be a salaried businessman or professional person, a single or married person, a minor, widow, incompetent or semi-incompetent, and so forth. Conditions of health or habits, alcoholism, for example, or spendthrift tendencies are learned as soon as possible after commencement of administration of the trust. The actual wishes of the beneficiary are, of course, also important.

So at the very commencement of the entertainment of the sprinkling function it is essential for the trustee to accumulate all the information he possibly can about the entire sprinkling group, as well, of course, as much as he can about the grantor himself.

Again, we have a problem when an application for special relief is made. At that time I think the instrument should have authorized the trustee to ask for any proof or any written factors he may consider desirable to base his decision on. Certainly if I were a sprinkling trustee, whether the instrument required it or not, I would ask for certainly financial data; I would want a statement from the applicant of his financial situation; I perhaps might want to see his income tax return; I would get as much detailed information about him as I could, similar perhaps but much more detailed, much more important perhaps even than where someone applies for a loan.

Well, what other procedures should the trustee take? For one thing, should he act only on applications or should he volunteer? I think the better procedure is to consider yourself really a trustee with parental powers. Basically you are the substitute parent, substituting for the grantor, and consequently if you happen to know or become aware of circumstances which would warrant special benefaction to one member of the sprinkling group, I think you ought to volunteer relief, after investigation. Beyond that, I don't think the trustee should be burdened with the duty of going out and trying to ascertain whether people are in need or not.

One thing in bank procedure particularly—where you have an individual as a sprinkling trustee you don't have this problem because the grantor of the trust has picked this person and relied

on him, but where a bank is the sprinkling trustee the decision should never be one man's decision, except in the most trifling cases of an application for relief. Most of the major banks in the country, I find, have created a system of successive committees where an application is made usually to one officer, a careful record is made, and he accumulates what information he can, and that is then submitted to a committee which, in turn, offers its recommendations and sometimes is sort of a court of appeal where the case is difficult. I think the grantor, the client, should be assured that there is such a mechanism so that he knows this one little man that he thinks of sitting in the bank isn't going to make these grave decisions about his family's welfare.

There should be periodic reviews. I think the trustee probably has a duty periodically, once every year or two, to re-examine the whole situation, take a careful audit of what has happened, and perhaps even backcheck and find out what has happened to the beneficiaries who have gotten special relief.

I would like to read you one more thing, what one bank has stated very carefully and, I think, intelligently as its procedure when acting on an application:

When a specific request for a distribution of funds is received from a particular member of the group of beneficiaries entitled to income, our procedures are generally as follows: The request usually comes directly to the attention of the account officer administering the trust. If the request is not in writing, as is sometimes the case, it is the responsibility of the officer to obtain written documentation for the request. We feel that it is most important in these situations to have as complete a file as possible for eventual accounting purposes. Once a request is received, the account officer must determine whether or not we have sufficient evidence to substantiate the purposes for which the request is made. If he feels that further supporting data, such as financial statements, affidavits, documents, income tax information, and so forth, is necessary, it is his duty to develop this background information before any further action is taken.

The general procedure is as follows:

1. Review the written request for the purposes of evaluation.
2. Review the instrument with particular regard to any restrictions, limitations, and so forth, relating to the sprinkling.
3. The governing instrument is also reviewed for the purpose of establishing whether or not the grantor in the instrument established any guidelines as to the general dispositive intent, or spelled out standards which the trustee should look to in administering the account. (This would include such things as precatory language relative to favoring particular members of a group, or other evidence of the general treatment which the grantor wishes to be given to various takers in the trust.)

If necessary, the officer should discuss with the beneficiary the purpose for which the distribution is to be used. There may be alternate methods of meeting the financial needs, such as a principal invasion if authorized by the instrument, or the making of a loan.

This brings us to the difficult subject of to what extent the other resources of an applicant should be taken into account. We've had some sprinkling trusts designed in which the client knowledgeably, expressly stated that he did *not* require the other resources to be taken into account. I think nevertheless they should be considered by the trustee anyway, whether the client requires it or not.

Dean Halbach of the University of California Law School who has written one of the major works on this subject, which I shall refer to later, raised the question, "Should we or should we not take other resources into account? What do you mean by 'other' resources?" What I just read you gave an indication of the difficulty in this area.

Suppose we are dealing with a child in the beneficiary group who has a parent living. That is another resource. Should that be taken into account, the fact that there is a parent who might come to his aid? Has he any interest in other trusts or other vehicles which might be used to help him? Has he insurance policies which he could cash in, and should you require him to cash in his policies for this purpose? Could he get a loan from a bank? Is it absolutely necessary that you give him this special distribution when he could borrow it somewhere, and so forth? This is a very difficult area, indeed, to what extent you should require him to tap collateral resources before giving him your benefaction.

What proof should be required of the applicant? Well, very clear proof. Certainly you should obey the old Latin maxim, "*Excrementum tauri mentem confundit*," which means literally, "The excreta of the bull the mind confuses." You should not take everything that you hear verbatim. Applicants are very likely to exaggerate their needs and their requirements and to minimize their resources.

Also, in considering an application I think it is usually essential to consult, when you can without creating civil war, other persons in the group. For example, one sister may make an application which another sister could very well inform you was entirely unnecessary, and if you rely entirely on the information given to you by the applicant you are possibly likely to go wrong.

There are financial problems in connection with discretionary distributions also, tax problems. For example, you may have to sell

an asset at a capital gains tax impact in order to make a distribution for the benefit of the applicant. Comes the question: How is that tax passed on? Is the beneficiary going to pay it or are the other beneficiaries in the group to suffer not only the loss of this special distribution but suffer also the impact of a capital gains tax? Of course it sometimes is necessary, where a severely heavy capital gains tax is involved, to distribute in effect more than the application. In other words, if a \$5,000 application is requested and it is going to require a \$500 capital gains tax on top of that, you are really distributing out of the trust \$5,500 and not \$5,000. So you have a problem of considering this factor also, though it's purely financial, in making your decision.

Then of course you have to watch technical tax problems also, such as the throw-back rules.

Well, let's get down to the law now. I mentioned that Dean Halbach had written so beautifully on this subject. He wrote a law review article called "Problems of Discretion in Discretionary Trusts." Unfortunately I don't have the citation here, but you can find it through your library. It is possibly the best collection of cases dealing with liability for unwarranted discretionary payments. There have been, as far as I know, none, or perhaps very few cases—I don't remember any—dealing with these very elaborate sprinkling trusts which we now use, but a great many decisions dealing with discretions as such. That is, the right to pay out principal or the right to distribute income in various ways. Dean Halbach discusses those in great detail and it is probably the best place to start for any research in this area.

He had an article on the subject in the proceedings of the Miami University Estate Planning Institute, which is also very valuable.

I can summarize by saying that two tests have been applied by the courts to determine whether the trustee has acted properly. He hasn't often been surcharged. There have been very few surcharge cases, but there have been many cases in which the court has reversed his decision or directed a decision other than what a trustee had determined.

One test that has been applied is what is called the "state of mind" test, and basically this is the theory that the trustee should put himself in the mind of the grantor of the trust. Under this, of course, is the theory that the sprinkling trustee is a successor pater familias. He is the successor head of the family. While this is a very sound basic approach to determine whether the trustee is doing right, it is not always easy to do. But the trustee can prepare

himself for it to a great extent by consultations in some detail with the grantor, or the testator, because I don't think a trustee should be obligated to take the sprinkling function unless he has seen the will in advance and had a chance to discuss it with the testator. Learning more about the way the man thinks, what his relationship to his family has been, even his philosophical ideas, his political ideas, a feeling for the type of man he is and how he would have decided various problems. Not easy to do, but a great deal can be accomplished in these kinds of discussions, because the sprinkling trustee, and the officers of a bank as sprinkling trustee, should of course not apply their own predilections and their own prejudices and their own ethical or sociological views. Theoretically, and the cases support this, they should try to do what the grantor would have wanted.

Another group of cases applies the test of "reasonableness." This is basically again the answer, when you come right down to it, because what the grantor would have done, presumably, in the circumstances would be reasonable, and I suppose fundamentally nothing else applies except the principle of reasonableness—an awfully difficult principle to apply.

It makes me think of a British writer, I've forgotten his name, who wrote a book called "Misleading Cases," fascinating cases that he discusses. One was a long discussion on the "reasonable" man. He pointed out that in the law again and again and again in all sorts of situations if you don't do what the reasonable man would do in the circumstances, you are liable, and if you followed what the reasonable man would do, you were all right. He said at the end of the article that in all the cases he had read he had never seen any mention of a reasonable *woman*.

I think basically the courts understand that the problem of a sprinkling trustee is a severe one and that if he has kept alert and done to a substantially reasonable degree everything he can in the way of accumulating information and submitting his judgment perhaps to criticism by associates within the bank, let's say, listening to even the prejudices of other members of the family involved, and so forth, I think the trustee may not need to have much worry.

Have we any time left?

CHAIRMAN ROCK: I would say about ten minutes.

MR. WORMSER: Well, instead of rattling along, I would like to explain, as I do occasionally, my chief function in life which is illustrated by the story of the small town where there was a tremendous influx of cats, and the city fathers brought in some experts

and they took a count and found there were 349 cats in this little town. They asked the experts, "How do you account for it?"

They said, "It's all due to one old tomcat."

So they captured the tomcat and took care of that problem, and they were very happy. The next year there were only 103 cats in the whole area. But the year *after* that the cat population went up to 908. So they called in the experts again and said, "Look, what's happened?"

They said, "Oh, it's the same old tomcat."

They said, "How could that be? We took care of that problem."

He said, "Oh, he's acting as a consultant now."

So if in a few minutes you have some questions, I would be very glad to answer. I would rather answer questions than go on rattling on this endless subject.

CHAIRMAN ROCK: Thank you very much, Mr. Wormser. I apologize for the distraction caused by our comings and goings here, but I think you've covered the topic well. When we have no questions, that is pretty good because generally somebody has a problem he hasn't solved along the line of the address.

CHAIRMAN ROCK: We are going to have this portion of the program on "Estate Income Tax and Estate Tax Procedures." It will be broken into two parts. The first part will be on the "Estate Income Tax Returns," and the second will be a panel on "Estate Tax Procedures."

The first part of the program will be presented to us by Robert Hinds, the senior trust officer at the National Bank of Commerce in Lincoln. Mr. Hinds will speak to us for 15 minutes and then we will have the panel on "Estate Tax Procedures."

## SELECTED PROBLEMS ON ESTATE INCOME TAX

### Robert S. Hinds

That was a most extraordinary talk by Mr. Wormser, and being a trust officer, naturally I was particularly interested in it. I had to chuckle a little bit when he was discussing the problem in all the cases searched looking for the test of the reasonable man and he mentioned he had never found a case involving a reasonable woman. A very nice lady was sitting next to me and she didn't realize I was going to be talking next. She leaned over and said, "Well, maybe that is because all women are reasonable." I thought that was a very cute little comment.

His discussion on sprinkling trusts also brings to mind a discussion I had with my wife a few years ago. In this matter of dealing with sprinkling trusts, as Mr. Wormser mentioned, it can be quite difficult in applying the provision, and from time to time I have presented a hypothetical problem to my wife, the purpose being to get the woman's touch. We also discussed it in connection with our own estate planning where we have used a sprinkling trust. One time she was trying to make a comparison and she couldn't find the magic word, and she finally said, "Oh, you know, like a dribbling clause." Well, she may not know what you call it but she certainly knows what it means. I thought you might be interested in that little comment.

I had better move on here. It is my privilege to discuss "Selected Problems on Estate Income Tax Returns." At the same time it will be necessary for me to make certain comments regarding the federal estate tax and the decedent's final income tax return. It would be my purpose to try to give you some helpful hints on what you should know in preparing the estate income tax return, and to bring you up to date on some recent changes in trends and in the law.

To begin with, I think I would like to discuss this matter of selecting the fiscal year of the estate for tax purposes. There isn't sufficient time to go into all the details and ramifications of selecting the fiscal year, but it is extremely important for you to recognize that the estate is entitled to adopt any fiscal year that ends on the last day of a month, but not more than twelve months after the decedent's death.

Once you select a fiscal year it is important that you file a time return, because under a regulation of the Internal Revenue Service, which is quite often ignored, if you do not file a timely return in this area the Internal Revenue Service quite rightfully can put you on a calendar year. So it is important that, once you select your year, you file a timely return.

The main purpose, of course, in selecting a fiscal year is to minimize the beneficiaries' over-all income tax consequences, and in order to do this you must know what income will come into the estate and when, and you must also know the income tax brackets of your beneficiaries. Once you know these things then you are in a position to do your arithmetic and make distributions to the beneficiaries in a manner which will result in the minimum income tax being paid on the estate's income.

However, before you begin recommending distributions to the beneficiaries of an estate so as to realize tax savings, it is important



that you understand several basic principles of taxing distributions from an estate.

First, the estate generally pays no income tax on the amounts distributed. There is an exception to this rule, unfortunately—there always seems to be—and the exception here is where the estate satisfies a dollar bequest by distributing assets. In that situation the estate is treated as having sold the assets on the date of distribution and therefore has realized capital gains or losses.

The next basic principle for you to know is that each distribution to a beneficiary is considered as including the same proportion of each type of income as the estate had. So if the estate had income, for instance, consisting of one-half tax-free municipal interest and one-half dividend income, then distribution to each beneficiary would consist of one-half of each. However, in this situation capital gains are not treated as being distributed unless they are specifically distributed by the executor to the beneficiaries.

The third basic principle of estate distribution taxation is that each distribution is treated as income to the extent the estate has "distributable net income." Now what is distributable net income? I think the best way to understand this is that it simply means taxable income before the estate makes any distributions to beneficiaries. If you can remember that, then it becomes a great deal easier.

Practitioners are sometimes unaware that if you make a distribution, which is characterized as principal or corpus, this will also be treated as an income distribution to the extent the estate has distributable net income, even if it is a distribution of property in kind.

My best example of this application is where the executor distributes the family car to the wife. Under normal circumstances this might very well be a distribution of income to the extent of the value of that car. The exception would be where the will specifically bequeaths the car to the wife. In that event it would not be considered as a distribution of "distributable net income," but when you are distributing property to the wife in kind, be very careful that you recognize that you might be distributing income.

I might add that a residuary bequest does not qualify under this exception, and any distribution to a residuary beneficiary will cause income to be taxed to the beneficiary to the extent of any distributable net income.

In this same connection, a possible change may be coming in the handling of the widow's allowance. There used to be complete

confusion on the treatment of the widow's allowance until the Internal Revenue Service issued a regulation here a few years ago on the treatment of the widow's allowance. That regulation stated that the widow's allowance would be considered as paid out of principal and not income unless local law or a court order dictated otherwise. Since it was treated as paid out of principal, the payments therefore were not taxable to the widow nor deductible by the estate.

Suppose under these circumstances you wanted to get a deduction in the estate and tax the income to the widow. It is a simple matter for the attorney to obtain an order from the court specifying that the widow's allowance be paid from income. But confusion seems to reign again, because the tax court this past summer ruled that a widow's allowance is deductible by the estate whether paid from principal or income. It left open the question whether the widow must include the allowance in her income. Under this case now it has been suggested that where you have a situation in which the allowance was paid from principal and not deducted on the return, you might consider filing a refund claim as to tax years which are still open.

As to new estates, it has been suggested that you claim the deduction on the estate income tax return, but I don't think I would do this unless you are prepared to have the widow treat it as income on her return. This particular tax court case which causes this confusion is *L. R. McCoy* 50 T.C. 53. There was a very pretty young lady who was supposed to be in this room who might help us on this situation. She is in the process of writing a law review article for future publication and maybe she will be able to give us some answers on this particular problem. So far as I can learn, this case has not been appealed yet by Internal Revenue Service.

The fourth basic principle of distribution taxation is that a distribution is treated as being paid out of "distributable net income" earned by the estate for the full tax year, whether or not there was any such income at the time of the distribution. This means that, if the executor makes an income distribution at a time when there is no "distributable net income," you must still wait until the end of the year to determine whether this distribution is taxable to the beneficiary. In other words, each distribution of income is treated as though it was made on the last day of the taxable year of the estate.

This brings us back to the selection of the estate's fiscal year and its importance. If, for example, you select a fiscal year ending January 31 and the estate makes a distribution shortly thereafter,

say in February 1968, to the widow or the estate beneficiary, then the beneficiary reporting his income on a calendar year basis will not have to report his income until 1969, the year in which the estate's fiscal year ends, and he won't pay his tax until 1970, the final tax—he might have to make installment payments but he won't make his final payment of tax until 1970, the year in which he pays his 1969 tax. So there may be real advantages in postponing payment of this income tax by a beneficiary with proper planning.

However, there is another exception. There is an exception to this rule that if that beneficiary dies during that particular year—our example in 1968 when he received the distribution—in that event the amount distributed to him prior to death is includable in his final return, regardless of the taxable year of the estate. The balance of any income tax due to the beneficiary from the estate is payable to his estate and treated as income in respect of a decedent.

I would like to take a moment to discuss the ways that you might make distributions to beneficiaries to save taxes. In estates where beneficiaries are in low income tax brackets, it is generally desirable to make income distributions to them regularly, particularly if the estate is in a high income tax bracket. At the same time, if the will creates trusts, you might begin making distributions to the trusts and then pass the income on to the trust beneficiaries so as to spread the income among several taxpaying units.

There is no law that says that trusts can't be established prior to the closing of an estate. As a matter of fact, we have a case in our Trust Department right now where we recognized we were going to have real problems on our federal estate tax return, and it is a fairly large estate. The will provides both for a marital trust and a residuary trust. Both trusts provide that the income is distributable to the beneficiary. In this particular situation we established the marital trust and we are keeping the residuary portion of the estate in the estate pending settlement of the federal estate tax, and in order to have two taxpayers here in connection with the income. If the widow needs some moneys in addition to income, we can always encroach on the principal of the marital trust for her benefit, and the result of this will be, of course, to reduce the potential estate tax liability at her death because we have reduced principal, unless of course we do a good investment job and return the amount of principal lost by appreciation. We have yet to find a beneficiary who was unhappy with us for doing that.

If the beneficiaries are in high income tax brackets, I doubt whether they will like waiting until the estate terminates before

receiving their distributive shares. If they are willing to wait, then the termination date is generally the best time to make distributions to them, since it is quite easy to work it so you can end up with a short period for the estate's final income tax return. And a short period will probably mean that very little distributable net income will be passed on to the beneficiaries to be taxed at a higher rate.

If those well-to-do beneficiaries are not willing to wait for their distributive share until the estate closes, and I frankly don't blame them, consideration should be given to taking the larger portion of the administrative expenses on the estate's income tax return and timing the distributions to the beneficiaries during the same taxable year that the expenses are paid and deducted, which will substantially reduce or eliminate the distributable net income. Now, you must be careful there.

If the administrative expenses are to be deducted on the estate tax return, then you might also consider making the distribution shortly after the federal estate and Nebraska inheritance taxes are paid.

If you select a fiscal year, let's say, for your first return which ends six months after date of death, then the second fiscal year will end 18 months (12 plus six is 18 months) after death, and this will be two months after, presumably, the payment of Nebraska inheritance taxes. Then you can make a substantial distribution to the beneficiaries, say in the 19th month after death, and it will carry with it only the income earned by the estate in the *third* fiscal year. That income should presumably be substantially reduced because there would be no income earned by the estate on either the assets sold to pay taxes or on the assets distributed to the beneficiaries.

Now the next matter I would like to cover is the administrative expense deduction. As I already implied, there are certain expenses which can be deducted on the estate tax return and the estate income tax return, but not both. The most common example of this, of course, is the attorney and executor fees.

It would seem to be quite a simple matter in making a determination on which return to take these deductions. If the top estate tax bracket is higher than the top income tax bracket, then you would think that you would use all or a part of these expenses as deductions on the estate tax return, and vice versa, keeping in mind that you can use a portion of these fees on both returns so as to help equalize the brackets between the two returns.

However, it is not quite that simple. There are a couple of things you must keep in mind. If the beneficiaries' individual income tax

brackets are higher than both the estate tax bracket and the estate's income tax bracket, chances are you are going to want to take the deduction on the estate's income tax return in order to pass through the deductions to the beneficiary, either as an excess deduction or as reduction of distributable net income, but you must be terribly careful here. If you want to pass the deduction through the beneficiaries, you must be certain to pay the fees during the final tax year of the estate, assuming that you are going to come up with a loss, because the estate can only distribute excess deductions on its final return, and it can be taken by the beneficiaries on their individual returns if they itemize their personal deductions.

The other matter that must be considered in deciding where to deduct the administrative fees is in the will itself. If the estate is entitled to a marital deduction, then the determination becomes a little tricky. You must keep in mind that, where you have a marital deduction, any expense deducted on the estate tax return will be reduced by the percentage of the marital deduction. So if you have a full marital deduction, then the effective rate of the administrative expense deduction will generally be one-half of the actual estate tax rate. This is because the marital deduction is based on the gross estate minus deductions, or the adjusted gross estate. So if you've got an estate tax where you end up paying 30 per cent, and you've got a full marital deduction, your effective rate for administrative expenses taken on that return is only 15 per cent, and your income tax bracket may be higher, so be very careful and just don't assume that if the actual estate tax rate is higher that you should take this deduction on that return.

Before I leave I should also point out that while the rule is that you cannot take a double deduction on both the estate tax return and the estate income tax return, a line of cases has developed recently which indicates that the courts are inclined to construe this statutory prohibition in a very technical way.

For example, the Sixth Circuit very recently allowed the so-called double deduction for selling expenses incurred by an executor in selling securities in an estate. He was permitted to deduct the selling expenses as administrative expense on the estate tax return and was also allowed to offset the expense against the proceeds to determine the amount of capital gains on the estate's income tax return. In other words, the selling expense was considered as a reduction in gain and not a deduction. Query: Whether or not this case would also permit an executor to deduct commissions on the sale of real estate in the same way? And this can be a very sizable and very important deduction, and I would think that this case would be appropriate for following under those circumstances.

Well, if you learn a few basic rules of distribution taxation and do the simple arithmetic involved, there is no reason why you all cannot become experts in preparing an estate's income tax return.

**CHAIRMAN ROCK:** The next part of the program will be a panel on estate taxation. John Gradwohl will be on it. John, as you know, is a Professor at the University of Nebraska law school; Bruce Anderson, an Omaha trust officer for the Omaha National Bank; Flav Wright, who is on almost every panel involving taxes or planning, a Lincoln lawyer; and Mr. Edward Phillips, a guest of the Bar Association from the Estate Tax Division of the Internal Revenue Service.

Leading off will be Flav Wright, and I will let him introduce the topics as he goes along and pass the torch to the one who follows.

### **PANEL ON ESTATE TAX PROCEDURES**

**FLAVEL A. WRIGHT:** When we planned this we thought you would all have the big book and that we would just hit some high spots as we went along. I think we are forced to continue that. We had in mind that we would have Ed Phillips representing the government, giving their view; we would have John Gradwohl who can tell you how it should be done according to the book; Bruce Anderson who is with the Omaha National Bank can tell you how the experts are doing it; and I am supposed to let you know how the rest of us are handling it.

### **Federal Tax Liens**

With reference to tax liens, the lawyer handling an estate first of all has to know what the obligation of the decedent or of the estate is with reference to taxes; he next has to make certain that that obligation is satisfied; and finally he has to make certain that he has provided evidence of that satisfaction in the estate file so that those examining it in the future will know that is has been satisfied.

There are two basic tax liens. One is a Code Section 63.21 lien, which is a general tax lien, which applies with respect to any person who is liable for the payment of any tax. That is a pretty broad area that it covers. However, it does not come into existence until there has been an assessment of the tax, and with reference to people holding security interests, and so forth, they are not bound by it unless notice of the lien has been filed. So that is the first lien statute.

The second one is 63.24, which applies to an estate and gift tax lien. It comes into existence as of the moment of death with reference to the estate tax, and as of the moment of the gift with reference to the gift tax lien. Neither filing nor notice is required to validate either the estate or the gift tax lien. So it is separate and distinct from the 63.21 lien, but nevertheless is a lien of which any lawyer must be aware and must take note of whenever there is a notice of an estate or a gift.

With reference to the responsibility of the attorney for the executor or the estate, his first obligation, of course, is to make an adequate investigation so that he knows what the assets of the estate are, and to make certain that he has a complete knowledge in this respect.

Second, he should make certain that proper returns are filed and that these properly reflect all property which is to be subject to the estate tax.

Third, he should make certain that the tax is paid, and that evidence of such payment is filed in the estate proceedings.

Fourth, when the closing letter is received, he should promptly file it in the estate proceedings.

Fifth, if a closing agreement is entered into, he should file that in the estate proceedings. If he has made a request of the director for the determination of the tax and pays the amount so determined, which has the effect of releasing the lien, he should file that, and any certificates that he receives evidencing release from the lien of the estate tax or gift tax should be filed in the probate proceedings.

Now a question may arise as to whether you can rely on closing letters. Actually they do not release the lien. If the government should later come back, even though they have issued a closing letter, they could come back and raise a further tax, but as a practical matter I think the closing letters have been taken as evidence that the estate tax obligation has been determined and that filing a receipt showing payment of that amount of tax is sufficient. But this is a matter which some of you may have different views on. The point to remember is that the closing letter does not in and of itself constitute a release of any lien, neither does the closing letter plus the receipt show payment of that tax.

With reference to the actual release of liens, and particularly the release of specific property from liens, Ed Phillips will comment on that at this time.

## Securing A Release of Lien

Edward E. Phillips

Flav has generally set out the two types of liens that we are concerned with. We don't get into the general lien too much in the estate tax branch because that is a filed lien. However, the one that we are concerned with is 6324 which is not filed, and is a lien against the entire estate of the decedent. My comments are going to be primarily on the release of this type of a lien by making application to the district director for the release of lien.

It may be that the estate representatives will determine it is either advisable or necessary to sell or mortgage particular property in the estate, and of course the purchaser or the mortgagee may desire that this lien be released before they will make any final payment. So to accomplish this, an application should be made to the district director on Form 4422. I think you will probably find a copy of that in this particular *Manual* that we have out in the audience. It is quite important that all of the information called for in that application be furnished, particularly if you are in need of fast action on the release. If you send only a partial summary of information in, it may be necessary to make additional requests for further information, all of which will delay the matter. If you would place yourself in the shoes of the person who would be looking at this, who has no familiarity with your estate and its problems, and he has to decide whether there is adequate provision made for the security of the taxes, you would appreciate his problem of making a decision without having adequate information.

One thing I want to point out particularly, don't overlook the small print on the form. There is one part in there that is pretty small, but it says to attach a description of the property to which the application applies. That seems very basic, probably, but by the time you get through working on the form and deciding all the rest of it you may possibly overlook this description of the property. The request for release of real property should have the legal description attached on separate pages in triplicate for each parcel for which a certificate is requested.

The true extent of the interest of the decedent should also be spelled out, and if the estate tax form, or the return form itself, 706, has not been filed, then a copy of the preliminary notice, 704, which John will comment on a little later, should be submitted with the application.

This application should be made only for the release of property interests which are *necessary*. It may well be expected that if you



request a larger proportion of the estate to be released, the application is going to be much more closely scrutinized, and the security requirements may be much more severe, but for smaller parcels the releases are handled in much more of a routine manner.

Once this certificate of release has been received, it should be promptly filed with the probate court or other recording office.

Another thing that I would like to mention as a practical matter, don't wait until the last moment to make this application. If you know that circumstances are arising which will call for the application, get the application in as soon as possible, even though you may have had very rapid action on it in the past. Unforeseen circumstances may arise in a particular case which will delay an application. So I can't really stress that enough, that it should be made as early as possible.

Another practical side of it is, do not send an application for release of lien in together with the estate tax return form, 704 or 706 themselves. Send it in as a separate item so it will receive separate and individual handling.

Now John will speak about our Preliminary Notice, 704.

### **Estate Tax Preliminary Notice**

**John M. Gradwohl**

The Estate Tax Preliminary Notice, Form 704, is a good illustration of how the *Probate Manual* will operate and the purposes of the *Probate Manual*. The current form is reproduced in Section 8.130 of the *Probate Manual*, and the general rules and the regulations applicable to the preparation and filing of the return are set out in Section 8.3. This is simply a one-page information return.

The return and the regulations require only that the *approximate* values by groups of assets, not individual assets, of the property which will later be included in the final estate tax return, Form 706 in Schedules "A" through "I," be set forth.

A preliminary notice is required to be filed in every estate where the total for the gross value of the assets subject to estate tax is more than \$60,000 at the time of death. This is true whether or not you've got deductions in the estate that will reduce the net value down below the \$60,000, whether you've got marital deductions or something that would even mean that no tax would ultimately be payable.

The regulations state that the preliminary notice should be filed as a precautionary measure if it cannot be determined whether or not the gross value is going to be over \$60,000. If it later turns out that the gross value is not \$60,000, all you need to do is to write a letter to the District Director of Internal Revenue stating that no final return is going to be filed, and that will clear up the matter.

The regulations explicitly provide, and this is set out in the *Probate Manual*, that only the best approximation available is required on this return. As long as the Service gets a general idea of the composition of the assets in the estate and the value, I am sure that the return would be considered as having been properly filed.

Bruce Anderson is going to talk next, and Bob Hinds with reference to gathering information, and Flav Wright with reference to the matter of working out problems of estate tax apportionment. The executor and his attorney are going to have to gather at least reliable estimates of value early in the estate, and filing the Form 704 is not going to impose any particular problem because it does not require a preciseness of value and it does not require individual assets to be listed but only categories of assets.

Many lawyers prefer to use a pretty conservative approach, and I think properly, to the valuations reported in the preliminary return. The closely held business may just not be worth as much after the principal owner dies as everyone had hoped that it would be. The real estate which has to be sold to pay taxes and administration expenses may just not bring the top price. As long as you've got a reasonable figure for a category of assets, there is going to be no real problem if the final values turn out to be higher. But if you substantially overvalue the assets in the preliminary return, and if the values shown in the final return are quite a bit lower, then you may have to make some explanations, or you may precipitate an audit of a return or more closely performed audit of the return. By the same token, I think it is fair to say that an unreasonably low value in the preliminary return might incite an examining agent to give very close scrutiny to all of the items shown in the final return.

This return is required to be filed within two months of the date of death, unless you've got an executor or administrator appointed within two months of death, in which case you've got until two months after the appointment of the executor or administrator. But remember that if you have no personal representative appointed—there are going to be no estate administration proceedings—then every person in possession of property includable in the

decedent's gross estate is technically required to file the preliminary notice, and the most significant penalty for failing to file it is that you may simply run into practical hardships. You may not be able to get a release of tax lien, which Ed Phillips has talked about, if you need an extension of time for the payment of tax or the filing of the return. This may be difficult to secure, and, again, the Service may subject the return to a closer scrutiny.

If a preliminary notice is filed late, then as a matter of good lawyer craftsmanship as well as compliance with the literal language of the requirements, the filing should be accompanied by an affidavit or other statement setting out the reason for the delay. This does not need to be an extensive statement, but I think it properly should be filed in some form.

Next, Bruce Anderson is going to talk about Items 4 and 10 in your printed outline.

### **Post Mortem Tax Planning**

#### **Bruce Anderson**

I enjoyed Bob Hinds' talk very much. I found out that he was speaking on quite a bit of what I was going to speak on in the first section, "Post Mortem Tax Planning," so for that reason I will only pop up twice this morning. I am going to include the remainder of my speech, the post mortem tax planning, along with the subject of executors' and attorneys' fees and commissions all at one time, at this time.

One area of great importance involves the various options open to the fiduciary when dealing with tax considerations. Put another way, how can the fiduciary best plan the administration so that the estate receives the most beneficial tax treatment?

As will be discussed later, if the decedent created either a testamentary or inter vivos trust, then it is mandatory for the executor and trustee to have open lines of communication so that joint planning will be possible, and the best results will be obtained if the executor and trustee are one and the same entity.

In this area of options we find that the fiduciary has been left with a great deal of flexibility, and if exercised properly, substantial tax dollars can be saved. Specifically, I am referring to the selection of a tax year for the estate. Contrary to the requirement that, in most cases, the decedent had to file his income tax return on a calendar year basis, the estate is entitled to select either a calendar year or fiscal year, and generally a fiscal year will be more advantageous.

One important use of a fiscal year is to avoid the bunching of income in any one taxable period. It frequently happens that large non-recurring items of income are realized by an estate within the first few months after death. Another important use which can be made of a fiscal year is to extend the first taxable period beyond the end of the calendar year in which the decedent dies so as to bring, into the first taxable period, income which can be used to offset deductions which the estate has. By far the most important reason for selecting a fiscal year is to facilitate distributions to beneficiaries in such a manner that they result in the minimum income tax being paid on the estate's income.

In addition, the executor has a clear choice as to where the expenses of administration should be deducted, and the optimal result to be achieved is to equalize the estate's income tax bracket with its federal estate tax bracket so that the maximum amount of dollars can be saved.

One other choice which is rather vital in post-death planning is that of the selection of date of death values or values as of the alternate date. Whenever an estate has more than a nominal amount of stocks and bonds, and unless little or no federal estate tax will be due, it would appear to be extremely risky for the fiduciary to do much in the way of liquidating such stocks or bonds before the alternate valuation date. If the alternate valuation date is ultimately selected, the value of any assets sold or distributed between the date of death and one year thereafter will be the value as of the date of distribution or sale. Effecting a sale or distribution during this twelve-month period can, in some instances, rule out the choice of alternate valuation. All things being equal, the best advice is to make few or no sales or distributions until the alternate valuation date has passed. If all of the heirs are insistent that the estate be closed at the earliest possible date, the advantages of the alternate valuation should be fully explained to them, and if they still demand an expedient administration, letters directing the executor to proceed without delay should be obtained from them.

#### ATTORNEYS' FEES AND EXECUTORS' COMMISSIONS

Attorneys' fees and executors' commissions can be taken as deductions either on the federal estate tax return or, in the alternative, on the estates fiduciary return. The determination of when and where the deductions will be taken is based on the very simple criteria of "where will they do the estate the most good?" By way of illustration, let us assume an estate which is, for income tax purposes, in a 25 per cent bracket. However, for federal estate

tax purposes the estate is in a 37 per cent bracket. Clearly, it would be an error in judgment to deduct all of the fees or commissions on the fiduciary return, for while the estate may not pay any income tax as a result of this treatment, tax savings are being unnecessarily lost by paying a federal estate tax at the rate of 37 per cent. While I have not worked out the mathematics in this hypothetical situation, I would assume that all of the fees and commissions would be deducted on the federal estate tax return. What the fiduciary really wants to do is equalize the income tax and federal estate tax brackets. With this in mind, let us assume a closer case in which the income tax bracket is 32 per cent and the federal estate tax bracket is 25 per cent. In this case the executor will most likely wish to take part of the fees and commissions on the federal estate tax return, with the balance to be taken on the fiduciary return. For federal estate tax purposes, it makes no difference when the portion of the fees to be deducted is taken, but for income tax purposes timing is very important. If a combination of fees and commissions is to be taken in a particular fiscal year as a deduction for income tax, they *must, in fact*, be taken sometime within that fiscal year or the deduction will be lost. In many cases the pro rata deductions of fees and commissions can be taken in one or more of the fiscal years so as to obtain maximum tax benefits.

Taking deductions on an estate tax return does not automatically preclude later claiming them as income tax deductions (if the estate tax return is amended to delete them). But once the deductions have been finally allowed for estate tax purposes, they can no longer be claimed on an income tax return. To be allowable on an income tax return, a statement must be filed in duplicate that the deductions have not been allowed as estate tax deductions and that their use for estate tax purposes is waived. Once the income tax statement is filed, the deductions can no longer be allowed for estate tax purposes. My authority for this is Regulation 1.642 G1.

One other matter should be discussed under this heading, and that is the waiver of an executor's commission by a family member when the member acts either as the sole fiduciary or as a co-fiduciary. If a fiduciary waives any compensation, but does not do so until a time close to the final settlement of the estate, the Internal Revenue Service claims that a reasonable amount for an executor's or administrator's commission should be imputed to the fiduciary even though no income is in fact paid. In addition, the Service takes the position that the fiduciary has made a gift to the heirs of the amount of the reasonable fee waived, and if the estate is large enough, the individual fiduciary may be forced to pay a gift tax or dip into the \$30,000 exemption. To eliminate this problem, it is

suggested that the question of fees be raised with the individual fiduciary early in the administration, and if it is determined that the compensation is to be waived, a waiver of fees should be signed by the fiduciary and filed with the probate court.

Now I believe Mr. Wright will talk to us on real estate.

### **Schedule "A"—Real Estate**

#### **Flavel A. Wright**

I propose to cover briefly Schedule "A" of the estate tax return which relates to real estate owned by the decedent. It does not relate to jointly owned real estate, but the principles involved would be applicable to joint real estate, too.

Two questions are really involved. Of course, you've got the old valuation question which is present, and a very important one. You also have a question as to what information should be provided on the return.

Again we run into the situation that it is essential that you have complete and accurate information. You should know what the deceased's interest in the property is, and it seems to me you ought to examine the abstract and make sure that you have his interest properly described and know what liens there are against the property, or what limitations there are on his interest.

You should determine rather promptly whether you are going to have a formal appraisal. If you do have a formal appraisal and if you base your valuation on that appraisal, the instructions require that you attach a copy of the appraisal. I think many attorneys feel that since they take other factors into account they will have the formal appraisal, and it is available at the time of the audit, but they don't attach it with the return.

Whether you have a formal appraisal, of course, depends on the facts in a certain case; it is a judgment decision you have to make. It is certainly one piece of evidence to determine what the value of the property is.

If you do decide to have an appraisal you ought to be certain you get a competent appraiser who is recognized in the area. You kid nobody but yourself if you choose some "hack" that is around that gives you an unrealistic appraisal.

In any event, when you include property on Schedule "A" you should include an exact description of it, say where it is located, show the status of the improvements on it, what crops are on it,

and generally give a rather accurate description of the entire property. The more you put into the return in this regard and the more reasonable it is for somebody examining it, the less chance you have of the return's being put back for further audit and having to argue the matter with a man in the field on audit.

Treatment of growing crops, according to the instructions, is to be included in Schedule "F." It seems to me they are more properly includable under real estate, certainly if they are attached to the real estate when the decedent died. And there is an early Board of Tax Appeals case indicating that is the case. In any event, I think you should state whether or not your evaluation does include the growing crop.

There is one other point I wish to make that relates to taxes against the real estate. If these have become liens against the real estate at the time of the death of the deceased, they are properly deducted in Schedule "K." If they have *not* become liens, the Internal Revenue Service, and I think properly so, says it is not a proper deduction under Schedule "K" because it is not a lien against the real estate and there is no personal obligation of the decedent to pay it. However, it seems to me in areas, as is the case in Lincoln where proration of taxes is the custom on the sale of real estate, it is a factor that has to be taken into account on valuing the real estate. I think it properly does reflect on the value of the real estate if the estate has to pick up eleven-twelfths of the taxes against the real estate in event of a sale from a willing buyer to a willing seller.

Finally, in valuing property all factors ordinarily considered in arriving at fair market value must be considered. I don't have time to go into those, and some of them will be mentioned, I think, by Ed Phillips. While there is a certain amount of leeway as to the value of a particular piece of real estate, the values returned should be realistic and should be fixed in an amount which can be supported by evidence. Ordinarily taxpayers are interested in saving estate taxes when they set these values, and the tendency is to keep them as conservative as possible. However, you must keep in mind that for all practical purposes you are also fixing the basis of that property for income tax purposes, and when the property is subsequently sold you may find yourself in a situation where you wish you had put a more realistic value on it for estate tax purposes.

Now I think Ed Phillips will cover "Closely Held Corporations."

**Information to Be Supplied Relative to Closely Held Businesses****Edward E. Phillips**

Frequently the decedent's interest in a closely held business of one type or another comes into question during audits and this may be either as a closely held corporation, an individual proprietorship, or an interest as a partner. These may be quite difficult in some of the estates, but most of the determinations are factual; they are not legal questions in most of these. If you acquire the information early in your handling of an estate it may avoid a lot of difficulty later trying to secure the basic facts.

The most basic information that we require in any estate is the financial data for this particular business enterprise for the previous five years. This includes balance sheets, profit and loss statements, and dividend records. These are necessary in the valuation of any of the businesses. There may frequently be other items that will be very important in the determination of value, but these are the starting points. These will give you a general indication of the size and the over-all value of the decedent's interest, and it may indicate to what extent further information will have to be secured.

It is most important, particularly in regard to close corporations, that the statement set out the number of shares actually outstanding in the corporation at the date of the decedent's death, and not just the amount authorized or the amounts issued. We want to know the complete interest of the decedent in that particular business enterprise.

Then in the event there is more than one type of stock outstanding, there should be corporate records available to show the differences which underlie the different types of stock.

In other corporations or businesses there may be buy and sell agreements, or there may be records of sale of stock of this business, and it may help in determining value, but they of themselves do not establish the value.

There may be frequently substantial variations between the value of assets shown on the balance sheet and the market value of the actual assets owned. In some cases appraisals of these assets may be of benefit to you.

If a business owns substantial amounts of securities, a summary should be prepared to show what these securities were as of the date of death and the values as of that time. It may be rather



difficult later, in light of some of the records that some people keep, to try to reconstruct the stocks that were held as of that particular date.

If there is a partnership involved, a copy of partnership agreement should also be submitted with the financial data.

The importance of any particular document will vary with the business that we are talking about, but the valuation will depend not on any one item in most cases; it will depend on a composite of all the information about the business to determine its place in the business community.

The general economic climate, the position in the competitive market, and many other facets, as well as the loss of the decedent who may have been a key man in the operation, are all very important.

Another problem area that we are trying to cover in this particular panel is in regard to transfers. John will take that up with you.

### **Schedule "G"—Transfers During Decedent's Life**

#### **John M. Gradwohl**

The Schedule "G" transfers during decedent's life require the executor to list and to give supporting information as to:

1. Each transfer of \$1,000 or more by the decedent within three years of his death; and
2. Each transfer at any time during his life of \$5,000 or more, except outright transfers not in trust; in other words, outright transfers not in trust of any amount do not need to be shown on the Schedule "G" unless made within three years of death. It is also necessary to file with the return copies of any written instrument of transfer, or relating to the transfer.

The purpose of the Schedule "G" is to cover items includable in the federal estate tax gross estate under Sections 2035, contemplation of death, 2036, retained life interest, 2037 transfers taking effect at death in which the decedent had a 5 per cent reversionary interest, and Section 2038 which is the revocable transfer section.

The goals in filling out the Schedule "G," I suppose like the entire estate tax return, are to avoid an audit, if at all possible, or if an audit occurs to present the position as to the facts in law of the estate in the most favorable light. But this is one of the areas most likely to be subject to a very intensive audit.

There are two general rules which will help achieve the goals: First of all—and this seems like a broken record, I guess, as each one of us has said it—it is extremely important to gather thorough and reliable information before completing the return. In this sense I mean full information as to every aspect favorable or unfavorable which can affect the eventual outcome.

Secondly, it is extremely important to see that only accurate and provable information gets into the return. Normally this means that the fuller principal facts and the legal positions of the estate should be professionally, in my opinion, set forth in the return at the time of initial filing.

The most commonly occurring situation that is set forth on the Schedule "G" is the transfer of property within the three-year period before death in which the commissioner has a statutory presumption that the property was transferred in contemplation of death. But the test here is whether the decedent's dominant motives in making the transfer were for a lifetime or death purpose. If the lifetime motives predominate, the property is not includable, and many factors are apt to enter into the determination of whether the lifetime motives (plural) predominate over the so-called death motives. While the commissioner has a statutory presumption in the contemplation of death area in addition to the normal presumption that the commissioner is right on a factual determination, it is the actual facts which will determine the result. The very generality of the rules which I am stating carefully here, the generality—the ambiguity of these rules means that the issue of contemplation of death is one which is ideally suited to settlement. The fact that there are very few cases that actually get to the point of litigation in the entire United States on this kind of a commonly occurring transaction where all you have to do is have a gift of more than \$1,000 within three years of death to have to report it. It means that this is a very fine opportunity for actually settling the issue at some point along the administrative procedure and, in my opinion, the filing of the return should be geared to, in doubtful cases, the matter of settlement rather than the matter of litigation. For this reason it is extremely important that everything be extremely carefully tested before you write line one on the schedule. If the motive of reducing income taxes is going to be relied upon, the existence of the decedent's income tax burdens during life are going to need to be verified. Certainly an examining agent is going back and check those income tax returns. If you claim a motive of ridding himself of the burdens of managing the property, helping grandchildren or children get an education, repaying prior moral obligations, equalizing past gifts, continuous generosity over a period of

years, seeing the beneficiary enjoy the property during his own lifetime, and the like, you should check each one of these before you put anything down on the return. And the potentially harmful items, such as advanced age, ill health, substantial portions of the estate given away, as distinguished from a minimal portion retained during life, should be explored thoroughly and their damaging impact considered before the return is filed.

Remember, too, that as I mentioned on the contemplation of death point, the test is the *dominant* motive or motives. *United States v. Wells*, 283 U.S. 102 (1931). Examining agents, understandably, stress the language in the regulations and try to write in the form. This is Reg. 20.2035-1 (c), something about "prompted by the thought of death." But if there is a difference between "dominant motive" and "prompted by the thought of death," then the rule of the United States Supreme Court in the *Wells* case is one on which district courts would instruct in a jury case if suit is brought for refund and, frankly, that is by far the best way to raise this kind of an issue. At some point along the line someone is going to have authority to settle the case under the threat of litigation. The true test of "dominant motives" will be applied in effecting a settlement if there is a difference in result between that and the language of the regulation, "prompted by the thought of death."

There is a question about how much information to put into Schedule "G." Perhaps everything shouldn't be put into Schedule "G" if this would make a mountain out of a mole hill. A lot of lawyers like to hold back some new ammunition for the appeals personnel because they feel in this area that the appeals personnel are the only Revenue Service agents who have any authority to horse trade on the issue. It is not clear whether the examining agent has any real authority to horse trade, in the sense that we lawyers normally settle cases, whether they have authority to horse trade on the contemplation of death issue itself, but the horse trading is the way out in the overwhelming number of difficult "dominant motive" contemplation of death cases.

And I think it goes without saying from things that I have referred to before that the settlement value of the issue can be greatly lessened, and the likelihood of a serious audit and the effect of a serious audit greatly increased, by either a misstatement of facts in the return or an overstatement of facts in the return. My own personal feeling is that the return should not be a brief. You've got enough time for briefs later, either to the examining agent or to the appeals personnel if this is necessary, but the return should be a fairly complete and forcefully presented statement of both

the facts and the legal reasoning as to the estate's position on items which could be includable as transfers during his lifetime.

We are going back to Ed Phillips now on contribution problems relating to jointly held property.

**Reporting Contribution to Jointly-Owned Property  
by Surviving Joint Tenant**

**Edward E. Phillips**

The first thing I should mention regarding jointly owned property is that this particular schedule of the return should include all jointly held property. There are some misconceptions that as long as there is real estate it should be shown under the real estate schedule, but actually if it is held in joint tenancy it should be reported under the jointly held schedule.

The Revenue Code requires the inclusion of all jointly held property in the estate, unless the estate can show that the surviving joint owner furnished consideration for its acquisition.

In preparation of the return a description of all of the jointly held property should be set out under Schedule "E." Even though it may be contended that a portion of this property is not includable in the decedent's estate, due to contribution by the survivor, the description still should be included along with the value of the property itself. Only the amount which is actually considered includable, however, should be placed under the extension to the valuation columns.

The question of contribution actually is a factual determination, although there may be some rather knotty problems of interpretation in the code. Most cases are resolved strictly on the factual basis. If it is contended that the property was acquired by gift, devise, bequest, or inheritance by the decedent and the survivor, considerable time and effort may be saved if, under the description, you set out the circumstances, giving the location of the estate, who the parties were that the decedent and the survivor receive these interests from, or if it was a gift, who the donor was. An inclusion of this information may expedite the action on the return.

Those are relatively simple cases to resolve, though the more complicated ones are those in which there is a contention made that a portion of the contribution came from the survivor, and only by a very careful analysis of the facts can we make a decision as to whether a contribution did come from the survivor. It is not sufficient to show that the survivor had funds from which a contribution

*could* have been made; but were contributions *actually* made? It may be that the funds that this survivor had were used to acquire some other individually owned property, may have been used to pay some other expenses or were subjects of gifts. Were these funds actually used to acquire this survivorship property?

Also it is very important to determine whether any portion of the funds originated with the decedent. Possibly he may have made a gift in prior years to the survivor, and then that particular portion might be claimed as a contribution, and that would not be an allowable contribution. There may be copies of checks written by the wife in acquiring the jointly owned property, but does that necessarily mean that the funds in back of these checks came to her? She may be writing checks on a joint account, all of which were contributed by the decedent.

I am not going to discuss some of the complications of the law and the types of property interests because some of them do get a little bit "hairy," but I want to point out, as we said, in each case the importance of getting all available facts *early*. Frequently in these contribution cases the facts are very difficult to secure. As long as the husband and wife are getting along in good fashion, frequently they have kept no records. Each one of them may have individual properties, but as long as they are trusting each other they have kept very few records. But this should not prevent you from trying to find out what the facts are to see if the survivor actually did make a contribution. The careful digging into these facts may be the making of your case. You may be assured, though, that in most cases a mere unsupported statement that the survivor furnished consideration will be challenged.

### Schedule "D"—Life Insurance

#### John Gradwohl

Schedule "D" requires full information on all life insurance on the life of the decedent, whether or not the decedent was the owner of the policy to be disclosed. The basic tax statute, Section 2042, includes any life insurance payable to the executor or administrator or any life insurance in which the decedent possessed *any* of the incidents of ownership at the time of his death. This all relates to life insurance on the life of the decedent. Life insurance which the decedent owned on someone else's life would be includable under Schedule "F," Miscellaneous Property.

The rules for completing the Schedule "D" are set out in Section 8.43 of the *Probate Manual*. There are sample filled-in copies of the

Schedule "D" and of the Form 712, which Harold Rock talked about yesterday, which need to be secured from each insurance company as to each policy of life insurance. The Schedule "D" is very easy to fill out from the information contained on the Form 712s. Note that the recent federal estate tax return Schedule "D" and the recent Form 712s require everything to be listed in the Schedule "D." Previously you had to put part in the Schedule "D" and part in Schedule "F," Miscellaneous Property, for some things like post mortem dividends.

The real reason for setting something out in this portion of the panel with reference to life insurance is to give you a word of warning about what is likely to happen on the audit today in cases in which you have life insurance on the life of the decedent owned by someone else. The sample return, Item 2 of Schedule "D" in Section 1.138, sets out an item of life insurance owned by someone other than the decedent, in which it is claimed in that return the decedent possessed none of the incidents of ownership. But the present Internal Revenue Service procedure is to examine, I think in each case, at least in this district, the face of the policy itself, as well as all of the surrounding circumstances to see whether the decedent did possess any of the incidents of ownership in the insurance at the time of his death. Remember, the statute does not require that the decedent be the owner, or that he have *substantial* incidents of ownership. The statutory language, itself, is merely that the decedent possess *any* of the incidents of ownership in the policy.

Here is the type of case which the Service is turning up on audit—and, so far, winning if litigation ensues. Three cases have come down since June of 1968. In *Kearns v. United States*, 339 F.2d 226 (Ct. Claims 1968), the United States Court of Claims included in decedent's gross estate insurance on his life owned by a corporation. The policy contained language that the "insured" could change beneficiaries, exercise the conversion privilege, surrender the policy, etc. The corporation properly was the owner of the policy, charged its purchase to surplus, and might have been able to exercise all of the rights of ownership over the decedent's objection. But following a First Circuit decision in 1966, *United States v. Rhode Island Hospital Trust Co.*, 355 F.2d 7 (1st Cir. 1966), the court gave effect to what it terms the "policy facts" as distinguished from the "intent facts" and the policy said the "insured" had rights which were incidents of ownership. In *Prichard v. United States*, 397 F.2d 60 (5th Cir. 1968), the Fifth Circuit included in decedent's gross estate life insurance on his life owned by his wife where the wife had pledged the insurance as collateral on the decedent's bank loan.

The use of the life insurance as collateral was an incident of ownership which rendered the insurance includable in decedent's federal estate tax gross estate. This was so even though the insurance was not primarily, but only secondarily, responsible, and even though the decedent's estate did in fact pay off the indebtedness and the proceeds were in fact payable to the wife. In *Estate of Harry R. Fruehauf*, 50 T.C. No. 93 (1968), the Tax Court recently held that the decedent's potential powers as a co-trustee of his wife's trust were incidents of ownership of life insurance on his life which had been owned by his wife. The wife had died 14 months before the husband. The fact that the trust had never been established and that, even so, the decedent could act only as a co-fiduciary, did not eliminate the incidents of ownership for tax purposes. As the United States Supreme Court had decided in the flight accident insurance case when the decedent was 40,000 feet over the ocean on his way to Venezuela, it is the *existence* of the incident of ownership and not the ability to exercise it which renders the insurance includable in decedent's estate. *Commissioner v. Estate of Noel*, 380 U.S. 678, 85 S.Ct. 1238, 14 L.Ed.2d 159 (1965).

These recent cases—and there have been others over the last few years—are given as illustrations of what may turn up during an audit of insurance on decedent's life owned by another person or corporation. They should serve as warnings to estate planners to protect against unintended incidents of ownership in the decedent, and should also serve as a warning to check all of the policy facts and operative circumstances before filling out the Schedule D.

We are going to shift next to Bruce Anderson on the procedure in unagreed cases.

### Unagreed Cases

#### Bruce F. Anderson

Occasionally the agent representing the Internal Revenue Service will not see the estate's position in exactly the same light as the estate does, and, at least at the audit level the case falls into the unagreed category. The agent prepares his report, which sets out the position of the Service. A copy of the report is furnished the estate, and following review the taxpayer will receive a 30-day letter. The 30-day letter will offer one of three alternative procedures, depending upon the situation.

(1) If the proposed deficiency does not exceed \$2,500, the taxpayer may request an informal "district conference" without the necessity of filing a written protest, although a written statement outlining the facts, law, or arguments may be submitted.

(2) If the proposed deficiency exceeds \$2,500, the taxpayer, on request, will be granted a district conference provided a written protest is filed setting forth the facts, law, and arguments, upon which the taxpayer relies. Alternatively, the taxpayer's written protest can request a conference directly with the appellate division.

(3) Likewise, if the proposed deficiency exceeds \$2,500, and the issues are such that there appears, in the opinion of the Service, to be little possibility of disposing of them at a district conference, the taxpayer will be encouraged to bypass the district conference in favor of a prompt conference with the regional appellate division.

If the auditing agent and the attorney have not arrived at an agreed case and if the district conference has been refused or does not result in a satisfactory settlement, the taxpayer may request a conference with the appellate division of the regional commissioner's office.

However, if the attorney and the personal representative decide not to enter into a conference with the appellate division, the following three alternatives are available:

(1) If the amount of the deficiency does not merit further legal expense, the representative may execute the waiver which will accompany the 30-day letter, or

(2) The representative may pay the deficiency with or without signing the waiver, then file a claim for refund and bring an action in the district court or the court of claims for the refund claimed, or

(3) The representative may wait for receipt of a 90-day letter and then proceed directly to the tax court.

It is generally to the taxpayer's advantage to file a protest and enter into a conference with a representative of the appellate division, as opposed to going directly to court, since the appellate division conferees are well-versed on tax matters and often settle negotiable items such as valuation and contribution.

If the appellate division hearing does not result in an adjustment, or if no protest was filed to the 30-day letter, a 90-day letter will be received advising the personal representative that a deficiency has been determined. Again, the estate has the alternative, within 90 days of the date of the Service's letter, of signing the waiver and paying the tax; refusing to pay the tax and appealing to the tax court; or paying the tax, filing a claim for refund and bringing an action for refund in the district court or court of claims.



We are running a little short of time so we will move along to Ed Phillips, who is going to talk about Form 3229, which is set out at 8.140 of your *Manual*, and I understand the Internal Revenue Service has, at least up until today, been reluctant to furnish this form.

### **Credit for Tax on Prior Transfers (Form 3229)**

**Edward E. Phillips**

This credit for tax on prior transfers is probably the cause of more head scratching among people generally in preparing these returns than almost any other section.

The Internal Revenue Code allows a decedent's estate credit for estate tax paid by the estate of a prior decedent on property interest transferred to the decedent, if that transferor died within ten years *prior* or two years *after* the transferee. It is most important in determining this to find out whether there was an estate tax paid in the prior estate actually on the property passing to the present decedent. It is not necessary to trace the property from the first estate to the second estate, as it was under the old '39 Code, but it is important that there was a tax paid on property passing to this decedent.

The actual computation of the credit appears quite complicated, but this form that Bruce mentioned here I think may help quite a little bit in the computation aspects of it. However, we seem to have more trouble in our office with the factual determinations than we do with the technical computations because people do not determine the amount properly which passed from the first estate to the second. It is necessary to analyze carefully the first estate to see not only the probate assets that passed to the second or to the present decedent, but also any insurance items, any jointly owned property, transfers, or any assets which pass outside of the administered estate. The extent to which the decedent was required to pay any obligations or taxes also must be checked, since only the amount of this taxed property actually received by the decedent is allowed.

It is frequently not recognized that credit may be allowable for the actuarial value of a life estate in property received from the first estate, particularly by a surviving spouse. The first decedent, being the husband, may have left a life estate to his wife. In computing the prior tax credit, the value of that life estate is considered. It is frequently overlooked because people pay more attention to the marital deduction feature, and since this life estate does not

qualify for the marital deduction, no more emphasis is given to the item, but it is property which was taxed in the first estate and going to the second.

After determining the property that was received by the decedent from the prior estate, this Form 3229 does help to simplify the mathematical computation. Page one of this form sets out the computation of tax which is attributable to the property this decedent received and the tax that was paid in the first estate. The second page of the form is a computation relative to the tax in the present decedent's estate, which is attributable to this property which was received. The lesser of the two taxes is the basis for the credit, which of course is then reduced to the extent of the time lag between the death of the first decedent and the second.

But after all your computations are done, it is most frustrating to have an answer and then to find out that the facts were wrong to begin with, that the decedent did not receive the property that you thought from the first estate.

Now Flavel will get into another quite complicated affair on apportionment.

### **Apportionment of Estate Taxes**

#### **Flavel A. Wright**

This will take only a few minutes because I am not going into it in detail, but assuming you have done everything you should do, you have got all the facts, you have put them down properly, and you've got everything in order, you end up with an estate tax that has to be paid and the question arises, "Where is the money coming from?"

The primary obligation to pay the tax is on the executor or personal representative, but where the ultimate impact of the tax falls may depend on a number of things. It probably should be provided in the will, and if the will so provides this may solve the problem. If it isn't provided in the will, then you have to look at the Nebraska Apportionment Act, which apportions it to the beneficiaries who receive the property which contributes to the tax, and you have to look at the Internal Revenue Code with reference to life insurance and the powers of appointment.

If you find that the impact of the tax is on the residue of the estate, or even if it is on property which is controlled by the executor, you don't have a real problem because it is a matter of

calculating what the share of the tax is and retaining that amount of money or getting it from the beneficiary before you let go of what you've got in the estate.

The real problem arises where you have a situation where the executor doesn't have control of the property. Life insurance beneficiaries may get their money directly from the insurance company. There is a tendency in these times to set up building and loan accounts in the name of John Doe as trustee for Mary Roe, and John Doe has got complete control of it but on his death Mary Roe is interpreted as being entitled to that account. This is particularly bad in states like California where the financial organizations have got some pretty good laws passed to protect them, and immediately after death of the decedent he may have a \$100,000 of building and loan accounts out in California which are payable to these various beneficiaries under these trusts. The executor in Nebraska has got the responsibility of seeing that that money is collected and set aside for the federal estate taxes. So this is an area where the executor and his attorney have got to act promptly, and you've got to be sure that you get control of enough money to take care of that beneficiary's share of the federal estate tax.

There are ways it can be done. Usually the beneficiary on these building and loan accounts doesn't have the passbook, he may not even know the account is there. You may be able to go out and get an agreement with him which you can deliver to the building and loan people setting aside a certain portion of that account, either in escrow or subject to the control of the executor. But the point involved is that it must be done, and must be done promptly, otherwise the executor maybe would be subject to having his account surcharged if the beneficiary has received the money, spent it, and is not then available for payment of these estate taxes some 15 months after the date of death.

I think that closes the presentation this morning.

## FRIDAY AFTERNOON SESSION

**November 8, 1968**

The third session of the Institute on Nebraska Probate Practice was called to order at one-fifty o'clock by Chairman Deryl F. Hamann of Omaha.

CHAIRMAN HAMANN: Gentlemen, let's be getting started with the afternoon session of our Institute on Probate Practice.

I might say that they have more of the *Manuals* out at the desk now and they will have an ample supply delivered during the afternoon. I think we will have enough for everyone here. If they should run out, leave your name and address and they will be mailed.

Also Chapter 7 will be mailed as soon as it is in final shape. I am sure you all left your name and address out there when you purchased the *Manual*. If you didn't be sure to stop by and leave your name and address so that can be sent out to you.

The *Manual*, as you know, is on Nebraska probate, our discussions have been on Nebraska probate.

One of the things that we talked about when we first decided to set this up was the existence of a committee setting up the model probate code and whether we should wait for that. After thinking on it, we concluded that we would not, that we would go ahead and prepare the handbook on the basis of Nebraska law. We should, however, be aware of the existence of a model probate code, which is under very serious consideration at the present time.

The gentleman who is going to be our first speaker this afternoon will tell us about that. I am not going to give long introductions for the remainder of the speakers. I do want to cover this man's qualifications in a little more detail.

Fred Hanson is a graduate of the University of Nebraska, cum laude. He has been a probate judge for 12 years. He has been on the National Conference of Uniform State Law since 1937. He is the gentleman who prepared the short forms of notice that now appear in our Nebraska Supreme Court Rules. He has been vice-chairman of the Real Estate, Probate and Trust Section and director of the Probate Division of the American Bar. He was chairman of the Committee on Acts Pertaining to Administration of Estates, 1949 to 1954, and a member of the Committee on the Uniform Probate Code since 1962.

## THE UNIFORM PROBATE CODE

Fred T. Hanson

First I want to register a correction of my announced subject. It is the "Uniform Probate Code," not the "Model Probate Code." The *Model Probate Code*, which was its predecessor, was drafted not by the National Conference of Commissioners on Uniform Laws, but by the Real Property, Probate and Trust Section of the American Bar Association. It resulted from a motion made by the late

R. G. Patten in the session of the Probate Division of the ABA in Philadelphia in 1940. This project was carried out largely by Professor Lewis M. Simes of Michigan Law School, who, by the way, is a native of Winfield in our neighboring state of Kansas. He was assisted by Paul Basye of Burlingame, California, who has been very prominent in the Real Property, Probate and Trust Section, was I think a director of the Probate Division and also chairman of the section in the past. He was, if you remember, a few years ago a guest of the Probate Section of our Association here. He is one of the so-called reporters, that is, the draftsmen that are working on the uniform probate code with the Commission on Uniform State Laws.

The *Model Probate Code*, if you are interested in that, is annotated, with a monograph by each of the two men who have produced it, and was published in a volume of the *Michigan Legal Studies Series* in 1946.

The Uniform Probate Code is another step, a forward step from that, we hope.

The Executive Committee of the National Conference of Commissioners on Uniform State Laws created the Committee on the Uniform Probate Code in 1962.

The committee at present is headed by two co-chairmen, Tom Martin Davis of Houston, Texas, and Charles Horowitz of Seattle, Washington. This is very appropriate, because one of the major changes that is introduced in the *Model Probate Code* is the independent administration, and it is appropriate that these men should be chairmen of the committee because they are familiar with the independent executorships in those two states, which I understand are used in the settlement of a great majority of the probate cases in those states.

Working with us is a corps of eleven reporters who are professors from various law schools, and they are headed by Richard V. Wellman of Michigan. They are the draftsmen.

The American Bar Association Section of Real Property, Probate and Trust Law, the ABA Advisory Committee on Uniform Probate Code, and the American Bankers Association Liaison Committee have cooperated in this project.

It is with considerable humility that I undertake to present this thing. My humility was enhanced somewhat by the fact that the people who were arranging this committee were going to get Professor Wellman to present this but then they were afraid that

he might steal the show from their other distinguished guest, Mr. Wormser, who was on the program this morning. So they made *sure* that nobody was going to steal any show. I am the insurance that that is not going to happen. I think it is unfortunate that we don't have Professor Wellman here because he has been steeped in this thing for six years, much more than any member of the committee has been, because these reporters have met a number of times in the summertime for two, three, or six weeks, and have done nothing on those occasions except to work on this uniform probate code.

You can see that I can't cover this very thoroughly. That is the present draft; it's the fourth tentative draft. I think there are 381 pages, 25 of them introductory material. There are a few notes, but most of that is the code itself. So this is not a short horse that could be soon curried, even if you do what I *have* to do, and that is to give your attention only to the spots that seem to be a little shaggy or soiled. Well, it does seem to me that there isn't anybody else in this whole audience who was raised on a farm, as I was, when the tractor was a *horse*, or you would know what I am talking about.

The code was conceived as a broader project than the usual probate code. It covers also such matters as charge accounts and trusts of the type used in estate planning. The word "probate," which originally meant only the proving of a will, has in the past been stretched to cover the whole field of administration of decedent's estates, testate or intestate, and is about to be stretched again to cover these other devices belonging to the general field of devolution of property upon the death of the owner, such as joint accounts, joint tenancy, and inter vivos trusts. Perhaps we will be able to hit upon a term that is more literally descriptive than "probate" without being too long. Except for that, the code has the usual complement of provisions that go to make up a probate code.

Article I deals with probate courts and their organization. The contemplated court would have a general original jurisdiction in its field. This jurisdiction would be exclusive in traditional probate areas and concurrent with the court of general original jurisdiction in all cases in which the personal representative or a trustee is a party. That is to say, controversies with third parties, regardless of the amount involved, jurisdiction of those trusts which are typically used in estate planning, and the jurisdiction of the court in those trusts would be exclusive as to those matters in trusts which now a person who deems himself aggrieved can take it to the district court, and as to other matters, controversies between the

trustees and third persons, it would have general jurisdiction, original jurisdiction without any limitation of amount. This court would perhaps more appropriately be called an "estates court."

We pass this for the present but will come to it after we have glanced at the high points of what the probate code does.

Article II deals generally with the substantive law of intestacy, wills, family relations, effective adoption, marriage and divorce, and the like, for succession purposes. Protection from disinheritance of the spouse and family protection, such as homestead, exempt property, and family allowances, are provided. There are rules governing the execution, revocation, and interpretation of wills. Renunciation of testate and intestate succession is permitted in general accord with the recommendation of a Special Committee on Disclaimer Legislation. The renounced share passes as if the renouncing heir or devisee had failed to survive the testator. This is a devise that will be deemed to be useful when the person to whom a share or a devise comes already has quite a large estate and doesn't want it to be increased.

The provisions concerning intestate succession deserve attention in Nebraska where our Statute of Dissent splits the smallest estate between the surviving spouse and the children who may be minors, whose share must therefore be tied up in the red tape of a guardianship. In this respect our legislation goes back to the King Decedent Law of 1907. That is quite an old law. Anything that lacks only five years of being as old as I am is practically past the days of its usefulness.

Surveys have been made to ascertain what kind of wills married people usually make when they do make wills. It was found that in the case of the small estate they generally leave it all to the surviving spouse. Accordingly, this is what is done by the Uniform Probate Code, which provides that the first \$50,000 in value of the net estate goes to the surviving spouse. The spouse also gets half of the excess if there are children or parents of the deceased surviving. The children, if any, or the parents get the other half. But if there are neither children nor parents, the surviving spouse takes the whole estate. There was some thought at the beginning of making a distinction in the case of spouses who had been married to the deceased only a short time—the Peaches and Daddy Browning type of situation—if anybody here is old enough to remember that. So they were struggling with the terminology and they were talking about the *preferred* spouse. Then they stopped to think how mad those spouses were going to be that weren't preferred, so they "chickened out" and decided not to make any distinctions. In our

meeting at New Orleans last weekend an attempt was made to bring a small part of this back, but the chickens were in the majority.

The treatment of the survivor's election is also noteworthy. It reflects the broadened scope of the Uniform Probate Code. All transfers with retained life estates, or in joint tenancy, or subject to a power to consume, or gifts to any person within two years of death, to the extent of the excess over \$3,000 to any person in any one of the two years, are added to the probate estate, whether they are gifts to the wife or to others. This is termed the "augmented net estate." The survivor's election, then, is to take one-third of the augmented net estate, and if that be less than the survivor has already received out of the augmented net estate by way of joint ownership or what have you, then nothing is taken by the election.

This provision accomplishes two things: It prevents transfer in fraud of the rights of the spouse; and, secondly, it prevents the survivor who has already received a fair share, or perhaps more than a fair share, of the estate from taking anything by the election.

I passed Article III, which deals with procedure. It adopts the practice that has long been followed in Oregon and Texas of permitting independent executorship and extends that principle to intestate administrations. This is accomplished by a system of informal proceedings, conducted without notice before a non-judicial officer called a "registrar" who may be, and typically would be the clerk of the court having jurisdiction under the code. Under this system an estate might be administered and settled by lapse of the three-year limitation period without having involved the judge at all. The will may be probated, letters issued, or the administrator appointed without contact with the judge. These, of course, are orders not on notice and therefor are not binding if other action is taken under the code.

Perhaps you think this is a rather shocking idea and you'll probably think other portions of this proposed code are shocking. Well, I felt that way too when I was first introduced to them, but I suppose six years of brainwashing is bound to have its effect. But they are not so shocking when you get used to the idea. It is rather like what our statutes *invite* us to do now. We have some fist-shaking sections about what happens to those who don't deliver the will to the executor within 30 days after learning of the death, or executors who have failed to deliver the will into court within 30 days. But on the other hand, we have statutes that have been engrafted on our 1907 Decedent's Law which provide that you can, after two years, have a will probated or have a determination of heirship to take care of the real estate. That is, of course, an



implied invitation to the parties to do what they do. They wait two years to save some money so they can take care of the real estate by these proceedings, and in the meantime they manage unofficially, and without any kind of a proceeding even before a non-judicial officer, to dispose of the personal property, and that is the end of it. In many instances estates involving no real estate have been settled in this manner. The Uniform Code makes it possible to have an official administration without resort to any public official except the administrative registrar or clerk.

On the other hand, any person can have a judicially supervised administration at any stage of the proceeding, before it is all settled by lapse of time, simply by petitioning for it. This may be done at any stage before the lapse of the final statutory period. This opens everything that has been done in the informal proceedings to judicial scrutiny. If the will has been probated informally, the person who, in his petition, is asking for the supervised administration can ask that they issue "a will" or a "no will" also be determined. And then a due process type of notice is given and from there on the case proceeds much as our cases do now.

Presumably these informal methods would be used rather sparingly at first in states that have always been accustomed to judicially supervised administrations exclusively. The highly satisfactory experience with similar procedures in Oregon, Texas, Pennsylvania, and I believe in New York would suggest that the use of these informal proceedings would increase in popularity. It remains true that at any stage in the informal proceeding the executor or administrator can apply to the court on any matter where he wants finality without waiting for the statutory period. He could make a petition to the court, he can give a due process type of notice, and then the matter which he presents to the court will be settled as soon as the comparatively short appeal period has gone by.

There was some talk in New Orleans this last weekend that it should be made clear that the supervised type of administration is an in rem proceeding. Your friend, Paul Basye, made a presentation on that subject and as of now it has been determined to word that portion of the code in such a way as to make it clear that it contemplates an in rem proceeding.

There is one thing about the California procedure that was interesting to me. They have this in rem theory, once you have filed the initial petition and given the notice, the matter is then before the court, and no notices are required to be given to anybody at any subsequent stage of the proceedings unless they have filed

a request to have notices given to them. I was surprised to learn from Mr. Basye that it is rather rare that anybody files such a request in their probate cases out in California.

I remember that before we started this, Deryl made the remark to me, "Are you going to make all of these things that we have been talking about this morning obsolete?" This is not true. They are not going to be obsolete because this supervised administration proceeding is to be very much like what we've got now. It won't make any great change. Anyhow, I don't think we ought to be too much afraid of statutory changes. That may be placing too much emphasis on statutes. I will never forget what the late Charles Augustus Robbins said to his freshman class 47 years ago. He said, "Gentlemen, don't make your legal training consist in memorizing the statutes, because if you do that the next legislature may repeal your education."

This morning I listened to Judge McCown talking about the stare decisis alive or dead, and the new type of decisions which are effective after a certain date, and so I am not so sure whether, if you memorize the *common* law, your education may not be repealed by the Supreme Court the next time it sits.

Article III also deals with the appointment of personal representatives. In formal proceedings a bond may or may not be required by the order of the court. You note again the similarity to inter vivos trustees. Of course, if the will or the trust instrument makes some provision on that matter, it would be followed. It might be a little hard to tell what the effect of some of those provisions would be. For instance, there's one my son was telling me about.

A man who made a will said, "I want that Adolph should be my administrator, but I want that the court should see that he has plenty bond put up, and watch him like hell."

With that kind of a case I don't know what the court would do. It has an admirable clarity of expression. I wish at the Conference of Commissioners on Uniform Laws and in our legislature we were always able to express ourselves so well.

Article III, Part 4, covers the duties and powers of personal representatives. Except in supervised administrations, the personal representative is to proceed expeditiously with the settlement of the estate without orders of court, except on issues where he chooses to seek orders, as I mentioned a while ago. He has a duty to prepare an inventory within three months. He has a duty to publish a notice to creditors, and that bars claims at the end of

four months. These things are not filed in the court. He does those. He keeps his own records so that he is prepared to clear his skirts if any question arises. Now, this is an important thing and I have expressed it in one sentence: He has the same power over property of the estate as an absolute owner of property has over his own. This is quite a departure from the idea that Mr. Brown was talking about yesterday where it is really the probate court that administers the estate and the personal representative is just sort of an agent. Here under the Uniform Probate Code he is independent. He has power to do things with the property, even though they may be wrong, even though they may be contrary to directions in the will. Any breach of duty in that respect will subject him to liability, but all persons dealing with him without actual knowledge that he is improperly exercising his power are protected.

However, the court-appointed representative may have restrictions on his power endorsed on his letters, and if that is the case, everybody who deals with him will be bound by those restrictions which are shown in his letters.

It seems to me that throughout the Uniform Probate Code, and particularly here, we have something of the atmosphere of the Uniform Commercial Code, especially where it comes to the protection of third persons dealing with the personal representative.

Here also the desire is to make the personal representative like a trustee in regard to third persons so that they may deal with him freely, without risk, as long as they act in good faith and without knowledge that anything is wrong. The sanctions are that the personal representative incurs personal liability for a wrong action, and he may be removed because of it. Actually where this method is used, experience shows that trouble is so rare as to be balanced by the desirability of free dealing.

We have an indication in our statutes that was mentioned by one of the speakers yesterday of a relaxation of rules that is in line with this. I have reference to the relaxing of the restrictions on trust investments that was enacted in 1965.

Notice to creditors is to be published, in which event claims are barred within four months. This is much like our three-month period. If notice is not given, claims are barred within three years after death. Claims may be presented to the personal representative, filed in court, or suit may be brought against the representative on them.

If distribution is made in informal proceedings, the distributees are liable for what they have received in excess of what they

*should* have received if the distribution turns out to be wrong. But innocent purchasers for value from the distributees are protected.

We have some provisions about foreign personal representatives and ancillary administration that I think should be mentioned. This article gives wide powers to foreign personal representatives appointed in the enacting state to act in other states, and reciprocally gives foreign-appointed personal representatives corresponding powers in this state. The effort and the thrust in these provisions is to reduce the need for ancillary administration as much as possible. It provides for jurisdiction over the methods of service of process upon foreign representatives.

Article V deals with the protection of disadvantaged persons. The term "guardian" is reserved for guardians of the person, but they also have limited authority to receive and handle some money where there is no guardian of the estate or "conservator," as it is called in the Uniform Probate Code. So the term "conservator" is applied to what was formerly known as "guardian of the estate" of the minor or disadvantaged person. If guardianship and conservatorship proceedings are pending in the same court in regard to the same person, they may be consolidated, and we have what we have now in most guardianships.

Money or property not exceeding \$5,000 per year may be paid to a minor over 18 or to a financial institution for federally insured deposits, provided no conservatorship is pending. The court may require a bond, not "must," and if it is required it should be in the amount of the capital value of the estate plus one year's income. The surety by executing the bond consents to jurisdiction of the court after simple notice by ordinary mail to an address which he has furnished.

There is provision for powers of attorney, which can be expressly written so that they become effective on disability of the grantor occurring, or so that they do not terminate when disability supervenes. This would solve many problems in the area where we now need to have a conservator appointed under our statute.

Article VI relates to non-probate transfers, and Part One deals with multiple party accounts. Presumptions as to ownership having no bearing on the right of withdrawal are set up. Each co-owner is presumed to own in proportion to his contributions, and in the absence of proof they are presumed to own equally. Death has no effect on beneficial ownership except to transfer the decedent's share to his estate, unless the account is joint or a survivorship account, and survivorship is presumed unless the contrary is expressed.

A survivorship account is not effective against an insolvent estate to transfer funds needed for debts, taxes, expenses of administration, and family allowances. All of this has no effect on the right of the financial institution to pay in accordance with the terms of the deposit or other accounts. This, I think, is a very salutary provision that brings the joint property easily within the control of the probate court if it is needed.

As presently drafted, the Uniform Probate Code calls for the registration of trusts, not by filing a copy of the declaration or other documents, but merely giving certain identifying information; that is, information that identifies the trust at the principal place where the trust is to be administered. This does not, of course, apply to any but the types of trusts used in estate planning. It expressly excludes business trusts, common trust funds, constructive trusts, escrows, investment trusts, resulting trusts, security arrangements, trusts to pay debts, dividends, profits, pensions, salaries, and so on, and voting trusts.

This registration is a matter of information only. It does not subject the trust to judicial supervision. Testamentary trusts are relieved of supervision and placed in the same category as *inter vivos* trusts; that is, any person who deems himself aggrieved at any point in the administration of the trust can bring it to court, and under the *Model Probate Code* the court that he brings it to is the estates court, which is contemplated by this code, but the probate court is given exclusive jurisdiction of this type of proceeding where the internal management of the trust or the estate is involved.

The estates court also has concurrent jurisdiction with other courts in regard to controversies between trustees and third parties, regardless of the dollar amounts involved. This is what I mentioned a while ago. The duties and liabilities of trustees are set out. Their powers are covered by the optional incorporation, in substance, of the Uniform Trustees' Powers Act for those states which do not have the latter act already on their statute books.

Pervading the entire act is the tendency to assimilate the position of the personal representative to that of a trustee so that the representative encounters no court supervision or direction unless the interested parties take him to court.

Much of this may seem strong medicine to us. It would require constitutional as well as statutory changes to create a court such as the code sets up in Article I, having jurisdiction of title to real estate and controversies between third parties and the personal representative regardless of amount.

I might say that there are two possibilities for the organization of a court to meet the requirements of this statute. The *Model Code*, however, provides a separate estates court and I think that is the preferable method. However, in many states now the probate jurisdiction is vested in the court of general original jurisdiction, and in those states it would probably remain that way.

It has always seemed a little incongruous to me to have a court not able enough to be trusted with real estate titles or controversies involving more than \$1,000, yet having unlimited jurisdiction over the devolution of *all* the property in the community about once in each generation. It doesn't seem logical.

Most of our probate statutes in this state go back to the King's Decedent Law of 1907. Some of them go back even further than that. True, there have been patches put on it, reduction of the length of time for creditors to file their claims, that is, the minimum time, to three months in 1917; and short form proceedings that I have mentioned before were added in 1921. In 1931 testamentary trusts were brought into the jurisdiction of the probate court for supervised judicial administration. As I have mentioned, under the *Model Probate Code* they would not be subject to continuous judicial administration but would be like other trusts in that respect.

Even though updating the probate law in Nebraska by adopting a law such as this, establishing a court such as this would require constitutional as well as statutory changes. It seems to me that it is high time for action.

The Uniform Probate Code, I believe, represents the wave of the future in this field of probate administration.

CHAIRMAN HAMANN: Thank you very much, Mr. Hanson. I am sure Mr. Wormser must look to his laurels now.

We are going to move along now with the program. Our next speaker needs no introduction, so I'll just ask for Jack North.

#### **ADMINISTRATION PROBLEMS CONCERNING NEBRASKA PROPERTY TAXES**

**John E. North**

Seldom do you have an opportunity to talk about the taxes we don't have any longer, but that is really the subject of the brief discussion this afternoon on property taxes.

The one thing that we should call to mind in connection with the probate of an estate is that personal effects, household furnish-

ings, etc., are no longer subject to personal property tax. In addition, intangibles are no longer subject to personal property tax. Consequently, the only property taxes which are troublesome in connection with the probate of an estate will be real estate taxes, and these are ordinarily not troublesome because they are usually assessed and collected quite promptly. So what is left is simply the tangible tax on business property.

Whenever you have an area that is so reduced, your natural inclination is to think, "Well, there can't be any difficulty here"; but I suggest that it is kind of like the porcupines making love—you have to do it very carefully.

In connection with your programming of your property taxes I think you will still want to do it very carefully, and I'll tell you why.

We are in a transitional period. We have a statute which provides in the event of death the assessor can not only collect the property taxes that are due in the year of death but the assessor can go back three years preceding the year of death and can assess the taxes that would have been due at that time. Consequently, if a man dies in 1968, intangible personal property taxes can be assessed for the years 1965, 1966, and 1967. This will pose a little bit of a problem for you, but I've got some good news.

The statute provides that not only can the tax be assessed and interest collected on the tax, but in addition to that a 50 per cent penalty can be assessed. As you recall, the original penalty tax statute was held unconstitutional. A new one was passed in 1967, and cannot be retroactively applied, so that when the decedent's representative comes into your office you have a wonderful opportunity. You could read the statute and advise him that not only is the tax due and payable, but interest is due and payable, and a penalty of 50 per cent is due and payable. The reason I say it is a wonderful opportunity is that you will take the penalty portion on a 50 per cent contingent fee commission and by doing that you will probably become rich, because if you talk to the Douglas County Assessor you will find that they are not presently assessing *any* penalties for any back taxes on personal property that was not reported.

I should mention just one other point in connection with property taxes. Something that always catches me a little bit by surprise is the fact that, for federal estate tax purposes, property taxes which have not accrued prior to the date of death are not deductible as an administration expense. That means that if you want to deduct

personal property taxes on the federal tax return, these taxes must have accrued prior to the date of death. Any taxes that accrue after the date of death are deductible only for federal income tax purposes.

Now in this connection I call your attention to the fact that deductions for federal estate tax purposes are not dependent upon when the amount is paid, but deductions for federal income tax purposes are *very* dependent upon when the amount is paid. So if you want to deduct for income tax purposes property taxes that accrue after the date of death, you should be sure that those taxes are paid in the year in which you want to take the deduction.

CHAIRMAN HAMANN: Our next speaker is probably the man most responsible for getting this handbook out in final form. He did all of the technical work of numbering the chapters, the section numbers, and the liaison with the printer. John Zeilinger is a Nebraska native, a graduate of the University of Nebraska and N.Y.U. Law School. He practices law in Omaha, Nebraska.

## NEBRASKA INHERITANCE TAX

John S. Zeilinger

Inheritance tax is imposed upon the right of succession to property of a decedent. It is not imposed upon the property itself but upon the right of the deceased to transmit this property. The purpose of my talk is to present some of the mechanics and procedures to be followed in determining inheritance tax, rather than to discuss in detail such matters as the rates of tax, exemptions, and the types of transfers subject to the tax. These items have been ably covered by Professor Birmingham in the first part of Chapter 9 of the *Estate Administration Handbook*.

Suffice it to say that the rates and exemptions fall into three categories, depending upon the proximity of the recipient's relationship to the deceased. In turn, the tax is imposed upon three general types of transfers:

1. All property which is subject to probate;
2. All property received by a surviving joint tenant, except to the extent that the tenant contributed consideration in money or property;
3. Certain lifetime transfers, such as gifts in contemplation of death, transfers intended to take effect in possession or enjoyment after the transferor's death, such as a retained life estate in the



grantor decedent, and property received by reason of decedent's death whereby the recipient becomes beneficially entitled in possession or enjoyment to any property or income thereof.

I might point out that life insurance payable to a named beneficiary is not subject to the tax, and that a decedent donee's exercise, or failure to exercise, a power of appointment is also not subject to the tax.

With those preliminaries, let's turn then to the procedural steps for determining inheritance tax, first in an instance where probate proceedings are pending, and second, in the absence of probate.

Where an estate is being probated, proceedings for determination of an inheritance tax are customarily initiated by the personal representative, although either the county judge or the county attorney or any other person having a legal interest in the property may initiate the proceedings.

The statute permits the judge to either appoint an appraiser or to make the appraisement himself. It is the custom in Douglas County not to appoint an appraiser unless a substantial tax is involved. I will discuss first the typical procedure where no appraiser is appointed.

Many counties utilize an attorney's worksheet for computation of the tax and this is the point of beginning. First, all of the decedent's assets which were held solely in his name are listed, with their assigned value, and then totaled. Then the allowable deductions are subtracted. Although they are not specifically allowed by statute, debts of a decedent, expenses of administration, funeral expenses, are deductible since the tax is imposed upon the clear market value of the property ultimately received by the recipient. To the figure remaining on the worksheet is added the value of any additional property acquired by the surviving spouse, if there be one. Here would be listed jointly held property or United States bonds payable upon death to the surviving spouse. Now of course to the extent that the spouse had contributed consideration in money or property, these figures would be correspondingly reduced.

Also subtracted are the homestead and succession interest of the surviving spouse, if applicable.

Then any jointly-owned property acquired by right of survivorship by others, by third parties, is added.

From this total there remains one more deduction, if applicable, and that is the amount of federal estate tax properly deductible.

"Properly deductible" is the key because not necessarily all of the federal estate tax owing from the estate is properly deductible; for example, insurance proceeds. The decedent may have held sufficient incidents of ownership for federal estate tax purposes, such that the proceeds of insurance policies were includable in his gross estate and a tax paid on them. Yet if such proceeds were payable to a named beneficiary rather than to the executor, they are not subject to inheritance tax, and in such a case the amount of the federal estate tax attributable to those insurance proceeds is not properly deductible for inheritance tax purposes. And before the deduction can be computed, the amount of federal estate tax paid must be reduced by the amount of tax paid which is attributable to the inclusion of the insurance in the gross estate.

Having completed the worksheet, it is next necessary to have obtained a voluntary appearance and waiver of notice from the county attorney, and to have the county attorney sign the attorney's worksheet.

If property is situated in more than one county, it may be necessary to obtain from the county attorney of such other county, in addition to a waiver and appearance, a stipulation as to value of the property located there.

Now the attorney is ready for the hearing with the judge, and it is the practice in Douglas County to first go over the worksheet in some detail with the clerk of the court who compares the worksheet to the inventory or the application for determination previously filed in the estate. The county judge then reviews the worksheet and sets his appraisalment. In Douglas County the office of the court prepares the inheritance tax decree.

The alternative procedure is where an appraiser is appointed, and the order appointing the appraiser instructs him to give such notice to all interested parties as the judge may direct regarding the time and place of appraisalment. The appraiser is authorized, by leave of the court, to issue subpoenas and to compel attendance of witnesses before him, if need be, and to take evidence of such witnesses under oath.

The appraiser's report is subsequently filed with the court, and interested parties may file their objections thereto within five days of the filing. The judge examines the report and any objections filed with it, and he may at his discretion take further evidence. The judge then enters an order fixing the proper appraisal of the property.

I want to distinguish here between that section of the inheritance tax statute which gives the judge discretion to appoint an appraiser, Section 77-2019, and Section 30-402, which also gives the judge discretion to appoint an appraiser of the estate's inventory. As I say, these sections are permissive and not mandatory, and in both Lancaster and Douglas Counties the appraisers of inventory under 30-402 are not customarily appointed. In many counties, however, it is the practice to use the same values for inheritance tax purposes that were determined by the appraiser of the inventory, and thus the estate pays the appraiser's fee.

It might be pointed out in this connection that in Douglas County the appraiser's fee is paid by the county out of the tax collected and not by the beneficiaries or by the estate, a policy which obviates potential criticism of the appraisal system.

I should point out that if it is made to appear to the county judge, either in probate proceedings or in the independent proceedings which I will discuss next, that the estate is clearly not subject to inheritance tax, the judge may so determine and enter a finding and an order to that effect in the final decree.

In the absence of probate proceedings, proceedings for the determination of inheritance tax may be initiated in the county where the property is situated by the petition of either the county attorney there or any person having an interest in the property. Upon filing such a petition, the county judge sets a hearing thereon, not less than two nor more than four weeks after the date of filing, and notice of hearing must be given by one publication and by personal service upon the county attorney in each county where property is located.

There are two exceptions to this procedure. One is where the petition is filed by someone other than the county attorney, and if it appears to the judge that no assessment of tax could result. In such a circumstance, the judge orders the county attorney to show cause within one week why a determination should not be made that no tax is due. Upon the failure of the county attorney to so show cause, notice by publication can be dispensed with, and the petitioner is entitled to a determination that no tax is due.

The second exception to the publication and notice requirements is where the county judge determines that the county attorney in each county where property is located, and all persons against whom the inheritance tax may be assessed, have executed a waiver of notice and entered a voluntary appearance.

Let's move then to the mechanics of the preparation of the application for determination of inheritance tax and independent proceedings. The application should allege the following: That at the time of his death the decedent was not possessed of any property subject to administration in Nebraska. There should be a statement of the nature of the property owned by the decedent, whether it is jointly held property or assets of an inter vivos trust, and of course the exact nature of the assets would be described with specificity, perhaps on an attached exhibit.

A statement should be made that the decedent did not, during his lifetime, except to the extent set forth above, convey any property in trust or otherwise in contemplation of death or intended to take effect after his death.

Here I should point out that death of the decedent and funeral expenses and expenses of determination of the tax which *are* deductible in probate, are not properly deductible with regard to jointly held property. However, if the property with which we are dealing in an independent proceeding is an inter vivos trust, and if the terms of the trust require the trustee to pay the decedent's funeral and burial expenses, and further authorize the trustee to procure necessary advice and services and to pay for such services, then allegations to that effect can be made and deductions for the funeral expenses and for the attorney fees can be taken.

Of course, if a surviving spouse is entitled to a homestead interest or a succession interest, an allegation should be added to that effect so that such an interest is properly deductible before computing the tax on the share of the surviving spouse.

In my remaining time I would like to turn to one special situation which can occur under the following set of circumstances. Where there are specific bequests to a named beneficiary, where the residue is left to charity and a clause is contained in the governing instrument which states that any inheritance or succession taxes are to be paid out of the residue, in such a situation what we have is that, instead of a bequest of, say, \$20,000, the value of the bequest is in fact \$20,000 plus the inheritance tax attributable to the \$20,000, and the beneficiary has received tax free the value of the tax paid by the charity. Hence a tax is due on the tax. Since the charity has also in effect paid the tax due on the tax, you can see that we could go on ad infinitum.

In this regard I would like to cite to you a very interesting article in the March 1968 *Trusts and Estates Magazine* at page 205, which deals with the analogous problem with regard to federal

estate taxes under the same set of facts, where the charity ends up getting nothing because all the residue is used to pay the tax free bequest. As a practical solution to the inheritance tax problem, the Douglas County court figures the tax on the tax out to three decimal places; they do this three times, and then stop and assess the tax. And so must I.

CHAIRMAN HAMANN: Our next speaker will talk on a subject that we still have with us. I understand that he was behind some move to get his topic abolished, but it didn't come off. Al Garfinkle will talk about the Nebraska income tax.

### NEBRASKA INCOME TAX

Allan J. Garfinkle

Prior to last Tuesday I thought I might be in the same position as Jack North this afternoon, only with a talk with even less future than his. But now it would appear that the Nebraska income tax is going to have a long future, whether glorious or inglorious I will leave to your individual preferences. Therefore it must be discussed.

The Nebraska tax on estates applies only to estates of decedents and not to estates of incompetents. The guardian or the conservator of an estate of a minor or an incompetent would file a tax return that would be the same as a return for any other individual.

A trust taxed as a trust under the Nebraska income tax act is a trust taxed as such under the federal income tax act. Therefore a trust which would be taxed as a corporation under the federal income tax law by reason of business activity and sufficient corporate attributes would not be taxed as a trust under the Nebraska act. Furthermore, a trust, the income of which would be taxed to the grantor or some other person under the Clifford Regulations of Section 671 to 678 of the Internal Revenue Code, would be taxed to such person under the Nebraska act.

Estates and trusts which are taxed as such under the Nebraska act are taxed basically the same as individuals, with the exception of course that there is no food sales tax credit allowable.

In general, the federal rules for computing the distributable net income of an estate or of a trust and the tax of an estate or a trust are the same as those followed in Nebraska for a resident trust, with the exception of the reduction for interest on United States obligations. The same thing is true of a nonresident trust, except that the income of the nonresident trust tax for Nebraska income tax purposes is limited to income from Nebraska sources,

and the determination of whether income is from Nebraska sources is made on the same basis as the determination of whether the income of an individual is made from Nebraska sources.

The determination of whether a trust is a resident trust or a nonresident trust is made purely on the basis of the domicile of the person creating the trust. The estate of a Nebraska domiciliary is a Nebraska estate; the estate of a foreign domiciliary is a foreign estate. The same thing is true of a testamentary trust, and such a trust will always be either Nebraska or non-Nebraska, depending upon the domiciliary of the decedent, whatever the case may be with respect to the situs, the executor, the trustee, the beneficiaries, anything else. The domicile is the only factor which governs.

In the regulations there are some very broad statements made about domicile. For example, in Regulation TC25-2 it says, "It is possible for a man to be a resident of another state for the purposes of voting, paying taxes, attending schools of higher education as a resident, or exercising other privileges of a resident of that state and still be a domiciliary of Nebraska if he maintained the intention of not permanently abandoning his former home in Nebraska."

It remains to be seen whether the tax commissioner will really push for that broad concept of domicile. If he did, and if the courts went along with him all the way, it would seem to me that if a person ever had a home in Nebraska he would be a domiciliary forever so long as he maintained that home, whatever the scope of his contacts elsewhere and however little his contacts with Nebraska, other than the fact that he has a home or an apartment in the state.

The regulations, however, seem to me to provide a very broad escape hatch in the matter of the domicile of an inter vivos trust. The rule there basically is the same as that for an estate or for a testamentary trust; that is, the trust is a resident trust if the grantor is a domiciliary of Nebraska, and a nonresident trust if the grantor is not a domiciliary of Nebraska.

The statute provides simply that a resident inter vivos trust is an inter vivos trust created by or consisting of property of a person domiciled in this state. However, in the regulation it provides that a resident trust will become a nonresident trust if a contribution is made to the trust by a nonresident, and similarly a nonresident trust will become a resident trust if a contribution is made to the trust by a resident.

Taking that literal language it would appear that if a Nebraska resident created an inter vivos trust with a corpus of one million

dollars and arranged for a resident of the state with no income tax to make a further contribution of \$5.00 to that trust the next day, the trust would thereupon become a nonresident trust.

Perhaps the tax commissioner will eventually want to either expressly change this regulation or will attempt to avoid the literal language of the regulation through arguments of sham or de minimis, or something of that type in the situation that I posed, but under the literal language of the regulation that would be the case.

Since it is the case, it would also seem to me that we have another reason for very seriously considering gifts which may very well be in contemplation of death, because if there is a person who is in a position in which it would seem not likely that he will live for three years, and that therefore there will probably be no estate tax advantage for him to create an inter vivos trust, there could still be a very marked income tax advantage if he created the trust and arranged for someone in another state with no income tax to make a contribution, because then the trust would be a nonresident trust.

Of course if the corpus of the trust were such that the income from the trust would be income from Nebraska sources, such as the stock in a corporation principally doing business in Nebraska, for example, then there would really be no advantage to that because the income would be taxed in Nebraska in any event.

There is a provision for a credit to a resident trust of tax paid to another state. It is the same kind of credit that an individual gets. He gets a credit of the amount paid to another taxing jurisdiction, but not in an amount that exceeds the proportion of the tax imposed by the Nebraska act that the income from that jurisdiction bears to all of his income.

There is one adjustment which is made and which should be noted, and that is that if there is a credit to an estate or a trust or a beneficiary because of an accumulation distribution, that credit is allowed. Under the Internal Revenue Code, with certain exceptions, if income is accumulated and then in a subsequent year an amount is distributed in excess of distributable net income, the additional amount will be taxed as though it had come from the income accumulated progressively backward over the five prior years. And there is a credit, then, for the tax which the trust paid on the income which had not been distributed in those years, and the beneficiary is given that credit under the Nebraska act.

As to the taxation of beneficiaries, it really makes no difference whether the trust is a resident trust or a nonresident trust—whether

an individual in Nebraska will pay Nebraska income tax on his entire distributive share of any trust, whether it is a resident trust or a nonresident trust. A nonresident will pay tax on the distributive share of the trust, whether a resident trust or a nonresident trust, attributable to Nebraska income sources.

The regulations, I think, set forth some very easily usable methods of computation of the Nebraska tax. It is in Regulation TC25-4. Basically, all that one does is to first take the federal income tax and reduce it by the amount thereof attributable to interest on United States obligations. Then one multiplies the resulting amount by a fraction the numerator of which is the Nebraska adjusted gross income less a proportion of the federal deductions and exemption which bears the same ratio to the federal income that the Nebraska income bears to the federal income. The denominator of the fraction is the federal income tax less the tax on the bond interest.

When one has so multiplied those figures, one gets the proportion of the adjusted federal income tax to which the Nebraska income tax rate applies. Actually this may sound rather complicated but even if there are capital gain distributions, and even if there are many of the things that can occur with a complex trust, it still, I think, is not a very difficult thing to actually work out.

CHAIRMAN HAMANN: Let's take a few minutes if you have any questions that you want to shoot at the members here.

LLOYD POSPISHIL, Schuyler: When you enumerate your deductions on your federal income tax, you are permitted to take them off your state income tax which, in turn, will be based upon your federal income tax. Now which comes first—the chicken or the egg?

CHAIRMAN HAMANN: Al, do you want to respond to that?

MR. GARFINKLE: Actually if you are a resident taxpayer, you simply apply the Nebraska rate that has been set by the Board of Equalization to the federal income tax less the adjustment for bond interest. If you are a nonresident then you take the same proportion of the deductions on your federal income tax return that the Nebraska income bears to the total income.

MR. NORTH: If you are a cash basis taxpayer, you deduct the amount that you have actually paid prior to the close of the year. You don't worry about computing your actual state income tax liability because the cash basis taxpayer for federal income tax purposes will be deducting the cash that he has actually paid prior



to the end of the year; in other words, his estimated payments or his withholding.

CHAIRMAN HAMANN: Then if he gets a refund on those estimates, it's income the following year.

MR. NORTH: That's right. That additional amount would be taken up the following year.

CHAIRMAN HAMANN: Any other questions?

GEORGE W. HAESSLER, Wahoo: Is there any thought of getting some uniformity on inheritance tax procedures? I heard the speaker say that in this county they pay the appraisers out of the county funds; and in our county they pay them out of the estate unless you can get the court to appoint the inheritance tax appraisers. He said that they won't allow a deduction for last illness on a separate determination; in our county you can. I have been in your county where you allege certain contributions and you have no trouble proving it; in our county you must have a complete proof of days of trial. In every county I have gone to you have different methods. Has there ever been an attempt made to have some uniformity?

CHAIRMAN HAMANN: Well, possibly this *Manual* might bring about a little bit of uniformity, but certainly not guaranteed. I don't know that there has been any concerted effort made to do this. Among other things this might point up a need not only in this area but in several other areas. I think on your hearing on final account you think you are in a different state in some cases when you are in different counties.

One more question and then we'll close.

MR. HAESSLER: My question is, we'll assume that the property of the estate consisted entirely of jointly owned property and the creditors took some of the jointly owned property under this procedure that the statute provides to satisfy their claims. Would those claims be deductible for inheritance tax purposes, where they were taken from jointly owned property?

CHAIRMAN HAMANN: You say the creditors took it under the Nebraska statute that allows creditors to reach jointly held property?

There is a statute, and the last time I looked at it this was the only state in the country that has it. It has been held in Douglas County that to apply it constitutionally it did not apply to jointly held property where the joint tenancy was created prior to the date

of the statute. In Lancaster County it was held not to apply, and I am not sure whether they declared the whole thing unconstitutional or not. I don't know just exactly the legal status of that statute. Now assuming it is constitutional, then your question exactly again is: Can it be deducted for inheritance tax purposes?

QUESTION: What was his question?

CHAIRMAN HAMANN: The question would be: If part of jointly held property is taken under the statute which allows creditors to reach it, would those creditors' claims be deductible for Nebraska inheritance tax purposes?

MR. ZEILINGER: It would seem that it should be because the tax is imposed upon the market value of what the recipient actually receives. So I would think so.

CHAIRMAN HAMANN: We have a pretty full afternoon remaining before us with a lot of interesting topics and interesting speakers.

Fred Hanson asked me to announce in respect to this uniform probate code that the last edition of the *Real Estate, Probate and Trust Law Journal* has three articles devoted to that. They are trying to get this circulated and generally known throughout the Bar Association. There will be another meeting very shortly, and after that the fifth draft of the uniform probate code will hopefully be adopted, and for those of you who would like to get a copy and take a look at it and see what it does and whether it is desirable for Nebraska, it can be secured from Francis Jones who is secretary of the National Conference on Uniform State Laws, the American Bar Center, 1155 East 60th Street in Chicago. If anyone didn't get that they can see Fred.

We are going to have a series of short presentations again, as we have had previously this afternoon and as we did yesterday afternoon.

Our first one will be on "Small Estates." Jim Lane practices at Ogallala, Nebraska. He has been there since 1941.

### SMALL ESTATES

James A. Lane

When this topic was assigned to me I thought they were trying to tell me something, but when I got to thinking about it I realized that there should be a little time devoted to lawyers' estates.

Whether through a great deal of generosity or whether from attending a few NADA meetings down at Las Vegas, there comes a time when we are depleted as to health and depleted as to property and we die, and then the spouse or the interested parties wish to get their property set across to them with a minimum of problems. Designed for that was the Small Estates Act which, in effect, is a waiver of administration.

If you meet two undesirable requirements then you can qualify for this type of administration. You have to show that the decedent's property is wholly exempt from attachment, execution, or mesne process, and that the decedent's property is not liable for the payment of decedent's debts.

Thereupon you go ahead and file a petition showing that the decedent was a resident of the county or an inhabitant of the State of Nebraska, or that the decedent was a nonresident of the State of Nebraska, and he died seized of property within the county where the petition is filed. You show that the decedent died intestate or that an instrument purporting to be his last will and testament accompanies the petition. You give the name, age, and residence of each of the heirs of the decedent. You show that the decedent's estate consists of property, real or personal, or any equity therein.

On order of the court, notice is given for three weeks, setting the matter down for a hearing and entitling as "Settlement of Said Estate Under the Small Estates Act," and that is sufficient showing as to the nature of the proceeding.

You have your publication, and follow the regular rule of course as to sending copies of the notice to interested parties, filing your affidavit. You probably would join, if there is real estate involved, particularly a request that there be a determination of no inheritance taxes, and I would assume, probably, that you would have to also get a certificate from the treasurer and county assessor as to tax and file that in the proceedings.

On hearing, a decree is entered where the court receives evidence upon the allegations of the petition, makes the finding that the value of the decedent's estate does not exceed the amounts prescribed for the Small Estates Act, sets forth in the decree the name of the decedent, the date of his death, that he died intestate or that he died testate and that the instrument filed is the decedent's last will, give the names and ages of the heirs and their relationship to the decedent, all facts bearing upon exempt property, a correct description of the decedent's property and character of such property left by the decedent. It is all covered, really, in Sections 30-334 to 335, and you really go right down the line.

On entering the final decree, setting forth the name of each of the heirs of the decedent, as determined by the law of Nebraska, and the age and place of residence of each heir, the decree will be conclusive upon that heir and any interested party and creditor. The decree will provide for distribution of decedent's property to persons entitled thereto.

If there is a will, of course, you would have to set forth in the decree the legatee and devisee and what property they took.

Any contest is handled on appeal in the same manner as appeals in probate matters under Section 30-336.

If it appears to the court, during the hearing, that any of the allegations of the petitioner are not substantiated, the court may go ahead and appoint an administrator-executor for the regular administration of the estate.

As to the decree on the filing, you have the same problem as you do with the decree now that you file a certificate describing the property with the register of deeds, instead of the old decree as we used to.

Although the evidence in the proceedings is to be reduced to writing, it is to be filed with the other papers in the proceedings and would remain as part of the court's records for the proceedings. An appeal from the determination of heirship may be taken in the manner prescribed for appeals under Section 30-337 to 338.

A second method of slipping by on short administration is in the case of waiver of administration and guardianship. If the decedent happened to be under a guardianship or conservatorship, and the value of the property in the custody of the guardian or conservator does not exceed a sum sufficient for the payment of expenses of last illness, the claim for burial expense not to exceed \$400, and unpaid costs of administration, the county court may dispense with regular administration. Such dispensation shall be made in closing the guardianship or conservatorship and only after there have been three successive publications regarding that disposition. Thereafter, upon hearing, the court may order the payment of the expenses as given to you, and also order the dispensation of the decedent's estate from regular administration. That is controlled under Section 30-339.

You then also may transfer property under certain circumstances without judicial proceedings. The decedent's surviving spouse, if there be one, otherwise the distributees of an estate containing real or personal property, shall have a defeasible right to decedent's

property without the appointment of a personal representative or the admission of the decedent's will to probate if the net value of the estate is less than \$700, and that is less liens and encumbrances, if 40 days have elapsed since the decedent's death, and there is no petition for the appointment of a personal representative, that is, petition for appointment pending or letters issued.

The surviving spouse or distributees, as the case may be, are entitled to transfer of the decedent's personal property, including money, securities, and the like, upon delivery of an affidavit executed by any person having knowledge of the facts contained within the affidavit which shows the defeasible right to receive the personal property. A copy of decedent's will, if claim is made thereunder, should accompany the affidavit. The defeasible right of the surviving spouse, or distributees, shall be subject to any proceedings for regular administration, testate or intestate, and the superior rights of any other person in the property.

The person delivering the property pursuant to the affidavit, prescribed in 30-341, is released from liability to the same extent as if the property had been delivered to the personal representative of decedent's estate. If delivery of property is refused, after presentation and delivery of the affidavit, an action may be maintained by or on behalf of the person entitled to delivery of the property in accord with the affidavit. Any person receiving property of the decedent pursuant to such affidavit, as prescribed in Section 30-341, is accountable to the personal representative of the estate or to any other person having a superior right in or to the property so delivered.

Another section that is pertinent and with which you are all familiar is the transfer of motor vehicles. It provides that a certificate of title for a motor vehicle may be transferred upon furnishing the Department of Motor Vehicles a statement, in affidavit form, of value executed by the county assessor and a statement within the affidavit meeting the provisions of Section 30-341, whereupon a new certificate of title may be issued by the Department of Motor Vehicles.

With that, I hope that both in your estate, and in any of the estates that you handle, you have a federal estate tax of five figures.

**CHAIRMAN HAMANN:** Our next speaker will tell us about principal and income accounting in estates, some of the problems we may be getting into, or getting our clients into, if we don't instruct them properly in that respect, particularly applicable with individual executors or administrators.

Ted Frazier is a member of the firm of Frazier & Frazier and practices in Lincoln, Nebraska.

## PRINCIPAL AND INCOME ACCOUNTING FOR ESTATES

Theodore J. Frazier

I do know why I have been assigned this topic, because several years ago I had a problem in this area which appeared to me to be somewhat relevant and probably should be reviewed by other attorneys in the state. Doing it the easy way, I wrote a letter to Judge Carter, who is chairman of the Judicial Council, and suggested that this might be an appropriate matter for legislation. He considered, or his committee considered, that it was not a procedural matter, that it was a substantive matter and therefore it should go back to the Bar Association. The next thing I knew this book was in the process of preparation and someone had heard that I had written this letter to Judge Carter, so they decided I should edit Bill Sawtell's chapter in our *Manual*. So now we are down to this level. So the old Army game still operates—don't volunteer for something!

I do think that there is some importance in this matter of principal and income accounting, because our statute on final reports, final accounts, is, of course, very specific because it charges the executor or the administrator with the whole of the goods, chattels, rights and credits of the deceased. He is supposed to make a report of these items within one year, and his final account, before he files his petition for settlement of his account, must be under an oath in which he states that he has in all respects just and truly, to the best of his knowledge and belief, accounted for all of the estate and effects of the deceased that have come into his knowledge and possession.

As was discussed yesterday on the handling of the claims, payment of debts, the sale of real estate, we find that these terms are used rather generally in our statute—there are many items which could be elaborated upon in our statutes but have not yet been, such as the extent to which taxes are included as debts or whether they are over and beyond debts of the decedent, and the authority of administrators and executors to charge certain property with the payment of these tax matters.

We also know that in many situations we have individual executors under wills but we have a corporate fiduciary who is going to take over a testamentary trust, or who may be appointed for a minor beneficiary under a trust, or we may have a guardian

appointed to take care of the administration of a minor ward's property, so that at some point there can be a requirement for an accounting among fiduciaries.

Those of you who have worked with corporate fiduciaries know that from the very beginning, in setting up the account of the fiduciary, they will segregate and define certain items of principal and items of income, even though it all may be cash. I think that all too often when the attorney or the executor or administrator ends up also being his bookkeeper, or at least being presented with his deposit slips and his checks, and asks his secretary to make up a report, you are merely interested that the total of the receipts and the total of the disbursements balance, and therefore you have satisfied the rules of accountability for all of the money which has transferred through the hands of the executor or administrator.

But what is the nature of this money? In the various comments which we have had, particularly today on the income tax as well as the estate tax matters involved in estates and trusts, we find and we know that we have, say, bonds or stocks or mutual funds, as well as real estate, which are definitely items of principal because they are easily identifiable and defined as items of principal. But are there some other items of principal which should be so treated and considered? We know that under our federal estate tax rules of accounting that if a decedent dies on the 15th day of the month, some corporation in which the decedent has stock on the 15th day of the previous month has declared a dividend payable to stockholders of record on that date, but the check is not actually received until the day after the decedent dies—that this dividend which was declared for stockholders of record prior to the date of death is an item of principal and is to be listed among the items of the taxable estate, not merely for income tax purposes but as an item of principal the same as the value of the shares of stock.

Also we know from our federal estate tax rules that items which are subject to periodic payment, such as rent, interest, or annuities are to be treated as having accrued from day to day so that whether it be a government bond, whether it be a time deposit, a C.D., or something like that—the person dies during the middle of one of these interest computation periods—the interest accrued to the date of death is also to be considered as an item of principal.

Going back up then the balance of that interest payment when it finally comes due is definitely an item of income only, but there is an apportionment there between, say, the total payment which you received several months after his death, apportioning it between principal and income.

Again looking at items of principal, you can have things such as cash rent which is due in a farming operation which the tenant just hasn't gotten around to paying. But if it is due on the date of death it would be the same as your cash dividend on your stock which was declared due, even though it was not paid and should be treated as principal.

Some of these things can make a difference once you get over into your trust, if there is to be a trust, and Buzz Dalton is going to pick up and really lay out the distinctions for us at the end of the afternoon.

The statute in Nebraska is blank on this subject, and the case law is practically blank on it. I do think that most of the corporate fiduciaries follow the Uniform Principal and Income Act in this regard, and that act does provide that there shall be charged against principal, not just against the bank account which you have on hand one year after the date of death, all the cash that has accrued from various places, but that there should be charged against principal as we have defined it: the debts of the decedent, the funeral expenses, the estate taxes, interest and penalties, which would be on back income taxes, family allowances, the attorney's fees, the fees due personal representatives, and court costs. So it behooves us to be aware, I believe, of these items as between accounting, between fiduciaries and also in your own record keeping for purposes of preparing the estate income tax, and now our state income tax as well as in the federal estate tax; and I am sure the same rule would apply, or should apply, in the inheritance tax determination of what items are principal and subject to our inheritance tax.

Of course when we talk about these things back and forth it is just like a conundrum.

CHAIRMAN HAMANN: Our next speaker—taking a look at his listing in Martindale, I find that among other things he was a Captain in the Field Artillery of the U.S. Army, 1941 to 1946. So having prepared our accounting, we'll ask Bill Sawtell to take a shot at the loose ends in closing up the estate.

## LOOSE ENDS IN CLOSING ESTATE

William A. Sawtell

When I was first given this topic of loose ends I was very pleased because I knew the committee figured that only an expert could handle a subject as difficult as that. And then I got to thinking, maybe they figured I had estates that had all sorts of loose ends and had a great familiarity with it. At that point I was at a loose



end myself, so I stopped worrying about *why* they had gotten to it.

The only clue I had as to what a loose end is in an estate was the injunction to discuss *Sass v. Sass*. So let's start with that one. While I don't think it is a loose end case, we'll at least get into it with that.

On that case, which was decided in 1967—it came out of Sarpy County—the administrator was somewhat dilatory. He had been some 15 years in getting his final accounts in.

In May of 1965 the court entered an order entitled "Decree on Final Account," but that provided, in part, that the administrator was to hold all of the assets of the estate until payment was made of court costs, bond premiums, appraisers' fees, attorneys' fees, and a few things like that. He paid none of those and he kept his hands on the assets. Now, I am giving you what the reported case says. I understand from talking to some of the people involved that there is a whale of a lot more than this brief resumé, but let's stick to what the court says.

So a petition was filed to have him removed and surcharged, and all sorts of nasty things were requested. That petition was dismissed in the county court on the theory that the order of May, 1965, was a final order, unappealed from, and therefore there was no jurisdiction in the county court to entertain a petition for removal and surcharge.

The district court agreed with that, but the Supreme Court held that the county court retains jurisdiction to review and discipline a personal representative until there has been a full compliance with all orders of the court and until the estate has been placed in the hands of the distributees. Fine! Nobody can argue with that.

But they didn't quit there. They put it on another basis also. The court further held that the order of May 1965 was not a final order, as there was more left to be done, that orders adjusting or correcting accounts are interlocutory and not final until discharged as administrator and final settlement of accounts upon such discharge.

So the net finding was only that there was jurisdiction and that can be based on the first reason ascribed. He hadn't done everything the court had told him to do. There was jurisdiction. That is as far as they had to go. But if you take the second point to its logical conclusion there isn't such a thing as a final order in an estate proceeding as far as accounting goes until the court actually enters a discharge; in other words, the document we all entitle "Decree on Final Account" always has something further for the personal

representative to do. The court sounds like it is going to treat that as an interlocutory adjustment of accounts because the administrator-executor still has to pay the distributees; he has to pay the final publication of the court costs; there is always something more he has to do, and bring back some receipts, and upon presentation of the receipts he is discharged.

So if you follow this through and you take an appeal from the decree on final accounts, the court is going to say, "That is not a final order." But if you wait until it actually enters the discharge, that is a thing that is done with no notice; nobody knows when it is going to happen; and maybe it will happen a week after the decree is entered, sometimes years afterward. Some beneficiary won't sign a receipt and you don't worry too much about it. Years later you get it and you take it over and get it filed and then you have a discharge. At that point you can appeal.

The only practical advise I can give is not only to appeal at once but appeal many times. That is the only way I can see out of this one. If you don't like the decree on final account, go ahead and appeal and then if and when a discharge comes out, appeal again.

I wish the court had not gone into the question of whether this was an interlocutory accounting or not, because that was really not the question they were being asked in this appeal; they were being asked: "Was there jurisdiction to ask that this administrator be removed?"

In walking around the room this afternoon I find that a great many of you have bumped into this case, have discussed it and analyzed it. I understand there is a question-and-answer period after we are through, so we'll fight about *Sass v. Sass* a little bit later.

The question of "What is a loose end?"—and I wouldn't call that a loose end; that was just an unfinished estate—but loose ends can relate only to four things: Persons, property, debts, or taxes. Let's take them in order.

If persons are omitted, they would be bound by a decree of heirship which is unappealed from, or by an order admitting a will to probate which is unappealed from. So I don't see how you can have loose ends in that situation. There may be people left out, but as far as the administration of the estate is concerned, it is not a loose end. They are just out.

On property omitted—if it is real property any determination of heirship or any order admitting a will to probate, whether it is

based on the property or not, or whether the property is ever mentioned in the proceeding, is binding on all property owned by that decedent. So if you have a piece of real estate and it turns out that it was owned by the man but it was never mentioned in the inventory of his estate, what is the difference? You have determined who the heirs are or you have determined who the devisees are, and that is all you need to know, so you don't have to go back and do anything.

However, if you find a pot of personal property after the administration has been closed, our court says that the personal representative has no residuary powers after he has been discharged. In some states he has enough power left to see that it gets distributed properly. Our court says he doesn't, so you have to go back in and get the old personal representative reappointed, or if he is not available, get another one and administer the forgotten assets.

Debts, again, I don't believe can be a loose end. If they are not filed within the time limited for filing claims there is only one procedure for tucking them in later. If within three months after that time you file a petition with the court stating, "I was left out. I didn't know what was going on, and I have a good reason why I wasn't in here earlier," then the county court has jurisdiction to exercise its discretion as to whether or not to let you file the claim. Absent those things, the court doesn't even have jurisdiction to talk to you about it. So after three months has gone by, past the time limited for filing claims, there can't be such a thing as a loose end debt because it is barred. The only place you can present it is to the county court and there is no way to get it in.

Taxes? Those are our real problems. There can be a lot of loose ends in taxes. If you let your personal representative distribute before you have a final clearance on your estate and income tax questions, both for the decedent and for the estate, the personal representative does have a personal liability which, of course, he can trace back and try to collect from the beneficiaries, but that is not a very satisfactory solution, so I guess the only solution is, don't get rid of all of the assets until they have cleared up all of the tax problems.

CHAIRMAN HAMANN: Tom Burke is going to talk to us on "Ex Parte and 'Noticed' Accountings in Testamentary Trusts."

### **EX PARTE AND "NOTICED" ACCOUNTINGS FOR TESTAMENTARY TRUSTS**

**Thomas R. Burke**

When I got the program this year and looked over that somewhat-like-a-railroad-schedule of speakers I wondered who lined

that up. Then as I was reading the advance sheets recently I noticed that it must have been someone like Associate Justice Bob Smith, who read all of these to be sure that they were confined within the ten-minute span. He is an expert in that category.

In our booklet that you have, Chapter 12 is "Testamentary Trusts," and in that chapter we have spelled out the procedures for accounting, and there are forms shown. If you have compliments on the chapter you could write to me; if you have any criticism write to Buzz Dalton down at Lincoln who reviewed my chapter.

We have gotten through the estate. You have established your testamentary trust, and now you wonder what next should be done. We'll talk first about ex parte accountings.

In Douglas County I know that Judge Troyer does not look with favor upon a useless filing, and most ex parte accountings in trusts are useless filings, unless your will requires an annual accounting of the trustee, or unless the surety company for special reasons known to it requires an accounting by its fiduciary, or unless the beneficiary requests such an accounting be filed; but it really accomplishes nothing by way of a final order because you prepare an application seeking approval of the filing of the account. Also in there you usually seek approval of the payment of the fiduciary's commission and an attorney's fee for the preparation of the pleadings, and then you walk over and you file it and the court signs the order and you walk back to your office. There is no notice. No one knows you are doing these things, so it is not really binding on the beneficiaries.

As I say, the only thing I can think of is that it might prevent a citation for contempt or something of this sort if you fail to file such an accounting if required by the court. You know, there is no requirement in Nebraska under the statute to file an annual accounting. The statute 30-1801 and those following merely say under requirements for filing of the bond that you shall file an accounting as the court shall direct.

So the query rises in those wills where you are not even required to file a bond for the trustee: Could the court request an accounting? Well, the answer to that is set out also in the statutes because there is a provision for removal of the trustee for failure to account, upon order of the court. So certainly if the court wants an accounting he can get it, even though you have not filed a bond.

I think that since 1951, since we do have the "noticed" accounting statute, that that is the procedure we should all pay close attention to. The reason I say that is this, that if you go through the statutory

procedure 24-606 and those sections following and you arrive at a final judgment and the appeal period passes, assuming there are no *Sass v. Sass* complications, then you are going to have a final judgment that will be binding and will protect your fiduciary.

I will point out, too, that there is a Nebraska case, *In Re Estate of O'Brien*, where the court specifically said that an interlocutory ex parte accounting is subject to re-examination as long as the administrator's accountings remain unsettled. So our Supreme Court has spoken on the ex parte accounting, and it would seem to me that to move ahead and do a real service you should proceed under the "noticed" statute.

There is also a problem, I think, on routine annual accountings where there is no requirement for them. I think it is an ethical and moral consideration because if the trust estate is small, and one of the principal expenditures each year is the attorney's fee for the preparation and filing of the annual account, then I think you should examine this very closely to see what service you are really rendering in exchange for the fee. It may be that upon examination you are rendering no service, and therefore you should not pursue the filing of these annual accountings when there is no requirement for it.

Now as far as the statutory proceeding goes, it is very clear, it is practically A B C set forth for you. The forms that you can use to gain such an accounting are attached in the *Manual*.

One or two comments on that procedure. First of all, it applies not only to the testamentary trustee, it likewise extends to conservators and guardians, so it is a simple, single procedure for any type of fiduciary that you might represent.

The other thing is that there is a provision where you can circumvent the publication notice and the mailing of the notices, and so on, if all of your beneficiaries are adults and if they are competent, so that if you have a testamentary trust, and if there are transactions each year that involve real questions of judgment on the part of your fiduciary, and if you have adults as beneficiaries, and if they are competent, then it would be a simple procedure to get from each of them a written waiver of the notice requirements and file them, prepare judgment and have the court sign it, and then you will have a final adjudication on all acts covered in your report and petition.

This is also suggested wherever you might have a sprinkling trust, such as Mr. Wormser was discussing this morning, because certainly where the trustee has these broad discretionary powers

on where this income is supposed to go, it would be well worth the time and the economics, the fees, to get yourself a final order to protect that fiduciary from claims that might arise in later years—that is, people's finding out where this money had actually been sprinkled and maybe they feel it was not proper. A final adjudication as you go along each year will obviate that difficulty.

Sometimes you are not going to have all adult beneficiaries and all competent beneficiaries. The statute contemplates this, and it specifically points out that notice should be given to either guardians ad litem or guardians or conservators, or whoever these people might be that are representing the interests of minors and incompetents. But once you have followed the statute and given the proper notices, then of course you can go in and get your judgment.

We have used this, and used the procedure frequently, but one situation I recall where we used it was to get approval of some court instructions to the fiduciary who was trying to determine just what the net income really was that he was supposed to distribute to the beneficiaries. The situation involved a farming operation and there was a question as to whether income from the crops not received, and so on, during the calendar year was truly income that should be distributed. So we noticed all the beneficiaries, proceeded to get the guidance of the court and instructions in the application, and upon the judgment being entered the trustee, the fiduciary, is carried on under the instruction of the court and we have a final order in there approving what this trustee is doing. This would also be true in these questions of allocation of income among different beneficiaries.

Then of course when you want to terminate a trust, when you finally come to the end of the road and that last person has reached 21 and you want to close it out, obviously you should proceed to get a final accounting on file, go through the statutory procedure of mailing out all of your notices, having publication, sending out copies of the report and petition to the beneficiaries, filing your affidavits as the statute requires, and then have your hearing and have your judgment entered.

This would also be true where you have co-fiduciaries. Perhaps you have a bank and an individual. The individual, as sometimes happens, dies, so you have a deceased fiduciary. The bank or the successor, whichever the case might be if you are going to have co-fiduciaries continue, will want to be sure that there is a final accounting as of the date of that co-fiduciary's death, and the way you proceed is under the statute to bring in the beneficiaries, give them notice, have your final adjudication up to the date of

death so that your successor fiduciary will begin his service as of the time of his appointment, and you will have gained a discharge and a final adjudication for all those actions that are recited in the report and in the application.

These are the procedures to be followed. It is my recommendation from the examination of this topic that the ex parte accountings, unless they are absolutely required under the original will or unless the surety company or the court or the beneficiary requires them, should not be followed, really, because all you do is fill up the cabinets in the county court with these filings. But if you are really interested in an adjudication, in a discharge for your fiduciary's acts up to that time, then follow the procedures of 24-606 and those statutes after that and gain a final approval, and then you will have rendered service for which you should be paid a fee.

CHAIRMAN HAMANN: Our last speaker this afternoon will talk on "Rights of Income Beneficiaries During Administration"—Mr. Warren K. Dalton from Lincoln.

### RIGHTS OF INCOME BENEFICIARIES DURING ADMINISTRATION

Warren K. Dalton

I approach this subject with a rather carefree attitude, assuming that I could go to the statutes and the cases and find out what the rights of income beneficiaries were and see if there are any problem areas, and if there were, discuss them, and if there weren't, just tell you that there weren't any. So I did that. After spending what seemed to be an inordinate amount of time for a ten-minute talk in research I came to the conclusion that this had probably better be a preliminary report because the subject deserved a little further study.

There are a few rules that I can give you, but not very many. We are talking now about the rights of income beneficiaries during administration, not during the course of a continuance of a trust or something of that sort. There are a few rules I can give you, and the first one and most important one, and the one that you may want to remember, is: "If the will defines the rights of income beneficiaries, then they have the rights granted by the will." Now that one you can remember. The rest of them are not really very valuable.

We have a rule as to the life beneficiary of a trust or the income beneficiary of a trust under a will in *Fulsom v. Strain*. This case says that when there is a trust, even though it is a trust consisting

of assets which are in the residue of the estate, the income beneficiary is entitled to income commencing at the date of death, not at the date the trust is established or the date the estate is closed. That is slightly different from the rights of other residuary legatees and beneficiaries, as we will see. However, the case does go on to lead us into sort of an interesting area which may have—although there has been a lot of time and effort spent on this question—it may have only a minimum value to us.

If assets are disposed of, sold during the course of administration for the purpose of paying debts, expenses, legacies, and so forth, then under the Nebraska law the life beneficiary of the income is not entitled to the income earned on those assets before they were disposed of, even though income becomes a part of the residuary portion of the trust.

This is, I assume, the "Old New York" rule. There are three rules, the "Old New York" rule, the "English" rule, and the "Massachusetts" rule. The "Old New York" rule and the "English" rule are distinguishable by the way income is defined under them. The "Massachusetts" rule says that income is income, and whether the principal is left or not, the income goes to the income beneficiary if it was income when it was received. The "Massachusetts" rule is the general majority rule today and, if you want to study this question further, there is an annotation on this in 2 A.L.R.2d 1061. This is about all we have on income beneficiaries under testamentary trusts in our cases, in our statutes.

We are talking about income beneficiaries who aren't granted income rights by will but who acquire some right to income, or possibly some right to income, because they obtain a right to property which may carry with it the right to income. We have a number of cases which produce some rules which are not always entirely consistent and coherent and which are not certainly enough to answer all of our questions.

Let me first talk about residuary legatees. I am going to talk about legatees and then devisees later. Residuary legatees get income and principal commingled without much distinction between them, primarily because our court has said that the residue is what is left, and it is what's left after debts, expenses, and legacies are paid.

A case, at least, is *Estate of Strolberg*, 106 Nebraska, and since the residuary legatees get whatever is left, they get it when it is finally determined that it is left. Income is a part of the residue undistributed therewith, and that rule is found in *Klug v. Seegar*, 98 Nebraska.



We have legatees who receive specific demonstrative or general legacies, and under the rule in *Lewis v. Barkley* in 91 Nebraska, and *Lehman v. Wagner* in 136 Nebraska, and basically under Section 30-409, legatees are entitled to interest on their legacy beginning one year after the granting of letters of administration or letters testamentary. This is primarily because Section 30-409 requires settlement after one year. In *Estate of Kierstead* the court said that interest need not be paid if the allowance of interest would be inequitable. However, the *Lehman* case is later than the *Kierstead* case and it ignores this gloss on that rule, and from the *Lehman* case one might assume there isn't any such rule that allows the court to ignore the allowance of interest, even though to pay interest might be inequitable.

I think this question may have suffered a little bit from coming up on a case-by-case basis.

You might also consider, if you want to philosophize about this question, Sections 30-610 and 30-611, which allow the court to set a time for paying debts and legacies not more than one year and six months after the granting of letters, and to extend this time. Now, if the court originally allowed a year and six months to pay debts and legacies, then later required the executor to start paying interest on the legacies after one year, the executor might very properly complain that he had been sandbagged a little bit.

The devisee who receives real estate has special rights which have produced a good deal of litigation and some fairly well defined rules at least. You should note that real estate, residuary real estate at least, and thus presumably the income from residuary real estate, may be used to pay legacies, *Bray v. Sedlak*, 168 Nebraska, and also that very clearly income from real estate is available for the payment of debts under Sections 30-405 and 406. It is available, however, only if the personal estate is insufficient. Reading *Neylon v. Parker* in 177 Nebraska and *Hahn v. Verret*, 143 Nebraska, it is incumbent upon us to take the rule quite seriously that real estate and its income are only available if the personal estate is insufficient.

If, indeed, the personal estate is insufficient, then the real estate can be used, but laying that aside the executor, despite the provisions of Section 30-406, or the administrator, has no right even to the possession of the real estate unless he is going to *have* to possess it to collect the income to pay the debts or for the purpose possibly of selling the real estate.

So generally speaking, our rule is that unless otherwise needed, income from real estate is payable to the devisee who is entitled

to the real estate or to the heir who is entitled to the real estate beginning at the date of death.

We sometimes may wonder what is income and what is principal, and Ted Frazier has talked about that. We have a few rules in Nebraska which don't depart particularly from the general rules about what's principal and what's income. The only one that disturbs me, and I am not certain that it has anything to do with income beneficiaries during the course of administration, is the rule in *Wecker's Estate*, which was later repeated in *Slocum v. Bohuslov*, followed in that case which says that when there is a fund of personal property, any appreciation in the value of the fund is income to the life tenant and does not pass to the remaindermen. This, I think, certainly is a rule different from that applying to trust assets, appreciation of value of trust assets is principal, appreciation of the value of real estate is principal.

The real problems, it seems to me, that we run into in trying to account for property in estates, are not even touched on by any of these rules, because we have situations in which we have property which is not to be sold. We have real property which isn't going to be sold because there is plenty of personal property to pay debts, expenses, and legacies. We have personal property which the family is not going to allow you to sell. You've got a 51 per cent interest in a corporation, with strangers owning the other 49 per cent and there is no possibility of selling any of the stock. They want to keep it. There is no possibility of redeeming any of it because the control would go. You are going to have to collect income in order to pay these expenses, debts, and legacies, if any.

If the various kinds of personal property in the estate are divided among the heirs or beneficiaries, this is not so much a problem among heirs but among beneficiaries under a will in different proportions. You may find that you have an almost insoluble problem of deciding whether income is to be considered merely as property which is available to the executor for the payment of debts without regard to whose personal property produced that income, or conceivably whose real estate produced that income, or whether income is going to have to be allocated in some fashion to the persons who eventually will receive the property which produces it in the same way that expenses are to be allocated among the beneficiaries in roughly the proportions at least that they received property or that taxes are assessed against property that they receive, or for some other cause.

CHAIRMAN HAMANN: We still have time for some questions and answers. Do we have any questions first and then we'll see if we have any answers?

MR. HANSON: For the record, I just wanted to clarify the status of the uniform probate code. The fifth tentative draft that is to be coming out before the next meeting of the committee in January is only a tentative draft. The committee may make changes in it at that January meeting. It may make changes in it at another meeting which is to be held in March. Then it will be presented to the committee of the whole at the national conference, and there may be other changes made, but hopefully it will be put in a shape where the conference will finally adopt it in Dallas in August of next year and, hopefully, the American Bar Association will approve it, and it will be promulgated and commended for adoption in all the states.

This tentative draft that is coming out now, like the third draft, will be in a paper-bound volume, and it is to be distributed widely, with the idea of getting suggestions from many sources for the improvement of the draft. I am sure that if this Association asks for a number of copies of this act to be considered by an appropriate committee, they will be given those copies and given an opportunity to make suggestions for the improvement of the draft.

Now I want to put in a plug for the conference and then I am going to quit. They are very hard-working and very sincere people, and this is true also of the committee and the reporters. To prove this, at the meeting we had in New Orleans recently there was no noticeable absenteeism from our sessions, notwithstanding our meeting place was only about a block from the most interesting portions of Bourbon Street.

CHAIRMAN HAMANN: Are there any questions? Russ, I am going to turn the microphone over to you, then.

PRESIDENT MATTSON: The House of Delegates will not hold its adjourned meeting, so this brings us to the final portion of the annual meeting.

I will first ask the Secretary-Treasurer if he has any unfinished business or announcements. I will ask anyone from the floor if there is any business they would like to present. None appearing, it is now my pleasure to turn the affairs of the Association over to your President Charles F. Adams.

PRESIDENT CHARLES F. ADAMS: Thank you. I have a captive audience. I've got 30 seconds in which to make an hour and 45 minute speech.

Deryl, I am sorry that neither Russ nor I was able to get the benefit of your afternoon meeting, and even the morning meeting because there is a little period called "transition."

What breaks my heart is that I learned only recently that there was an act of Congress about the presidential transition where they have appropriated three-quarters of a million dollars to the incoming administration to get ready for the job, and H.H.H. and L.B.J. will each get \$75,000 to ease their transition into civilian life. Russ, I don't know that you are going to get a cent out of this outfit and I am sure I am getting nothing coming in.

I do declare, in all seriousness, this Sixty-Ninth Annual Meeting of the Nebraska State Bar Association adjourned sine die.

. . . The Sixty-Ninth Annual Meeting of the Nebraska State Bar Association adjourned sine die at four thirty-five o'clock . . .

## NEBRASKA STATE BAR ASSOCIATION

## Statement of Cash Receipts and Disbursements

Year ended August 31, 1968

## Receipts:

|   |               |
|---|---------------|
| Active members' dues .....  | \$ 61,385     |
| Inactive members' dues .....  | 5,820         |
| Reinstatements .....  | 225           |
| Interest .....  | 59            |
| Expense refunds .....   | 27            |
| State ex rel Nebraska State Bar Association,<br>net of disbursements of \$1,633 ..... | 728           |
|   | <u>68,244</u> |

## Disbursements:

|  |              |
|--|--------------|
| Salaries .....   | \$ 14,725    |
| Payroll taxes .....  | 835          |
| Printing and stationery .....  | 2,322        |
| Office supplies and expense .....                                    | 727          |
| Telephone and telegraph .....  | 92           |
| Postage and express .....  | 3,458        |
| Directory .....  | 1,326        |
| Officers' expenses .....   | 1,791        |
| Executive council .....  | 2,195        |
| Judicial council .....   | 210          |
| Nebraska Law Review .....  | 8,270        |
| Nebraska State Bar Association                                       |              |
| Journal .....  | \$ 2,885     |
| Less receipts for advertising .....                                  | <u>467</u>   |
|  | 2,418        |
| Committee on public service .....                                    | <u>6,018</u> |
| Less receipts for pamphlets .....                                    | <u>115</u>   |
|  | 5,903        |
| American Bar Association meetings .....                              | <u>6,102</u> |
| Less reimbursements .....  | <u>226</u>   |
|  | 5,876        |
| Midyear meeting .....  | 172          |
| Annual meeting, 1967 .....   | 9,347        |
| Less reimbursements and<br>exhibit space .....                       | <u>1,116</u> |
|  | 8,231        |
| Committee on inquiry .....   | 839          |
| Committee on legal education<br>and continuing legal education ..... | 27           |
| Advisory committee .....   | 331          |

|   |          |           |
|---|----------|-----------|
| Committee on cooperation                        |          |           |
| with American Law Institute .....               | 699      |           |
| Committee on reorganization .....               | 439      |           |
| Committee on executive director .....           | 39       |           |
| Committee on availability of legal service .... | 234      |           |
| Committee on economics and                      |          |           |
| law office management .....                     | 175      |           |
| Conference of judicial                          |          |           |
| nominating commissions .....                    | 209      |           |
| Eighth Circuit conference .....                 | 450      |           |
| Conference committee on                         |          |           |
| uniform state laws .....                        | 377      |           |
| Tax institute .....                             | \$ 1,913 |           |
| Less reimbursements and                         |          |           |
| registration receipts .....                     | 662      | 1,251     |
| Creighton Law Review .....                      | 804      |           |
| Institute on will and trust drafting .....      | 53       |           |
| Institute on new legislation .....              | 610      |           |
| Less reimbursements .....                       | 382      | 228       |
| Section on taxation .....                       | 49       |           |
| Law day U.S.A. ....                             | 1,630    |           |
| Insurance .....                                 | 79       |           |
| Maintenance expense .....                       | 296      |           |
| Auditing .....                                  | 381      |           |
| Dues and subscriptions .....                    | 75       |           |
| Section on real estate, probate and             |          |           |
| trust law .....                                 | 144      |           |
| New equipment—photocopy machine .....           | 876      |           |
| Bridge-the-Gap program .....                    | 8        |           |
| Nebraska District Judges Association .....      | 250      |           |
| Annual meeting, 1968 .....                      | 218      |           |
| Loan to Great Plains Tax Institute .....        | 500      | 69,212    |
| Excess of disbursements over receipts .....     |          | 968       |
| Balance at beginning of year .....              |          | 11,588    |
| Balance at end of year* .....                   |          | \$ 10,620 |

\* The balance at end of year does not include a \$500, noninterest-bearing note receivable from Great Plains Tax Institute which is due January 1, 1969.

## ROLL OF PRESIDENTS

|          |                                 |               |          |                                |              |
|----------|---------------------------------|---------------|----------|--------------------------------|--------------|
| 1. 1900  | *Eleazer Wakely .....           | Omaha         | 36. 1935 | *L. B. Day .....               | Omaha        |
| 2. 1901  | *William D. McHugh .....        | Omaha         | 37. 1936 | *J. G. Mothersead .....        | Scottsbluff  |
| 3. 1902  | *Samuel P. Davidson, Tecumseh   |               | 38. 1937 | *C. J. Campbell .....          | Lincoln      |
| 4. 1903  | *John L. Webster .....          | Omaha         | 39. 1938 | Harvey M. Johnsen .....        | Omaha        |
| 5. 1904  | *C. B. Letton .....             | Fairbury      | 40. 1939 | *James M. Lanigan .....        | Greeley      |
| 6. 1905  | *Ralph W. Breckenridge, Omaha   |               | 41. 1940 | *E. B. Chappell .....          | Lincoln      |
| 7. 1906  | *E. C. Calkins .....            | Kearney       | 42. 1941 | Raymond G. Young .....         | Omaha        |
| 8. 1907  | *T. J. Mahoney .....            | Omaha         | 43. 1942 | *Paul E. Boslaugh .....        | Hastings     |
| 9. 1908  | *C. C. Flansburg .....          | Lincoln       | 44. 1943 | *Robert R. Moodie .....        | West Point   |
| 10. 1909 | *Francis A. Brogan .....        | Omaha         | 45. 1944 | *George L. DeLacy .....        | Omaha        |
| 11. 1910 | *Charles G. Ryan, Grand Island  |               | 46. 1945 | Virgil Falloon .....           | Falls City   |
| 12. 1911 | *Benjamin F. Good .....         | Lincoln       | 47. 1946 | Paul F. Good .....             | Omaha        |
| 13. 1912 | *William A. Redick .....        | Omaha         | 48. 1947 | *Joseph T. Votava .....        | Omaha        |
| 14. 1913 | *John J. Halligan, North Platte |               | 49. 1948 | Robert H. Beatty, North Platte |              |
| 15. 1914 | *H. H. Wilson .....             | Lincoln       | 50. 1949 | *Abel V. Shotwell .....        | Omaha        |
| 16. 1915 | *C. J. Smyth .....              | Omaha         | 51. 1950 | *Earl J. Moyer .....           | Madison      |
| 17. 1916 | *John N. Dryden .....           | Kearney       | 52. 1951 | Clarence A. Davis .....        | Lincoln      |
| 18. 1917 | *F. M. Hall .....               | Lincoln       | 53. 1952 | *George B. Hastings .....      | Grant        |
| 19. 1918 | *Arthur C. Wakely .....         | Omaha         | 54. 1953 | Laurens Williams .....         | Omaha        |
| 20. 1919 | *R. E. Evans .....              | Dakota City   | 55. 1954 | J. D. Cronin .....             | O'Neill      |
| 21. 1920 | *W. M. Morning .....            | Lincoln       | 56. 1955 | John J. Wilson .....           | Lincoln      |
| 22. 1921 | *A. G. Ellick .....             | Omaha         | 57. 1956 | Wilber S. Aten .....           | Holdrege     |
| 23. 1922 | *George F. Corcoran .....       | York          | 58. 1957 | Barton H. Kuhns .....          | Omaha        |
| 24. 1923 | *Edward P. Holmes .....         | Lincoln       | 59. 1958 | Paul L. Martin .....           | Sidney       |
| 25. 1924 | *Fred A. Wright .....           | Omaha         | 60. 1959 | Joseph C. Tye .....            | Kearney      |
| 26. 1925 | *Paul Jessen .....              | Nebraska City | 61. 1960 | Flavel A. Wright .....         | Lincoln      |
| 27. 1926 | *E. E. Good .....               | Wahoo         | 62. 1961 | Hale McCown .....              | Beatrice     |
| 28. 1927 | *F. S. Berry .....              | Wayne         | 63. 1962 | Ralph E. Svoboda .....         | Omaha        |
| 29. 1928 | *Robert W. Devoe .....          | Lincoln       | 64. 1963 | George A. Healey .....         | Lincoln      |
| 30. 1929 | Anan Raymond .....              | Omaha         | 65. 1964 | Floyd E. Wright .....          | Scottsbluff  |
| 31. 1930 | *J. L. Cleary .....             | Grand Island  | 66. 1965 | Harry B. Cohen .....           | Omaha        |
| 32. 1931 | *Fred Shepherd .....            | Lincoln       | 67. 1966 | Herman Ginsburg .....          | Lincoln      |
| 33. 1932 | *Ben S. Baker .....             | Omaha         | 68. 1967 | M. M. Maupin .....             | North Platte |
| 34. 1933 | *J. J. Thomas .....             | Seward        | 69. 1968 | George B. Boland .....         | Omaha        |
| 35. 1934 | *John J. Ledwith .....          | Lincoln       | 70. 1968 | C. Russell Mattson .....       | Lincoln      |

## 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        | 9. 1909-11  | R. W. Breckenridge ..... | Omaha        |
| 2. 1900-08 | Andrew J. Sawyer .....   | Lincoln      | 10. 1910-12 | Frank H. Woods .....     | Lincoln      |
| 3. 1900-02 | Edmund H. Hinshaw .....  | Fairbury     | 11. 1910-10 | Charles G. Ryan .....    | Grand Island |
| 4. 1903-06 | W. H. Kelligar .....     | Auburn       | 12. 1910-19 | Alfred G. Ellick .....   | Omaha        |
| 5. 1904-07 | John N. Dryden .....     | Kearney      | 13. 1911-13 | John A. Ehrhardt .....   | Stanton      |
| 6. 1905-08 | F. A. Brogan .....       | Omaha        | 14. 1911-11 | Benjamin F. Good .....   | Lincoln      |
| 7. 1907-10 | S. P. Davidson .....     | Tecumseh     | 15. 1912-15 | C. J. Smyth .....        | Omaha        |
| 8. 1908-09 | W. T. Wilcox .....       | North Platte | 16. 1912-12 | William A. Redick .....  | Omaha        |

|      |         |                               |               |
|------|---------|-------------------------------|---------------|
| 17.  | 1913-15 | W. M. Morning .....           | Lincoln       |
| 18.  | 1913-16 | J. J. Halligan .....          | North Platte  |
| 19.  | 1914-14 | H. H. Wilson .....            | Lincoln       |
| 20.  | 1915-17 | Edwin E. Squires .....        | Broken Bow    |
| 21.  | 1916-16 | John N. Dryden .....          | Kearney       |
| 22.  | 1916-17 | Fredrick Shepherd .....       | Lincoln       |
| 23.  | 1917-17 | Frank M. Hall .....           | Lincoln       |
| 24.  | 1917-18 | Anan Raymond .....            | Omaha         |
| 25.  | 1918-18 | A. C. Wakely .....            | Omaha         |
| 26.  | 1918-22 | Fred A. Wright .....          | Omaha         |
| 27.  | 1919-19 | R. E. Evans .....             | Dakota City   |
| 28.  | 1919-22 | Geo. F. Corcoran .....        | York          |
| 29.  | 1919-20 | L. A. Flansburg .....         | Lincoln       |
| 30.  | 1920-20 | W. M. Morning .....           | Lincoln       |
| 31.  | 1920-27 | Anan Raymond .....            | Omaha         |
| 32.  | 1921-21 | Alfred G. Ellick .....        | Omaha         |
| 33.  | 1921-23 | Guy C. Chambers .....         | Lincoln       |
| 34.  | 1922-24 | James R. Rodman .....         | Kimball       |
| 35.  | 1923-26 | E. E. Good .....              | Wahoo         |
| 36.  | 1924-26 | Robert W. Devoe .....         | Lincoln       |
| 37.  | 1924-24 | Fred A. Wright .....          | Omaha         |
| 38.  | 1925-28 | Paul Jessen .....             | Nebraska City |
| 39.  | 1925-27 | Clinton Brome .....           | Omaha         |
| 40.  | 1927-29 | Charles E. Matson .....       | Lincoln       |
| 41.  | 1927-28 | Fred S. Berry .....           | Wayne         |
| 42.  | 1928-29 | Robert W. Devoe .....         | Lincoln       |
| 43.  | 1928-30 | T. J. McGuire .....           | Omaha         |
| 44.  | 1928-34 | Harvey Johnsen .....          | Omaha         |
| 45.  | 1929-31 | E. A. Coufal .....            | David City    |
| 46.  | 1929-29 | Anan Raymond .....            | Omaha         |
| 47.  | 1930-32 | Paul E. Boslaugh .....        | Hastings      |
| 48.  | 1930-30 | J. L. Cleary .....            | Grand Island  |
| 49.  | 1931-33 | W. C. Dorsey .....            | Omaha         |
| 50.  | 1931-31 | Fred Shepherd .....           | Lincoln       |
| 51.  | 1932-34 | Richard Stout .....           | Lincoln       |
| 52.  | 1931-32 | Ben S. Baker .....            | Omaha         |
| 53.  | 1933-35 | Barlow F. Nye .....           | Kearney       |
| 54.  | 1933-33 | J. J. Thomas .....            | Seward        |
| 55.  | 1934-36 | Chas. E. McLaughlin, Omaha    |               |
| 56.  | 1934-34 | John J. Ledwith .....         | Lincoln       |
| 57.  | 1935-35 | L. B. Day .....               | Omaha         |
| 58.  | 1935-37 | James M. Lanigan .....        | Greeley       |
| 59.  | 1935-38 | H. J. Requartte .....         | Lincoln       |
| 60.  | 1935-38 | Raymond M. Crossman .....     | Omaha         |
| 61.  | 1935-40 | F. H. Pollock .....           | Stanton       |
| 62.  | 1935-41 | T. J. Keenen .....            | Geneva        |
| 63.  | 1935-39 | Walter D. James .....         | McCook        |
| 64.  | 1935-37 | Roland V. Rodman, Kimball     |               |
| 65.  | 1936-36 | J. G. Mothersead, Scottsbluff |               |
| 66.  | 1936-36 | James L. Brown .....          | Lincoln       |
| 67.  | 1937-39 | David A. Fitch .....          | Omaha         |
| 68.  | 1937-39 | Raymond G. Young .....        | Omaha         |
| 69.  | 1937-41 | M. M. Maubin, North Platte    |               |
| 70.  | 1937-41 | Golden P. Kratz .....         | Sidney        |
| 71.  | 1938-42 | Sterling F. Mutz .....        | Lincoln       |
| 72.  | 1938-42 | Don W. Stewart .....          | Lincoln       |
| 73.  | 1940-46 | George N. Mecham .....        | Omaha         |
| 74.  | 1940-42 | Abel V. Shotwell .....        | Omaha         |
| 75.  | 1940-42 | Frank M. Colfer .....         | McCook        |
| 76.  | 1941-43 | Virgil Falloon .....          | Falls City    |
| 77.  | 1941-43 | Joseph C. Tye .....           | Kearney       |
| 78.  | 1941-47 | Earl J. Moyer .....           | Madison       |
| 79.  | 1937-37 | C. J. Campbell .....          | Lincoln       |
| 80.  | 1938-38 | Harvey Johnsen .....          | Omaha         |
| 81.  | 1939-39 | James M. Lanigan .....        | Greeley       |
| 82.  | 1940-40 | E. B. Chappell .....          | Lincoln       |
| 83.  | 1942-45 | Fred J. Cassidy .....         | Lincoln       |
| 84.  | 1941-41 | Raymond G. Young .....        | Omaha         |
| 85.  | 1942-48 | Max G. Towle .....            | Lincoln       |
| 86.  | 1942-42 | Paul E. Boslaugh .....        | Hastings      |
| 87.  | 1942-45 | John E. Dougherty .....       | York          |
| 88.  | 1942-49 | Yale C. Holland .....         | Omaha         |
| 89.  | 1943-45 | Robert R. Moodie, West Point  |               |
| 90.  | 1941-45 | B. F. Butler .....            | Cambridge     |
| 91.  | 1943-46 | Frank M. Johnson, Lexington   |               |
| 92.  | 1944-49 | Floyd E. Wright, Scottsbluff  |               |
| 93.  | 1945-50 | John J. Wilson .....          | Lincoln       |
| 94.  | 1945-48 | Robert B. Waring .....        | Geneva        |
| 95.  | 1944-46 | George L. DeLacey .....       | Omaha         |
| 96.  | 1945-47 | Virgil Falloon .....          | Falls City    |
| 97.  | 1945-49 | Leon Samuelson .....          | Franklin      |
| 98.  | 1946-48 | Harry W. Shackelford .....    | Omaha         |
| 99.  | 1946-48 | Paul F. Good .....            | Lincoln       |
| 100. | 1947-48 | Joseph T. Votava .....        | Omaha         |
| 101. | 1947-48 | John E. Dougherty .....       | York          |
| 102. | 1947-55 | Lyle E. Jackson .....         | Neligh        |
| 103. | 1948-49 | Robert H. Beatty .....        | North Platte  |
| 104. | 1947-50 | Frank D. Williams .....       | Lincoln       |
| 105. | 1947-50 | Thomas J. Keenan .....        | Geneva        |
| 106. | 1948-51 | Laurens Williams .....        | Omaha         |
| 107. | 1949-51 | Joseph H. McGroarty .....     | Omaha         |
| 108. | 1949-54 | Wilber S. Aten .....          | Holdrege      |
| 109. | 1948-49 | Abel V. Shotwell .....        | Omaha         |
| 110. | 1949-55 | Paul L. Martin .....          | Sidney        |
| 111. | 1949-55 | Joseph C. Tye .....           | Kearney       |
| 112. | 1949-51 | Earl J. Moyer .....           | Madison       |
| 113. | 1950-60 | Harry A. Spencer .....        | Lincoln       |
| 114. | 1950-55 | Paul P. Chaney .....          | Falls City    |
| 115. | 1950-59 | Paul Bek .....                | Seward        |
| 116. | 1950-52 | Clarence A. Davis .....       | Lincoln       |
| 117. | 1951-55 | Barton H. Kuhns .....         | Omaha         |
| 118. | 1952-57 | Thomas C. Quinlan .....       | Omaha         |
| 119. | 1951-52 | George B. Hastings .....      | Grant         |
| 120. | 1952-53 | Laurens Williams .....        | Omaha         |
| 121. | 1953-54 | J. D. Cronin .....            | O'Neill       |
| 122. | 1954-57 | Norris Chadderdon .....       | Holdrege      |
| 123. | 1954-56 | John J. Wilson .....          | Lincoln       |
| 124. | 1955-56 | Wilber S. Aten .....          | Holdrege      |
| 125. | 1955-58 | F. M. Deutsch .....           | Norfolk       |
| 126. | 1955-64 | Clarence E. Haley .....       | Hartington    |
| 127. | 1955-58 | R. R. Wellington .....        | Crawford      |
| 128. | 1955-64 | Alfred G. Ellick .....        | Omaha         |
| 129. | 1954-55 | Jean B. Cain .....            | Falls City    |
| 130. | 1955-57 | Hale McCown .....             | Beatrice      |
| 131. | 1956-62 | C. Russell Mattson .....      | Lincoln       |
| 132. | 1956-58 | Barton H. Kuhns .....         | Omaha         |
| 133. | 1957-59 | Paul L. Martin .....          | Sidney        |
| 134. | 1957-60 | Richard E. Hunter .....       | Hastings      |
| 135. | 1957-64 | John R. Fike .....            | Omaha         |
| 136. | 1957-64 | Thomas F. Colfer .....        | McCook        |
| 137. | 1958-63 | William H. Lamme .....        | Fremont       |
| 138. | 1958-61 | Carl G. Humphrey .....        | Mullen        |
| 139. | 1958-60 | Joseph C. Tye .....           | Kearney       |
| 140. | 1959-65 | Charles F. Adams .....        | Aurora        |
| 141. | 1959-61 | Flavel A. Wright .....        | Lincoln       |
| 142. | 1959-60 | Thomas C. Quinlan .....       | Omaha         |
| 143. | 1960-61 | Hale McCown .....             | Beatrice      |
| 144. | 1960-63 | Ralph E. Svoboda .....        | Omaha         |
| 145. | 1960-67 | Herman Ginsburg .....         | Lincoln       |



|              |                        |              |                        |              |
|--------------|------------------------|--------------|------------------------|--------------|
| 146. 1960-65 | James F. Begley        | 155. 1964-   | W. E. Mumby .....      | Harrison     |
|              | .....Plattsmouth       | 156. 1964-65 | Hale McCown .....      | Beatrice     |
| 147. 1961-64 | George A. Healey ..... | 157. 1963-   | Harry B. Cohen .....   | Omaha        |
| 148. 1962-65 | Lester A. Danielson    | 158. 1965-   | Bernard B. Smith ..    | Lexington    |
|              | .....Scottsbluff       | 159. 1965-67 | Robert D. Mullin ..... | Omaha        |
| 149. 1962-65 | Floyd E. Wright ..     | 160. 1966-   | Paul P. Chaney .....   | Falls City   |
| 150. 1962-   | John C. Mason .....    | 161. 1966-   | M. A. Mills, Jr. ....  | Osceola      |
| 151. 1961-   | Vance E. Leininger     | 162. 1966-   | M. M. Maupin ....      | North Platte |
|              | .....Columbus          | 163. 1966-67 | George B. Boland ..... | Omaha        |
| 152. 1964-   | Fred R. Irons .....    | 164. 1966-   | Leo Eisenstatt .....   | Omaha        |
| 153. 1964-66 | Wm. J. Baird .....     | 165. 1967-   | C. Russell Mattson ..  | Lincoln      |
| 154. 1964-66 | Tracy J. Peycke .....  | 166. 1968-   | Charles F. Adams ..... | Aurora       |