

1966

## Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1965

Harry B. Cohen

*Nebraska State Bar Association, president*

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**NEBRASKA STATE BAR ASSOCIATION**

**HOUSE OF DELEGATES**

**WEDNESDAY MORNING SESSION**

**October 20, 1965**

The House of Delegates of the Nebraska State Bar Association, convening in Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at nine forty-five o'clock by Chairman Robert D. Mullin of Omaha.

**CHAIRMAN MULLIN:** I believe we have enough at least to justify a roll call to see whether or not we have a quorum. George Turner, our Secretary, will now call the roll of those present.

[Roll call.]

**SECRETARY-TREASURER GEORGE TURNER:** More than a quorum present, Mr. Chairman. I move that the Calendar be approved as the order of business of the day.

**CHAIRMAN MULLIN:** Is there a second to the motion?

**CHARLES H. YOST,** Fremont: I second the motion.

**CHAIRMAN MULLIN:** If there is no discussion, all in favor say "aye"; opposed. Carried.

It now gives me great pleasure to call upon Mr. Harry Cohen, President of our Association, for a statement.

**STATEMENT OF PRESIDENT**

**Harry B. Cohen**

Members of the House of Delegates: It is customary for the President of the Association to report to the House of Delegates at its annual meeting. According to our bylaws, the administration of the Association is vested in the House of Delegates. The Executive Council is the executive organ of the Association having delegated powers, "and when the House of Delegates is not in session, shall exercise the legislative powers of the Association." Outside of the ex officio members, the members are elected from judicial districts, and the bylaws generally provide for that number of representatives from each judicial district which is equal to the number of district judges in each judicial district.

The House of Delegates is undoubtedly the most important division of the Association. For some reason or another the membership does not generally seek election to this body. At the last meeting of the Executive Council it was necessary for the Council to make nominations for twelve of the twenty judicial districts. I feel that the seeming lack of interest is undoubtedly due to the lack of knowledge on the part of the membership of the procedures for nomination and election. I would suggest that the responsibility for obtaining at least the required nominees should be that of the Chairman of the House of Delegates. It would be desirable for the chairman each year and at the appropriate time to make every effort to advise lawyers in the judicial districts of the procedures for nomination and election to the House of Delegates and to see to it that the proper number of nominees are selected.

The bylaws (Article V, Section 2c) designate the number of delegates to be elected from each judicial district. In view of changes of the number of district judges in some of the judicial districts and in view of changes in the number of judicial districts, and for the purpose of avoiding the necessity for amending the bylaws to conform to these changes, it is recommended that Article V, Section 2c of the bylaws be amended so that, as amended, same shall read as follows:

ARTICLE V, Section 2c. Delegates from each Judicial District, equal in number to the number of District Judges appointed and/or elected to serve each such Judicial District.

The "c" is a subparagraph of 2, which outlines the number of delegates. That is the preamble.

You will recall that last year about this time we discovered that we had been operating on a deficit basis for many years. We also ascertained at the time of the 1964 annual meeting that our deficit for the calendar year 1964 would exceed \$20,000. We even had to borrow money with which to finish out the year. The House adopted an amendment to the bylaws providing for an increase in the dues of senior and junior members. A motion for such purpose was filed in the Supreme Court. The court granted an increase in the annual dues of senior members from \$20.00 to \$30.00, and of junior members (those admitted for a period of five years or less) from \$10.00 to \$15.00. The increase in our income enabled us to pay off all loans and to make whole a reserve fund from which borrowings were made. I might parenthetically state that there are no restrictions on the use of this reserve fund. Our expense for the annual meeting and for operations for the remainder of calendar year 1965 will exceed our

present cash balance by approximately \$6,000. Barring unforeseen events, we should be operating in the black by the end of the year 1966.

We are going to need more money if we are to operate on a sound financial basis and if we are to continue to render the necessary services. I would suggest therefore that the Association again request an increase in dues, beginning with the year 1967, to the amount originally requested—\$35.00 for senior members and \$17.50 for junior members. This was the amount originally requested in the application which we filed in the Supreme Court.

For some time neither the members of the Executive Council nor the officers of the Association have been satisfied with the functioning of the committees and the sections. On paper the procedures looked good. We all felt that something had to be done to get results. As a first step it was decided to make the President-Elect responsible for the functioning of sections and committees. Accordingly, the President-Elect was appointed Coordinator of Activities for Sections and Committees.

We next determined to devote our entire midyear meeting to the sections and committees. The various sections and committees met for a whole day on June 18 in Lincoln, Nebraska. Everybody paid his own expenses. The Association was responsible for the luncheon and dinner for those who remained after the formal meetings had ended. The response was excellent. Over one hundred persons attended. The various sections and committees met in separate groups. An Executive Council meeting was held at the same time. This meeting afforded a central meeting place for all members of committees and sections. Good discussions took place and many of the committee reports were finalized at this meeting. This is a good beginning, but more can and should be done to make the committees and the sections active, functioning, and responsive units of the Association. I am sure that the incoming President and President-Elect will continue these efforts and institute other changes.

The meetings of the Executive Council were held regularly during the year. They were all well attended. I assure you that the members of the Executive Council always performed in a very effective manner and were constantly mindful of their responsibilities.

Our Association was represented at every function and meeting of the American Bar Association. In addition, we were represented at the Washington meeting of the American Law Institute



and the Washington Conference on Law and Poverty, sponsored by the Department of Justice and the Office of Economic Opportunity.

We all know that George Turner IS literally the Association. Every officer and every section and committee member looks to him for advice and answers. Time marches on, and we are all getting older. It is time for us to be practical. We should begin now to train someone for the position of Secretary-Treasurer. I recommend, therefore, that an assistant be employed immediately to perform services under the direction of George Turner. The selection should be made very carefully.

I intend to cover other matters in my formal report to the Association. I merely want by this short report to point out some matters which demand consideration and guidance from the House of Delegates. I hope that you take the time to do so.

CHAIRMAN MULLIN: With your permission I will call upon one of the committee chairmen for a report out of turn. Jack North has to give a talk today before the County Attorneys' Association. I believe it starts at ten o'clock. I am going to ask you to come right on up, Jack. We know your speech won't take over ten minutes. This is Item 25, the report of the Committee on Joint Conference of Lawyers and Accountants, John E. North, Chairman.

#### **REPORT OF COMMITTEE ON JOINT CONFERENCE OF LAWYERS AND ACCOUNTANTS**

**John E. North**

The report appears on pages 43 and 44 of your program. I presume you have all read it, so I'll move for its adoption.

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

JAMES F. BEGLEY, Plattsmouth: I second it.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Special Committee on Joint Conference of Lawyers and Accountants**

At the annual joint meeting of the Committee of Lawyers and Accountants, it was unanimously agreed by all of the lawyers

present and all of the accountants present that one area in which lawyers and accountants could cooperate for their mutual benefit would be in presenting a tax institute.

At this joint meeting of lawyers and accountants, it was unanimously recommended that a joint committee, consisting of four members of the legal profession appointed by the President of the Nebraska Bar, and four members of the accounting profession appointed by the President of the Nebraska Certified Public Accountants Association, be inaugurated with the understanding that it would continue from year to year and explore the possibility of putting on a joint institute annually. The time, place and subject matter of said institute was to be considered by the committee and was not to supersede or necessarily replace any institutes being presented by either the accountants or the lawyers.

Harry Cohen appointed John E. North, Keith Miller, Tom Davies and Allan Garfinkle to serve on this committee, and we were represented at the first joint meeting held approximately June 1, 1965. The tentative proposal of this joint committee was to present an institute in December relating to corporate tax problems in general. However, the exact subject matter and the speakers have not been considered in detail.

Approval of the foregoing project was requested of the Executive Council so that the committee could proceed with the joint institute. The Executive Council of the Nebraska State Bar Association, at its meeting held on June 18, 1965, approved cooperation with the Nebraska Society of Certified Public Accountants for conducting taxation institutes, provided that such cooperation would not interfere with the regular annual December taxation institutes sponsored by the Taxation Section of the Nebraska State Bar Association, and provided further that these Nebraska Certified Public Accountants Society institutes are not to be substituted for such Tax Section annual institutes.

John E. North, Chairman  
Robert K. Adams  
H. Alan Curtiss  
Thomas M. Davies  
William A. Day, Jr.  
John M. Gradwohl  
Frank J. Mattoon  
Eugene L. Radig  
Paul A. Rauth  
John W. Stewart  
Roger H. Vandenack

CHAIRMAN MULLIN: The next order of business on our calendar is the report of George Turner, our Secretary-Treasurer. George!

### REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman, Members of the House: This is a much better report than we had a year ago, as our President has indicated.

The increase in dues made it possible to pay off all indebtedness and still leave us in the black.

The books have been examined by Peat, Marwick, Mitchell & Company through their Lincoln office, and this is their accountant's report:

We have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the year ended August 31, 1965. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we consider necessary under the circumstances. In our opinion the accompanying statement of cash receipts and disbursements presents fairly the cash transactions for the Nebraska State Bar Association for the year ended August 31, 1965.

The accompanying statements of condition and cash receipts and disbursements of the Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund for the year ended August 31, 1965, are presented for analysis purposes only, as such funds, managed by a Board of Trustees appointed by the President of the Nebraska State Bar Association, have not been audited by us.

It shows in their report, which incidentally will be published in full in the proceedings of this annual meeting, total receipts of \$77,247 and an ending cash balance of \$8,588, which is considerably better than last year, when we were indebted at this time about \$10,000.

As the President has indicated, it will be necessary to encroach on 1966 dues to run the balance of this calendar year, but I feel quite sure that this will be the last year the Association will not be fully self-supporting within calendar years.

The auditor further reports that there is in our trust account, which is maintained to guard against any possible further increase in insurance premiums, a balance now of \$25,912. It shows that the Daniel J. Gross Welfare and Assistance Fund now has to its credit \$31,450.

CHAIRMAN MULLIN: You have heard the report of the Secretary-Treasurer. Do I hear a motion that it be approved as read?

JAMES F. BEGLEY, Plattsmouth: I so move.

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the report be approved as read. All in favor say "aye"; opposed. Carried.

#### Introduction of Resolutions?

SECRETARY-TREASURER TURNER: To the best of my knowledge, Mr. Chairman, no resolutions have been submitted. The purpose of the place on the program for that item is to afford a member of the Association who is not a member of the House of Delegates, and therefore does not have the right to the floor, an opportunity to present a resolution which, if there be such, goes to a resolutions committee to be designated by the chairman, and the resolutions committee then reports at a later meeting of the House. As I say, to the best of my knowledge, there are none.

CHAIRMAN MULLIN: I will now call upon all those within the sound of my voice who may be Association members, if you have any resolutions to propose at this time, please raise your hand and come forward. Hearing none, I will ask that the record show there are no resolutions.

The next order of business is that of the report of the Committee on Legislation, Bob Perry, Chairman. Bob!

### REPORT OF COMMITTEE ON LEGISLATION

#### R. Robert Perry

Mr. Chairman, President, Members of the House of Delegates: The report of the Committee on Legislation has been available to you and probably has been read by most of you. Most of it is now pretty much history anyhow. Fortunately for the Bar Association, the load this time was somewhat lighter than usual as to the legislation which was sponsored by the Bar Association.

We had a moderate degree of success. We had one very bad slip-up, in that the legislature changed one bill on the floor. It had come out of committee in a rather harmless form. It wasn't something we liked particularly, but it wasn't particularly damaging either. Then, without our realizing it, they changed it on the floor to where it required that actual consideration, a form of it, be recorded with every deed, and it passed and went to the Governor in that form. At that point your chairman finally woke up. We got that at least partially straightened out. We got an-

other bill introduced, or asked that it be introduced, and it was passed by the legislature and signed by the Governor, which gives the right to the Tax Commissioner to insist that you furnish him with information as to the consideration, but it does not have to be filed with the Register of Deeds. You can refuse to file it and then the Register of Deeds just notifies him that such has occurred.

With reference to the future of the Legislative Committee, frankly legislation is one of my interests and loves and I thoroughly enjoy my time and work on the committee and as chairman. The time has come for the Bar Association, in my opinion and in the opinion of my committee, to have assistance of a more nearly full-time nature, someone to do the work for the Legislative Committee. I don't feel that I did a particularly good job as chairman, yet the amount of time I devoted was rather substantial from my own standpoint.

We have a possible solution which we have put in the form of a recommendation to this body. Professor Wallace Rudolph of the University of Nebraska Law School is willing to attempt to set up a student help type of thing that could assist the Legislative Committee. The Bar Association would match funds with the federal government under one of these federal aid programs whereby the Bar would put up \$1.00 for \$9.00 furnished by the federal government. We would employ students (it would be partially supervised by the University of Nebraska College of Law and by the Bar Association Legislative Committee) for the purpose of preparing and drafting bills and also keeping track of legislation. Also, students at the University would be available to do research for the Legislative Committee during the session and probably also attend Legislative Committee meetings and get some valuable education on both the drafting and the legislative process as such.

Therefore, I make the recommendation, as chairman of the committee, that this method of setting up a more permanent type of assistance to the Legislative Committee be adopted by the House of Delegates and by the Bar Association.

The other recommendation for the future is that the Bar Association actively find a method to properly fund the judicial retirement system. One of the problems that we were met with in this session was a bill to, in effect, change the retirement system of our judges to an extent that would practically emasculate it, and the reason for this move on the part of some of the members of the legislature is that the funds that are available to actually fund this are not doing the job. I think it is up to the Bar

Association to find a method of funding this retirement system so that it does not become a burden on the state at some future date, one that the state cannot afford to handle.

I think, frankly, this is one of our very serious legislative problems that we've got to meet or we are going to be very embarrassed in the future.

Those are the two things that are recommendations of our committee.

Mr. Chairman, I move acceptance of the recommendations.

PRESIDENT COHEN: Mr. Chairman, may I ask a question? Has the committee given any consideration to the removal of judges? California, I know, has a system.

SECRETARY-TREASURER TURNER: It was passed at this session.

CHAIRMAN MULLIN: One other question: When you refer to a one-to-nine matching basis, what do you mean in your written recommendation?

MR. PERRY: Legislation was passed by the federal government whereby, as a basis for student help or financing students with a type of on-the-job training, the federal government, as a part of this federal program for poverty stricken people, I guess, can set up a program for matching funds where they furnish 90 per cent of the money if some local group is furnishing the other 10 per cent.

CHAIRMAN MULLIN: Thank you. Is there a second to the motion? We will vote on these recommendations separately. Is there a second to the first recommendation relating to the allocation of funds for a student to aid the State Bar Legislative Committee?

ROBERT A. BARLOW, Lincoln: I second the motion.

SECRETARY-TREASURER TURNER: Inasmuch as the Executive Council is the only organ in this Association authorized to appropriate money, may the recommendation of Chairman Perry be interpreted as approval by the House of Delegates of the proposal and a recommendation to the Council that it be considered?

CHAIRMAN MULLIN: Will you consent to such an amendment in your motion?

MR. PERRY: Yes.

CHAIRMAN MULLIN: And Mr. Barlow, who seconded? Then all in favor of the motion as amended signify by "aye"; opposed. Carried.

The second recommendation related to the finding of a method for funding the judicial retirement system, including the inclusion of widows within the provision of the system. Would anyone care to second that motion?

ROBERT K. ADAMS, Omaha: I'll second it. Would the chairman of that committee care to comment on how that fund stands now and whether the committee has any suggestions to make on substitute funding methods?

CHAIRMAN MULLIN: Mr. Perry? He has stepped out.

JAMES N. ACKERMAN, Lincoln: Mr. Chairman, I'm chairman of the Judiciary Committee and that will be in my report to some extent.

MR. ADAMS: Mr. Chairman, I would also like a clarification that the chairman of this committee has. I am not quite sure whether he means they are recommending that widows be added to the program, or recommending that a study be made regarding the inclusion of widows.

CHAIRMAN MULLIN: All he says in his written recommendation is "and addition of widows to the provisions of the system."

The motion as made only asks that a study be made, rather than any action be taken, so I think even though he be absent perhaps it might be in order to generally favor looking into the whole subject.

MR. ADAMS: I think that clarifies what we are voting on.

CHAIRMAN MULLIN: Is there any other question or discussion? If not, all in favor say "aye"; opposed. The motion carried.

I would like to say a word about Bob Perry and, unfortunately, he is not here to hear it, but perhaps his friends or those in his district can convey the message. I happened to be a member of that Legislative Committee during the past year, and the task which he undertook and carried out was almost an overwhelming one. Every member of the committee received a copy of every bill that remotely affected Bar Association or legal interests. All of these bills were divided among committee members. They were categorized into different groups as to whether we favored them,

opposed them, or took no position. Information was then channeled back to him and he, in turn, had to do the lobby work, or a large part of it, over at the legislature. I think that he, and particularly those members who served with him in Lincoln, deserve a great amount of credit, and I do hope that Mr. Ginsburg and the others will convey this message to him.

[The report of the committee follows.]

### Report of the Committee on Legislation

The status of bills in Nebraska legislature in which the Bar Association or its Legislative Committee has taken a position is attached in four categories:

1. Bills to Sponsor
2. Bills to Favor
3. Bills to Oppose
4. Undesirable Bills

Briefly a bill to include municipal judges in primary and metropolitan cities in retirement system has been reported to general file (149); raising juvenile court judges' salaries to the same as district judges has passed (219); increasing workmen's compensation judges from 3 to 4 (491) and increasing the number of judicial districts to 21 has passed (491). The Rules of the Road bill was withdrawn until unanimity of the bar could be reached (736).

We were also fairly successful in opposing legislation which was thought undesirable, except that LB 527 received a floor amendment we did not catch as it was passed. It was signed by the Governor and has become law. The amendment permits the state Tax Commissioner to prescribe a form to be filed with all instruments filed with the register of deeds reciting "true consideration."

It is the committee's recommendation that the Bar sponsor immediate repeal of this new law.

The committee met with Professor Wallace Rudolph of the University of Nebraska College of Law relative to part-time law student help in developing the Bar's legislative program. It is the committee's recommendation that the Bar allocate \$1,000 to \$2,000 on a \$1 to \$9 matching basis in arranging supervised law student help to aid the State Bar legislative committee in preparing legislation and keeping track of the course of legislation.



It is further recommended that search be made for a method of complete funding of the judicial retirement system with the addition of widows to the provisions of the system, and

That the proposed changes in rules of the road be given careful study, revision, approval and be sponsored at the next legislative session in 1967.

R. Robert Perry, Chairman  
Leo Eisenstatt  
Edward R. Geesaman  
Richard E. Hunter  
Raymond E. McGrath  
George McNally  
Robert D. Mullin  
Bryan Quigley  
William J. Ross  
Donald Sass  
George A. Skultety  
Samuel Van Pelt

CHAIRMAN MULLIN: The next order of business is the report of the Committee on Administrative Agencies, Einar Viren, Chairman.

## REPORT OF COMMITTEE ON ADMINISTRATIVE AGENCIES

Einar Viren

Mr. Chairman, Members of the House of Delegates: The report is in the program. I don't know on what page because I didn't bring the book along, but it is there in its entirety. (Page 44) The addition to the report is simply that I would urge the incoming president, in making the appointments to this committee, to consider very seriously appointing members who have an interest in administrative agencies. The most discouraging thing for any committee, and particularly the Committee on Administrative Agencies (which is the only committee upon which I have served for several years and I have been its chairman for several years) is the fact that you browbeat, beg, write letters, do everything you can to get these people down to attend the meetings (particularly when legislation is involved that affects the particular interests that they represent) and they don't come. Then when you get the legislation by hard work of the members of the committee that undertook that task ready for the legislature and it gets in bill form, they suddenly wake up and find out that some of their clients might be adversely affected, and all hell breaks loose.

Now, to me, that is a pretty lousy way to serve on a committee. It would appear to me that if they are going to be members of these committees, if they have interests that are affected, whether for clients or because of the nature of the practice of the law, they ought to attend the meetings of the committee, particularly when those meetings are called for specific purposes.

In addition to the committee members, we requested the attendance of the people we knew would be directly affected by certain proposals and certain corrective legislation. Fortunately it was all taken care of and everybody was happy and satisfied, but it put a burden upon the junior member of the committee who, because of conditions, undertook to handle the entire work of the committee.

I would strongly urge that in the continuance of this committee, the membership be made up of people who have a very substantial interest in the operations of the committee. I can assure you that the future work of the Committee on Administrative Agencies is going to be enlarged.

I forwarded to the President-Elect a copy of a letter that was sent out to all of the members of the motor carrier industry by the Chairman of the State Railway Commission asking for comments on present motor carrier legislation, for example, knowing full well that he could send out 5,000 of them, and I think there are 5,000 motor carriers in Nebraska, and he won't get a single response. Why he sent it out, I don't know. Yet I know full well that legislation is going to be required in connection with that field, as well as in connection with other interests.

Now most people seem to think that the Administrative Agencies Committee is concerned only with legislation in so far as it affects the State Railway Commission. I think strongly that it is only the beginning. There are other administrative agencies that require considerable supervision by the members of the Bar or they are going to be running away with the prerogatives that belong to the members of the Bar, and particularly those who are affected in their practice and in their clients' interests by administrative agencies.

With that, I move the adoption of the report, Mr. Chairman.

CHAIRMAN MULLIN: And does that motion include your recommendation that the work of the committee be continued?

MR. VIREN: It does, sir.

CHAIRMAN MULLIN: Is there a second?

THOMAS R. BURKE, Omaha: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

### **Report of the Committee on Administrative Agencies**

The work of the Committee on Administrative Agencies has centered almost entirely on certain specific legislation pending before the Seventy-Fourth Session of the Legislature. The committee prepared and sponsored the following pieces of legislation, all of which were adopted.

**Legislative Bill 750.** This bill corrected the major oversights of the Railway Commission recodification of the previous session, inserting the mistakenly omitted motor carrier penalty section, clarifying the provisions pertaining to consolidation, merger, transfer and lease of certificates and permits, and inserting certain language mistakenly omitted relating to railroad equipment regulations.

**Legislative Bill 510.** This bill re-enacts three sections of the statute relating to the transportation of personal property, which were inadvertently repealed and not re-enacted by the prior recodification.

The committee also reviewed legislation introduced pertaining to the Railway Commission and other administrative agencies, and on at least one occasion lobbied against and helped to secure indefinite postponement of one piece of legislation relating to the organization and composition of the Railway Commission, which the members of the committee felt to be contrary to the best interests of the public and the Bar Association.

**It is the recommendation of the committee that its work be continued, with instructions from the Association to pursue those matters referred to it by the president, and any and all other matters which would properly come within the scope of this committee's jurisdiction.**

Einar Viren, Chairman

CHAIRMAN MULLIN: Item No. 7 is the next item. This involves the report of the Committee on American Citizenship by Dewayne Wolf, Chairman.

SECRETARY-TREASURER TURNER: Mr. Chairman and Members of the House: Mr. Wolf wrote me that it would be

impossible for him to attend and asked that a motion be made that their recommendation be adopted.

The report is found on page 36, and the recommendation is: Some of the trial demonstrations held over the state during the past years have developed into a form of entertainment and have lost their purpose in demonstrating the protections furnished to citizens by our court system. Therefore, the committee recommends that wherever possible, the local bar associations cooperate with the school authorities, district judges, and attorneys to arrange for high school classes of civics and government to attend actual courtroom trials.

On behalf of Mr. Wolf, I move the adoption of this report.

CHAIRMAN MULLIN: Is there a second?

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Committee on American Citizenship**

The American Citizenship Committee of the Nebraska State Bar Association had a well attended meeting at Lincoln, Nebraska, during the midyear conference on June 18, 1965. After extended discussion the committee makes the following recommendations:

1. Some of the trial demonstrations held over the state during the past years have developed into a form of entertainment and have lost their purpose in demonstrating the protections furnished to citizens by our court system. Therefore, the committee recommends that wherever possible, the local bar associations cooperate with the school, authorities, district judges and attorneys to arrange for high school classes of civics and government to attend actual courtroom trials.

2. Mock trials, as such, should be used only in counties where actual trials are infrequent. In the event mock trials are conducted, they should:

- a) Be conducted without frivolity,
- b) Be supervised or conducted by attorneys,
- c) The presiding judge should be a judge or other member of the bar,

- d) Be preceded by an explanation of the procedure of trial, and
- e) Be followed by an explanation of the constitutional guarantees provided by our method of trial.

3. The Committee on American Citizenship should assist in improving public understanding of the privileges and responsibilities of American citizenship by providing speakers to schools and organizations. The committee should also undertake the preparation and distribution of news releases to call attention to these privileges and responsibilities.

4. The committee should cooperate with local school boards and instructors by providing lists of available materials suitable for the instruction of high school students on American citizenship and the threats of Communism.

5. The committee should arrange for lawyers to appear before high school civics classes on an annual or semiannual basis to discuss the responsibilities and privileges of American citizenship.

6. Each individual member of the Nebraska State Bar Association should assume his professional responsibility by actively promoting the patriotic spirit of his community at every appropriate opportunity.

Dewayne Wolf, Chairman  
Glen A. Burbridge  
Wendell P. Cheney  
Jack Craven  
Dale Cullen  
Donald E. Endacott  
James E. Fellows  
Ronald D. Fly  
Raymond Frerichs  
Clinton J. Gatz  
James R. Hancock  
Fred R. Irons  
George F. Johnson  
Francis D. Lee  
Jon F. Luebs  
Frank J. Mattoon  
James P. Monen  
W. E. Mumby  
Leslie H. Noble  
L. F. Otradovsky  
Ronald K. Samuelson  
James I. Shamberg

Howard W. Spencer  
Richard L. Spittler  
Charles L. Whitney

CHAIRMAN MULLIN: We have now the report of the Committee on Atomic Energy Law, Richard D. Wilson, Chairman. The Chair recognizes Mr. Robert Berkshire.

## REPORT OF COMMITTEE ON ATOMIC ENERGY LAW

**Robert H. Berkshire**

Thank you. Dick Wilson asked me to submit the report of the committee. The recommendation is: That this committee keep abreast of all developments in the atomic energy law field and make recommendations as required with particular emphasis on studying the desirability and possibility of giving more autonomy to the Radiation Advisory Council, and, if changes be considered desirable, they be prepared for submission to the next legislature.

Apparently there was some reference to this recommendation in the Lincoln papers, and we received the dissenting report to the committee from the State Board of Health, which feels that they are perfectly satisfied with the status quo. However, it was more, as the recommendation indicates, just considering the matter further.

In view of that, I would request that the report be adopted and that the recommendation be accepted.

CHAIRMAN MULLIN: Do we have a second?

DALE E. FAHRNBRUCH, Lincoln: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the report be accepted and approved as read. All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

### Report of the Committee on Atomic Energy Law

The committee met in Lincoln on June 18, 1965, and committee member Robert H. Berkshire, who also serves as a member of the State Radiation Advisory Council, described the progress of that organization. The council has prepared a draft of radiological health regulations, and at Mr. Berkshire's request all members of this bar association committee have received copies of the proposed regulations for comment prior to the setting of a hearing

for their adoption. Together with appendices these proposed regulations total more than 100 pages.

Your Committee feels that the present status of the Radiation Advisory Council as a subordinate part of the Department of Health under the State Board of Health is not necessarily what the legislature intended. The members of the Radiation Advisory Council are the experts in the radiation field and perhaps their work should not be filtered through the State Board of Health. Moreover, the promotion of development of the atomic energy business in Nebraska can perhaps not be done most effectively by medical people who are very properly primarily interested in controlling rather than promoting such business.

It is recommended that this committee keep abreast of all developments in the atomic energy law field and make recommendations as required with particular emphasis on studying the desirability and possibility of giving more autonomy to the Radiation Advisory Council, and, if changes be considered desirable, they be prepared for submission to the next legislature.

Richard D. Wilson, Chairman  
Wilber S. Aten  
Robert H. Berkshire  
Robert E. Johnson, Jr.  
Vance E. Leininger  
Tracy J. Peycke

CHAIRMAN MULLIN: Our next report is that of the Committee on Cooperation with the American Law Institute. This report appears on page 32 of your program, and its chairman, John C. Mason, is here and will report for that committee.

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

**John C. Mason**

The American Law Institute engages in three broad areas of work. One of the areas is the preparation of the Restatements of the Law, in which of course it has been engaged for many, many years, and this is a continuing process.

There are revisions which have just been completed on some of the Restatements. Other Restatements are currently under reconsideration for revision, and there are certain areas of law which are being proposed for new Restatements. In the report, I have listed those various areas of the law for your information, if you care to look at it.

A second broad area of work of the American Law Institute is in the area of legislation, the preparation of model codes of laws and uniform laws. One of the most current and large projects of the Institute in this area, of course, is the Uniform Commercial Code. You will note from the report that at the time of the annual meeting in May there had been forty-one states which had adopted the Code, and four other states in which it was expected to be adopted during this calendar year. So it has received very broad acceptance.

One of the things which has been observed, of course, is that there are some variations from uniformity in some of the states which have adopted the Code, and this is true of Nebraska. The American Law Institute Committee is reviewing these variations and will come up with some recommendations in those areas in which there have been variations. One of the recommendations of our Nebraska committee in cooperation with the American Law Institute is that when that report is prepared it should be given thorough consideration by the Association through proper committees in an effort to determine whether additional legislation should be recommended in Nebraska to promote greater uniformity.

The third broad area is in legal education. The Institute has a Joint Committee on Continuing Legal Education, which is composed of representatives of the Institute and the American Bar Association. They produce a number of very, very helpful educational programs and written pamphlets and books. I have listed the three general areas of their publications. They issue, actually, Practice Texts, textbooks on various subjects. They have Practice Handbooks, which are quite helpful. All of you, and the members of the Association generally, should be familiar with these handbooks. There are many of them which you would like to have in your offices. In addition, they publish study outlines or course materials which are used in connection with the presentation of various educational programs.

These materials, of course, are available to lawyers generally and, in particular, the Study Outlines are available for Nebraska and other state association legal education programs and should be used.

They also sponsor the publication of *The Practical Lawyer* and *Practical Lawyer Manuals*, which are related to that, being a collection of selected subjects. They are revising or issuing new publications in several fields, which I have listed in the report also for the information of the Bar generally.



The Joint Committee of the American Bar and the American Law Institute has, over the years, through the "Arden House" Conference and other meetings, adopted certain recommendations which Nebraska has been fully aware of and has followed. One of them was encouraging the needs of the newly admitted lawyer, and Nebraska has adopted the Bridge-the-Gap program in response to that suggestion.

They also have encouraged inclusion of material on legal ethics in the various educational programs, and we have responded to that.

A third area in which the Joint Committee has been active is in the development and recommendations for the establishment of professional administrators of legal education programs, established by the bar associations in various states to coordinate and to promote the legal education programs in the states. This has proved to be a very effective development in many of the states which have professional administrators. It has been studied in the past by the Association and I am sure will receive continuing study here.

Finally, I would like to suggest—this suggestion came from outside our committee and it is an excellent suggestion—that the Nebraska Annotations of the Restatements have not been revised and brought up to date in many years, and this is a project which would be of great help, I think, to all the Nebraska lawyers and judges. It is something which we find is not done on a national basis but must be done locally by each state. It seems to be an appropriate thing for the Nebraska Bar Association to give attention to and to sponsor and try to find some means of accomplishing. We are in the process of working with the two law schools to determine ways and means of accomplishing this, and we will continue to follow up on this and try to see that as soon as possible the Restatements will be brought up to date with annotations for Nebraska.

The committee recommends continued support of the American Law Institute and cooperation with it by the Nebraska State Bar Association.

I have drawn this report and reported orally to you in an effort to give you a broad outline of what the Institute's work is, because I think there are many who may not have been exposed to the entire program and may not be fully familiar with it, and I thought it would be helpful to you to know what it is that we are cooperating with. Thank you.

George Turner suggests that I mention the film which will be presented during this annual meeting, a film which Mr. Casner will present. It has been a project of the Joint Committee on Continuing Legal Education of the American Bar and the Institute.

CHAIRMAN MULLIN: Thanks for an excellent report.

There is a motion before the floor that the Association continue to support the American Law Institute and cooperate with it through the Nebraska Bar Association. Is there a second?

ROBERT A. BARLOW, Lincoln: I second the motion.

CHAIRMAN MULLIN: All in favor signify by the usual sign; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Committee on Cooperation with the American Law Institute**

##### **AMERICAN LAW INSTITUTE MEETING**

The annual meeting of the American Law Institute was held in Washington, D. C., in May 1965. The Association was represented at the meeting by the chairman of the committee.

The Institute is engaged in the work of revising three Restatements: Conflicts, Torts, and Contracts. Portions of each of these were considered at the annual meeting. The Institute is also engaged in four major legislative projects which were studied at the meeting: division of jurisdiction, estate and gift taxation, pre-arraignment criminal procedure, and public control of land use.

The Institute is being urged to concern itself with other important projects as soon as time and funds permit. Some of these are: revision of the Restatement of Property, establishment of a restatement of the law of literary property, restating certain aspects of the labor law, unification of statutes on the regulation of securities, and consideration of some of the problem areas in antitrust law.

Projects being completed this year include: publication of Volumes 1 and 2, Torts Restatement, Second; new three volume edition of the full Restatement in the Courts; completion and publication of Restatement of Foreign Relations Law of the United States; and publication in the spring of 1966 of the Model Penal Code and Commentaries.

The Uniform Commercial Code, a project of the American Law Institute, had been adopted in forty-one states as of the May 1965 meeting, and there was legislation pending and expected to be enacted in four other states at that time. Some variations in the Code as enacted in some of the states are receiving attention by the Permanent Editorial Board. When this review is complete the Nebraska State Bar Association Committee on Cooperation with the American Law Institute recommends serious consideration of the report by the Association in an effort to determine whether Nebraska should consider any amendments which would promote greater uniformity.

#### CONTINUING LEGAL EDUCATION

The Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association reported on the status of its work at the annual meeting of the Institute. The committee is working with various agencies of the organized bar in developing and sponsoring more effective programs of continuing legal education. Printed material developed by the committee falls into the following categories:

Practice Texts—comprehensive hard-cover texts

Practice Handbooks—paperbound summary exposition

Study Outlines—course materials for lecturers and registrants

These are supplemented by the periodical *The Practical Lawyer* and by the *Practical Lawyer Manuals*, consisting of collected reprints from *The Practical Lawyer* on selected subjects.

New or revised publications since July 1, 1964, include handbooks on: *Tax Planning of Real Estate*; *Federal Income Taxation of Securities*; *Buying, Selling, and Merging Businesses*; *Family Law*; *Basic Accounting for Lawyers*; *Bankruptcy and Arrangement Proceedings*; a text entitled *A Transactional Guide to the Uniform Commercial Code*; and a study outline on Securities Acts Amendments of 1964.

The joint committee continues to encourage meeting the educational needs of the newly admitted lawyer. Nebraska has responded to this with the annual Bridge-the-Gap Institute. The joint committee encourages inclusion of material on legal ethics in educational programs. Such material has been included in many of the Nebraska institutes. The joint committee also has worked with many state organizations in establishing professional administrators of their legal education programs. This has been very effective in many states.

## REVISION OF THE NEBRASKA ANNOTATIONS OF THE RESTATEMENTS

The Nebraska State Bar Association Committee on Cooperation with the American Law Institute is investigating the possibility of a project for updating and revising the Nebraska Annotations to the various Restatements. This may be possible to accomplish through a sponsorship by one or both of the law schools in Nebraska. The American Law Institute does not have funds for such state revisions, and therefore Nebraska must work out a program for such revision if the Nebraska lawyers are to have the benefit of updated annotations. The committee will continue to investigate and determine a practical method for accomplishing this. If it will require funds from the Nebraska State Bar Association a suitable report and request for funds will be made by this committee.

**The committee recommends continued support of the American Law Institute and cooperation with it by the Nebraska State Bar Association.**

John C. Mason, Chairman  
James A. Doyle  
Henry M. Grether, Jr.  
Walter D. James, Jr.  
Barton H. Kuhns  
Hale McCown

**CHAIRMAN MULLIN:** William H. Meier is chairman of the Committee on County Law Libraries, and I will call upon Bill to report for that committee. This is Item 10 on your program, and the written report appears on page 34.

## REPORT OF COMMITTEE ON COUNTY LAW LIBRARIES

**William H. Meier**

Mr. Chairman, Members of the House of Delegates: The report which appears on page 34 was, in fact, intended as an interim report to an inquiry of the Secretary following the midyear meeting. However, it does pretty well state the status of the work of the committee and its intention as of this time.

I therefore move that the report be approved and that the committee be continued.

**CHAIRMAN MULLIN:** Is there a second?

**HARRY N. LARSON, Wakefield:** I second the motion.

**CHAIRMAN MULLIN:** All in favor signify by "aye"; opposed. Carried.

[The report of the committee follows.]

### **Report of the Committee on County Law Libraries**

The committee is requesting the State Library to supply a list of all county law libraries now receiving copies of the state Statutes, Supreme Court Reports and Session Laws pursuant to L.B. 166, Laws of Nebraska, 1963, and intends to contact the county attorney of each of the other counties to ascertain whether they now have or plan to establish a county law library in the near future.

Contact with the District Judges Association is being made by the committee to interest the district judges in asserting their supervisory authority under Sec. 51-220, R.S. Supp. 1963 with reference to county law libraries.

According to the record of our committee, the district judges have reported going county law libraries in the following counties:

1. \_\_\_\_\_
2. Cass and Otoe
3. Lancaster
4. Douglas
5. Saunders, Butler, Seward, Hamilton, and York
6. Dodge, Platte, and Merrick
7. Saline
8. \_\_\_\_\_
9. Madison and Knox
10. Adams, Webster, Kearney, and Phelps
11. Hall, Valley, Howard, and Greeley
12. Buffalo and Custer
13. Kimball, Cheyenne, Lincoln, and Dawson
14. Red Willow
15. Brown, Rock, and Holt
16. Box Butte, Cherry, Sheridan, Dawes, and Sioux
17. Scottsbluff
18. Gage and Jefferson

If these county law libraries are not on the list to receive the Statutes, Session Laws and Supreme Court Reports, it seems that they should be. It may well be that others should also be on the

lists. We will appreciate it if you will be good enough to let us know which county law libraries are on the list to receive these publications.

I hope and trust that we will be able to get some response from the District Judges Association before the October meeting of the Bar. In the meantime, if there is any further data which you would like the committee to assemble for the State Library or other agencies, please let me know.

William H. Meier, Chairman  
County Law Library Committee

CHAIRMAN MULLIN: Item No. 11 is the report of the Committee on Crime and Delinquency Prevention, Gerald Vitamvas, Chairman.

## REPORT OF COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Gerald S. Vitamvas

My apologies to this House and to the President and to Mr. Turner, but I failed to get a report in in time to be published in the pamphlet. It is short.

This committee held one meeting during the year. At this meeting the committee reviewed and studied legislation which had been enacted pertaining to criminal law. Pending bills were also considered. Of particular interest were L.B. 836 and L.B. 839. L.B. 836, relating to criminal procedure, provides for a post-conviction remedy for individuals accused of a crime. L.B. 839 provides for the appointment of counsel to represent a person accused of a felony at the preliminary criminal proceedings as well as in the district and supreme courts. Authority is provided in this bill for the payment of attorney fees by the county.

At the meeting this committee met with the Committee on Legal Education and Continuing Legal Education. The cooperation of this committee was pledged in assisting that committee in its educational program.

The committee considered the question of studying the changing of the present system of county attorneys to that of a district attorney system in which the district attorney is assigned the duty of the prosecution of criminal complaints, with county attorneys being responsible for representing the county in civil matters. It is recommended that a further study of this proposal be made by this committee.

During the year the committee continued its cooperation with the Nebraska Committee for Children and Youth. The Legislative Committee referred a number of items of legislation to the committee for its consideration and recommendation which, after circulating the members, was given.

Respectfully submitted,

Gerald S. Vitamvas, Chairman  
Russell J. Blumenthal  
Donald L. Brock  
E. A. Cook, Jr.  
Dale E. Fahrnbruch  
Melvin K. Kammerlohr  
Walter J. Matejka  
Clark Nichols  
Robert E. Otte  
John Samson

This is the committee's report. I move adoption of the committee report and that the work of the committee be continued.

CHAIRMAN MULLIN: Is there a second?

CLARK G. NICHOLS, Scottsbluff: I second the motion.

CHAIRMAN MULLIN: Those in favor say "aye"; opposed. Carried.

CHAIRMAN MULLIN: The report of the Committee on Economics of the Bar and Professional Incorporation. Tom Burke will report for Thomas M. Davies, Chairman.

#### REPORT OF COMMITTEE ON ECONOMICS OF THE BAR AND PROFESSIONAL INCORPORATION

Thomas R. Burke

The report begins on page 17 and concludes on page 18. The committee recommends:

1. That the Minimum Fee Schedule and Manual on Economics of the Bar be constantly reviewed, and revised and expanded as needed. That new materials be added if necessary.

2. That local bar associations direct their requests to George Turner, Secretary-Treasurer, Nebraska State Bar Association, when they desire a program to be presented by members of the two committees in connection with law office management, economics of the bar and the minimum fee schedule.

3. That the committee be continued.

CHAIRMAN MULLIN: Thank you. Is there a second?

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: All in favor of the motion say "aye"; opposed. Carried.

[The report of the committee follows.]

### **Report of the Committee on Economics of the Bar**

The committee worked out the revisions adopted by the House of Delegates and assisted Mr. George Turner in the publication of the new Minimum Fee Schedule and Manual on Economics of the Bar which was adopted by the House of Delegates at the annual meeting on November 11, 1964. This new schedule has been distributed to the members of the Association.

The committee met on June 18, 1965, and later held a joint meeting with the Law Office Management Committee. Demonstrations were held for the joint meeting of the work of an automatic typewriter and its application to a law office, and of the potential use of computers in legal research as programmed by Mr. John Gradwohl of the University of Nebraska College of Law.

The joint committee decided that, upon request of local bar associations, members of the two committees would be made available to discuss law office management and economics of the bar, including the minimum fee schedule.

The committee would, likewise, be available to assist in adapting the state bar fee schedule to local situations and assist in implementing the adopting of such local schedules.

The chairman has answered a number of inquiries about the new minimum fee schedule and has discussed it at meetings of several local bar associations.

The committee recommends:

1. That the Minimum Fee Schedule and Manual on Economics of the Bar be constantly reviewed, and revised, and expanded as needed; that new materials be added if necessary.

2. That local bar associations direct their requests to George Turner, Secretary-Treasurer, Nebraska State Bar Association, when they desire a program to be presented by members of the two committees in connection with law office management, economics of the bar, and the minimum fee schedule.



3. That the committee be continued.

Thomas M. Davies, Chairman  
Thomas R. Burke  
Harvey D. Davis  
James J. Fitzgerald, Jr.  
C. C. Fraizer  
Richard E. Gee  
Herman Ginsburg  
James R. Hancock  
Bert L. Overcash  
Ray C. Simmons

CHAIRMAN MULLIN: The report of the Committee on Judiciary, James N. Ackerman, Chairman. This appears on page 16 of the program.

REPORT OF COMMITTEE ON JUDICIARY

James N. Ackerman

Mr. Chairman, the report being set out in writing on page 16, I will confine myself to a discussion of the two recommendations that have been made by the committee.

The first of these has to do with the possible expenditure of funds, so I assume, George, that we appropriately refer it to the Executive Council. The second one I think should appropriately be referred to this body, since I believe it does not involve the expenditure of funds. At any rate, our committee was sincere in both recommendations.

One has to do with the Judicial Retirement Act. We received an alarm, on twenty-four hours' notice, to hurry over to the legislature and oppose a bill which had been offered, Legislative Bill 488, which would have made very substantial amendments in the Judicial Retirement Act. This bill is the product of a subcommittee of the Revenue Committee of the Legislature, spearheaded by Senator Gerdes. I had a series of conferences with Senator Gerdes and I can tell you that he is sincerely trying to accomplish a legitimate purpose in the mind of a conscientious legislator. He is aware of the problem which exists in connection with the financing or funding of the Judicial Retirement Act. As a member of the Budget Committee, he is aware that there is, at least reportedly, a prospective deficit in the Judicial Retirement Fund.

To answer the question you asked a few minutes ago, he made the statement that while the fund at the present time is

apparently able to meet the commitments that are now in existence, before the next legislature convenes, or at the time the next legislature convenes, the actuary assumes that there will be an accruing deficit. This will require the legislature to appropriate general funds to meet the cost of continuing payments under the Judicial Retirement Act. Entirely offhand and without any formality, several of us are of the opinion that the legislature has no alternative but to appropriate those funds.

On the other hand, it is good housekeeping, to say the least, for the legislature to take into account the commitments which previous legislation has imposed upon the state, and to take appropriate steps, whatever they may be, to fund these liabilities.

The second part of the problem is that we have a pension plan which is certainly non-typical in terms of pension plans. It is so easy to confuse the problem of retiring employees of a commercial or industrial institution with the problem of retiring judicial office holders. We hire our employees, so to speak, late in life. We want them to accumulate substantial retirement benefits, maybe on the average in a very short period of time, and it would be relatively easy for us to be criticized by people who are not aware of the needs of judicial retirement programs and who could easily find fault with a program that has the outlines that we lawyers and the public, if they were informed, would really want for their judges. This is the basis of the problem, and it is why our recommendation to the Executive Council is that a special committee study the existing retirement plan and employ the necessary professional counsel in the form of an actuary or actuaries to assist in this, so that in future sessions of the legislature, when the question is raised as to what form our retirement plan should take or what amendments should be made, we will not have to start making our plan at that time.

There are, I understand from visiting with several judges, some questions about the present plan that have nothing to do with the funding of it. One of them has been raised here this morning by the Legislative Committee, and that has to do with a death benefit in the event of the death of a judicial incumbent, or possibly a retired judge. This question and others for the benefit of improving our plan could well be considered by such a special committee.

Do you want to take any action on that? This does involve expenditure of funds, if our recommendation for professional counsel be included.

CHAIRMAN MULLIN: I think that portion of your motion which relates to referring the question to the Executive Council can be placed at this time. Does anybody second the motion that we refer to the Executive Council the question of sponsoring an amendment to present merit plan legislation which would provide a procedure for giving or withholding endorsement of candidates for re-election.

TYLER B. GAINES, Omaha: I'll second that.

CHAIRMAN MULLIN: You have heard the motion. All in favor —

ROBERT A. BARLOW, Lincoln: Mr. Chairman, is that the one that is going to the Executive Council, or is it the other one?

CHAIRMAN MULLIN: Well, I took my wording from the written report of the committee —

MR. ACKERMAN: If we hire an actuary, Bob, you will have to pay him. I am pretty sure of that. That will involve expenditure of funds, so taking a tip from George's remark here earlier I think we can resolve in favor of the action but we will have to leave the implementation of it to the Executive Council.

CHAIRMAN MULLIN: Actually, Jim, the two motions could be combined. Both of them constitute recommendations to the Executive Council.

MR. ACKERMAN: All right. Shall I go ahead with the other half? The other half has to do with the criticism which has been made of the present judicial selection legislation. We have a rather careful and, I think, generally acceptable method of giving an approval or disapproval, an indication of approval or disapproval, of judicial aspirants in the initial appointing procedure. There is, however, in the law nothing that gives the same opportunity for the organized bar to express itself on the re-election of judges who stand on their record to be elected under the merit system.

The suggestion of the committee is that consideration be given to this and appropriate amendments be suggested to existing law to make it possible for the bar to signify its endorsement or lack of endorsement to a judicial office holder.

CHAIRMAN MULLIN: If there is no objection from the floor, we will treat these as one motion. The first, as you know, suggests that a recommendation be made to the Executive Council that a special committee, with the services of an actuary made

available, study methods of funding the judicial retirement system; the second motion recommends to the Executive Council that there be an amendment to present merit plan legislation which would provide procedure for giving or withholding endorsement of candidates for re-election.

PRESIDENT COHEN: Which does the committee recommend?

MR. ACKERMAN: The committee was of the opinion that it would be desirable and in the public interest that we do take a position favoring or not favoring the judicial re-election.

JAMES F. BEGLEY, Plattsmouth: Mr. Chairman, I would like to know the thinking of the committee concerning the appointment of a special committee rather than referring this matter back to the Committee of Judiciary. Does the Committee on Judiciary think there are too many other items to concern the committee with and therefore it would be better to have a special committee, or what?

MR. ACKERMAN: It was considered a technical question, Jim, that a small committee probably could handle better.

CHAIRMAN MULLIN: Perhaps some members of the Committee on Judiciary could serve on such a special committee, but I believe the Executive Council could make that determination.

All in favor signify by saying "aye"; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Committee on Judiciary**

The Committee on Judiciary met on June 18th, 1965, at the Cornhusker Hotel in Lincoln. The following members of the Committee were present:

Thomas F. Colfer, McCook  
James M. Knapp, Kearney  
Donald W. Pederson, North Platte  
Tracy J. Peycke, Omaha  
R. M. Van Steenberg, Scottsbluff  
Farley Young, Lincoln  
James N. Ackerman, Lincoln, Chairman

The committee reviewed suggested revisions in the Merit Plan for Selection of Judges which had been made publicly in recent months. The basis of the criticism lies in the area of reelection of judges. Specifically the criticism is that where a judge

is seeking to succeed himself by reelection there is no procedure by which his qualifications can be examined by the electorate. At the time of the original appointment the selection procedure contains ample opportunities for determining the capability of any applicant. Similar procedure would seem appropriate at the time a judge seeks reelection. The lawyers who practice before a judge are in a very difficult position to be critical of his performance. Some independent examination of it would seem to be appropriate and must be free from involving personalities.

**The committee recommends to the Executive Council that it give consideration to actively sponsoring an amendment to the present merit plan legislation which would provide a procedure for giving or withholding endorsement of candidates for reelection. This is considered to be a policy decision which is properly within the discretion of the Executive Council.**

The chairman reported on legislative activities during the past session of the Nebraska Legislature. He reported that appearances had been made in opposition to Legislative Bill 488, which bill would have substantially revised the present judicial retirement plan. Members of the Budget Committee of the Legislature have raised serious questions about the validity of the plan and the state's responsibility to fund it. It is anticipated that legislation will be offered in succeeding legislative sessions for the purpose of "improving" the judicial retirement program. **The Committee recommends to the Executive Council that a careful reexamination of the judicial retirement program be made by a special committee having the advantages of technical assistance from an actuary in order that the bench and bar will have some voice in the preparation of future legislation rather than finding themselves in a position of opposing legislation growing out of studies of the Legislative Council.** It is the opinion of the committee that the maintenance of a satisfactory judicial retirement program requires continuing interest and cooperation with the legislature.

**CHAIRMAN MULLIN:** Next on the agenda is the report of the Committee on Lawyer Referral, Al Ellick, Chairman. This appears at page 46 of your program. Al is another chairman who, I happen to have personal knowledge, has exerted untold hours on this particular challenge.

## REPORT OF COMMITTEE ON LAWYER REFERRAL

Alfred G. Ellick

The report of the committee is on page 46 of the bulletin. I think it is self-explanatory and I certainly won't read the whole report.

There is a little propagandizing at the beginning of the report, the first few paragraphs. Perhaps I was influenced when writing this report by the fact that your Bar Association sent me back to the Conference on Law and Poverty in Washington at the end of June, where I heard some of the ideas of many lawyers throughout the country, to wit, that we as attorneys and our organized bar associations have got to face up realistically to this problem of representation of the poor, and that if we don't ourselves do something about it and cooperate and work with the people who are interested in better representation of the poor, we may find the government stepping in more and more to take over that function.

Our lawyer referral program in Omaha is, we think, moving along in good order. We have 115 lawyers on the referral panel, each of whom has paid a fee of \$7.50 to be on the panel. That is payable each year.

The statistics at the bottom of page 46 and at the top of page 47 show the total number of referrals that went through our referral service for 1964 and for the first six months of 1965. There has been a gradual increase in the use of the Referral Service. At the present time approximately two referrals per day are being made at our referral office, which operates out of the Legal Aid Office at 18th and Harney Streets.

We have run, during the past year, a series of ads in the *Omaha World Herald*, thirteen of them, to be exact. Each ad, in effect, says, "Do you have a legal problem? If so, consult your lawyer. If you do not know a lawyer, call the Referral Service of the Omaha Bar Association"—and it gives the telephone number. Every ad stresses the fact that if a person has a legal problem he should first consult his own attorney, but if he does not have an attorney, then the Referral Service will assist him in finding a lawyer. The ads have had little cartoons and sketches along with them, and the results have been fair. There has been a little increase in the number of calls coming into the Referral Service after each ad in the *Herald*, but frankly, not enough, we think, to warrant continuation of the ads during the coming year.

I have distributed around here to some of the tables a little pamphlet that the Omaha Lawyer Referral Committee put out called "How to Get a Lawyer." Some of it is stolen, to be honest with you, from the Allegheny County Association in Pittsburgh, Pennsylvania. That pamphlet is going to be placed in the Court House and in other places where people who might want a lawyer can pick it up. It mentions a few of the common problems that people run into from a legal standpoint and, of course, ends up with the admonition, "If you have a legal problem, consult your lawyer. If you do not know a lawyer, call the Referral Service of the Bar Association."

Our state committee is most anxious to cooperate with any community that wants to start a Referral Service. We particularly would like to see a Referral Service started in Lincoln. We think that our experience in Omaha indicates that a Referral Service is worthwhile, that it benefits the individual lawyers, frankly, by indicating to people the type of legal problems where they should consult a lawyer. It increases the business of individual lawyers. It helps the organized bar because it is a public service function. It is in line with the theory that we should make legal services available to everyone. And of course we think it helps the public because it does provide a method whereby persons who have a legal problem and do not know a lawyer can be assured that they will be placed in contact with some attorney who will charge a reasonable fee for an initial consultation and an attorney, in effect, who is vouched for by the local bar association.

I would be glad to answer any questions any of you might have. Since this is, I believe, a special committee, before closing I would like to move that the committee be continued.

CHAIRMAN MULLIN: Do I hear a second?

THOMAS R. BURKE, Omaha: I second the motion.

CHAIRMAN MULLIN: Are there any questions on the motion that the report be approved and the committee be continued? All in favor signify by saying "aye"; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Committee on Lawyer Referral**

The availability of legal services to the indigent and to persons of moderate means is a matter of growing concern to bar associations everywhere. Equal justice under law is simply unattainable unless all persons, of whatever economic status, can obtain skilled

legal help when accused of crime or confronted with any other legal problem. The American Bar Association has placed top priority on this very serious question of providing legal services to all who need them. In addition, as we all know, the federal government through the Criminal Justice Act and the Economic Opportunity Act has announced its intention to improve the quality and quantity of legal help that poor persons can expect. It thus behooves all Nebraska lawyers to face up to this problem squarely and to reexamine the availability of legal services throughout our state. This obligation was stated succinctly by President Powell at the American Bar Association meeting in August:

We must ever recognize that under our system the exclusive privilege to practice law has been granted to the legal profession. Lawyers have a monopoly on the rendering of legal services. It is axiomatic that those who enjoy a monopoly have higher duties and responsibilities. In discharging these, the ultimate test must be the public interest. It is our clear duty to see that this interest prevails.

The plain fact is that unless we ourselves take steps to make sure that the poor person in trouble can be represented by competent counsel, we may very well find that some form of "socialized law" will soon be staring us in the face.

Legal aid and lawyer referral go hand in hand, with first priority, of course, going to legal aid. If the organized bar is going to move forward in these areas, the first step is to make sure that persons who are wholly indigent can obtain legal help when needed. The next step is to make it simple and convenient for persons of moderate means who do not know a lawyer to find one, and to assure such persons that they can consult an attorney at reasonable cost. This is the function of lawyer referral. It benefits the public, the individual lawyer, and the profession as a whole.

Omaha is still the only city in Nebraska with an organized lawyer referral service. The service is a project of the Omaha Bar Association and operates out of the Legal Aid Society offices at 1805 Harney Street. Attorneys on the referral panel pay a registration fee of \$7.50 per year and must agree to grant an initial consultation for a flat fee to any client referred from the referral office. The statistics for 1964 and for the first half of 1965 are as follows:

	1964	6 mos. - 1965
Total number of clients referred	395	226
Clients who failed to keep appointment	48	34
Active referrals	347	192



Number of cases closed during year	203	111
Total fees collected	\$5,321.65	\$3,173.48
Average fee per closed case	26.41	28.59
Number of closed cases in which the fee collected exceeded the minimum of \$7.50	60	30
Highest fee collected	\$ 250.00 (4)	\$ 475.00

Publicity is an essential element of an effective referral system. The Omaha service recently published a small folder explaining the referral plan and pointing out a number of common situations where the average person should consult a lawyer. A number of newspaper ads have also been run in the *Omaha World Herald* on an experimental basis.

Your committee stands ready to assist any local bar association or group of lawyers who may be interested in establishing a referral system. The mechanics are simple and the plan is largely self-supporting. The committee is particularly hopeful that a referral service can be inaugurated in Lincoln in the near future.

Alfred G. Ellick, Chairman  
W. A. Day, Jr.  
John R. Dudgeon  
Leo Eisenstatt  
John C. Gourlay  
Keith Miller  
Donn Raymond  
Eugene P. Welch

CHAIRMAN MULLIN: Harold Rock is the chairman of the Committee on Legal Education and Continuing Legal Education. I will call upon him for his report.

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

Harold L. Rock

I refer you to our report which starts on page 38. There is nothing there that needs to be repeated at this time; I am sure you can read that.

We do have one recommendation that fits in somewhat with the Committee on Unauthorized Practice studying group legal services, and the Committee on Legal Aid and Lawyer Referral. It concerns the problem of representation of the lower middle class and other indigents in civil and criminal cases.

The committee recommends that the Association study the feasibility of forming a local "Arden House" committee composed of members of the bar and interested members of the general public to study the community relationship of the bar and the public with the object of obtaining a stronger relationship through a deeper mutual understanding and the further object of recommending improvements in areas of existing conflict or neglect, or alternatively, consider the problems of proper legal representation of defendants in criminal matters, of indigents in civil cases, and problems in the area of lawyer referral.

I don't know whether our Legal Education Committee is specifically concerned with studies of this type. However, we've noticed that the problem is big. It has been discussed and was one of the main topics at the ABA meeting, and we feel that the Association should take the bull by the horns and go ahead with the study, and an "Arden House" study appealed to us.

I have a resolution that we were to submit to the Resolutions Committee but we just had it prepared. You will notice in our report that Dr. Alan Knox's report has been finished, although it isn't in final form.

I would ask Mr. Burke, as a member of the House of Delegates, to submit the resolution, if he would.

THOMAS R. BURKE, Omaha: Do you want me to read it now?

WHEREAS, Dr. Alan B. Knox and the Adult Education Research Department of the University of Nebraska have conducted a survey of the attitudes of active members of the Nebraska State Bar Association on continuing legal education, the results of which appear to provide significant and valuable information; and

WHEREAS, Many hours of personal time and careful attention were devoted to the project by Dr. Knox beyond his required duties; now therefore be it

RESOLVED: By the House of Delegates of the Nebraska State Bar Association that the appreciation of Nebraska State Bar Association be expressed to Dr. Alan B. Knox for his part in conducting the continuing legal education survey and preparing reports thereof.

CHAIRMAN MULLIN: I find that Mr. Burke, being a member of the House, is entitled to move the adoption of this resolution. Is there a second?

ROBERT K. ADAMS, Omaha: I second the motion.

CHAIRMAN MULLIN: All those in favor say "aye"; opposed. I declare the motion carried.

MR. ROCK: Dr. Knox did do a splendid job. He has been transferred to another school. We have his report. I have gone over it and John Gradwohl is preparing it in final form. I would ask leave to include it in the records of this meeting of the House of Delegates so it will appear with the records, but I would not ask the House to approve it, not having had a chance to read it, until next year, but if we could get it in this year it would uphold the continuity of the program. May I ask leave to include it in this report?

CHAIRMAN MULLIN: Yes. I am wondering one thing, Harold: The formation of an "Arden House" type of project would probably involve some funds. Am I right about that? If so, your recommendation should be directed to the Executive Council.

MR. ROCK: I don't know whether it would necessarily include funds, but it may, so maybe we should be safe and send it to the Executive Council.

CHAIRMAN MULLIN: Also this same subject probably overlaps with two or three of our other committees, and I imagine that maybe some central agency like the Executive Council should decide what, if anything, should be done and who will carry it out. If you will accept the suggestion that the Executive Council consider the recommendation, I will now ask whether anyone seconds the motion of Mr. Rock, that the report be approved and that this request be made to the Executive Committee.

ROBERT R. MORAN, Alliance: I'll second the motion.

CHAIRMAN MULLIN: It has been moved and seconded. All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Committee on Legal Education and Continuing Legal Education**

The committee reports the following activities for the year.

The final report prepared for the Bar Association on the survey of the Nebraska Bar Association members, under the direction of Dr. Alan B. Knox of the Adult Education Research Department of the University of Nebraska, has been nearly com-

pleted. The raw data, preserved on IBM cards, is available to the bar generally for other research or to answer questions of local bar groups. A proposed resolution of appreciation for the work of Dr. Knox and his staff has been submitted to the Resolutions Committee for action.

A clinic on some of the areas of common interest to the legal and medical professions is planned for May 5, 1966, under the joint sponsorship of the Nebraska State Medical Association and the Nebraska State Bar Association at Lincoln, Nebraska. This committee will cooperate with the Committee on Medico-Legal Jurisprudence for the Nebraska Bar Association's part of the program.

This committee is joining the Committee and Section on Practice and Procedure in presenting a program on evidence to the 1966 Annual Meeting of the Nebraska State Bar Association. This committee has taken the responsibility for the supervision of the preparation of a comprehensive review in outline form of the law of evidence in Nebraska.

The educational projects available to the bar during the year 1965 are the following:

Bridge-the-Gap program in Lincoln for new members of the bar, sponsored and presented by the Junior Bar Section, on June 25 and 26. Outlines and forms consisting of approximately 250 pages were distributed to new members of the bar attending the session.

New legislation seminar by the Junior Bar Section on September 17 and 18 on the 1965 legislation in Lincoln.

An estate planning program of selected topics featuring A. James Casner, Harvard Law School, presented by the Real Estate, Probate, and Trust Section at the Annual Meeting October 21 and 22.

A program on modern development in criminal procedure presented by The Creighton University Law School in Omaha on November 12 and 13. Although this is not a Bar Association project, it does augment the program and this committee intends to attempt to build a short traveling program of general interest to the Bar Association in the criminal area to be available to local bar groups.

The Tax Section will have three meetings, two one-day sessions in the out-state area and one two-day session in Omaha, all in early December. The topics are to be of general interest in the area meeting.

The committee has initiated plans to establish a volunteer speakers program to make speakers on educational topics available to interested small bar groups. The speakers, or a speaker, could be called upon, through the committee, to travel to a bar meeting, present a topic, e.g., criminal law developments or natural resources law developments, for one, two, or three hour sessions. The committee hopes to have a pilot group available by fall.

The committee believes there is an ever increasing interest in continuing education. The committee stressed the necessity for the distribution of complete and detailed papers and materials at the clinics, the cost of which is supported in part by a modest admission fee. The committee is of the opinion that the distribution of useful forms, checklists, and outlines should be continued and expanded in future years.

It is the consensus of the committee that the relationship of the Bar Association of the State of Nebraska with the public could be improved by creation of an Arden House-type committee, established to study and consider the subject of the general relationship of the public and the bar with particular emphasis on topics of indigency, legal aid, and adequate representation of individuals in all levels of society, whether or not ability to pay is a factor, to assure equal protection and due process for all. A strong portion of the committee felt that the subject of the study should be limited to consideration of problems incident to providing proper legal representation to defendants in criminal matters and to indigents in civil cases, and perhaps extend to problems in the lawyer referral area.

The committee recommends that the Association study the feasibility of forming a local "Arden House" committee composed of members of the bar and interested members of the general public to study the community relationship of the bar and the public with the object of obtaining a stronger relationship through a deeper mutual understanding and the further object of recommending improvements in areas of existing conflict or neglect, or, alternatively, consider the problems of proper legal representation of defendants in criminal matters, of indigents in civil cases, and problems in the area of lawyer referral.

Harold L. Rock, Chairman  
A. Lee Bloomingdale  
Thomas R. Burke  
Dean David Dow  
Dean James A. Doyle  
John M. Gradwohl

Richard E. Hunter  
John C. Mason  
John E. North  
Donald R. Sampson  
Thomas M. Shanahan  
Howard Tracy  
Flavel A. Wright

CHAIRMAN MULLIN: Somewhat along the same lines, we come to the report on legal aid, William D. Blue, Chairman. It appears on page 31 of the program.

## REPORT OF COMMITTEE ON LEGAL AID

William D. Blue

Mr. Chairman, Gentlemen: The Nebraska State Bar Committee on Legal Aid met at the midyear meeting in Lincoln this year, and at this meeting serious consideration was given to how legal aid service in Nebraska could be improved. The effect of certain federal programs and the local legal aid situation was seriously discussed. Mr. Sheldon Krantz, who is practicing law in Omaha now and is a member of our committee, agreed to investigate this matter and report to the committee.

The Legal Aid Clinic in Lincoln this year has, as it has in the past, conducted its functions in the Law College Building, University of Nebraska. This free Legal Aid Clinic is sponsored by the College of Law and the Lincoln Bar Association and the Barristers' Club in Lincoln and the Lincoln Community Chest. This Clinic is open on Tuesday and Thursday afternoons. It has a paid director who is assisted by senior law students and by members of the Barristers' Club. There hasn't been much change in the function and operation of the Legal Aid Clinic in Lincoln for several years.

Omaha now, and for the past two or three years, has had its first full time legal aid office, and with a full time attorney-director and legal secretary with offices here in Omaha.

I move that the report be accepted.

CHAIRMAN MULLIN: Do I hear a second?

ROBERT A. BARLOW, Lincoln: I second the motion.

CHAIRMAN MULLIN: Those in favor say "aye"; opposed. Carried.

PRESIDENT COHEN: May I ask a question, Mr. Chairman, of this committee? Will this committee take care of the recom-

mendations and work with the national Office of Economic Opportunity?

MR. BLUE: Mr. Krantz has been checking this out. We certainly intend to examine it and try to work along with this national program that fits in with or takes care of the problem in Nebraska. We will consider doing this, yes.

[The report of the committee follows.]

### **Report of the Committee on Legal Aid**

Your Committee on Legal Aid respectfully submits the following report:

The Nebraska State Bar Committee on Legal Aid met at the midyear meeting in Lincoln. At this meeting, serious consideration was given to how the legal aid service in Nebraska could be improved. The effect of certain federal programs on the local legal aid situation was discussed, and Mr. Sheldon Krantz of our committee agreed to investigate this matter and report to the committee.

The Legal Aid Clinic in Lincoln this last year has, as in the past, conducted its functions in the Law College building at the University of Nebraska. This Legal Aid Clinic is sponsored by the College of Law, the Lincoln Bar Association, the Lincoln Barristers' Club, and the Lincoln Community Chest. This clinic is open on Tuesday and Thursday afternoons, with a paid director who is assisted by senior law students and by members of the Barristers' Club.

Omaha now has its first full-time legal aid office with a full-time attorney-director, and a legal secretary with offices in the A. C. Nelson Center for Community Services.

William D. Blue, Chairman  
Robert R. Camp  
Kenneth H. Elson  
Charles F. Fitzke  
Sheldon Krantz  
Donald L. Wood

CHAIRMAN MULLIN: The report of the Committee on Procedure, Norman M. Krivosha of Lincoln, Chairman.

## REPORT OF COMMITTEE ON PROCEDURE

Norman M. Krivosha

Mr. Chairman and Members of the House of Delegates: I will not take the time to read in detail the report of the Committee on Procedure. It appears in the printed program on pages 42 and 43. I direct your attention to that report.

There is, however, one matter which I would like to take a few additional moments to discuss with you, and that pertains to the recommendation of the committee concerning settlement of claims involving minors. Nebraska presently has Sections 38-121 and 38-122 of the Revised Statutes of Nebraska, which in substance provide that when the amount due any minor under any proceedings *in any court of record* shall be of the value of \$200 or less, the natural guardian or parent of the minor may accept and receipt for such amount. It then provides, in effect, that the amount so received shall be invested as provided for in Section 38-121, which section authorizes the parent, when directed by the county court in its discretion, to invest such sum in a savings account of a bank or in stock of a building and loan association or in postal savings of the United States of America in the name of the ward. No appointment is necessary or bond required.

It would appear from the language of Section 38-121 that some proceeding must be pending in a court of record for that section to apply. Therefore, even if the sum is \$200 or less, an action would have to be commenced in district court or some proceeding brought in county court.

In all other cases, then, the statute requires the appointment of a guardian, posting of bond, and annual accounting.

As pointed out in the report now on file, oftentimes this guardianship remains open and the bond premiums paid for many years.

This filing of the annual report and the payment of bond premium is required by law and in many counties strictly enforced by the county court, all to the difficulty and dismay of counsel.

It should now become apparent that the provisions of these statutes no longer are realistic and in the best interests of either the parent or the minor child.

Far too often the parent and minor child remove themselves from the county in which the guardianship was filed and even from the state, making it impossible for the attorney of record to



prepare the annual accounting or obtain payment of the bond premium.

Furthermore, it would seem, at least to this chairman, that the procedural difficulty inherent in effecting such settlements is unnecessary.

Obviously, the two ends sought to be obtained by such statutes is to provide the defendant or, more realistically, his carrier, with a valid release from a minor while insuring protection of the estate to the minor.

There is nothing difficult or in violation of due process of law to provide by statute that a release executed under conditions prescribed shall constitute a valid and binding release.

To now require a filing in the county court requesting the appointment of a natural parent as guardian when the law already recognizes the natural parent as a guardian, and then further requiring such parent to request the county court for permission to approve a settlement, oftentimes already pending in the district court, seems a needless waste of time. There is nothing magic in vesting authority in the county court to approve a compromise involving a minor, and it would appear that court approval of settlements involving minors could just as effectively be obtained in the district court as in the county court, thereby eliminating the necessity of first going to the county court and then to the county court and then to the district court. It is approval by a court which is important, and the district court would be just as effective in safeguarding the minor.

Many jurisdictions have already recognized this needed change and have brought it about.

Although by no means do I intend this to be a report of an exhaustive study of the entire area, nevertheless I have made a brief examination into various other jurisdictions and found similar changes have already been made. Iowa permits the parent to accept and receipt for payment up to \$1,000 without the approval of court and vests the court with the discretion in requiring a bond where the sum is in excess of \$1,000. The court referred to there is equivalent to our district court.

California, to my mind, has even more realistically approached the problem, providing that the natural parent is automatically authorized to compromise disputed claims for minors subject only to approval of the superior court. The code further provides that if the court approves the compromise and the amount does not

exceed \$10,000, the court may order the balance after the payment of expenses, costs, and fees deposited in a bank or trust company similar to Nebraska Section 38-121.

Illinois likewise has more realistic provisions.

It would therefore seem to me that serious consideration should be given to analyzing this entire problem and considering drafting legislation which:

1. Recognizes the parent as guardian without the necessity of appointment thereof and authorizes settlements up to \$3,000 without court approval; and providing that the parent may sign a valid release.

2. Vests jurisdiction in the district court to approve settlements where the amount is in excess of \$3,000.

3. Directs the district court, where the settlement exceeds \$3,000 but is less than \$10,000, to order the deposit of said funds in a bank or savings institution subject to withdrawal only on approval of the district court, eliminating a bond and annual reporting.

4. Provides for a bond in the discretion of the court only where the amount exceeds \$10,000.

In my mind, this appears to be a more practical and realistic approach to the problem and one which achieves all of the goals sought.

Mr. Chairman, I ask that this supplemental report be considered as part of the report of the Committee on Procedure and move the adoption of such report.

CHAIRMAN MULLIN: Is there a second?

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: Is there any discussion? All in favor of the report as amended signify by "aye"; opposed "nay". Carried.

[The report of the committee follows.]

#### **Report of the Committee on Procedure**

The committee wishes to report upon its activities during the past year.

During the course of the year, several meetings were held by the committee including one at the midyear meeting of the Bar Association.

Several specific areas were covered at each of these meetings and resolutions adopted by the committee in connection therewith.

A resolution was adopted by the committee recommending that Rule 11 A-2 of the Revised Rules of the Supreme Court of the State of Nebraska, be revised to provide that in workman's compensation cases and unemployment compensation cases, brief day shall be on the thirtieth day after the date the transcript is filed, and that the appellee shall serve and file his brief within thirty days after appellant's brief has been served and filed. It was the feeling of the committee that this would then bring the rule in connection with workman's compensation cases in line with other cases brought before the Supreme Court and avoid confusion or impossibility of compliance.

The further resolution was adopted by the committee recommending that an investigation by the committee be conducted to suggest legislation to the Legislative Committee of the Bar Association in so far as the same applied to the settlement of claims involving minors.

It was the feeling of the committee at the present time that the provisions of Section 38-122 R.R.S. 1943 pertaining to the right of the parent to settle claims of a minor where the sum is of the value of \$200 or less was no longer realistic and that much difficulty was encountered in effecting a settlement for a minor and then being required to maintain and keep open a guardianship, in some cases, for as long as fifteen or sixteen or eighteen years and pay the bond premiums thereon.

The committee further recommended that some investigation be made to determine the feasibility of transferring specific statutory authority for settling personal injury claims involving minors into the district court so as to eliminate the necessity of filing a separate action in the county court when a suit is already pending in the district court. No specific solutions were reached other than to recognize that a problem existed in this area and that some further work and investigation should be made.

The committee further adopted a resolution recommending that investigation be made into the area of service of process on nonresident manufacturers so as to eliminate the necessity of a Nebraska resident being compelled to travel to some far off state in order to bring suit for an injury caused in the State of Nebraska as a result of a faulty or defective product shipped into the state. Again no conclusion was reached other than to suggest further investigation.

It is therefore the recommendation of this committee:

1. That the Supreme Court of the State of Nebraska, consider the possibility of revising rule 11 A-2 to make the same uniform and consistent with other briefs filed before the Supreme Court.

2. That an investigation be conducted during the coming year in regard to the matter of the settlement of claims of minors.

3. That an investigation be conducted by the committee during the ensuing year in regard to service of process for product liability.

4. That the foregoing report of this committee be adopted.

Norman M. Krivosha, Chairman  
Kenneth H. Elson  
Lyle C. Holland  
Hans J. Holtorf  
Daniel D. Jewell  
William P. Mueller  
Milton C. Murphy  
Albert G. Schatz  
Warren C. Schrempp  
Bernard B. Smith  
Edward M. Stein  
Thomas A. Walsh

CHAIRMAN MULLIN: The report of the Special Committee on Oil and Gas Law, Mr. Paul L. Martin, Chairman.

## REPORT OF SPECIAL COMMITTEE ON OIL AND GAS LAW

Paul L. Martin

The last session of the legislature of the State of Nebraska passed one act which was of vital importance to the industry, involving involuntary unitization, or forced pooling. It is just getting under way. A few hearings have been held, and we will know within the next year or so whether that is going to produce a lot of litigation. But it is very interesting to the oil and gas industry.

The committee has recommended for presentation to the next legislature five different amendments to the present statutes. They are not controversial. They are merely matters that we think will help the administration of the acts they cover.

In addition to that, we have under consideration at the present time, and we are studying with a committee of the Rocky Moun-

tain Oil and Gas Association, the legal committee of the association, in an endeavor to work out some sort of a satisfactory solution of the problem of dormant, abandoned, or severed mineral or royalty interests, and also provide a way that you can get a lease on these small interests that have been, maybe not abandoned, but at least they are so small that they do interfere with the orderly drilling of the wells, where they are involved. The committee will have something later to present on that.

The committee makes the following recommendations:

1. That the report of the committee be approved.
2. That the committee be continued.
3. That the committee submit to the Committee on Legislation for consideration, drafts of the proposed legislation.
4. That the members of the Association be requested to submit to the committee for investigation, study, and action, problems arising in connection with oil and gas law and desirable legislation to be presented to the legislature of the State of Nebraska.

This oil legislation doesn't mean a lot to those of you who don't have any activity at all, but it is of vital importance to those of us at the west end of the state, southwest, but we like ideas and we do hope that items that can help out with an orderly changing of our statutes to cover the problems of the industry will be presented to us during the next year.

I move the adoption of the report.

CHAIRMAN MULLIN: Thanks very much, Paul. Stay here with us, as you have the next report too.

The chairman has moved the adoption of this report and the recommendations contained therein. Do I hear a second?

PAUL P. CHANEY, Falls City: I second the motion.

CHAIRMAN MULLIN: All in favor signify by "aye"; opposed "nay". Carried.

[The report of the committee follows.]

#### **Report of the Special Committee on Oil and Gas Law**

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

The Seventy-fifth Session of the Nebraska State Legislature in 1965 passed major legislation affecting the oil and gas industry in

the form of an involuntary unitization amendment to the state's Conservation Act. This will probably introduce some unusual litigation and will be watched with interest by the oil and gas industry and those engaged in oil and gas practice. No other legislation particularly affecting the industry received favorable attention of the legislature.

Your committee feels that the statutes of Nebraska affecting the activities of the industry are in excellent shape, but a few matters should receive the approval of the Nebraska State Bar Association in the legislature of 1967.

Your committee recommends the following legislative changes for the next session of the legislature.

1. Amendment of Chapter 58, Section 811, of the Revised Statutes of Nebraska to provide that oil and gas liens be filed in the office of the register of deeds and indexed against the land in those counties where the office of county clerk and register of deeds is separate, and in said counties where liens have been filed in the office of the county clerk, that the clerk refile the same in the office of the register of deeds and that the liens be indexed against the land.

2. Amendment of Chapter 57, Sections 210-212 and Sections 401-402, to authorize execution of oil and gas leases and pipe line easements by conservators as well as administrators, executors, guardians, or trustees as now provided.

3. Amend Chapter 57-817 to provide that, when any lien provided for by Sections 57-801 to 57-820 shall have attached to the property covered thereby, it shall be unlawful for any person to remove such property or any part thereof or cause the same to be removed from the premises where located at the time such lien attached, or otherwise dispose of the same without the written consent of the holder of such lien; providing further, that the liens follow the property.

4. Amend Chapter 57-203 to add the word "certification" in the enumerations of actions that would start the ten days time for computation of filing date for the affidavit.

5. Submit legislation clarifying the manner in which notice of hearing shall be given as provided in the Code of Civil Procedure for the service of process in civil actions in the district courts of this State, in cases involving involuntary unitization.

In addition to the above recommended legislation, the members of the committee have under study legislation for the extinguishment of dormant, abandoned, or severed mineral or roy-

alty interests and the problem of leasing unknown or nonconsenting severed or dormant mineral interests. These are controversial matters and the committee will be in contact with the Legal Committee of the Rocky Mountain Oil and Gas Association trying to work out proposed legislation that will be satisfactory and fair to both the owners of these interests and to the oil and gas industry. We would like to have any member of the Nebraska State Bar Association interested in this type of legislation submit his observations and recommendations to the committee.

If this report is approved, the committee will submit its recommendations to the Committee on Legislation of the Nebraska State Bar Association so that drafts of the legislative bills to cover the recommendations will be prepared in ample time for further consideration by the Committee on Legislation of the Association.

The committee makes the following recommendations:

- (1) That the report of the committee be approved.
- (2) That the committee be continued.
- (3) That the committee submit to the Committee on Legislation for consideration, drafts of the proposed legislation.
- (4) That the members of the Association be requested to submit to the committee for investigation, study, and action, problems arising in connection with oil and gas law and desirable legislation to be presented to the legislature of the State of Nebraska.

Paul L. Martin, Chairman  
Robert J. Bulger  
P. J. Heaton  
Hans J. Holtorf  
John D. Knapp  
J. H. McNish  
R. L. Smith  
Howard W. Spencer  
Ivan Van Steenberg  
Floyd E. Wright

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

Paul L. Martin

While I am on my feet I am going to make just a short report of the Trustee of the Rocky Mountain Mineral Law Foundation. Some of you don't know too much about it, but the present mem-

bers of the Association consist of thirteen law schools, ten bar associations, six mining associations, and three oil and gas associations, extending from Arizona to North Dakota and from California to Oklahoma. It is a very interesting organization. I think they are doing some good.

The publications they have now at the present time are the *Rocky Mountain Mineral Law Institute Proceedings*; *The Gower Federal Service* (Public Lands, Oil and Gas Leasing Service); *The Gower Federal Service—Outer Continental Shelf* (Outer Continental Shelf Oil and Gas Leasing Service); and also one on mining. They recently published the *American Law of Mining*, which is a five-volume treatise—there wasn't anything like it in publication; the *Law of Federal Oil and Gas Leasing*; the *Rocky Mountain Mineral Law Review*; and, at the present time, which is of more interest to the lawyers in the State of Nebraska, they are putting out the *Water Law News Letter*, and I think they will go into the water law phase of natural resources more and more.

I am not going to name the scholarships and other programs that they have. The research center of the Foundation is at the University of Colorado. Recently the executive director resigned, and you will be interested to know that we have just appointed a Nebraska graduate, Don Sherwood of Denver, who has been with one of the leading law firms out there, to take his place and we think we are going to get a real good job out of Don. I happen to represent the Nebraska State Bar Association on the Board of Trustees. This year I am acting as president, and it has been a very, very interesting job over the past few years. I like it and I really think that it is worth while to the oil and gas industry.

CHAIRMAN MULLIN: Paul, I want to thank you for an excellent and very interesting report. I do not believe that a motion is required in connection with this last report.

[The report of the Trustee follows.]

#### **Report of the Trustee of the Rocky Mountain Mineral Law Foundation**

The Rocky Mountain Mineral Law Foundation is an educational institution unique in its concept and organization. It was conceived as a cooperative project of law schools, bar associations, mineral associations, and the affected industries to stimulate research and continuing study in mineral law and its development by students, lawyers, lay members, and corporate employees engaged in the industry. Since its inception ten years ago, the



Foundation has gained national reputation, not only for its annual institutes but for its increased research activities and for its publications in the field of mining law. Among the better known of its publications are the following:

1. *Rocky Mountain Mineral Law Institute Proceedings.*
2. *The Gower Federal Service.* (Public Lands, Oil and Gas Leasing Service).
3. *Gower Federal Service—Outer Continental Shelf.* (Outer Continental Shelf Oil and Gas Leasing Service).
4. *Gower Federal Service—Mining.* (Public Land Mining Service). In 1965 a compilation of the general mining laws and regulations was added as an optional feature of the service.
5. *American Law of Mining.* (Five volume treatise, published in 1960).
6. *Law of Federal Oil and Gas Leasing.* This treatise is the only comprehensive analysis of the laws and regulations and decisions concerning the leasing and development of oil and gas deposits on the public domain, acquired lands, Indian lands and outer continental shelf lands. Because of the recent revision in regulation numbering, the treatise is being revised and the revised portion of the treatise will be distributed by the publisher in the coming year.
7. *Rocky Mountain Mineral Law Review.*
8. *Water Law News Letter.* (Quarterly report of water law development in the western states, beginning publication in August of this year).

In addition to the Foundation's publications it has been active in other programs of interest to oil and gas and mining attorneys. Some of the more important projects are as follows:

1. **SCHOLARSHIP.** Each year the Foundation makes available scholarships of \$200 each to students in each of the 13 member law schools. The scholarships are designed to promote and encourage interest in oil and gas and mining law, and are awarded annually to law students who have done outstanding work in this field.

2. **ELECTRONIC DATA RETRIEVAL PROGRAM.** For the past two years years the Foundation has been working in conjunction with the Denver University College of Law and the Denver Computer Center to develop a practical method of using electronic computers to do legal research concerning the decisions of the Department of the

Interior. The Foundation is now conducting tests to determine the reliability of the program and to develop the operational phase. When the test program has been completed the Foundation expects to continue its work with Denver University with the expectation of storing all of the administrative decisions of the Department of the Interior concerning oil and gas and mining law and making this information available to practicing attorneys throughout the area.

3. **WATER LAW NEWS LETTER.** Last year the Foundation decided to commence making its services available to water law attorneys as well as those interested in mining and oil and gas law. As an outgrowth of this decision, a special committee has developed a program for the publication of a quarterly news letter which will report water law developments on a regional and state by state basis for all of the western states. In addition, federal legislation and administrative activity of interest to water law attorneys will be reported.

4. **RESEARCH CENTER.** The Research Center of the Rocky Mountain Mineral Law Foundation, located in the University of Colorado Fleming Law Building, provides a collection of unpublished briefs, memoranda and articles and other material which is often unavailable through regular research methods. The Center is maintained for the use of the registrants of the institutes, Foundation members and contributing organizations.

5. To further direct research and writing for the benefit of all interested in the development of mineral law, the Foundation has inaugurated a program of grants and aid for specific research projects, thereby implementing the Foundation's purpose of student participation while at the same time securing the answers to problems of current importance to other members of the Foundation.

6. One of the principal functions of the Foundation is the annual three-day institute devoted to oil and gas law, mining law, and allied subjects. These institutes feature scholarly papers and discussions by outstanding authorities and reflect the thinking, experience, and research abilities of the leading minds in the field. That they have attained national prominence is indicated by the continued large attendance by lawyers and industry representatives from all parts of the nation and certain foreign countries. Proceedings of each institute are edited by the Foundation and are preserved for the use and benefit of all in permanent form by Matthew-Bender and Company. The institute for 1966 will be held at Boulder, Colorado, on the University of Colorado campus, on July 14th, 15th and 16th.

Present members of the association consist of thirteen law schools, ten bar associations, six mining associations and three oil and gas associations. Representing the Nebraska State Bar Association, I have the privilege of acting as president of the organization for the ensuing year. My service as a trustee has been interesting, enjoyable and rewarding.

Paul L. Martin

CHAIRMAN MULLIN: The report of the Committee on Unauthorized Practice, Albert Reddish, Chairman. This appears on page 18 of your program.

### REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE

Albert T. Reddish

Mr. Chairman, Members: The report is rather lengthy. I do want to stress the first two items of committee policy and committee procedure. We have been asked several times this year to try to take part in things where we would be participants in private litigation. That is not the function of the Unauthorized Practice of Law Committee. Our function is to try to protect the public. It isn't to preserve the bread and butter of the lawyer and it isn't to settle lawsuits for private litigants.

On procedure, we have had some who have wanted us to start lawsuits all over the state. We don't encourage lawsuits. We try to settle things as much as we can by negotiation and by amicable discussion.

I will enlarge briefly on the proposed conference. Today we have a meeting among members of the Unauthorized Practice of Law Committee and representatives of the Trust Division of the Nebraska Bankers Association with the objective eventually of preparing for presentation a statement of principles between the Trust Division of the Nebraska Bankers Association and the lawyers, for approval by both groups. We'll follow that up with a conference committee which we believe will help us resolve any problems we may have, particularly with trust departments, but since the Trust Division is substantially an independent bankers association we may not have as much luck working with the small banks that do not have trust departments, but it will give us a vehicle, we believe, which will eliminate some of the source of controversy and some irritation that has existed in the past. We believe this will be very beneficial for everybody concerned and will give the public a great deal of protection. I am very encouraged by this and very pleased with the developments. I be-

lieve that when completed, and I am sure it will be completed, it will represent a significant advance in bar-trust department relations.

The committee recommends:

1. If debt adjustment legislation appears likely in Nebraska in the future, the Bar Association promote an act prohibitive in scope.

2. Amendment of Section 28-746 to eliminate conviction of a misdemeanor as a condition to prohibition of resort to provisional remedies to collect a debt, and to provide such prohibition in each instance where it is proved the creditor, its agent, or assignee, has used simulated process.

3. Amendment of the act to license and regulate collection agencies to prohibit any licensee under the act from using documents which simulate court process or which simulate government documents as a collection device, with such amendment to correspond with provisions of the proposed model collection agency licensing act.

And, parenthetically, we received this year a number of complaints about "payment demand," which is the name of it. It comes in a manila envelope shaped just like an Internal Revenue envelope, with a Washington D. C. zip code number identical with the Treasury Department, and inside is "Payment Demand"—you are notified to pay. The Federal Trade Commission has said that it is not simulated process. Our committee, after considering it, has decided it isn't simulated court process, but the ABA Unauthorized Practice Committee and the Wisconsin Attorney General's office have decided that it is simulation of government process and has recommended this, and the Model Collection Agency Law is being revised to prohibit this as much as court process. I have had about seven complaints in the past three months about this.

4. Legislation making it a misdemeanor to print for use, make available for distribution, distribute, promote, or sell forms simulating court process or government documents for use in debt collection activities.

Mr. Chairman, I move the adoption of the report and request that it be printed in full in the journal of the meeting.

CHAIRMAN MULLIN: Is there a second to Mr. Reddish's motion?

DANIEL D. JEWELL, Norfolk: I second the motion.

PRESIDENT COHEN: Mr. Chairman, I would like to ask Mr. Reddish a question on these pooling arrangements that are being sponsored in some states by the bar associations. I recall reading an article in a law journal outlining in detail how much good work is done and this seems to be spreading over the country. The one that was held up as a very fine arrangement was the one that is in use in Arizona, especially in Phoenix. Does your committee have anything on that?

MR. REDDISH: We haven't felt that it is within the scope of the Unauthorized Practice of Law Committee to undertake that. That would appear to be more within legal aid. I do believe that Bar-sponsored committees, along with social welfare agencies, are doing excellent work in that field, and we believe that if the Legal Aid Committee would undertake that, it would be very desirable. Of course, our objection is to the active debt-adjustment firms which make assurances that sound like a loan in the advertising, lots of times, and they make assurances that they are going to get everybody free from their debts, but the creditors haven't accepted the debt arrangement; it doesn't protect them against garnishment or against replevin, foreclosure of a mortgage, or anything like that. If they advise them on those things, they are practicing law; and if they don't advise the debtor on those things, the debtor is ill informed or incompletely informed as to what his rights and remedies are. That, of course, is what we are directing our objection to.

I do believe that the Legal Aid Committee might have an area of investigation and activity here in debt pooling in connection with the activities that they are sponsoring, particularly in Lincoln and Omaha, and out-state as well.

ROBERT A. BARLOW, Lincoln: Briefly, what is debt pooling?

MR. REDDISH: I don't know if you can be brief about it. Debt pooling is where somebody says "Now you give me a list of your creditors and you pay me \$35.00 a week and we will pay off your creditors pro rata."

We had one complaint this year where the initial payment of \$250 was made. They wouldn't accept a check, which was perfectly good and the bank assured the debt pooling agency it was perfectly good, but they demanded cash. Five months later not a single creditor had received a penny. That is not typical but it does occur too frequently. They, of course, charge a premium for performing this service.

CHAIRMAN MULLIN: If there are no other questions, we have a motion now before the floor. All in favor signify by the usual sign of "aye"; opposed. Carried.

[The report of the committee follows.]

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

**Committee Policy.** The Committee has found it necessary to restate the policy underlying its functions and existence during the past year to legislative committee, lawyers and laymen. The committee is not established to further the interests of private individuals in private litigation; to preserve the bread and butter of lawyers; or to stir up litigation to prove theoretical points. The function of the committee is to protect the public from damage to property or civil rights or interests through the practice of law by unauthorized persons who are not subject to the canons of ethics of the Bar Association or the discipline of the courts. The statement of the Iowa court that the battle against practice of law by unauthorized persons is the public's war, but the bar must fight it, bears constant restatement. The Committee on Unauthorized Practice of Law is solely a vehicle for preservation of the public interest, but can be effective only through the alert cooperation of all members of the bar, lay agencies, and the public generally.

**Committee Procedure.** The committee attempts to handle each situation as it is presented without litigation. First, there must be a complaint; second, the complaint must be investigated; third, if investigation reveals some possible violation, negotiation is attempted with the allegedly unauthorized practitioner; fourth, if negotiation is unsuccessful, the matter is referred to a conference committee, if one exists, on either the state or the national level which is composed of members of the business or profession of the lay person and members of the bar, and resolution is attempted there. The committee resorts to litigation only as a last resort to stop an existing overt activity which is damaging the public, and not to prove a theory.

**Proposed Conference.** The committee presently is engaged in preliminary negotiations toward establishment of a new conference committee between the State Bar Association and representatives of influential commercial institutions. The committee hopes within a short period of time to be able to recommend to the Executive Council of the Association establishment of a conference committee with this group. Such a conference committee would eliminate a major source of irritation, and substantially benefit not only the members of the bar and the institutions involved, but also the public.

**Debt Pooling.** A representative of the committee appeared to support LB 416, a bill to prohibit debt pooling, and to oppose LB 545, a bill to license and regulate debt pooling firms. The Banking, Insurance and Commerce Committee of the legislature killed LB 416 and approved LB 545, which was later passed by the legislature. Partly upon the urging of the UPL Committee, the Governor vetoed LB 545. Further activity in this area may be expected. Presently the committee has before it a complaint about one debt pooling firm operating in Nebraska.

**Simulated Process.** Although the committee constantly receives complaints of simulated process, incidence of its use has multiplied so far as reports to the committee would indicate this year. Much of this use has originated in Nebraska. The committee has protested resort to simulated process to offending firms or persons, and has received agreement from several of these firms or persons that use of the offending forms would cease. Several of the complaints have originated outside Nebraska. The committee has reported these instances to general counsel or unauthorized practice of law committees of the originating states. A new form of demand probably beyond the scope of simulated process has appeared on the scene. It is designed to appear similar to cover envelopes and forms of the Internal Revenue Service or other governmental agencies. The Assistant Attorney General of Wisconsin is drafting a bill to prohibit the use of such forms in Wisconsin and the proposed model collection agency act is being amended to prohibit simulation of government documents as a collection device. Amendment of the Nebraska Collection Agency Licensing Act in such manner appears desirable.

**Group Legal Services.** The committee was solicited for its reaction to a proposal for group legal services submitted by a special committee of the California Bar. Although the Nebraska UPL Committee is still considering the proposal, it is noted the California Bar Governors rejected the proposals of its special committee on group legal services, while recognizing that the legal profession must discharge its responsibility to provide all citizens with legal services, and the obligation of the organized bar to ascertain whether public needs for legal services are being fulfilled and to devise or approve methods by which such needs may be met.

**Real Estate.** The National Conference of Lawyers and Realtors has approved a legend to be placed upon real estate binder forms directing attention to the fact that the binder is a legal document and that the services of a lawyer may be required. The Nebraska UPL Committee has recommended that the Bar Com-

mittee on Collaboration with the Nebraska Real Estate Association sponsor adoption of such a legend in its negotiations with realtors.

**Investigation.** Investigation remains a major problem of the committee. The committee has requested the Executive Council of the Association to authorize retaining an investigator in one area of constant concern to the committee.

The committee recommends:

1. If debt adjustment legislation appears likely in Nebraska in the future, the Bar Association promote an act prohibitive in scope.
2. Amendment of Section 28-746 to eliminate conviction of a misdemeanor as a condition to prohibition of resort to provisional remedies to collect a debt, and to provide such prohibition in each instance where it is proved the creditor, its agent, or assignee, has used simulated process.
3. Amendment of the act to license and regulate collection agencies to prohibit any licensee under the act from using documents which simulate court process or which simulate government documents as a collection device, with such amendment to correspond with provisions of the proposed model collection agency licensing act.
4. Legislation making it a misdemeanor to print for use, make available for distribution, distribute, promote, or sell forms simulating court process or government documents for use in debt collection activities.

Albert T. Reddish, Chairman  
 Charles W. Baskins  
 Bevin B. Bump  
 Edward F. Carter, Jr.  
 Peter E. Marchetti  
 August Ross  
 Ronald G. Sutter

(NOTE: Walter H. Smith of Plattsmouth was an active member of the Committee prior to his appointment to the district court bench).

**CHAIRMAN MULLIN:** It is always a pleasure and indeed a privilege to introduce my associate of many years and my very good friend, George Boland, who will give the report of the Committee on Medico-Legal Jurisprudence. The written report appears on page 22 of our program. George!



**REPORT OF COMMITTEE ON MEDICO-LEGAL  
JURISPRUDENCE****George B. Boland**

Mr. Chairman and Members of the House of Delegates: I will not read for you the report of our committee, but I would like to make acknowledgement, first of all, of the pleasant association that exists between all of the members of your committee; and secondly, the thoughtful application of their talents and their efforts to the problems which we have considered during the past year. With that in mind, I would like to call to your mind and to your attention the members of the committee. They are: Charles E. Wright, Harry L. Welch, Joseph P. Cashen, James I. Shamberg, Thomas W. Tye, Bernard Sprague, and myself.

The members of the committee feel that by the activities of the committee and their associations with the Nebraska Medical Association there has been created a very desirable spirit of camaraderie between the Nebraska State Bar Association and the Nebraska State Medical Association. We believe that this relationship of interprofessional groups is a very valuable asset not only to the associations themselves but to the general public.

Therefore I would offer a motion that the report of this committee be approved and that the activities of the committee be continued.

CHAIRMAN MULLIN: Thank you. Is there a second?

CHARLES H. YOST, Fremont: Second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the report be approved and that the activities of the committee be continued. All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

**Report of the Committee on Medico-Legal Jurisprudence**

The Committee on Medico-Legal Jurisprudence of the Nebraska State Bar Association met at Suite 700, First National Bank Building, in Lincoln, Nebraska, on June 18, 1965. The items of discussion revolved around the responsibility of the Nebraska State Medical Association and the medical profession in regard to supplying expert medical testimony in malpractice cases for both plaintiffs and defendants. No definite conclusion was reached in regard to formulating a procedure relating to this subject. There was long and detailed discussion of the effect of the move-

ment in some jurisdictions for the appointment of court appointed expert medical witnesses in all types of medical-legal cases. It was the confirmed opinion of the members of your committee that the appointment by the court of expert medical witnesses is not in the best interests of the legal profession, the courts, or administration of justice and might likewise result in unwarranted restrictions on advocacy.

The obligation of attorneys in paying expert witness fees for the attendance or the examination of doctors, either general practitioners or experts, was discussed. The question also arose as to whose obligation it was for the payment of such fees and what the basis therefor should be. It was generally agreed that the expert witnesses, either as attending physicians or examining physicians, should be the obligation of the client, but in order to be certain of the attendance of the medical witness at the trial if needed, the attorney should make the financial arrangements with the medical witness with the guaranty by the attorney for the payment of a reasonable fee payable to the medical witness either for attending trial or attendance at the taking of his deposition.

It was further agreed that if the deposition of an adverse medical witness is taken the party who seeks to take such deposition of such adverse medical witness should pay a reasonable fee for his attendance at the taking of such deposition.

The committee also discussed the question of uniformity of charges of both attending and examining physicians. It was the opinion of the committee that as far as practicable there should be uniformity of charges arranged by the medical profession and at least tacitly agreed to by the members of the legal profession and that the charges for medical reports should be reasonable, commensurate with the nature and type of the injury or condition involved.

It was brought to the attention of the committee that the charges for medical reports in somewhat similar cases range from \$5.00 to \$100.00 and that in many instances the attending physician of the plaintiff refuses to give a medical report without a specific fee. It is hoped that the attending physician for plaintiff will feel the same obligation to the patient as the examining physician for the defendant and that the responsibility to the client will, in a personal injury case, involve the furnishing of a medical report as a part of the service to the patient just as it does in the case of doctors making examinations on behalf of defendants in personal injury cases.

It was recommended that there be created some means of implementing the knowledge of medical terms and descriptions of injuries and of the anatomy by younger and less knowledgeable lawyers when dealing with medical-legal subjects.

It was the recommendation of the committee that a one day joint meeting of the Committee on Medico-Legal Jurisprudence of the Nebraska State Bar Association meet with a like committee of the Nebraska State Medical Association.

There was a further recommendation that a one day joint meeting of the Nebraska State Medical Association and the Nebraska State Bar Association be held following the annual meeting of the Nebraska State Medical Association in Lincoln on May 5, 1966.

It was further recommended that there be a joint meeting of the Committees on Medical-Legal Jurisprudence of the Nebraska State Bar Association and the Nebraska State Medical Association updating the code adopted by the Nebraska State Bar Association in 1960.

Pursuant to the first recommendation of the committee a joint meeting of the Committees on Medical-Legal Jurisprudence of the Nebraska State Bar Association and the Nebraska State Medical Association was held in Omaha, Nebraska, on September 2, 1965. It was a very pleasant, enjoyable, and profitable meeting, held in a spirit of complete friendship and cooperation.

It was agreed that the members of the legal profession should impress upon the members of the medical profession that it is not only the duty and obligation of the medical profession towards its patients to give reports and to attend trials where their patients are involved but that the duty and obligation of the medical profession extends to the performance of a civic duty with a clear understanding made by the legal profession to the medical profession that without the cooperation of the medical profession the extensive field of personal injury litigation will not receive the consideration to which it is entitled both by the courts and the litigants involved.

The matter of the appointment of court appointed expert witnesses was again reviewed and it was the unqualified position of the joint committees that such procedure is not desirable either from the standpoint of the litigants involved or the courts or the general administration of justice.

The question of uniformity of charges for medical reports was likewise discussed with the recommendation that that subject be

brought to the attention of the members of the Nebraska State Medical Association for action on their part.

It was brought to the attention of the committee members that there is presently a movement on foot in colleges and universities whereby students attending law schools are to be given a course of practical knowledge and the use of medical terms and a general knowledge of the anatomy. A similar course is to be given to students in the medical colleges relating to the giving of medical reports, testifying in court, and the procedures involving the testimony of attending and expert medical witnesses.

It was determined that in Lincoln and in smaller communities there is complete cooperation between the doctors and the lawyers particularly in regard to the attendance at trials and the giving of their testimony and that there is likewise a great spirit of cooperation in the same field between the lawyers and the doctors in Omaha with few and rare exceptions. It was the consensus of opinion that cooperation between the lawyers and doctors will be complete if the lawyers will give as much advance notice to the medical witness as possible and that the medical witness in turn will then have the opportunity of arranging his appointments insofar as possible to meet the trial commitments of the attorney.

George B. Boland, Chairman

Joseph P. Cashen

James I. Shamberg

Bernard Sprague

Thomas W. Tye

Harry L. Welch

Charles E. Wright

CHAIRMAN MULLIN: We turn the page now to Item No. 22, the report of the Committee on Publication of Laws, Richard M. Duxbury, Chairman. Richard!

## REPORT OF COMMITTEE ON PUBLICATION OF LAWS

Richard M. Duxbury

Mr. Chairman, this report is on page 35 of your program. Gentlemen, the last session of the legislature authorized for the first time the publication of the legislative journals and other committee reports and so forth of the legislature, which were to be sent to the clerks of the district courts in the various counties. This is the first time this has been done and it was the culmination of a great deal of work by this committee long before I ever was on the committee.

The problem that has arisen is that there is considerable cost to the legislature in sending these out, and they are afraid that the utilization of these particular documents has not been sufficient to justify this expense. Apparently many of the court clerks in the various counties did not keep the service up to date, people didn't even know it existed, and some people kept it in their own private offices so that it was not available to the public.

So the problem really is one—and in preparing this we talked, I should say, with Attorney General Clarence Meyer, who is quite concerned about this—the problem seems to be that we should at least let the legislature know that the Bar Association does appreciate receiving this service and having it available, and that information should be gathered on utilization of the service in the various counties to show that it is justified in terms of cost.

Another function or area of the committee—and I am not sure whether this falls under this particular committee or not but it is one that probably does—is on the publication of laws by use of electronic processing which is going on at the University of Nebraska College of Law. John Gradwohl, a professor at the College of Law, is doing a considerable amount of work on this particular subject, and they now have all of the Nebraska statutes on electronic tape and are beginning to be able to do research through the use of the computer and the retrieval system. Some thought has been expressed as to whether or not this could be coordinated with the legislature and enable us to have more current publication of laws, so that we would have our laws up to date immediately upon the adjournment of the legislature rather than having to wait for ten to twelve months for the cumulative supplement to be published. In any event, this is an area that is under consideration. I think this probably should be a function of this committee—to work in this area and to coordinate with the College of Law and to do whatever is necessary along these lines.

The committee made the following recommendations:

1. A resolution of appreciation for the records provided by the legislature to the various district court clerks should be adopted by the Bar Association and sent to the legislature immediately.
2. Information should be disseminated on the availability of the legislative records and their use encouraged.
3. Facts should be gathered on the utilization of the service throughout the state.
4. Coordination should be made with the University of Nebraska College of Law and other Bar Association committees in-

terested in the electronic processing of the Nebraska statutes and the possible restyling of the publication of the Nebraska statutes.

5. This committee should be continued to carry out these projects.

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

CHAIRMAN MULLIN: Do we have a second?

ROBERT A. BARLOW, Lincoln: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; negative "no". Carried.

[The report of the committee follows.]

### **Report of the Committee on Publication of Laws**

Due to the fine efforts of the members of the Committee on Special Publication of Laws in the past, the primary purpose of the committee has been accomplished. This purpose was to have all bills, amendments, and legislative journals sent to the clerk of the district court in each county, so that there would be a public record in each county of the activities of the legislature and its recent enactments. This has been done this session for the first time. It is the feeling of this committee that a resolution should be sent to the legislature expressing the appreciation of the Bar Association for this service.

There remain, however, several problems in connection with this activity. Apparently there has been insufficient information disseminated that the service exists, so that too few lawyers and even fewer private citizens realize the availability of the legislative records. Also, there have been complaints that some of the clerks are not keeping the service up to date or not making the information available to the general public.

Because of these problems, there is a great danger that the legislature will not authorize this service in the future. There is a substantial expense in providing these records to the clerks, and apparently many members of the legislature feel that if it is not being utilized, then it should not be continued. It is the opinion of this committee that the previously mentioned resolution will be of great value in retaining the service.

It is also the committee's opinion that any information the Bar Association can provide on the utilization of the service will be most helpful. The possibility of a survey of the district court clerks or attorneys in each county has been mentioned. Publicizing

the availability of the service in the Bar Journal would be of help in informing the members of the Bar concerning this matter. Comments could be invited in such an article.

Another current matter of interest that may fall in the area of this committee is the electronic processing of Nebraska Statutes. The University of Nebraska College of Law has been very active in this area and will begin putting the Nebraska Statutes on computer cards this summer. It is a possibility that in the near future it will be possible to publish the Nebraska Statutes in loose-leaf form, so that new legislation could immediately be put in the various volumes of statutes rather than waiting months for a supplement to be published. This system will also allow the use of computers for indexing and research. This committee feels that the Bar Association, through this committee or any other that may be appointed, should encourage and assist this program in whatever way possible.

This committee makes the following recommendations:

1. A resolution of appreciation for the records provided by the legislature to the various district court clerks should be adopted by the Bar Association and sent to the legislature immediately.
2. Information should be disseminated on the availability of the legislative records and their use encouraged.
3. Facts should be gathered on the utilization of the service throughout the state.
4. Coordination should be made with the University of Nebraska College of Law and other Bar Association committees interested in the electronic processing of the Nebraska Statutes and the possible restyling of the publication of the Nebraska Statutes.
5. This committee should be continued to carry out these projects.

Richard M. Duxbury, Chairman  
Committee on Publication of Laws

CHAIRMAN MULLIN: Item No. 23 is the report of the Committee on Cooperation With Law Schools, Charles E. Oldfather, Chairman. The written report appears at page 15. Charles Wright will make the report in behalf of the chairman.

## REPORT OF COMMITTEE ON COOPERATION WITH LAW SCHOOLS

Charles E. Wright

Mr. Oldfather was unable to be here today and asked that I give the report for him, and since the report is brief and contains three recommendations I hope you will indulge me while I read it.

The committee respectfully reports:

1. As recommended by earlier committees, publication of photographs and biographical sketches of the Nebraska and Creighton Law School seniors in the *Nebraska State Bar Journal* has been continued. It is recommended that this practice be continued for the coming year.

2. It is recommended that further consideration be given to statutory or informal arrangements that might be utilized to give law students limited court practice under the supervision of members of the bar.

3. No other matters have been suggested during this year for the committee's attention. The committee does, however, serve a purpose in its availability for advice and assistance when needed, and is a means by which the deans of the law schools and the Bar can consider matters of mutual concern. It is accordingly recommended that the committee be continued.

I so move.

CHAIRMAN MULLIN: Does anyone second?

ROBERT D. MOODIE, West Point: I second the motion.

CHAIRMAN MULLIN: You have heard the motion and the second. All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

### Report of the Special Committee on Cooperation With Law Schools

The Committee respectfully reports:

1. As recommended by earlier committees, publication of photographs and biographical sketches of the Nebraska and Creighton Law School seniors in the *Nebraska State Bar Journal* has been continued. It is recommended that this practice be continued for the coming year.

2. It is recommended that further consideration be given to statutory or informal arrangements that might be utilized to give law students limited court practice under the supervision of members of the bar.

3. No other matters have been suggested during this year for the committee's attention. The committee does, however, serve a



purpose in its availability for advice and assistance when needed, and is a means by which the deans of the law schools and the Bar can consider matters of mutual concern. **It is accordingly recommended that the committee be continued.**

Charles E. Oldfather, Chairman  
David Dow, Coordinator  
James A. Doyle, Coordinator  
William H. Grant  
Robert D. Mullin  
Thomas J. Skutt  
Donald R. Treadway

CHAIRMAN MULLIN: The report of the Committee on Military Law, James A. Nanfito, Chairman. Jim!

### REPORT OF COMMITTEE ON MILITARY LAW

James A. Nanfito

Mr. Chairman, to begin with may I offer apologies for having failed to file a written report, but earlier in the year I was a little engrossed with the anticipation of a return to World War II haunts and I must say that the realization of the anticipation was far greater than I expected.

The Special Committee on Military Law was originally organized at the request of the Judge Advocate of the United States Army to assist the Armed Services in the procurement of young lawyers to enter the service as members of the Judge Advocate. Due to a change in the world atmosphere, the original concept of the committee has to some degree gone by the wayside, and your committee is now almost exclusively concerned with attempting to solve some of the problems which arise during the course of a year in the field of relationship of the military with the military and, above all, the relationship of the military with the civilian.

Over the past few years much of the work of the committee has been located in the Omaha area along with the Strategic Air Command and its supporting base. There are also the 16th Army Corps Headquarters and the Naval Reserve Training Command located at Fort Omaha. These command posts find themselves at times in need of answers to questions put to them by their personnel. The questions and answers generally are concerned with the rights of the military under the Soldiers and Sailors Relief Act; the rights of the personnel about to be discharged wanting to know about re-employment privileges under the Selective Service laws for draftees who are about to be discharged; the legal rights

of military personnel involved in administrative board action which was organized for the purpose of giving to the person an early discharge because of undesirability during his service term.

The committee admits that its function today is much more profound than was originally intended, yet we feel that your committee has been of great assistance to certain members of the military. In this respect we cite you the following instances:

1. An Army enlistee was about to be discharged as an undesirable. Under the present regulations of the Army such a discharge would have deprived him of any and all privileges accorded a discharged person as a veteran. By proper counseling and advice, your committee was able to assist a member with an officer's rank in assisting the soldier to obtain a discharge without honor, which grants to him all of his veteran privileges and rights, and at the same time helped the Army in releasing this person from active duty. He was a source of constant irritation to the officers and a grave disciplinary problem.

2. An Air Force officer stationed in the Panama Canal Zone was being subjected to collection letters from a certain firm in Omaha for the payment of a bill which had been paid by the said captain. This officer complained by letter to the office of the Attorney General who, in turn, forwarded the officer's letter to the committee. It took a few phone calls and letters to prove the payment by the officer and this brought about a happy ending as far as the captain was concerned.

3. An enlisted man was referred to the committee by one of the commands in Omaha concerning his re-employment rights with a railroad upon his discharge as an enlistee with two years of active duty. The advice of the committee assisted him in obtaining not only his prior civilian job but with all rights of seniority during the period of active duty.

The foregoing examples have been the highlights of another year of your Committee on Military Law. We do feel that a purpose is served in assisting our fellow attorneys who are members of the Armed Forces even though we are not procuring attorneys for the Armed Forces. Therefore, it is the recommendation of the committee that the Special Committee on Military Law be continued in force for another year, and it is so moved.

CHAIRMAN MULLIN: Is there a second?

THOMAS R. BURKE, Omaha: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that it be approved as read. All in favor say "aye"; opposed. Carried.

CHAIRMAN MULLIN: The Committee on Rules of the Road and Traffic Courts is chairmanned by Donald Lay, whom I see in the back of the room.

## REPORT OF COMMITTEE ON RULES OF THE ROAD AND TRAFFIC COURTS

Donald P. Lay

Chairman Bob and Members of the House of Delegates: I will be very brief.

L.B. 736, I think, is one of the most important pieces of legislation that lawyers and citizens of this state should be concerned with over the next two years. Our committee is presently studying this. It is actually a redraft of the Uniform Motor Vehicle Act. Various civic groups, the Highway Patrol, safety organizations, and so on have studied this bill through the cooperation of Professor Wallace Rudolph of our University and Pat Healey, one of our members who was in this combined group that studied 736. Then it was actually offered as a bill in our last legislature at about the time that the State Bar Association was notified that perhaps some of its members should make a committee study of the bill.

It was our position that we would not appear before the legislature to take a stand on this bill without having an opportunity to actually study it, compare it, and go into the background of it. This bill, in some instances, changes our law very radically; in other instances it follows it. It revises a vast, comprehensive area—penalties, enforcement, procedural forms, from municipal courts, justice of the peace courts on up into our very basic substantive rules of law, so it is our position that we would like to study this in time to take a position and recommendation on it at the next legislative session.

With this position, the bill was withdrawn, and our committee is presently studying this bill. We are going to start monthly meetings. It is quite vast and is going to take some time to actually study it.

We hope that by the next meeting of the House of Delegates, your annual meeting, we can give you at least the highlights of this bill and our recommendations for it. Primarily my report to you at this time would be that we recommend that the present committee be carried over for at least another year so that we can continue the exhaustive study that we are actually just starting.

With this report, Mr. Chairman, I move the report of our committee be adopted.

CHAIRMAN MULLIN: Is there a second?

JAMES F. BEGLEY, Plattsmouth: I second the motion.

CHAIRMAN MULLIN: You have heard the motion. All in favor say "aye"; opposed "no". Carried.

[The report of the committee follows.]

### Report of the Committee on Rules of the Road and Traffic Courts

This committee has undertaken the review of L.B. 736, which is a redraft of the Uniform Motor Vehicle Code. Through the co-operation of Professor Wallace Rudolph, one of the members of the committee, an exhaustive study has been made in the past by various groups other than the Bar Association to undertake the amendment of our Motor Vehicle Code. This act attempts to adopt comprehensive rules of the road, provide penalties, enforcement and procedural reforms to our present law. Each member of the committee has certain areas of the law assigned him for study. The study is to compare the proposed statute with the present law and with laws in other states along with any analytical comment that can be made. It is the hope of the committee to recommend any amendments to the proposed statute and to submit these in time for the consideration of the bill at our next legislative session.

Donald P. Lay, Chairman  
 Albert G. Schatz  
 David A. Svoboda  
 Eugene P. Welch  
     of Omaha, Nebraska  
 Patrick W. Healey  
 Wallace Rudolph  
     of Lincoln, Nebraska

CHAIRMAN MULLIN: Our President, Harry Cohen, has asked permission to have the microphone for the purpose of making a motion.

PRESIDENT COHEN: In my report I made a recommendation for the adoption of an amendment to our bylaws, and under the procedures it is necessary for the House of Delegates to pass a resolution to this effect. I would like to take this opportunity to recommend and offer this amendment:

RESOLVED that Article V of Section 2c of the Constitution of

the Nebraska State Bar Association should be amended so that the same as amended shall read as follows:

ARTICLE V, Section 2c. Delegates from each Judicial District, equal in number to the number of District Judges appointed and/or elected to serve each such Judicial District.

I will tell you the necessity for this amendment. Under the present article, the judicial districts are all listed by number. The number of delegates from each judicial district is listed in the article. In practice or in essence each judicial district has a number of delegates to the House of Delegates, a number of persons equal to the number of district judges in that judicial district. Now we have had several changes. For example, they extended the number of districts. I understand we now have twenty judicial districts. We have changed the number of judges in some of the judicial districts. So if Section 2c is not amended in the manner suggested, the article must be amended every time we have a change. We feel that this amendment would take care of all possible future changes, both as to the number of judges in any judicial district and as to the number of judicial districts.

I so move that amendment.

SECRETARY-TREASURER TURNER: Harry, is that a by-law or one of the rules of court?

CHAIRMAN MULLIN: He shows it as Article V, Section 2c. We'll check the Directory and see for certain if that is a bylaw.

HERMAN GINSBERG, Lincoln: Mr. Chairman, I rise to a point of order. I rather think that the President has been referring to the Rules controlling and regulating the Nebraska State Bar Association which have been adopted by the Supreme Court, and not the bylaws. If that is true, they will have to get the approval of the Supreme Court.

SECRETARY-TREASURER TURNER: That is correct.

CHAIRMAN MULLIN: Do you withdraw your motion, Harry?

PRESIDENT COHEN: We still have to recommend it. I'll change my motion to the effect that the Supreme Court be *requested* to amend the Rules in the manner suggested.

CHAIRMAN MULLIN: Do we now have a second?

JAMES I. SHAMBERG, Grand Island: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the Supreme Court be requested to make the amendment to

its Rules which has been described to you. All in favor say "aye"; opposed "no". Carried.

Is Robert J. Kutak in the room? I don't see him but I will ask formally if he is here. If not, we will postpone until this afternoon the report of the Committee on Federal Criminal Justice Act, which is Item 27 of our business.

Before adjourning for the noon hour, just two announcements.

[Announcements.]

CHAIRMAN MULLIN: The House will stand in adjournment until one-thirty o'clock this afternoon. Thank you.

[The House adjourned at eleven forty-five o'clock.]

## HOUSE OF DELEGATES

### WEDNESDAY AFTERNOON SESSION

October 20, 1965

[The Wednesday afternoon session was called to order at one forty-five o'clock by Chairman Mullin.]

CHAIRMAN MULLIN: I know some of the members of the House, or I should say committee chairmen, have other commitments this afternoon, so although we are short some of our members we will start with the reports. I don't believe it is necessary to have a quorum on hand at every moment.

Howard Moldenhauer is chairman of the Committee on Law Office Management. His committee report is on page 21 of the program. Howard is listed as No. 35 but has a pressing commitment this afternoon and has asked to make his report now and be excused.

### REPORT OF COMMITTEE ON LAW OFFICE MANAGEMENT

Howard H. Moldenhauer

Mr. Chairman, Members of the House of Delegates: Without bothering to read the report of the Committee on Office Management, I would particularly point out to you the various pamphlets which are listed in this report and which are also listed in the *Nebraska State Bar Journal*, in the October issue, which concern law office management and procedures, put out by the American Bar Association, which are available to members of the Nebraska Bar.

I would also mention that we have implemented one of the suggestions in our report, that we consider the possibility of disseminating information to members of the bar concerning law office economics and management items, and would call your attention to the article in the October issue of the *Nebraska State Bar Journal* entitled "Telephone or Write," which is the first of what we hope will be a series of articles put out by the American Bar Association Committee on Economics of Law Practice. With George Turner's very fine cooperation, we hope to be able to continue publication of this sort of article in order that you will all be exposed to the advancements which come along in the area of law office management.

We are considering such things as a poll on office procedures, and towards this end we will obtain copies of polls from the Erie County State Bar Association in New York and the Beverly Hills Bar Association in California.

We have several other programs which are under way and which appear in our report. Because of these pending programs, I would therefore move that this committee be continued.

CHAIRMAN MULLIN: Thank you, Howard, for a fine report.

Do I hear a second?

JAMES I. SHAMBERG, Grand Island: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the report be approved and that the work of the committee be continued. All in favor say "aye"; opposed "nay". Carried.

[The report of the committee follows.]

#### **Report of the Special Committee on Law Office Management**

During the past year the committee has continued to follow closely the publications and activities of the American Bar Association in the area of economics and law office management. The chairman attended the First National Conference on Law Office Economics and Management in Chicago which was an extremely useful session. Several new law office management pamphlets have been published by the National Conference on Law Office Economics and Management and are now available from the Economics of Law Practice Department of the American Bar Association at the prices indicated:

PAMPHLET	PRICE
<i>Docket Control</i> by Orme Lewis of Phoenix, Arizona, and Kirk McAlpin of Atlanta, Georgia	\$ .50
<i>Non-Conventional Systems and Equipment for Law Office Economics, Management and Legal Research</i> by Raymond J. Long of Datatrol Corporation	.50
<i>Administrative and Financial Management in a Law Firm</i> by Clark Sloat and Richard Fitzgerald of Price Waterhouse & Co.	.50
<i>A Yardstick for Legal Records and Information Retrieval</i> by Fred Gleason of Leahy Archives and Company	.50
<i>Proceedings of the First National Conference on Law Office Economics and Management</i>	.50
Set of all pamphlets	\$2.00
In quantity purchases of 100 or more, the pamphlets are available at 25 cents each.	

At the midyear meeting of the Nebraska State Bar Association the committee witnessed a computer demonstration prepared by Professor John M. Gradwohl at the University of Nebraska. The committee feels that it is an essential function to continue in close contact with the development of the computer program in connection with legal research in order that the State Bar Association may be in a position to take advantage of any advancements in this area when they prove economical and feasible.

The committee is in close liaison with the Law Office Manual Committee of the Omaha Bar Association, which is in the process of preparing a secretaries' manual, and the committee will be in a position to consider the utilization or implementation of any such manual by the entire state bar upon its completion.

The committee is also continuing further exploration into the advisability, cost, and feasibility of a statewide poll on law office practices and procedures. A preliminary draft of such a possible poll has been prepared but will require further study and consideration.

The committee is also considering the possibility of disseminating information concerning law office economics and management items which would be useful to lawyers through articles in the *Nebraska State Bar Journal*.

The committee joins with the Committee on Economics of the Bar and Professional Incorporation in welcoming inquiries from



any local bar associations or groups of lawyers interested in obtaining speakers or programs on the subject of law office management or economics and recommends that a program be made available to the various areas of the state to explain the reasons, purposes, and uses of the minimum fee schedule and to discuss other economics and law office management problems.

**It is therefore recommended that this committee be continued.**

Howard H. Moldenhauer, Omaha,  
Chairman

Robert H. Berkshire, Omaha

Thomas R. Burke, Omaha

John R. Dudgeon, Lincoln

Leo Eisenstatt, Omaha

Richard A. Knudsen, Lincoln

M. M. Maupin, North Platte

Charles E. Oldfather, Lincoln

Harold Rice, Neligh

Charles I. Scudder, Jr., Omaha

Bernard B. Smith, Lexington

CHAIRMAN MULLIN: Robert J. Kutak is chairman of the Committee on the Federal Criminal Justice Act. He is listed as No. 27 on page 6 of our program, and I will ask Bob to make his report at this time.

#### **REPORT OF COMMITTEE ON FEDERAL CRIMINAL JUSTICE ACT**

**Robert J. Kutak**

The Special Committee on the Federal Criminal Justice Act was established effective July 1 of this year. It was for this reason that no report was included in the programs that were circulated prior to this meeting.

The purpose in establishing the committee was to have, through the Nebraska State Bar Association, a liaison between the members of the bar and the federal district court in the operation of the act which gives the committee its name.

The Criminal Justice Act of 1964 became effective on August 20, 1965. Its purpose, of course, is to provide for the representation of defendants who are financially unable to obtain an adequate defense in federal criminal cases. The act requires each district court to draft a plan to carry out its provisions in a manner appropriate and suitable to the needs of each district.

Such a plan has been drafted and adopted by the federal district court in Nebraska. It also became effective on August 20, 1965. Because new ground is broken, so to speak, by the law, and problems lacking precedent for guidance will arise under the plan, the committee will serve to inform the members of the bar as to the coverage of the act, assist the court in maintaining the standards required for the appointment of counsel and the employment of fact-finding services, and to review the operation of the plan in light of undoubtedly expanding needs in Nebraska.

The committee is well prepared to undertake these tasks. As an ad hoc committee, it drafted the plan at the request of the federal district court. Then in the same capacity it also coordinated the initial lists of names proposed for the panel of attorneys provided in the plan. Through such assignments it has become very familiar with the scope of the legislation and the objectives of the plan which are both now in effect.

In the coming months, as an increasing number of appointments are made by the federal district court, it is anticipated that members of the committee will meet with individual lawyers and local bar associations to familiarize them with the purpose and scope of the Criminal Justice Act. There no doubt will be occasions as well to confer with the United States commissioners and others concerned with the coverage of the plan. It is our hope thereby to assist all parties concerned with the administration of criminal justice in the United States District Court for Nebraska.

Robert J. Kutak, Chairman  
Robert H. Berkshire  
George B. Boland  
John C. Gourlay  
Gerald Matzke  
Donald W. Pederson  
C. M. Pierson  
F. L. Winner  
Warren S. Zweiback

Mr. Chairman, I move that the report be adopted and that the committee continue in existence for the next year.

CHAIRMAN MULLIN: Thank you, Bob. Do I hear a second?

ROBERT R. MORAN, Alliance: I'll second it.

CHAIRMAN MULLIN: It has been moved and seconded that the report be adopted and that the committee remain in ef-

fect for the coming year. All in favor say "aye"; opposed. Carried.

Perhaps I should mention that the Executive Council is still in session across the hall but was nearing the end of its business when I left, so they should be in here rather quickly.

The report of the Committee on Federal Rules of Procedure, William C. Spire, Chairman.

### REPORT OF COMMITTEE ON FEDERAL RULES OF PROCEDURE

**William C. Spire**

Members, my lengthy and well-written report appears on page 45 of the program, and since I know you have other things to do I won't take the two or three hours that would be necessary to read it.

We are in the process, as I have indicated in there, of getting some suggestions from the official court family of our federal district court on the problems that have come up most frequently in connection with rule changes in the last three years. When we have had a chance to screen those out we will bring them to the attention of the bar, either through a short note in the *Bar Journal* or a circularized letter.

My committee has not actually met in person. We have been in correspondence, the most illuminating letter which I received being from an out-state committee member who wrote back and said, "About those rules, Bill, I haven't been in Federal Court in twenty-seven years and don't ever expect to be. Yours very truly." So we haven't had exactly a tremendous response, but we are getting some ideas in from the clerk of the court and judges on areas of problems under the new rules, and we hope to bring them to your attention. I would, therefore, respectfully move the adoption of the report and that the committee be continued during the coming year.

CHAIRMAN MULLIN: May I have a second?

ROBERT D. MOODIE, West Point: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the report be adopted and the committee be continued during the coming year. All in favor say "aye"; opposed "no". Carried.

[The report of the committee follows.]

### Report of the Committee on Federal Rules of Procedure

The committee has, by correspondence, considered the impact of recent revisions in the federal rules and discussed the best and most appropriate way to bring the more significant changes to the attention of the practicing bar. Suggestions have been requested from court officials as to what they have found to be the areas where difficulties exist or might come up. The committee hopes to be in a position to offer constructive ideas to the association through an informal memorandum or note in the *Bar Journal*. The committee solicits ideas or questions from the bar.

William C. Spire, Chairman

CHAIRMAN MULLIN: Mr. Ginsburg, who is next on the program, is across the hall. We will pass him. Is Raymond Young in the room at this time? Not seeing Mr. Young, I will ask whether or not Patrick Healey is here. Pat Healey is Chairman of the Committee on Public Service. His report will be given by Bill Rist of Beatrice, Nebraska.

### REPORT OF COMMITTEE ON PUBLIC SERVICE

William B. Rist

Mr. Chairman and Members: The report of the committee appears on pages 30 and 31 of the program. I don't think it is necessary to review it in detail, but these comments I think are in order.

This committee has been, for a number of years, one of the more active committees of the Bar. We have been engaged not only in carrying on what might be called the more traditional activities of this committee, but have been engaged, in conjunction with a professional public relations firm, in trying to expand a better image of the bar to the public.

We have been, for two years at least now, engaged in the preparation of professionally prepared radio comments for broadcast as a public service feature, and we are now in the process of preparing television spots which should be made available this year.

Last year, for the first time, the President's Award to a member of the Bar for outstanding service, and the award of appreciation to an individual who is a non-Bar member, were presented at the annual banquet, and that will be done this year. It is expected that this award will be continued as one of the

efforts of the committee to do more to create a favorable image with the public.

It is recommended in the report that the committee continue its vigorous program of public relations and, as heretofore, that the Executive Committee grant us an adequate budget for this activity.

Mr. Chairman, I move the adoption of the report and the recommendation contained therein.

CHAIRMAN MULLIN: Do I hear a second?

PAUL P. CHANEY, Falls City: I'll second the motion.

CHAIRMAN MULLIN: You have heard the motion and the second. All in favor say "aye"; opposed. Carried.

[The report of the committee follows.]

#### **Report of the Committee on Public Service**

The committee continued and expanded its public service activities during the last year.

Law Day, U.S.A., continues to be one of the most important projects of the committee. Under the outstanding leadership of Honorable William C. Hastings as Law Day chairman and Jack Wenstrand as vice-chairman, the role of law in everyday life was brought home to the citizens, both by state-wide campaigns and by valuable programs and activities in many of the counties.

The committee hopes that the Law Day chairman and vice-chairman for the ensuing year will be appointed before the time of the annual meeting so that they can get an early start in appointing committees and county chairmen, and also so that special events of substantial public interest can be planned to carry forward the story of Law Day.

The committee has continued to make use of free radio public service time by providing one minute radio tapes "Mr. Middleton, Attorney At Law" produced by the committee and furnished to many radio stations throughout the state.

The committee continues to move more aggressively into the field of television. In addition to providing television stations, at no cost to the stations, with film messages produced by the American Bar Association, the committee is producing its own twenty-second television spots on legal subjects of general public interest, to be furnished free to the stations. We anticipate

that these will be extensively used in the public service time on the stations throughout the state.

Also in the field of television, the committee is in the process of producing two fifteen-minute educational television programs dealing with legal subjects of common interest, in cooperation with Station KUON-TV at the University of Nebraska. Pilot shows are now in the process of production and, if these work out as we think they will, a series of these educational programs will be continued on educational television and might find some use as well on the commercial stations.

The committee continues its program of awards to increase public awareness of the value and service of the legal profession. We have outstanding nominations for the President's Award, to be given to a member of the bar for outstanding contributions to furtherance of public understanding of the legal system and confidence in the profession; and for the Award of Appreciation to be presented to an individual, not a member of the bar, who has performed outstanding service in helping to create a better understanding of the legal profession and the system of law and justice within which it operates. Recipients for these awards will be selected and the presentation of the awards will be made at the time of the annual meeting.

The newspaper column on legal subjects continues to be provided, and the legal pamphlets and jury manual distributed through George Turner's office continues to be widely used.

**It is recommended that the Committee on Public Service continue a vigorous program of public relations in the many fields available and that an adequate budget be provided for the assistance of our fine professional Public Relations Council.**

We express our particular thanks to Thomas L. Carroll, public relations consultant, and to George Turner and his staff for their fine cooperation and assistance with the program.

Patrick W. Healey, Chairman  
John O. Anderson  
Harold W. Booth  
Theodore L. Carlson  
Donn E. Davis  
Tyler B. Gaines  
William C. Hastings  
Richard A. Knudsen  
Edmund D. McEachen  
Robert A. Nelson

William B. Rist  
Joseph C. Tye  
Warren Urbom  
Joe T. Vosoba  
John E. Wenstrand

CHAIRMAN MULLIN: Harry Welch is a trustee of the Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund. I will call on Harry to report as one of the trustees.

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

**Harry L. Welch**

Mr. Chairman and Members of the Delegation: If I appear a little nervous, it's because I am, not because I have to make this report, but I just concluded a jury trial in federal court this noon and the jury is sitting on *my* nest of eggs. It leaves me a little bit nervous to be thinking about what they are writing down in that jury room when I'm not there to help them out and bring them along.

I am also sorry that there aren't more members of the delegation present because I had hoped to pass out application blanks for the recipients of charity out of this fund. You are all welcome to fill out a blank. We will be glad to give your request consideration. We've got more money than we need. We've got to spend it. We want to do the right thing. We are thinking of joining the poverty program. Before we do, though, I want you men to have the first benefits of this fund.

Seriously, as many of you men know, Dan died in November of 1958. As was his custom during his lifetime, he thought of lawyers in his death, or by way of his will. He left \$25,000 to the Nebraska State Bar Association in one of the most wide-open bequests that you probably ever put in a will or ever read in a will, and that is for the welfare and charitable purposes of active, practicing lawyers in Nebraska, their wives, widows, and children.

I was named chairman of the three trustees, with John Mason and Earl Lee, who is now dead and who has been succeeded by "Danny" Danielson of Scottsbluff, and we have been managing this fund.

In addition to the \$25,000 that Dan gave the Bar Association, in his will he also made a bequest to Harvey Johnsen, who was

his former law partner, of \$1,000. Harvey didn't want to take the money. Frankly, he didn't. So we suggested that he take the money, give \$1,000 to this fund, and he could also deduct \$1,000 from his income tax because this is a charitable fund and is classified as a charitable bequest, though I doubt if he ever did it. Nevertheless, he did make the donation, so we started out with \$26,000, and I would say by prudent investment we are now up to \$35,500 and we've also made distributions to worthy causes.

In my report, which is not published—or that part is not published—we listed the various people we have helped and the various donations and allocations that we have made, but to prevent anybody or their families from being embarrassed we asked the Secretary not to publish that portion of the report because it is somewhat confidential.

We are hoping to carry on. As I say, we've got a lot of money and we are hoping to find some indigent lawyers or their families that need help. If you know of any, let us know.

I might say, though, that the chairman of the committee has priority rights on any benefits that might be distributed, and if I don't use them all up there might be some left for some of the rest of the folk.

I wish, of course, to move acceptance of my report and to continue this trusteeship in effect.

CHAIRMAN MULLIN: We thank you very much, Harry, and we all appreciate hearing this report on this wonderful gesture of Dan Gross. If I am correct—I know some of the people in the room may wish to know about this—somewhere over \$500 was spent or disbursed during the past year for purposes intended by Mr. Gross. Is that about right? So the fund is being used. Even though that be the case, the income from it is causing it to increase.

Do I hear a second?

JAMES I. SHAMBERG, Grand Island: I second the motion.

CHAIRMAN MULLIN: You have all heard the motion and the second. All in favor say "aye"; opposed "nay". Carried.

[The report of the trustees follows.]

**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 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. Acting under this authority, the trustees, on January 11, 1960, accepted from the Honorable Harvey M. Johnsen of the United States Eighth Circuit Court of Appeals the sum of \$1,000 as a gift in memory of the late Mr. Gross. On June 4, 1965, the trustees accepted the sum of \$120 from F. B. Baylor, attorney of Lincoln, to aid in the care and support of a lawyer who is disabled and without adequate funds to support himself.

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

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

The following is a financial statement of the fund as of June 30, 1965:

As of June 30, 1965, the trust had received the original contribution under the Will of Daniel J. Gross in the amount of \$25,000, an additional contribution from the Honorable Harvey M. Johnsen in the amount of \$1,000, and a contribution from F. B. Baylor of Lincoln in the amount of \$120, making a total of \$26,120 in contributions made to the trust.

As of June 30, 1965, the trust assets were as follows:

Checking Account—First National Bank, Lincoln	\$ 2,542.98
Deposit with First Federal Savings & Loan Association of Lincoln	2,837.99
Certificate of Deposit with First National Bank of Lincoln	6,000.00
Interest accumulated on Certificate of Deposit, approximated to June 30	180.00
Bonds of National Cylinder Gas Company, principal amount \$5,000.00, market value 112½	5,625.00
Bond of Allied Stores Corporation, principal amount \$300.00, market value 115¼	345.75
<i>Common Stocks</i>	
Standard Oil of California, 48 shares at 68¼	3,276.00
American Natural Gas—New Jersey, 75 shares at 46	3,450.00
Allied Stores Corp., 30 shares at 73¾	2,212.50
General Motors Corp., 40 shares at 95⅝	3,825.00
Northern Natural Gas Co., 25 shares at 59⅜	1,484.37
Pacific Lighting Corp., 30 shares at 29⅞	873.75
Union Electric Co., 100 shares at 29⅞	2,912.50
Total Value of Assets	<u>\$35,565.84</u>

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

CHAIRMAN MULLIN: C. M. Pierson will report for the Section on Real Estate, Probate and Trust Law, he is chairman of the Section and at this particular meeting will be a very, very busy man, I predict. Carry on, Mr. Pierson.

**REPORT OF SECTION ON REAL ESTATE,  
PROBATE AND TRUST LAW**

**Clarence M. Pierson**

Mr. Chairman, Members of the House of Delegates: I suppose that if it were required that I be busy during this meeting of the Bar Association, it would be because I had not been busy prior to the meeting. If it hasn't been accomplished by this time, it's too late!

We have spent most of the time during the past year in preparing for this program, which is to be developed by this Section. In addition to that, at the midyear meeting the Title Standards Committee adopted a title standard which I wish to submit at this time for the approval of the House of Delegates. If this is adopted, it will be titled "Standard No. 71—BANKRUPTCY SEARCH." It is not necessary to require a bankruptcy search in any county other than the county in which the land is located.

"Comment: See L.B. 606 passed by the 1965 Legislature; Sec. 11 U.S.C.A. Sec. 44 (g); Patton on Titles (2nd Ed.) Sec. 653."

In connection with this title standard, it should be pointed out to the House of Delegates that 606 will not be effective until November 18, but it is the suggestion of the Title Standards Committee that the standard be adopted and usable as soon as the statute becomes effective.

Walter Huber, who is the chairman of the Title Standards Committee, requests that the section should also report to the House that they voted unanimously at the midyear meeting to encourage local and regional bar association title committees. We have a title committee in Lincoln. I know there is one in Omaha. There is one in Fremont. There are several, and we think they are a fine thing. I think Walter is probably a member of the Omaha Title Committee.

Mr. Chairman, I move the adoption—I think this is the right procedure—I suppose this title standard would have to be adopted by the Bar as a whole, so maybe the motion should be that the House of Delegates recommend its adoption to the Bar Association.

CHAIRMAN MULLIN: Do I hear a second to that?

LUMIR OTRADOVSKY, Schuyler: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the House of Delegates recommend that the Association as a whole adopt the title standard which has been submitted and read. All in favor say "aye"; opposed. Carried.

MR. PIERSON: Now since there isn't a written report by this section, it was requested by our Secretary that we make a report on the selection of the Executive Committee for this section. There will be two new members, Alex Mills of Osceola and Bernard Smith of Lexington. The holdovers are George Farman, John Cockle, Frank Mattoon, and myself. The officers will be Frank Mattoon, chairman; George A. Farman, vice-chairman; and John R. Cockle, secretary.

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

CHAIRMAN MULLIN: Do I hear a second?

PAUL P. CHANEY, Falls City: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

Would you furnish some information in writing concerning the names that you just read that have been elected. We wish you good luck on your program!

Item 37 concerns the report of the Section on Corporations. Is Mr. Overcash with us? We will pass that for the moment.

Bernard Smith is chairman of the Section on Tort Law and is still involved with the Executive Council, so we will pass Item 38 for the moment also.

Bob Veach I saw come into the room a moment ago. He is chairman of the Section on Taxation, and I will ask him to present his report.

## REPORT OF SECTION ON TAXATION

**Robert R. Veach**

The Tax Section sponsored the Twenty-Second Annual Institute on Federal Tax Law at Omaha in December, 1964. Principal speakers were Professor Joseph Trachtman of the New York City Bar and Mr. Rudy Hertzog, Assistant Chief Counsel, IRS, of

Washington, D. C. The institute was well attended and well received.

Elected to the Executive Committee in 1964 for three-year terms were John M. Gradwohl and Flavel A. Wright. Holdover members of the committee are Albert Reddish and Robert Veach, whose terms expire in 1965; and Leo Eisenstatt and Robert D. Moodie, whose terms expire in 1966.

The Tax Section actively participated in the midyear State Bar meeting held in Lincoln in June, 1965. Discussion at the midyear meeting included means by which participation in the Tax Section may be broadened to include a larger segment of the Nebraska bar. Suggestions in this regard are solicited.

Plans are presently being formulated for the 1965 tax institutes. One-day sessions will be held in Sidney and Kearney on December 2 and 3 on basic taxation for the general practitioner. John Gradwohl is chairman in charge of planning the Sidney and Kearney institutes. A two-day institute will be held in Omaha on December 9 and 10, with Leo Eisenstatt as chairman of the Planning Committee. The Omaha institute will be on the subject of corporate tax problems.

On the lighter side, the suggestion has been made that at the conclusion of the Omaha meeting the Nebraska Bar Association's Twenty-Second Annual Tax Institute be adjourned to 2:00 P.M. January 1, 1966, to the Cotton Bowl in Dallas, Texas, or to such other football stadium as future circumstances may indicate appropriate. The Executive Committee is holding this suggestion under advisement.

Respectfully submitted,  
Robert R. Veach, Chairman

Mr. Chairman, I move adoption of the report.

CHAIRMAN MULLIN: Thank you very much, Bob. Do you move continuation of the committee?

MR. VEACH: Yes.

CHAIRMAN MULLIN: Is there a second?

ROBERT R. MORAN, Alliance: I second the motion.

CHAIRMAN MULLIN: You have heard the motion and the second. Those in favor say "aye"; opposed. Carried.

Next year's program at the Sixty-Seventh Annual Meeting of our State Bar Association will be devoted to practice and pro-

cedure. It has already come to my attention that any number of hours of work have gone into this program by the Section on Practice and Procedure and its members. It is my pleasure to call upon Charles Wright to give a report from his section on developments to date.

## REPORT OF SECTION ON PRACTICE AND PROCEDURE

**Charles Wright**

The Section on Practice and Procedure did hold several meetings during the year. This whole thing was triggered when we received a letter from the Committee on Continuing Legal Education advising us that the section would be in charge of the program for the meeting next June.

The Committee on Continuing Legal Education and the Committee on Practice and Procedure had held a joint meeting and discussed some of the things that they felt needed to be presented at next year's meeting on the program.

At the midyear meeting we held a meeting of the Section on Practice and Procedure June 18 in Lincoln, Nebraska. Section members Thomas Walsh, Jr., Kenneth Elson, and James M. Knapp, and newly elected section member, Warren K. Urbom, were all present.

The plans for the evidence program to be presented at the 1966 annual meeting of the Association were discussed in detail. The chairman advised that the Committee on Continuing Legal Education would take full responsibility for the preparation, binding, and distribution of the evidence handbook at the 1966 annual meeting. The Committee on Practice and Procedure would take responsibility for the organization and presentation of a panel workshop to be presented for one-half day at the 1966 annual meeting. The Section on Practice and Procedure is to have the over-all responsibility for presenting the program on evidence at the 1966 meeting, and this responsibility would include the selection and arrangements for speakers on the topic of evidence for one full day of the meeting, as well as coordination of the efforts of the two committees that are involved with the efforts of this section.

It was the general consensus of those section members present that there should not be more than six nor less than four speakers on the program and that one or two of the speakers should be men of national prominence in the field of evidence. The chairman was also requested to determine from Mr. George

Turner what funds would be made available by the association for the payment of these speakers.

The incoming section members whose terms will expire with the annual meeting in 1968 are Warren K. Urbom and William P. Mueller.

The following section members were elected officers of the section, with terms to commence at the conclusion of the 1965 annual meeting and expiring at the conclusion of the 1966 annual meeting:

Thomas A. Walsh, Jr., Chairman  
James M. Knapp, Vice-Chairman  
Harold W. Kay, Secretary

Following the election of section officers for the forthcoming year, Mr. Walsh requested that all section members furnish him with their suggestions as to the names of prospective speakers and topics for the 1966 meeting.

Following the section meeting, the section held a joint meeting with the Committee on Continuing Legal Education and the Committee on Practice and Procedure, and there followed an additional discussion of the plans for the evidence program for the 1966 annual meeting.

I might say that our discussion was quite spirited concerning the evidence handbook. We think that the final product is going to be extremely useful for lawyers in Nebraska, both at the briefing level and at the trial level. There was considerable discussion that in this handbook we want something that will not only serve as a treatise on the law of evidence in Nebraska, but will also contain as completely as possible a digest of every case, and have it properly indexed, which has something to do with the Rules of Evidence decided by our Nebraska Supreme Court. We have made a very decided effort to attempt to locate and sort out each individual case and categorize it properly in the type of handbook that will be useful to the lawyers right in the court room.

We are going to hold another section meeting tomorrow, and I might pass on to the House of Delegates that we would welcome any suggestions from any of you as to possible speakers. We want to have some Nebraska lawyers and we also want to have one or two men of national prominence. We have requested that the Executive Council authorize us to spend up to \$1,000 to obtain one or two speakers. George Turner thinks that this figure is a little low. I think perhaps we can obtain a couple of good

speakers for an honorarium of this amount. In any event, I can assure you that under the chairmanship of Tom Walsh next year the section will proceed ahead and have a well organized and, I am sure, interesting and informative program on the topic of evidence for your 1966 annual meeting.

With that, I move that the report of the Section on Practice and Procedure be accepted.

CHAIRMAN MULLIN: I want to thank you for a fine report.

Do we have a second?

ROBERT D. MOODIE, West Point: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the report be accepted and adopted. Those in favor say "aye"; opposed. Carried.

Charles, for your information, the last thing that happened before I left the lunch over there with the Executive Council was that they voted you your \$1,000, so you've got it. They said "more or less."

Is Howard Tracy with us today? Not seeing Howard, I will now ask whether or not there are any matters which any section or committee ... I see Mr. Raymond Young now coming into the room, so I will call upon Ray for the report of the State Advisory Committee. This is Item No. 30 in your program.

## REPORT OF STATE ADVISORY COMMITTEE

Raymond G. Young

Mr. Chairman, Gentlemen: Because of the necessity of receiving so many reports from other committees—we now have twenty district complaint committees—it is difficult and sometimes impossible, as it was this year, to get my report formulated in time for publication in the advance program.

The report is brief and I would like to read it:

The disciplinary activities for the year just past may be summarized as follows:

### REVIEWS

The Advisory Committee reviewed without further hearings one record from District No. 2 and three from District No. 3. In three of the cases it was held that no cause for disciplinary action exists; the other case is pending.



## HEARINGS

The Advisory Committee held formal hearings upon review of the action of the Committees on Inquiry in one case from District No. 11, and one case from District No. 6. In both cases it was held that there had been no sufficient showing of cause for disciplinary action.

## SUPREME COURT

In the Supreme Court one case is pending upon referee's report. Three judgments of disbarment were rendered. One of the respondents waived all proceedings.

## COMMITTEES ON INQUIRY

Mr. Harold Prince of Grand Island, who for many years was chairman of the Committee on Inquiry for his district, departed this life in December 1964. He served the profession and this Association with extraordinary zeal and devotion, and all of us who were associated with him miss his excellent service and his wise counsel.

By reason of the revision by the legislature of the judicial districts of the state, two districts, Nos. 19 and 20, have been added to the list. Mr. James A. Lane of Ogallala was appointed chairman of the committee for District No. 19; Mr. A. F. Alder of Taylor is chairman of the committee for District No. 20.

The districts in which no action by committees on inquiry has been required are 1, 9, 12, 18, and 20.

Minor matters not involving the filing of formal charges were disposed of satisfactorily in Districts 2 and 8.

Informal charges were investigated and found to be without merit in District 5 (three matters) and in District 17 (four matters).

Under investigation is one matter in each of Districts 7, 15, and 19, and two each in Districts 10 and 13.

Hearings resulted in dismissals in Districts 14 and 16.

In District 3 (Lincoln) charges were received in nine matters. Five of them were disposed of without the filing of formal charges. One has been heard in part and continued for further hearing. Three remain to be considered by the committee.

In District 4 (Omaha) five matters pending at the date of last year's report, October 6, 1964, were disposed of as follows:

Upon formal hearing one case resulted in dismissal. Three were dismissed without formal hearing, for lack of merit. One case was settled. Charges in twelve cases have been filed since October 6, 1964. Two of them were withdrawn by complainants; one was concluded by direct action of the Supreme Court; three were dismissed for lack of merit; four were formally heard before the committee and resulted in dismissal; and two were pending conclusion of investigations and hearings.

In District 6 two cases were investigated and found to be without merit. In one case the lawyer complained against was reprimanded.

I have always been a little dubious about the authority of local committees and of the Advisory Committee to do any reprimanding, but sometimes it gets a good practical result.

In District 11 (now Hall County), after partial hearing in one case, continuance was had pending compliance with suggestions of the committee. Compliance was had and thereupon the case was disposed of. One extensive investigation was conducted and no cause was found for disciplinary action. Charges are pending in one case.

#### ADVISORY OPINIONS

Many advisory opinions have been rendered, most of them relating to special situations and of no general interest. Some of the subjects covered and the highlights of some of the opinions may be summarized as follows:

1. The committee considered and expressed its views on ethical problems involved in (a) taking over the practice of a deceased lawyer, and (b) operating a claim service.

2. At the request of a county bar association, a study was made of the permissible form and limits of an advertising program by the Bar Association.

3. A study was made of the ethical considerations involved in continuing the practice of law, in association with or in employment by others, by one who is in public office.

4. The practice of enclosing return envelopes with billings is not deemed by the committee to be objectionable.

5. It is not permissible for a county attorney or his partners or his office associates to defend criminal cases in any court in the state.

6. It is unethical for a lawyer to receive a commission for

recommending or selling title insurance without fully disclosing to his client his financial interest in the transaction. (A.B.A. Opinion 304)

7. It is not considered unethical for a county attorney to accept employment by a village within the county to represent it in matters in which the interests of the county are not adversely affected.

8. A lawyer may maintain a listing in the classified section of a city directory only when the directory lists all lawyers residing in the community and makes no charge therefor. (A.B.A. Opinion 313)

9. A lawyer may not be listed more than once in the classified section of a city directory or telephone directory. (*Id.*)

10. The American Bar Association committee has ruled that names of partners and associates of law firms may not be shown under firm listing in telephone book. (Opinion 646, 49 A.B.A. Journal 954)

Respectfully submitted,

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

That concludes our report. No action by the Association is required.

CHAIRMAN MULLIN: Ray, we want to thank you for a fine report and compliment you and your committee for undertaking a serious and sometimes a very difficult job. We do have one question here: Does this mean, for instance, that all the lawyers in Omaha may not have their names carried in the yellow sheets so long as the telephone company charges for such a listing?

MR. YOUNG: No, that refers only to the city directory.

CHAIRMAN MULLIN: I see. It is still permissible to be in the yellow pages of the telephone book.

MR. YOUNG: Oh yes!

CHAIRMAN MULLIN: Our President-Elect, Herman Ginsburg, is chairman of the Committee on Title Guaranty Insurance

and is considered, I understand, very much an expert in this field. It is my pleasure to call upon him for a report.

## REPORT OF COMMITTEE ON TITLE GUARANTY INSURANCE

**Herman Ginsburg**

Mr. Chairman and Members of the House of Delegates: There is no written report in the printed program this year, for the reason that the action that was taken by the House of Delegates last year was, in effect, conclusive. You ordered the committee to go ahead and work out a deal with Kansas Insured Titles and the committee has done so. My purpose now is simply to bring you up to date on what has transpired.

Your committee sent a subcommittee down to Kansas. We met with Kansas Insured Titles and they have agreed to come into Nebraska and operate in Nebraska as an adjunct of the Nebraska Bar as well as of the Kansas Bar. Their application to do business in the State of Nebraska is presently pending before the Insurance Department of this state.

I believe that at least those of you who were here last year are aware of the fact that they have a capital of \$250,000 and a surplus of approximately \$100,000. They are in the process of issuing additional stock and raising the capital and the surplus, and I think by the first of the year they will have had a clearance from the Nebraska Insurance Department to do business in the State of Nebraska. Then they intend to apply to the SEC for authority to sell stock so that if any lawyers in Nebraska wish to purchase any stock, it will be available, but that is not a condition precedent.

I was very much interested in the preceding report where there was this question about attorneys representing title insurance companies, and that is the way they operate. If you recommend the Kansas Insured Titles to a client, you are supposed to tell your client that you do have an interest in the company, if you do.

Be that as it may, the second part of our report, which was accepted last year, was that we were to contact the local bar associations and see whether or not they were interested. Representatives of the Kansas Insured Titles and representatives of our committee appeared at the Western Nebraska Bar Association meeting, I think it was in June. At that meeting it was voted

that the action taken be approved, not in so many words, but the members were all in favor of the transaction with the Kansas Insured Titles. I attended a meeting of the bar association at Alliance where unanimous action of that kind was taken. I also attended recently a meeting of the Southeast Nebraska Bar Association, which had a very large attendance and they were very enthusiastic and were one hundred per cent in accord with this program.

At a meeting of the Nebraska Title Association, which was held here in Omaha Sunday, Monday, and Tuesday of this week, they had a Mr. George Collins, who has been the president of the Kansas Insured Titles and probably the hardest worker for the cause, attend their meeting. They were very much interested in the efforts and the progress that the Nebraska Bar Association was making in that field. As a matter of fact, I can say that for the first time I felt a warmth in the attitude of the Title Association, which are the abstractors and the people who sell title insurance.

I met Mr. Collins while I was at this meeting, and you might be interested to know that Kansas Insured Titles is now developing into a, shall I say, regional organization. They have already made the same sort of deal with the Bar of Oklahoma that they are making with Nebraska. They are already now operating in Oklahoma. They are in the process of entering into Wisconsin in the same sort of deal as with the Nebraska Bar, and also with the State of North Dakota, and they assume that South Dakota will fall into the lap, so to speak, in very short order. So Kansas Insured Titles is going to be operating pretty much throughout the Midwest territory. They are also right now in the process of changing their name so it won't be just Kansas, or a local organization.

As you know, the whole program is based upon the fact that no title insurance policy is written without a lawyer's opinion and without an abstract to work from.

I think that brings you up to date with the progress of our committee. Right now there is nothing further for us to do until the Nebraska Insurance Department grants them permission to proceed to do business in Nebraska. I will say this, that if anybody has any questions, I will do my best to try to answer them.

I don't think that there is any recommendation that I need to make formally at this time because, as I say, this was all done last session, so I simply ask that my report be filed, Mr. Chairman.

CHAIRMAN MULLIN: Thank you very much, Mr. Ginsburg. The report will stand filed as read and it will not be necessary, I take it, to have a motion to continue your committee in existence.

MR. GINSBURG: I don't know. I don't make such a motion. If we need it I suppose . . .

SECRETARY-TREASURER TURNER: The Council can create it.

CHAIRMAN MULLIN: The report will be accepted and we thank you for furnishing it.

Is Mr. Tye in the room, or is anyone here in his place to report for the Committee on World Peace Through Law? If not, the report appears at page 47 of our program and contains this recommendation on the last page of our program: "This being a special committee for the purpose of cooperation with the ABA Committee on World Peace Through Law, it is recommended that the committee be continued."

I will place that recommendation before the House and ask if there is any delegate who wishes to make such a motion.

ROBERT K. ADAMS, Omaha: I so move.

ROBERT R. MORAN, Alliance: I second the motion.

CHAIRMAN MULLIN: All in favor of the motion signify by "aye"; opposed. Carried.

[The report of the committee follows.]

### **Report of the Special Committee on World Peace Through Law**

This special committee was originally appointed and has continued because of the World Peace Through Law movement established by the ABA. Although there has not been a great deal of activity in this field during the past year, the committee has continued to study and keep abreast of the World Peace Through Law Movement carried on principally by the ABA committee. Continued effort is being made to bring about a close relationship with members of the profession in all countries of the World. There still remains a bar insofar as some of the totalitarian countries are concerned.

During the past year we have received literature, particularly copies of the Hammarskjold Forums, which literature has been placed in various educational institutions. The Forums have

touched upon many subjects, particularly a study of international disputes and the possibility of settlement by rule of law. There have been international conferences held at Kearney State College during the past two years with representatives from many foreign countries.

The 1966 Ross Essay Contest, which is conducted by the American Bar Association pursuant to the terms of the bequests of Judge Erskine M. Ross, has for its 1966 subject, "How To Develop World Peace Through Law." The prize is \$4,000. The essay must be submitted to the ABA on or before April 1, 1966. It would be most complimentary if a member of the Nebraska State Bar Association could win this noteworthy award.

Although it has been heard during the past year from various sources and particularly from one claiming to be of a religious faith, that World Peace cannot be attained through law, we sincerely believe that the legal profession can play an important part in bringing about a forum for the discussion of international disputes and we would hope that another world conflict by force might be averted. If the legal profession can point the way in this direction, it would certainly be to our everlasting credit.

**This being a special committee for the purpose of cooperation with the ABA Committee on World Peace Through Law, it is recommended that the committee be continued.**

Joseph C. Tye, Chairman  
Wilber S. Aten  
Thomas F. Colfer  
Clarence A. Davis  
LeRoy E. Endres  
Margaret R. Fischer  
Robert G. Fraser  
William Grodinsky  
Benjamin Groner  
Roman L. Hruska  
Francis J. Melia  
Barlow Nye  
Joseph R. Seacrest  
Lawrence I. Shaw  
V. J. Skutt  
Harry A. Spencer  
A. W. Storms  
Antonia F. Travarez

CHAIRMAN MULLIN: We are privileged to have with us today the president of one of our neighboring bar associations, and

while I've never met the gentleman, Harry Cohen noticed him come in the room and I am referring to Charles B. Whiting, president of the South Dakota State Bar Association. Mr. Whiting is with us and he is here from Rapid City, South Dakota. Will you stand up, Mr. Whiting. We welcome you to Nebraska.

This brings us to the report of the Section on Corporations. I will ask now whether anyone is present in the room to report in behalf of the Section on Corporations.

SECRETARY-TREASURER TURNER: Mr. Chairman, that section feels that it has accomplished its purpose in the recent corporation laws that have been enacted. The officers have told me that they see no necessity for continuing the section, as such. I would therefore move that it be abolished.

Understand, of course, that under the bylaws the discontinuance of a section cannot become effective until the next annual meeting.

CHAIRMAN MULLIN: Is there a second?

W. E. MUMBY, Harrison: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the Section on Corporations be abolished. All in favor say "aye" ...

JOHN C. MASON, Lincoln: Mr. Chairman, I would like to say a word on that, if I may.

CHAIRMAN MULLIN: Certainly.

MR. MASON: It seems to me that a substantial number of lawyers in Nebraska derive a substantial amount of their income from corporate practice, or at least practice which includes a lot of corporate business. It may be that the Section on Corporations has not functioned to the advantage of the lawyers who are engaged in corporate practice. In fact, initially it wasn't even set up for that purpose. I believe initially it was set up more in connection with municipal law.

But it seems to me that there is an important area of law practice which devotes itself to corporate matters—organization, reorganization, sales, mergers, and various things of that kind. I don't claim that it is a large percentage of the total Nebraska law business. I just claim that it's a substantial part of it, enough that it seems to me it would be worthwhile to have a committee or a section which at least has the responsibility, which we would hope would be fulfilled, of devoting its attention to these



matters. It is a growing field of law, in my judgment at least, and I would like to suggest that perhaps this matter of abolishing the section might be deferred, at least temporarily, pending some kind of a study by somebody—I don't have any definite recommendation on that—as to whether the work of such a section could be perhaps directed in a way that it would be beneficial to the state association rather than just discontinuing its work altogether. Now, perhaps George has in mind some alternate method of accomplishing that. If so, I think the House should know what it is.

SECRETARY-TREASURER TURNER: No, I do not, John. I was simply voicing what I understood to be the sentiment of those who have been in the past active in this section.

I think perhaps your suggestion that it be deferred is good. As you know, a section preference card went out with every dues statement. They have not gone out-state as yet. They have gone only to Lincoln and Omaha. I believe that if there is any substantial interest shown on these cards in a corporation section, it should not be abolished. I will, therefore, withdraw my motion. If there is no interest I will renew it next year.

ROBERT R. MORAN, Alliance: Mr. Chairman, I would like to ask a question in connection with this. Is it the obligation of the Section on Corporations to keep abreast and to recommend such modifications to the Model Business Corporation Act as are proposed from time to time, or is that the obligation of some other committee?

CHAIRMAN MULLIN: I would think it would primarily fall within their jurisdiction and from there to make recommendations to perhaps the Legislative Committee who would take it from there.

MR. MORAN: In that respect I would like to support Mr. Mason, because I know of litigation in my county which would not have occurred if the committee had acted upon the recent recommendations of the committee that proposes and supports and modifies the Model Business Corporation Act. So I think it is essential to keep some committee functioning in this respect.

CHAIRMAN MULLIN: Mr. Turner has withdrawn his motion. Mr. Mumby, will you withdraw your second? We will consider the motion withdrawn and tabled for the present.

Is Mr. Bernard Smith with us? Bernard is chairman of the Section on Tort Law and will report on behalf of his section.

**REPORT OF SECTION ON TORT LAW****Bernard B. Smith**

Mr. Chairman and Members of the House of Delegates: The Section on Tort Law held no formal meetings during the past year. You might say that they did entertain many questions informally and they have applied themselves industriously, but having been relieved of sponsoring a program, no formal meetings, as such, were held.

The members of the committee whose terms will continue through 1966 are: Robert D. Mullin of Omaha, James A. Lane of Ogallala, Albert G. Schatz of Omaha, and myself, Bernard B. Smith of Lexington.

We have two members whose terms will expire: Daniel Stubbs of Alliance, and Fred K. Stiner of Lincoln.

In keeping with the ground rules, as I understand them, in the event there has been no formal meeting the governing rules and regulations provide that there will be appointments by the Executive Council. However, I learned during the noon meeting of the Executive Council that Mr. Herman Ginsburg as President-Elect, through his canvassing of the bar at large, has asked for an expression of preference from the lawyers as to the committees and sections in which they are interested. All of this information is to be fed into either Mr. Ginsburg's brain or some computer, and the results will be analyzed, and it is anticipated that there will be a meeting sometime during the month of December, at which time these results will be reviewed, and it was thought that the filling of the vacancies should be reserved until that time.

In view of the fact that we do not have a full complement of members of the Executive Committee and won't have until after the December meeting, it is the opinion of your Executive Committee that we wait until that time to complete the organization of this section and the election of the officers. That concludes my report.

**CHAIRMAN MULLIN:** Thank you very much. The section is a standing section and I think no motion is needed. The report will be placed on file.

Howard Tracy came in the room a few moments back and I will ask Howard to report on the Junior Bar Section.

## REPORT OF JUNIOR BAR SECTION

Howard E. Tracy

Mr. Chairman and Members of the House: I believe that most of you know that our section has concentrated on two programs during the last several years. We have an annual fall clinic, which we hold in conjunction with the University of Nebraska College of Law at Lincoln, and we have the Bridge-the-Gap program which we conduct in June.

The fall clinic, as has become our custom in odd numbered years, was this year again addressed to the legislation enacted by the 1965 session of the unicameral. We had 248 lawyers register for that clinic and we felt that that was an excellent turnout. The fact is that our fall clinic has become more and more popular during the past two or three years. We hope that some of this is due to the efforts of people like Claude Berreckman of Cozad, who was responsible for the organization of this year's clinic, to the efforts of George Turner and his staff who help us so much, to the efforts of Dean Dow and Professor Gradwohl. We feel, however, that it is no more than right to admit that some of the enthusiasm for the trip to Lincoln is generated by Mr. Bob Devaney.

Some of you may have wondered why we moved the fall clinic from the Kellogg Center. The reason is that the Kellogg Center was charging us \$2.50 per registrant, and for that we got only the use of the bare room, a few free pencils, coffee, and doughnuts, and even those who celebrated on Friday night didn't drink that many dollars worth of coffee the next morning.

Our second major program is held in June of each year, and that is the Bridge-the-Gap program. It is addressed primarily to lawyers who have just taken the bar examination. It is held in the two-day period between the taking of the bar examinations and the formal ceremony of admission to the bar. This program lasts for two days. The participants start out with the general instructions on how to find the court house, and we continue throughout the period instructing these young men as to the practical aspects of the practice of law.

I hoped when I walked up here you didn't misinterpret this as my report, because I am not going to go on that long, but this book, approximately 250 pages long, is the book that we now pass out to these young lawyers at the Bridge-the-Gap program as part of their registration fee. This book—and I would be glad to have any of you who are interested examine it later—is tanta-

mount to a basic form book. It has forms of a lot of things, as a matter of fact, that you cannot find in the standard form books. It is revised every year by the persons who partake of a particular subject on the program.

The registration fee for the Bridge-the-Gap program has been \$15.00. It pays the expense of this publication, buys the luncheon, buys a little bit of coffee, and, hopefully, leaves a few dollars for your general Bar treasury. We heartily recommend this program to anybody who is just entering into the practice of law, whether just graduating or returning from the service, and we think it is \$15.00 well spent on the part of lawyers who are hiring these young men.

Many of our section members are individually serving on committees of the American Bar Association. One of the members of our section is Jim Knapp who is also a member of this House. He is a director of the Young Lawyer Section of the American Bar Association. Jim is also one of the six members of the ABA's Special Committee on Availability of Legal Services. I hope that you are familiar with what that committee is because one of the primary things that that committee is doing is investigating the socialization of the practice of law, which is now going on under the federal War on Poverty. I am sure that you ought to know, if you don't, that the Office of Economic Opportunity now has, as I understand it, twenty-three projects, although at the time this paper was typed it was only fourteen projects, which are designed in metropolitan areas to furnish legal services to those people who are indigent. These are families who make, by federal definition, less than \$7,500 a year. In these twenty-three projects lawyers on federal salary are charged with the specific responsibility of going out and soliciting the law business of these folks. I am talking about the *civil* law business, not just the criminal business.

Our section cooperates fully with the Young Lawyers Section of the ABA. For some reason that has never been perfectly clear to me, some of the members of what used to be the Junior Bar Section of the ABA objected to the name "Junior" and wanted it changed to "Young" Lawyers Section. They accomplished this on the national level and asked us to accomplish it on the state level. Accordingly, we would ask that sometime when it is convenient this House amend its bylaws to show that the name of our section is "Young Lawyers Section" rather than "Junior Bar Section."

Richard A. Huebner of Grand Island and Bill Campbell of Omaha have been elected to the Executive Committee of our

section to replace Harold Rock and to replace me. The Executive Committee for next year will meet tomorrow, and if it is all right, George, I will give you the names of the officers who are elected at that time. Thank you.

SECRETARY-TREASURER TURNER: Quite all right.

JAMES I. SHAMBERG, Grand Island: Mr. Chairman, would it be in order for a motion that the House of Delegates recommend that the name "Young Lawyers Section" be adopted in place of "Junior Bar Section," to fall in line with the American Bar Association nomenclature?

CHAIRMAN MULLIN: I think your motion is in order if you take out the word "recommend." I think this House has the power to amend its own bylaws rather than recommend it to anybody else.

MR. SHAMBERG: I so move.

CHAIRMAN MULLIN: Do I hear a second?

JOHN C. MASON, Lincoln: I second the motion.

CHAIRMAN MULLIN: Any further discussion? If not, all in favor say "aye"; opposed "nay". The motion is carried and the new name of the Section is "Young Lawyers Section."

CHARLES F. ADAMS, Aurora: Mr. Chairman, I believe, in accordance with our bylaws, however, that will not be effective until the expiration of one year. You might ask Mr. Turner to clarify that.

CHAIRMAN MULLIN: Thanks, Mr. Adams. We'll check that.

SECRETARY-TREASURER TURNER: That used to be in our bylaws but I believe it is no longer there. Article VII now provides: These bylaws may be amended at any meeting of the House of Delegates by a majority vote of the members present."

MR. ADAMS: I think you will find a separate section, however, on the matter of enumeration of sections.

SECRETARY-TREASURER TURNER: That could be.

CHAIRMAN MULLIN: While they are looking, I will mention that we have now covered the first 41 items of business on our program. Number 31, the report of the Committee on Resolutions, was waived or bypassed because no resolutions had been proposed and it was not necessary to designate any committee, which brings us to Item 42, presentation of any matters any sec-

tion or committee wishes to bring before the House of Delegates. The chair will recognize a representative of any section or any committee in connection with any matter which is to be brought before the House of Delegates. Seeing none, we will move to No. 43, unfinished business. Does anyone know of any unfinished business which should be brought before this House? Again, seeing no hands raised, I will ask Mr. Adams if he has found the appropriate paragraph.

MR. ADAMS: Mr. Chairman, I was thinking of Section 2 with reference to the creation or abolition of a section. It does not apply to change of name. I would therefore think we could change the name and have it effective immediately.

CHAIRMAN MULLIN: I think in that case the name change becomes effective as of this moment.

That completes the formal program. The Chair will now entertain a motion to adjourn.

CLARK G. NICHOLS, Scottsbluff: I move we adjourn.

CHARLES H. YOST, Fremont: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that we adjourn. All in favor say "aye"; opposed. Carried. Thank you for coming and for your cooperation and help!

[The House of Delegates adjourned sine die at two-forty o'clock.]

**THURSDAY MORNING SESSION****October 21, 1965**

The opening session of the Sixty-Sixth Annual Meeting of the Nebraska State Bar Association, convening in Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at ten o'clock by President Harry B. Cohen of Omaha.

**PRESIDENT COHEN:** Will everybody please stand. The invocation will be given by Reverend L. William Youngdahl, Pastor of Augustana Lutheran Church of Omaha. He has a legal heritage. His father was a United States District Judge and the former Governor of the State of Minnesota. Reverend Youngdahl!

**INVOCATION****Reverend L. William Youngdahl**

Let us pray. Almighty and merciful God, we acknowledge Thee as the great Lawgiver. Thou hast written into the life of every age the height, the depth, the length, and the breadth of divine justice.

Teach us in our day, O God, that the chief Commandment is to love Thee and our fellow man. Help us to see beyond the letter of the law. In so doing may we keep uppermost in our minds the human equation. Forgive us when we are so caught up in legal technicalities that we are blind to our brother's need.

Make every lawyer and judge here assembled for the 1965 annual meeting of the Nebraska State Bar Association more fully conscious of the awesome responsibility of interpreting and administering the law. Truly, Thou hast ordained this endeavor to be a holy calling. Amen.

**PRESIDENT COHEN:** The next order of business is the Address of Welcome by Mr. William Baird, who is the President of the Omaha Bar Association. Mr. Baird!

**ADDRESS OF WELCOME****William J. Baird**

Thank you, Harry. Distinguished Guests and Fellow Lawyers: One of the nicest features which attends the office of President of the Omaha Bar Association is that of acting in the role of official spokesman for the host. So in that capacity it gives me a great deal of pleasure, on behalf of the 520 members of the

Omaha Bar Association, to extend our most cordial welcome to Omaha to all of our fellow lawyers throughout the state to this Sixty-Sixth Annual Meeting of the Nebraska State Bar Association.

I am not quite sure just why we are cast in the role of host. As I look back over the extensive preparations that have gone into this convention, which is now getting under way, I find that the Omaha Bar as such, and especially its President, has contributed absolutely nothing to the many hours of painstaking planning that has gone into making what I am sure will be its usual success. However, as long as George Turner, who is responsible for all of the work, doesn't object, we are delighted to claim the spotlight as the host.

I think these infrequent opportunities for the lawyers of the state to get together on a non-controversial basis, with no causes to espouse, no axes to grind, is a fine thing for the legal fraternity. Not only are excellent and informative programs worked up and presented to further the education of all of us, but even more important, it tends to strengthen the common bond that exists between all the lawyers of the state.

I think the most valuable result that flows from these meetings is the opportunity to renew acquaintance with our colleagues whom we don't see very often and to meet others whom we haven't met before. It tends to enhance the pride that all of us take, and rightfully so, in just being a member of the Nebraska State Bar Association.

I think all of us are painfully aware of the fact that the public image of the lawyer in this day and age is not as good as it should be, is not as good as it once was. We know that the public is prone to seize upon every transgression by someone who happens to be a lawyer, and which is always well publicized, to indict the entire legal profession. We know that there are lawyers, and there will always be a few, who are a discredit to the bar. I don't think there is much we can do about that. What I think all of us *can* do, and by "us" I mean the other ninety-nine plus per cent of the lawyers, to counteract and neutralize the unfavorable publicity that comes from any transgressions by a lawyer, is to so conduct ourselves in our public and professional, even our private lives, so that the respect that is rightfully due the legal profession will be forthcoming inevitably from our associations with the general public and with the laity.

I hasten to add that I would hate to think this little lecture on morals would dampen the pleasure of any of you who are



coming to Omaha. It is supposed to be a pleasurable stay. I would certainly hate to think that my remarks would keep anyone who otherwise might have a drink or two at an appropriate time from taking it.

So in the spirit of fellowship may I again extend our warmest welcome to all of you from out-state to Omaha. We hope that your stay here will be profitable as well as pleasurable. We certainly hope you will come back again next year.

Incidentally, you might take your last look at that architectural monstrosity which is our City Hall at 18th and Farnam Street. It won't be there next year, we hope.

PRESIDENT COHEN: As an Omahan, I ditto those remarks.

We will have the response by Mr. Murl M. Maupin who ostensibly, although not yet technically, is your President-Elect. Murl!

### RESPONSE

#### Murl M. Maupin

President Cohen, Mr. Baird, Distinguished Guests, and Members of this Association: I am sure that I voice the feelings and sentiments of all the members of this Association who do not reside in Omaha for the kind words that have been given by Mr. Baird, and for the efforts that we may not see. Notwithstanding Mr. Baird's claim to modesty in the lack of participation of the Omaha Bar, nevertheless we do recognize that the committee members who reside within the city of Omaha and the members of the Omaha Bar have spent countless hours of their individual time in arranging for this very, very fine program that is scheduled for this annual meeting.

So on behalf of the membership generally I desire to express our thanks, not only to you, sir, but to the other members of the Omaha Bar. We are looking forward again to this meeting of fellowship, comradeship, educational opportunities, and pleasurable moments that we shall have.

PRESIDENT COHEN: I have a message about our group insurance program. For over twenty-one years there has been in force an excellent program of group insurance underwritten by the Continental Insurance Companies and administered by the local agency here in Omaha, Harold Diers and Company.

The outstanding feature of the program is that you get local claim service through the administrative office. Many of you can confirm the fine quality of this service.

We attorneys, by and large, are dependent on our professional time, and if that is taken away by sickness or accident, it is mighty important that you be well insured. Our insurers, the Continental Insurance Companies, are a 112 year old organization with two billion dollars worth of assets. They have never canceled any organization's professional men insured under their disability program, so you never need worry about the security of your coverage.

They have a man outside here, Mr. Hobbs, and if you have any questions about your insurance or if you want to know about increased insurance, Mr. Mac Hobbs of Harold Diers and Company has a booth outside and you can go and see him at any time. He will answer any questions and give you any information that you desire.

This year we lost one of our very, very faithful servants. This lady had been with the Bar Association since 1927. All of the Executive Council thought it appropriate to remember her by appropriate resolutions. Accordingly, we have adopted a resolution which I want to present to this gathering for adoption by the Bar as a whole:

#### MEMORIAL RESOLUTION IN MEMORY OF MAYSEL E. TAYLOR

WHEREAS, on or about January 1, 1927, Maysel E. Taylor commenced employment with the Supreme Court of the State of Nebraska in the capacity of Opinion Clerk, and as such zealously performed the duties of her position, which constantly required the utmost of integrity, for twenty-five years; and

WHEREAS, said Maysel E. Taylor in the Fall of 1937 commenced the rendering of services to the Nebraska State Bar Association, the first of which was as an Assistant in Charge of Registration for the 1937 Annual Meeting of the Association, and thereafter in various capacities continued to perform various and sundry duties and to render various and sundry services in connection with all events of the Nebraska State Bar Association, including but not in limitation, the annual meetings, the many institute meetings and the many other functions and activities of the Nebraska State Bar Association; and

WHEREAS, the said Maysel E. Taylor was a familiar figure at all of such events and on all such occasions rendered services to the Association and its entire membership in a most gracious and understanding manner, and by reason thereof contributed to the success of all of such events and made a deep and lasting impact upon those who came in contact with her; and

WHEREAS, the Executive Council of the Nebraska State Bar Association desires that the memory of Maysel E. Taylor be perpetuated for the present and future membership of the Nebraska State Bar Association as a person who gave of herself in the furtherance of the philosophy and the ideals of the Bar of the State of Nebraska, and to extend the most sincere

condolences of the entire membership of the Nebraska State Bar Association to the immediate members of her family, on her death, which occurred on January 4, 1965.

NOW, THEREFORE, BE IT RESOLVED, by the Executive Council at its Mid-year meeting held on June 18, 1965, that in the death of Maysel E. Taylor, the entire membership of the Nebraska State Bar Association lost a close personal friend, an outstanding personality, and a most loyal and exceedingly dedicated public servant, and one whose deeds and performances for and on behalf of and whose devotion to the Bench and the Bar of the State of Nebraska will serve as a constant reminder to the membership of the Association of the importance of rendering services to the Bar and for the furtherance of justice.

BE IT FURTHER RESOLVED, that these resolutions be recommended for adoption by the Nebraska State Bar Association at its Annual Meeting to be held in Omaha, Nebraska, on October 20th, October 21st, and October 22nd, 1965.

BE IT FURTHER RESOLVED, that these resolutions be made a part of the permanent records of the Nebraska State Bar Association, and that a copy of these resolutions be delivered to the members of the immediate family of Maysel E. Taylor.

Harry B. Cohen  
Herman Ginsburg  
Charles F. Adams  
William J. Baird  
James F. Begley  
Fred R. Irons  
Vance E. Leininger  
John C. Mason  
W. E. Mumby  
Tracy J. Peycke  
Bernard B. Smith  
Floyd E. Wright  
EXECUTIVE COUNCIL

May I hear a motion for the adoption of these resolutions?

ROBERT K. ADAMS, Omaha: I so move adoption.

RALPH E. SVOBODA, Omaha: I second the motion.

PRESIDENT COHEN: It has been moved and seconded that these resolutions be adopted and be made a part of the permanent records of the Association, and that copies be submitted to members of the immediate family. All those in favor say "aye". Carried.

The next order of business, in accordance with the bylaws, is the so-called "Report of the President." Having been admonished to be brief, I shall do so.

## REPORT OF PRESIDENT

Harry B. Cohen

The bylaws of the Association require a report from the president at the annual meeting. I had listened to these reports in the past and I am frank to admit that when the time arrived for the preparation of this report I had no recollection of the format or comments of the reports of any of the most recent presidents. Accordingly, I began reading the reports contained in the proceedings of previous annual meetings. In the main, these consisted of a survey of the activities of the Association, suggestions for improvement, recommendations, and expressions of thanks. Events control the appraisals, observations, and recommendations in each instance. I want to present my analysis of events transpiring during my term of office and make some recommendations. I have been admonished to be brief.

For quite some time the officers and members of the Executive Council of the Association have not been satisfied with the functioning of the committees and sections. On paper the procedures look good. We knew that in many instances committees had not been able to get together during the course of the year for even a single meeting and that this was likewise true of the sections. We also knew that the contents of the reports were in many instances prepared and submitted by the committee chairman to the membership, and upon approval were submitted to the Association as the report of the committee or the section, as the case may be. There exists no procedures for the maintenance of a membership roster for the sections.

We determined to make a start for improvement of the situation. Frankly, about all one can do in the course of a year is to make a start. As a first step, the President-Elect was appointed Coordinator of Section and Committee Activities. The Coordinator corresponded with the chairmen of the committees and sections and in a sense gave direction to the work of these divisions of the Association.

As a second step it was determined to devote the entire midyear meeting to the committees and sections. Accordingly, on June 18, 1965, all committees and sections were directed to hold meetings of their respective organizations in Lincoln, Nebraska. They met for the whole day. Everybody paid his own expenses. The Association was responsible for only the noon luncheon and dinner for those who did not leave earlier. In all, the expense to the Association was less than \$500. This was money well spent.

The response was excellent. Over 100 persons attended. Each committee and section held its separate meeting. Many members informed me that this was the first time that their respective committees or sections, as the case may be, had ever met as a group. Good discussions were had. Many of the committee reports were finalized at this meeting. This is a good beginning. More can be and should be done. I feel confident that the incoming President and President-Elect will implement and continue these efforts in a very tangible manner. I want to publicly express my thanks to Herman Ginsburg for a good job well done.

You will recall that last year we were exceedingly concerned about finances. We had a right to be. It was apparent that by the end of calendar year 1964 our deficit would be in excess of \$20,000. We had to borrow money from a bank and, in addition, we made use of funds in a reserve account which belonged to the Association and which was not limited in any manner as to use. The House of Delegates determined to ask the Supreme Court for authorization to increase the dues from \$20.00 to \$35.00 for senior members, and from \$10.00 to \$17.50 for junior members. A motion was filed in the Supreme Court and the court authorized an increase in dues from \$20.00 to \$30.00 for senior members and from \$10.00 to \$15.00 for junior members.

Our expenses, like those of any other active and growing organization, continue to rise. During the course of the year we had many requests for additional funds. Because of the necessity for husbanding our funds, it was necessary in most such instances to grant only portions of the amounts requested. This sometimes leads to frustration on the part of the committees and sections that have planned and want to execute programs involving expenditure of moneys. I am certain that in all such instances the committees met their responsibilities with the funds made available. During the course of a year many unforeseen events occur which require the expenditure of funds. I assure you that our responsibilities for all important matters were fully met.

Even though I sound pessimistic, I am happy to report that the debt to the bank has been fully paid and that the reserve fund had been fully reimbursed, and that our deficit will as of the end of this year in all probability not exceed \$6,000. George Turner has advised me that the Association under present operations should be in the black by the end of 1966.

The House of Delegates is undoubtedly the most important division of the Association. For some reason or another the membership does not generally seek election to this body. At the

last meeting of the Executive Council it was necessary for the council to make nominations for twelve out of twenty judicial districts. I feel that this seeming lack of interest is undoubtedly due to the lack of knowledge on the part of the membership of the procedures for nomination and election. I would suggest that the responsibility for obtaining at least the required nominees should be that of the chairman of the House of Delegates. It would be desirable for the chairman each year and at the appropriate time to make every effort to advise lawyers in the judicial districts of the procedures for the nomination and election to the House of Delegates, and to see to it that the proper number of nominees is selected.

Meetings of the Executive Council were held regularly. They were all well attended. I assure you that the members of the Executive Council are all intensely interested individuals and were ever mindful of their responsibilities to the Association. Our Association was represented at every function and every event of the American Bar Association. We had a full delegation in attendance at the midyear meeting and at the annual meeting of the American Bar Association.

You are all familiar with the recent decisions of the Supreme Court of the United States requiring legal representation for persons accused of crimes. Congress enacted the Federal Criminal Justice Act to provide methods and means for making services available to indigent persons accused of crimes. The Criminal Justice Act required the formation and adoption of a plan for implementation of its provisions. Originally, with the advice of our federal judges, we appointed an ad hoc committee to draft and recommend a plan. This committee performed its duties in a most admirable manner. A plan was drafted and the plan was adopted by our federal judges.

The plan provided for the appointment of a special committee to serve in an advisory capacity to the federal judges and the members of the Nebraska Bar.

Accordingly, pursuant to authority granted by the Executive Council, such a special committee was appointed. It will be the duty of this committee to assist the federal courts in maintaining the standards required in the appointment of counsel and employment of fact-finding services, to review the operation of the plan in light of experiences, practical demands, and increasing requirements, to assure the maximum use of the Criminal Justice Act, and to avoid any public abuse of its terms. This committee is functioning. I want to extend my thanks to Robert Kutak, who

was the guiding hand and did so much of the work in connection with this exceedingly important matter.

I do not know whether any of you have read the report of the outgoing President of the American Bar Association, Lewis F. Powell, Jr., delivered at the annual meeting. I listened to it. I was exceedingly impressed with its contents. In essence, it was a plea by a sincere, dedicated lawyer to his fellow lawyers for devotion to and cooperation with the Office of Economic Opportunity in the area of providing legal services for indigent persons. We are living witnesses to the actions of government in the area of providing medical and legal services for the indigents. If we are honest with ourselves, we must recognize that there is need for the rendering of legal services to the indigent.

I am personally very proud to be a member of a profession that at all times recognized its responsibilities in this area by sponsoring the creation of legal aid clinics. The Bars of both Lincoln and Omaha have had operating and functioning legal aid clinics for many years. The profession, acting through the American Bar Association, determined early to cooperate with the Office of Economic Opportunity. The profession has responded admirably. This response has been very favorably received by the Office of Economic Opportunity. It recently appointed Mr. E. Clinton Bamberger, Jr., a very able member of the Maryland Bar, as Director of Legal Services of the Office of Economic Opportunity. Our profession, unlike our sister profession, as a result, will actually be able to be on top of this program at all times. I earnestly urge all members of the Association and the many district bars to cooperate fully in this program. Let us all stand up and be counted, whatever our political philosophies.

It can truly be said that this Association owes so much to so few in connection with the various activities involving the functioning of the Association. The work of the few is of extreme importance to the Bar as a whole. As you know, the legislature was in session for a long time and it enacted many bills. The Legislative Committee performed its monumental task most admirably in a very, very fine manner. I want to extend special thanks to this committee. I also want to extend special thanks to Mr. Al Reddish and Mr. Pierson for their very excellent program on probate law and trust law which will begin this afternoon.

Over the years I have become well acquainted with the activities of George Turner as Secretary and Treasurer of the Association. Frankly and honestly, George literally IS the Association most of the time. George has occupied this position

for many years, and I shudder to think of the chaos that would result if George became incapacitated or passed away. The time has come for all of us to face realities. We should begin now to train someone for the position of secretary-treasurer. I recommend that the incoming officers and Executive Council provide the funds and employ a young man for the position of Assistant to the Secretary and Treasurer of the Association.

I want to express my personal thanks to George for all his assistance. I also want to express to you, George, the thanks of the Association. In the tradition of the past you have again performed in a most diplomatic and capable manner.

Every president feels deeply his responsibilities upon assuming office. I hope I have contributed in a small measure to the progress and success of the Association. The members of the Association always responded whenever I asked any of them for assistance. They have all been very kind to me. I thank you all for your interest and assistance.

I am personally well acquainted with Herman Ginsburg. He is known to every one of you. He has been in bar association work almost continuously since his admission to the bar. He is a student, a very able lawyer, and a good administrator. It is so comforting for all of us to know that the Association will be in extremely good hands.

Thank you very much for permitting me to serve as your president. I have enjoyed it very much.

The next order of business is the report of the Secretary-Treasurer, Mr. George Turner.

## REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. President and Members of the Association: As the President indicated, the report this year is much better than it was at this time a year ago when we were very badly in the red.

As you probably know, the books of the Association are closed as of August 31 in order to give the accounting firm an opportunity to prepare its report for submission at this annual meeting. The report is from the firm of Peat, Marwick and Mitchell Company, through their Lincoln office:

We have examined the cash receipts and disbursements of the Nebraska Bar Association for the year ended August 31, 1965. Our examination was made in accordance with generally accepted auditing stand-



ards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion the accompanying statement of cash receipts and disbursements presents fairly the cash transactions of the Nebraska State Bar Association for the year ended August 31, 1965.

The accompanying statement of the condition in cash receipts and disbursements of the Daniel J. Gross-Nebraska State Bar Association Welfare and Assistance Fund for the year ended August 31, 1965, are presented for analysis purposes only, as such funds managed by a Board of Trustees appointed by the President of the Nebraska State Bar Association have not been audited by us.

Their detailed report of receipts and expenditures shows total receipts during the year of \$77,247, and a balance at the end of the year of \$8,588. The report shows the Daniel J. Gross Welfare and Assistance Fund has now on hand a total of \$31,450.

A detailed report of the audit will be published, of course, in the proceedings of this annual meeting.

PRESIDENT COHEN: Thank you, George. Are there any questions? Gentlemen, there are no secrets in the Bar Association. This is your Association. If there is something you don't understand or something you want to know, feel free to ask.

The next order of business is the report of the American Bar Association Delegate, Mr. John J. Wilson.

## REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

Mr. President, Members of the Nebraska State Bar Association: As of August 31 of this year the American Bar Association had 119,995 members, or 45 per cent of all the lawyers in the country. It is made up of lawyers who want to improve their knowledge. Sections are provided for educational purposes, so anyone who wants to improve in his field has a great opportunity not only to work but to learn.

At the last meeting in Miami a new section was created called Public Contract Law. That started out with 1,000 members. It was created to give a new field of learning to those lawyers who were dealing with public contracts.

Nebraska ranks twenty-fifth among the states in American Bar membership, and 51 per cent of the lawyers of this Association belong to the American Bar Association.

The American Bar Association is growing. Last year they gained 7,300 members and ended up the year with a net gain of 3,298 members.

The American Bar Association is operated similarly to our Association with a House of Delegates. Ed Murane of Casper, Wyoming, is chairman of the House of Delegates. The President, Mr. Ed Kuhn from Memphis, Tennessee, is here and will talk to you today and will bring you the work of the American Bar Association.

Nebraska is represented in the American Bar by three members. George Turner is the State Delegate. He is elected by the members of the American Bar Association in Nebraska. I am your Bar Representative, and I am elected by the members of the Nebraska State Bar Association. Clarence Davis was elected this summer to the Board of Governors. So Nebraska is well represented in the affairs of the American Bar Association.

This year the Uniform Law Committee revised the Uniform Gift Bonders Act and proposed a new law on uniform statutory construction. That committee is busy trying to keep abreast of the times in furnishing modern law for different legislatures to enact.

There were many discussions of interest at the House of Delegates meeting at Miami this year, and most of those reports are briefly covered in the last *American Bar Association Journal*. Those of you who are members of the American Bar, if you read your last *Journal*, will get a good report on the doings of the American Bar Association and on how successfully it is operating.

PRESIDENT COHEN: If any of you are not members of the American Bar Association, I urge you very much to become members. What you get out of the *Journal* and out of the reports of the various sections is just excellent. They are very well done.

It is only in the last few years that I personally have attended the American Bar convention. I think the last one I attended was when I was a youngster just starting out in law practice. Frankly, the reason I didn't go back was because I wasn't very well impressed with the first one I attended in Kansas City. But you just can't appreciate all the work of the various sections and the areas of law, like taxation and insurance. You get the publications, if you are a member, of the various sections you belong to. These are excellent. You can go there and you can listen in on lectures by outstanding authorities in your particular field. There are so many lectures that what I do is sit down and chart out those I want to hear, primarily because of the fields

I may be interested in, and secondly because of the people who are going to be doing the talking. You know of these people from literature.

I urge you, if you can possibly do so, to go to the American Bar convention. You don't go there for a good time; you go there to learn, and you have a good time incidentally.

The next report is that of our House of Delegates. Mr. Robert D. Mullin is Chairman of the House of Delegates.

## REPORT OF THE HOUSE OF DELEGATES

**Robert D. Mullin**

Mr. Chairman, President Harry, Honored Guests, and Fellow Lawyers: Before giving the formal portion of my report I am glad to see Bill Baird is here because I thought this had been a very unusual morning. It is the first time I can ever remember going through a very moving invocation and having the next speaker give me a blanket dispensation to drink all the booze I want.

I am pleased to report that yesterday we had almost one hundred per cent attendance at our House of Delegates' meeting. The meeting convened promptly at nine-thirty yesterday morning, October 20, and remained in constant session until noon. We reconvened at one-thirty and adjourned shortly before three o'clock.

President Harry Cohen presented an excellent opening statement which contained several suggestions for the betterment of our Association. His statement has already been incorporated in his report to you this morning and will not be repeated by me.

The annual audit was presented by George Turner, our Secretary-Treasurer, in the form which you have heard, and was approved as read.

As shown in the program, some forty-three items of business came before the House of Delegates. These reports reflect untold hours of work and sacrifice on the part of committee and section members of your Association. Time permits but a brief reference to some of the recommendations which were considered and adopted by the House.

The House voted favorably on recommendations by the Committee on Legislation that a request be made to the Executive Council for allocation of between \$1,000 and \$2,000 for participation in a federal-state law student program which would make

it possible for a law student, one or more, at the University of Nebraska to be employed part time and to devote time to researching all of the legislative bills that are proposed to the legislature, explaining them, and finally furnishing a study which would enable your Legislative Committee to intelligently consider them without the back-breaking hours that the committee went through last year. The Legislative Committee in one instance reported that just through sheer accident one bill slipped through and was passed before they even knew about it. Having a law student following up on every bill, one or more law students, it is hoped, would meet this problem.

The Legislative Committee, as did another committee, also recommended that immediate search be made for a sane method of properly funding the judicial retirement system, and this was approved by the House.

The Committee on Citizenship recommended encouraging members of the public and students of our schools to attend actual court trials, and this likewise met with a favorable vote. I perhaps should mention that one reason for that suggestion was some of the mock trials that have been put on either in our state or on radio or TV which they thought were somewhat misleading to members of the public.

The Judiciary Committee recognized the financial problems in our judicial system, particularly the retirement area, and urged the appointment of a special committee which would be empowered to employ an actuary to study the funding of our retirement system and to devise a concrete plan. This committee also recommended that the Executive Council amend the Merit Plan so as to enable lawyers and members of our Association to endorse or oppose judges for re-election. Both recommendations were voted favorably by the House.

All other reports containing recommendations were voted favorably by the House, and reports submitted without recommendations were received and filed.

Last, but not least, upon the recommendation and motion of the Junior Bar Section, the House of Delegates voted to change the name of the Junior Bar Section to "Young Lawyers Section" wherever it may appear in our constitution or bylaws. This is in line with the national change of name from Junior Bar to "Young Lawyers."

In the coming year all members of the Association are invited to offer nominations for membership in the House of Delegates, the most important division of our Association. Better yet, each

individual lawyer is invited to submit his own name for election by the lawyers of his own judicial district. The vitality of our House remains dependent upon the continued interest, support, and participation of every lawyer in our Association.

PRESIDENT COHEN: Thank you very much, Bob. Are there any questions on this report? Did anybody have any questions on the report of Jack Wilson? I guess nobody is in a mood to debate this morning.

The next report is that of the Judicial Council. The Honorable Edward F. Carter is chairman of this group. Judge Carter!

### REPORT OF JUDICIAL COUNCIL

Edward F. Carter

Mr. President, Members of the Association: The Judicial Council submitted fifteen proposed procedural bills to the 1965 session of the legislature. All were enacted into law. No meetings of the council have been held since adjournment of the legislature, although several important matters have been referred to individual members for preliminary study. The council will meet on November 6 to take up the consideration of these matters.

It is essential that court procedures be continuously improved to meet the needs of a social order that is ever changing and becoming more complex. In an article on procedure, the author of which is unknown to me, I found the following:

Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they all are justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted is no evidence that justice has not been done by the court or jury. It may be the highest evidence that justice has been done, for it is perfectly just not to uphold a just title, not to convict a guilty man, if the debt or the title or the guilt be not verified. It is unjust to do justice by doing injustice. A discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fall it must be justice of substance, for what justice of procedure courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail.

While I do not subscribe fully to the foregoing, it points up the absolute necessity for the adoption of the best procedure possible.

At the instance of the Judicial Council, the last session of the legislature enacted a post conviction procedure in criminal

cases and a statute to provide legal counsel for persons charged with crime who are not financially able to provide them. Whether or not the members of the council were in accord with the reasons for bringing about the substance of these statutes, the fact remains that they are now a necessity. While it probably means that a criminal prosecution is never ended, it is better to have subsequent issues determined by the same court which originally tried the case, not only because of its familiarity with it but also because of the experience gained, for the handling of future cases.

While it seems ironical that a person admittedly guilty of crime is allowed to escape punishment because he had no legal counsel when none was asked for, particularly under newly created rules of due process applied retroactively, yet we cannot ignore the rulings of the Supreme Court of the United States based on the Due Process Clause of the federal Constitution. It is better, we think, to make the procedures of the state as amenable as possible to the requirement of the federal Supreme Court in the hope that criminal litigation may be terminated in the state courts. We are in agreement, of course, with the principle that one charged with crime is entitled to all his constitutional rights. But the rights of persons charged with crime ought not to be so expanded by constitutional interpretations, often questionable, that defeat the purposes of law enforcement and deprive the law-abiding public of protection from those who have no respect for the personal and property rights of others. With this view in mind we proposed these two bills in accordance with federal holdings in the hope that they will do more to give protection to the public by providing our own law enforcement procedures within the scope of the legal decisions which are binding upon us.

We are in an era of procedural change in the legal profession. Such change is good when it improves the administration of justice. It is bad when done to place restraints upon a whole system in order to restrict the few who abuse their discretion or violate the law. Proper and correct procedures are essential, as I have attempted to point out to you.

Deficiencies in legal procedures should arouse the interest of every lawyer. The Judicial Council can only be a clearinghouse for improving them. I personally think the Judicial Council has done much over the years in this field to improve the administration of justice. More could be done with an increase in interest on the part of the bar.

This is an off year for the Judicial Council, since the legislature will not meet again, in the absence of special call, until

1967. Our work has not progressed far enough to provide much for a report. Hence, I have used my time to point up the importance of the work and the necessity for bar interest and co-operation.

Mr. Chairman, I move the report be accepted and placed on file.

PRESIDENT COHEN: You have heard the motion. All in favor say "aye"; Carried.

Are there any questions of Judge Carter? I recall last year there were quite a number of questions?

Gentlemen, there was a very important conference this summer in Washington, D. C., in connection with the rendering of legal services to indigents. All state bar associations were requested to send delegates to this conference. The conference was brought about through the Attorney General's office, the Office of Economic Opportunity, and the American Bar Association. We all felt it important that we be represented.

I know of no man in this bar association who has done so much work in this area. We have what I think is an excellent, and I believe one of the finest, legal aid clinics in the City of Omaha. I know other people work, but Al Ellick has done more than anybody I know of in this area. We thought it very wise and very good for our State Bar Association to be represented at this conference by Al Ellick. I am going to ask Al to report on that conference.

#### REPORT ON NATIONAL CONFERENCE ON LAW AND POVERTY

**Alfred G. Ellick**

Mr. President and Members of the Nebraska Bar Association: I want to thank you for affording me a nice trip to Washington, D. C., in June, to attend the National Conference on Law and Poverty. The money given me by the Bar Association was spent very carefully. I took my younger boy with me, who had never been to Washington. However, his expenses, I assure you, were not charged to the Association.

This was a fascinating conference. It started out with each of us being given a booklet on "Law and Poverty—1965" prepared by some of the staff members of the Office of Economic Opportunity. There is a great deal of material in here. I have a few extra copies of this booklet if anyone would like one. Addi-

tional copies can be obtained by writing to the O.E.O. in Washington.

There were about 400 representatives at the conference, most of them attorneys. Every bar association in the United States was represented, except North and South Dakota, and I am not sure, but I believe that while they were not officially represented, there were persons from communities in those two states.

There were educators—Dr. Miller, Director of our Omaha school system was present. We met for three days, from June 23 through June 25.

I went to the conference a little bit suspicious that perhaps this was simply some kind of a new New Deal program, socialized law, a Great Society program that maybe we wouldn't be interested in here in Nebraska, or at least should be suspicious of, but I will have to say to you gentlemen that I came back feeling that there were some dedicated persons involved in the program, that it is a program that we should and must become concerned with because if we don't I think we are going to find that the federal government itself will step in and we will have a program run by people in Washington instead of by lawyers on the local level.

I wrote Harry Cohen a brief report of the conference when I returned, and I think perhaps the best way to give you the picture of what took place there is simply to read you just a part of what I wrote to President Cohen. I summarized the general conclusions of the conference in this way:

First, the conference, without any question, concluded that the legal problems and rights of the poor are not being handled and protected to the extent that they should be. I think all of the speakers and all of the conferees agreed on this point unanimously.

Second, individual lawyers have a duty to protect the rights of the poor to the same extent and to the same degree that they have a duty to protect the rights of those persons who can afford to pay for legal services. The point was made time and time again that the lawyer has a duty to strengthen the hand of the weakest among us, and that lawyers are the only ones who can articulate the grievances of others.

Considerable time was spent on defining the particular fields of law in which lawyers can help the poor, such as landlord-tenant relationships, consumer relationships, adoptions, laws relating to welfare agencies, and so forth.



Third, the organized bar has a duty to take steps to encourage greater social consciousness among lawyers and laymen alike so that the poor can be adequately represented.

I should have said beforehand that the American Bar Association was, of course, represented. President Powell spoke to the conference. The Attorney General spoke to the conference. I had the feeling that it was conducted on a very high level.

I felt that one of my jobs was to find out what bar associations have been doing and should do in this field, and I came back with some conclusions that were reached by the conference as a whole:

First of all, I think it was agreed by everyone that bar associations must encourage rather than discourage attorneys who represent the poor, whether in civil or in criminal actions. It was pointed out that too many attorneys have a tendency to look down their noses at lawyers who represent indigent clients.

Second, bar associations must emphasize to their own members the legal right of the indigent to counsel. One speaker quoted Justice Learned Hand's famous statement, "Thou shalt not ration justice."

Third, bar associations must elevate the status and extend the scope of legal aid and lawyer referral programs. It was pointed out that in most instances legal aid staff attorneys have developed tremendous abilities in handling the problems of the poor. It is logical that legal aid should be a part of any program of expanded legal services to the indigent.

Fourth, bar associations should encourage the establishment of neighborhood centers where poor people can consult with attorneys. This can be done through established legal aid societies, through organizations of younger lawyers, or through independent organizations established for the purpose of obtaining funds under the Economic Opportunity Act.

Fifth, bar associations should encourage preventive law seminars and workshops where the special legal problems of the poor are discussed and lawyers can learn how to handle such problems and where poor people themselves can learn how to avoid troublesome legal difficulties.

Sixth, bar associations and lawyers should try to learn, first hand, about the typical legal situations confronted by poor people. For example, lawyers should visit slum areas so that they will realize the terrible housing conditions which frequently exist.

A lawyer who is aware of these situations can do a much better job of representing, for example, a poor person who is trying to make his landlord comply with housing standards and codes.

The emphasis in general was upon new approaches and new ways of helping the poor with their legal problems. Frequent mention was made of the American Bar Association resolution of last February acknowledging the need for greater legal effort to assist the poor and pledging the cooperation and support of the American Bar Association in establishing programs to render such assistance.

The state bar of Michigan, for example, has appointed a special committee to help and cooperate with lawyer services to the poor in each community and to assist local bar associations in developing programs which will qualify for economic assistance under the Economic Opportunity Act.

The state bar of Illinois has done the same and has conducted special one-day seminars and meetings throughout the state. The Detroit Legal Aid Society is handling legal services under an expanded program financed largely by an O.E.O. grant. Other bar associations and other legal aid societies are taking similar steps. For example, the St. Louis Legal Aid Society has just recently been granted a quarter of a million dollars to expand its legal aid program.

In summary, I think it was the feeling of most of us who went to the conference, and there were many of us from the rather conservative Midwest, that we lawyers have got to move ahead in this area, that it is going to be better to cooperate with this kind of a program than to resist it, that if we don't use our own initiative and our own imagination we, one way or another, are going to find that someone else is going to provide legal services to the indigent client.

You may be interested in knowing that in Omaha our Legal Aid Society has applied to the Office of Economic Opportunity for a grant. In a way it is kind of humorous the way our grant got up to its present amount. We started out with an application for approximately \$19,000 on the theory that that would provide for two part-time attorneys in North Omaha and South Omaha. That application was rejected by our local Greater Omaha Community Action Committee on the grounds that it was not large enough, that we couldn't do the job with so few extra dollars. So we met again and increased our application to \$46,000.

At that stage two representatives from the Office of Economic Opportunity came to Omaha, one from Kansas City and one

from Texas, to discuss the application with us. It was their conclusion that \$46,000 wasn't going to do the job. We then increased our application to over \$70,000, and that application has been approved by the GOCAC, Greater Omaha Community Action Committee, which is the governing body here in Omaha handling all O.E.O. funds. Just yesterday morning I received a call from the Assistant to the Director of the Legal Services Program of the Office of Economic Opportunity who told me that he was hopeful our application for funds would be approved within the next twenty to twenty-five days.

Under this plan neighborhood law offices will be opened on the North Side in Omaha and in South Omaha with two full-time lawyers and with staff assistance. It will also provide funds for seminars to be conducted to educate poor people on their legal rights.

Any bar association in our state has the right to apply to the Office of Economic Opportunity for a grant. They are anxious that the programs be administered by attorneys. Our program here in Omaha will be operated under the auspices of the Omaha Legal Aid Society, which is sponsored by the Omaha Bar Association and United Community Services.

We have been assured time and time again that there is no intent to have this program taken over by social workers or anyone other than lawyers. But I do believe, gentlemen, and I don't mean to be lecturing at all, that we have got to stop being quite so complacent about these problems. I think we have got to do something about them in Lincoln and in other communities.

It is disturbing to me that in Lincoln, for example, your legal aid office is open only two afternoons a week. I have a feeling from my work with our State Bar Lawyer Referral Committee that you probably are not meeting the needs of the poor.

Our legal aid office is overburdened. We are running now at the rate of about 1,000 cases a year, with wholly, completely indigent persons, with one full-time lawyer plus an assistant unable to handle the job.

It is disturbing to me, for example, that in Omaha—and I am not intending to criticize our local bar association—but our bar association pays only \$750 to support our legal aid clinic. That is less than \$2.00 per member, where the clinic has a budget of approximately \$30,000. I think lawyers owe more support to a legal aid program than that.

In any event, that was what happened in Washington.

Mr. Jim Knapp of Kearney has been appointed a member of the American Bar Association's Special Committee on Availability of Legal Services, so we have a representative in Nebraska. I think it behooves all of us to watch this program to see that it is run by lawyers and not by outsiders.

I will be glad to answer any questions any of you may have.

JAMES I. SHAMBERG, Grand Island: How does the government define a "poor" person? What is the income bracket, and so forth?

MR. ELLICK: The standards are left to the local agency administering the program to the poor. There is no exact definition. They have a manual which they have put out wherein they set out some of the guidelines for obtaining funds for a legal aid program. Again, no guideline as to who is a "poor" person.

In Omaha we really haven't had the problem. We thought we were going to have it when we established our legal aid clinic, but the persons who have come to our legal aid office are so plainly indigent that there is just not the slightest question about it. Our local bar association was worried for a while about whether this was going to cut into the private practice of attorneys. I don't think there is the slightest question that it hasn't.

In some communities they have adopted a standard of an income of \$3,000 a year or less; that is, a person with at least one dependent who has an income of \$3,000 a year or less is thought to be indigent. I think perhaps the Office of Economic Opportunity thinks that is too low a figure and you ought to go up to \$4,000, or something like that.

In our lawyer referral program here, if a person comes to a legal aid office with any money in his pocket, he is shoved over to the lawyer referral program where he can get a consultation from an attorney for \$7.50, and our lawyer referral program is working quite well.

In answer to your question, they don't have a standard of indigency.

FRANCIS M. CASEY, Plattsmouth: Does this program provide for furnishing court costs for these indigent families?

MR. ELLICK: Yes, there are funds available for court costs. That is correct.

The program has been set up in different ways in different communities. Sometimes it is a legal aid society, sometimes it is

a group of younger lawyers who have started up legal clinics for the poor. In some communities the legal aid society is kind of an old established group that doesn't have too good relationships with the bar association, so the bar has set up a special committee itself. The plan is very flexible. The only thing I can say is there seems to be a lot of money floating around, as you can tell from the example I gave you of our application here in Omaha.

MR. CASEY: I wonder if you have any recommendations: I had an incident come up in my small town of Plattsmouth about a month ago where our county judge, who is the head of our local bar, called me in and he had a woman who said they had filed an action to declare her children dependent children. She went to every lawyer she could find and she couldn't get anybody to represent her because she didn't have any money. Finally the county judge called me and asked if I would, as a gratuity, represent this woman because she obviously had nothing. Is there any plan or any program for a small community such as ours?

MR. ELLICK: Not specifically that I know of, Mr. Casey. Your organized bar association for that area or community is certainly entitled to apply to the Office of Economic Opportunity for a grant to establish a program for the poor. They are anxious to have the applications, they tell me. That would be the only way I could suggest that it be handled. It doesn't have to be actually a legal aid society or organization. In some communities the bar association has applied for a grant of funds, and the bar association itself administers the funds and pays them to attorneys who represent the poor.

For example, if we didn't have a legal aid society here in Omaha and if we were under the type of program I just mentioned, our bar association could get funds. The president of the bar association or the chairman of a committee, when he learned that an indigent person needed representation, could call upon an attorney and pay that attorney a fee out of the funds supplied by the Office of Economic Opportunity. Understand, now, as I get it this O.E.O. program is just for two years. The local community or bar association must supply ten per cent of the funds. Only ninety per cent of the fund is supplied by the federal government, so you have to some way figure out how you are going to get ten per cent from your own resources.

J. MARVIN WEEMS, Ainsworth: You say this is a two-year program. Does that mean it would be terminated at the federal level in two years?

MR. ELLICK: Yes. The legislation is for a two-year period, although I think most people expect that it is probably going to go on, like all federal programs.

DEAN DAVID DOW, Lincoln: Al, there have been many discussions on the ethical problems that are raised by this particular kind of a program. I would deeply appreciate knowing how Omaha has dealt with these problems.

MR. ELLICK: Explain to me what particular ethics you are thinking of.

DEAN DOW: The principal problem that is raised in ethics is the fact this is an association of non-lawyers, and this association is designed to bring clients into the particular office of a lawyer. That is one. The second is the problem of the confidential relationship between the lawyer and client where there may be other workers in the particular area. The Office of Economic Opportunity program has, in many instances, required that this be a part of a community action organization and that this be, in a large measure, manned by an advisory committee composed of four people. These are a few of the ethical problems.

MR. ELLICK: In Omaha, frankly, we don't feel we have had a problem. Our legal aid office is run by an attorney, a woman, Miss Colleen Buckley. She now has one full-time assistant. The office is run like any other law office. The client's problems are told only to the attorney. The applicant is asked a question when he comes in, first as to income, secondly, as to the general nature of the problem, just for statistical purposes. Some people don't want to tell the general nature of their problem, in which case they are not pressed. Then the client is given an interview by the legal aid attorney or her assistant. So in that respect it is run just like any other law office, so we don't think there is a confidential relationship problem.

The governing board of the Legal Aid Society is composed, I would say, of over fifty per cent lawyers. We do have representatives of some of our social agencies on the board, and the county attorney's office, and of course that representative is an attorney. Our board never learns the nature of any problem. We are not soliciting business, we don't think; we are simply offering legal services to poor people who cannot afford to have a private attorney.

There is an area in this program of the O.E.O. which I think has caused some lawyers to be a little worried about the ethics involved. Their program almost encourages litigation, in a way. They are strongly suggesting that seminars be conducted on the

local level to educate poor people in their rights. When you open up these local neighborhood law offices where poor people can come and interview a lawyer, in conjunction with that there is supposed to be publicity encouraging people to come in. Now there, again, you may say it is encouraging litigation, and it probably is, to be honest with you, because as soon as these people learn some of their rights, as soon as some of these people living in substandard housing find out what can be done, there might be a lot more law business created.

I don't know, Dean, whether I have answered your question exactly. I have, and they gave out to us at this conference, a talk by a representative of the American Bar Association's Committee on Ethics concerning the ethical aspects of this. I think most of us felt, maybe wrongly, that at least in our local community there is not an ethical problem.

PRESIDENT COHEN: Are there other questions? Thank you very much, Al, for a very fine report.

We will next have a report on our group life insurance. This report will be given by Mr. Black, who is a member of our Association.

### GROUP LIFE INSURANCE

**Walter I. Black**

Mr. President and Members of the Nebraska State Bar Association: It is a privilege to appear before you again and to give you a very brief report relative to the financial transactions last year between the members and the home office of the John Hancock Mutual Life Insurance Company of Boston, Massachusetts.

This report was written by one of the home office officials in Kansas City and forwarded to me last week:

Last year, when the policy year ended December 1, the members of the Association had paid in an amount of \$126,383. Of this amount, the John Hancock retained for taxes, contingency, reserves, and general expenses, \$12,607, or 9.98 or less than 10 per cent of the premiums.

Our claims charged was \$60,000. Of that, \$10,000 is being held, since a claim has not been fully processed in the policyholder reserves account, thus leaving the claims charged 47.47 per cent of the premium. This left a surplus of \$53,776, or 42.55 per cent.

By combining the surplus and claims charged we find that \$113,766, or 90.2 per cent of the premium was returned for the benefit of the members of the Nebraska State Bar Association.

Of the \$53,776 available for distribution, \$9,200 was used to fully recover prior deficits.

Then \$17,954.77 was returned to the members who participated in the plan during the previous year, that is 1963, and who at that time were still participating members. That means that the dividend last year equaled 15 per cent of the premium money that we paid in. Although, to date, we do not have the complete total of losses this year, I have not yet been alarmed in that particular area.

I trust the above material will be of some value in making your report to the Nebraska Bar Association.

Last year as I left the platform I asked each of you, or appointed each of you verbally, to be one of the committee members to be ever on the alert for new members. By keeping the membership up or by increasing it, I should add, we certainly can look forward to and have every reason to look forward to a larger dividend. We especially need the younger members. We made an intensive drive this summer after graduation from the law colleges in the state, and while the drive was successful, it was not as successful as we had hoped it would be. By your individual aid and by being on the look-out for non-members, you can spread the gospel as to the value of their joining your group life insurance plan.

PRESIDENT COHEN: Are there any questions? Mr. Black is here to answer them. We can all see the importance of getting participation, because participation is what actuarially makes you get your insurance cheaper, or possibly someday if we can get enough we can get more benefits or extend the age limit, and so on. It is extremely important. This is a retrospective plan; in other words, we participate in all savings. I am happy to tell you that any funds we get back to the State Bar Association are set aside. We do not spend those funds. We set them aside for emergencies just for this very purpose.

This is the time when the old officers are told to move over and the new officers come in. I am happy to let George announce the election of new officers. As your names are called, I wish you would stand up.

SECRETARY-TREASURER TURNER: One year ago you designated Herman Ginsburg of Lincoln as your President-Elect, and when Harry lays down the gavel tomorrow night, Herman picks it up. Mr. Ginsburg!



Under the constitution and bylaws, the Executive Council met on June 18 and nominated M. M. Maupin of North Platte to be President-Elect, and renominated John C. Mason of Lincoln to be Member-at-Large of the Executive Council.

Under the bylaws there is a provision by which opposing nominations may be made. None were made. So Mr. Maupin becomes your President-Elect. And John Mason continues to serve as a member of the Executive Council.

One announcement I would like to make at this time. I would like to call your particular attention to the luncheon in this room at noon. We have a truly great American lawyer to speak to you, Edward Kuhn, the President of the American Bar Association.

Then, with respect to the balance of the program for this convention—it is one of the most pretentious programs ever attempted. It has been organized by Al Reddish and his committee. The principal speaker is Associate Dean A. James Casner of Harvard Law School. Professor Casner has prepared a film for the American Bar Association and the American Law Institute. We have the film here and a manuscript which accompanies it. I can tell you that it is a very expensive program. There is no charge to the members of the Association, either for viewing the film or for the manuscript which will be distributed to you. The manuscript accompanies the film, and the payment to the American Bar Association and the American Law Institute is at the rate of so much per viewer. For that reason, we are limited in the number of manuscripts we can give out because the Association will have to pay. If you lose your manuscript or desire a duplicate or wish to take one home, they will be available at the registration desk at a charge of \$1.00.

For the program this afternoon you will receive a set of outlines of four speakers. One contains the outline that Dean Casner will use today; the others are for speakers who will appear on the program tomorrow. There are plenty of those, so if you lose one of those there is no charge.

**PRESIDENT COHEN:** I urge you to get your tickets for the luncheon, and I especially urge all of you to come to the dinner. Our speaker at the dinner is a fine, capable person. I have known him personally for more than thirty years and I have heard him speak at least a dozen times. We just had a little inkling of it last night at the Past Presidents' dinner. He gave a short two-minute talk, but he did nobly. He is an excellent speaker and I know you will enjoy him.

JOSEPH C. TYE, Kearney: Mr. Chairman, could I refer back to a subject which Mr. Ellick referred to? I do not know the authority of this Association as we are now convened but I have in mind that the House of Delegates is in adjournment. It runs in my mind that in that case the Executive Council has authority.

It seems to me that this subject is of vital importance to the lawyers of this state. As we all know, geographically at least, we are principally rural, and Omaha seems to be the only bar association which has undertaken some definite program on this lawyer referral and legal aid idea.

If it is proper, Mr. President, I would like to move that the incoming President appoint a special committee of this Association to make a study of this legal aid and lawyer referral matter as applied to the state-wide level, whether it can be negotiated in county bar associations or city bar associations, and ask that this special committee come in with a definite proposal whereby the State of Nebraska can meet this proposition.

PRESIDENT COHEN: You are in order and I will accept your resolution. Do I hear a second?

J. MARVIN WEEMS, Ainsworth: I second the motion.

PRESIDENT COHEN: All those in favor say "aye"; contrary. The resolution is carried.

Is there any other business? The Association doesn't have much business, and we only devote half a day to it.

Annually we remember those of our brethren who have passed to the Great Beyond. Many faces have left us during this past year. I am going to call upon Mr. George B. Hastings, a past President of the Association, to report for the Memorials Committee.

## REPORT OF THE MEMORIALS COMMITTEE

George B. Hastings

Mr. President, Gentlemen of the Association: Your Committee on Memorials, consisting of Honorable E. B. Chappell, Mr. Paul F. Good, Esq., and myself, respectfully submit the following report:

In the tradition of the Nebraska State Bar Association we pause in our deliberations to pay tribute to the memory of our distinguished brethren at the bar who have been taken by death since the last meeting of this Association.

There is something inexorable and final in the death of our friends. Man is mortal. That day will come for each of us when we, too, shall be here no more.

During the year which has passed since the adjournment of our last Association meeting, fifty-one members have departed from our midst. They were lawyers in this state. Some of them were active practitioners, some were judges, some lived in retirement. All of them were recognized for their high standing at the bar. They were respected and distinguished lawyers. We shall not see them again.

We were bound to them by the ties of loyalty to our profession. They and we registered a solemn obligation to support constitutional government, to maintain respect for courts of justice, to refrain from suits or proceedings which appear to be unjust; to refrain from any defense except such as is believed honorably and honestly debatable; to employ only such means as are consistent with truth and honor; and never to reject the cause of the defenseless or oppressed.

We walked and talked together. We practiced our profession before the same courts. We studied and interpreted the same laws. We conversed with them on related topics of interest and mutual concern.

These distinguished lawyers reflected the highest ideals of the legal profession. They exemplified the philosophy of the Old Testament prophet, "What doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God." These members of our Association whose names we honor and whose loss we mourn were steadfast in their determination to advance the cause of the administration of justice; to uphold the rule of law in the affairs of men and to preserve the institutions of free men. By their devotion to the practice of law, they brought honor to themselves and the respect and confidence of their fellow citizens. They made their contribution to the preservation of our system of law and government. These institutions are stronger and more secure because these men lived.

We commend their souls to God, who can be with them and yet remain with us, that this government under Him may long continue indivisible, with liberty and justice for all.

Whittier's poem, which I love:

I know not what the future hath  
Of marvel or surprise,  
Assured alone that life and death,  
His mercy underlies;

And so beside the Silent Sea  
 I wait the muffled oar;  
 No harm from Him can come to me  
 On ocean or on shore.

I know not where His islands lift  
 Their fronded palms in air;  
 I only know I cannot drift  
 Beyond His love and care.

I now read you the roll, and will you all stand and remain in solemn and reverent silence as this list of distinguished lawyers is read:

Carl F. Benjamin, Omaha  
 Robert E. Brooks, Columbus  
 George Christofferson, Kent, Washington  
 Walter L. Cropper, Omaha  
 Dwight W. Dahlman, Cheyenne, Wyoming  
 George L. DeLacy, Omaha  
 Donald E. Devries, Lincoln  
 John M. Dierks, Nebraska City  
 Harvey R. Ellenberger, Tekamah  
 George Evens, Omaha  
 Allen W. Field, Lincoln  
 E. C. Finlay, Omaha  
 L. T. Fleetwood, Lincoln  
 Alva Gaylord, Downey, California  
 Ernest D. Gerye, Omaha  
 Frank C. Grant, Garden Grove, California  
 Fred N. Hallner, Omaha  
 Ray M. Higgins, Grand Island  
 Earl L. Hunter, Hastings  
 Lyle E. Jackson, Neligh  
 John P. Jensen, Kearney  
 Harry E. Judd, Omaha  
 E. Melvin Kennedy, Omaha  
 Robert A. Krall, Grand Island  
 Charles E. Lafferty, Chicago, Illinois  
 Maurice F. Langdon, Papillion  
 Robb T. LeCron, Jacksonville, Florida  
 George J. Lemmon, Pender  
 Ed P. McDermott, Tokyo, Japan  
 Albert A. Mann, Lexington  
 Andrew D. Mapes, Norfolk  
 Edwin T. Mars, Omaha  
 Edward A. Nelson, Omaha  
 Carroll H. Orr, Omaha

Philip O'Hanlon, Blair  
Arthur C. Pancoast, Omaha  
C. Petrus Peterson, Lincoln  
Harold A. Prince, Grand Island  
C. S. Radcliffe, Sidney  
Charles H. Rahn, Omaha  
Harold J. Requarte, Lincoln  
Philip H. Robinson, Hartington  
Carl P. Rohman, Lincoln  
John O. Sheldahl, Oregon City, Oregon  
William E. Shuman, North Platte  
Clinton A. Stafford, Exeter  
John Starr, Santa Rosa, California  
Paul F. Steinwender, Omaha  
Wayne O. Stoehr, Omaha  
Edward J. Tangney, Omaha  
Ivan D. Thomas, Golden, Colorado

[Silence.]

Mr. President, I move the adoption of this report and that this resolution be made a part of the records of this Association.

PRESIDENT COHEN: You have all heard the motion. Those in favor say "aye." Gentlemen, be seated.

This concludes our meeting, unless anyone has anything to offer.

[The session adjourned at eleven forty-five o'clock.]

#### THURSDAY LUNCHEON SESSION

October 21, 1965

The annual State Bar Association luncheon was presided over by President Cohen.

PRESIDENT COHEN: Gentlemen, I would like to introduce to you some of the gentlemen at the head table. To my far right, Mr. George F. Guy, President-Elect of the Wyoming State Bar.

Next to him is Ron Kull, Executive Secretary of the Kansas Bar Association.

Next to him is F. C. Bannon, President of the Kansas Bar Association.

And next to him is Roy E. Willy. He is "Ex" everything—from South Dakota.

Next to him is my very good friend, Justice Sam Freedman of Winnipeg, Canada.

I am going to skip the gentleman next to him; you will hear of him and from him in a moment.

On my far left, Mr. Edward Dailey, President of the Iowa Bar Association.

Then we have Mr. Murl Maupin, your President-Elect.

Next is Mr. Herman Ginsburg. I can now say, your President, because I am about through.

Mr. Charles H. Whiting, President of the South Dakota Bar Association.

And that ever-smiling Mr. George H. Turner.

Our guest of honor was born and raised in Memphis, Tennessee. He is a southerner by birth, by tradition, by history, but we had a chance to visit with him last night and I assure you that he is a Northerner by philosophy.

He went to St. Thomas parochial school in Memphis, Christian Brothers High School, Catholic University, and is a graduate of the University of Michigan with an A.B. degree in 1927 and an LL.B. degree in 1933.

He has been a practicing lawyer for a little over thirty years. He is a trial lawyer, and for those of you who are personal injury lawyers, he is ninety-nine per cent of the time on the other side—he represents insurance companies, railroads, and little clients of that character. He is a member of the College of Trial Lawyers, the Association of Insurance Counsel, the International Association of Insurance Counsel, and the National Association of Railroad Trial Counsel. He was president of the Association of Insurance Counsel.

He has been exceedingly active in bar activities in his city, in his state, and nationally. He was president of the Memphis Bar, president of the Tennessee Bar. He is a member of the Board of Governors of the American Bar Association. He has been very active in legal aid work.

It is a pleasure indeed, gentlemen, to introduce to you Mr. Edward Kuhn, the President of the American Bar Association.

## ADDRESS

Edward W. Kuhn

Mr. President, Distinguished Guests, Members of the Nebraska Bar, and I have written here "Ladies," but I think they all went elsewhere, but the Ladies who are here: That introduction was very fine, just the way I wrote, and you gave it well.

These introductions, as you know, can get you into trouble occasionally. Down home we had a governor who had a daughter, and the daughter would always go around saying that she was Joanne, the governor's daughter, until her mother heard about that and said, "Now, listen, from here on you're just Joanne."

The little old lady who loved to gossip and learn all the news in the neighborhood came down the street one day and said, "Aren't you Joanne, the governor's daughter?"

She said, "That's not what Mommie says!"

It is a great pleasure for my wife and myself to be here with this fine bar. We are very flattered to be invited out here and to be with so many of my long-time friends, men like George Turner, Clarence Davis, Jack Wilson, Roy Willy, and all these fine fellows here from the surrounding bars. I assure you that Nebraska is well thought of and well represented in the ABA. George Turner, I think, has more influence than anybody in the ABA, as to who runs it, and if it wasn't for him I wouldn't be up here in front of you fellows today.

Clarence Davis, of course, is on the Board of Governors, quite a nationally known lawyer, and we look for three years of real service out of Clarence. I appointed him to the Budget Committee and in a couple of years he will be chairman, and that is the second most important committee in the American Bar Association.

As you know, the first regional meeting of the American Bar Association was held in Omaha, and recently we had another one, and I was very happy to appoint Bob Mullin to our regional meeting committee as a result of his outstanding work here in Omaha.

I had selected a subject to discuss with you because it's a subject that I have found that the lawyers around the country are greatly interested in. They are very much disturbed and perplexed by the recent events that have taken place sort of on the Eastern Seaboard. Men like Reginald Hebersmith have declared that this problem that I want to discuss with you is the No. 1 facing the profession during the coming year. But since arriving

here I have noticed your reports and I see that the reports on lawyer referral and legal aid treat very well of this subject. I attended your meeting this morning and I heard the wonderful reports and the report from Mr. Ellick, which I thought was magnificent, all of which brings me to the point that I am going to have to talk to you about the same subject, but maybe from an official standpoint.

Incidentally, may I break in here to advise you gentlemen, whether you have heard it or not, that Senator Ted Kennedy of Massachusetts has withdrawn from consideration Morrissey's name for the district judgeship in Boston and blamed it all on the American Bar Association and its underhanded methods.

In that connection I would like to bring to your attention the fine services that Roy Willy renders for our Standing Committee on the Federal Judiciary. It is indeed a hard working, one of the hardest working committees, and Roy's committee had a great deal to do with this recent episode in preserving the integrity of our federal courts, and I want to thank him personally for his committee.

Getting back to the subject—but before we discuss this subject I would like to talk briefly about the “object of our affections,” which is the average lawyer.

Incidentally, much that I may say here today may have an academic interest to a lot of you gentlemen; that is, those of you who are fortunate enough to have a large retainer clientele or a good corporate practice or a real nice probate practice, and so forth, specializing in taxation and all that. Of course I am not expelling you from the Association or from this consideration. You should be interested in the fate of those lawyers that are probably largely rural lawyers, the younger lawyers beginning their practice, the marginal lawyer, the general practitioner.

Reverting to the lawyer in general, we know that that fellow is intensely individualistic. He is fiercely so. He is impatient of any restraints imposed by any person, organization, or government. In the voluntary states they even resent the organized bar, which of course is not the case in Nebraska. Up to now he has always considered the practice of law as a high privilege exercised only by those found well trained and devoted to the administration of justice. He is his own reservoir of strength and knowledge, his own citadel of courage, and only to his God and his own conscience does he answer for his actions. He is independent and he is largely conservative. He rightly values the elements of stability and continuity in human affairs. And his



love of precedent makes him look to the past for guidance in the future.

Now so much for the average lawyer. As I say, I feel so at home here in Nebraska because this Bar reminds me exactly of the Tennessee Bar. You sort of approach these problems the same way and act the same way and have about the same amount of fun.

As everyone is well aware, the United States is in a period of looking at its ideals, its aspirations, and its image—a word which I don't like, but it is expressive. One after another we are re-assessing our institutions and measuring them by the past in an effort to accommodate them to the future and to present-day living, to salvage what is durable, and to build for a future which contemplates a population in the United States within the next thirty years of probably 325,000,000 people, when today's law school graduates will be in the prime of their practice.

The courts and the legal profession have not escaped this critical analysis and are on trial in more ways than one before the bar of public opinion in this field of legal services.

Looking at legal services in the broad historical perspective, we see that until around 1910 the lawyers' activities were largely concentrated in matters of a transactional type; that is to say, in drafting wills and conveyances, preparing articles of incorporation and similar documents, handling divorces and collection suits. In a society where few people were highly educated, and indeed many were illiterate or semiliterate, which seemingly is now the prime attribute for voters by today's standards, the lawyer provided the skill of writing. In a society of fairly few and modest governmental institutions and small uncomplicated private ones, the lawyer was the substitute for bureaucracy. He figured out what had to be done, he wrote up the papers, he filled out the forms and got the show on the road.

In the Twentieth Century general literacy has diluted the peculiar value of the lawyer's own literary skill. Moreover, with the growth in size of governmental and business units, there has grown up an army of managers, officials, and clerks who work in the highly specialized and standardized procedures that deal with the paperwork problems that lawyers formerly handled.

Against this background; training, and tradition let us examine briefly the changes that came so rapidly and unexpectedly during the very recent years. First, the Supreme Court of the United States' opinions of 1963-1964 dealing with group legal services, and the more or less sanctioning of solicitation of law business,

and the use of lay intermediaries; second, the emergence and growth, due to the change in a highly collectivized culture, of group legal service plans in industry and commerce as publicized by the California Bar reports—both of these subjects; however, are outside the scope of this discussion and I simply mention them for the sake of emphasis; third, the subject matter before us, was the sudden and astonishing entry of the United States government into the field of law at about the same time that the medical profession found itself suddenly up to its armpits in the concept of Medicare. So some ask, Is Lexicare next, and after that what?

Well, snugly fortified and heartened by an overwhelming vote of confidence by the electorate of 1964, the present Administration conceived and launched its program against poverty, a concept which, if carried out along reasonable and proper lines, could not be objectionable. The ideal, of course, is proper, but the practices in most instances bear scrutiny. Compared to the vast total budget available to eradicate poverty, legal services command only a minute portion thereof. But the principles involved demand the very best attention that we can give because we are dealing with more than just the question of providing legal services for any particular group.

Although the organized bar, on a voluntary basis, with little financial assistance from public or private sources, but with the dedicated and uncompensated efforts of thousands of lawyers, had, as long as eighty-five years ago, recognized the problem of providing aid for the indigent and its responsibility therefor, the federal government suddenly discovered that something like this was abroad in the nation and intended to do something about it. All these years the legal profession had been calling for financial assistance, and now in less than a year finds itself inundated with millions of dollars and an energetic personable administrator ready, willing, and able to spend it come hell or high water.

You heard Mr. Ellick's report today how the amount pyramided from \$19,000 to \$80,000, more or less. Not only were the indigent going to be represented in the protection of their rights by lawyers primarily, and if there were not enough lawyers for the need then by trained social workers, but also the vast group of people of moderate means, the standard being quite evasive. It is in that area that we are principally concerned. The program goes beyond representation in court and embraces a comprehensive education in individual rights under the facts of the particular case. Well, rightly so, and we are gratified with the recognition of our role.

The Office of Economic Opportunity called upon the organized bar to come forward and shoulder its responsibility along these new, broad, and far-reaching lines. And, to the mind it is a staggering proportion—30,000,000 people to be served. Mind you, there are now only 200,000 practicing attorneys in the United States, according to government statistics, serving about 160,000,000.

Now what did the organized bar, led by the national legal organization, the American Bar Association, do? After recovering its fright and its equilibrium, the Board of Governors, the affected Committees of Legal Aid and Defense of the Indigent and the Lawyer Referral Committee and finally the House of Delegates carefully considered the course we should pursue. Naturally, there were several choices: One, to ignore the request; second, to gird for battle and defy the government—after all, the medical profession spent over a million dollars fighting Medicare for a handful of votes and have now contracted to spend another million dollars improving their image before the American people; third, we could throw the entire burden on the federal government and allow it to set up its own system of supplying legal services on some basis, God knows what!; and fourth, we could agree to cooperate to the fullest to match services with dollars and to forcefully insist that cooperation would be a two-way street.

We chose, and we think rightly so, the last course. So we support and subscribe to the policy laid down by the House of Delegates of the American Bar Association, truly under its unique composition the voice of the American lawyer, under the leadership of our illustrious past President, Lewis Powell, who in his address at Miami just a few months ago said, and I quote:

Most lawyers would have preferred local rather than federal solution. Certainly this would have been my own choice. But the complexities and demands of modern society, with burdens beyond the will or capacity of states and localities to meet, have resulted in federal assistance in almost every area of social and economic life. There is no reason to think that legal services would be excluded from this fundamental trend of the mid-Twentieth Century. Lawyers must be realistic as well as compassionate. We now enter a new phase in which significant financial assistance will come from the federal government. The cooperation and support of the bar must surely continue. Indeed, we must welcome the increased resources which may make possible a great thrust forward in an area of manifest need.

That ends his quotation.

It is well for us to remember that we are talking about legal services, and the full cooperation of the bar is essential to assure

that these are performed by trained and independent lawyers and in accordance with prescribed ethical standards. This is our duty to the public. It is also in the obvious self-interest of the bar. We can best accomplish these objectives by the type of co-operation authorized by the House of Delegates.

You will probably note that it is insisted that legal services be rendered by *trained and independent lawyers and in accordance with prescribed ethical standards*. I submit that that is not an abject note of surrender to the federal government!

What cooperation did the House of Delegates authorize? After a very careful consideration and a conference with the affected committees, other organizations, and leaders of the bar, the House adopted a resolution at its February meeting in New Orleans to the effect that the Association, through its offices and appropriate committees, shall cooperate with the Office of Economic Opportunity and other appropriate groups in the development and implementing of the programs for expanding availability of legal services to indigents and persons of low income, such programs to utilize to the maximum extent deemed feasible the experience and facilities of the organized bar, such as legal services to be performed by lawyers in accordance with ethical standards of the legal profession.

At its spring meeting the Board of Governors authorized the President to appoint a special committee to study the whole spectrum of availability of legal services, a part of which we have been discussing, and the American Bar Endowment made a substantial grant of money to the committee to employ the necessary clerical, research, and legal help. This committee is now functioning under the leadership of Bill McAlpin of St. Louis.

Offices of the ABA and other interested and affiliated groups attended the meeting in Washington that you heard Mr. Ellick refer to and on which he gave you that very nice report this morning.

Finally, to allow every lawyer in the nation a chance to learn what was going on, the Association at its Miami meeting sponsored a discussion by a group of experts who discussed several facets of the over-all picture of availability of legal services. Sargent Shriver, the Administrator of the Office of Economic Opportunity, was the principal speaker and the ultimate target of all the questions thrown at him by the panelists and the audience. There were about 2,000 lawyers in attendance.

Without quoting his extended remarks, we had his word that

the agency is not attempting to impose a uniform federal blueprint for the rendition of legal services for the poor, not trying to replace lawyers with social workers or laymen, not trying to subvert the Canons of Ethics, not trying to destroy the independence of the bar or to socialize the legal profession. Each and every lawyer—and Shriver is a lawyer; he was trained at Yale and graduated from Law School—as reasonable men, should and must take him at his word and at face value. He will be the first to agree that cooperation is a two-way street, but I warn you that he is determined that the federal government will insist that the poor in America receive the same protection that the hallowed rule of law provides for the rich, something known, understood, and insisted upon by the legal profession in its own quiet manner long before the federal government took any measurable cognizance of the poor, and I might add we did it without any hope of reward.

As of December 31, 1964, there were 246 organized legal aid offices handling civil matters, plus 136 legal aid committees maintained by local bar associations.

Now I know you are interested in the present status of this matter. After a long and careful search for a lawyer to administer the Office of Legal Services in the Office of Economic Opportunity, a search in which we cooperated to the fullest, and I might say that this gentleman was our suggestion (to show you that the federal government is *not* dictating to the legal profession), a young and prominent lawyer named E. Clinton Bamberger, a partner in the firm of Piper & Marbury, an old outstanding Baltimore firm, was selected. He has had considerable experience in organized legal aid work in Maryland, in addition to being an active practitioner. He is steeped in the traditions of the profession.

An advisory committee composed of leaders of the profession, including the offices of the ABA and non-lawyers is being formed to direct the project, and we have been assured that the legal profession will have equal representation on this advisory or directing committee.

In addition, our Washington office has established a close liaison with the OEO and is on a friendly first-name basis with its Administrator.

Now OEO is disappointed in the number of community action programs submitted to it which do not contain any application of funds for legal services. The agency is convinced that the

need exists, and it is critical of the profession for not urging their inclusion.

One might observe that perhaps the need is nonexistent, or that local legal aid and lawyer referral facilities are taking care of the public needs for legal service. But the local communities have the burden of proof, and since this is a matter of local application I urge all of the local bars to re-examine their facilities and take a reasonable attitude about the whole matter. In other words, gentlemen, if this is handled on a local basis and in accordance with our ethical standards, however we are eventually going to work that out, I don't think we shall have any fear for socialization of law. But if we don't take the leading part, if we don't handle this on a local and a national basis, then I assure you something drastic and dangerous to the profession is going to happen.

We know very good and well that communities and states and cities have surrendered their sovereignty to the federal government, because every time they want something they go to the government to get it. But the legal profession has an obligation and an opportunity, if they handle this on a local basis and in their own way and with their own facilities, to reverse, insofar as we are concerned, this dangerous trend of the Twentieth Century.

Over and above the question of discharging our public responsibility to the indigent and those of moderate means, we are faced with important problems involving the Canons of professional ethics. The resolution of the ABA provides that cooperation with the OEO requires adherence to the ethical standards of the legal profession. A possible revision of the Canons of Ethics has already been launched by the ABA, and experience in rendering legal services for the poor and those of moderate means may provide useful guides as to the form some of these revisions might take. In particular, the question of solicitation, lay control, use of lay intermediaries, the confidentiality of lawyer-client relationships, unauthorized practice of the law, barratry, collaboration with other professions, champerty, will emerge. While simple expansion of existing legal services may not raise these problems, development of new forms of representations may.

In closing, I think we should do well to reflect upon the words of Mr. Justice Robert H. Jackson, who wrote in 1949 in the *American Bar Journal*, and I quote him, "Today any profession that neglects to put its own house in order may find it being dusted out by unappreciative and unfriendly hands. Society

shows a growing disposition to call the professions to account for the use made of their privileges. It is only the part of wisdom for the leadership of any profession to anticipate the problems and difficulties of those it undertakes to serve and to remedy them before they grow into public grievances."

Again, I thank you sincerely for your attention and for the opportunity of being with you. We are looking forward to another fine two days here and watching Nebraska beat Colorado.

PRESIDENT COHEN: Thank you very much for those fine words, President Kuhn.

We have an in-depth clinic starting this afternoon with Professor Casner. He is here. We are going to start in this room as soon as the tables can be cleared and chairs set up. If you will all leave the room for about thirty minutes we will reconvene for our session at two o'clock.

**INSTITUTE OF THE SECTION ON REAL ESTATE, PROBATE  
AND TRUST LAW****THURSDAY AFTERNOON SESSION****October 21, 1965**

The first session of the Institute of the Section on Real Estate, Probate and Trust Law was called to order at two o'clock by the Moderator, Herman Ginsburg of Lincoln.

MODERATOR GINSBURG: Ladies and gentlemen, I think you can observe from the arrangements up here in the front that they are not ideal and we want to beg your indulgence as well as the indulgence of our speaker for the rather poor arrangements.

I want to welcome you on behalf of the Real Estate, Trust and Probate Section of the Bar Association to the 1965 institute, which is devoted to problems in the field of estate planning. The purpose of this institute is to discuss and give you some ideas relating to useful tools that we can and should use and which perhaps have been somewhat neglected or overlooked in our own State of Nebraska.

We are most fortunate and proud to have as our speaker the Associate Dean and Weld Professor of Law at Harvard Law School, Dean A. James Casner. He is not only an acknowledged authority in the field in which he is going to speak, but is a dynamic lecturer. I am sure we will all get a great deal of good out of our attendance at these institutes.

The institute today will be devoted to the subject "Legal Life Estates and Powers of Appointment Coupled with Life Estates and Trusts."

You will see at my left a distinguished panel. They are rather removed from the speaker. They are not a useless appendage. They are not just a tail; they are here for a purpose. Let me introduce them to you:

First, at my extreme left, is Mr. Charles Oldfather of Lincoln; next to him, Mr. Deryl F. Hamann of Omaha; next, to the right, Professor Henry Grether of Lincoln; and closest to me, Mr. Auburn H. Atkins of Scottsbluff.

What these gentlemen propose to do after our lecturer completes his presentation is to perhaps propound some observations concerning Nebraska law in this particular field and perhaps ask some questions in relation to Nebraska problems.



Let me lay down a few ground rules for this meeting. We will not be able to field any questions from the floor. You can see that, with the size of the audience we have and the arrangements, that would be impossible. However, during the afternoon there will be a short recess. Any of you who have any problems or anything you would like to see further expounded may, during that time, send up your suggestions or your inquiries in writing to the members of the panel. Insofar as they will have the time to do so, during the latter part, or after the conclusion of the set presentation, the panel members will try to bring to the floor whatever questions or suggestions you may have. Don't feel insulted or let down if your precise question is not asked or put forward in the way you want it. It is, as you can see, impossible to do that. We will do the best we can with the time at our disposal. As you will note, we are already forty-five minutes behind time, so we will just have to do the best we can.

With those preliminaries out of the way, may I say to you ladies and gentlemen that I am proud to present to you as our speaker for this afternoon Dean A. James Casner, who will now proceed to the subject, "Legal Life Estates and Powers of Appointment."

### **LEGAL LIFE ESTATES AND POWERS OF APPOINTMENT COUPLED WITH LIFE ESTATES AND TRUSTS\***

#### **A. James Casner**

It is rather difficult in a room of this type, when you have people on both sides of you and in front of you and in back of you, to talk to all of you at once, but I am going to try to do the best I can. We were supposed to have a microphone I could hang around my neck, but I think all of you will be able to hear me. If you don't hear me, just say something and I will pitch it a little higher than I am talking now. I've got a lot of volume left.

The subject we are going to deal with this afternoon is one that I think has not been explored with the depth and consideration that it should have in the light of the importance that it may have in properly arranged family affairs.

The legal life estate is a sort of orphan child in the law, and people have, when they have used it, sometimes done so rather blindly without fully being aware of what it is they have in their

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\* Transcribed from reporter's notes without editing.

hands. I am going to talk about various aspects of this problem this afternoon. We will see before we get through that it will have some rather complex features. The going is going to get a little rough, I think, before we get through, but I hope that at least a majority of you will understand some part of what I say. I may not understand it all myself, so we may all be in the same boat before we get through.

I want to put on the board here several examples because the discussion this afternoon is going to center around one or the other of these examples, and each one is designed to illustrate a particular type situation with which we will deal and which will differ from the others in some important respect.

I might say that my observations about the legal life estate this afternoon are going to be concerned with land, where land is the subject matter of the disposition, plus those items of tangible personal property that are peculiarly associated with the land we are dealing with. For example, if we are disposing of a farm, I am talking about the farm machinery that normally would go along with that farm to make it a usable item of property.

I am not going to be concerned this afternoon with legal life estates in tangible personal property that have no relationship to the use of a particular piece of land. There are places, there are times, where it may be desirable to use a legal life estate with respect to tangible personal property that has no association with land. One common example is if you have a family portrait and you want to hand it down from generation to generation, you can create a succession of life interest in the family portrait and each successive owner can hang it on the wall and look at it.

You get into some other types of tangible personal property and you run into what is called the consumable goods doctrine. For example, you cannot create a succession of life estates in a banana; I mean, it just won't last that long. Thus there are some types of tangible personal property that you just don't think of in terms of a succession of life interest of any kind in them.

When you come to stocks and bonds, intangible personal property, while theoretically it is possible to create a succession of legal interest in such items of property I think as a practical matter it is extremely undesirable to do so. The legal life estate remainder arrangement just isn't suited to handle that type of property that over a period of time calls for possible sales and reinvestment. If you are going into that kind of an arrangement the trust is the device that has been made to order for centuries

to deal with the handling of that particular type of property. Consequently, I think we are concentrating this afternoon on the type of property for which, from a practical standpoint, it is most useful to consider employing legal life estates in the property—land and those things that are associated closely with the use of land.

Let's take these illustrations and let me just show you a little bit of the thing that distinguishes one from the other that is very important for you to keep in mind.

Let's suppose that A takes Blackacre, a piece of land, transfers it to B for life, remainder to C and his heirs. The feature of this particular conveyance that I am talking about first is that the remainder interest in C is indefeasibly vested in C. There are only two people that have any interest in this property: They are B, the life tenant, and C, the remainder. Those two together have all the interests there are in this piece of land.

Contrast with that the case where A makes a conveyance to B for life, then to B's issue living at B's death. Here we are dealing with a remainder following the life interest that is contingent on certain people surviving to the death of the life tenant. It may be, as a result of this conveyance that there won't be any remainderment when the time comes. B may die leaving no issue surviving. Consequently, if you use that kind of a transfer you do not have all of the interests outstanding in presently ascertainable people. There is B, there are the issue of B now living, but there may be more and there may be none, and you've got a reversionary interest back here in the person who created the life interest and the remainder, and that reversion will go some place on his death to whomever it is that may take the residue of his estate.

I may say that either of these conveyances, either 1 or 2, can take place by deed or by a will. They may make this disposition by deed or by will. We will want to keep in mind the possible differences if he proceeds in one way or the other to set up the arrangement.

The third arrangement is where he simply makes a deed or a will conveying the property to B for life, and makes no disposition of the remainder at all. There, of course, if it's a conveyance *inter vivos*, you've got a reversion back in A, and this reversion back in A is very much like the remainder that we give to C in example No. 1. It's an indefeasibly vested reversion, and A and B together would have all of the interests in the property.

If this transfer was being made by will, then this reversionary interest would be picked up under the residuary clause in A's will, and whoever the residuary beneficiaries would be would be the owners of that reversionary interest in the property.

Fourth, you come to the case where A makes a conveyance and follows whatever local rules may require to produce this conveyance. You end up with the fact that the life interest is in A, with remainders over that may be either of this type, contingent, or may be of the indefeasibly vested type of 1 and 2. The characteristic of this conveyance, of course, is that the transferor becomes the life tenant, and we want to talk about that and whether that is a good thing to do, and under what circumstances it may be usable as a life estate arrangement in this particular land.

Then you come finally to the case where A makes a conveyance to B for life; then to A, that is, back to the transferor if he is living at the death of B, and otherwise the remainder is to go either to B's issue or to C, some other designated remainder. The characteristic of this conveyance is that on the death of B, A may take it back. If he isn't living, the remainderment will take it. But they cannot enjoy the possession of this property without surviving heirs. This fits into a particular category of what we commonly discuss as tax consequences of setting up one of these arrangements or the other.

Now let's just review briefly the characteristics that I want you to keep in mind. In connection with the creation of a life interest, is the life tenant other than the transferor? He isn't 1; he isn't 2; he isn't 3; and he isn't 5. Is the remainder following the life estate indefeasibly vested, as it is in 1, or is it contingent upon the ascertainment of people in the future to take it, as it is in 2 and as it is in 5 and as it may or may not be in 3 and 4, depending upon other circumstances in connection with the conveyance? We've got to keep those characteristics in mind because some very serious things will turn on the type of conveyance we have, so far as these characteristics are involved.

What I want to do first is approach the problem from the standpoint of discussing with the client the creation of one or the other of these life interests, and to raise with the client the things that ought to be thought about if we proceed down the road of establishing one or the other of these interests.

Let's assume first that what we are talking about is a case like 1 or 2 where the life interest is going to be created in somebody other than the transferor, and where we are going to fill out the

conveyance, with remainder interests in other people to take on the death of the life tenant.

Let's assume for the moment that this is something he wants to do by his will, not something he is going to do inter vivos. When he does this, the first thing that comes to my mind in talking with him about setting up this type of a division of ownership is the extent to which we should try in this will that we are going to draft to anticipate problems of an administrative nature that may arise during the existence of this life estate and try to direct how they are going to be solved.

If we were drawing a trust, it would be very natural for us to think in these terms, very natural when we draw a trust and set up a division of ownership under the trust to give instructions to the trustee about how to solve various problems of the administration of that trust during the period of time that it exists. But for some reason or other people rush to creating this life estate in land, with a remainder to somebody else, without giving a second thought to the problems that can arise during the existence of that life estate which, if they are not in some way solved ahead of time, you are going to end up in the courts to have the problem solved, because there isn't any state in the United States that has got such a well-rounded body of law operating in this area that you could predict, without litigation, what the consequences will be if certain problems arise.

Now, in the field of trusts that isn't so. In most states today if you don't give the trustee any charter of administration, you've got a fairly well established body of trust law that directs you in the solving of problems that may arise during the administration of the trust, and when you draw a charter of administration for a trustee you are doing it primarily to change what would otherwise be the basic trust law operating under the arrangement, giving him more freedom than he otherwise would have, or possibly to spell out some details in which the local law is not as clear as it might be. In the trust field you start with quite an extensive charter of administration, a body of law well known and worked out. But here we start with very little if anything in the way of a clearly defined body of law.

Back in the '30s a group of us put together at that time what was known as a Restatement of the Law of Property. If any of you take a look at Volume I of the Restatement of the Law of Property that we put together, we spelled out in considerable detail the characteristics of legal life estates and we did it mostly out of our heads because there wasn't a clearly defined body of

law in existence that gave us the guidance and help that we needed. Some of the things that we put together out of our heads that appear there might influence a court in its decisions in this area, and some of the things that we put together out of our heads I think ought to be changed pretty fast. So if you operate in this area, if that is going to be the guiding body of law, you may want to see if you can't prevent that body of law from operating on this arrangement if particular problems arise.

The question, then, is: To what extent is A, who sets up this life estate, in the position to dictate in the instrument of conveyance or transfer how certain problems could well be resolved? Legally, I can see no possible objection to the enforcement of A's desires in the solution of problems as long as he isn't trying, by the way in which he directs their solution, to accomplish something that is against public policy. He is setting up this conveyance. He ought to be able to say, "If this problem comes up, this is the way it is going to be resolved," or "This is the mechanism that will be set up to solve it." I can't see any good reason why his desires will not be effectuated as long as they are reasonable in light of all the circumstances.

Now let's see what kind of problems I am talking about. Anybody who sets up a legal life estate for the remainder something that might last for thirty or forty years in this defined form and doesn't provide a mechanism for selling the fee simple title to this property is simply creating something that may be a real menace before the life tenant dies. You can't predict with certainty that this thing can stay in this form of ownership throughout the duration of B's lifetime. It seems to me there ought to be a fundamental principle any time a legal life estate is established that a mechanism be provided for the sale of the fee simple title in the event circumstances warrant that type of disposition.

The question is: Where are you going to put that power to determine whether the fee simple title will be sold at any particular time? There are three places you could put it. You could put it in B, the life beneficiary; you could put it in the remainderment; or, conceivably, you could put it in a person who has no interest in the property at all to make that decision.

Where you will put it will depend somewhat on the people that are involved and who it is that ought to be entrusted with the making of that kind of a decision which, in turn, of course will affect all that are involved.

A second situation basic to the same problem is the power to borrow money. If you are going to have any borrowing ability

with respect to this piece of land, when you have created a legal life estate in it with a remainderment, B can't borrow anything on his life interest. Anybody who would loan him anything on that would be crazy. If they loaned the money on him with the life estate as security and the next day he dies, they haven't got any security. The remainderment may have nothing that is really acceptable as security. He clearly hasn't, unless he got an indefeasibly vested remainder, and in a little while I am going to try to show you that that is something you should never create in connection with one of these interests.

Thus, if you are going to have this land usable to raise money, in the event conditions as they develop make it desirable to borrow money, you've got to put in somebody the power to mortgage this property and mortgage the fee simple title. Again, that power may be placed in any one of the three places that I have suggested before.

If this is property that may be most effectively used by leasing it out at a rental, you can't get anybody to accept a lease from a life tenant and make any significant investment in the property that he is operating under the lease, because the day after he gets the lease the life tenant may die and he won't have any lease any more. So if the leasing power is to be an effective vehicle available here, somebody has got to have the power to sign a lease for some period of time that will not be upset by the fact that the life tenant dies; a lease that will bind the remainderment's interest in this property, in other words, must be a part of the picture.

If the property is situated in a way that if it might ever be taken under eminent domain proceedings, some advance thought should be given to who it is that is going to have the power to decide whether to contest the award in the eminent domain proceedings? Who is it that is going to make that decision, so that we won't have three or four people in there fighting, one pulling one way and one the other in deciding issues of that particular type?

I suppose in most of these cases where you would set up a life estate and a remainderment and you gave thought to these problems, the likelihood, certainly not the certainty but the likelihood, is that you would come out and say, "Well, the life tenant is probably the place where the power to make these decisions should rest."

If we put that power in the life tenant, and let's assume that we've decided after thinking it over, this is a case where B is the son and we set up a life estate in the son with the remainder in

his family, and we put the power of decision in the son to do these things that may have to be done over a period of time that will bind more than just his life interest in the property.

We have then got to decide, if he sells, what he is going to do with the money, because if we give him the power to sell and use the money, then we have given him a general power of appointment and the value of the property will be includible in his gross estate for estate tax purposes when he dies, and probably the reason we gave him only a life estate to begin with was to avoid that result.

And the same thing would be true if we gave him the power to lease unless we didn't give him the power to accept, in connection with the lease, any lump sum payment in advance for the rent. If we gave him the power to make a lease, to accept a lump sum payment for the rent, and that went beyond his life interest, he would have a power then in effect to lease for lump sum, take part of the remainderment to himself, and he would again have a general power of appointment for estate tax purposes.

The same thing with respect to eminent domain proceedings. If he is going to decide whether the award is just, if he is going to get the award and be able to use it as he pleases, he is going to destroy one of the basic purposes that we may have had in mind in setting up this legal life estate in the beginning.

It seems to me that when you have these problems that enable you to reach in and, in effect, convert the remainder as well as the life estate to money, you have then got to have, running along hand in hand with the establishment of this legal life estate, a trust into which the money must go as soon as it is realized, a trust under which the life tenant will get the income for life and the remainder will go as originally described in setting up the legal life interest. This can be accomplished by drawing a trust at the time the legal life estate is created which will spell out in the trust the same terms as originally attached to the land, and provide that when the fee simple is sold the money realized on the sale will immediately be payable to that trust. The son can be the trustee of that trust, having the same terms as he had with respect to the land, getting only the income for life. But if you don't think this thing through to the point of the disposition of the proceeds, if you give the power of sale, then you may upset, as I say, the very purpose that led to the creation of the legal life estate in the beginning.

Now let's turn our attention to some other problems. So far I have been talking about a power to do something that will dis-



pose of the fee. I come next to consider a number of situations where the question is how much the remainderment can restrain the life tenant in the use that he makes of the property. If we say nothing, then we throw the life tenant and the remainderment under the laws of waste. To what extent can a life tenant of land make use of the land without committing waste?

Well, for example, under the laws of waste the life tenant now cannot take any oil out of the land—that would be committing waste. If minerals were discovered that were valuable, he couldn't remove the minerals without committing waste. He couldn't tear down a building that was there that was still a usable building without committing waste. In other words, if you ignore this problem you set the life tenant up with a very limited, restricted use of this property over a long period of time. Here, again, we can give the life tenant power to go beyond the normal use that a life tenant is allowed to make of property without committing waste. We can give him the right to open mines. We can give him the right to drill for oil and remove it, if he finds it. We can give him the right to tear down a building and put up another building. We can do all of that if we think of it and if we spell it out in the instrument that sets up the life estate.

But now, again, a tax problem comes up because if we give the life tenant the power to do these things, we then may give him a general power of appointment for tax purposes, and he may throw the entire value of this land in his gross estate for federal estate tax purposes, so that, again, what we have got to do is to give him the powers that we want to do these things, but if he exercises the power and exceeds the normal user of a normal life tenant, the proceeds realized from that excessive use go into the trust from which he can get the income for life from the investment of that excess, but we mustn't give him the power to *use* it unless we want to undermine what may have been the major purpose back of the creation of the life estate in the first instance.

The third thing that I think we ought to think about is that during the time that the life tenant is there, some bills are going to be run up. There are going to be real estate tax bills. There may be some other assessments against the land. There will be repairs, if the property is to be kept in a usable form. Insurance should be carried on the buildings and on the land. Who is going to pay these bills? Where is the money coming from to pay the bills? Well, if we say nothing and throw ourselves back on what the law will require—we said at least in the Restatement of Property that the life tenant had to pay the taxes, had to pay other

current charges on the land, had to keep the property in reasonable repair, but only to the extent that the income from the property was adequate to cover those charges. If the income of the property was not adequate to cover those charges, then there was no duty on the life tenant. These would be to the remainderment to keep these charges paid.

Well, the question is whether we want to adopt that principle or whether we want to impose on the life tenant a greater burden. There is no duty on the life tenant to insure the property. If he wants to run the risk of not insuring his life estate, that is up to him. Do we want to put a duty on him to insure not only the life estate but the full property, including the remainderment's interest? And do we want to say to the life tenant, "If you accept this life estate you have got to accept it with these burdens, to dig down into your pocket beyond the mere income that you realize from the property and see that these bills are paid, and your failure to do that will entitle the remainderment to forfeit the life interest which you possess. We can do that if you want to. Do we want to go that far? That is a question that has got to be resolved.

Again, if you say to him, "We want you to insure the entire premises, your interest as well as the remainderment's interest, then we have got to remember "What do we do with the insurance money if it is collected?" If he could put in his pocket not only the insurance on his life interest but also that covering the remainderment's interest, we are back to the case again where he may be able to convert that remainder interest to his own property as a result of the course of events. So, again, that insurance should go into this trust that is going to be collected; or, in the alternative, he uses it to rebuild and restore the premises to their former condition, so far as that is feasible. But unless these problems are thought about and some decision made as to their solution, if they occur, we are right back in the courts to find out what the respective rights of the parties may be. You must remember, if your remainder interest is in the issue of your son living on his death, that including not only his son's children but unborn grandchildren he may have, if that is the situation then the guardian on that item of those unborn interests will be in there fighting tooth and nail against the son. This isn't just a family party that you are getting into. The guardian has got to go in there, even though the son is the life tenant, and see that he accounts for every dollar that the son is not entitled to, unless you have spelled out a solution for the disposition of the money that may come in to the life tenant's hands when he gets more than what his life interest entitles him to.

As we set up this interest, another problem I think you ought to look at would be the rights of the creditors of the life tenant and the rights of the creditors of the remainderment. Suppose that B gets into some debt difficulty and the creditor comes and levies on his life interest. That is going to be sold at the creditor's sale for practically nothing. In other words, this is a bonanza to the creditor. They pay little or nothing to get it and have a chance of reaping a whirlwind by the life beneficiary living a long period of time. Nobody will pay anything for that at the sheriff's sale. If a legal life estate is inherently vulnerable to that kind of attack, you ought to know it and your client ought to know it.

You set up a remainder interest in the issue of B. They are adults. They get into creditor difficulties. The remainderment comes in and levies on that contingent remainder and sells it. Who buys it? The creditor buys it. No one else will buy it, because it is contingent upon his surviving the life beneficiary and, again, for very little investment he may pick up a very substantial interest in the property.

The possibility that creditors may come in and upset this arrangement and buy it out at a very low price creates a very serious problem about the existence of these life interests and these contingent remainders as legal interest in property. Now the question is, Is there anything we can do about that? Well, you had some fairly good law here in Nebraska at one time, and I am going to ask the panel later to comment on it, but it looks like you let that get out of the window. Nebraska for a while was one of the few states where you could impose some creditor restraints on reaching legal interests in property. The extent to which you can still do that remains questionable. But if you can't do it, and even when you could do it, as I understand it, it is only by what is called "forfeiture restraint", where the property was taken away from the life tenant and given to somebody else in event creditors tried to get it. The disabling restraint which we can set up in a trust which I am going to talk about later, you could never impose on legal life estates. This makes a very serious question, a very serious question of whether you should put out into the stream of commerce interests of this type of which people may be so readily deprived at sacrificial prices by the course of events. If you think it isn't easy to have creditors beyond your means to pay, you go out and hit an automobile with five people in it and see how many creditors you've got. You can really build up a creditor claim beyond your means to solve, unless you carry an exorbitant amount of insurance, which most of you don't carry

and certainly most of your clients don't carry. So the creditor problem is not anything to dismiss lightly. It is one to which the legal life estate and remainder may be particularly vulnerable, and one that you may not be able to do anything about.

Then every time you set up one of these arrangements you must remember that there will be a neighbor to the land in which the legal life estate and the remainder exists, and someday during the time of the life tenancy there will be a dispute between the parties as to where the right boundary is, or something else. If there is, is there going to be anybody on this side that can make a decision that will settle definitively the boundary dispute? Again, we can't give the life tenant and beneficiary the power to settle any dispute with adjoining landowners over boundaries, to settle not only his rights but the rights of the remainder. Some mechanism of working out disputes of that kind is certainly worth giving some consideration to.

Also during the course of this life tenancy somebody sooner or later is going to come on that land and do some damage very likely, and there is going to be a lawsuit between the owner of the land and the outsider who invaded that land illegally and improperly. Who can bring that lawsuit? Can the life beneficiary bring it? Can he recover not only the damage done to the life interest but also the damage done to the remainderment? If he can't, he is going to bring one suit and the remainderment, and there may be twenty of them, would each have to bring a different suit. The question of determining their loss becomes a very difficult matter because they all have tenuous interests in the property.

Here again I think we can direct that with respect to any outsider coming onto the land, the life beneficiary can maintain the suit and recover the full damage. But, again, if he recovers the full damage you can't let him have all the money or we are giving him more than his life interest, and we may have to provide that the excess money, the money he has recovered, go into a trust the income from which he will receive and preserve the principle of recovery for the ultimate remainder.

Sooner or later when we set up one of these life estates, unless history doesn't run true to course, the life tenant is going to become incompetent. They all get that way. And the more incompetent they become the more competent they think they are, so you have to decide now on anything that you set up in the way of a mechanism to solve these problems if, as, and when they arise. What are you going to do with respect to carrying on the resolution of these problems if the life beneficiary becomes incompetent?

I think here again it would be perfectly legal and proper to provide that if, in the opinion of somebody that you have confidence in, the life beneficiary is no longer competent to manage his affairs, from that moment on the entire property will go into the trust and run under a trust, under which the trustee will have discretion to solve these problems and under which the trustee will have power to apply the income for the benefit of the incompetent life income beneficiary.

This is not a very pleasant thing to talk about, yet when it arrives if it isn't taken care of it leads to litigation, to a court-appointed conservator, the publicity that is always involved in those disputes, and the unpleasantness that frequently arises because of the fight over whether or not in fact he is incompetent. Yet if you throw out on the stream a legal life estate without paying any attention to that problem, you are in many, many cases simply setting up the day when this kind of a contest or fight will come, and then the whole mechanism for settling these disputes we've been talking about will be gone because the incompetent can no longer exercise the powers that you gave him.

Finally, in connection with this aspect of the problem, I said earlier that I don't think anybody ought to set up a case like No. 1, where you have got a life estate and an indefeasibly vested remainder. The reason for that is that the remainderment may die before the life beneficiary, and if he dies then you've got an asset here that is in his estate for tax purposes and on which taxes will have to be paid—they can be postponed but that is expensive—they have to be paid without the remainderment ever having enjoyed that property for one day in possession. And if you want to milk an estate dry by taxes, send that kind of an interest through taxation in decedent's estate. It just doesn't make sense to subject an interest to federal death taxation before the owner thereof every enjoyed it in possession.

The only way you can avoid that is to provide always that the remainderment, in order to take, must survive to the termination of the life interest, and then if he dies he has no interest that is taxable in his estate on his death. Thus it is a case like No. 2 that will be more normally bought, the case where the remainderment interest will be contingent on surviving the life tenant.

Whenever you do that, however, remember, as I pointed out earlier, you will have set up a reversionary interest in somebody, that being an interest that will take if the children don't survive. If that reversionary interest isn't subject to a requirement of

survival, it will go through the owner of the reversionary interest's estate if he should happen to die. So the only way you can guard against this is to have a set of alternative contingencies where nobody, and I mean *nobody*, can possibly own something that will descend on his death without his ever enjoying the property in possession. A descendible future interest is the worst kind of an interest that you can possibly create from a tax standpoint, and if you do create one you do it with your eyes open, with your client fully understanding what has happened and be appreciative of what is happening.

Now I want to point out, if I can at this juncture, what the difference is fundamentally between putting this land in trust, with the income drawing for life to the intended beneficiary and remainders over, and giving him a legal life estate with remainders over. Is there something that is fundamentally different that calls for using one rather than the other? And I am assuming for purposes of this illustration that the trustee will be the life beneficiary. The question is, A to B as trustee, to pay the income for B for life, remainder to the remainderment, or giving B the right to take the legal life estate.

If there is something that you can do by going through the little gymnastics of a trust that is desirable to do and that you can't do if you go the direct legal route, then you ought to think seriously of putting it in the mantle of a trust. And, vice-versa, if there is something that you could do by using the legal life estate and remainder that you can't do if you run it through the format of a trust, then that ought to be known. To make an intelligent decision you ought to be able to put it down and say, "Here's where they are exactly alike for practical purposes, and here is where they differ."

I would like to raise a question with this in mind, and let's see whether we can point or pick out something of significance that we can do one way that we can't do the other. Let's take the question of the physical occupancy of the land, because what we have in mind here is that the life tenant is going to occupy the land physically, not somebody else. Can we set up a trust under which the trustee is directed to allow the life beneficiary to occupy and use the land physically? Yes. There is no reason why we can't set up a trust where the trustee is directed to allow the life beneficiary to occupy the land. Back in the marital deduction regulations it is recognized that if you have a family residence and you put it in trust, and under the terms of the trust the trustee is directed to allow the wife to occupy the premises for

her lifetime, that satisfies the requirement of the life interest that the wife has had in connection with the so-called power of appointment arrangement. There is nothing inherent about the trust that prohibits the beneficiary of the trust from physically enjoying the property in the trust. So if that is your goal, physical occupancy by the life tenant, that doesn't force you to the legal life estate and remainder arrangement. You get that result under a trust with a direction of the trustee to allow the life beneficiary to occupy and use the property.

Now, what about depreciation or depletion of the deduction for income tax purposes? If we set up this life interest, and it's property that is being used for purposes that would entitle us to a depreciation or depletion deduction, will we get any different result if we run it through the trust form than if we run it through the legal life estate and remainder format?

If you look at the statutory provisions, it looks like you have got quite a different result, because the statutory provisions say that if you've got a legal life interest, the legal life beneficiary shall be entitled to the entire depreciation deduction and the entire depletion deduction as though he was the absolute owner. If you look, however, at the depreciation-depletion provisions with respect to trusts, it says you will allocate between the trust and the life beneficiary in accordance with the way in which they receive the income from the trust, unless the trust instrument directs otherwise. Some power there recognized that the trust instrument could designate a different way of handling depreciation and depletion.

But is that, in the final analysis, anything different? In order to understand the trust route, you've got to appreciate how you determine what we call distributable net income of trust, because by hypothesis in the case that we are considering, all the income is going out to the life income beneficiary, and thus if any depreciation there is is allocated to the trust, it simply is deducted in determining distributable net income and in determining the amount of the income that would be taxable to the income beneficiary, which for all practical purposes in most cases will have the same end result as though the depreciation or depletion deduction was made available to the life income beneficiary.

There are fancy trusts that can be set up where there will be some possible differences, but where we are dealing with a very simple trust, where all the income is going out in the life income beneficiary, absent any provision in the trust, all of the deduction has to be allocated to the life income beneficiary. So I don't think

from that standpoint, in the normal simple case, that you've got anything that is going to operate significantly different in one situation than in the other.

What about deduction for real estate tax? If the trustee pays the deduction for real estate taxes, then that is a deduction only of the trust. If the legal life income beneficiary has to pay them, then it is a deduction directed to him. But, again, if you are simply having the income from the trust all go out, the deduction that you get from real estate taxes reduces the distributable net income the amount taxable to the life beneficiary and you end up basically in the same place as if the deduction is directly available to him.

The time that you can get into trouble is where you get a deduction that the trust could use, and the trust doesn't have any income. Then it is of no use. Whereas, if it was a deduction directly available to the life income beneficiary, he could use it against other income that he might have. That is a very important factor. Don't get yourself tied up in an arrangement where under the trust you may not have any trust income that is going out to the income beneficiary, and as a result you lose the deduction.

This would be particularly true if you were putting in the trust "not income-producing real property" on which real estate taxes have to be paid. If you had a direct legal life estate, and the legal life beneficiary was paying real estate taxes, he could use that deduction against other income. If you had it set up in a trust and the trust paid the taxes, and the trust having no income that could use it again, it is a lost deduction.

Earlier I pointed out that we want to give a power of sale with fee simple title so we wouldn't get tied up with a life estate and remainder frozen in. Now, if B, the life income beneficiary, has the power to sell the fee, he may have a capital gain. Who is going to pay the capital gains tax with respect to this combination interest that has been sold for the life income beneficiary?

We had some rather interesting litigation on that for a while. One court even reached the result that nobody had to pay it because there was nobody getting the gain, and therefore it went tax free. It was obvious that that result wasn't going to last very long. Now I think it is pretty clear that they are going to make the life income beneficiary pay it, if it is a legal life estate, as though the gain was entirely his. Even though he can't use it he has got to bring that into his own income and treat it, and the rate will be determined as though it was his income.



Now if we have a trust and we have got a sale in the trust and a realization of capital gain, then the trust is a separate tax entity and the tax on the gain may be much more than the tax to the life income beneficiary. Therefore, this is a factor that makes it possible to consider the desirability of the trust.

But notice what you can do with a little planning. If you give a power to sell the fee, you could require that prior to the sale the property be transferred to the trust and have the sale sold out of the trust. As I said, you have to have a trust anyway for the proceeds. Now it doesn't have to really sell out of the trust rather than have the life beneficiary sell directly, and then you may have a different tax entity for use for capital gains tax purposes rather than throwing it into the life income beneficiary's range. I see no objection to setting up that kind of an arrangement for the sale of the fee and the payment of the capital gains tax.

But then watch out, because if you've got a loss, if you are selling at a loss, who is going to get the benefit of the loss? Suppose the loss exceeds the realized gains of the seller? If it is an individual that we are dealing with, the individual can use \$1,000 of that against ordinary income each year until it is used up. But if you sell this in a trust at a loss, and we are distributing all of the income to the trust anyway, one of the very great quirks here is that you can't take that \$1,000 loss in determining D.N.I. going out of that trust, and you may end up with that extra \$1,000 that you could use against ordinary income if the loss was attributable to the individual, and in the trust it does you no good. So the sweep back and forth between the trust and the legal life estate in that particular little area can be quite significant in working out the details and ramifications of that particular problem.

Here's another little quirk: If you put a family residence in the trust with direction to let the wife live in it, after she lives in it a while she doesn't like it, too many memories of the husband around there and she doesn't like it any more. So the trustee sells it and buys her another house and lets her live in that. Section 1034 doesn't apply for purposes of the postponing gain, if the sale is in the trust and the trust is reinvested in another residence within a year; whereas if the wife owned it outright and she made the sale from the reinvestment in another residence in a year, you could postpone the gain under Section 1034.

So there is another little tax difference that comes in depending on whether you handle this in a trust or outside the trust. You will notice some of these things swing in the way of using the

legal interest, some swing in the way of using the trust, some swing in the way of carrying a combination of the two that you might be able to push it in or out one way or the other, depending on the problem with which you are dealing.

Finally, the big difference that is quite important to keep in mind, and the one that I mentioned a little bit ago, is the creditor problem. In most states you can have spendthrift trusts, disabling restraints on equitable interest where creditors cannot reach the interest even though the beneficiary is not deprived of it. And if there is a serious problem of protecting this interest against creditors' claims, the trust may be the only device that is available to you to accomplish that kind of a safeguard.

There is no one answer to this problem. It is like most legal problems. The thing that I think is so important here, as in so many areas, I am not worried about the decision that is reached by anybody if it is a decision that is an informed one, if it is a decision that is made after weighing the pros and cons of going one way or the other. That will be a good decision. A decision that is made with a complete blank mind as to these considerations, if it is a good decision it is accidental, not intentional.

Now I want to turn to the marital deduction and the use of this legal life estate and remainder when you have a marital deduction setup. Does that have any special problems?

What you are interested in is making this gift to the wife and qualifying it for the marital deduction. You are going to give her a legal life estate and remainders over. How do we qualify it for the marital deduction? What's the problem? Is there any problem?

The first question is: How do you satisfy the requirement of Section 2056 that says the wife must be entitled to all of the income? If you are giving her the use of the property, does that satisfy the language in 2056 that she must be entitled to the income? Suppose it is a family residence. No income is going to be realized but she is going to use it.

I think the answer to that certainly *ought* to be, and I have no doubt that it is, that physical use is the equivalent of income for purposes of applying 2056. I wouldn't worry for a minute about using the legal life estate and remainder to qualify for the marital deduction on the ground that somebody might upset it on the claim that she wasn't entitled to the income. I think that would be an absurd claim. Although there is no decision that has dealt with this problem, it seems to me that we are entitled to go ahead

with the marital deduction and not assume that absurd decisions or absurd rules will be reached, even though sometimes they are. This, I think, is one case where we are free to take that position, and take it very happily.

Then you come to the other requirement, which is the power of appointment requirement. Here is where so many people with legal life interest in a wife have stubbed their toe, because it got to be a kind of drugstore formula in setting up one of these legal life interests to talk in terms of the wife being entitled to enjoy this property for her lifetime and what *remains* at her death is to go to someone else. Resting on the word "remains" means that she could dispose of it otherwise during her lifetime. Or to put it another way, some of them read "to the wife for life with the power to consume all of the property during her lifetime, and that which is unconsumed will go over to someone else."

There have been almost hundreds, there are many, many cases that have gone to court on construing the adequacy of the power that you have given the legal life beneficiary. It is simple. Of course you've got to draw a power carefully that will give the wife the power to appoint to anyone, including her estate, and to appoint outright to her estate so that it can get into her estate and out under her will if that is her desire. You can't just restrict her to the power to consume it in her lifetime with no ability to appoint the entire amount to her estate, if she wants to. So you must draw that power carefully in connection with the legal life estate, but if you do there is no reason why the combination of the right to the use of the property for life with the properly drafted power should not qualify the interest for the marital deduction.

There is another type of marital deduction arrangement you could make, and that is to give the property to the wife for life and the remainder to her estate, what we call an estate arrangement that will qualify equally with the power of appointment arrangement. But that forces the property into probate on her death, whereas the power of appointment arrangement doesn't. And there may be some other local considerations as to why one arrangement should be used rather than the other, but the legal life estate for the wife is available as a marital deduction arrangement. But it is still a question whether that should be done or whether it should be done under the format of a trust.

I have two other matters that I want to develop with you. I think you have been very good to sit as patiently as you have

this long. Let's have a seventh inning stretch of about five minutes and then we'll go on.

[Recess.]

MODERATOR GINSBURG: If anybody has any questions, now would be the time to send them up.

Let's resume, gentlemen. May we please have order.

DEAN CASNER: So far what I have been talking about in connection with life estates and the power to make decisions, I have been talking about what I, for want of a better name, am calling "administrative powers." They deal with the ability to make decisions in connection with the administration of the property with which we are concerned.

These administrative powers that I have been talking about, the power to give the life beneficiary the power to sell the fee simple, or the power to open oil wells or minerals, or what have you—these powers, even though they are tied with a legal life estate, would normally be construed, I think, by any court as not being completely freewheeling powers. I mean, if I gave the life beneficiary the power to dig for minerals, I think that any court might very well say that that means to dig for minerals in a manner that would make good husbandry of the land in the light of the circumstances of the land; and acting in arbitrary and capricious and unreasonable ways might be subject to restraints. That is, even though they are powers that are not in a trustee, they very likely would be construed to be subject to reasonable restraints, as is true of any powers you give a trustee. When you give a trustee powers, even though you describe it in very broad terms of being subject to his uncontrolled discretion, for example, all courts agree that when you put that kind of a power in a fiduciary he must act reasonably in light of all of the circumstances. It isn't a power to act arbitrarily and capriciously. I think that is the way we would want these powers that we might give the life income beneficiary, construed. In most of these administrative powers we're not trying to get freedom for arbitrary and capricious action; we are trying to get something similar to the restraints a trustee operates under without going through the formality of setting up a trust.

I want to turn my attention now, however, to what *are* recognized as completely non-fiduciary powers, completely freewheeling powers that I may want to give somebody that will enable him to act under the power for any reason he wants to, and act any way he wants to under the power. For want of a better name, I will

call them "non-fiduciary" powers. They are more commonly, I think, referred to as powers of appointment, where I give a person a power by his will, for example, to appoint the property as he desires among a designated group of possible appointees. He can pick one out, even though he does it for a completely arbitrary reason and exclude the others, if I have authorized him to do so. I haven't put that power in his hands for the purpose of making him a fiduciary; I've put that power in his hands to move him nearer to what he could do if he was the real owner of the property.

The tax structure that we operate under doesn't always distinguish very carefully between these so-called fiduciary powers and these so-called non-fiduciary powers. You can get a bad tax result with a fiduciary power just as well as you can with a non-fiduciary power. So we have got to keep the distinction between the two types of powers in mind as to how free the holder of the power may be to act, but merely because we end up with it being in a fiduciary category isn't going to take it out of the realm of possible tax significance when we begin worrying about a tax problem.

What I want to do now with you, if you will go along with me, I want to have an interview with a client who comes in with this story, and it is not an uncommon one:

He says, "I want to give all my property outright to my son."

You say to him, "That's fine, but you know if you do that it is going to be taxed when you die on the way to your son, and it is going to be taxed again when your son dies, and that is going to cut down the total available amount rather substantially."

He says, "Is there anything you can do about that?"

You say, "Yes, we can do something about that. We can give this property to your son for life, and we can designate that on his death—you would want it to go to your grandchildren, wouldn't you?"

"Yes."

"We can designate that on his death it go to the son's issue, then living, on a per stirpes basis."

"What does that mean?"

Then you explain to him what this per stirpes business is.

He says, "That is all right. That seems equal enough, for it to go on Son's death. But that isn't what I came in here to give my son. This is only a life estate and he can't sell it, can he?"

"No, he can't sell it unless we give him power to sell it, and if he sells it we can't give him the power to use any more than the income from the proceeds of the estate."

He says, "Well, that saves some taxes but it is quite a different arrangement, and I am not sure I want to put that much restriction on my son."

We say to him, "We can do a little bit more than that without changing the tax result, because we have in the tax law some provisions about powers of appointment. Now these are the free-wheeling powers that I am talking about, where we can give him power to do certain things, for any reason that he wants to, free and clear of any restraints that normally operate on a fiduciary or trustee."

He says, "What can we do along that line?"

We say, "We can provide, in connection with setting up this legal life estate, that he can have the power by his will to appoint this property on his death to anyone but himself, his estate, his creditors, and creditors of his estate."

He might say to you, "Well, why would he *want* to appoint to any of those people?"

You of course would say, "He wouldn't, so it really isn't any handicap to him. If we can give him a power by his will to appoint any place he would really want to appoint if he owned it outright, we would put him, for all practical purposes, in the same position he would be in if he owned it outright, kept it until he died, and then disposed of it by his will."

He says, "You mean we can set that arrangement up, and he can have it as long as he lives and enjoy it as long as he lives, and give it to anybody he wants to when he dies, except the ones he wouldn't want to give it to anyway, and he doesn't have to pay a tax then when it goes on down to his children?"

"No, you don't have to pay any tax then."

"Whereas, if I give it to him outright and he keeps it until he dies and by his will he makes the same disposition, we have to pay another tax?"

"Yes, that's the difference."

"Well, it begins to look a little silly, then, doesn't it, to give it to him outright and incur that additional tax."

We say, "Yes, that is the reason we mentioned it to you, because we thought you ought to know about this before you go ahead and give this property outright to your son."

Then we say, "By the way, we might be able to do something else here."

He says, "Well, what else could you do?"

We say, "If we gave this property to him outright, if he wanted to during his lifetime he could give some of it to his children."

He says, "Yes, that is a nice thing to be able to do, to give some of your property to your children, if you want to, during your lifetime."

"If we give it to him outright and he does this, he is going to have to pay a gift tax."

"To give it to his own children?"

"Yes, pay a gift tax to give it to his own children."

"In his lifetime?"

"Yes, in his lifetime. Now if we go this route, however, in addition to this power to appoint by will we can give him a power by deed to appoint this property in whole or in part during his lifetime to anyone but himself, his estate, his creditors, or creditors of his estate."

"He wouldn't want to give it to them anyway."

"That's right, he wouldn't want to give it to them anyway."

"So by deed, then, he can do what he could do up here if he wants to make some gifts?"

"Yes."

"And if he does it this way, no gift tax?"

"No gift tax, by the only decision that is now outstanding. A court of claims case held that this is an exercise of an exempt power and even though the exercise carried out part of the life interest the son was enjoying, there wasn't any gift tax. So at least we, by going this way, put it in a format that makes it possible to make a gift under the only decision there is without a gift tax. Now, that decision mightn't hold up if the Treasury Department doesn't

agree with it, nevertheless there it is. This route at least makes it possible for gift tax-free transfer, whereas with the other one we can't possibly do anything but pay a gift tax if you want to give it away. He can decide before he gives it whether he wants to, and if there is a gift here the only gift he makes in this case is the value of his life interest in what he is giving away; whereas up here he makes a gift of the fee. It is clear. Even the Treasury Department says there is no more of a gift than the gift of the value of his life interest in what he is transferring. That's a lot less than a gift of the fee."

"Well," he says, "that's fine. Now what about if he wants to sell it?"

We answer, "We can do that very easily. We give him the power to sell the fee any time he wants to, and we provide of course that if he sells the fee for cash it comes back into a trust, but under the terms of that trust where the cash will come back into it he will get the income for life, he will have the power to appoint by will, he will have the power to appoint by deed. So when he sells the fee, we'll preserve the same powers and characteristics it had before the fee was sold, with the same tax consequences."

He says, "That's fine, but all you have done so far is enable him to give it to somebody else. He can't get more than just the income for life. Whereas, if he owned it he could sell part of it and use the cash as he pleased."

"Yes, that's true, but we might be able to do something for you along that line."

"What can you do along that line?"

"We can give him the power to sell any part of this and put the cash in this trust we can have drawn to go right along with it, and then under the terms of that trust we can give him the power to withdraw any amount that he wants to to pay expenses for his health, maintenance, and support. Any time he needs anything for these purposes he simply draws it out of the trust, and if he doesn't need it he leaves it in the trust. Then when he dies, what he hasn't drawn out goes on—no tax."

"You mean we can do that too?"

"Yes, we have a special provision in the Code, Section 2041 that defines as not being a general power of appointment any power in the power holder to make withdrawals for his health, support, and maintenance, even though he has such a power of



withdrawal, that which he does not withdraw is not, on his death, property over which he had a general power of appointment so it isn't taxed in his estate when he dies."

"That is about the only reason he would spend the money if he owned it outright, isn't it?"

"Yes, that's about the main reason he would spend it, unless you want him to have the power to spend it on wine, women, and song. That standard does not apply here—that's not for health. But you can do almost anything else if you keep within reasonable, moral bounds and it will tie into your health, support, and maintenance.

"There is something else we might do for him because we can also provide in this arrangement, even though he isn't making the withdrawals for his health, support, and maintenance, we can give him the power to withdraw \$5,000 or five per cent of the value of the property, whichever is greater, each year just for any reason he wants to. If he doesn't withdraw it, it will still be in there and won't be taxed at his death except in a year of his death the amount that he could withdraw in that year will be taxed, but the previous amounts that he could have withdrawn, if left there won't be taxed. So he has that freedom of getting these amounts without any standard to apply, standard to fill up emergency matters, power to give it away, power to will it, all added up together along with this life estate, and quite a distinctly different tax result from that of giving it to him outright."

Now when you can create these life estates with these powers and move as near to ownership as the outright ownership would be, it is rather foolish to invite a second tax on the death of the son; and these powers don't have to be set up in a trust, they can be set up in connection with legal life interest as well.

There are some income tax consequences that have got to be noted in connection with these powers here. But remember, by hypothesis, we are dealing with a case where you're going to get all the ordinary income anyway, and if it is a legal life estate all the capital gain is going to be taxed to him in case of a sale, unless we put it into a trust before the sale so that we can use the trust as a separate tax entity. If we do put it into a trust, and these powers attach to a trust, then the capital gains tax problem will work a little differently than if he didn't put it in the trust. If he didn't put it in the trust he is going to be taxed on all the gain. If we put it in the trust he has the right to withdraw \$5,000 a year out of the trust principal. Then you will have to tax him on

capital gains on a proportionate amount of the gains. That proportionate amount of the gains that would be produced by multiplying the total gains for the year by a fraction, the numerator of which is \$5,000, and the denominator of which is the value of the trust property at the beginning of the year. I can say that again if you want me to. But even so, that is only a portion of the taxable gains. It is not the whole amount that he is subject to if you sell the property and realize the gain outside of the trust. In other words, the power of appointment provisions are normally thought of as only usable in connection with trusts. They are not limited at all. Section 2041 in all of its ramifications is available to attach to a legal life interest to move the legal life beneficiary closer to ownership with what I call freewheeling powers, not fiduciary powers, freewheeling power of the type he would have if he owned it outright, and still end up with a more favorable tax result than outright ownership would have produced.

This kind of an arrangement with its tax benefit where you are so near to what this one is, is now under study and there may be some modifications and changes in the future that will come into this picture. But while it is here, it's here, and while it's available and if it has already been set up before changes occur, there will always be the question as to whether the changes apply to pre-existing arrangements. This isn't a significantly difficult interest to operate. The worse result is that you would be taxed the same as if you owned it outright. And for all practical purposes you are in about the same position. So it isn't like some arrangements where you set them up and if they change the tax law on you then you are in a worse position than if you hadn't set them up at all. Significantly, this is not enough different from the other to worry too much about if there is a change in the setup.

Consequently, it seems to me that whenever anybody starts thinking about setting up a legal life estate, one at least ought to go through with it. The extent to which these freewheeling powers, as distinguished from the ones I was talking about before, may be added to and tacked onto the arrangement to produce a greater equivalence of outright ownership without change in the long range tax consequences that would otherwise be available.

Now the other problem I want to go through with you in conclusion here is the problem of the client that comes to you and wants to make some transfers before he dies. This is the case I was talking about just now of the will. A comes in and he owns a considerable amount of land and he has heard a little bit about the idea of making some transfers in your lifetime in order to cut

down on the tax impact when he dies. So he has in mind making some gifts to his children of interest in this property. The first thing he says is, "What I would like to do, in order to get this out of my estate, is to give a certain section of this, a certain segment of it, one-third to Son 1, one-third to Son 2, and one-third to Son 3, and I will retain the right to the income until I die, but I will make it irrevocable so that it is theirs now."

Then you say, "Oh no! That kind of a life estate you must not create in yourself."

"Why?"

"Because if you do that, if you make this transfer to yourself for life, in effect, with indefeasibly vested remainders in your three sons, you will have to pay a gift tax now on the remainder interest that you are giving to your sons, and when you die the full value of this property is still going to be in your estate for estate tax purposes, because of course Section 2036 says that any time you make a transfer and retain the right to the income for life, it will be included in your gross estate when you die, even though it is an irrevocable transfer of the remainder interest."

It is surprising how many people don't know this, and it is a rather costly thing to pay gift taxes now and then have to pay an estate tax when you die, even though you may get a credit against the estate tax assessed later for the gift tax that you pay now. It is still putting out money now and depreciating the total usable estate in the lifetime of the settlor.

Now he may come to you, or his family may come to you with him, and it may be generally agreed that he can't be trusted any more and that something should be done to keep you from dissipating this estate further. Therefore we want to cut him down to a life interest. That is all right. It may be a good thing, if he is willing to do that, but you want to do it in a way that won't get you into a gift tax now, and all you have to do if you put it into that is that you have him reserve a power in A, in conjunction with somebody else you have confidence in, to revoke the arrangement, where X must consent to the revocation of the arrangement, and then you haven't made a completed gift for gift tax purposes of the remainder interest. You can accomplish your same result if you just know what particular blocks to put together in connection with the objective that you are seeking to attain.

He then says, "I want to give the property out to some life beneficiary." Suppose he has a sister that he wants to support. He says, "I want to give my sister a life estate and when she

dies I want it to come back to me." You might ask, "Can we create a legal life estate in the sister with the reversion back in A?" We can do it, but if we do it, what consequence are we setting up? Is it possible that the income that the sister collects from the land, though it is irrevocably hers, will be taxed back to A, the transferor, this not being a trust. If it was a trust we've got a set of rules that very specifically deal with this problem, Section 673, which says that you can create a life interest in a beneficiary of a trust no matter how short their life expectancy is, and the income will not be taxed back to the settlor under the so-called short term trust rule. But those sections don't apply to legal interests. There is nothing in the Code about legal short-term interest and the taxability of them in connection with the income tax law. We don't know yet what is going to happen in this area. There may be, sooner or later, developing a whole set of Clifford Rules around legal short term interest, if you start creating them, and thus there is some problem of the taxability of a legal interest when there is a reversion back in the grantor after what may be a relatively short time.

I think this is all right. There is an earlier Revenue ruling that says it is all right, the income will be taxed to the sister even though it is a legal interest, but this is a very wide open area, so don't start making legal short-term interests within the language of Section 673 and think that you've got for certain a result that Section 673 would give you if you were dealing with short term trusts. They are not freely transferable rules by any decisions that are now known.

He says, "All right, I'll wash myself out of the picture as far as getting any income is concerned. Let's set up a legal interest in my son for life with remainders over, if you want to, and I just simply want the power to revoke it at any time, get it back."

"Well, you can attach a power of revocation to a legal interest, just as you can to a trust, and if you do you can rest assured that the tax result is going to be as though you hadn't set it up at all. So you can't pull that string. Section 2038 isn't limited to trust instruments when it says that 'a power in the transferor to terminate or revoke an interest will cause the value to be included in his gross estate'. That applies to legal interests as well as trusts."

He says, "I won't revoke it, then, but I sure would like to have the power to do something about it after I set it up if I don't like what happens. Can I have a power to tell where it will go among

his children, or take it away from him and give it to somebody else?"

"No. That's a 2038 power, and for tax purposes you will be treated as though you owned it for estate tax purposes if you have the power to amend, to alter, as well as to revoke and terminate. So if you are going to get this thing out of you and have no estate tax results, you are going to have to cut this clean. You can't keep any strings at all to this property and accomplish the end result that you are seeking to attain of getting it out of your estate for estate tax purposes."

He says, "Can we give the power to somebody else who will do what I want him to do?"

I say, "You can't do that and get him to agree ahead of time. If you think you can persuade him from time to time to do what you want to do, and it is his decision, then the fact that there is a power to make changes in somebody else isn't going to cause it to be taxed to you for estate tax purposes."

"How about my wife? Can I give the power to her?"

"Yes, under the present law you can give the power to your wife as long as the understanding is that she is not to do what you tell her to do just because you tell her to do it. She is to make up her own mind."

"She hasn't got any mind, though."

"Anyway, she is to make up her own mind about this and do it of her own free will and not because you pressured her into it or told her to do it, and if you can prove all of that under the present law, the fact that there is a power to change this arrangement in her will not affect your estate-tax wise."

"But we've got an income tax law, too, and you must remember that if you set up an arrangement whereby powers may be exercised and changes made in the arrangements you have set up by people, you may still be taxable on the income, even though *you* can't get it back and even though you haven't got any voice in the management of the power, because the income tax law is phrased a little differently than the estate tax law, and under certain circumstances if you've got somebody that is under your control you will be treated as though you had the power even though you haven't."

Here, again, the so-called related and subordinate trustee doctrine that operates in the income tax field is spelled out only in

sections applicable to trusts. Thus it is a question as to how far they will develop with respect to legal interests, judicially, a set of Clifford Rules again operating in the legal interest field, rules that are now codified for trusts in the Trust sections.

So you may clear the hurdle for estate tax purposes and move right into the mess for income tax purposes. Thus if you are going to cross both of those bridges, get it out for estate tax purposes, get it out for income tax purposes you are going to have to cut this thing pretty sharply so far as powers are concerned that are given to people to change the arrangement.

Suppose we give the son the power by his will to appoint to anyone. Is that a power in the son that may cause the income to come back to the settlor? If we were dealing with a trust we could answer that because in the trust sections there is a specific provision in Section 674 that says, "A power to appoint by will is not a power that will be treated as under the control of the settlor of the trust." We haven't got any provisions in the legal interest field. We don't know. Presumably the court will follow for legal interests the rules that Congress enacted for trusts; but we don't know. So if you tie in one of these powers that we were talking about before in people that might do the bidding of the transferor, some courts may take it in the legal field and say, "The fact that Congress didn't enact rules in the legal field is indicative of a more strict set of rules that are operating in the field of trusts," and therefore tax the income back to him. In other words, it is very dangerous to move in the direction of setting up that very liberal life estate with all those powers in an inter vivos transfer in the present time outside of trusts, because we don't have the well settled body of law as to when the income will be taxed back to the settlor.

That is the reason I went through that illustration in the beginning in a will where we clearly didn't have the possibility of taxing the income back to the settlor in the picture. At least at present as soon as the will goes into effect the Service does not any longer attempt to follow the decedent. We shift over then and tax other people, so that the will case gets us out of this problem. But any inter vivos transfers you make you have always got to look both ways, the estate tax rules and the income tax rules, and when you look at the income tax rules in connection with legal interests you don't find them like you find them when you do with respect to trusts.

I agreed with my distinguished panel over here, in order to give them a chance to be heard so you really wouldn't think they

were stooges, that I would stop at four o'clock. It is four o'clock now. You have been a delightful audience.

MODERATOR GINSBURG: I speak for all of us when I say that we have been educated. And now during the short time we have left this afternoon I am going to ask the various members of the panel to comment on the statements which have been made by Dean Casner, particularly insofar as there are any Nebraska cases or Nebraska statutes which might be applicable or which should be considered by Nebraska lawyers.

I will first ask Mr. Atkins to make any suggestions he might have to offer.

AUBURN H. ATKINS: As to the general rule that the life tenant cannot make any instrument in the nature of a lease beyond the term of the life, or receive any benefits in his estate beyond the term of the life, there is of course the exception that our court has held that the estate of the life tenant is entitled to the crops growing at the time of the death. Our court, in that decision as I read it—that is 136 Nebraska, 875—calls Nebraska an agricultural state. Since that time we have had other developments such as oil, gravel, minerals, and now we are getting some timber. I don't know the answer.

There are two exceptions where the district court can authorize the guardian or the trustee to enter into oil and gas and mineral leases for a period of ten years, and as long thereafter as there may be production. That is Section 57-223 and 57-510. The area of the distribution of the benefit of production I don't believe is clear. In this 57-223 the court says "the bonuses and delayed rentals shall be paid to the life tenant or the person entitled thereto." Apparently some non-lawyer got that last one in there, or else it might have been doubtful remainderment.

As to the questions that Dean Casner spoke of concerning the problems of settling disputes with strangers and other people, we have no law on it except to get into court and try to get you an answer.

As to future interests of creditors, we have a statute that says you can reach them. That is 76-108; and 76-107 does create future interests.

I know that the man on my left has some very interesting things to tell you so I'll drop off here, although I reserve the right to interrupt him.

DEAN CASNER: May I just stick a word in here because something you said reminded me of something that happened in

Massachusetts. A lot of very zealous people got around when the dividends had to be handed out in connection with the duPont Case and passed a statute trying to determine where certain of these dividends would go to principal rather than go to the life income beneficiary, but they left it up to the discretion of the trustee to determine which way it would go. The result is that by passing that statute in case of a lot of trusts where the life beneficiary is the trustee, they put in the power in the trustee, the life beneficiary, the power to decide whether he gets it or whether it goes to remainderment. A lot of them unsuspectingly are passing on that decision by giving it to the remainderment and don't realize that they are making a gift for gift tax purposes, making a gift in which they are retaining the right to the income for life of what they are giving away, and the result is that when they die the whole thing is going to be all messed up in their estate under 2036. So you've got to be very careful when you start drafting statutes to take care of these problems. Maybe this fellow was wise to just throw in that language that is very loose and general.

MODERATOR GINSBURG: Professor Grether, what do you have to say?

HENRY M. GREETHER: I would like to add one caveat to what Professor Casner had to say about freewheeling powers of appointment. In view of the Nebraska inheritance taxation on powers of appointment, which follows a scheme different than the scheme on the federal powers, I think maybe we ought to be a little bit careful in getting something for nothing.

Under the federal scheme we can have a special power which will have no significance tax-wise to the exercise of the power, as Dean Casner said, so long as we can't appoint to ourselves or our estate or our creditors or the creditors of our estate. I think we fall into the attitude of "Let's get the special powers as broad as we can."

But under the Nebraska inheritance tax statute we don't purport to tax the exercise of the power; it is the *creation* of the power, and then the rate of tax varies depending on how closely related the donee of the power is to the donor. It says, however, that if he can appoint to a special class, specific individuals or classes, I believe the statute says, then the tax will be as to the appointees or potential appointees, and of course we tax not as it actually happens but what *might* be. So if we use the freewheeling power as broadly as we might, we can cause as much as nine



per cent of the property in excess of \$60,000, all over that nine per cent higher tax than if we cut back the power.

DEAN CASNER: May I ask you a question right there? Suppose the donee of the power is the son, which was the case I was using, and we give him the wide open power that I gave him as contrasted with the donee being the son with the power to appoint only to his children. In which case would you come out with a better tax result?

PROFESSOR GREETHER: I think on that one you would come out with the same difference. I think we have to move over to the case of the elderly testator who has neither wife nor children and is going to start giving property to nephews and nieces.

DEAN CASNER: I thought that was your case and that is the reason I wanted to bring it out. In the more usual family case you can use the freewheeling power without an adverse tax result.

PROFESSOR GREETHER: I think it is something we ought to keep in mind.

DEAN CASNER: I think it is very important. It is very easy to overlook state inheritance taxes, and they can amount up to a substantial amount sometimes. For example, in practically all states, and I assume you here in Nebraska have what we call a "gift to take effect from and after death" will be subject to state inheritance taxes, and the rules for determining what's a gift to take effect from and after death for federal estate tax purposes. So you very carefully fix it up so you don't violate the federal rule, and you wake up the next morning and find you are right in the trap that has been set for the state inheritance tax law. They don't run hand in hand, and it is very important, as you point out, to take a special look at those things.

PROFESSOR GREETHER: That summarizes it very well.

One other added footnote to that—it seems to me possibly that if you already have one of these that are created a little bit adversely in this situation, it might be possible to use a partial release of the power and tailor make it back to where you would be in the best shape tax-wise for both federal and state.

The other comment I wanted to make was really to ask for a little further clarification from you, Dean Casner. In referring to life estates in land, of course we think about farm land in Nebraska, and the land itself is no problem but with farm land, as you pointed out, there is accessory property that goes with it.

I still am not clear in my mind how we work this out with the powers in connection with some of this other property that goes with it. For example, we've got animals on the farm. Some of those animals are for sale, some of them are for the breeding herd. We get rock quarries on a farm. Some farmers store grain worth a lot of money on the farm. Some of them store it somewhere else. So we've got a whole variety of personal property, consumables, as you mentioned, and machinery which you mentioned, but maybe you could refresh my mind just a little as to how you handle this personal property when you say "I give a gift of my farm to A for life and remainder to B."

DEAN CASNER: I think there are several ways you can go about it. One way is to really draw that out and give it outright to the life beneficiary and not fiddle with the problem, because in most cases that you are concerned with the life beneficiary is going to give it on down to the remainderment even if he gets it outright. It may be that you'll want to cut your problem down to size to avoid a lot of these problems.

The other alternative is to create a life estate in it with the remainder and provide, as I suggested, as soon as that is liquidated and sold that the proceeds of the sale either go back to re-acquire property of the same kind for use on the farm, and newly acquired property will be subject to the life estate and remainder treatment; or have it go into a trust in which the income from the property that is sold will go to the life beneficiary with remainders over.

If you are talking about grain that is stored, it seems to me there when it is sold if you want to keep it from going into the life beneficiary's estate you've got to say that the proceeds will then go into a trust from which they will get only the income from the proceeds of the grain.

You get into problems there because the sale of that grain may be ordinary income itself. You get into what we call "income with respect to the decedent" problems that complicate the tax structure when a person dies and disposes of that type of property.

But you have put your finger on the most difficult part of this, and I don't know that there is any one solution. I was thinking more of things like corn combines and wheat cutters, the farm utensils that are used on the farm and eventually wear out. I don't know whether you raise wheat out here or not. I have a farm in Illinois and we raise corn and soybeans. Whatever kinds

of farm equipment you would regularly need, I think you can create life estates and remainder in that property, and if it is used up before the life tenant dies, the remainderment gets nothing, but if it is there when the life tenant dies whatever is left goes to the remainderment and not to the life beneficiary's estate. It is a difficult problem. I don't know that there is any one answer.

PROFESSOR GREETHER: Yes, Professor, but you have got some livestock and you've got high priced breeding stock and these old bulls get old. You sell him and he is baloney. It costs you \$3,000 to get a young bull to take his place, and the remainderman is paying the difference between baloney and good bull.

DEAN CASNER: I have a lot of good bull. I don't know much about baloney, but go ahead.

PROFESSOR GREETHER: Then the remainderman is stuck somewhere along the line, isn't he?

DEAN CASNER: The remainderman is stuck if the bull dies and isn't there, but you can give a life estate in the bull to the life tenant and if the bull is still there, whatever is left of him can go to remainderment. It is like any other asset that is used up in use. You can't preserve anything for the remainderment unless you require the life beneficiary in some way to take a particular amount of the income and set up a reserve in order to pool back what is being used up by use. I think this depends upon how much burden you want to put on the life beneficiary. I think in most cases if it is a son you won't want to put that burden on him to force him to build up a reserve to replace the used up bull.

PROFESSOR GREETHER: What if we reverse this the other way: What do you do with the increase from the bull, the calves?

DEAN CASNER: The life estate and remainder in the increase. Again, you've got a question of setting up a life estate in the bull and everything that comes out of the bull. Nothing will come out of the bull as I know, but something might . . .

MODERATOR GINSBURG: I think we can say that we recognize that there is a difference between the problem as it relates to personal property and the problem as it relates to real property.

DEAN CASNER: If you want to go the trust route you can set up rules for the trustee to set up reserves to offset the depreciation of the property in which the life interest exists. You can keep setting up reserves to replace it for the remainderment or you can expend them as you want. You've got the same prob-

lem under a trust, if you put this bull in trust or if you leave him out of the trust.

MODERATOR GINSBURG: I know that Deryl Hamann has read some Nebraska cases that fall right within the condemnation that Dean Casner has made about life estates with power to consume. I will ask Mr. Hamann at this point to tell us what the Nebraska law is.

DERYL F. HAMANN: I will try as best I can. These drugstore formulas, as Dean Casner has called them, one good sample is found in the case of *Abbott v. Wagner*.

DEAN CASNER: A lot of good lawyers are good druggists. That is the reason I use that "drugstore" formula.

MR. HAMANN: In this case the testator gave his wife the property "for and during the full term of her natural life, the same to be her own individual property to use, enjoy, and dispose of as to her shall seem fit," and at the time of her decease the principal of this request or what shall remain thereof is given over to remainderment.

My first question is, "What are the life tenant's administrative powers?" The court says that with this kind of a broad general clause she does have full powers to sell and reinvest the proceeds, but that the proceeds of any such sale she holds as a quasi-trustee for the remainderment. This doesn't give her the power to put it into her own estate or to give it away or to put it in her estate in such a way that she can devise or bequeath it to anyone. As to the limits on her power to take it for her own use, the court says that this kind of a clause gives her power "to invade the principal for her own maintenance, pleasure, enjoyment, and comfort." They go on to say that no matter how much pleasure it gives her, she can't give the property away to her second husband, for example.

MR. ATKINS: Nor take him to California during the winter.

MR. HAMANN: That is a different case.

PROFESSOR GREETHER: That's the famous case of *Coburn v. Birmingham*.

MR. HAMANN: This is one where she was trying to give the stock—and there was personal property in the residue which went under this clause—and she was trying to give the stock away to her second husband. The court, in effect, impressed a trust on it in the hands of the second husband.

Usually, as the court indicates, she would have a power to give a good title to a transferee. There is one case to look out for, *Attebery v. Prentice*, 158 Nebraska, 795, which had the same kind of a broad drugstore clause. In that case the life tenant transferred the life estate for life annuity, \$6,000 a year, plus free medical service for life. Unfortunately, she only lives a year and one-half. The ranch she transferred was worth \$130,000. In that case the court didn't follow the customary route of impressing a trust on the proceeds in the hands of the life tenant; rather it upset the sale itself and took the property away from the transferee. A title examiner looking at the abstract would say that she had a power to give a good title.

The only conclusion I can draw from the case is that the lady was quite elderly, the transferee was her doctor, and although the court specifically denied it they were really saying she was overreached in the case and they went after the transferee. Apparently it was not a bona fide sale for good consideration, but the court doesn't spell that out.

The next question is: "What kind of a tax result will you get with this kind of a clause under present law?" This is assuming this is a power that is set up today, a post-1942 power.

The first thing that would happen, let's say that the husband owns the property and leaves it to his wife. When he dies, do you get a marital deduction for this power you put in trust? The answer is "no." She can't take this property to put into her own estate where she could thereafter give it to anyone by deed or by will. There is no marital deduction. She does not have a general power of appointment.

You say, fine, if she doesn't have a general power of appointment at least when she dies it won't get taxed there. But unfortunately when you look at the general power of appointment clause under Section 2041 she *does* have a general power of appointment of a different kind. Our Nebraska law says that with this kind of a power she can invade for her pleasure and comfort. And 2041 says that if her power to invade is limited by an ascertainable standard, then she does not have a general power of appointment. However, a power to invade for her pleasure or enjoyment is not an ascertainable standard.

DEAN CASNER: That ascertainable standard has to be one related to health that spells out maintenance and support.

MR. HAMANN: Health, maintenance, and support. The result of this is, you've done about as bad a job as you could possibly do if you set out to design a bad job.

For example, you take a \$200,000 estate. You have all seen articles or been at lectures where someone has pointed out that with proper planning you can minimize your estate taxes to about \$9,600, but if you follow a simple will route, giving everything to the wife outright, and then when she dies she gives it to the kids, it is going to cost the kids in estate taxes well over \$30,000 before it gets down to them. With the kind of will we are talking about here, according to my computations, where you don't get a marital deduction when the father dies and you get a general power of appointment when mother dies, it is going to cost about \$55,000. That's all I have on this point.

DEAN CASNER: That is extremely important. This is something that has happened so many times and so unnecessarily.

MODERATOR GINSBURG: That seems to be, as I might say from my short survey of the Nebraska law, about the size of the cases that have been up in our Supreme Court, indicating to me that our lawyers have not been very careful in the choice of the language they have used in this sort of a transaction.

Now, Mr. Oldfather, do you care to sum up your analysis of any Nebraska law?

CHARLES E. OLDFATHER: I had a rather easy assignment. I was to apply Nebraska law to III and IV of Dean Casner's outline. We have no gift tax. I don't think we know whether or not we have an income tax. And Henry Grether sort of stole my thunder on inheritance taxes.

Let me emphasize that again. It is a subject that we don't particularly propose to go into here today because it is a subject all of its own, but there is Nebraska inheritance tax impact which may or may not be the same as the federal impact when you try to set up one of these arrangements, particularly in the life estate or the power of appointment field.

One of Dean Casner's comments struck me when he stated the rule of the Restatement in regard to the duty of the life tenant to pay taxes. I believe he indicated the rule of the Restatement was that the life tenant has that duty to pay taxes to the extent that there was income from the property. I don't know that I have ever researched it, but my recollection is that we have Nebraska cases that definitely say that the life tenant *must* pay the taxes—period.

MR. ATKINS: I agree with you.

MR. OLDFATHER: We are beginning to see more and more city real estate problems where you have the single building with the life estate. The widow has lived for thirty years and they haven't been able to get urban renewal passed and it can't be rented and there is no money to remodel it. You are in a real trap on this tax question if you haven't built in the necessary powers of sale and converting it into a trust, and that sort of thing.

DEAN CASNER: Let me ask a question on that because it surprises me a little bit. When I said we took the position that the life beneficiary had to pay it, that means that if the remainderment hadn't paid it the remainderment could make the life tenant reimburse him for the amount that could have been paid to the life beneficiary in the light of the income, and that doesn't mean actual income; it means either actual income or the economic worth of the property, whichever is higher.

The question, though, is that if there isn't enough in the life beneficiary's income or in the economic worth of the property, is the life beneficiary under a duty vis-a-vis the remainderment to pay it? The question is if the life beneficiary pays it, can it make the remainderment contribute to part of the tax bill? The government, of course, may go against the life beneficiary and hold the life beneficiary for the full amount of the tax. I don't know that you've got any Nebraska decision that says the life beneficiary couldn't make the remainderment contribute part of the bill if the life beneficiary's income is not adequate. That is the real problem.

MR. OLDFATHER: I think that is up in the air.

MR. ATKINS: We have had one problem in our area that we never thought of. With the deep wells a great deal of the dry land is being reclaimed so that they are not with dry land crops. However, to put down those wells, roughly, we would say, is \$10,000 and the normal well would reclaim 80 acres of land, but then when you have the well you must have the necessary laterals, and the most economical way is by cement, so you will end up with about \$50,000 of capital investment to reclaim 80 acres of land. Then you get into a fight with the life tenant and the remainderment as to who is going to pay the bill. If they can't agree they just sit there and let the grasshoppers and the Democrats consume it.

MODERATOR GINSBURG: I think as a good Democrat I can say in answer to Auburn that if you had had a good lawyer it wouldn't have happened in the first place.

I want to thank our panel, unless they have something more they want to challenge Dean Casner on or want to bring up. I am extremely grateful to the panel. As you will note, if I may take the liberty as your presiding officer to state, there is comparatively little Nebraska law, and it just goes back to the question that there being no law, proper legal draftsmanship will answer the problems that you may come to face. The only real thing about it is that you should be lawyer enough to recognize the problems that might arise.

I want to thank Dean Casner more than words can say for the wonderful presentation and the wonderful education he has given us this afternoon.

The institute will continue tomorrow morning at nine-thirty, I believe.

MR. ATKINS: Herman, I want to make one correction as to the oil and gas leases. So far it doesn't provide that a conservator can apply. Therefore, if you've got anybody under conservatorship perhaps you should have him elect to be discharged and make the lease himself and then go back and have it ratified, or else declare him crazy and then the court take care of him.

MODERATOR GINSBURG: Thank you, Mr. Atkins.

We will now adjourn and will meet here for the subject "The Revocable Trust" at nine-thirty tomorrow morning. I declare this meeting adjourned.

[The institute adjourned at four twenty-five o'clock.]

## THURSDAY BANQUET SESSION

October 21, 1965

The annual State Bar Association dinner was presided over by President Cohen.

PRESIDENT COHEN: I believe that everybody has been well fed, and if you haven't, George Turner will take all complaints after the dinner. He has so many duties now I might as well add a few more.

I should like to introduce to you our people here at the head table. We have a lot of distinguished visitors to our city on this occasion.



Starting at my extreme left, Mr. Lew Jeffrey, Program Director of Station KMTV, and his good lady, Mrs. Jeffrey. Will you please stand.

Mr. Murl Maupin, President-Elect Designate of the Nebraska State Bar Association, and his lady, Mrs. Maupin.

Professor A. James Casner, Associate Dean and Weld Professor of Law, Harvard Law School, and his good lady, Mrs. Casner.

The Honorable John W. Delehant, Judge of the United States District Court, retired.

The Honorable Harvey M. Johnsen, Judge of the United States Court of Appeals for the Eighth Circuit.

The Honorable Robert L. Smith, Judge of the Supreme Court of the State of Nebraska, and Mrs. Smith.

The Honorable Harry A. Spencer, Judge of the Supreme Court of the State of Nebraska, and Mrs. Spencer.

The Honorable Edward F. Carter, Judge of the Supreme Court of the State of Nebraska.

Mr. Edward W. Kuhn, President of the American Bar Association, and Mrs. Kuhn.

At my far right, Mr. Robert D. Mullin, Chairman of the House of Delegates, and Mrs. Mullin.

Mr. Clarence A. Davis, member of the Board of Governors of the American Bar Association, and Mrs. Davis.

Mr. Herman Ginsburg, President-Elect of the Nebraska State Bar Association and about to be President, and Mrs. Ginsburg.

Dr. Willis D. Wright, President of the Nebraska Medical Association. Dr. Wright told me confidentially that the Nebraska Medical Association is now going to recognize Medicare.

The Honorable Richard E. Robinson, Chief Judge of the United States District Court for the State of Nebraska, and Mrs. Robinson.

The Honorable Hale McCown, Judge of the Supreme Court of the State of Nebraska, and Mrs. McCown.

The Honorable Leslie Boslaugh, Judge of the Supreme Court of the State of Nebraska.

The Honorable Robert C. Brower, Judge of the Supreme Court of the State of Nebraska, and Mrs. Brower.

The Honorable Paul White, Chief Justice of the Supreme Court of the State of Nebraska.

For the moment I am merely going to introduce the next gentleman, the Honorable Justice Samuel Freedman of the Court of Appeal, and his lovely lady, Mrs. Freedman.

I am the Honorable Harry B. Cohen . . . and my lady, Mrs. Cohen.

Then over at this table is my sister, Rose. My brother and his wife, Dr. Louis Cohen from Little Rock, Arkansas. For the benefit of all you Northerners, he has been integrated. And my son, Robert. Also Mr. and Mrs. Jacobs and Mr. and Mrs. W. O. Swanson.

Now beginning at my left at this table, the Honorable Fred Jacobberger, President of the City Council of the City of Omaha and Acting Mayor, and Mrs. Jacobberger.

Mr. Charles H. Whiting, President of the South Dakota Bar Association.

Mr. Edward Dailey, President of the Iowa State Bar Association, and Mrs. Dailey. We attended the Iowa State Bar Association meeting and Mrs. Dailey brought six of her children, but she couldn't to this meeting.

Mr. George H. Turner, and Mrs. Turner.

Mr. William J. Baird, President of the Omaha Bar Association, and Mrs. Baird.

Mr. F. C. Bannon, President of the Kansas State Bar Association, and Mrs. Bannon. I call her "Jim." That's her name!

Mr. George F. Guy, President-Elect of the Wyoming State Bar Association, and Mrs. Guy.

Mr. Roy E. Willy, Past Chairman of the House of Delegates of the American Bar Association and past a few other things—I have known him a long time—and Mrs. Willy from South Dakota.

Mr. John J. Wilson, Delegate of the Nebraska State Bar Association to the House of Delegates of the American Bar Association, and Mrs. Wilson.

We have inaugurated for the first time in the history of our Bar Association recognition of those of our members who have attained vintage—that means at least fifty years in the practice of law. These gentlemen have all reached their fiftieth year of ad-

mission to the practice in this state. George, will you deliver these as I call their names. We present the Fifty-Year Certificate to:

Mr. Warren H. Howard, Omaha  
Mr. John L. Cutright, Fremont  
Mr. William H. Heiss, Gering  
Mr. Thomas J. Kennan, Geneva  
Mr. Edward J. Robins, Fremont  
Mr. Charles W. Peasinger, Omaha  
Mr. Henry S. Payne, Omaha  
Mr. Merle M. Runyan, Broken Bow  
Mr. John J. Gross, West Point  
Mr. Albert E. May, Omaha  
Mr. Walter B. Sadilek, Schuyler  
Mr. Leon W. Samuelson, Franklin  
Mr. Lowell L. Walker, Columbus  
Mr. Davis Swarr, Omaha  
Mr. William Grodinsky, Omaha—my partner!  
Mr. Jacob J. Friedman, Omaha  
Mr. Mark J. Ryan, South Sioux City  
Mr. Paul L. Martin, Sidney

Will all you gentlemen and your wives please stand up.

There are some Fifty-Year Honorees that weren't able to be here:

Mr. Lawrence Chapman of California  
Mr. C. F. Connolly, Omaha  
Mr. Hugh H. McCulloch, Omaha  
Mr. Harry L. Norval, Seward  
Mr. Thomas J. Dredla, Crete  
Mr. Robert G. Simmons, Lincoln

I have a telegram that I would like to read from Senator Hruska:

My calendar reminds me that the Sixty-Sixth annual meeting of the Nebraska State Bar Association begins today. Deeply regret that because we are in the final throes of the adjournment rush I cannot be with you and our colleagues for this important occasion. Will especially miss the banquet Thursday evening. Please convey my warmest greetings to those attending. Heartiest congratulations to yourself. Best personal regards,

Roman L. Hruska  
U. S. Senator from Nebraska

We annually deliver two awards: One is entitled the President's Award; the other is entitled an Award of Appreciation and comes from our Public Relations Committee.

One award usually goes to an outstanding man who has devoted a great deal of time and done a marvelous job legally for the Bar Association, for the lawyer, and for the profession of law as a whole. The other goes to a non-lawyer, either an institution or a person, who has rendered a tremendous amount of service to the bar.

This year the Award of Appreciation to a non-lawyer is being presented to Radio Station KMTV of Omaha, which has made an outstanding contribution in our public relations program. During the whole year they carried a half-hour public service television program, and also another one in connection with Law Day. They cooperated with the Bar Association of Omaha. They presented various talks rendered by members of the Omaha Bar Association, explaining areas of the law in a non-technical manner to the public.

I am very happy indeed to make this award to Station KMTV. Mr. Owen Sadler is the Executive Vice-President of the May Broadcasting Company but he was unable to be here, and Mr. Jeffrey will receive the award for him. Mr. Jeffrey!

LEW JEFFREY: Gentlemen, on behalf of Mr. Sadler, who could not be here this evening, we are most appreciative of this award. Thank you very much.

PRESIDENT COHEN: The other award is made to a lawyer. I don't think he knows he is going to get this award because it is supposed to be secret, and lawyers, you know, as a rule can keep things confidential.

This man has rendered outstanding service to the legal profession. He has been a lawyer in this state for a number of years. He has on all occasions devoted himself to the furtherance of justice. He has done a lot of work publicly. He was attorney-general of the state back in 1919. He is a past president of the Nebraska State Bar Association. He was a member of the commission that compiled our Nebraska statutes 'way back in 1922. He is a trustee of Nebraska Wesleyan University. He has been very active in developing the water laws of this state. At one time he was undersecretary of the Interior under President Eisenhower.

I am happy indeed, and it gives me great pleasure to present the President's Award to Mr. Clarence A. Davis.

CLARENCE A. DAVIS: Mr. President, I want to thank you, the members of the committee, and many of the members of this body for this award, which I do very deeply appreciate.

I would be a little remiss if I didn't also say that if it hadn't been for George and June Turner—they won't like this—helping me over an awful lot of rough spots through the years, I don't think we would be here.

I have seen many, many awards given all over the United States at various times. I never yet saw a recipient who could do the job of receiving his award gracefully. If he says, "Why, Mr. President, I don't deserve any such honor as this!" you just know he is a hypocrite, see. On the other hand, if he says, "Yes, I've achieved a good deal with the help, of course, of the rest of you," then you know very well he is bragging. So the third course, and the only practical course to take on one of these occasions, I am thoroughly convinced, is to say "Thank you all over again, Harry," and then shut up!

PRESIDENT COHEN: We are very honored this evening to have with us in our midst one of our neighbors to the north, from the Dominion of Canada. This man was born and reared in Winnipeg. I know when he was born, so I am just a little older than he is. He was educated in Winnipeg in its public schools, and also at the University of Manitoba. He received his B.A. degree in 1929 and his LL.B. degree in 1933. But he didn't stop there. He wanted some more degrees. So in the course of time he has accumulated four honorary degrees: University of Windsor, Ontario, in 1960, Doctor of Literature; Hebrew University in Jerusalem in 1964, LL.D.; North Dakota State University, 1965, an LL.D.; and University of Toronto, 1965, an LL.D.

He is also very active in his bar association. He was president of the Manitoba Bar in 1951-52. He is very civic minded. He is in a lot of things. He is a member of the Board of Governors of Hebrew University in Jerusalem. He has been a member of this board since 1955. He is chairman of the Rhodes Scholarship Committee of Manitoba.

He has spoken in the United States, Canada, Britain, South Africa, and Israel.

He was admitted to the Bench in Manitoba. He was appointed Justice of the Court of the Queen's Bench in 1952, and he was elevated to the Court of Appeal for the Province of Manitoba in 1960. The Court of Appeal is equivalent to our state Supreme Court and to our Eighth Circuit Court. It is an appellate court having jurisdiction over the Dominion of Canada as a whole and also the Province of Manitoba.

I have known Sam for twenty-five or thirty years at least. He is a scholar. He is a gentleman, and just a real fine person.

It is a pleasure, indeed, to have Sam come to Omaha for the first time. It is an honor to me to introduce to you the Honorable Sam Freedman, Justice of the Court of Appeal of the Province of Manitoba.

[The audience arose and applauded.]

## ADDRESS

### Honorable Samuel Freedman

Mr. President, Distinguished Guests, Ladies and Gentlemen: I greatly fear that you have just heard the speech of the evening. If, following this evening's proceedings, I should be told that my good friend, Harry Cohen, made a better speech than I did, my only defense will be that he had the better topic.

I think I ought to warn you that there was probably an element of self-protection in that introduction because, after all, it was Harry who invited me to be the speaker this evening and perhaps he had in mind the story of the Scottish professor with which you are doubtless familiar. You remember this was the Scottish professor who was invited to address an audience of Welsh miners. For this audience of miners, honest, upright, but quite unlettered people, our professor chose as his topic, "The Use of the Final 'E' in Chaucer." Then he addressed himself to his task in a heavy, weary, plodding, toilsome, lumbering, excavating style until heads drooped everywhere. Finally the ordeal ended. And when it did, one of the miners walked up to the speaker and said to him, "Professor, you did your best, but I say 'To hell with them that asked you!'"

I am delighted to have been asked this evening. I have had some interesting experiences in that regard. Some time ago in the City of Winnipeg a ladies' organization was planning to have a bazaar, and for this bazaar they needed a master of ceremonies. The ladies met in executive session for the purpose of selecting a master of ceremonies. Someone proposed the name of Sam Freedman. One of the other ladies said, "Oh, he would never accept. It is not in his line."

The proposer said, "I am not sure. I think he would accept it."

That started a merry debate, some saying he would accept, some saying he would not accept, until the chairman, who knew her parliamentary procedure, said, "Girls, what are we arguing about? Let's put it to a vote. How many think he would accept? How many think he would not accept?" The question was sol-

emly and formally put. The majority decided that I would not accept and I was not asked.

Mr. President, I should like to address myself this evening to the theme "A Three-Fold Counsel for Our Profession." My approach is going to be purely personal. I am going to refer to three elements, three aspects of this counsel which seem to me to be relevant and pertinent. They are in no sense exhaustive. I am sure others could add to the list other elements of counsel no less pertinent and no less valuable. But I hope that in the course of my presentation of them occasionally you may hear an echo of your own thoughts and perhaps a reflection of your own ideals.

I take as the first aspect of this three-fold counsel a loyalty to our profession, and appreciation of the role of lawyers in society, a recognition of the part played by bench and bar in the maintenance of the rule of law.

I think it is necessary that occasionally we should remind ourselves of the law's triumphs and of its glories. The critics of the law are by no means backward in pointing out to us the law's failures and the law's shortcomings.

When I speak of a loyalty to the profession I am thinking of the profession in every aspect, in all its branches. I sometimes think that there is less than adequate appreciation by those who serve in one particular branch of the law of the work being done in a kindred branch. Sometimes I think it is very much like the old ditty,

"We are God's children; you  
All others, will be damned!  
There is no place in heaven for you;  
We can't have heaven crammed."

A visitor to one of the English inns of court once commented on the fact that the door through which he had entered was built unusually low. His host said to him that this was designedly so, adding that all who entered that temple should be willing to bow their heads. I think it is that attitude of humility which will enable us to recognize the role played by others who work in the fields of law, but not quite in the precise area to which we devote our labors.

Would you allow me to say just a word about one or two of the minorities of the legal profession. I refer to one such minority, those who are engaged in the practice of criminal law. I know that the public has a curious misconception about criminal law and about those who engage in it. Some of the more sensational

paper-back novels, some of the older Hollywood films, have created a spurious image of the criminal lawyer. They have portrayed him as cunning, slick, tough, professing the philosophy of the prize ring expressed in the language of the pool room. He speaks out of the side of his mouth and punctuates every sentence with a spit. Well, that is an image that is a fantastically false one. Rarely, if ever, will its prototype be found in true life.

I venture the observation that criminal law can be and is being practiced on a high ethical and responsible level. My criticism is that too few lawyers will practice criminal law. I am not familiar with the situation in your country, but I can tell you that in Canada, in every city, there are many offices—large, middle-sized, small—which will have nothing to do with a criminal case. What is the result? The public gets the impression that because leading civil counsel will have nothing to do with criminal matters, that criminal law must be something less than wholly reputable. Against that view, I take my stand! Never is the lawyer engaged in a more worthy task than when he exerts his efforts in the defense of the liberty and, in some extreme cases, of the life of the individual.

The situation in England is quite different, I may tell you. There, leading civil counsel can be associated with murder cases most unsavory and most sordid without the slightest impairment of their reputation. Indeed, sometimes they may even be knighted therefor.

Let me refer for a moment to another minority of the legal profession. I am thinking of the professional law teacher. I know there is a tendency sometimes on the part of the practicing bar to look upon the professional law teacher as an academic theorist. I would like to remind you of what is undoubtedly the case, that it is so often the professional law teacher who alone has the time, the detachment, yes, if I may say so, the legal scholarship to see the judicial process in the large, to situate a particular case into the context of this sphere of law with which it is concerned, to assess the trend of judicial decisions, and to evaluate from time to time the changes in legal theory. I think that every judge who has written an opinion has, from time to time, found himself indebted to the scholar in his study who has not only prepared the young law student to become the lawyer of tomorrow, but who, by his legal writing has made valuable comment upon the law of today.

Let me say a word about the practicing lawyer, and I am thinking not only of the trial lawyer but of the attorney, the



solicitor, the man who, in his office, guides clients by sane, sensible, practical advice. It is a magnificent function. I am not going to speak of it at length because, as a member of the judiciary, I would like to comment for a moment about those lawyers who are trial lawyers, the advocate in the court room. I know that there is a feeling amongst many people that every judge, from the moment that he is appointed to the bench, moves speedily to the conviction that the practice of law has sharply deteriorated from the days when he was at the bar. Well, I don't hold that view. But I think the members of the bench who are in this room tonight will agree with me that the judge has a unique opportunity of assessing the gradations of ability amongst lawyers, gradations from what I might describe as uniform excellence at the top to something, shall I say, perceptibly below that.

Whenever I think of the good trial lawyer I think of an old legend of a stern, just king who was known for the rigid impartiality with which he administered the laws of his kingdom. One day the king's son became charged with an offense, a capital offense of which he was only technically guilty and for which the penalty was death, death by having a huge rock thrown upon the convicted person's head. Everyone wondered whether the king would set aside the law, particularly since the offense, as I've said, was entirely technical in character.

As the day of execution approached, the king's soul was torn with anguish. He finally came to his wise counselor and put the problem before him. The wise counselor said to the king, "Grind the rock into dust of finest powder, and let it fall gently upon his head."

Sometimes in court a case is presented in such a dull, heavy, ponderous manner that the effect is indeed like the rock upon the head. What a joy it is to hear the lawyer who says what should be said, who omits what should not be said, and who, without sacrificing any of the solid substance of his case, is able to present it so that it reaches the court in that pleasant, welcome, and agreeable manner which is the hallmark of the great men of our profession.

A loyalty to our profession in all its aspects, I suggest then as the first aspect of this three-fold counsel.

A second, a recognition that life is not always grim, that it has its moments of lightness and of gaiety. To savor those moments can lighten many dire hours of stress. In short, I counsel the development of a sense of humor.

Man differs from other beasts, it has been said, in that he is the laughing animal. But not all men. Some men seem to be destined to be solemn from the cradle to the grave. Others, on the other hand, seem to see the comical situation in every event. Indeed, sometimes the event is not quite as funny as they themselves see it. Something within themselves invests the surrounding circumstances with a quality of gaiety.

It is an ancient thing, this quality of humor. They say that certain archeologists dug up an excavation and they saw printed on it something which has been attributed to Heraclitus. It is a conversation between two men. One says to the other, "Hurry! A saber-toothed tiger is fighting with your mother-in-law!"

The other man answers, "What care I what happens to a saber-toothed tiger!"

My mind goes back to my student days when our life on the campus was brightened by the periodic visits of the Oxford debaters. They came to Canada, they came to the United States, also, I recall, and they brought with them a different type of debating, a type of debating marked by a light, deft touch, somewhat different from our serious, rather statistical type of presentation. We owed a great deal to the influence of the Oxford debaters.

I can recall there was one occasion when they came across by ship and landed at New York City and they were greeted in customary American fashion by a few reporters. They were interviewed right at the dock. They were asked many questions, and one of the debaters was asked if he would do any writing while he was on the American Continent. He was asked specifically whether he would contribute to the "Atlantic Monthly." He said, "No, because on the voyage across I've contributed to the Atlantic daily."

Some of the debates that they have at the Oxford Union are an index to the kind of thing I have in mind. Two or three of these debates are perhaps familiar to you: RESOLVED: That to be swum again as often as it has been in the past would not be in the best interests of the English Channel. RESOLVED: That it is better to have loved and lost—period. RESOLVED: That it would have been better that instead of the Pilgrim Fathers landing on Plymouth Rock, Plymouth Rock had landed on the Pilgrims.

There may even be some humor in our own profession. I know that law is a serious business. One doesn't normally look for humor in a mortgage under the Real Property Act, or in covenants in a lease, and I am sure that there are gayer things by far

than a warrant of committal to jail. But even in our profession there are occasionally lighter moments.

You know, in our country, it may be the same in the United States, one lawyer refers to his adversary as "My learned friend," and the reason for that is so that the judge will know they are not referring to him.

May I say in the presence of members of appellate courts that it has been said that every lawyer, when appearing before a tribunal consisting of more than one judge, should repeat each argument three times: He states the argument the first time in order that one of the judges may grasp his point. He repeats the argument the second time in order that, while he is repeating it, the judge may explain the point to his brethren. Then he repeats the argument the third time in order to correct the erroneous impression which that judge had of what he said.

One remembers the experience of the client who received a letter from a lawyer which went something like this: "We act for Mr. John Brown. We understand you have been keeping company with his wife. We would like you to come down to our office on Thursday at two o'clock to discuss the matter."

In due course the reply came to the lawyer and it read thus: "I have received your circular letter. Unfortunately I am busy on Thursday and can't be at your office, but whatever the other boys at the meeting decide to do will be perfectly all right with me."

One remembers the lawyer who practiced informally, I think in Missouri. He always appeared in court in his shirt sleeves without a jacket. Then one day he had an appeal which had to go to Jefferson City. One of his friends said, "You mustn't appear in your shirt sleeves with your braces or galluses showing. Wear your jacket."

The Old Adam dies hard, you know, and this was a rugged individualist. He argued the case in the court of appeal precisely in the dress in which he would have argued it back home—and he lost.

A short time later one of the judges of the appellate court came to his town and he saw this judge and said to him, "Tell me, Judge, did I lose that case before your court because I appeared in my shirt sleeves with my braces showing?"

The judge said, "No, no that wasn't the reason."

The lawyer said, "Well it was a darned sight better reason than the one *you* gave me."

I can tell you of a true story that happened in the Province of Manitoba. It was a domestic relations case. A woman was petitioning for divorce. She was represented by counsel. The husband appeared himself. When the case was called, the husband rose to his feet and said to the judge, "Judge, this isn't right. This isn't the way a husband and wife should live, she in one home, I in another. Tell her to come back. Tell her that I want her to be with me so we can re-establish our lives together."

It was an appeal from the depth and the judge was visibly moved. Then he looked at the petition for divorce and he saw in paragraph 7 of the petition an allegation that this man was living in an illicit and adulterous relationship with one Beulah Matilda McGillicutty. He looked over his glasses at this man and he said, "Do you know a lady named Beulah Matilda McGillicutty?"

A light dawned in this man's eyes and he said, "Yes, Judge. Do you know her too?"

May I express the hope that a willingness to see the lighter side of life, both in and out of our profession, will enable us to paint the rainbow above the cloud.

I move on the third aspect of this three-fold counsel, and it will be the last I will deal with this evening—an attachment to a free society.

It seems to me that the Twentieth Century, particularly the last two or three decades through which we have lived, have brought to a focus a clash between two fundamental ideologies. The conflict has been variously expressed between democracy and authoritarianism. I think we understand the differences between the two systems, whether they be of the communist or the Nazi-fascist type on the one hand, or those characteristic of a free society on the other hand.

A free society is difficult of attainment, but, in the words of Dennis Brogan, "Life is on its side, and so is the whole western tradition."

What is the difference between them? One worships the sovereignty of the individual; the other the sovereignty of the state. One believes in the fundamental freedoms—freedom of speech, freedom of the press, freedom of assembly, freedom of conscience; the other governs, in the words of Stanley Baldwin "by the insolence of dominion and the cruelty of despotism, bringing into aid brown houses, concentration camps, exiles into Siberia." One has the ethical outlook on life and believes in the dignity of human personality; the other has the pagan outlook

and believes that man eats and drinks and sleeps and lives and dies and goes down into the ditch, man and beast alike.

I know that this country was nurtured in freedom. It was conceived in the ideas and the ideals of a free society. I suppose that the story of Jefferson's last days is part of American folklore. A distinguished Canadian reminded us of it not long ago. Do you remember that Jefferson had prayed that he be allowed to live until the fiftieth anniversary of the Declaration of Independence. And he lived exactly to the fiftieth anniversary, dying on that very day. In a letter to a friend, shortly before his death, he wrote, "Here we stand as a bulwark against the return of tyranny and of bigotry. As for me, I prefer the dream of the future to the history of the past."

An attachment to a free society is not always an easy thing, ladies and gentlemen. It carries with it certain responsibilities, certain challenges. I would suggest that one of them is a refusal to yield or surrender to what I might describe as the "tyranny of labels." In 1772, at a time in England when there was a conflict in politics between the Whigs and the Torys, the great Samuel Johnson was introduced by Boswell to a relatively unknown philosopher, a man named Sir Adam Ferguson. The conversation with the great Dr. Johnson, unfortunately caught here in an unhappy moment, was short and curt. Boswell records in his diary that Sir Adam was unfortunate in his topics, because when Sir Adam Ferguson ventured to express an opinion the great Johnson shut him off with the words, "Sir, I do perceive you are a vile Whig."

A Canadian editor writing about this subject describes it as a "crushing irrelevancy." It was that, but it was something more than that. It was a simple surrender to the tyranny of labels. Instead of meeting argument with argument on the merits, one avoids the conflict, one avoids the discussion by hurling an epithet, an insulting epithet at your adversary.

Do you believe that reasonable safeguards should be taken in the interests of the safety of the state? Then obviously you are a witch hunter.

Do you believe that there are certain dangers in inquisitorial investigations, involving, as they might, guilt by association, guilt by kinship, ordeal by slander? Then you are obviously a "fellow traveler" and playing the Soviet game.

Or do you believe that there are false positions at both extremes and you prefer to make up your mind upon individual as-

pects of these problems as they arise from time to time? Then, in that case, you are a neutralist, a timid soul, afraid to stand up and be counted.

I say that the man who has a reverence for the ideals of a free society will not succumb to, or be overcome by, the tyranny of labels.

What is required if we are to make our society be actually free in name and in practice is a spirit of tolerance and of understanding. I am not pleading for an abstract love of humanity. I know that the lovers of humanity in the abstract are the ones who get us into all kinds of difficulty. I think of the merry jingle of G. K. Chesterton:

"Oh how I love humanity,  
With love so pure and pringlish!  
But how I hate the horrid French,  
Who never will be English.

"The villas and the chapels  
Where I learned with little labor,  
The way to love my fellow man  
And hate my next-door neighbor."

Well, *not* that is the ideal of the free society, but rather the determination to reject the dislike of the unlike, to be tolerant of everything except intolerance, to remember above all the great words of John Morley: "Tolerance means a reverence for all the possibilities of truth. It means an acknowledgment that she dwells in diverse mansions and wears the vesture of many colors and speaks in strange tongues."

May I suggest that we who have the privilege of being in the legal profession should have a special affection for a free society. A free society is particularly meaningful for those in the legal profession, because the keystone of a free society is assuredly the rule of law, and we ought to become imbued with a sense of the precious value of the free society. We should become convinced that this is something of imperishable worth, for you and I know that in the last analysis the judicial process and the rule of law stand forth as the shield and the safeguard of the freedom of the individual.

I think of classic cases that have taken place over the years. I think of *Somerset's Case* in 1771. You may remember that the slave, Somerset, was being transported by his American owner from Africa to Jamaica, and the ship stopped at a harbor in England. Somerset, the slave, tried to escape and he was bound in irons on this ship. A habeas corpus application was brought to

the court. You know, I have often wondered how it was that the case ever got to court. Who brought this application in?

I went to the record and you will find it in *Howell's State Trials*. It is interesting. It says that friends of the Negro caused an application to be brought by way of habeas corpus. Friends of Somerset? Friends of the Negro?—not likely. Friends of justice. I think *that* is what they were. They brought that case.

Hear Lord Mansfield: "Slavery is so odious that nothing can be suffered to support it except positive law. This case is not allowed by the law of England. Let the Negro be discharged."

The echoes of those words come rolling across the centuries, and they have been heard by courts in your country and in mine. I venture to think that the spirit of *Somerset's Case* must have been in the mind of Chief Justice Warren and all the judges of the Supreme Court of the United States when, about eleven years ago, they proclaimed that segregation in education does violence to the spirit of the American Constitution. We have had overtones of that in our country as well.

Whenever the freedom of the individual has been threatened, whenever it has been invaded from any quarter, the spirit of *Somerset's Case* has again been manifested and expressed, and justice has been vindicated. So I say that we who share the privilege of brotherhood in the law ought to have a special affection for freedom and for a free society.

In the last analysis I suggest to you that the court room, no less than congresses and parliaments, represent a citadel and the sanctuary of our democratic faith.

Here, then, Mr. President, in one person's view are three aspects of a counsel for members of the legal profession: A loyalty to the profession in all its aspects; a recognition that life is not always grim and that it has moments of lightness and of gaiety; and the necessity of having an allegiance to and an attachment for a free society.

One final word. I revere my profession. I am aware of its shortcomings. I know that it is administered by human, fallible men and that it has imperfections, but I have a deep reverence for law and the judicial process. If any young man should ever ask me my advice about choosing law as a profession, I would tell him that if he sought rewards of great wealth, the law was not its best source; that if he expected a life that would be easy, unmarked by study and toil, the law was not for him; that if he ex-

pected supreme mastery of his profession, he would be disappointed because in law perhaps more than in other professions what one knows is always so measurably less than what one needs to know. Performance lags behind aspiration, and man's portion is the road and not the goal. But to travel that road on which great men of a great profession have traveled before him—Mansfield and Story, Jessup and Marshall, Holmes and Cardozo, Erskine and Marshall Hall and Clarence Darrow—can be a stimulation, an enrichment, and a high and satisfying adventure.

[The audience arose and applauded.]

PRESIDENT COHEN: Sam, I am deeply grateful to you for visiting our city. I have been trying for many years to get you here and I am very happy that you took occasion to come here and be presented to our fine profession and a great bar association in the State of Nebraska. It is a joy indeed to have you here with us and I hope you have a nice trip home. Thank you very much.

It now becomes my duty, and a very pleasurable one indeed, to present to this audience and to the members of the bar our next president. Notwithstanding the fact that I am going to present him to you and announce to you that he is our next president, and extend to him the gavel of office, I do want to admonish him that until five o'clock tomorrow night I am still president. Herman!

I have known Herman for many, many years. When I started to Arts College, Herman was already in Law School. I went through Law School with his brother. He came from a little town in Nebraska. He was born and reared in Nebraska. He is a great lawyer. He is a student of the law. He is a fine administrator and a gentleman. It is an honor indeed to present to this audience the next President of the Nebraska State Bar Association, Herman Ginsburg of Lincoln, Nebraska.

PRESIDENT-ELECT HERMAN GINSBURG: As I accept this gavel as the symbol of my new position, I assure all of you that I am keenly aware of the great honor that is being conferred upon me. At the same time I am just as keenly aware of the great responsibility that is being conferred upon me.

I feel that the responsibility is two-fold: First, to see to it that our Association gives the service to its members which they are entitled to expect; and secondly, that our Association gives the service to the public that the public is entitled to expect. And perhaps the second is the more important of the two. Be that as it may, I feel very keenly my own inadequacy to fulfill the re-



sponsibilities that I have mentioned to you. I am, frankly, scared. There is only one thing that keeps me from resigning the office right now, and that is a very, very wonderful experience that I have had in recent weeks that I want to share with you.

You all know, all of you from Nebraska, that we sent out a questionnaire asking for volunteers to work for the Bar Association. We have received back over 500 signed and sealed volunteer work applications, if I may call them that. The thing that is so pleasant to me is that many of them wrote at the bottom, "Herman, I don't care to pick anything. You tell me what you want me to do and I will do it." May I say that if I have support of that kind, plus the support of the officers of the Association, the experience that is in our Executive Council that I know I can rely on, and the good will of all of you, we may not be able to meet here next year and say, "We have conquered all the obstacles, we have accomplished everything," but I hope we can certainly meet here next year as I pass this gavel on to Mr. Maupin and we can say, "We at least have progressed."

Thank you from the bottom of my heart for the great honor you have conferred upon me.

PRESIDENT COHEN: Just one announcement: Professor Casner wants us all to return to school tomorrow morning at nine-thirty. Be up, awake, and alert. Ladies and gentlemen, we are adjourned.

[The meeting adjourned at nine-fifteen o'clock.]

**FRIDAY MORNING SESSION****October 22, 1965**

The second session of the Institute of the Section on Real Estate, Probate and Trust Law was called to order at nine forty-five o'clock by President Cohen.

**PRESIDENT COHEN:** Gentlemen, we have a long program, a very, very interesting program this morning on the use of the revocable trust. The first part this morning will be devoted to a film.

I would like to introduce the members of the panel: Professor Michael J. O'Reilly, Professor of Law at Creighton University. Mr. Edwin A. Langley, Attorney at Law, Lincoln, Nebraska. Mr. Louis E. Lipp, Attorney at Law, Omaha. Mr. Robert R. Moran, Attorney at Law, Alliance. And for those of you who may not know me, I am Harry B. Cohen. After this afternoon I will resume practice of the law at Omaha, Nebraska.

I would like to introduce to this audience Professor Casner of Harvard University. All of you undoubtedly met him yesterday. Dean Casner!

**THE REVOCABLE TRUST:  
AN ESSENTIAL TOOL FOR THE PRACTICING LAWYER\***

**A. James Casner**

I thought it might be helpful, before we start showing the film, to tell you a little bit about the way in which we will proceed. The film is in two reels. The first reel takes about thirty to thirty-five minutes to show, and then there will be a short intermission while the camera changes to the second reel. It will not be a long enough intermission to leave the room because we will go on rather quickly, as soon as the film is changed, to show the second reel. It also takes about thirty to thirty-five minutes. The over-all showing time of the film is about an hour and fifteen minutes.

After the film has been presented we will then have a discussion with the panel to comment particularly on the aspects of the film where there may be Nebraska law that ought to be brought out to the attention of the audience, and discuss other aspects of the problems raised in the film.

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\* Transcribed from reporter's notes without editing.

In the intermission I want to tell you a little bit about some of the problems we had making the film and some other interesting things that occurred during the course of its development.

I think now we will get under way with the film.

[Showing of American Bar Association film "The Revocable Trust: An Essential Tool for the Practicing Lawyer."]

[Intermission.]

DEAN CASNER: I thought some of you might be a little bit interested in the making of this picture. While what you see is a continued presentation, most of these shots were less than a minute long. In other words, you go along in doing this and maybe do about 45 seconds to a minute of shooting. Then the camera cuts. Sometimes some of the scenes were done as many as seven or eight times in order to produce the result that the director of the film thought out.

We shot this film in New York, at one of the professional studios in New York. We had a director, of course, who supervised everything. We had a complete camera crew and a different sound crew and different people to move scenery around on the stage. Everybody had certain things to do.

Even though you are operating in a soundproof studio, if there is any noise of any kind that the sound man picks up, you have to start over again. For example, if a jet airplane took off from Kennedy Airport or LaGuardia, this sound track would pick it up and we would have to stop and wait until the airplane got out of New York, and start over again.

One day we were shooting and the sound man said, "I'm picking up a ham radio operator who is broadcasting." We finally found him and explained the situation to him, and he very kindly stopped broadcasting so we could go on with the film.

We would start about seven in the morning, when the makeup man would come in to make me up. The man who made me up made up Rhonda Fleming the week before. So he had quite a change of pace. I had all this makeup on, eye shadow, and so forth. I looked quite different. I wouldn't go out on the street for fear I might be mistaken for what I was supposed to be doing.

It is quite an experience to go through all this. We took about four days. We would start about seven in the morning and go until about seven at night, for four continuous days. We finished and had a big celebration at one of the fancy eating places in New York, and I went back to Cambridge.

I got a call Tuesday of the next week saying that we had to do it all over again because the camera man had failed to synchronize his speed with the sound man. The result was that the sound and the film were not together. So back we went a week later and spent four more days in New York going over the same thing again.

Those are some of the background features. If you will go on now, we'll have Reel II.

[Second reel.]

PRESIDENT COHEN: We have only a little time left to get into the application of Nebraska law, so we are going to proceed immediately. The panel have all done a lot of research work on Nebraska law.

I am going to ask Professor O'Reilly to get into the area of whether or not this is testamentary in character and also into the area as to rights of creditors.

MICHAEL J. O'REILLY: Dean Casner, Mr. Cohen, and Members of the Bar here today for this discussion: First in a very early period our state was confronted with the question of whether or not the kind of trust we are talking of here today was in fact testamentary or whether there was a passage immediately upon the death of the person. This was involved, not so directly as some of our discussion today, but with extensive powers of control and with the disposition upon death with reservation of the right to income. In *Whalen v. Swircin*, 141 Nebraska 650, our court, quoting from the Restatement, Section 57, at that time found that the mere fact that these powers were reserved and that there was such extensive power and control in the settlor, did not, in fact, constitute this a testamentary disposition.

As to the insurance trust being an asset of the estate subject to attack by heirs at law, and so on, to bring it into the estate or by the executor, it was held in 131 Nebraska 557, a 1936 case, that the insurance trust such as we heard discussed here today did not constitute an asset of the estate and was not subject to the attack as being testamentary in character.

Dean Casner had mentioned the spendthrift trust provision. At a very early period our court had upheld the validity of provisions in a trust providing against voluntary restraints by the beneficiary and also against involuntary alienation, or the subjection of the particular interest of the rights of creditors.

As I indicated, it was in a very early period, and this can be found at 57 Nebraska 455; followed by 120 Nebraska 436; 130 Nebraska 141; 140 Nebraska 320; and as late as 177 Nebraska 365, wherein our court reiterates its opinion and conclusion that these spendthrift provisions were valid.

With regard to this rather electric question of the validity of the widow's renunciation in terms of these assets, which have been disposed of by the revocable inter vivos trust, we did not have an exact situation in this state in terms of all of these powers. What we had primarily involved in the case I am to discuss briefly was a set of gifts with notes back with the reservation of the right to interest giving the trustee these notes and providing that upon the death of the so-called settlor they were to be canceled. At that time the estate assets, properly so-called, were about \$40,000; the non-estate assets, if this were valid as to the widow, as to *the widow*, I illustrate, then of course she would have her right to renounce under the will and take as an intestacy, but depending on her share, which in this case was one-fourth, it might have been that she would get \$10,000 as opposed to \$20,000. She used terms like "fraud" because at this time we did not have the benefit of Judge Lehman's decision in New York Court of Appeals and several other decisions that came later.

However, our court referred to the difficulty of the problem, and of course if actual fraud were involved we are not in too difficult a problem, but the query is: Is this kind of an arrangement, and much stronger in the case that Dean Casner had illustrated, illusory as to the widow, is it a device, is it a sham so as to defeat effectively her right to renounce under the will?

Our court was not confronted with too difficult a problem by reason of the powers retained here. Nevertheless, the language read in terms of bona fides, in terms of device, in terms of reasonableness, in terms of relationship of the beneficiaries to the settlor, and moreover in this case the widow had not been the mother of all the children, there had been a second marriage. Our court, then, looking at all the facts in terms of the bona fides, felt that this was not illusory or a sham as to the widow. Moreover, it articulated extremely well in 119 Nebraska 314, the fact that with regard to personal property in this state it's almost a total power to dispose of as one pleases, and it is only in the case of realty wherein the dower interest has been enlarged into a contingent interest in the fee by reason of 3101 that we have the problems, so it is almost impossible in the light of our borrowing statutes to have this situation in terms of realty, but it can arise

in terms of personalty, and we have *Simes* as some guide in terms of language.

Of course there has been extensive elucidation on this problem and, in general, it may well be said that in the absence of statute, in the absence of actual fraud, or in the absence of adopting the Restatement position with regard to tontine trusts whereby you can use the tontine trust for purposes of computation of the elective share, however, only to the extent that the general assets are not sufficient to supply and furnish the intestate share in totality.

I might mention to you here today that there is an extremely interesting case which illustrates the various theories of estates and their views on this problem incorporating the Restatement view in 130 N.W. 2nd 473.

I see no particular problem which affords more difficulty here in terms of accumulations and perpetuities, where within the common law rule thinking we have no elaborate statutory provisions and therefore there is no particular problem.

Lastly, 30-1806, the pour-over provision adopted recently in this state: A testator may by will devise and bequeath real and personal property to a trustee or co-trustees of a trust, including an unfunded life insurance trust which is evidenced by a written instrument in existence when the will was made and which is identified in the will—this is the test, remember, we used to apply for incorporation thinking—even though the trust is subject to amendment, to modification, to revocation or termination provided, however, that if it has been revoked there is nothing to pour over to.

Unless the will provides otherwise, the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust, including any amendments or modifications in writing made at any time before or after the making of the will, provided, of course, before the death of the testator. The property so devised or bequeathed shall be administered under the provisions of 30-1801 to 30-1805 in regard to inventory, filing, and so on, duties of the trustee, as if held by a trust created by will, unless the designated trustee or one of the designated co-trustees is a corporate trustee authorized by law to exercise trust powers. And then we find below that the trustee, unless the will provides otherwise, is not required to comply with the provisions of 30-1801 if one of the co-trustees is a corporate trustee authorized by law or is a trustee.

With these brief remarks we can summarize the extent to which what might be called Nebraska substantive and statutory law is involved in these considerations.

I think all of you will agree with me and with this panel here today that this has been an invaluable experience.

DEAN CASNER: I just want to make two comments. One, any time you are dealing with movable assets and the Nebraska law doesn't do what you want to do in keeping the wife from renouncing the disposition, all you have to do is move your trust assets to Massachusetts, set up a Massachusetts trust with a Massachusetts trustee, and our court has held that the wife cannot get at those assets at all, and even though the person dies in another state they are going to apply Massachusetts law in determining whether she is going to have any right to reach those assets.

This is a rather strange thing. It seems to me it is rather foolish for a state to have a body of law where you can move the assets to another state and get a better deal for what you are trying to do. All you do by having such a restrictive law locally is to drive the assets out of the state when it really becomes important to accomplish the goal that you try to forbid.

The second thing, this is a strange statute that you have enacted here in Nebraska in regard to the pour-over. I am a very good friend of corporate trustees. I am a member of the board of one of them. But how they got that provision written into your pour-over statute, I would like to know! I mean, it says in effect that the only way you can get the pour-over property to be a non-court trust is if you have a corporate trustee in connection with the pour-over. I know of no other state that got that written in.

Now I want to tell you something, if you don't want a corporate trustee, you can get the benefit of a non-court trust in Nebraska by funding it in the lifetime of the settlor so that you are not dealing with the pour-over. This provision does not force you to a corporate-trustee if you want a non-court trust with respect to assets put in the trust.

PRESIDENT COHEN: Dean, I think that the lawyers of Nebraska must have been asleep when that legislation was enacted. We've got something now for our Legislation Committee to act upon in the next legislature.

I am going to ask Lou Lipp to give us a little digest of what the difference is between costs as to probate and the use of revocable trusts.

LOUIS E. LIPP: I am afraid I haven't either the capacity or the occasion to give you the learned comments like Professor O'Reilly. Mine is concerned strictly with the economics of it, mainly from the point of view of many of the listeners here, the economics of the bar.

As was indicated by Dean Casner, following the route of the revocable inter vivos trust in avoiding probate will effect some reduced probate costs. It will be more dramatic probably in Omaha than, say, in Lincoln where our minimum fee schedule makes a distinction in the valuation of assets for the calculation of the fee by applying a different formula to non-probate assets than it does to probate assets. As a matter of fact, in computing the attorney's fee in Omaha we only take into account non-probate assets at fifty per cent of their value. I think that the rule may be otherwise in other parts of the state.

So, assuming that the choice was between all of the assets going through probate and all of the assets going through a revocable inter vivos trust, the amount of attorney's fees will be dramatically reduced in the City of Omaha. Naturally, there would be no executor's fee, the fee being fixed by statute, and, assuming that there are no particular complications involved, your general rule there is \$150 on the first \$5,000, two per cent on everything over that. On the other hand, assuming that the assets are all in this revocable inter vivos trust, under the rules of the Omaha corporate trustees they assess a fee of three-eighths of one per cent per year. So if the inter vivos trust which is funded was in existence for many years, obviously that would aggregate to a much larger figure than the executor's fee would be, but if this was all planned within a short time prior to the client's death there would be a saving there in that element of probate costs.

The court costs, obviously, would be almost eliminated. You would have to have a proceeding on the determination of inheritance tax. The difference would be considerably reduced. There's all publication expense and the general court costs which would relate to the amount of the estate, and that of course would be greatly reduced.

The bond premium—most wills I assume would make some provision for maybe a nominal bond, and that would be a small amount. If there were no provision in the will, that bond premium could be of some substance. I assume if you planned the revocable inter vivos trust you would make a provision there of relieving the trustee of the bond premium, which could be an additional saving in cost.



From this other standpoint there is a little bit of consolation to lawyers, generally, who might have some human considerations toward the use of this tool in estate planning as a conflict between their own self-interest, for example, and service to their clients. I might point out to you that the drafting of an inter vivos trust would probably result in a larger fee than the drawing of a will, as Dean Casner indicated. It would be an immediate fee most likely, whereas the prospect of an estate is what it is, an expectancy. Not all of the wills that we draw result in an estate for us to handle. We may not survive the client or he may make other arrangements, or his family may make other arrangements as well. As Dean Casner indicated, the revocable inter vivos trust just is not going to replace *all* wills and I don't think that the attorneys have to be particularly alarmed that this is going to have a tremendous economic impact on their lives.

DEAN CASNER: I want to say just one thing. I think we are going to have inadequate work in this field as long as you do legal work on the basis of expecting to be paid through something that happens in the future. I think a great deal of the inadequate work in this field is because it is not on a currently paying basis. To do a job in this area properly takes time, takes care, takes consultation with clients to be certain that they have appreciated the various things that should be considered. You can't do it quickly and do it properly, and it ought to be paid for. I am doing all I can to get the price up where it ought to be, but I can't do it alone. Nobody in this state can do it unless you *all* recognize what the fee should be. As long as there is a cut-rate operation going on in some law offices you are going to get the general level of pay in this area down.

I think it is in the *client's* interest more than in your interest that the cost get up where it should be because legal advice today, to me, in my mind, is just about worth what you pay for it. If you get a \$25.00 will, it isn't worth any more than that, and it really is going to be very costly in the long run because the great cost today to beneficiaries is not in bad tax advice, not in anything but the poor drafting and planning of various estates, and the fights that result thereafter in court costs, and construction of documents that are inadequately drawn; and the money that goes out of beneficiaries' hands through that channel and into the lawyers' hands is terrific. And it comes from badly drawn documents.

If any of you just take the time, as I do—I read every construction case in this field that comes out in the state courts of last resort in every state, and the volume is terrific. And it only represents a part of what goes on here. There are many,

many cases that never get into the courts of last resort where money has been spent in trying to find out what this plan means and what it says. The clients in the long run will be thousands and thousands of dollars ahead if they pay on a current basis at a proper rate of return for the work that is done so that time will go into it to make it a thorough and adequate job.

PRESIDENT COHEN: Significantly, I heard in the film references to the use of guardians ad litem. I would like to ask Ed Langley to talk on that.

EDWIN A. LANGLEY: Basically, as far as guardian ad litem in Nebraska is concerned, we had discussion earlier relative to whether it was necessary to appoint one, as to a final accounting in your probate matters.

Basically, the statutes say that one can be appointed but there is no requirement that one be appointed, and so as far as this particular position is concerned, unless the court feels that one is necessary it is not required to have one appointed. As far as avoiding probate costs is concerned along this line, without the appointment of one, obviously the costs are eliminated.

DEAN CASNER: I was very much interested in our conversations that we had earlier today about your practice of having executor's accounts approved without the appointment of anyone to represent the interests of minors and unborn and unascertained persons, if that is the practice.

That is not the practice in Massachusetts. We have a statute in Massachusetts which says that if the testator in the will has excused the appointment of any guardian ad litem to represent unborn and unascertained persons, then there will not be any need to have one and the account can be approved without this. But this is a matter, it seems to me, to a considerable extent, of what the person who is disposing of the property really intends, because if he has set up interests in people in a way that doesn't really excuse their being represented in proceedings that may have effect on their rights, I have some question whether your executor isn't in a position where some day he may be sued by some minor that becomes of age, who isn't bound by the executor's accounting, if something went on there that he didn't like. Unless you have some clear mechanism that avoids the necessity of that, you've got a problem on your hands as to how effective the allowance of the executor's account may be.

Now in a trust we can always put in a provision, or should always put in a provision, to the effect that the accounts may be

allowed without those people's being represented. It seems to me in Nebraska it might be worth considering putting in your will some provision indicating that the testator intends that the accounts be allowed without having any guardian ad litem appointed for unborn and unascertained persons to make it clear that the testator wasn't insisting upon this being done.

PRESIDENT COHEN: Reference was also made in the film to the use of appraisers. I found out for the first time this morning that in some of the outlying areas they use two appraisers. I am going to ask Bob Moran to comment on this, and also to comment again when you have a pour-over provision whether, under our law, that makes the portion that pours over a court trust.

ROBERT R. MORAN: I found this morning, much to my surprise, that the rest of the State of Nebraska doesn't follow the procedure in Box Butte County insofar as appraisers are concerned. I take it from the discussion which we had that there is no uniformity at all. I think you just have to look to the situation in your own county, or the counties in which you practice, with respect to the practice of the county court insofar as the hiring of appraisers at the administration level is concerned, as well as the practice of the court with respect to the appointment of an appraiser for inheritance tax purposes. I know that in our area, insofar as the inheritance tax matter is concerned, we are having a high degree of success with respect to this problem in getting stipulations from our county attorney. Obviously if you have cash or you have securities which are traded, you have no real problem in getting a stipulation. But, again, the point is that you have to see what is going on in your county and act accordingly.

With respect to a few of the odds and ends that I thought were interesting, I think we all ought to know that if the trust is properly drawn when we deal with residences, you can still get the benefit of the homestead exemption. I think that this is important from the point of view of the creditor problem as well as the life interest that the widow might have.

Now our court, in *Giles v. Miller*, 36 Nebraska 346, 54 N.W. 551, held that any interest in real estate, whether legal or equitable that gives a right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein. And I think this is important and valuable to us.

One other thing I would like to comment on is the absence, in my judgment, of any title problems when property is—and I am

talking about real estate here—conveyed pursuant to the terms of an inter vivos trust. I am sure that most all of us are aware that 76-268 says that where you convey title to real estate to someone as trustee, that person or that corporation is conclusively presumed to have authority to convey the real estate, and you don't need to worry about what is behind it or what is in the trust instrument, or anything like that at all unless a document is filed that sets up the terms of the trust. But of course that document does not have to be filed.

Another observation that worries me, but doesn't seem to worry any of the other members of the panel, is that I think out in these rural areas we have to watch out for the escheat statutes. Now you recall that those statutes prohibit a foreign corporation from taking title to real estate outside the corporate limits of cities or villages in a three-mile area beyond. I don't think the trust will fail, but I think you are looking for trouble if you aren't aware of that.

With respect to the non-court trust and the court trust, I think that the statute is extremely simple, and Professor O'Reilly quoted it to you. One of the problems that I see is this statement in the statute which bothers me no end, which says that when you bequeath or devise property to a corporation you can make a non-court trust out of it, if it is a corporation authorized *by law* to have trust powers . . . . Now, my question is: Whose law? The law of the State of Nebraska? Or the law of any jurisdiction? I think I would be awfully careful when I got into that as to just what I proposed to do.

PRESIDENT COHEN: Thank you very much.

One very, very significant area I think we should cover is the rights of creditors, because if you put all of your property in inter vivos trust, how are creditors going to attach to it when you die? I am going to ask Professor O'Reilly to comment on that.

PROFESSOR O'REILLY: If I may, I am referring you again, in case I was too rapid before with regard to the *Estate of Sides*, 119 Nebraska 314, on the right of election, and the outside case in another jurisdiction, 130 N.W. 2nd 473.

As you know, gentlemen, we have referred here to the spendthrift trust with regard to voluntary alienation and involuntary alienation and the prohibition thereof. Of course, the settlor cannot effectively, as to his creditors, create a spendthrift trust for his own benefit. That is the first consideration.

Secondly, to the extent that a settlor would reserve an interest in himself, that of course would be subject to the claims of creditors. Moreover, if he combined that interest with a power to appoint the principal it may be that the entire thing would be subject to the claims of creditors.

However, the mere fact that a trust is revocable does not per se subject that trust estate to the claims of creditors, the mere fact that it's revocable. It may be that such estate by statute would make that subject to claims of creditors, which has been done in certain states. And in 36-201 we find that "all deeds or gifts, all conveyances, all transfers, all assignments verbal or written, all goods, chattels, or things in action made in trust for the use of the person making the same, shall be void against the creditors existing or subsequent of such person."

DEAN CASNER: I think if you would turn, in your booklet that you have before you, to the sample trust document that is set out there, it might be useful to make a few comments on the document that is there.

It is very dangerous to suggest any document of this sort for wide-spread use in various states. It must be tested very carefully under local law as to whether there is anything here that might be undesirable in the light of local law.

We had a meeting this morning and I asked the gentlemen on the panel whether they thought there was anything in the provisions set out in this sample trust, the drafted portions of the document, that might be undesirable from the standpoint of Nebraska law. I understand that their answer to that question is that there is no undesirable result that would be produced by following the provisions here on certain aspects of the revocable trust so far as Nebraska law is concerned, that is, the drafted portions of the document.

As you look through that document, however, you'll see you come to certain parts of it where nothing has been drafted. Well, that is due to the fact that in those particular parts you have got to draft it with the particular wishes of the client in mind and with the particular provisions of local law in mind.

Division 4, which begins on page 26 of the booklet, is probably the most important part of the document from a drafting standpoint. That is where you will describe in detail what is to happen to this property from and after the death of the settlor. Now it is in that part that you can provide, for example, for a marital deduction arrangement. If this is a funded trust, then it will be in

that part that you may set up whatever marital deduction share is to go to the wife. If you are running with a combination of a funded trust and a pour-over, then you have got the problem of how you work out the marital share when part of the property that is to go into the marital share is going to come over from the will and part is going to reach the trust, possibly through the channel of insured's proceeds coming down from the policy. There are various ways that this can be done, but it is a very complicated drafting problem and one that must be worked out with considerable care.

This afternoon, at the session on the marital deduction, we will expand more on this problem of working out the marital deduction share when you are dealing with a combination will and revocable trust arrangement and some of the alternative ways of doing that. But it would be in this division here that that would be worked out and spelled out in detail, as well as the provision for the benefit of other beneficiaries that may be involved.

The provision at the top of page 27 is the rule against perpetuities provision. If you are running a long range trust you have got the problem as to when the period of the rule begins to run when you set up a revocable trust. Does it begin to run from the date the trust is drawn so it lies in being as of that time, must be the key to determine the period allowed by the rule; or does it begin to run from the date the power to revoke ceases, as would be the case if you were dealing with a will where the period of the rule is measured with respect to lives in being at the date the will goes into effect? Well, if you haven't got any clear law on that, you had better play it safe and use lives in being at the date the revocable trust is drawn.

We said in the Restatement of Property, and I think it is sound, that where you are dealing with a revocable trust the period of the rule should be measured from the date of the termination of the power to revoke, not from the date the instrument is executed. But if you don't have a clear establishment of that principle there is no point in taking any chance.

One of the most important provisions that you are faced with in drafting this revocable trust is the one that begins on page 32, and that is the provision about the payment of death costs, because if you are setting up a funded revocable trust where a substantial amount of the gross estate property is going to be in this trust and not subject to the control of the executor, you are going to have to work out a very well thought out plan of the sources of funds to pay various death costs. You must remember here that

if you are going to get the full marital deduction for marital deduction gifts, you have got to free those marital deduction gifts from contributing to the payment of death costs. If you don't you are going to get into the problem of the contribution out of the marital deduction eating into the allowable marital deduction, and you can't tell the amount of the death costs until you know the amount of the marital deduction, and you can't tell the amount of the marital deduction until you know the amount of the death costs, and around and around you go.

This provision here must be thought out very carefully to throw that death tax load on these assets in the trust in a way that they will not eat into the marital deduction share that you may have provided back in Division 4. And, particularly, you will find in most cases that you will have a marital deduction gift in the form of some jointly owned property that won't be property going under the will and it won't be property in this trust; and if you simply set up a provision in the will to pay death costs on property disposed of by the will, and a provision here to pay death costs of property disposed of by the trust, you are going to have out here a third category of property that is not disposed of either by the will or by the trust on which you haven't relieved that property of the payment of death costs; and if some of that qualifies for the marital deduction you are going to find you have lost part of the marital deduction by not taking the load off that property. This is probably the most important provision you have to draft, the payment of death costs, and see that that load gets where it should be.

PRESIDENT COHEN: Thank you very much, Dean.

PRESIDENT COHEN: This concludes our morning session. We will reconvene in this same room this afternoon at one-thirty, and let's be on time.

[The session adjourned at twelve o'clock noon.]

INSTITUTE OF THE SECTION ON REAL ESTATE  
PROBATE AND TRUST LAW

FRIDAY AFTERNOON SESSION

October 22, 1965

The third and final session of the Institute of the Section on Real Estate, Probate and Trust Law was called to order at one forty-five o'clock by Moderator Clarence M. Pierson of Lincoln.

MODERATOR PIERSON: A couple of preliminary items: One is an announcement that Dean Doyle has requested. He says that the Creighton University Legal Institute originally scheduled for November 12 and 13 has been postponed because of several featured speakers having conflicting trial dates and being unable to attend to present their subjects in person.

Another preliminary item is that the Bancroft Whitney Company is giving a door prize, a \$50 gift certificate. As I recall, this is probably the second time this event has occurred. So we will have the drawing and do it quickly. The winner will be contacted by Bancroft Whitney.

DEAN CASNER: Remember the income tax consequences of winning the prize.

MODERATOR PIERSON: If there is no objection, I am going to ask John to do the drawing: The winner is Francis J. Kneifl of South Sioux City.

One other preliminary item, and that is that this is my first opportunity and probably the last opportunity to tell this gathering that the institute we are having is the result of the efforts of the Section on Real Estate, Probate and Trust. The Executive Committee of that section, in addition to the Moderator, consists of Frank J. Mattoon, George Skultety, George Farman, John Cockle, and Al Reddish. I want to recognize publicly the service and the efforts that have been put out by two of these fellows, Al Reddish and John Cockle. We had a meeting prior to the midyear meeting in Lincoln. I asked these boys—I guess I had the authority or apparent authority to ask them to set up the program and to set up the panels. All Reddish and John Cockle really performed! I would like for you at this time to recognize these two boys and the rest of the group for their efforts.

The procedure this afternoon is to be a little different from what we have had before. We are going to go into this free-wheeling process they have been talking about this afternoon.



The gentlemen who have prepared papers are going to give their papers, and Dean Casner has asked for the privilege of interrupting whenever it would appear that an interruption should be made. Alex Mills does not have a paper. He has been requested to participate after the papers have been delivered.

These men who are seated at the head table are all men of talent. They've put in a lot of effort in getting prepared for this meeting. We will get it under way because we want to get it completed somewhere around four-thirty.

It is a pleasure for me now to present to you Warren K. Dalton of Lincoln, who will give a "General Review of Marital Deduction Planning."

### GENERAL REVIEW OF MARITAL DEDUCTION PLANNING

Warren K. Dalton

As you can readily see from all the subjects that were assigned, I am the only non-expert on this panel. Originally I was supposed to make some mistakes in my outline so the experts could correct them, and I wasn't supposed to tell you about that because you wouldn't believe it anyhow. But I have had some discussion with some of these fellows earlier today and I believe I had better tell you about it because they may be correcting them. Well, that took up a little time while the last ones are getting seated.

We also should understand that my outline covers more material than I can cover in the time they have let me have, so we will go skipping through the outline and I will hope that none of the things that I don't cover are significant anyhow, which is probably true.

To begin with, we are going to talk about the estate and gift tax marital deductions this afternoon, I suspect primarily about the estate tax marital deduction. These provisions were inserted in the law in 1948 in an effort to equalize the treatment of spouses in non-community property states with the treatment received by similarly married people in community property states. For historical purposes you may be interested to know that the law applies to the estates of people dying after January 1, 1948, and the gift tax provisions apply to gifts made after April 2, 1948.

Speaking very generally, the rules do not apply to any property which is community property or which was community property and which became separate property by the action of the

spouses. Since we don't have community property in Nebraska, or at least we ignore it if we have it, I am not going to talk about that.

There is a rule which may be of some benefit to you . . .

DEAN CASNER: May I interrupt? It is going to happen all afternoon. You may find that you've got community property in Nebraska, because some people may have lived in California and moved to Nebraska, and don't you forget that if they have, because it is still going to be community property in Nebraska when they bring it from California here, and all of the community property rules are going to apply in dealing with the marital deduction.

MR. DALTON: You see what I mean? There is a rule which may be of some help to you but it must be treated negatively, and I want you to listen carefully.

These marital deduction provisions *may* apply to a gift, either a gift during life or upon death, which is in such form that, immediately after the property is transferred to the spouse, it would be includible in the spouse's estate if the spouse immediately died.

If these facts are not true, the marital deduction will not apply, but this doesn't mean that if the facts *are* true the marital deduction *will* apply, since the test is not taxability to the surviving spouse; the test is what the statute says it is.

My point is that if the wife takes from the husband in such form that the property would not be included in the wife's estate if she immediately died, you can rest almost assured you are not going to get the marital deduction for that property. If she takes it in such form that it would be taxable in her estate, you at least have got a fighting chance.

The people who are entitled to take advantage of this marital deduction are citizens or residents of the United States; not both—they can be either citizens or residents. Now I am talking about the donor or the decedent. The citizenship or residence of the recipient of the gift is not important.

I would like to talk very briefly about some of the major features of a gift which is to qualify, which you will find referred to in I-A of my outline. This is the estate tax marital deduction, but I think what I have to say applies also to gifts which qualify for the gift tax marital deduction. I am not going to worry about the gift tax marital deduction point, however. The gift must pass, or must have passed, from the decedent. This means it

can either be property which is included in the decedent's gross estate for estate tax purposes, because it was owned by the decedent at the time he died or he had an interest in it, or it can be property which was previously given by the decedent, and because it is a gift in contemplation of death or a gift with some sort of a reserved interest, it is included in his estate.

If you don't mind, I am going to talk about the husband dying and the wife surviving throughout because that is usually the way it happens, according to the statisticians. The gift must be a gift to the decedent's surviving spouse. Now if you don't know whether the spouse survived or not, if, either by reason of local law or because of a provision included in a will there is a presumption that the spouse did survive, the gift may qualify. We don't have any local law that creates such a presumption, so if you want to use that route to qualify a gift you had better put it in the will.

There may be a question as to whether this lady is the spouse of the decedent or not, and in that connection there are a couple of recent income tax cases which are cited in my outline which may be instructive. These involve gentlemen who got invalid Mexican divorces and then married again, and for income tax purposes these second wives, who really weren't their wives at all, were treated as their wives for a period at least. There may be a question, you know, as to whether the people were really married or not.

In any event, the gift will qualify only to the extent that the interest which you are trying to qualify is included in determining the value of the decedent's gross estate. A gift which was made more than three years before the man's death, without the reservation of any interest so that it can't be a gift in contemplation of death, is not going to qualify for the marital deduction because it isn't going to be in the gross estate. The exercise of special powers of appointment won't qualify for the marital deduction because that property presumably will not be included in the husband's gross estate.

Now I am going to slide over a way because I don't have enough time to cover everything, and go over to III in my outline and discuss for a little bit the use of gifts to spouses in estate planning.

There are obviously some circumstances in which gifts to spouses may be highly desirable, but to my mind—and John Gradwohl does not entirely agree with this so I'll mention it at

some length—to my mind the fact situation which makes substantial gifts to a spouse desirable in estate planning is unusual, for two reasons—well, for several reasons. In the first place, only one-half of any gift to a spouse qualifies for the gift tax marital deduction, and if you want to work out the usefulness of gifts which pass free of gift tax, you will find, for example, that in order to give your wife \$100,000 completely free of gift tax, using the annual exclusions and the specific exemption, it is going to take you about seven years. On the other hand, if you had about \$200,000 in your estate and you wanted to give your wife half of that, you could give her \$100,000 by your will and it would pass entirely free of estate tax in one fell swoop, so that the process of getting property to your wife by gift completely free of tax is somewhat more difficult than if you do it by will.

In the second place, property passing to a spouse upon the death of the other spouse acquires a new basis. Property passing by gift retains the donor's basis, and if you have appreciated property this may be very important.

However, you may find situations in which the facts are such that it is highly desirable that the husband give his wife half his property immediately, right now. This usually comes about when the couple desires the utmost assurance that they will get the best tax break in the estate, that they will keep estate taxes at a minimum.

For example, if you've got a husband and wife who are about the same age but the husband is healthy and the wife is sick, and there is no real prospect of the husband remarrying if the wife pre-deceases him, you may feel that it is desirable that he give his wife half his property to be sure that if she does die he is not going to lose the benefit of being able to give his wife property tax free.

However, there are still some disadvantages to this that may come up. The first is the problem of having to pay some gift tax if you are going to do it all at once, which I have already mentioned.

The second is—it is a little complicated, to me; it may be simple if you look at the statutes—if the wife, the donee, dies before the husband and the donor dies less than three years after he makes the gift—the wife dies and then the husband dies within three years of the date of the gift—you are not going to have any marital deduction because the property did not pass to a surviving spouse, so there it goes to that extent.

If, by some horrible mischance, he should make the gift, the wife should die, and more than two years after the wife's death but less than three years after the gift the husband should die, then you won't even get the estate tax credit under Section 2012 which you would otherwise get if the husband had died within two years of the wife's death.

Another disadvantage—and this is one that is peculiar to me; you may not have these problems—but I am sure that if I told a husband who didn't want to give his wife half his property that he *had* to give her half his property or he would lose all these tax benefits, and I just didn't want to see him do that, we would get all the papers signed up and the next week the wife would sue him for divorce and ask for not only the property she already had but half of what he had left, and I would be unpopular with my client—with him, maybe not with her.

However, as I say, you may find fact situations that are such that it is desirable to divide the estate; even though the husband owns it all you are going to have him give half of it to his wife. You are going to find a little reluctance in many husbands to do this but it may be the thing to do.

There are many situations, however, in which gifts are desirable. First, if you've got a husband and wife each of whom own substantial property, and you are going to have to juggle around a bit anyhow to obtain the maximum estate tax minimization, shall we say, you may want the one with more property to give some of his or her property to the other one so that you are going to save the last dime of estate taxes so far as possible.

Also you may very often find that gifts which do not qualify for the marital deduction are very useful in estate planning, gifts which will get the property out of both estates. For example, the husband puts stock or other property in trust for his wife's life and then to his children—this is an irrevocable trust—for his wife's life and then to his children and gives his wife a special power of appointment, to appoint the property to his children or possibly to a small group including his children and himself, in case by the time his wife dies he has decided he wants it back and she is willing to be friendly about it. In this case you would get the property out of both estates, presumably, but you would not get the marital deduction. The gift would not qualify.

DEAN CASNER: If you do that, though, you may find that the husband is going to be taxed on the income of that trust.

MR. DALTON: I think this is entirely possible, because if

they are filing a joint return and the wife is getting the income, they could hardly avoid it. But in any event he may get rid of the estate tax problems.

Next I want to touch very lightly on V-E, life estate with power of appointment. This was covered, I am sure, quite adequately yesterday, and I mention it only because I think in Nebraska, if we are going to use life estates with powers of appointment, we had better go back and read some of the life estate cases that we have, particularly those where there is a power to consume, and particularly where there is a broad power to consume which our court has deemed not to be a complete general power of appointment.

In *Abbott v. Wagner*, for example, the power to use, enjoy, and dispose of "as to her shall seem fit," which would seem pretty broad, was construed to be limited to consumption for the wife's benefit and she couldn't give the property away, and that language would not qualify as a grant of a general power of appointment.

We also have some other problems. There is a distinction between what happens to appreciation in the value of personal property which is held for life, and what happens to appreciation in the value of real estate. Appreciation in the value of personal property, under *In Re Wecker's Estate*, remains with the life tenant and becomes a part of the estate of the life tenant. Appreciation in the value of real estate, under *Trute v. Skeede*, passes to the remaindermen, and that makes quite a little difference in a large mass of property.

In Section F of the same Roman numeral you will find a reference to "Specific Portion" Life Estates or Trusts, which came into the marital deduction provisions quite recently. The law says that you can qualify a specific portion of a life estate or of a trust for the marital deduction.

The regulations, if you read them, talk about a percentile or fractional portion. Under a number of cases—in the *Gelb Case* which is cited and is probably the main one, these regulations are not followed by the courts and you don't have to have a specific fractional or percentile portion of the life estate or the trust. The *Gelb Case* opens up some pretty broad vistas as to how you can juggle various interests in a life estate or in a trust to attain your client's unusual or peculiar desires.

Going to J of Roman V, I have here some catch-all provisions. You may want to keep in mind that on pecuniary legacies

in Nebraska, that is legacies of a dollar amount, in the absence of a contrary manifestation of intent, a dollar legacy, a pecuniary legacy, does not earn interest for the beneficiary for a year, but after the year is passed, unless it would be inequitable to do so, it does earn interest. Since many estates are held open for sixteen to eighteen months without much happening while you decide what you are going to do about the estate tax, you may want to consider whether pecuniary beneficiaries are entitled to interest after the year is up.

On the other hand, under *Folsom v. Strain* you find that a residuary legacy in trust, with some exceptions, earns income from the date of death, and that if there is income there—the income hasn't been spent for the payment of expenses, taxes, and so forth—it will go with the residuary legacy beginning as of the date of death.

The A.L.R. citation which you will find under that same section (it is J-2) explains what happens to the income which was earned by assets which have been used to pay debts, expenses, and what have you. There are three rules: The Massachusetts rule, the old New York rule which New York doesn't follow any more, and the English rule. They are very complicated. We follow the Massachusetts rule but I forgot to put the citation down, so I don't have it.

You must also consider that legacies abate, if the property of the estate is not sufficient to pay all legacies, and that they abate in the order of first residuary bequests, second, general bequests, and third, specific bequests, so that if you give all your A.T. & T. stock to the church and \$5,000 to the Red Cross, and the residue to your wife, your wife is going to suffer if the estate isn't as big as you expected it to be.

DEAN CASNER: May I come in for a minute, because you have touched on something that is of extreme importance in this area and I happen to be aware of something that is going on that bears on it.

You mentioned a moment ago that if you give a pecuniary legacy to an individual, under Nebraska law that legacy does not earn interest until a year from date of death. In my book I raised the question in connection with the legacy of that sort, if you give \$50,000 to the wife, for example, outright, if she is not going to be entitled to interest on that legacy until a year from date of death, that legacy isn't worth \$50,000; in other words, the right to get \$50,000 a year from today is not worth \$50,000 today.

Therefore, if you set up a pecuniary legacy to the wife in that form and do not change the Nebraska law and say that she *will* be entitled to interest from date of death, you may have a valuation problem for marital deduction purposes, and you may not get her \$50,000 marital deduction, but rather you get a marital deduction for the right to get \$50,000 a year from date of death.

In a case that is now pending before the Court of Claims, the Treasury Department, on the basis of what appears in my book—and I have been criticized for putting things in my book because they said that the Treasury Department wouldn't have thought of it if I hadn't put it in there—on the basis of that this question is raised in connection with a pecuniary legacy of a stated dollar amount going outright to the wife under the law of the State of Washington.

Under the law of the State of Washington you are not entitled to interest on a pecuniary legacy prior to its distribution by the executor, no matter how long that lasts. And this happens to be about a \$2,000,000 legacy, and they are claiming that about \$500,000 should be knocked off of it because of the fact that it will not be worth more than the difference when the time for distribution may eventually arrive.

This is a very serious loss of value for a marital deduction gift, so I think you have got to face up to the question that whenever you give an outright pecuniary legacy, which you are hoping will qualify for the marital deduction, you've got to decide whether to put in there a provision that she will be entitled to interest from date of death to avoid this evaluation point.

I think if you use a formula to determine the pecuniary amount that is going to the wife, you are all right, because the formula is a self-adjusting amount and the formula must produce an amount that will give the wife the amount that will eliminate or use up the maximum marital deduction. That might happen in one or two ways. The use of the formula might automatically overcome the presumption that interest doesn't pay until a year from date of death.

I think it is very sensible to say that if you use a formula to create a pecuniary amount in Nebraska, that means that there *will* be interest from date of death because that is the only way the formula will produce the maximum amount that is to be deductible, so that the formula is a safer pecuniary gift in getting the true value that you want than a stated dollar amount may be.

I would like for you to verify this: In most states, if you



make a pecuniary gift of \$50,000 in trust, that will overcome the rule about interest, and interest will earn from date of death. Is that true in Nebraska?

MR. DALTON: That appears to be true under this case that I cite.

DEAN CASNER: Then that means that this problem that we are talking about is only a problem when you are giving a stated dollar amount outright to the wife. If you are giving it in trust, or if you are using a formula to produce the amount, then the problem should not arise. Be on the lookout for this Court of Claims decision. It is going to be argued shortly on this whole issue, and it will be handed down probably in the course of the next six weeks.

MR. DALTON: There is another point immediately following J-3, the Executor's Power to Fix Values. If the executor has the power to fix values for the purpose of making distribution of a pecuniary gift to the spouse, this power may be considered. I don't say it will but it may be considered a power to change the spouse's interest and may convert it into a terminable interest. Consequently, you shouldn't give the executor that power by the terms of the will. Now I suspect that many of us, and I think I have been guilty of it, have been doing exactly that, and I trust we won't do it in the future. This will work out fine for everything except the pecuniary gifts to the spouse.

The next section about "boot-strap" provisions John Gradwohl is going to talk about. There is a Revenue ruling there, a recent one, which I think is wrong. I don't think it can possibly be right, but I am not the Internal Revenue Service.

Roman VI in my outline covers joint tenancy and other non-probate property. We have had a lot of conversation over the years about what to do about joint tenancy property, and unfortunately we still have the problem with us.

I think the best thing that can be said about it in Nebraska is that we can continue to hope that in view of the reasoning that we are finding in cases such as *Glaser v. United States* and *Heasty v. United States*, which are cited, we may eventually get to the point where *Harris v. United States* won't represent the law any more, or if it does it will represent the law in very limited circumstances.

Now going over to Roman VII, I have a capital A sort of a selection of our statutory sections which have to do with admin-

istration of the estate. Some of these you are no doubt very familiar with. Others you may have overlooked because we have a tendency not to go back and read the statutes every time we have an estate. I am not going to dwell on those at length, but I think it is desirable to review them from time to time and to see, for example, what property is available to pay debts and in what order that property is going to be used and is available to be used.

There is one statutory provision which Al Ellick raised a question about and which you may want to consider. It is Arabic 6 under A. Section 30-103.01 says, "The succession interest of a surviving spouse is to be determined prior to the payment of any federal or state estate tax and shall not be subject to or diminished by such tax."

This is just lovely, except in one situation. If a husband dies leaving a widow but no blood relatives, her succession interest, as I read the statute, is one hundred per cent of what he owns; and if the wife gets one hundred per cent of what the husband owns I don't think this statute is going to keep that property from being subject to federal estate tax. I am afraid the federal boys will come in and want some tax out of it no matter what the statute says. In other cases the statute may be very useful to you in arguing that at least in intestate cases there is no federal estate or state estate tax, and of course if it is a succession interest there isn't any inheritance tax either.

DEAN CASNER: You don't have any marital deduction for state inheritance taxes, do you, in Nebraska?

MR. DALTON: Not for inheritance taxes.

DEAN CASNER: Then if the husband dies intestate and a third of his estate goes to his wife, while it will not be reachable to pay the federal taxes, what about the state inheritance tax?

MR. DALTON: Let me back up a minute. The "succession interest" is not subject to inheritance tax, the wife's succession interest.

DEAN CASNER: No matter how much it is?

MR. DALTON: No matter how much it is. It isn't a marital deduction provision. As a matter of fact, the court decided some time ago that she didn't inherit it so it wasn't subject to inheritance tax.

DEAN CASNER: You could give her the whole estate, you mean, and there is no inheritance tax?

MR. DALTON: No. This is the amount she would receive if the man died intestate.

DEAN CASNER: That is not subject to inheritance tax?

MR. DALTON: That is not subject to inheritance tax.

DEAN CASNER: Suppose you leave a will and you give her the approximate half that would qualify for the federal marital deduction? Do you pay some state inheritance tax on that?

MR. DALTON: You may very well if her succession interest, because of the relationship and the children, is less than one-half, and it normally is, in fact.

DEAN CASNER: Under that situation where any state inheritance tax may be payable on her gift, you've got to be very careful to free the marital deduction gift from paying that state inheritance tax or you get some of the marital deduction eaten into to pay the state inheritance tax, and then you get into that circle I mentioned before, that you can't tell how much the marital deduction is until you know how much it will be eaten into to pay state inheritance taxes, and you can't tell how much it will be eaten into to pay state inheritance taxes until you know how much of a federal tax is going to be payable on the state inheritance tax that you have to pay. I don't understand that, either.

MR. DALTON: If any of you would like to explore this a little bit, you can read the *Rice Case* which was cited under Arabic 7 immediately following the section I just mentioned to you. I don't understand it, but it is in the case there. It is very plain in the case, I am sure. It was the first time I read it; it wasn't so plain the second time.

John is going to take the next section also. All this conversation that is in my outline about claiming administration expenses as income tax deductions, John is going to cover all that. I want to mention to you only the capital E which cites you *Levy's Estate*, a New York Supplement case.

This was a case in which the executor claimed administration expenses as income tax deductions rather than estate tax deductions. This saved the estate some \$32,000 in income tax but it cost \$7,000 more in estate tax, so the court directed the executor to credit principal with the estate tax which would have been saved had they claimed these expenses for estate tax rather than income tax, that is, \$7,000. The amount was all credited to the residuary share, not the widow's share, since the widow's share was increased as a result of the increase in the adjusted gross estate, and the

widow's share was free of estate tax in any event. The case, I think, for our purposes today is important because it brings home rather clearly the point that if you are going to save income taxes by claiming administrative expenses as deductions, this may affect the residuary beneficiaries to the extent that the court may want you to make adjustments in the accounts, and it gives you some idea of how this may be done.

In F I gave you an example, a problem, without giving you any answer, which originally was a great idea but as the time draws shorter it may not have been so nice.

Here we have a pecuniary bequest which requires the executor to distribute to the widow an amount of money equal to one-half the adjusted gross estate. This is an ascertainable number of dollars. Now at the time of distribution, as you can see from the problem in the outline, the widow is going to get \$200,000 and there isn't \$200,000 there available except in property which has increased or decreased in value. If we are going to make a distribution in kind to her, we are going to realize gain or loss, or both. One of the things we could do, if you look at the values there, is to give the widow Stock A which had a date of death basis of \$100,000 and is now worth \$125,000, and you are going to get \$125,000 credit against her gift, because that is what it is worth, and also give her \$75,000 in cash. In this case the estate has a \$25,000 gain, which it is going to have to report for income tax purposes. Also, you might give her Stock B, which has a \$50,000 loss, and give her the real estate which represents a \$25,000 gain, and \$25,000 in cash, and the estate has a net loss of \$25,000.

DEAN CASNER: Which it may not be able to use, either.

MR. DALTON: Which it may not be able to use.

The third possibility is to give her one-half of Stock B, that is the \$25,000 loss, the real estate which represents a \$25,000 gain, that is washing out the gain and loss, and \$50,000 cash. The administrator or executor is going to have to make some sort of a choice here as to whether he wants the estate to have a gain, whether he wants the estate to have a loss, or whether he would rather have it come out even. In any event, the basis to the widow is going to be the value at the time she receives distribution.

Finally, I am going to go to the last three items in the outline. The first one I have entitled "Uncertainties and Estimations" and I will cover that very briefly.

During administration you are going to have some items which become fixed and others which, fifteen months after the date of

death, are not going to be fixed. At that time, for example, you may not know what the total legal fees are going to be because you've got claims that have't been decided yet. In the estate you may have been closing up a business and you've got expenses involved there which you don't know fifteen months after the date of death.

If you overestimate these expenses in filing the estate tax return, the adjusted gross estate is going to be low, the marital deduction is going to be low, the taxes are going to be low, and later, when you find that you have overestimated the expenses, you will have a deficiency and you will have interest to pay. On the other hand, if you underestimate them, your adjusted gross estate will be high, the marital deductions will be high, the tax will be high, and later you will have a refund and presumably get interest on it. These are things you may want to take into account at the time you file the return and decide whether you would rather have a deficiency later or a refund later, or both. I don't know how you could get both but you can try it.

DEAN CASNER: If you have two estates you get both.

MR. DALTON: If a gift is made within three years of the date of death, and it may or may not have been in contemplation of death, and you haven't made up your mind which way you are going to be able to go, if you include the value in the gross estate in filing the estate tax return, then your estate is going to be high if it later turns out that it wasn't made in contemplation of death, the marital deduction will have been high, and you are going to possibly have later adjustments, one of which may be getting some money back from the widow. On the other hand, if the gift was made to the widow, then you have real interesting problems. For example, let's suppose we have a probate estate of \$100,000, but two years before the man died he gave his wife \$50,000. Now you don't know whether to treat this as a gift in contemplation of death or not.

Let's say you've got a clause in the will which gives the wife the maximum marital deduction out of the probate estate, the maximum marital deduction less, however, other amounts which pass to her in such manner as to qualify. All right, if this gift *was* in contemplation of death it nevertheless was a gift and we'll assume it qualifies. So here is what you have: You have a \$100,000 probate estate. If the gift isn't included in the probate estate, the widow is entitled to \$50,000 out of probate estate, and of course she has already got the \$50,000 gift, so she got \$100,000.

On the other hand, if the gift *was* in contemplation of death, then she's got \$50,000 but this gross estate is then \$150,000. She is only entitled to a total of \$75,000. She gets \$25,000 out of the probate estate and a total of \$75,000.

I hope you don't have this problem, but if you do you are going to have to make up your mind which way to go at the time the estate tax return is filed, primarily, probably, on the basis of how well you think your case will hold up that the gift is or is not in contemplation of death.

DEAN CASNER: You can actually get into a situation of this sort where the beneficiaries are arguing that it is in contemplation of death and the government is arguing that it isn't.

MR. DALTON: K covers some problems in distribution. We have here an estate which totals \$400,000. There is some jiggling around, a sale of stock for \$125,000 with a \$25,000 gain. The man keeps the cash and buys more stock with \$100,000, and at date of distribution we have \$450,000 in the estate. For the purposes of the problem we have income, not capital gains, but just ordinary income of \$20,000, and the debts and administration expenses equal \$20,000. We are going to pay that out of the income. That simplifies my figures.

Now first let's suppose we have a non-formula pecuniary bequest, an amount equal to "one-half of my adjusted gross estate to be paid in money or property or both selected by my executor." For the minute let's not worry about Revenue Procedure 64-19. The executor sets off to the widow the real estate, which was worth \$120,000 at date of death and is worth the same amount at date of distribution. He sets off to her one-half of Stock X, which was bought by the estate for \$100,000 and still is worth \$100,000, representing \$50,000, and he sets off to her \$30,000 in cash. There is no gain or loss to the estate on the distribution. We have already got a \$25,000 gain when we sold Stock A. We may have a problem over whether or not interest should be paid on this distribution, and as Dean Casner has pointed out, probably the will ought to say one way or another that interest should be paid. The value of the marital deduction may be reduced if interest is *not* paid.

If the executor had picked out one of the properties which has increased in value, for example Stock B, in payment of a part of this bequest, the estate would have a gain.

Now suppose we have a formula pecuniary bequest and somebody has read 64-19 and decides that the right formula is one

which requires distribution at estate tax values but also requires that assets distributed be fairly representative of appreciation or depreciation in the estate property.

The outline, I think, indicates a couple of possible solutions. The first one is pretty simple. You just give her half of each item, right down the line. This is fine if the items are subject to division in this way.

On the other hand, there is another possible solution which I suggest to you, that we give her all of the original cash, we give her all the personal effects, we give her all of Stock X, we give her one-fifth of Stock B, and we give her three-tenths of the real estate. This comes out to \$200,000, date of death values, \$225,000, date of distribution values. It meets the requirements of the will. But I suggest to you that it may be a little hard to figure out just which three-tenths of the real estate you want to give her, unless you want to give her an undivided three-tenths of the real estate, and if you are in such a position that an undivided three-tenths of the real estate is a reasonable distribution to her, you are lucky, because this may not be the proper way to divide the real estate. Likewise, Stock B may not be the kind of stock you want to give her one-fifth of. All that this teaches me is that I am not real sure I am going to use any of these "fairly representative" clauses.

Paragraph L, as you will note from reading it, shows that the residue which you choose, out of which you give the widow a fractional share, may make a difference in the size of the fraction, and this may have some result as to the amount of money she gets, despite the fact that the fraction was chosen to produce the same maximum marital deduction in every instance. Where property appreciates or depreciates in value from the date of death to the date of distribution, the fraction you pick out is going to govern the distribution of this appreciation or depreciation, and this may affect the widow. These mathematical problems are of a great deal of interest, but they are best done with a calculator in the privacy of your office rather than here in front of an audience. Thank you.

MODERATOR PIERSON: I think I should have told you more about "Buzz" Dalton when I introduced him. He is, as you note in the program, a member of the firm of Marti, O'Gara, Dalton & Bruckner in Lincoln, but in addition to that he now is teaching an income tax course at the University of Nebraska Law School.

# GENERAL REVIEW OF MARITAL DEDUCTION PLANNING

BY WARREN K. DALTON

## Introduction:

Reason for adoption of law

Basic principle

Persons to whom marital deduction available—Sections 2001, 2523, IRC.

## I. Estate Tax

- A. Marital Deduction—Section 2056 (a), IRC
  1. "Passes or has passed"—Section 2056 (e), IRC
  2. Surviving spouse—Regs. § 2056 (e)-2 (e)
  3. "Spouse"—*Borax*, CA2, 7-30-65 reversing 40 TC 1001 and *Wondsel*, CA2, 8-2-65, reversing TC Memo 1964-213.
  4. Included in determining the value of the gross estate.
- B. "Terminable Interest" Limitation—Section 2056 (b) (1), IRC, See *Jackson v. U.S.*, 376 U. S. 503
- C. "Unidentified Assets" Limitation—Section 2056 (b) (2), IRC.
- D. Survival for a Limited Period—Section 2056 (b) (3), IRC.
- E. Death Taxes Payable from marital share—Section 2056 (b) (4), IRC.
- F. Life Estate with Power of Appointment in Surviving Spouse—Section 2056 (b) (5), IRC.
- G. Life Insurance or Annuity Payments with Power of Appointment in Surviving Spouse—Section 2056 (b) (6), IRC.  
—The IRC seems to have abandoned its former position that formal limitations on the power of appointment disqualified the interest. 1964-1 CB (Part 1) 4.
- H. Maximum Deduction—Section 2056 (c), IRC—Equals one-half of "adjusted gross estate"—The adjusted gross estate is the gross estate less Section 2053 and 2054 deductions.
- I. Disclaimers—Section 2056 (d), IRC—Note cases involving agreements in settlement of will contests, etc.—*Tebb*, 27 TC 671; *Dutcher*, 34 TC 918; *Barrett*, 22 TC 606.
- J. Definitions—Section 2056(e), IRC.
- K. Persons Receiving Property not Ascertainable—Section 2056 (e), IRC—Excludes cases covered by Sections 2056 (b) (5) and \_\_\_\_ (b) (6).
- L. Certain Interest Non-deductible—Regs. § 20.2056 (a)-2.



- M. Valuation of Interest Passing—Regs. § 20.2056(b)-4.
  - 1. If gift in trust does not draw interest until distribution and distribution may be unreasonably delayed, the gift may be disqualified. Regs. § 20.2056(b)-5(f)(9).
  - 2. Property subject to encumbrance—Use net value.
  - 3. Death Taxes
  - 4. Remainder interest—Use actuarial value.

## II. Gift Tax

- A. Marital Deduction—Section 2523(a), IRC—One-half the value of the gift.
- B. Life Estates and Other Terminable Interests—Section 2523(b), IRC.
- C. Interest in Unidentified Assets—Section 2523(c), IRC.
- D. Joint Interest—Section 2523(d), IRC.
- E. Life Estates with Powers of Appointment—Section 2523(e), IRC.

## III. Use of Gifts to Spouse in Estate Planning

- A. General Rule—Don't.
- B. Special Rule Number 1—Maybe—The “big split” rule.
- C. Special Rule Number 2—Yes.
  - 1. The “little split” rule.
  - 2. Non-qualifying gifts.

## IV. Before Drafting the Plan

- A. Should the Marital Deduction be Used?—Consider:
  - 1. Spouse's separate estate
  - 2. Spouse's expectancies
  - 3. Age factors
  - 4. Health factors
  - 5. Gross amount of property involved
  - 6. Family factors—E.g. previous marriages and issue thereof
  - 7. Should the gift exceed the marital deduction?
- B. Factors Affecting the Form of the Gift
  - 1. Availability and acceptability of trustees
  - 2. Kind of property owned
  - 3. Wishes of client.

## V. Forms of Bequest

- A. Gifts of Specific Property.

- B. General Bequests.
- C. Residuary Bequests.
- D. Choice of Title—Outright Bequests.
- E. Choice of Title—Life Estate with Power of Appointment.
  - 1. Existing law as to life estates with powers should be considered.
    - (a) *Abbott v. Wagner*, 108 Neb. 359, 188 N. W. 113 (Cf. *Hoffman v. McGinnes*, 277 Fed. 598; *Benjamin*, 44 T.C. No. 55)  
*In Re Darr's Estate*, 114 Neb. 116, 206 N. W. 2  
*Annable v. Ricedorff*, 140 Neb. 93, 299 N. W. 373  
*Perigo v. Perigo*, 158 Neb. 733, 64 N. W. 2d 789  
*Attebery v. Prentice*, 158 Neb. 795, 65 N. W. 2d 138  
*Trute v. Skeede*, 162 Neb. 266, 75 N. W. 2d 672.
    - (b) *Lesiur v. Sipherd*, 84 Neb. 296, 121 N. W. 104
    - (c) *In Re Wecker's Estate*, 123 Neb. 504, 243 N. W. 642
    - (d) *Harris v. U.S.*, 193 F. Supp. 736
    - (e) Other jurisdictions—1 Casner, Estate Planning (3d Ed.) 846, Note 128, and the same reference in the 1965 supplement.
  - 2. Special situations
    - (a) Where management and encroachment are not significant factors because of available cash and management capacity.
    - (b) Where no management is required or encroachment possible.
    - (c) Possibility of qualifying non-productive property by use of this form of gift.
- F. Choice of Title—"Specific Portion" Life Estates or Trusts.  
 Cf.—*Gelb v. Commissioner*, 298 F. 2d 544, 9 AFTR 2d 1888.
- G. Choice of Title—Trusts.
- H. Choice of Title—Power of Appointment Trusts vs. Estate Trusts—Power of Appointment Trusts—Note problem of how taxes are to be paid in second estate. *Duell*, 227 N. Y. S. 2d 469.
- I. Choice of Title—Power of Appointment Trusts vs. Estate Trusts—Estate Trusts—Is a gift to an "estate" meaningful. See 1 Casner, op. cit. 855 and 1965 Supplement.
- J. Miscellaneous Considerations.
  - 1. Interest on Pecuniary Legacies—*In Re Estate of Kirstead*, 128 Neb. 654, 259 N. W. 740; *In Re Estate of*

- Knight*, 91 Neb. 127, 135 N. W. 379; Section 30-1409, R. R. S. 1943.
2. Interest on Residuary Legacies—*Folsom v. Strain*, 138 Neb. 497, 293 N. W. 357. Anno. 2 ALR 3d 1061.
  3. Abatement—*In Re Grenier's Estate*, 168 Neb. 633, 97 N. W. 2d 225.
  4. Executor's Power to Fix Values
  5. "Bootstrap" Provisions—Rev. Rul. 65-144, IRB 1965-22 p. 25; *Commissioner v. Proctor*, 142 F. 2d 824.

## VI. Joint Tenancy and Other Non-Probate Property

### A. What to do about joint property.

1. Creation of joint tenancies not constituting gifts.
2. Section 2515(a)
3. Severance
4. Severance and exchange of real estate
5. Incorporation of joint tenancy into plan
6. Sale
7. *Harris v. United States*, 193 F. Supp. 736. See "Estate Taxation of Joint Tenancies Severed in Contemplation of Death", John Gradwohl, 10 Nebr. State Bar Journal No. 4, p. 115.
8. Contribution—Proof  
*English v. U.S.*, 270 F. 2d 876  
*Tuck v. U.S.*, 282 F. 2d 405  
*Estate of Brown*, Para. 60,265, PH TC Memo
9. Creation of trust, or conveyance reserving life estate—  
 How to eat your cake and have it—Maybe!  
*Hornor's Estate v. Commissioner*, 130 F. 2d 649  
*Estate of Hornor v. Commissioner*, 305 F. 2d 769  
*Glaser v. U.S.*, 306 F. 2d 57  
*Heasty v. U.S.*—F. Supp.—15 AFTR 2d Para. 146, 731, 65-1 USTC Para. 12304 (D. Kans. 1965)

### B. Revocable living trusts

1. May be used for a pour-over gift—Section 30-1806, R. S. Supp. 1963.
2. Use care to insure that the gift is to the living trust and not to a testamentary trust having the same provisions. *Second Bank-State Street Trust Co. v. Pinion*, 341 Mass. 366, 170 N. E. 2d 350.
3. The trustee may be liable for the settlor's income taxes and death taxes—Title 31 USC Section 192, and Section 6324(a)(2), IRC.

C. Use of Life Insurance Policies Qualified for the Marital Deduction.

VII. Administrative and Other Problems

A. Introduction

1. Under Nebraska law, the whole of the decedent's estate is subject to the payment of debts, expenses (and family allowances). Sections 30-229, 30-405, and 30-406, R. R. S. 1943.
  - (a) Personal property is used first—Section 30-405, R. R. S. 1943.
  - (b) Income from real estate is available to the executor who takes possession thereof. Section 30-406, R. R. S. 1943. *Neylon v. Parker*, 177 Neb. 187, 128 N. W. 2d 690. The extent to which the homestead can be taken by the executor may be doubtful. *Estate of Robertson*, 86 Neb. 490, 125 N. W. 1093.
  - (c) It appears that the income from real estate should be used to pay debts before the real estate is sold. See Section 30-1103, R. R. S. 1943. 34 C. J. S. p. 363, *Executors and Administrators* § 480, Same, p. 476, § 538 (c).
2. The assets of the estate are to be used to pay debts:
  - (a) According to the provisions of the will. Section 30-230, R. R. S. 1943.
  - (b) If the provisions of the will are not sufficient, property not disposed of by will is used first. Section 30-231, R. R. S. 1943.
  - (c) The estate given by will is liable in proportion to the amount thereof, except that specific legacies and devises may be exempt if the court deems necessary to carry out the intent of the testator. Section 30-232, R. R. S. 1943.
  - (d) The property described is liable for debts, expenses, and family expenses (Section 30-232) and to make up the share of pretermitted heirs (Section 30-233, R. R. S. 1943).
3. The household goods and personal property allowed to the widow (children *not* mentioned) pursuant to Section 30-103 are not property in the hands of the executor or administrator and presumably are exempt from the payment of debts or expenses. Section 30-404, R. R. S. 1943. See *Ballard v. Davenport*, 178 Neb. 293, — N. W. 2d —.

4. If land must be sold, land descending to heirs (as contrasted with land devised) is sold first, and if land has been sold by heirs or devisees, the unsold land is first sold. Section 30-1113, R. R. S. 1943. The devisees, and presumably heirs, hold property distributed subject to the payment of debts and expenses. Section 30-234, R. R. S. 1943.
  5. In the absence of controlling provisions in the will, it is generally recognized that it is the executor's duty to sell all personal property not specifically bequeathed as soon as possible. 1 Casner, op. cit. 814. See also Section 30-1408, R. R. S. 1943, dealing with the personal representative's liability for failure to sell when loss results.
  6. The succession interest of a surviving spouse is not subject to federal or state estate tax. Section 30-103.01, R. R. S. 1943. Query?—Is this statute entirely effective?
  7. The estate tax apportionment statute requires that any marital deduction be taken into consideration. Section 77-2108, R. R. S. 1943. However, if inheritance taxes are payable out of the marital share, this may make the share liable also for estate taxes. See *Albert T. Rice*, 41 TC 344.
- B. Claiming Administration Expenses as Income Tax Deductions.
1. Rev. Rul. 55-225, 1955-1 CB 460, and Rev. Rul. 55-643, 1955-2 CB 386, hold that the adjusted gross estate equals the gross estate less Section 2053 and 2054 deductions actually taken. If not taken, the adjusted gross estate, and thus the marital deduction, may be increased.
  2. Subsequent cases have held, for various reasons, that Section 2053 deductions *not* taken nevertheless reduced the estate for marital or charitable deduction purposes.  
*Roney*, 33 TC 1801, 294 F. 2d 774 (CA5)  
*Luehrmann*, 33 TC 277, 287 F. 2d 10 (CA8)  
*Ballantine v. Tomlinson*, 293 F. 2d 311  
*Alston v. U.S.*, 16 AFTR 2d Para. 146, 805 (CA5, 7-23-65)
  3. In a speech before the Illinois Bar Association, April 23, 1965, the Chief Counsel of the IRS indicated that the Service may review Rev. Rul. 55-643 in the light of *Jackson v. U.S.*, 376 U. S. 503.

4. Other considerations—Language of will or applicable statutes—*McTarnahan's Estate*, 202 N. Y. Supp. 2d 618; *Empire Trust Co. v. U.S.*, 226 F. Supp. 623.
- C. Should Debts and Administration Expenses be Charged Against the Marital Share?
  1. Unless source of payment outside the gross estate (e.g. income) is available, not charging expenses against the marital share may increase the share, but will not increase the maximum marital deduction.
  2. The *maximum* marital deduction will thus normally be computed after deducting expenses and debts.
- D. How Can the Marital Share be Relieved from Paying Debts and Expenses?
  1. Payment from income, when permitted, and income available.
  2. Use of a pecuniary bequest, exempted from such charges.
  3. Use of a residuary gift, with the residue being the estate *before* paying debts and expenses.
- E. Result of Claiming Administration Expenses as Income Tax Deductions—*Levy's Estate*, 167 NYS 2d 16.
- F. Allocating Property to the Marital Share—Pecuniary Gifts.
  1. Payment of a pecuniary gift in appreciated or depreciated property will produce a gain or loss. Rev. Rul. 56-270, 1956-1 CB 325; Rev. Rul. 60-87, 1960-1 CB 286; *Estate of Ruth Hanna v. Commissioner*, 320 F. 2d 54 (CA6).
  2. Assume the assets available for distribution are as shown below. Debts and expenses are paid. Taxes are to be paid out of the non-marital share. The widow is entitled to an amount equal to one-half the adjusted gross estate, payable in money or property, or both, selected by the executor. (Ignore Rev. Proc. 64-19).

	Date of Death	Date of Distribution
Property	Value	Value
Cash	\$100,000	\$100,000
Stock A	100,000	125,000
Stock B	100,000	50,000
Real Estate	100,000	125,000

The widow is entitled to receive \$200,000.

3. The widow's basis is the value of the assets at the date of distribution. *Commissioner v. Brinckerhoff*, 168 F. 2d 436 (CA2).
- G. Allocating Property to the Marital Share—Residuary Gifts.
- H. What Property Is Included in the Part of the Residue Making up a Fractional Share?
1. Assume: The widow is given one-half of the residue of the estate after distribution to her of household goods and personal effects. All charges against the estate are payable out of the non-marital share. The executor has power to sell and reinvest. The probate estate (excluding household goods and personal effects) includes:
    - Cash—\$10,000
    - Stock A—\$100,000
    - Stock B—\$100,000
    - Real Estate—\$100,000
  2. Debts and costs of administration are \$25,000. The executor sells Stock A for \$150,000, and buys 100 shares of Stock X for \$100,000. All charges except taxes are paid and the estate then holds:
    - Cash—\$35,000 = \$10,000 + \$50,000 Stock A—  
\$25,000 (paid out)
    - Stock X — \$100,000
    - Stock B — \$100,000
    - Real Estate — \$100,000
  3. The widow's share would be:
    - Cash—\$30,000 = \$ 5,000 (original cash) +  
\$25,000 (Stock A)
    - Stock X — \$50,000
    - Stock B — \$50,000
    - Real Estate — \$50,000
- I. Do Testamentary Directions to Exclude Designated Property from a Residuary Marital Share Change the Character of the Gift?
1. For a variety of reasons, the will may direct that certain property be excluded from a residuary marital share.
    - (a) Terminable interests
    - (b) Stock of a family corporation
  2. The exclusion may be absolute or discretionary.

3. It may be argued that
  - (a) Such a provision creates a dollar claim, rather than a residuary gift, and therefore gain or loss may be recognized, and, possibly, problems created under Rev. Proc. 64-19.
  - (b) Such a provision requires a "sale" of terminable interests or other non-qualifying property and thus the marital deduction is lost under Section 2056(b) (2), IRC.
4. (a) The first argument may have some merit, although cases dealing with comparable situations find no recognized gain or loss. *Wren*, 24 CCH TCM 1965-52; *Walz*, 32 BTA 718.
- (b) The second argument ignores the fact that no "sale" has occurred, and the gift is not payable from the "proceeds" of any such sale.

**J. Uncertainties and Estimations.**

1. Administration expenses—effect of estimating.
2. Gifts arguably not in contemplation of death—effect of excluding or including in the gross estate
  - (a) Changes in values
  - (b) Identity of recipient.

**K. Problems in Distribution.**

PROPERTY	ESTATE TAX VALUES	SALES AND REINVEST- MENTS	INCOME	PROPERTY AND DATE OF DISTRIBUTION VALUES
Cash	\$ 50,000			Original— \$ 50,000 Proceeds, Stock A— 25,000
Personal Effects, etc.	10,000			10,000
Stock A	100,000	Stock A sold for \$125,000; Stock X bought for \$100,000	Stock A— \$ 2,500; Stock X— 1,500	Stock X— 100,000
Stock B	120,000		4,000	145,000
Real Estate	120,000		12,000	120,000

**Assumptions:**

- (A) Debts and administration expenses equal \$20,000.
- (B) The decedent leaves a widow and a son.



(C) There are no directions in the will as to the payment of expenses and debts. The taxes are to be paid out of the non-marital share.

(D) The executor has power to retain property or to sell and reinvest.

(E) The date of distribution is 18 months after the date of death, and the estate is valued as of the date of death.

1. Non-Formula Pecuniary Bequest—Assume: “An amount equal to one-half of my adjusted gross estate to be paid in money or property or both selected by my executor.”

(a) Expenses were paid out of income, and deducted on the income tax return.

(b) The executor sets off to the widow:

(1) Real estate—\$120,000

(2) One-half of Stock X—\$50,000

(3) Cash—\$30,000

Comments:

(A) There would appear to be no gain or loss to the estate upon the distribution.

(B) In view of the provisions of Section 30-1409, R. R. S. 1943, and the Nebraska cases earlier cited relative to the payment of interest on legacies, the executor would be well advised to make sure that there is no controversy over whether or not interest should be paid upon distribution 18 months after death.

(C) The value of the marital deduction may be reduced because the widow did not get interest on the bequest between the date of death and date of distribution. See Regs. Section 20.2056(b)-4(a).

(D) The very general language of the Nebraska law would appear to authorize the payment of expenses out of income. See Section 30-229, R. R. S. 1943 and other sections cited earlier.

(E) If the executor had given the widow Stock B, in payment of a part of the bequest, the estate would recognize a gain.

2. Formula Pecuniary Bequest—Assume: A pecuniary bequest intended to produce the maximum marital deduction requires distribution at estate tax values, but also requires that the assets distributed be “fairly representative of appreciation or depreciation in the estate property.”

(a) See Subparagraph 1(a) above.

(b) The estate has had a \$50,000 gain on an original value of \$400,000, or 12½%. The widow is entitled to receive distribution of property having an estate tax value of \$200,000 (We will assume this is the maximum marital deduction) and a date of distribution value of \$225,000.

**A Permissible Solution:**

Distribute fractional shares of the assets, one-half of each asset, making allowance for the statutory distribution of personal effects, etc.

PROPERTY	ESTATE TAX VALUE (ONE-HALF)	AMOUNT DISTRIBUTED AND DATE OF DISTRIBUTION VALUE
Original Cash	\$ 25,000)	(\$ 20,000
Personal Effects, etc.	5,000)	( 10,000
Stock A	50,000	( Cash 12,500
		( Stock X 50,000
Stock B	60,000	72,500
Real Estate	60,000	60,000
	<hr/> \$200,000	<hr/> \$225,000

**A Possible Solution:**

PROPERTY	ESTATE TAX VALUE	AMOUNT DISTRIBUTED AND DATE OF DISTRIBUTION VALUE
Original Cash (All)	\$ 50,000	\$ 50,000
Personal Effects (All)	10,000	10,000
Stock X (All)	80,000	100,000
Stock B (One-Fifth)	24,000	29,000
Real Estate, or Pro ceeds (Three-Tenths)	36,000	29,000
	<hr/> \$200,000	<hr/> \$225,000

**Questions:**

(A) Suppose the cash received from the sale of Stock A was substituted for \$25,000 of the real estate in the second solution. This cash represents stock having an estate tax value of \$20,000. What are the income tax results of such a payment? Would such a distribution conform to the requirements of the will?

(B) Is it reasonable to assume the possibility of being able to distribute three-tenths of the real estate?

(C) Can you devise a distribution under the facts given which would conform to the will's requirements and give the widow *all* the real estate?

**L. Choosing the Residue Out of Which to Satisfy a Fractional Share Bequest.**

Assume:

(A) Gross estate is \$400,000; the expenses and debts are \$40,000; and the death taxes, state and federal, are \$40,000.

(B) The widow is to receive a marital share equal to one-half the adjusted gross estate in the form of a fraction of the residue. Assume this is equal to \$180,000.

(C) Assume the will describes a fraction, to be applied against a residue, the numerator of which is the "maximum marital deduction allowable \* \* \*", which we have assumed to be \$180,000.

1. Note the changes in the arithmetical value of the fraction as the denominator is changed.

(a) A fraction of the gross estate before the payment of any expenses, debts, taxes or any other charges:

$$\begin{array}{r} 180,000 \quad 18 \quad 9 \\ \hline 400,000 \quad 40 \quad 20 \end{array}$$

(b) A fraction of the adjusted gross estate, after the payment of expenses or debts, but before the payment of taxes:

$$\begin{array}{r} 180,000 \quad 18 \quad 1 \\ \hline 360,000 \quad 36 \quad 2 \end{array}$$

(c) A fraction of the net estate after all taxes, expenses and debts are paid:

$$\begin{array}{r} 180,000 \quad 18 \quad 9 \\ \hline 320,000 \quad 32 \quad 16 \end{array}$$

2. Assume the estate consists of:

Personal Property	\$300,000
Real Estate	100,000

During administration, the executor pays all expenses and debts out of the personal property, leaving \$220,000 in personal property at estate tax values, which property has appreciated in the amount of \$40,000. Ignore income.

(a) If the clause providing for a fraction of the total estate is used, the executor must pay the widow 9/20ths of the assets traced into the estate as though originally constituted.

Personal Property	$9/20 \times (300,000 + 40,000)$	\$153,000
Real Estate	$9/20 \times \$100,000$	45,000
		<hr/>
		\$198,000

(b) If the fraction of the adjusted gross estate before taxes is used, the executor must pay the widow one-half of the assets after the payment of debts and expenses.

Personal Property	$\frac{1}{2} \times (260,000 + 40,000)$	150,000
Real Estate	$\frac{1}{2} \times 100,000$	50,000
		<hr/>
		\$200,000

(c) If the fraction is a fraction of the net estate after all payments,

Personal Property	$9/16 \times (220,000 + 40,000)$	\$146,250
Real Estate	$9/16 \times 100,000$	56,250
		<hr/>
		\$203,500

#### M. Other Mathematical Problems.

For other examples of very interesting mathematical problems, see Casner, *Estate Planning* (Third Edition), Chapter XIII, where many are suggested, and 68 *Michigan Law Review* 809, Polasky, "Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations," in which many problems are demonstrated.

MODERATOR PIERSON: Now John Gradwohl, Professor of Law at the University of Nebraska will speak on "vesting" under the marital deduction, 64-19.

#### "VESTING" UNDER MARITAL DEDUCTION, REVENUE PROCEDURE 64-19 AND HANDLING PRE-OCTOBER 1, 1964, DISPOSITION

John M. Gradwohl

I think the general heading for my remarks might better be "Marital Deduction Viewed as at the Date of Decedent's Death," as it appears in the printed materials that you have, than this "vesting" language that you will find in the advance program of the meeting that went out.

Two developments in early 1964, the decision of the United States Supreme Court in *Jackson v. United States* and issuance of Revenue Procedure 64-19 by the Internal Revenue Service, have focused a lot of attention on the general proposition that "qualification of property for the federal estate tax marital deduction will be viewed as at the date of the decedent's death."

The results in both the *Jackson Case* and Revenue Procedure 64-19 were at least foreseeable, if they weren't actually predictable. Both, in my opinion, represent a sound application of the tax law and the underlying policy, and I think that neither one of them need pose any really insurmountable difficulties from here on out with reference to estate planning. The difficulties arise from what I think is some unfortunate language in the *Jackson Case* about this "vesting" thing and from what I think has been the Internal Revenue Service position with reference to the whole problem area covered in part by Revenue Procedure 64-19, since

issuance of that Revenue Procedure, which was followed in a few days by the *Jackson* decision.

The *Jackson Case* involved the qualification of a California widow's allowance under the federal estate tax marital deduction. Fourteen months after the date of her husband's death a California widow got an allowance by the probate court of \$3,000 a month payable to her for a period of twenty-four months. For federal estate tax purposes the question was whether or not this was a "terminable interest" because the widow's right to the allowance accrued only when the court made the order and because the California widow's allowance terminates upon her death or remarriage.

The Internal Revenue Code denies the marital deduction to interests passing to the wife which are terminable, and it defines a terminable interest as one where on the passage of time, on the occurrence of an event, or on the non-occurrence of an event the interest of the surviving spouse comes to an end and the property goes to someone other than the surviving spouse or the surviving spouse's estate.

The holding in the *Jackson Case*, apart from the language, amounted to no more than a determination that the qualification for the widow's allowance was viewed as of the date of death, and not as of the date of the later award by the probate court or actual payment of the allowance.

The Nebraska widow's allowance had similarly been denied qualification for the federal estate tax marital deduction in *Quivey v. United States*, an Eighth Circuit decision. We still have some ability to control the income tax consequences which can result from a widow's allowance in Nebraska, depending upon whether we get the order to state that the payment is out of income. But I think it was clear for several years, even before the *Jackson Case*, that the Nebraska widow's allowance based on *Quivey* did not qualify for the federal estate tax marital deduction.

But the thing that has people talking and worrying about *Jackson* is the breadth of some of the language in the opinion, and I have set this out in my outline—language like the California widow's allowance "is not a vested right and nothing accrued before the order granting it"; that the widow "did not have an indefeasible interest in property at the moment of her husband's death, since either her death or remarriage would defeat it." This has led some Internal Revenue Service personnel and some other people to talk about a "vesting" requirement under the federal

estate tax marital deduction. I know of no "vesting" requirement in either the *Jackson Case* or the tax law or in the policy behind the law. I am not quite sure what is meant by "vesting," because Professor Casner's treatise and others point out that this word has had different meanings, at least historically, when used in different contexts. But the *Jackson Case* has certainly raised the language "vested" and it is something that we are going to have to live with and deal with from here on out.

I am going to switch for a moment to Revenue Procedure 64-19 and then we'll talk some more about the *Jackson Case* and possible combinations of the two.

Revenue Procedure 64-19 happened to be announced only four days before the *Jackson* opinion. For this Revenue Procedure to be applicable there must be three things, all of which apply to the very same disposition:

First, we must have a pecuniary bequest to the surviving spouse. It doesn't make any difference whether the pecuniary bequest is determined by formula or otherwise, but we must have a pecuniary bequest.

Second, an executor, a trustee, some person at any rate other than the spouse, must have the power to select the assets that will be distributed, in kind, in satisfaction of the pecuniary bequest.

Third, the assets which are to be distributed in satisfaction of the pecuniary bequest must be valued for this purpose at their estate tax values—a pecuniary bequest, a power in someone other than the spouse to distribute in kind, a valuation of the estate tax values. Ordinarily a trustee would have the duty to distribute assets in kind, based on their fair market value at the date of distribution, and I think this is the law unless you look at the instrument and find something in the instrument permitting the executor or trustee to distribute, basing the distribution upon estate tax values rather than fair market value on the date of distribution.

The objection to these clauses is that since the executor or trustee has the ability to distribute based upon an estate tax valuation, the surviving spouse may get nothing or she may get a low value because of assets that had a higher estate tax value than they have fair market value on the date of distribution. Contrariwise, someone else in the estate may get assets which have a much higher value on the date of their distribution than in the estate tax return.

The real vice to which Revenue Procedure 64-19 is directed, and I think properly so, is that we have an executor or a trustee in a position of diverting value, of diverting property away from the spouse and to someone else. This is an event or contingency in which the wife gets less and someone else gets more. I think that in this context the Revenue Procedure is wholly correct. It is certainly a foreseeable result. I know that Professor Casner predicted this result, or at least suggested it as early as 1951 in writing, and probably privately before that, maybe before that in writing. I know that for three years the Internal Revenue Service and the Bar Association publicly discussed the problem, and I think that it was certainly predictable, if not foreseeable.

If we have a pecuniary bequest which is disqualified because of the executor's power to distribute at estate tax value, it is completely disqualified and the marital deduction goes down to zero, for the reason that assets in the estate could go down to zero, the wife end up with the assets valued at zero, and the other parties in the estate end up with items of value. But I call to your attention the fact that it applies only to pecuniary bequests satisfied by distributions in kind at federal estate tax values.

Now, why did all of this come about when lawyers around the country and Internal Revenue Service people have been talking about it for quite a few years? Al Ellick is going to talk later on about some of the factors that have influenced the use of pecuniary bequests, whether determined by formula or otherwise. But if we give a pecuniary bequest to the wife, then we've got some problems. How do we come up with the cash to pay off the pecuniary amount? Do we have to sell assets which may result in a capital gain, which may be an unwise thing from the standpoint of managing the property? It may involve inconvenience. It is likely to involve expense. Why not do the thing that we've certainly come to do, have a provision for distributing assets in kind.

At this point, ordinarily the executor or trustee has the duty to distribute in kind based upon date of distribution value, and the problem that "Buzz" Dalton talked about arises where there is a satisfaction of a fixed monetary amount by the use of assets at fair market value, which is in excess of their income tax basis. The problem is no different in this regard than if the estate had sold the assets and taken the cash and paid off the pecuniary legacy. It's no different than if I pay my \$200 grocery bill with stock worth \$200 but with an income tax basis to me of \$100. I have realized a \$100 capital gain by my so-called constructive sale.

I realize that, in the good times we have been having with the rising market, this is probably a real problem. I wonder, though, in all of the estates that you have had in the State of Nebraska, whether or not the magnitude of this potential capital gain as an axiom of estate planning hasn't been somewhat unduly emphasized in the writings and as a matter of concern.

I want to direct your attention next, if I may, to page 15 of my printed outline. I am going to review with you very briefly some general forms of making a bequest to a wife which will qualify for the federal estate tax marital deduction despite Revenue Procedure 64-19, the *Jackson Case*, and any other limitations that there may be.

We may certainly give to the surviving spouse specific property for which she gets the property and, as "Buzz" Dalton says, the income and the appreciation, or loss, from the date of death.

We can certainly give her a fractional share, a percentage, as distinguished from a dollar sign type of bequest, in which she shares in all, or whatever assets we describe, a proportionate interest in the assets in the estate.

We can still use very effectively, in my opinion, a pecuniary bequest, whether determined by formula or otherwise, if we satisfy it in cash or have the liquid funds to satisfy it.

If we distribute assets in kind to satisfy it and value the assets as of their distribution date, we still can use a pecuniary bequest, and nothing in Revenue Procedure 64-19 limits this. We only are left then to live with our capital gain problem.

We can satisfy the pecuniary bequest by the distribution of assets in kind by valuing the assets at their estate tax values, but depriving the executor of the discretion to switch assets over to the wife or over to someone else. In this kind of bequest we use a pecuniary bequest but we direct the executor to satisfy it first out of ABC stock, second out of General Motors, and spell out a priority of items, removing from the executor, which is the vice of 64-19, an ability to vary the interest of the wife.

We can distribute assets in kind but use either the date of distribution value or the estate tax value, whichever is lower. At this point the wife isn't going to end up with zero because she is guaranteed the minimum value of either the fair market value, if the estate has anything of fair market value, or the estate tax value, whichever is lower.

We can also permit the executor to select the assets for distribution and to use estate tax values but add a floor provision, that



the aggregate fair market values on the date or dates of distribution are equal to or greater than the marital deduction pecuniary bequest. This is specifically provided for as a permissible device in Revenue Procedure 64-19.

Revenue Procedure 64-19 also permits us to distribute assets at their estate tax marital deduction in satisfaction of a pecuniary bequest if the executor or trustee or person making the distribution has to distribute assets which are fairly representative of the appreciation or depreciation of all available assets to the date or dates of distribution. This is specifically provided for, specifically sanctioned, by Revenue Procedure 64-19.

I will leave to later discussants whether this is a pecuniary clause or a fractional clause, and if it is a fractional clause how it differs from the so-called true fractional clause, but it is at least something that is permitted by Revenue Procedure 64-19.

Revenue Procedure 64-19 expressly avoids commenting on any of the income tax consequences from the transactions that we have been talking about. I think that the potential trap in this area is from a satisfaction of a fixed monetary sum with assets which are valued, for purposes of distribution, in excess of their income tax basis. I think we have to have a fixed monetary sum, but I think we also have to have a valuation by the executor who is satisfying his fixed monetary sum to distribute at a value higher than the income tax basis.

I have, on page 15 and 16 of the printed outline, taken a guess at some of the non-estate tax ramifications of the bequests that I listed that will qualify, and I think that still the only area where we are going to have an adverse income tax effect is where we use the date of distribution value. I think we will be safe in the long run for income tax purposes on the other forms of qualifying bequests that I have listed.

I have deliberately omitted talking about something that I think has a tremendous potential adverse tax consequence, and this is giving the spouse the right to select assets applicable to her own marital deduction pecuniary bequest.

This has been suggested in the writings and it has been suggested by Internal Revenue Service people. If you do this, it will certainly satisfy your estate tax marital deduction problems under 64-19, because no one other than the spouse can take anything away from the spouse, but it seems to me you have given her a tremendously dangerous general power of appointment that may exist for a long time in the future and subject her to adverse

estate and gift tax consequences much greater than the problems that we are trying to solve.

There is a note in my outline on the possibilities of combining the forms of gifts which can be useful, and some pitfalls from combinations of these gifts, which there may be. But I think that I will skip at this point over to some of the . . .

THOMAS M. DAVIES, Lincoln: John, may I break in? on page 14 of your outline under IV-A and B you are saying A or B; you are not saying A *and* B. Right? It is an alternative. You don't have to do both.

PROFESSOR GRADWOHL: In my Paragraph A, I have tried to outline some general forms for securing the federal estate tax marital deduction. Are you worried about under sub-heading 3?

MR. DAVIES: Yes.

PROFESSOR GRADWOHL: It is one or the other. These are meant to be alternatives. It is *or* in each instance, as I describe the gifts.

DEAN CASNER: You've got to be very careful, however, that you don't give the executor the power to do one or the other in connection with these qualified arrangements. The Treasury Department has indicated that if the executor can make a choice between two methods of distribution that you give him, and those differences may produce different amounts, the whole thing will be disqualified under Revenue Procedure 64-19. For example, Mississippi drew a statute in which it, in effect, said that the executor could give the wife either distribution that was fairly representative of appreciation and depreciation or could give her cash equal to the pecuniary amount that was stipulated. So he ended up with the executor having a power to give her the exact cash amount or possibly something less under the fairly representative of appreciation and depreciation test. The Treasury Department has indicated that that choice in the executor's hands will taint the whole thing and won't be any good at all. So if you are going to pick one of these methods that 64-19 allows, pick one and stick with that. Don't start roaming around giving him a choice of two or three methods. In other words, two rights may end up making a wrong, whereas one right standing alone is all right.

PROFESSOR GRADWOHL: I would move back into my outline at the point where I am discussing formula clauses which are

keyed to, in some form, the maximum allowable marital deduction. The initial problem that I would put to you is the construction problem that both "Buzz" Dalton and Dean Casner have alluded to.

When Dean Casner said, as he did this morning, that he has read all the construction cases that have been coming out of courts with opinions, I believe him. On page 306 and 307 of his 1964 Supplement, he has categorized what seems to be a fairly substantial body of law now, construing the effects of these clauses for various purposes, maybe twenty or thirty cases to date, and has listed a number of cases that reach apparently conflicting, or at least different, results, on situations that seem to be sometimes quite close.

I would suggest that there are two things that are foremost, at least insofar as qualification under Revenue Procedure 64-19 is concerned: No. 1 is the clause "pecuniary or fractional"; and No. 2, if pecuniary, does the clause, at least as applied in conjunction with state law, require a sharing in the appreciation or depreciation of assets in the general estate up to the date of distribution? Insofar as these clauses are possibly unclear in Nebraska law, then I have some thoughts that may be helpful. It seems to me that in the event of an ambiguity, the cardinal rule that our courts apply, with other courts, is that the testator's intent is controlling. As we have moved into these marital deduction clauses, I think the intent of the testator to secure a federal estate tax marital deduction is not only clear but dominant. I think that as the court construes these clauses, the court should construe the clause in such a way that it will produce, if the operation is not clear, a result which is consistent with the allowance of the federal estate tax marital deduction. I think that when a court in a state does this, the matter becomes a determination of state property law. By that I mean property trust probate, but I am using property in the broad sense, which is binding and controlling, as a matter of specifying the beneficial interests in the arrangement for purposes of the federal estate tax return.

I have some question about what happens if there is more than one possible construction. I have a clause which produces the federal estate tax marital deduction qualification. I may not have ultimately, by these rules of testator's intent as I have stated them, eliminated a construction process, but I think I may have gone quite a way towards saving a federal estate tax marital deduction.

One thing that bothers me is that virtually every case that is cited in Professor Casner's Supplement—eight of the ten states

which have acted legislatively in this area have gone to the proportionate sharing of increase or decrease to the date or dates of distribution as a matter of what a testator would have intended in this general area. Somehow, to me, one of the minimum value types of approaches seems to be a little bit more consistent with what I think testators would have had in mind if it had been necessary to construe those documents in a way that is necessary to save the bequest for federal estate tax purposes.

DEAN CASNER: I would like to add a little bit, by way of emphasis, to what he has just been talking about. I have been terribly concerned with the way the marital deduction has evolved over the years since 1948. What started out to be a relatively simple idea of bringing about some equality of tax treatment has turned into, over the years by the highly technical approach taken in some instances by the Service, in some instances by courts, with a sort of attitude that this is something people really aren't entitled to and therefore we must try to keep them from getting it if there is any possible way to construe the arrangement as failing to meet some of these requirements. I think this is an extremely unfortunate development in this area. This was not done for the purpose of giving something to people that they shouldn't have. This was a policy of Congress to allow people to have a marital deduction arrangement. They had to meet certain requirements, but the question was whether the arrangement is one that is capable of being construed to meet the requirements. That should have been the approach all along, it seems to me, instead of the approach of: Is it possible to construe it as *not* meeting these requirements?

The consequence is that you can't tell now what somebody may think of as a possible construction or attitude with respect to a conveyance drawn in entire good faith as something that might fail to meet some technical requirement. This thing has become a technical monster that is about to devour us, in the way in which some of the approaches are being made.

It seems to me quite clear that when I say in this document, "I intend that this qualify for the estate tax marital deduction, and I direct that all questions be resolved accordingly," the approach must be in any intelligent analysis of the problem: "Is it possible to construe this arrangement to carry out that clearly manifested intent?"

In the State of Maryland, in what we call the *Pierpont Case* that came down not so long ago, a person who obviously intended to make a marital deduction gift, set up a trust giving the wife the

income for life, and then he said "I give her the power by her will to appoint to any person."

Now, years before the marital deduction was thought of, a Maryland court had construed a power that said you could "appoint to any person" as not giving you the right to appoint to your estate, that that is what the fellow meant when he used that language in setting up a power. But that was a question of construing the *intent* of the person who set up the power at a time when there was no marital deduction, at a time when that construction kept the appointive assets out of the estate of the donee of the power for estate tax purposes.

Now, after the marital deduction is involved, a person draws a trust giving the income to the wife for life and giving her the power to appoint to any person. Instead of re-examining the intent of the testator when he uses that language in this context, they argue that it means the same thing in *this* context that it meant in the context in which it was previously construed.

It seems to me it is an entirely different question and that any court that approached that problem ought to say "used in this context 'to appoint to any person or persons' means even to appoint to his estate, because that is necessary to qualify for the marital deduction," that it ought to have been construed in that way. And yet the district court didn't construe it that way, and the Court of Appeals for the Fourth Circuit approved the district court's construction and applied, it seems to me, blindly the old *Maryland Case* and deprived the person of the marital deduction where they ought to have had it in any fair construction of the statute and the purposes behind the statute.

In many of these cases where they have construed these powers that were just referred to, to deny the marital deduction where it ended up, however, with the result that it is going to be in the wife's estate for estate tax purposes because it is a general power under 20-41, but because it didn't say in so many words, that she could appoint to her estate, it denied the marital deduction.

Again, the issue is, What did he mean by this language in the context of what was a clearly intended arrangement to qualify for the marital deduction? If the approach had been along those lines from the beginning, we wouldn't be in the position we are in now, where every time one of these things comes up you wonder what ghost will be brought out of the closet that nobody previously thought of before and lead to the question of whether the marital deduction isn't going to be allowed.

PROFESSOR GRADWOHL: Dean Casner, while we are on this same subject let's shift over to the so-called "savings" clauses that you refer to in the "construction" clauses. I've got some material on that. Do you want me to lead off with it?

DEAN CASNER: Yes, I think this might be a good point to bring it in because it bears out the general problem of what the approach ought to be, but what I am afraid it hasn't been. And my complaint is, because of this approach that has now developed, people are encouraged to think up things. It seems to me there is a kind of a game going on as to what may be brought out next to upset these things.

I think I know a little bit of something about the marital deduction. I've spent considerable amount of my professional life working with it. I have drawn a great many of these things, and, gentlemen, I want you to know I worry every time I set one of these up, whether it is going to qualify, because I don't know what they are going to bring out of the closet next. I think it is a shame that this thing has reached this stage where people who are trying to do an honest effort to simply give you what the law very carefully provided for you, have to lose sleep at night over the question of whether some new technicality is going to upset what you've tried to work out with great care and great pains. I have said this in Washington to the Internal Revenue Service, I have said it to Internal Revenue agents in other parts of the country. I hope that they will develop a policy of not looking to see what *might* possibly under any conceivable construction upset something, but approach it from the standpoint of carrying this thing out in the fairness with which it was intended to apply.

PROFESSOR GRADWOHL: One of the ways by which Dean Casner tries to insure his sleep at night, as well as his marital deductions, is to put into his instruments very carefully drawn provisions, which you will see, that tend to operate as savings clauses. He referred to one, the fact that if somehow his instrument—and I can't believe that it ever could possibly be unclear in a situation—but if it were it would be construed in such a way as to achieve the federal estate tax marital deduction result.

He also includes a clause, for example, that none of the powers of an executor or trustee shall be exercisable, or can be exercised, during a period that the surviving spouse survives, in such a way that this would defeat the federal estate tax marital deduction, and there are other clauses that range the whole gamut by just simply saying "this bequest to my wife is no good if it doesn't qualify for the federal estate tax marital deduction or will not

take effect if there is no federal estate tax marital deduction in effect at the date of my death."

The Internal Revenue Service has recently, in a ruling that relates to the allowance of charitable deductions, charitable remainders, and maybe that is part of the problem here, but in the marital deduction area the Chief Counsel of the Internal Revenue Service has applied a decision, *Proctor v. Commissioner*, in such a way that it casts some doubt, it seems to me at least, on what they are threatening to do, on the validity of these savings clauses. I can see Professor Casner grabbing his microphone, and this is going to be a race to see which one of us can get there first, but fortunately I'm up.

*Proctor* was a case in which a transfer was made by gift with a provision that if the gift were subject to the federal gift tax, the property would revert to the donor, and it didn't take very long to say that this was void as a condition subsequent, because it is contrary to the tax administration policy and the administration policy of courts, the administration of justice, because the only effect of trying to enforce the tax by the commissioner would be that in the same judgment you would have to say that the property has to get given back and thereby defeat the tax. I think that the savings clauses that we have are very proper conditions precedent, if you have to get technical, I think they are a part of the public policy of Nebraska. I say that with some confidence, after we "horsed around" in 1947 with community property to try to get the same result, I think that being valid under Nebraska law they are not subject to attack by the Internal Revenue Service. I will go one step further: Being valid property law of the State of Nebraska, I think they are controlling on the commissioner and that if he means to apply *Proctor* or Revenue Ruling 65-144 in the area that I am talking about of the savings clauses of the marital deduction area, he is *wrong*.

DEAN CASNER: Well, I would certainly echo this. In most of these cases that I am talking about there isn't the clear-cut situation that was involved in the *Proctor Case* nor in the actual case that led to this Revenue ruling that has been referred to. The Revenue ruling that was handed down was a case involving the deductibility of a charitable remainder. It had nothing to do with the marital deduction. In the case that was submitted to the Treasury Department for ruling there was a provision that said that the trustee would be entitled to treat certain receipts as income or principal in his discretion, those receipts being capital gains, for example, that he could give to the income beneficiary

rather than to the remainderment. The Treasury Department ruled that that would mean that the value of the charitable remainder was not ascertainable because there was the power, in effect, to divert what would normally be principal to the income beneficiary, and the deduction would be denied.

There was, however, a provision in the instrument that if these powers that had been granted to the trustee to divert what was principal to the income beneficiary would defeat the allowance of the charitable remainder deduction because it could not be valued, that then those powers given in express language, and not anything else, they were very clear, expressed powers, that those powers would be taken away. So it did involve the case of giving an unequivocal, clear, and expressed power to a trustee and then saying, "If it turns out that you can't have that power and get the tax result I intended, then I take that power away from you."

It was in that context that the *Proctor Case* was applied, saying that that kind of provision was void because it meant that as soon as the Revenue Department attacked it, if they were successful in their attack they lost anyway, because then the power was gone. But that kind of provision does discourage making attacks on these arrangements.

When you switch this over to the marital deduction side of the picture, in the first place the way most of the savings clauses are phrased they are phrased in terms of the way in which language given should be construed to determine what was granted in the way of powers in the first instance. When I set up a series of powers in a trust instrument and I say that the executor or trustee shall not have any of these powers if the possession of them would disqualify the gift for the marital deduction, I am doing nothing more than incorporating by reference into that instrument the restrictions imposed upon the grant of powers by the regulations set up for the marital deduction. Incorporation by reference has been a long established doctrine in determining what it is that is granted in the first instance, not what was granted and then later taken away. It is a question of what is given in the *first* instance. And the saving clause in a sense is saying, "All I give you from the very beginning is what you can have without this being disqualified for the marital deduction."

From the standpoint of the trustee, he is unhappy with this kind of savings clause because he doesn't know what he can do and what he can't do. That is true, and he may do something that will subject him to being surcharged if he doesn't find out



what limitations I have put on him. The trustees have said to me, "I don't like that. I don't know what I can do and what I can't do."

I say, "Well, I would rather have the marital deduction and let you worry about what you can do and what you can't do. You come to see me later and I will give you an opinion as to what you can do and what you can't do, but I am interested in saving that marital deduction."

PROFESSOR GRADWOHL: But isn't the potential liability of the trustee one of the very clear distinguishing features between the Revenue Procedure, our marital deduction savings clauses, and the *Proctor Case*, because we've got the trustee on the hook?

DEAN CASNER: Yes, this is not a case when we say we have qualified for the marital deduction that then there is no further restriction, people can do what they please. This will bind the trustee as long as that trust lasts to operate within the restrictions I have put on him by that savings clause.

Furthermore, in many of these cases, when you read the power granted it isn't clear just what it means. When I say to a trustee, "You can determine whether particular receipts are income or principal," that has never been in any state a wide open freedom to make arbitrary decisions. He has got to act like a *trustee* in making those decisions and formulate decisions that are based upon sound fiduciary principles. Therefore when I tell him that he can't exercise that power except in a manner consistent with the marital deduction, that puts on him a restriction to meet the requirements in the marital deduction law that the wife get all the income, which is one of the requirements of the marital deduction. Any other approach in this area, it seems to me analytically or legally, is unsound, and that the marital deduction cannot possibly be denied when you have these restrictions put on the interpretation of the language that is employed.

Now, obviously, you can't set up a trust and say "I give all the income to my son, and I intend this trust to qualify for the marital deduction." Obviously, of course, you can't do something that is as blatant as that in cutting out a requirement for the marital deduction and expect to bring it back in line by a savings clause. But when the thing is in a format that is *capable* of being construed in that way, it seems to me that everybody ought to agree that under those conditions it *will* be construed in a way that will carry out the clear intention of the person who is involved.

I don't think this Revenue ruling is, by any means, to be taken as a complete repudiation of the significance and operation of a savings clause in connection with marital deduction gifts. That was an entirely different situation and it should not be carried over, and I urge very strongly, as I did not so long ago, that the Treasury Department come out with some explanation on this, because a panic may be developing around the country as to what to do in this situation, a panic that is entirely unjustified in the light of the whole thing. And you are not getting away with anything because, by virtue of its being construed to qualify for the marital deduction, it forces it into the wife's estate for tax purposes when she dies. You are not playing this game fast and loose. It doesn't end up that way. It ends up just as the law intended, half of the estate being taxed when the husband dies and the other half when the wife dies.

PROFESSOR GRADWOHL: Let me say two more things and then we will take a recess and have a little break.

The commissioner is threatening to do something comparable to what we have been talking about with savings clauses with reference to the marital deduction formula clauses keyed to the maximum allowable marital deduction. As you know, the executor has a choice as to how to use administration expenses. He can use them for estate tax purposes or income tax purposes, and under a formula keyed to the final tax result then the widow may get more or less, depending on the election.

The same thing is true in the area of the optional valuation date. The commissioner has indicated that he is going to look at what have been past rulings, saying that whatever actually passes to the spouse as a result of the elections will qualify for the federal estate tax marital deduction. Recently there have been some indications that he is at least going to review this area because, as of the *Jackson Case*, you can't tell at the moment of the death how the executor is going to exercise those elections. Professor Casner's answer in his book is that these are tax elections that have been in the Code a long time before the marital deduction, and what was given by the optional valuation date in the elective deductions area was certainly not taken away by the marital deduction area. These sections inter-relate by specific reference in the section, and nothing in the statutes or in the policy behind the law should invalidate the qualification of property for marital deduction purposes as a result of whichever election in this regard the executor makes.

DEAN CASNER: I just want to add one thing. I made a talk this winter to all of the Internal Revenue Service in Washing-

ton on this particular issue. I went into it with great detail, trying to point out that these powers created by operation of law were, as a matter of construing the basic statute that was involved, the terminable interest rules to be construed in light of the fact that these were inherent powers in the Code.

There is a Revenue ruling already outstanding from the Treasury Department that recognizes that in a formula gift the marital deduction may shift up or down, depending upon how the executor exercises these powers given by the Code itself. I think it is quite clear, and they told me at the time that while this is a matter that they have been concerned about, that if they did go into this and did anything, it would have to be on a prospective basis. In other words, it would operate something like 64-19, that with instruments drawn after a certain date there would be some view taken differently from that that had been taken before.

I think we are in an area where something may happen, but I don't think it is going to be applied retroactively in a way that will deprive people of rights they have been led to believe exist on the basis of presently outstanding Revenue rulings and attitudes of the Treasury Department.

PROFESSOR GRADWOHL: My one last point would relate to some problems which have arisen in connection with signing agreements by an executor or a spouse with reference to instruments executed before October 1, 1964, the cut-off date. In situations where the instrument is unclear as to the discretion of the executor to satisfy the bequest that the estate tax values, you will find in the outline—I have given you the best answers that I can give you—you will find that in many areas we simply do not know the answers to the questions under Nebraska law about the authority of an executor, about how the clauses operate from the standpoint of sharing in appreciation or depreciation, and so on.

I had intended to make the point in this portion of the outline that ten states, to my knowledge, have already legislated to ease the problem of executors in this area, and I would add this to the subject this morning, that we deferred to the Legislation Committee for possible action in two years. If you find my outline wanting, as I do, for answers, I think this can be cured by a legislative enactment.

DEAN CASNER: I just want to say one more thing on this question that I have been talking about. If you are granted a marital deduction on the basis of the language meaning, something that qualifies for the marital deduction where that meaning may be assigned to it as a reasonable construction of it in light of the

purpose behind its use, it seems to me that it is professionally unethical if, when the wife dies, you try to take a contrary position. I think justification for this is that when you have applied and construed it to qualify for the marital deduction, when the wife dies the same construction must be applied in the case of the wife's estate. That is one of the things on which the Treasury Department comes back to me and says, "If we construe it this way and allow the marital deduction, then when the wife dies they are going to argue that it meant something else. Therefore, we get the marital deduction and it isn't included in her estate when she dies."

I think the mere filing of the return and the admission that it qualifies is an admission as to the meaning of that language that carries with it a definite agreement and understanding that a contrary and inconsistent position will not be taken with respect to the meaning of that language when the wife dies. You can't have it both ways. You have got to stay with it in a professionally honorable way.

MODERATOR PIERSON: Thank you, John.

[Recess.]

# MARITAL DEDUCTION "VIEWED AS AT THE DATE OF THE DECEDENT'S DEATH"

BY JOHN M. GRADWOHL

I. "In determining whether an interest in property is a terminable interest \* \* \*, the situation is viewed as at the date of the decedent's death \* \* \*." Senate Report No. 1913, Part 2, 80th Cong. 2d Sess., p. 10, quoted in *Jackson v. United States*, 376 U. S. 503, 84 S. Ct. 969, 11 L. Ed. 2d 871 (1964).

II. Internal Revenue Code § 2056(b)(1)(A) and (B):

"(b) Limitation in the Case of Life Estate or Other Terminable Interest.—

(1) General Rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;"

III. The *Jackson* case: Fourteen months after her husband's death, a California widow was given a widow's allowance of \$3,000 per month for twenty-four months, receiving \$42,000 accrued to the date of the order and \$30,000 for the ten months thereafter, a total of \$72,000. The United States Supreme Court held, that in view of the nature and characteristics of the California widow's allowance, which "is not a vested right and nothing accrued before the order granting it" and which abates upon a widow's death or remarriage, (a) the widow "did not have an indefeasible interest in property at the moment of her husband's death since either her death or remarriage would defeat it."; (b) "judging deductibility as of the date of the Probate Court's order ignores the Senate Committee's admonition that in considering terminability of an interest for purposes of a marital deduction 'the situation is viewed as at the date of the decedent's death'"; "qualification for the marital deduction must be determined as of the time of death"; and (c) this conclusion is supported by legislative history, despite the fact that the \$72,000 is also potentially subject to estate tax in the widow's estate.

A. The Nebraska widow's allowance had similarly been held not to qualify for the federal estate tax marital deduction. *United States v. Quivey*, 292 F. 2d 252 (8th Cir. 1961), reversing 176 F. Supp. 433 (D. Neb. 1959). Remember that the income tax consequences of a widow's allowance depend upon whether or not the probate court order charges the payment to estate income. In the absence of such an order under Nebraska law (see I.T. 3074, 1937-1 C.B. 153), the payment will be considered to be made out of corpus and not subject to the distributable net income rules. See Reg. § 1.661(a)-2(e).

B. The problems of *Jackson* will arise out of interpreting the language of the opinion; such as "indefeasible interest in property", "vested right," and whether there is a difference between "deductibility" or "qualification" and a "valuation" thereof.

#### IV. Revenue Procedure 64-19, 1964-1 C.B. 682.

A. General Rule: An executor's or trustee's power to select assets at their *estate tax values* to satisfy a *pecuniary bequest* to the surviving spouse disqualifies the bequest from the federal estate tax marital deduction.

1. It makes no difference whether the pecuniary gift is determined by formula or otherwise.
2. A gift so conditioned is completely disqualified for the marital deduction.
3. It makes no difference whether the executor or trustee actually distributes property having a fair market value greater than the pecuniary gift to the spouse.

B. Reason for the Rule: The principal reason for the rule is that the executor or trustee might be able to select assets with a high estate tax value but little or no fair market value on the date of distribution and thereby vary the interest of the surviving spouse. See I.R.C. § 2056(b)(1). See also I.R.C. §§ 2056(a), 2056(b)(5), 2056(e). The classic example has a spouse entitled to a pecuniary bequest of 100, assets A and B worth 100 each on the date of death, but with A becoming valueless before the date of distribution from the estate and B worth 200. Under a clause giving the executor or trustee a power to distribute at estate tax values, IRS takes the position that the valueless asset could be distributed in full satisfaction of the pecuniary bequest. In the absence of a specific state law, however, IRS will recognize the ordinary rule that assets distributed in kind are to be valued at date of distribution value. Speech of Mitchell Rogovin, Chief Counsel IRS, April 23, 1965, reported in 2 CCH Estate and Gift Tax Reporter par. 8163; 104 Trusts and Estates 432; 22 Journal of Taxation 348.

V. Reasons given for satisfying pecuniary bequests by using estate tax values of property distributed in kind (although the ordinary fiduciary duties require equal treatment of all interested beneficiaries and that assets distributed in kind be valued at fair market value on the date of distribution):

- A. avoid capital gain from the use of appreciated assets in satisfaction of the pecuniary bequest. See Rev. Rul. 60-87, 1960-1 C.B. 286.
- B. avoid subsequent valuations of assets as of the dates of distributions.
- C. permit considerable opportunities to manipulate distributions to achieve additional estate, income and gift tax benefits by a post-death "second guess." Especially valuable is the opportunity to keep anticipated high-growth stocks out of the spouse's potential taxable estate.

## VI. Documents Executed After October 1, 1964:

A. Forms of gifts qualifying for the federal estate tax marital deduction:

1. gift of specific property.
2. fractional share, whether determined by formula or otherwise.
3. pecuniary gift, whether determined by formula or otherwise, and
  - a. satisfied in cash.
  - b. satisfied by distribution of assets in kind, when:
    - (i) executor selects assets but must use *date of distribution values*.
    - (ii) assets are valued for distribution at *estate tax values* but executor does not have a discretion to select the items for distribution to the marital deduction gift.
    - (iii) executor selects assets, but must use *date of distribution value or estate tax value whichever is lower* with respect to each asset distributed to the marital deduction gift.
    - (iv) executor selects assets and uses *estate tax values*, but
      - (A) must distribute assets having an aggregate fair market value on the dates of distributions equal to or greater than the marital deduction gift.
      - (B) must distribute assets fairly representative of the appreciation or depreciation of all available assets to the dates of distributions.

B. Summary of the probable other tax and estate planning consequences of forms of gifts qualifying for the federal estate tax marital deduction:

FORM OF GIFT	POTENTIAL CAPITAL GAIN ON DISTRIBUTION	SUBSEQUENT VALUATION NECESSARY	POST DEATH "SECOND-GUESS"
1. Specific gift	No	No	No.
2. Fractional share	No <sup>1</sup>	No	No.
3. Pecuniary gift:			
a. satisfied in cash	No <sup>2</sup>	No	No.
b. distribution of assets:			
(i) date of distribu- tion value	Yes <sup>1</sup>	Some Assets	Some

<sup>1</sup> Reg. § 1.1014-4(a)(3); Rev. Rul. 60-87, 1960-1 C.B. 286; Rev. Rul. 56-270, 1956-1 C.B. 325.

<sup>2</sup> But if the estate needs to sell appreciated assets to produce the cash, there would be a capital gain from the sale.

(ii) ET value, no executor discretion	No	No	No.
(iii) date of distribution or ET value which ever is lower	Probably Not <sup>3</sup>	Some Assets	Some
(iv) estate tax value, but			
(A) aggregate fair market value of MD gift	Probably Not <sup>3</sup>	Some Assets	Some
(B) representative of apprec. or deprec.	No. <sup>4</sup>	Unless distribution is pro-rata, all available assets at each distribution date	Some

C. For a more complete consideration of the comparative advantages and disadvantages of the different forms of qualifying gifts, see Ellick outline. In addition, it may be necessary to weigh the absence of case law or legal precedent to affirmatively support a proposed plan; invalidity of charitable remainders for unascertainability of value; lack of specificity concerning the fiduciary duty of impartiality both as to beneficial interests and tax consequences; limitations of operation in case of a decrease in value of some or all items; reduction of the allowable marital deduction bequest for failure to pay interest or allocate income from the date of death.

D. Specifically not suggested is giving the spouse a power, as executor or otherwise, to select assets to satisfy the marital deduction bequest at estate tax values. While this could solve the marital deduction problem in the decedent's estate, it would appear to involve devastating estate, gift and income tax problems for the spouse. See Int. Rev. Code §§ 2041, 2514. See also Int. Rev. Code § 678 and the cases it codifies.

<sup>3</sup> See Casner, Estate Planning, 1964 Supplement 315, note 66a, suggesting that this is a transfer in part a sale and in part a gift. If so, the estate would have a gain only to the extent the amount realized (i.e., the pecuniary bequest) exceeds adjusted basis, which would not occur under the clause; but no loss would be recognized. Reg. § 1.1001-1(e). For the transferee's basis, see Reg. § 1.1015-4.

<sup>4</sup> Speech of Mitchell Rogovin, April 23, 1965, *supra* (treating this for income tax purposes as a fractional bequest). See also Rev. Rul. 55-117, 1955-1 C.B. 233.



E. Combining more than one otherwise accepted form of qualifying gift may be:

1. helpful in some estate planning situations. Examples: (1) Directing that the executor first apply specific property at estate tax values in satisfaction of a pecuniary bequest might reduce to "workable" limits the potential disadvantages from using date of distribution values on the balance. (2) To narrow or possibly eliminate the operation of formula bequests and the potential effect of problems therefrom, gifts of specific property might be made in an anticipated amount to come close to or slightly exceed (but not greatly exceed) the maximum allowable marital deduction—the formula clause remaining as an escape valve against greatly inflated values in the decedent's estate (but providing no hedge against a decrease in anticipated values).

2. disadvantages, if under any alternative, discretion can be exercised in a way that the spouse is not guaranteed a specific amount or specific share. Example: Mississippi enacted a statute permitting an executor to choose either of two alternatives expressly permitted in Rev. Proc. 64-19 for employing estate tax valuations to satisfy a pecuniary bequest: (a) distribute assets having an aggregate fair market value on the date of distribution at not less the marital gift; or (b) distribute assets fairly representative of the appreciation or depreciation in the value of all property available for distribution in satisfaction of the marital gift. The IRS has indicated that this arrangement will not qualify for the federal estate tax marital deduction because the executor's choice does not guarantee the spouse either the amount of the pecuniary bequest or a share of the appreciation or depreciation.

#### VII. Documents Executed before October 1, 1964.

A. The same general rules apply except that "In cases where it is not clear on the record available that the discretion of the executor would be limited, \* \* \* the marital deduction may nevertheless be allowed for the value of such a pecuniary bequest or transfer in trust, under an instrument executed prior to October 1, 1964, if the Internal Revenue Service receives appropriate agreements from the fiduciary and the surviving spouse that the assets of the estate, both cash and other property, available for distribution will be so distributed between the marital deduction bequest or transfer in trust and the balance of the estate available for distribution in satisfac-

tion of such pecuniary bequest or transfer that the cash and other property distributed in satisfaction of the marital deduction pecuniary bequest or transfer in trust will be *fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution.*" Rev. Proc. 64-19, § 3.01. For problems arising in connection with these agreements, see part IX, F, below.

B. As long as the marital bequest "is not mentioned in or in any way affected by the codicil," the IRS will not take the position that republication by codicil after October 1, 1964, precludes execution of the agreement. See speech of Mitchell Rogovin, April 23, 1965.

#### VIII. Formula Clauses Keyed to "Maximum Allowable Marital Deduction."

##### A. What do these clauses mean?

1. General Construction Problems. See, for example, Dalton outline, part VII, sections B-2 and B-4, citing cases considering the effect of the executor's election concerning the tax use of administrative expenses under the clause.

2. "Pecuniary" or "Fractional" Bequest? Cases have reached both results where the operation of the clause has not been clearly specified. See Casner, Estate Planning, 1964 Supplement, pp. 306-7.

3. If a pecuniary bequest is involved, does it share, nevertheless, in appreciation and depreciation of the general estate to the date of distribution? See Casner, Estate Planning, 1964 Supplement, p. 307.

4. To the extent there is any ambiguity under the instrument as to how the marital deduction bequest is to operate (whether formula or not), these clauses should be construed in a way which creates *beneficial property interests* which qualify for the federal estate tax marital deduction.

a. The cardinal rule of construction is to carry out testator's intent.

b. The dominant intent from the marital deduction provision is to achieve tax and estate planning results. See, for example, *Dodd v. United States*, 345 F. 2d 715 (3d Cir. 1965) (marital deduction bequest overcame presumption that taxes apportioned to all residue). See Note, Wills—Consideration of Tax Consequences in Construction of Ambiguous Wills, 113 U. of Pa. L. Rev. 472 (1965).

c. The instrument should be construed to effect to the greatest extent possible the testator's wishes both on the beneficial interests and the various (possibly conflicting) tax and estate planning objectives—estate tax marital deduction, capital gains, non-augmenting spouse's estate, flexibility of personal representative, etc.

d. This result should be especially clear where the testator has inserted "construction" and "savings" clauses. But see part IX, C, below.

B. Elective Deductions.

1. Rule has been that the actual figures shown on the estate tax return will be allowed for federal estate tax marital deduction purposes, despite the choice of the executor to use certain items as either income tax or estate tax deductions, and thereby vary the dollar value of the marital gift. Rev. Rul. 55-643, 1955-2 C.B. 386.

2. The chief Counsel of the IRS has indicated that, relying on *Jackson*, the Service is contemplating modifying its present position to deny deduction of the increase in the marital bequest which results from use of the administrative expenses in an income tax return. Speech of Mitchell Rogovin, April 23, 1965, reported in 2 CCH Estate and Gift Tax Reporter, par. 8163; 104 Trusts and Estates 432; 22 Journal of Taxation 348.

3. This position would appear to be unwarranted. "The power in the executor is given by the terms of the Revenue Code itself and, like other powers created by operation of law, should not disqualify for the marital deduction any part of the gift to the wife." 1 Casner, Estate Planning 788 n. 13.

4. One possible solution for the draftsman, although it does not seem very practicable, would be to provide instructions to the executor in the will concerning exercise of tax elections and any adjustments which might be needed to preserve the beneficial interests in the property.

C. Optional Valuation.

1. In addition to problems analogous to elective deductions in some situations, selection of the valuation date affects the spouse's income tax basis for property received from the decedent and would thereby theoretically affect the value to the spouse of the property received.

2. The *Jackson* decision should not be so expanded as to apply to the statutory valuation date election under Int. Rev. Code § 2032. But see statement of Herman T. Reiling, Chairman, Chief Counsel's Policy and Research Committee, IRS, reported in 103 Trusts and Estates 905. Also, the Senate Committee Report (in the portion quoted somewhat out of context in *Jackson* because the references were made to property transferred in contemplation of death rather than at or after death) stated: "The election of the executor to determine the value of the gross estate as of a date subsequent to the decedent's death \* \* \* does not extend to such later date the time for determining the character of the interest passing to the surviving spouse and its deductibility. \* \* \*"

#### IX. Corrective Actions For Plans Now in Existence.

- A. Wherever possible, advise past clients of recent developments which may affect the plan. Depending upon the circumstances, it may not only be proper for a lawyer to call the attention of past clients to the effect of Rev. Proc. 64.19, but he may have an affirmative ethical duty to do so. A.B.A. Opinion No. 210: "Many events transpire between the date of making the will and the death of the testator. The legal significance of such occurrences are often of serious consequence, of which the testator may not be aware, and so the importance of calling the attention of the testator thereto is manifest. It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it might even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will." See Drinker, Legal Ethics 254.
- B. Redraft to a safer plan wherever possible.
- C. "Construction" or "savings" clauses.
  - 1. The Chief Counsel of the IRS has indicated that bequests otherwise within Rev. Proc. 64-19 might not be rescued by savings clauses (Speech of Mitchell Rogovin, April 23, 1965), relying upon *Commissioner v. Proctor*, 142 F. 2d 824 (4th Cir. 1944), cert. denied 323 U. S. 756 (1944), holding void as against public policy a condition that the title to property transferred by gift would revert to the donor should it be held to be subject to the federal gift tax: "The condition is contrary to public policy for three reasons: In the first place, it has a tendency to

discourage the collection of the tax by the public officials charged with its collection, since the only effect of an attempt to enforce the tax would be to defeat the gift. In the second place, the effect of the condition would be to obstruct the administration of justice by requiring the courts to pass upon a moot case. If the condition were valid and the gift were held subject to tax, the only effect of the holding would be to defeat the gift so that it would not be subject to tax. \* \* \* In the third place the condition is to the effect that the final judgment of a court is to be held for naught because of the provision of an indenture necessarily before the court when the judgment is rendered."

2. *Proctor* seems clearly distinguishable:

- a. The savings clauses and construction clauses are a portion of state property law determining the nature and extent of the beneficial property interests, and even the IRS is willing to concede that state property law is controlling to define the beneficial interests for federal estate tax marital deduction purposes.
- b. Giving effect to clauses to achieve a federal estate tax marital deduction is certainly consistent with Nebraska public policy—especially in view of our previous experiment with community property in 1947 along the same lines.
- c. On a more technical line, the traditional savings and construction clauses are at most conditions "precedent" and not "subsequent" which was the real vice of the *Proctor* case: "This is clearly a condition subsequent and void because contrary to public policy. A contrary holding would mean that upon a decision that the gift was subject to tax, the court making such decision must hold it not a gift and therefore not subject to tax. Such holding, however, being made in a tax suit to which the donees of the property are not parties, would not be binding upon them and they might later enforce the gift notwithstanding the decision of the Tax Court. It is manifest that a condition which involves this sort of trifling with the judicial process cannot be sustained."

D. Statutory Election Against Spouse's Will. Assuming that the spouse's right of election comes into being at the moment of testator's death and need not await admission of the will to probate (see Annotation, 120 A.L.R. 1270), the property passing to a surviving spouse under the statutory election

(R.R.S. §§ 30-107, 30-108) should clearly qualify for the federal estate tax marital deduction, even though specified procedures for making the election must be followed, and despite the fact that the spouse's right is personal and does not pass to heirs or personal representatives in the event of death before exercise.

E. Bona-Fide Family Settlement. If the beneficial rights under the disposition are unclear, then it would seem that a bona-fide family settlement would continue to control the marital deduction tax result after *Jackson*, although the IRS apparently scrutinizes these agreements very closely and there has been considerable litigation in this area in recent years.

F. Agreements of Spouse and Executor Under Rev. Proc. 64-19.

1. Only under instruments executed prior to October 1, 1964.
2. Only where it is not *clear* whether discretion of executor is limited.
3. Only if fiduciary and the surviving spouse sign agreements that distribution to the spouse will be fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. Note that the agreement cannot utilize the other form approved in section 2.02 of Rev. Proc. 64-19 by distribution of assets having an aggregate fair market value at the dates of his distribution amounting to at least the value of the pecuniary gift.
4. Execution and performance of the agreement is not a gift.
  - a. failure to make distribution in accordance with executed agreements may be a gift.
  - b. failure to make distribution in accordance with executed agreements may also be a transfer of a type leaving the property subject to tax in the spouse's estate, if the widow retains "strings."
  - c. the IRS will recognize a reasonable time interval between preparing the final distribution schedule and the court approval and actual distribution thereon.
5. But what if the parties never intend to distribute in accordance with the agreement?
6. What if the spouse refuses to sign the agreement?
7. What is the authority of an executor to sign the agreement
  - a. in general under Nebraska law?

- b. if *all* beneficiaries have not consented or suitable indemnity given or court approval secured?
    - (i) county court approval can protect the fiduciary, but does not determine beneficial interests.
    - (ii) district court approval is necessary
      - (A) to adjudicate beneficial interests under the instruments; and
      - (B) to render a state property determination effective to control the federal tax result.
- Note: For each of these reasons, there must be an "adverse" proceeding with full protection for the rights of contingent, unborn, unascertained, minor or incompetent beneficiaries.
- 8. What is the authority of an executor to fail to distribute in accordance with the agreement?
  - 9. Procedural notes:
    - a. personal representative can sign for spouse.
    - b. District Director has some authority to alter the form of the agreement contained in Rev. Proc. 64-19.
    - c. Technically the agreement is required only when requested during audit, but as a practical matter it might be best to file it with the return where this is possible in order to be certain of the beneficiary consents and avoid possible difficulties during the audit.

MODERATOR PIERSON: Gentlemen, we will get on with our program.

I would like now to introduce to you Alfred Ellick of the firm of Ellick, Spire & Ryan of Omaha, who will speak on "Forms of Marital Deduction Gifts, Formula and 'Back-up' Clauses."

#### FORMS OF MARITAL DEDUCTION GIFTS, FORMULA AND "BACK-UP" CLAUSES

Alfred G. Ellick

Professor Casner and Gentlemen: Let's assume that you have a live client who wants you to help him plan his estate, that you are thoroughly familiar with his family situation and you have a list of all of his assets; you have memorized Mr. Dalton's outline here and Professor Gradwohl's outline, and you've bought Professor Casner's book on estate planning, and you have studied that thoroughly; and you have finally reached the point where the client says to you, "All right, you go ahead and draft a will that I

can look at, take home and show to my wife, and be sure and use that marital deduction that you have been talking about."

The purpose of my outline this afternoon is to give you at least some suggestions as to alternative drafting possibilities so that you may have some place to start when you come to the marital deduction part of the will.

In the first place, let's admit right off the bat that any lawyer is a fool who will stand up here and try to tell other lawyers how to draft the provisions in a contract or a will or any other legal instrument, because I am sure, and I hope, that you will look at these clauses realistically and relate them to your own particular client's problems. I am also well aware that if the clause that you might happen to use from this outline turns out well you are probably not going to say to your client, "Mr. Ellick, at that meeting last year, suggested this clause"; on the other hand, if it doesn't turn out very well I am sure you are going to say, "That damn fool last year at the Bar meeting suggested we use this and now look what has happened."

Anyway, with those little preliminary remarks, let's get into the substance of the outline, and again I make the usual disclaimer: "Please look at these suggested clauses in the light of what has been said by everyone else here yesterday and today and in light of your own client's particular problems."

First of all I think we have learned that the use of any formula clause has certain dangers in qualifying property for the marital deduction. By its very nature the use of a formula means that we can't determine the exact amount of the marital deduction until the return has finally been audited by the Treasury Department, because we are not going to be absolutely certain of the value of the various assets until that time has been reached. So to avoid some of these problems of the formula clauses that we have been talking about, a very simple solution is to give specific property either outright to the wife, or to a trust which will qualify for the marital deduction.

DEAN CASNER: Even if you do that you can't tell at date of death what the value is for marital deduction purposes, because you don't know what the valuation is that is finally going to be settled on the property you specifically give.

MR. ELLICK: That is correct. You are going to have a valuation problem at some time no matter what solution you come up with, but perhaps you are going to avoid some of the problems in some of the formula provisions.



DEAN CASNER: This is the thing that I think is interesting because they talk about the fact that under the *Jackson Case* and others you must be able to determine everything as of the date of death or it doesn't qualify for the marital deduction. If that is true, it is impossible to draw a marital deduction gift, and they have ruled the statute out of existence.

MR. ELLICK: So in Roman numeral I of my outline I have given you a few suggestions with respect to direct gifts to the wife.<sup>1</sup> These same ones can be used to transfer property directly to a trustee in a trust that will qualify for the marital deduction, and later on in the outline some of the suggested language that might be used is set forth.

In connection with Dean Casner's talk yesterday afternoon on legal life estates I have included a life estate to the wife with power of appointment over the remainder. I believe it would qualify. "I give and devise my house and lot, legally described, to my wife for her life, and I further hereby grant to her alone and in all events the power to appoint by her will the remainder of this property to her estate or in favor of any other person or persons," and then a transfer over in the event she fails to exercise the power of appointment. Bear in mind the problem Dean Casner raised yesterday afternoon on the right of the wife to borrow money. What happens if the property is to be sold?

To come a little closer to the maximum marital deduction, we can use a formula clause which does not take into account property passing other than under the will. Remember, however, that the disadvantage of a direct bequest to the wife is that you may not qualify enough of the property to get the maximum marital deduction. Estate values may change. What constitutes fifty per cent of the adjusted gross estate, including jointly held property and property passing other than under the will when you make the will, may not be fifty per cent of the adjusted gross estate when your client dies. So a direct bequest to the wife or a

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<sup>1</sup> I give and bequeath \$100,000 to my wife, Mary

or

I give and bequeath all of my stock in ABC Corporation to my wife, Mary

or

I give, devise and bequeath my farm in Seward County, Nebraska, legally described as \* \* \*, together with all livestock, poultry, feed, seed, produce, farm machinery and equipment, and other property which I may own in connection with farming operations thereon to my wife, Mary, if she survives me, and if she does not so survive me, I direct that said property shall pass as part of the residue of my estate.

direct bequest of specific assets to the wife or to a trust has the disadvantage that you may not qualify enough to get the maximum marital deduction, or you may qualify too much. You may put too much into the wife's hands directly or into the marital trust, with the result that you pay a little more extra tax when the wife dies.

My personal judgment is that over-qualifying some of the property is not too serious if the wife is middle-aged or reasonably young because, through gifts by herself during her lifetime and use of the property herself, the second tax may be minimized, at least to some extent.

Let's suppose that instead of a direct gift to the wife or a direct gift of specific assets you want to use a non-formula clause but related, nevertheless, to a percentage of the gross estate. We've talked about a fractional share of the residue clause. Near the bottom of page 22 I have given two examples of a fractional share of the residue clause: "I give and bequeath to my wife, Mary, a fractional share of my estate equivalent to one-half of my adjusted gross estate as finally determined for federal estate tax purposes." The objection, of course, is that you aren't taking into consideration property passing to the wife other than under the will, such as jointly held property, life insurance, and so forth.

An alternative form is also suggested at the bottom of page 22 and the top of page 23.<sup>2</sup>

Also I have included a pecuniary bequest, non-formula pecuniary bequest, which could be used in the event that all, or practically all, of the testator's property is going to pass under his will. Bear in mind that what we mean by a pecuniary bequest is a bequest of a fixed dollar amount, or a bequest worded in such a way that it can be translated into a fixed dollar amount: "I give and

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<sup>2</sup> All the rest, residue and remainder of my estate, both real and personal and wheresoever situated, I direct the executor hereinafter named to divide into two (2) parts, as nearly equal as may be, and I give, devise and bequeath said parts as follows:

A. In the event that my wife shall survive me, one of said parts to \* \* \* (the wife outright or in trust to qualify for the marital deduction).

B. The remaining part, or my entire residuary estate in the event that my wife shall predecease me, to the trustee hereinafter named, in trust nevertheless, for the following uses and purposes:

To have and to hold the same during the life of my wife \* \* \* (in trust in form not to qualify for the marital deduction).

In each of the above cases there should be an instruction to the executor to pay taxes out of the non-marital share.

bequeath to my wife, Mary, an amount equal to one-half of my adjusted gross estate as finally determined for federal estate tax purposes." Caution there, of course. If you authorize the executor to satisfy that bequest in kind and with assets valued at estate tax values, you are going to run afoul of Revenue Procedure 64-19, so you have to take care of that with other provisions in the will.

Again, the advantage, I suppose, of this particular type of clause would be its simplicity; its disadvantage is that it does not, as we've said, take account of property passing outside of the will.

DEAN CASNER: Let me interrupt for a second, because when you are setting up the type of disposition to make to the wife to qualify for the marital deduction, you've got to take a look at the income tax situation.

If you make a gift to the wife of \$100,000, when you do make your distribution to satisfy that \$100,000 legacy, the distribution will not carry out distributable net income of the estate in the year you make the distribution to make up that amount. In other words, what the wife receives will be non-taxable from a standpoint of income, except to the extent of what you may pay her in the way of interest for delay in payment, but the basic amount comes to her not subject to income taxes. If, however, you use a formula pecuniary gift in favor of the wife, then because of the fact that the amount is not definitely ascertainable as a specific sum on the date of death, a distribution to satisfy that amount will carry out distributable net income of the estate for the year of distribution, and she may end up with a big income tax bill if you are not pretty careful in how you make that distribution. This is a factor to take into consideration. In some instances I have drawn two gifts. I have drawn a specific dollar amount gift of, say, \$100,000, and then drawn a separate pecuniary gift on a formula basis so that I could, if I wanted to, during distribution, make distributions out to the wife without carrying out a state income for state income purposes. I would make distributions in satisfaction of the specific amount of \$100,000 which, under Section 6-63 will not carry out a state income, and cut down on the dimensions of the problem where distributions under the formula would carry out a state income by making that a separate gift.

MR. ELLICK: Probably most of us are eventually going to use what we call the true formula clauses. In that way we guarantee, or at least we hope we guarantee, that we will get the maximum marital deduction. I have set forth in III some of the possible forms for obtaining a maximum marital deduction with the use of the true formula clause.

First, I have set forth an example of a fractional share of the residue clause, starting at the middle of page 23 of the outline,<sup>3</sup> and I am going to confess that this is taken from the proceedings of the Committee on Estate and Tax Planning of the Probate and Trust Law Division of the American Bar Association, from their proceedings published in reflecting the matters taken up at their

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<sup>3</sup> (1) If my wife survives me for thirty days, I give, devise and bequeath the residue of my estate remaining after payment of all death taxes as provided in Article \_\_\_\_\_ to my trustee hereinafter named as trustee of separate trusts designated as Trust A and Trust B. Trust A shall be comprised of the fractional share of all property passing under this Article (exclusive of property or interests in property, if any, which would not qualify for the estate tax marital deduction under the Internal Revenue Code if left outright to my wife) required to obtain for my estate a full marital deduction of fifty percent (50%) of the adjusted gross estate as finally determined for federal estate tax purposes, taking into account the aggregate marital deductions allowable other than under the provisions of this Article. Said share shall not be diminished by any portion of the death taxes payable by reason of my death. Trust B shall be comprised of the remaining fractional share of the residue, together with all nonqualifying assets, if any.

(2) If my wife does not survive me for thirty days, I give, devise and bequeath my entire residuary estate to the trustee hereinafter named, as trustee of Trust B, to be held and administered in accordance with the terms and provisions applicable to Trust B.

(3) The trustee shall pay the entire net income from Trust A to my said wife during her lifetime, at least as often as quarterly, and shall pay to or for her benefit such amount or amounts of principal as the trustee may from time to time deem necessary or advisable for her comfort, maintenance and support.

(4) Upon the death of my said wife the trustee shall pay such part or all of the principal of Trust A as then constituted, including income, to or for such person or persons including the estate of my said wife, as she may by her last Will direct and appoint, making specific reference to this general power of appointment hereby granted her. To the extent that such power of appointment shall not extend or take effect, the Trustee shall add the unappointed portion to Trust B to be thereafter administered under the provisions of Article \_\_\_\_\_ in the same manner as though my wife had predeceased me and I had died immediately following her death.

Article \_\_\_\_\_. (1) The trustee shall pay the net income from Trust B to or for my wife, \_\_\_\_\_ during her lifetime as long as she remains unmarried, and shall pay to her for her benefit such amount or amounts of the principal thereof as the trustee may from time to time in its sole discretion deem necessary or advisable for her comfort, maintenance and support or for the comfort, maintenance, support, and education of any child or other descendant of mine.

(2) Upon my wife's death or remarriage, or upon my death if she should predecease me, I direct that Trust B \_\_\_\_\_ (continue with dispositive provisions desired, such as division among children, etc.).

meeting in 1964. It's a fractional share of the residue provision which does not use a numerator and denominator but which the committee felt, nevertheless, constituted a workable fractional share of the residue formula.

I have carried this out to indicate the type of trust provisions that should be included in the marital deduction trust, the one that is going to qualify for the marital deduction. Bear in mind that the Code requires that all of the income be payable to the wife at least annually, and you will see in sub-paragraph 3 of the form, near the bottom of page 23, "The trustee shall pay the entire net income from Trust A to my said wife during her lifetime, at least as often as quarterly"—now that could be annually or even monthly—"and shall pay to or for her benefit such amount or amounts of principal as the trustee may from time to time deem necessary or advisable for her comfort, maintenance and support."

Then there is the typical power of appointment provision at the top of page 24, giving the wife power to appoint the remainder upon her death to her estate, making specific reference to the general power of appointment. Then follows the traditional gift over to a non-marital trust if she fails to exercise the power to appoint.

The next paragraph gives a suggested form of the non-marital trust: "The trustee shall pay the net income from Trust B"—that is the trust that doesn't qualify for the marital deduction—"to my wife during her lifetime as long as she remains unmarried,"—now you don't have to have that in if you don't want it—"and shall pay to her for her benefit such amount or amounts of the principal thereof as she may need for her maintenance and support in the sole discretion of the trustee." That portion of the estate, that is, the portion in the non-marital trust, then is not taxed upon the death of the wife.

I have also included in the outline a fractional share of the residue formula clause which uses a numerator and denominator formula, and the expert on this is Professor Casner himself.<sup>4</sup>

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<sup>4</sup> I give, bequeath and devise to my wife, Mary, the following described fractional share of my residuary estate:

The *numerator* of the fraction shall be the maximum estate tax marital deduction (allowable in determining the federal estate tax payable by reason of my death) minus the value for federal tax purposes of all items in my gross estate which qualify for said deduction and which pass or have passed from me to my said wife in a form which qualifies for said deduction (the word 'pass or have passed' shall have the same meaning as such words shall have under the provisions of the Internal Revenue Code in effect at the time of my death) under other provisions of this will, by right of survivorship with respect to jointly-

I have studied and read a booklet put out by Prentice-Hall which gives the substance of a talk given by Professor Casner, I believe in 1960 and then reviewed and brought up to date in 1964, on the fractional share marital deduction gift, and with particular reference to the numerator-denominator clause. Professor Casner, would you care to comment on that particular formula at this time?

DEAN CASNER: I started out originally, in connection with fractional share gifts, using the type of fractional share clause you first referred to, which simply, in general terms, directed that the wife be given that fractional share of the residue, or whatever other fund I was dealing with, that would equal the maximum allowable marital deduction minus other gifts that qualified for the marital deduction which passed to the wife, which left entirely to the executor the calculation of the formula to carry out the generally expressed intent. I have no doubt that that is adequate to do the job.

The only thing that bothered me a little bit, there has been a considerable amount of litigation in connection with whether a particular gift is a pecuniary gift or a formula gift, and they have reached some rather strange results sometimes in construing this general language as to converting what I thought by the general language was an instruction to produce a fraction into a construction that produced a dollar amount and made it a pecuniary gift.

I switched to the numerator and denominator formulation of language simply because I thought it removed any possibility of the construction of general language into a pecuniary formula gift. That's the sole reason.

I think, furthermore, it tells the executor in detail what to do, whereas the general language means that the executor has got to find out what to do.

I think it is a little bit more complete to spell it out in the way of a numerator and a denominator, but I certainly hold no brief that it must be done in the numerator and the denominator approach.

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owned property, under settlement arrangements relating to life insurance proceeds, or otherwise than under this bequest and devise (in computing the numerator, the values as finally determined in the federal estate tax proceedings shall control); and the *denominator* of the fraction shall be the value of my residuary estate (the value of my residuary estate shall be determined on the basis of the values as finally determined for federal estate tax purposes).

Somebody asked the question: If you use a fractional formula marital deduction gift and there is a power in the executor to satisfy in kind at federal estate tax values, aren't you back to 64-19? Well, that is just a completely repugnant idea to talk about satisfying a fractional share gift by federal estate tax values, because a fractional share gift you don't satisfy at any values; you give them a fractional share of the items that are available for distribution, and you should never put in any fractional share gift anything about satisfying it at estate tax values. It is a repugnant idea to the very concept of a fractional share gift.

Now, what you *do* put in any fractional share gift is that in computing the fraction that will be allowed you compute it on the basis of estate tax values. You've got to do that. You set up the fraction on estate tax values but that fraction, once it's ascertained, is applied against the fund to be distributed when the distribution date arrives on the basis of what the fraction is. You reach the fraction, you determine it is two-thirds or one-half or three-fifths, and you've got to pick estate tax values to formulate the fraction, because what you are making a gift of is three-fifths or four-fifths of values at date of death, or values a year from date of death for purposes of what you put into the estate tax return. Then the estate tax values are no longer significant. You have determined your fraction, and if the property goes up in value you still give that fractional share of the increased value when you distribute. If it goes down in value you give that fractional share of the decreased value.

Get away from a formula for a minute and just say, "I give one-half of the residue to my wife." We've got to determine what we are going to take in the way of an estate tax deduction for one-half of the residue on the basis of estate tax value, because that is the date at which we calculate the amount that will be put into the federal estate tax return, but when we go to distribute that one-half six years, two years, or three years later it is one-half of what the fund has grown to or what it has decreased to. That is an inherent characteristic of a fractional share gift, that it rides up and down, as distinguished from a pecuniary gift which has a fixed dollar amount that the widow will receive later no matter whether the property rides up or down.

I don't care too much about the format that you use. I personally think the spelling out of the numerator and the denominator requires you to think the matter through more carefully, and it is something that I think, even though it looks more complex, can be explained to a client better than to use very broad general language which the other type of fractional share gift produces.

MR. ELLICK: Thank you, Dean. Bear in mind that with a fractional share formula clause you will have no capital gain problem. The residue is distributed on the basis of the formula, half, in effect, of each item going to the wife or the marital trust and the other half to the non-marital trust or to other parties. So there is no construction of a sale of the assets as you might have in a pecuniary bequest. You realize, of course, that in a pecuniary bequest the interpretation is that if you satisfy it with appreciated assets, it's equivalent to a sale of the assets by the estate and then the payment of the funds or the proceeds from the sale to the marital share.

DEAN CASNER: If you start playing around with that fractional share gift, when you come up to the date of distribution you can get yourself into some tax problems.

Suppose that you've got 100 shares of Chrysler and 100 shares of General Motors, and the fraction is worked out that the wife is to get one-half of the residue, and this residue consists of these two items. You come up to the date of distribution, you bring in the wife and you bring in the children who are going to get the other half, and you say, "What about satisfying this by giving all the Chrysler to the wife and all the General Motors to the children?" If you start playing around in that way you may find that you have made a taxable exchange, because one-half of the residue, to me, means one-half of each item in the residue that is there for distribution when distribution date arrives. Each party is entitled to that and if you have worked out something else for them and somebody is giving up something he is entitled to in exchange for something else, if that is what has happened, you've got a taxable exchange.

Many people say, "We can't use a fractional share gift because we don't want this closely held stock to go to the wife. We want it all to go to the children or to the non-marital trust under which she doesn't have control." If you are going to do that, you've got to figure out ahead of time whether you shouldn't withdraw that closely held stock entirely from the fund against which the fraction is to be applied, make a specific gift of it to the other trust, and then have the fraction apply against the fund with those items eliminated from it at the beginning.

If you give the trustee discretion when he comes to distribute to satisfy the fractional share of the wife with whatever assets he selects and assign the other assets to the other trust, then you've got a problem as to whether you haven't given the executor the power to set up in favor of the marital deduction share a dollar



claim equal to the property that he has assigned over to the other trust. If that is what you've done, when he then distributes other assets to satisfy the dollar claim he has established in favor of the marital deduction trust, you may be back in a pecuniary gift in part.

In other words, certain things that you write in here may change it from a true fractional share gift into a combination fractional-share-pecuniary gift. If so, then you have got to be very careful that you watch out for 64-19 or you may get in the back door into that problem when you thought you were dealing with a fractional share gift. A true fractional share gift, to me, is a fractional share of each item in the fund that is set up for distribution.

MR. ELLICK: If you are going to use a pecuniary formula, that is, a formula which gives to the wife or to the marital trust a dollar amount calculated on a formula basis, then you must beware of Revenue Procedure 64-19 if you are going to allow the executor of the estate to select the assets to satisfy the pecuniary bequest and to use estate tax values. Professor Gradwohl has already commented upon the requirements of 64-19. You can avoid the problem if you distribute in cash, or if you distribute in specified assets, or if the distribution is in assets fairly representative of appreciation or depreciation in the value of all property available for distribution, or distribution of assets having a value at date of distribution amounting to no less than the amount of the marital deduction allowed for federal estate tax purposes. So you can avoid the problems of 64-19 if you are sure that your distribution is to be handled in any one of these ways.

I have inserted in the outline, commencing at about the middle of page 25, a formula where the distribution is to be fairly representative of appreciation or depreciation in the value of the property available for distribution when it is distributed.<sup>5</sup> This is

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<sup>5</sup> If my wife survives me, I give to \_\_\_\_\_ as Trustee, an amount equal to fifty per cent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes, less the aggregate amount of marital deductions, if any, allowed for such tax purposes by reason of property or interests in property passing or which have passed to my wife otherwise than by the terms of this article of my Will.

My Executor shall assign, convey and distribute to the Trustee of said trust the cash, securities and other property, including real estate and interests therein, which shall constitute said bequest. The assets to be distributed in satisfaction of said bequest shall be selected in such manner that the cash and other property distributed will have an aggregate fair market value fairly representative of the distributee's

called sometimes a quasi-pecuniary clause or sometimes a tax-value formula clause and should work reasonably well except that you are going to have valuation problems again if you make a number of different distributions. It is going to mean that your executor is going to have to sit down and revalue the assets in the estate, the remaining assets in the estate, every time a distribution is made to be sure that he is distributing proportionately assets which have increased in value and assets which have decreased in value.

DEAN CASNER: May I just come in because I think we are right on a very critical problem here. What you are up against in most estates is that you've got two results that you would like to reach, and you can't reach both of them without trying to do something rather fancy.

One result is, you don't want to cause the realization of a gain in connection with the distribution of property to beneficiaries, particularly if the property distributed will very likely not be sold before the wife dies. If you, in other words, cause the realization of a gain in connection with the distribution to the wife of property that probably wouldn't be sold until after she died, you are incurring a tax that otherwise would not have been incurred, because as soon as the wife dies you are going to pick up a new basis again, because by hypothesis this property is in her estate for estate tax purposes, and thus it seems to me it is almost inexcusable to incur a gain in connection with property that would not have been sold in all likelihood during the time the wife survives.

As opposed to that, you also have some interest in not throwing into the wife's estate any more property for estate tax purposes than necessary. When you are dealing with an estate that may be in administration for two or three or four years before you distribute, if you use the fractional share and the property

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proportionate share of the appreciation or depreciation in the value to the date, or dates of distribution of all property then available for distribution. Any property included in my estate at the time of my death and assigned or conveyed in kind to satisfy said bequest shall be valued for that purpose at the value thereof as finally determined for Federal estate tax purposes, and any other property so assigned and conveyed shall be valued for that purpose at its cost. No asset or proceeds of any asset shall be included in the trust as to which a marital deduction is not allowable if included. Said bequest shall abate to the extent that it cannot be satisfied in the manner hereinabove provided.

Said trust shall be known as the "Marital Trust" and shall be held, administered and disposed of as follows: \* \* \*

goes up in value, you are going to throw into her estate more than you got a marital deduction for, because you've got to give her the fractional share of the increased value of the fund at the time of distribution. But the fractional share won't cause you to realize a gain when you make the distribution of the fractional share. So the things pull in opposite directions. Try to keep it down and avoid the realization of a gain. That is what got the boys into trouble that led to 64-19. They were trying to have their cake and eat it. They were trying to provide a distribution that would not cause the wife to get any more than the minimum amount that they could work out, and secondly, they were trying to work out an arrangement that wouldn't cause the realization of a gain in connection with that distribution. I don't think you can have your cake and eat it here any more than you can in other areas.

One of the reasons that has led to some of the attitudes that I regret developed in this area is that we've got a lot of smart alecks trying to set up phony arrangements and get some benefits that were never intended that you should have. I think these people in the legal profession, these lawyers who think of these ingenious ideas, that *they* think are ingenious, who try to avoid taxes in situations where obviously it wasn't intended that they should have this privilege, setting up what I regard as phony arrangements, an arrangement that as soon as it becomes apparent that if they set it up and it works there is going to have to be a statute passed to stop it because it cannot be countenanced in any equitable and fair tax system, are really doing a disservice not only to the client they represent but to the other clients they represent, because it forces these technical decisions to be made lots of times in this area.

I think in this area you ought to approach it with: Do you want to pay the capital gains or don't you? If you don't want to pay the capital gains, use the fractional share gift. If you are willing to pay the capital gains, use a formula if you want to, but don't try to have it both ways because that is going to move you into an obviously phony area and something is going to have to be done about it because the tax system would not be a fair one if it allows you to have it both ways.

MR. ELLICK: Another formula clause that qualifies as a pecuniary formula I have set forth on the bottom of page 25, and in this particular formula we have valued the assets at the date of distribution.<sup>6</sup> I think that has perhaps the advantage of simplicity.

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<sup>6</sup> If my said wife, \_\_\_\_\_, shall survive me, then I give and bequeath to my Trustee hereafter named, as a separate trust

Let's take an adjusted gross estate of \$500,000. The wife's share would be \$250,000. When the assets are distributed to the wife, you distribute to her assets which, at the date of distribution, are worth \$250,000. Now if you use assets which have appreciated in value from the date of death to the time of distribution, you have a capital gain. That is the disadvantage. But perhaps the executor can wisely choose the assets that are going to be used to satisfy the gift to the wife and minimize the gain, and also by distributing these assets promptly and not allowing them to remain in the estate for a lengthy period, you again may minimize the chance of a gain.

So the disadvantage is that you have the possibility of a capital gain to the estate if you are satisfying this bequest with appreciated assets. A loss can be recognized also if you satisfy it with assets which have depreciated in value. The advantage of this particular formula is that the widow gets the maximum marital

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to be known as Trust A so much of my estate as is equal in value to the amount by which the maximum marital deduction available to my estate exceeds the aggregate value of all interests in property which pass or have passed from me to my said wife under other provisions of this will, or otherwise than under this will, and which otherwise qualify for the marital deduction. The final determinations made in the proceedings to fix the liability of my estate for federal estate tax shall be conclusive as to the value of Trust A. The decision of my executor as to the property to be allocated to Trust A shall be final and conclusive and binding upon all beneficiaries, provided only that: (1) there may not be allocated to Trust A any property with respect to which no marital deduction would be allowed if such property had passed from me to my said wife free of trust; and (2) in distributing assets in kind to Trust A, my executor shall value the assets so distributed at their respective values on the date, or dates, of their distribution. The marital deduction referred to herein is the deduction allowed in determining the federal estate tax for property passing to a surviving spouse under the Internal Revenue Code in effect at the date of my death.

A. The Trustee shall pay the entire net income from Trust A to my wife during her lifetime, at least as often as quarterly, and shall pay to or for her benefit such amount or amounts of principal as the Trustee may from time to time deem necessary or advisable for her comfort, maintenance and support.

B. Upon the death of my said wife, the Trustee shall pay such part or all of the principal of said Trust A as it may then exist and any accrued or unpaid income to or for such person or persons, including the estate of my said wife, as she may by her last will direct and appoint, making specific reference to this general power of appointment hereby granted her. To the extent that such power of appointment shall not extend or take effect, the Trustee shall add the unappointed portion of said Trust A to Trust B hereinafter created and shall hold, manage and distribute the same as an integral part thereof.

deduction and no more, whereas in the fractional share of the residue, as Dean Casner has pointed out, if the estate goes up from \$500,000 to \$700,000 from the date of death to the time of distribution, the wife is going to get one-half of \$700,000, whereas, if that happens in an estate where you've used a pecuniary bequest, she still is going to get only one-half of the estate value at the date of death, to wit, \$250,000.

Notice that on page 26 the language is quite specific:

The final determinations made in the proceedings to fix the liability of my estate for federal estate tax shall be conclusive as to the value of Trust A. The decision of my executor as to the property to be allocated to Trust A shall be final and conclusive and binding upon all beneficiaries, provided only that (1) there may not be allocated to Trust A any property with respect to which no marital deduction would not be allowed if such property had passed from me to my wife free of trust; and (2) in distributing assets [and this is the important language] in kind to Trust A, my executor shall value the assets so distributed at their respective values on the date or dates of their distribution.

DEAN CASNER: I might say that there is something in there that I don't like; I don't use it. That is, as I heard you say when you first started out, you did give the executor the power to determine the value. That is the first part of what you read before you got to (1) and (2).

MR. ELLICK: "The final determinations made in the proceedings to fix the liability of my estate for federal estate tax shall be conclusive as to the value of Trust A. The decision of my executor as to the property to be allocated to Trust A shall be final and conclusive and binding upon beneficiaries" . . .

DEAN CASNER: It's just the decision as to *what* to distribute, as to what to select. That is all right. Some people put in a provision that in valuing property at date of distribution the value placed thereon by the executor shall be conclusive on all concerned. That, I think, is a dangerous provision because it may be interpreted to give him some leeway in determining what the value is, and if he has some leeway in determining what the value is, then he may have some leeway in determining what she will get.

MR. ELLICK: The time is getting late. Near the bottom of page 26 I have given an example of a so-called "boot-strap" or savings clause: "Notwithstanding any other provision of this will I direct that neither my executors nor my trustees shall have the authority to exercise any power granted by this will if or to the extent that the exercise thereof would result in the property disposed of not qualifying for the marital deduction."

You have heard the discussion as to whether a clause like that would be recognized. I agree that it certainly should carry some weight and have some validity and be influential upon the Treasury Department in interpreting the provisions of the will.

I have last set forth in Paragraph IV a type of formula clause that you might want to use in a living revocable trust whereby the trustee upon the death of the testator is instructed to divide the trust into two parts, one of which will qualify for the marital deduction and the other of which will not.<sup>7</sup> This can be used either with a funded revocable living trust or an unfunded trust. Of course, in the unfunded case the trustee would have the duty to divide the assets in this manner when the assets were poured into the trust by the testator's will.

DEAN CASNER: One of the things that you want to keep in mind, you set up a funded revocable trust that we were talking about this morning and then you set up a formula to be applied against the fund that you have put in the trust for marital deduction purposes. Then you have a pour-over from the will of what you haven't put in the trust, what little you didn't put in the trust to be added to the non-marital share under the revocable trust.

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<sup>7</sup> Upon the death of the Donor the Trustee shall deal with the trust estate, including any property that may be added thereto by reason of the Will of the Donor or otherwise, as follows:

(A) If \_\_\_\_\_, wife of the Donor, shall survive him then the Trustee shall set aside as a separate and distinct trust fund to be known as "Trust A" a sum which equals the maximum Federal estate tax marital deduction (allowable in determining the Federal estate tax payable by reason of Donor's death) diminished by the value for Federal estate tax purposes of all items in Donor's gross estate which qualify for said marital deduction and which pass or have passed to Donor's wife (the words 'pass or have passed' shall have the same meaning as such words shall have under the provisions of the Internal Revenue Code in effect at the date of Donor's death), whether under the provisions of Donor's Will or by right of survivorship with respect to jointly owned property or otherwise. The Trustee shall have the power and the sole discretion to set aside this fund wholly or partly in cash or in kind and to select the assets which shall constitute this trust; provided, however, that if cash and property are used to satisfy this gift the total value of such cash and property at the time of distribution to the trust shall be at least equal to the amount of this gift; and provided further, that in no event shall there be included in this trust any asset or the proceeds of any asset which will not qualify for said marital deduction. The marital deduction referred to herein is the deduction allowed in determining the Federal estate tax for property passing to a surviving spouse under the Internal Revenue Code in effect at the date of Donor's death. (Presently Section 2056 thereof.) This trust shall be held, administered and disposed of as follows: \* \* \*.

In other words, you make the fund against which fraction is to be applied, the fund that you had put in the inter vivos trust during the lifetime of the settlor. Then what happens sometimes is that the settlor makes some significant withdrawals from that trust during his lifetime and you end up with the fund left in the trust not being large enough to make up a marital deduction share that will equal the maximum. If you are not careful that you check each withdrawal he makes to see if the fund left is adequate to work out a maximum marital deduction you can end up with quite an undesirable result.

Whenever I fund a trust and use the fund in the trust as a fund against which the fraction is to be applied to make up the marital deduction, I put in the will a corresponding fractional share gift to that trust in the event that the share set up in the trust originally isn't enough to use up the maximum marital deduction, a combination arrangement that will assure you of protection in the event the settlor, unbeknown to you, makes a significant withdrawal from that revocable inter vivos trust. It is a rather complicated procedure but it may be necessary to protect against that possibility.

MODERATOR PIERSON: I am sure there are other events to take place yet today that are going to require our terminating this session by four-thirty.

Alex Mills has been asked to participate in the discussion this afternoon and I am sure has some inquiry to make from the panelists. I think we ought to give Alex the opportunity to make the inquiries at this time.

M. A. MILLS: I was instructed just to ask questions, and I am better at that than answering them. Most of the questions that I had planned on or thought about asking have already been anticipated either by the panelists or by Dean Casner. However, one of the questions that I was wondering about was, suppose a federal estate tax return had already been filed and it came under 64-19. Would there be any particular advantage in securing the agreement that is called for prior to the return's being audited? What would you do in that case?

MODERATOR PIERSON: John, do you want to field that one?

PROFESSOR GRADWOHL: I think you would be well advised to get the agreements at the earliest possible date and, in addition, be sure that the necessary beneficiaries have all consented to whatever the proposed action is going to be. Only the

spouse and fiduciary sign the tax agreements, but other persons in the estate may be beneficially affected. To protect the executor against beneficial claims, I think the agreement should be executed as promptly as possible even though you may not know until fifteen months after death what dollar figure can be inserted in the blank on the form. Incidentally, I also think the agreements can be properly signed and filed even though the spouse does not intend to take the proportionate increase in value if one occurs, and that the wife would only have to file a gift tax return and pay the gift tax thereon at the later date.

MODERATOR PIERSON: Anything further, Alex?

MR. MILLS: I had one other question—I've got some others but, as I say, most of them have already been answered.

It is my understanding that, in the case of a fractional bequest where the share is expressed in terms of a numerator or denominator, the executor must divide each asset of the residuary estate in the proportional share that it figures out to be? Does this make any particular problem later on as far as complicating the flexibility of the distribution is concerned? I was thinking, for instance, of real estate or some such thing.

MODERATOR PIERSON: Dean, would you take this one?

DEAN CASNER: I think clearly it does. That is one of the problems you've got to face as to whether you want to use a fractional share gift. The normal and natural meaning of a fractional share gift is the fractional share described of each item in the fund when the date of distribution arrives. Now, if you want to change that into something else you can without necessarily undermining the marital deduction, but you may raise for yourself some other tax problems, that's all. You've got to decide whether you want to raise those other problems. What many people won't put in is a discretion in the executor when the date of distribution arrives to allocate different items to different shares to make up the fractional shares by, in effect, saying that what he allocates to the non-marital trust we will have to allocate other property of equivalent value to the marital trust in making up the fractional share. The only thing is that you may be creating for yourself some income tax problems when you do that.

What I've suggested sometimes, we'll put in the discretion to allocate certain items to one and other items of equivalent value to the other, and then, when the date of distribution arrives, decide whether you want to avoid income tax problems by going right down the middle or whether you want to possibly create them by



some other distribution. I don't think it is a marital deduction problem; I think it is an income tax problem.

MODERATOR PIERSON: Ladies and gentlemen, we are going to permit Dean Casner to make whatever final remarks he wants to make at this time. Dean!

DEAN CASNER: Once I get started talking I am in the habit of talking for an hour or so before I stop, but I can assure you I'll fall on my face if I do that now.

This is going to be reasonably short. I simply think that after spending all this time you might be interested to know that we are now working on a complete revision of estate and gift taxation. The American Law Institute is engaged in a project to draft entirely new estate and gift tax structures. We have been working on it for two or three years, and one of the proposals that we have under very serious consideration is a completely free inter-spousal transfer rule, that for gift and estate tax purposes we get the husband and wife out of the bookkeeping business and you can swing property back and forth between them in any way you want to, in any proportions, in any amounts without any tax being paid during the time they live or on their death. Many of us feel that the tax here should be paid when it goes down and that there should not be any required economic readjustment on the part of the surviving spouse as the result of the death of one of the spouses.

We are also making a much more liberal rule in terms of what will qualify as a transfer from one spouse to the other. We are planning to eliminate entirely this power of appointment requirement that has caused so much trouble, and all you have to do is give the wife the current beneficial enjoyment, namely the income for life, and that there will be no tax imposed until the wife dies and the property then goes on down to the next generation.

This of course also will bring about the real equality between community property states and common law states that was designed originally when this whole setup existed, because it will eliminate entirely the significance of the order of the deaths of the two spouses, which is now a very vital factor in working out arrangements in this whole particular area. This is something I think is in the offing.

The Treasury Department has not looked unkindly on it if other changes that we are proposing will also take effect. In other words, we are proposing a number of other changes that are going to work against the taxpayer and his present structure

because we think there are some things which you can now do in avoiding taxes that make somewhat a mockery of real estate and gift tax structure. So this whole thing is under study, examination, and change, and it may be in the course of the next year or two I will have to come out and let you know about what happens as a result of this change. I hope I will get a chance to come back anyway.

MODERATOR PIERSON: Now all I want to do is suggest that I have had a delightful time for the last day and one-half, that these participants in the program have been extraordinary, and I want to suggest further that I think we have had a helluva good audience too.

Now I have no authority to close this meeting, so I am going to call on the Honorable Harry Cohen to close it.

PRESIDENT COHEN: You have that authority.

MODERATOR PIERSON: Since I have that authority, the meeting is adjourned. See you in Lincoln tomorrow.

[The Institute of the Section on Real Estate, Probate and Trust Law adjourned at four-thirty o'clock.]

## NEBRASKA STATE BAR ASSOCIATION

**NEBRASKA STATE BAR ASSOCIATION**  
**Statement of Cash Receipts and Disbursements**  
**Year ended August 31, 1965**

**Receipts**

Active members' dues .....	\$59,130
Inactive members' dues .....	5,605
Reinstatements .....	227
Bridge the gap program .....	140
Expense refunds .....	335
Bill Digest subscriptions .....	1,570
Interest on savings certificate .....	240
Proceeds of loan .....	10,000
	<u>77,247</u>

**Disbursements**

Salaries .....	\$ 7,580
Payroll taxes .....	547
Printing and stationery .....	3,144
Office supplies and expense .....	593
Telephone and telegraph .....	148
Postage and express .....	2,789
Directory .....	1,146
Officers' expenses .....	579
Executive council .....	880
Judicial Council .....	239
Nebraska Law Review .....	7,379
Nebraska State Bar Association	
Journal .....	\$2,349
Less receipts for advertising .....	614
	<u>1,735</u>
Public service .....	8,593
Less receipts for pamphlets and racks ..	149
	<u>8,444</u>
American Bar Association meetings .....	6,754
Mid-year meeting .....	388
Annual meeting .....	6,470
Less reimbursements and exhibit space ..	540
	<u>5,930</u>
Committee on inquiry .....	680
Committee on uniform commercial code .....	2
Committee on legal education and	
continuing legal education .....	430
Advisory committee .....	676
Committee on economics of the bar and	
professional incorporation .....	5

## NEBRASKA STATE BAR ASSOCIATION

## Statement of Cash Receipts and Disbursements, Continued

## Disbursements, continued:

Committee on cooperation with American Law Institute .....	295	
Committee on law office management .....	110	
Section on real estate, probate, and trust law .....	84	
Aid to local bars .....	117	
Tax institute .....	\$2,747	
Less reimbursements and registration receipts .....	2,058	689
Institute on law office management and economics of the bar .....	1,505	
Less reimbursements and registration receipts .....	1,293	212
Law day U.S.A. ....	936	
State ex rel Nebraska State Bar Association, Rhodes .....	1,500	
State ex rel Nebraska State Bar Association, Neilson .....	135	
Insurance .....	83	
Maintenance expense .....	332	
Auditing .....	277	
Dues and subscriptions .....	100	
Nebraska State Bar Foundation .....	87	
Bill Digest .....	606	
District Judges Association .....	250	
Nebraska State Bar Association Group Life Insurance Trust Fund .....	11,752	
Payment of loan .....	10,000	
Interest on loan .....	125	
National Conference on law and poverty .....	245	
Purchase of equipment .....	104	78,107
Excess of cash disbursements over cash receipts .....		860
Cash balance at beginning of year .....		9,448
Cash balance at end of year .....		\$ 8,588

## ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely	Omaha	34. 1933	*J. J. Thomas	Seward
2. 1901	*William D. McHugh	Omaha	35. 1934	*John J. Ledwith	Lincoln
3. 1902	*Samuel P. Davidson	Tecumseh	36. 1935	*L. B. Day	Omaha
4. 1903	*John L. Webster	Omaha	37. 1936	*J. G. Motherhead	Scottsbluff
5. 1904	*C. B. Letton	Fairbury	38. 1937	*C. J. Campbell	Lincoln
6. 1905	*Ralph W. Breckenridge	Omaha	39. 1938	Harvey M. Johnsen	Omaha
7. 1906	*E. C. Calkins	Kearney	40. 1939	*James M. Lanigan	Greeley
8. 1907	*T. J. Mahoney	Omaha	41. 1940	E. B. Chappell	Lincoln
9. 1908	*C. C. Flansburg	Lincoln	42. 1941	Raymond G. Young	Omaha
10. 1909	*Francis A. Brogan	Omaha	43. 1942	*Paul E. Boslaugh	Hastings
11. 1910	*Charles G. Ryan	Grand Island	44. 1943	*Robert R. Moodie	West Point
12. 1911	*Benjamin F. Good	Lincoln	45. 1944	*George L. DeLacy	Omaha
13. 1912	*William A. Redick	Omaha	46. 1945	Virgil Faloon	Falls City
14. 1913	*John J. Halligan	North Platte	47. 1946	Paul F. Good	Lincoln
15. 1914	H. H. Wilson	Lincoln	48. 1947	*Joseph T. Votava	Omaha
16. 1915	*C. J. Smyth	Omaha	49. 1948	Robert H. Beatty	North Platte
17. 1916	*John N. Dryden	Kearney	50. 1949	*Abel V. Shotwell	Omaha
18. 1917	*F. M. Hall	Lincoln	51. 1950	*Earl J. Moyer	Madison
19. 1918	*Arthur C. Wakely	Omaha	52. 1951	Clarence A. Davis	Lincoln
20. 1919	*R. E. Evans	Dakota City	53. 1952	George B. Hastings	Grant
21. 1920	*W. M. Morning	Lincoln	54. 1953	Laurens Williams	Omaha
22. 1921	*A. G. Ellick	Omaha	55. 1954	J. D. Cronin	O'Neill
23. 1922	*George F. Corcoran	York	56. 1955	John J. Wilson	Lincoln
24. 1923	*Edward P. Holmes	Lincoln	57. 1956	Wilber S. Aten	Holdrege
25. 1924	*Fred A. Wright	Omaha	58. 1957	Barton H. Kuhns	Omaha
26. 1925	*Paul Jessen	Nebraska City	59. 1958	Paul L. Martin	Sidney
27. 1926	*E. E. Good	Wahoo	60. 1959	Joseph C. Tye	Kearney
28. 1927	*F. S. Berry	Wayne	61. 1960	Flavel A. Wright	Lincoln
29. 1928	*Robert W. Devoe	Lincoln	62. 1961	Hale McCown	Beatrice
30. 1929	Anan Raymond	Omaha	63. 1962	Ralph E. Svoboda	Omaha
31. 1930	*J. L. Cleary	Grand Island	64. 1963	George A. Healey	Lincoln
32. 1931	*Fred Shepherd	Lincoln	65. 1964	Floyd E. Wright	Scottsbluff
33. 1932	*Ben S. Baker	Omaha	66. 1965	Harry B. Cohen	Omaha

## ROLL OF SECRETARIES

1. 1900-06	Roscoe Pound	Lincoln	5. 1920-27	Anan Raymond	Omaha
2. 1907-08	Geo. P. Costigan, Jr.	Lincoln	6. 1928-36	Harvey Johnsen	Omaha
3. 1909	W. G. Hastings	Lincoln	7. 1937-	George H. Turner	Lincoln
4. 1910-19	A. G. Ellick	Omaha			

## 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	12. 1910-19	Alfred G. Ellick	Omaha
2. 1900-08	Andrew J. Sawyer	Lincoln	13. 1911-13	John A. Ehrhardt	Stanton
3. 1900-02	Edmund H. Hinshaw	Fairbury	14. 1911-11	Benjamin F. Good	Lincoln
4. 1903-06	W. H. Kelligar	Auburn	15. 1912-15	C. J. Smyth	Omaha
5. 1904-07	John N. Dryden	Kearney	16. 1912-12	William A. Redick	Omaha
6. 1905-08	F. A. Brogan	Omaha	17. 1913-15	W. M. Morning	Lincoln
7. 1907-10	S. P. Davidson	Tecumseh	18. 1913-16	J. J. Halligan	North Platte
8. 1908-09	W. T. Wilcox	North Platte	19. 1914-14	H. H. Wilson	Lincoln
9. 1909-11	R. W. Breckenridge	Omaha	20. 1915-17	Edwin E. Squires	Broken Bow
10. 1910-12	Frank H. Woods	Lincoln	21. 1916-16	John N. Dryden	Kearney
11. 1910-10	Charles G. Ryan	Grand Island	22. 1916-17	Frederick Shepherd	Lincoln
			23. 1917-17	Frank M. Hall	Lincoln

24.	1917-18	Anan Raymond	Omaha	95.	1944-46	George L. DeLacy	Omaha
25.	1918-18	A. C. Wakely	Omaha	96.	1945-47	Virgil Falloon	Falls City
26.	1918-22	Fred A. Wright	Omaha	97.	1945-49	Leon Samuelson	Franklin
27.	1919-19	R. E. Evans	Dakota City	98.	1946-48	Harry W. Shackelford	
28.	1919-22	Geo. F. Corcoran	York				
29.	1919-20	L. A. Flansburg	Lincoln	99.	1946-48	Paul F. Good	Lincoln
30.	1920-20	W. M. Morning	Lincoln	100.	1947-48	Joseph T. Votava	Omaha
31.	1920-27	Anan Raymond	Omaha	101.	1947-48	John E. Dougherty	York
32.	1921-21	Alfred G. Ellick	Omaha	102.	1947-55	Lyle E. Jackson	Neligh
33.	1921-23	Guy C. Chambers	Lincoln	103.	1948-49	Robert H. Beatty	
34.	1922-24	James R. Rodman	Kimball				North Platte
35.	1923-26	E. E. Good	Wahoo	104.	1947-50	Frank D. Williams	Lincoln
36.	1924-26	Robert W. Devoe	Lincoln	105.	1947-50	Thomas J. Keenan	Geneva
37.	1924-24	Fred A. Wright	Omaha	106.	1948-51	Laurens Williams	Omaha
38.	1925-28	Paul Jessen	Nebraska City	107.	1949-51	Joseph H. McGroarty	
39.	1925-27	Clinton Brome	Omaha				Omaha
40.	1927-29	Charles E. Matson	Lincoln	108.	1949-54	Wilber S. Aten	Holdrege
41.	1927-28	Fred S. Berry	Wayne	109.	1948-49	Abel V. Shotwell	Omaha
42.	1928-29	Robert W. Devoe	Lincoln	110.	1949-55	Paul L. Martin	Sidney
43.	1928-30	T. J. McGuire	Omaha	111.	1949-55	Joseph C. Tye	Kearney
44.	1928-34	Harvey Johnsen	Omaha	112.	1949-51	Earl J. Moyer	Madison
45.	1929-31	E. A. Coufal	David City	113.	1950-60	Harry A. Spencer	Lincoln
46.	1929-29	Anan Raymond	Omaha	114.	1950-56	Paul P. Chaney	Falls City
47.	1930-32	Paul E. Boslaugh	Hastings	115.	1950-59	Paul Bek	Seward
48.	1930-30	J. L. Cleary	Grand Island	116.	1950-52	Clarence A. Davis	Lincoln
49.	1931-33	W. C. Dorsey	Omaha	117.	1951-55	Barton H. Kuhns	Omaha
50.	1931-31	Fred Shepherd	Lincoln	118.	1952-57	Thomas C. Quinlan	Omaha
51.	1932-34	Richard Stout	Lincoln	119.	1951-52	George B. Hastings	Grant
52.	1931-32	Ben S. Baker	Omaha	120.	1952-53	Laurens Williams	Omaha
53.	1933-35	Barlow F. Nye	Kearney	121.	1953-54	J. D. Cronin	O'Neill
54.	1933-33	J. J. Thomas	Seward	122.	1954-57	Norris Chadderdon	
55.	1934-36	Chas. F. McLaughlin	Omaha				Holdrege
56.	1934-34	John J. Ledwith	Lincoln	123.	1954-56	John J. Wilson	Lincoln
57.	1935-35	L. B. Day	Omaha	124.	1955-56	Wilber S. Aten	Holdrege
58.	1935-37	James M. Lanigan	Greeley	125.	1955-58	F. M. Deutsch	Norfolk
59.	1935-38	H. J. Requarte	Lincoln	126.	1955-64	Clarence E. Haley	
60.	1935-38	Raymond M. Crossman					Hartington
			Omaha	127.	1955-58	R. R. Wellington	Crawford
61.	1935-40	F. H. Pollock	Stanton	128.	1955-64	Alfred G. Ellick	Omaha
62.	1935-41	T. J. Keenan	Geneva	129.	1954-55	Jean B. Cain	Falls City
63.	1935-39	Walter D. James	McCook	130.	1955-57	Hale McCown	Beatrice
64.	1935-37	Roland V. Rodman	Kimball	131.	1956-62	C. Russell Mattson	Lincoln
65.	1936-36	J. G. Mothersead	Scottsbluff	132.	1956-58	Barton H. Kuhns	Omaha
66.	1936-36	James L. Brown	Lincoln	133.	1957-59	Paul L. Martin	Sidney
67.	1937-39	David A. Fitch	Omaha	134.	1957-60	Richard E. Hunter	Hastings
68.	1937-39	Raymond G. Young	Omaha	135.	1957-64	John R. Fike	Omaha
69.	1937-41	M. M. Maupin	North Platte	136.	1957-64	Thomas F. Colfer	McCook
70.	1937-41	Golden P. Kratz	Sidney	137.	1958-63	William H. Lamme	Fremont
71.	1938-42	Sterling F. Mutz	Lincoln	138.	1958-61	Carl G. Humphrey	Mullen
72.	1938-42	Don W. Stewart	Lincoln	139.	1958-60	Joseph C. Tye	Kearney
73.	1940-46	George N. Mecham	Omaha	140.	1959-65	Charles F. Adams	Aurora
74.	1940-42	Abel V. Shotwell	Omaha	141.	1959-61	Flavel A. Wright	Lincoln
75.	1940-42	Frank M. Colfer	McCook	142.	1959-60	Thomas C. Quinlan	Omaha
76.	1941-43	Virgil Falloon	Falls City	143.	1960-61	Hale McCown	Beatrice
77.	1941-43	Joseph C. Tye	Kearney	144.	1960-63	Ralph E. Svoboda	Omaha
78.	1941-47	Earl J. Moyer	Madison	145.	1960-	Herman Ginsburg	Lincoln
79.	1937-37	C. J. Campbell	Lincoln	146.	1960-65	James F. Begley	
80.	1938-38	Harvey Johnsen	Omaha				Plattsmouth
81.	1939-39	James M. Lanigan	Greeley	147.	1961-64	George A. Healey	Lincoln
82.	1940-40	E. B. Chappell	Lincoln	148.	1962-65	Lester A. Danielson	
83.	1942-45	Fred J. Cassidy	Lincoln				Scottsbluff
84.	1941-41	Raymond G. Young	Omaha	149.	1962-65	Floyd E. Wright	Scottsbluff
85.	1942-48	Max G. Towle	Lincoln	150.	1962-	John C. Mason	Lincoln
86.	1942-42	Paul E. Boslaugh	Hastings	151.	1961-	Vance E. Leininger	
87.	1942-45	John E. Dougherty	York				Columbus
88.	1942-49	Yale C. Holland	Omaha	152.	1964-	Fred R. Irons	Hastings
89.	1943-45	Robert R. Moodie		153.	1964-	Wm. J. Baird	Omaha
			West Point	154.	1964-	Tracy J. Peycke	Omaha
90.	1941-45	B. F. Butler	Cambridge	155.	1964-	W. E. Mumby	Harrison
91.	1943-46	Frank M. Johnson		156.	1964-65	Hale McCown	Beatrice
			Lexington	157.	1963-	Harry B. Cohen	Omaha
92.	1944-49	Floyd E. Wright	Scottsbluff	158.	1965-	Bernard B. Smith	
93.	1945-50	John J. Wilson	Lincoln				Lexington
94.	1945-48	Robert B. Waring	Geneva	159.	1965-	Robert D. Mullin	Omaha



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