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Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1964

Floyd E. Wright

Nebraska State Bar Association, president

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NEBRASKA STATE BAR ASSOCIATION

HOUSE OF DELEGATES

WEDNESDAY MORNING SESSION

November 11, 1964

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

CHAIRMAN McCOWN: Gentlemen, if the House will be in order I'll ask the Secretary to call the roll.

[Roll call by the Secretary.]

SECRETARY TREASURER GEORGE H. TURNER: More than a quorum present, Mr. Chairman.

CHAIRMAN McCOWN: The Chair declares a quorum present.

I will entertain a motion for approval of the calendar as you have it in your program as the order of business of this House. Do I hear such a motion?

ROBERT A. BARLOW, Lincoln: I so move.

IVAN VAN STEENBERG, Kimball: I second the motion.

CHAIRMAN McCOWN: All those in favor say "aye"; opposed the same. The motion is carried. The calendar as shown in your program is adopted as the order of business of this House.

The first item is the statement by the President of the Association, Mr. Floyd Wright. Floyd!

STATEMENT BY PRESIDENT

Floyd E. Wright

Members of the House of Delegates: It is gratifying to see so many here at the beginning of this meeting.

I have only a brief statement to make to you. During the past year the Executive Council has attempted to carry out the program as adopted by you at the last meeting. The committee reports which you have and which you will receive this morning will give you a good idea of the activities of the Association during the past

year, and of course the directions here will determine generally what the program of the Association shall be for the coming year.

I want to call your attention particularly to the report of the Committee on Continuing Legal Education which contains a preliminary report of a survey that was made among the Nebraska lawyers in order to determine the type of programs that the lawyers desire in the future. I think this survey is outstanding and will be of great benefit, not only to the Committee on Continuing Legal Education but to all committees in knowing just what the lawyers of the state expect from the Bar Association.

During the past year the Association has joined in a brief *amicus curiae* with most of the other states in the case of the *Brotherhood of Railroad Trainmen v. the Virginia State Bar Association*. This was on a motion for a rehearing, and the rehearing was not granted. This decision of the Supreme Court creates a problem for the committees on the unauthorized practice of law.

The Association was represented in Washington at the National Forum on Presidential Inability and Vice President Vacancies, sponsored by the American Bar Association, by your President-Elect, Harry Cohen.

We were also represented at the annual meeting of the American Law Institute by Dean Dow of the University.

Paul Martin has again been appointed our trustee of the Rocky Mountain Mineral Law Institute, an organization of which he is now president.

I am sorry to say that during the year, by reason of a change of the rules of the American Bar Association, we lost one of our delegates to the American Bar Association; that is, under their present ruling we do not have enough lawyers in Nebraska to qualify for two delegates. So we have had the two delegates for only one year and now our Association is represented by only one, John Wilson.

In May of this year the American Bar Association held a very successful regional meeting in Omaha. The State Bar Association cooperated in putting on this program. One of your members, Robert Mullin, was the general chairman of the meeting, and I am sure the officials of the American Bar Association felt that the Omaha meeting was one of the finest regional meetings they have had.

There is one thing that is not in your program to which I would like to call your attention, and that is the fact that during the past

three years this Association has operated at a loss; that is, our dues haven't been sufficient during the past three years to pay the expenses of the Association. It is fortunate that we had a surplus three years ago, but this is now used up. So now we are faced with a proposition of either curtailing our activities or increasing the dues.

At a meeting of the Executive Council in September the Council was unanimously of the opinion that the dues should be increased. At that meeting a motion was passed that, subject to the approval of this House, the Supreme Court be asked to amend the rules which regulate the organization by increasing the dues of the Active members from the \$20.00 which we now pay to \$35.00; and the dues of the Junior members from \$10.00 to \$17.50.

If this increase is granted, the dues of the Association would not be out of line with the dues paid by other state bar associations. I am sure when you read and hear the committee reports this morning you will find that there is a great deal for the Association to do next year. To carry out all the proposed programs it is going to be necessary that we have an increase in dues.

I don't care to say anything more as to the reason for the increase of dues. I expect to say something about it in my address tomorrow before the Association, and Harry Cohen of the Executive Council, the President-Elect who will have charge of the program next year, will have a resolution relative to this sometime during the morning.

CHAIRMAN McCOWN: Thank you very much, Mr. Wright.

The next item on the calendar is the report of the Secretary-Treasurer, Mr. George Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman, Members of the House: The Association operates on a fiscal year which ends August 31. The books are audited by Peat, Marwick, Mitchell & Company, accountants in Lincoln, and they are found to be in order.

Supplementing what President Wright has said to you, our expenses have increased very markedly. Our cost of publishing the *Nebraska Law Review* has increased; the cost of the *Journal* has increased; the cost of institutes has increased.

For the past three years we have been operating on anticipated dues; that is, after the close of the fiscal year we will start drawing

against the dues of the following year. We have exhausted our surplus, as President Wright told you. Most of it was expended in the Merit Plan campaign. We did have a cash balance as of August 31 of slightly over \$3,000. That, of course, is long since gone and we are now operating this convention on borrowed money.

The problem is just as simple as it can be. We either have to increase the income of the Association or decrease the activity.

Other items we will have to take into consideration: I am reasonably certain that during the next year the Association will be involved in litigation brought by a former member, recently disbarred; and we do have other disciplinary matters pending which will require the payment of referees' fees. You gentlemen this morning are facing the problem of what the future of the Association shall be.

CHAIRMAN McCOWN: Thank you very much, George.

We are going to have to move along rather rapidly and there will be no opportunity for very much dragging of feet, so to speak. I can probably refer you to a "Tonight" show of a couple of weeks ago when someone said, "Do you know where dragon milk comes from?" When he said "No," the answer was "It comes from a cow with short legs." I trust we will not be referred to in that fashion today.

Our next item on the program, as you have noted, is the introduction of resolutions. Anyone having resolutions will please present them either to the Chair or to Harry Cohen, the chairman of the Resolutions Committee. Does anyone have any resolutions he wishes to present at this time to that committee? Their report will come later on this afternoon when they will report on any resolutions which are submitted. I have one here, Harry, that has been presented.

Harry, will you come up to the mike? The question is whether or not the House wishes to waive its regular order of business and take up at this time the report of the Resolutions Committee in connection with the proposed change in dues of the Association. George advises me this is regular order of business, that the report of the Committee on Resolutions applies only to resolutions submitted by members of the House and not to resolutions proposed by the committee itself. The committee, I understand, has the resolution which it wishes to propose. Mr. Cohen!

HARRY B. COHEN, Omaha: Mr. Chairman, Members of the House: You have all heard the report of the President and the report of the Secretary with respect to the condition of our finances.

We were terribly concerned about it this summer at our last meeting in September when we learned that all we had on hand, as the Secretary-Treasurer reported, was about \$3,400 to go for the rest of the year.

Although we report on a fiscal year basis, beginning on September 1 of each year and ending on August 31 of next year, we really operate on a calendar year basis. Because the dues are payable on a calendar year basis we accordingly have to operate on a calendar year basis. So we find ourselves with \$3,400 in the bank but there may be \$8,000, \$9,000, or \$10,000 of additional expenditures, and that \$3,400 was all gone before we had our convention. Something had to be done!

An analysis was made of the expenditures and receipts for the last three years. With the exception of the year ending August 31, 1961, in which we had a slight excess of receipts over expenditures, the other two years, the one ending August 31, 1962, and the one ending August 31, 1963, definitely were deficit years. These were deficit years as of *August 31*, and yet we were operating on a calendar year. It became quite evident we were in bad condition, as I have said before.

Some investigation was made concerning the dues charged by our surrounding areas and we have some information in that respect. Iowa charges \$35.00, Kansas \$25.00, Minnesota \$36.00, Missouri \$35.00, Colorado \$25.00, South Dakota \$100.00.

I was at the South Dakota convention, as were President Wright and Secretary Turner, and we were surprised when that motion went through to increase their dues from \$50.00 to \$100.00 per year. Of course this pays for their dinners and luncheons at the annual convention as well.

North Dakota has a \$40.00 charge, Oklahoma \$30.00, Wyoming \$20.00.

For the Junior dues Iowa has \$20.00, Kansas \$18.00, Michigan \$15.00, Minnesota \$6.00, Missouri \$15.00, Colorado \$12.50, North Dakota \$20.00, Oklahoma \$20.00, and Wyoming \$10.00.

Under the rules it is necessary that the Executive Council submit a resolution to the House of Delegates, and that the House of Delegates, in turn, adopt a recommendation to the Supreme Court. I have prepared the resolution and the recommendation of the Executive Council. I am not going to read the preamble paragraphs:

NOW THEREFORE BE IT RESOLVED that the Executive Council of the Nebraska State Bar Association at a duly convened meeting held in

Omaha, Nebraska, on September 20, 1964, pursuant to a motion with respect thereto duly adopted at said meeting by a three-fifths vote of the membership thereof, make the following recommendation to the House of Delegates for amending Section 1 of Article IV of the Rules Creating, Controlling, and Regulating Nebraska State Bar Association, to wit: That the House of Delegates at its annual meeting to be held in Omaha, Nebraska on November 11, 1964, consider the advisability of, and take action upon, the adoption of a resolution in accordance with the provisions of Article IX of the Rules Creating, Controlling, and Regulating Nebraska State Bar Association, recommending to the Supreme Court of Nebraska the amendment by said Court of Section 1 of Article IV of said Rules so that said Section 1 of said Article IV is amended to read as follows:

1. The annual dues for Active members shall be \$35.00 per year, payable on or before January 1 of each year; except that during the first five years after his original admission to the Bar the dues of an Active member be \$17.50 per year.

(This is the exact wording of the present rule, with the exception of the change in dollar amounts.)

2. That the House of Delegates at said annual meeting adopt a further resolution authorizing, empowering, and directing the President and President-Elect of the Nebraska State Bar Association, and the Chairman of the House of Delegates to prepare and file with the Supreme Court of Nebraska such pleadings as may be necessary and requisite for applying to said Court for an order amending the Rules Creating, Controlling, and Regulating the Nebraska State Bar Association in the manner recommended by said House of Delegates; and that the President, President-Elect, and Chairman of the House of Delegates appear before said Court at the time and on the date designated therefor by said Court for the purpose of presenting the said recommendation for amending said Rules in the manner recommended by the action with respect thereto of the House of Delegates.

3. That a copy of these resolutions be delivered to the Chairman of the House of Delegates and that he be requested to present same to the annual meeting of the House of Delegates to be held in Omaha, Nebraska, on November 11, 1964 for its consideration and action.

Presently we have approximately 1,900 Active senior members who pay \$20.00 per year. We have 332 members who pay \$10.00 per year; that is active Junior members. We have 1,076 members who are nonresident, Inactive members, most of them nonresidents, who pay \$5.00 per year. The total receipts from all three categories is \$46,540 per year.

Now the estimated receipts by the proposed increase would give us gross receipts of approximately \$80,100 per year: 1,892 members at \$35.00 gives us \$66,220; 332 members at \$17.50 would give us \$5,810. There will be about \$2,500 less, making it close to \$77,500 because I had in my calculations a proposal for an increase in the Inactive membership from \$5.00 to \$7.50 but we decided not to do this because this \$5.00 per year from the Inactive members is purely a gift. Since we have 1,000 people who make a \$5.00 per

year gift to us we felt we should let well enough alone. So we will have an increase in dues of a little better than \$30,000, and we absolutely need it to operate because we cannot operate without it. You have heard all the other comments.

Mr. Chairman, I submit to you the resolutions of the Executive Council for consideration by the House of Delegates.

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

WILLIAM J. BAIRD, Omaha: I second the motion.

CHAIRMAN McCOWN: Is there discussion on the resolution recommending to the Supreme Court the changing of the Rules to provide for increasing the dues of this Association from \$20.00 per year to \$35.00 for Active senior members, and \$17.50 for the Junior Bar members?

THOMAS R. BURKE, Omaha: Harry, could you give us an idea of what you propose to use the \$30,000 for in the way of additional . . .

MR. COHEN: These are all more or less nebulous. We know one thing, presently we are operating on an estimated \$10,000 to \$15,000 a year deficit. We are borrowing money right now. So part of this \$30,000 will go to make up the operating costs, and these costs will increase; they have been increasing right along. Sadly enough, our dues have not been increased for many years and our costs have gone up. All of you are aware of this in other organizations that you belong to and also in your own activities. The cost of everything has gone up.

Secondly we have a lot of disciplinary actions going on all over the state and you just cannot expect that to be done by personnel on the ground floor level, for several reasons: First of all, these are active practicing lawyers and they haven't got the time to make these investigations. We are going to have to engage counsel, some young lawyer who wants to devote himself to this work, to go out and do all the necessary investigation proceedings in connection with this type of activity. We need assistance. We need more assistance in a lot of things.

You have all read in the reports of your committees how overwhelmingly the Bar Association of this state wants these continuing education clinics. Now, gentlemen, these things cost money. We have one here this year on the Commercial Code. The committee in charge of that has done a terrific job. I know because I have worked with them for several months setting this thing up,

and they have done a marvelous job. We have to pay the expenses of these people. They don't take fees. They don't take honorariums. All they want is their expenses. As a matter of fact, one speaker who is with the Federal Reserve Bank of Philadelphia wouldn't even take his expenses. He said the bank pays his expenses for this type of trip, that this was part of the service of the Federal Reserve Bank.

You just cannot carry on without money. To me it was extremely gratifying that the Bar Association wants these institutes and clinics, and we intend to keep on doing this type of work because this is where we can be of great service to the members of the Bar Association. They get something of value in return for their money, other than just a card acknowledging that you are a member of the Bar.

CHAIRMAN McCOWN: The question has been called for. Is there any further discussion?

LEO EISENSTATT, Omaha: I am wondering about these nonresident lawyers, why that fee cannot be raised to \$10.00 instead of \$5.00. It seems to me that anyone who would wish to be a nonparticipating or nonactive member of the Bar would be willing to increase that by another \$5.00. If we would increase it to \$10.00 instead of \$5.00 certainly we would retain more than half that membership and that would boost it up a little bit.

MR. COHEN: The increase from \$5.00 to \$10.00 would bring us an additional \$5,000 in revenue. We have a little over 1,000 of these members.

SECRETARY-TREASURER TURNER: Maybe I can answer your question. The inactive member gets so little from his membership other than preserving his license. He does receive a subscription to the *Law Review*. He does not get the *Journal*. He gets none of the other publications of the Association. I think that is what the Council had in mind in leaving it at the present figure.

MR. EISENSTATT: May I ask a question concerning the non-active members? Has anybody tried to analyze what they are getting and what it is costing us? Is there any cost analysis on that?

SECRETARY-TREASURER TURNER: No.

MR. COHEN: All they get, as I understand it, is just the *Law Review*.

SECRETARY-TREASURER TURNER: That's right.

MR. EISENSTATT: Approximately what does it cost?

SECRETARY-TREASURER TURNER: *The Law Review* is now running a little over \$7,000 a year.

CHAIRMAN McCOWN: For how many copies?

SECRETARY-TREASURER TURNER: A little over 3,000 copies.

MR. EISENSTATT: My only thought was that maybe we could justify some increase on a straight cost basis if some analysis could be made. There is some bookkeeping involved, mailing, as well as the *Law Review*.

SECRETARY-TREASURER TURNER: That figure I gave you of \$7,000 includes mailing. The Association pays for one-third of each of the three issues during the year that do not contain the proceedings of the Association and pay the full cost of the February issue which does contain the report of the convention; in other words, we pay exactly half of the cost of publication over a year.

MR. EISENSTATT: My only thought was, Harry made the remark that they would probably drop out, as this was only a gift. I thought if a letter of explanation on the increase went out to them on the basis that they should at least pay their own way, it might keep them all in and also help defray the cost.

CHAIRMAN McCOWN: Mr. Eisenstatt, it might be appropriate if you wished to propose an amendment to the resolution with that in mind.

MR. EISENSTATT: That is difficult to do without knowledge. Would it be in order, would the Parliamentarian permit an amendment on some kind of a cost analysis to be made by the Executive Committee? I will propose such type of amendment, that the non-resident members' dues be increased by that amount which would appropriately cover the cost of maintaining them as members.

CHAIRMAN McCOWN: I see no reason why such an amendment, if it is agreeable with the committee, would not be appropriate.

MR. COHEN: We will accept the amendment.

SECRETARY-TREASURER TURNER: Why don't you make it a flat figure, say \$7.50?

WILLIAM J. BAIRD, Omaha: I would like to ask George, if we have a gross income through this increase as originally pro-

posed of some \$77,000, do you anticipate that this will cover all of our expenses and the expected activities?

MR. COHEN: We think we will be in a much more healthy position. Out of approximately \$30,000 of increase in revenue we know around \$10,000 or \$12,000 of it will have to go to make up present operating expenses, a deficit. That will give us somewhere around \$18,000 to \$20,000 with which to operate, to increase our services, and then we have got to engage help.

Just by way of an aside—and I don't want George to listen to this—I have made it a point to find out in some of my traveling what secretaries of bar associations are paid. We get by quite lucky, to be honest with you! I think our Secretary, so far as the Association is concerned, costs us from one-fourth or one-third of what any other bar association pays a secretary.

SECRETARY-TREASURER TURNER: I think in addition, Bill, in answer to your question, as I recall the discussion at the meeting of the Executive Council it was felt that there should be a reserve of some kind built up to guard against calamity years.

CHAIRMAN McCOWN: The Chair is in the somewhat dubious position of not being exactly certain how to state the amendment. It was approved by the committee but I am not certain of the wording of it. I think it might be more appropriate if we made a specific amount of some sort, Leo, that would be an approximation on your part. Maybe the solution is a proportionate increase in Inactive dues in the same proportion as the Active dues are increased.

MR. COHEN: Why don't you make it from \$5.00 to \$7.50 or \$10.00, or whatever you want, and start out with that?

MR. EISENSTATT: I'll accept that.

CHAIRMAN McCOWN: The amendment as proposed is to increase the Inactive dues to \$7.50. Is there a second to that proposal?

DALE E. FAHRNBRUCH, Lincoln: I'll second it.

CHAIRMAN McCOWN: Is that agreeable with the committee?

MR. COHEN: It is acceptable to the committee.

CHAIRMAN McCOWN: The question has been called for. Is there any further discussion? As many as favor the motion will say "aye"; opposed the same. The motion is carried.

SECRETARY-TREASURER TURNER: That's the amendment. How about the motion?

CHAIRMAN McCOWN: The Chair treated that, the consent having been given by the committee to the amendment of its resolution, the amended resolution carried. If there is any question about that I had better call for the over-all question again, as amended and as approved by the committee. All those in favor of the resolution in toto and as amended will say "aye"; opposed the same. Carried.

The next item is the report of the Committee on Legislation. Mr. Bert Overcash is the chairman. You will find the report at page 36 of your program.

REPORT OF COMMITTEE ON LEGISLATION

Bert L. Overcash

Mr. Chairman, Members of the House: Our report contains principally the matter of appointing local legislative committees, conforming to the recommendation of this committee last year.

It has been our purpose in recent years to strengthen the legislative program of the Bar Association. This has a direct relationship to this matter of fees which you have just considered. If we want to be realistic we have to recognize that the legislative problems and pressures are increasing. It is no small job, gentlemen, to sort over, approve, and look over 800 bills for the Bar Association at each session, review the various individual requests of members of the Bar, and take care of the other duties of a legislative nature.

I think the Legislative Committee is one area where the activities of this Association are going to increase. This Association cannot long continue, in my opinion, to expect a few volunteers to carry on this program without any compensation.

The affirmative program of the Bar will be reflected generally in the reports of the specific committees. Your President this year has specifically asked these committees to include that in their reports.

In addition to those matters, and coming in late to me as chairman, there have been a number of suggested legislative matters which my committee has not had an opportunity to review. I assume a number of these will come up during your meetings. They include enlargement of the Workmen's Compensation Court, some proposals of the Omaha Bar regarding practice and procedure, some

proposals from Judge Troyer regarding juvenile legislation, and other proposals from various individual members of the Association, one of which is a proposed bill to license abstractors.

It works out much better if these proposals are funneled through the Substantive Law Committee of the Association. That gives the Association a firm and solid basis for consideration of these matters.

But beyond these affirmative matters there is a negative program of the Bar. A lot of bills are introduced in the legislature that, upon consideration, the Bar will decide to oppose. These must be handled by the committee, and through the committee, and the committee will endeavor to do this.

These late proposals I will refer to the new committee that is appointed by the new President for the coming year. I solicit the support, as the present chairman, of this new committee and its various activities. I hope that you, as well as all these local committees, will give the new committee your full support.

CHAIRMAN McCOWN: You have heard the report from the chairman of the Committee on Legislation. Is there a motion with respect to the report?

MR. OVERCASH: Mr. Chairman, I move that the report be approved and accepted.

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

THOMAS M. DAVIES, Lincoln: I'll second the motion.

CHAIRMAN McCOWN: Any discussion? As many as favor the motion will please say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Committee on Legislation

This committee has proceeded to implement the program approved by the House of Delegates to establish legislative committees in each legislative district. It is anticipated that the state committee will work closely with such local committees and that this arrangement will add strength to the legislative program of the Bar.

The President of the Association has directed each committee to include legislative proposals in their annual report so that the

House of Delegates will have an opportunity to establish a legislative program of the Bar Association.

In establishing the local committees the state committee has consulted with the various area and local bar associations. Some bar associations, such as Omaha and Lincoln, have legislative committees which will carry on this activity in cooperation with the state committee.

The local committees thus established are as follows:

Leg. Dist. No. 1	Dale K. Cullen, Auburn Elmer F. Witte, Pawnee City Robert S. Finn, Tecumseh Simon Lantzy, Falls City
Leg. Dist. No. 2	Bernard M. Spencer, Nebraska City James F. Begley, Plattsmouth
Leg. Dist. No. 3	Dixon G. Adams, Bellevue
Leg. Dist. No. 4-13	Legislative Committee of Omaha Bar Association
Leg. Dist. No. 14	Bernard Pipher, Tekamah Clark O'Hanlon, Blair
Leg. Dist. No. 15	Ray C. Simmons, Fremont George E. Svoboda, Fremont
Leg. Dist. No. 16	George E. McNally, Schuyler John J. Gross, West Point
Leg. Dist. No. 17	C. M. Kingsbury, Ponca Norris G. Leamer, South Sioux City Charles E. Boughn, Pender
Leg. Dist. No. 18	T. L. Grady, Stanton E. D. Beech, Pierce Kenneth M. Olds, Wayne
Leg. Dist. No. 19	Roscoe L. Rice, Creighton Philip H. Robinson, Hartington
Leg. Dist. No. 20	Harold Rice, Neligh Stanley Oliverius, Albion Arthur O. Auserod, Bartlett Keith J. Kovanda, Burwell
Leg. Dist. No. 21	George H. Moyer, Madison Richard Mueting, Norfolk

Leg. Dist. No. 22	Wilbur L. Johnson, Columbus
Leg. Dist. No. 23	Howard V. Kanouff, Wahoo John G. Tomek, David City
Leg. Dist. No. 24	Maynard M. Grosshans, York Byron J. Norval, Seward
Leg. Dist. No. 25-29	Legislative Committee of Lincoln Bar Association
Leg. Dist. No. 30	F. W. Carstens, Beatrice
Leg. Dist. No. 31	Joe T. Vosoba, Wilber John Mekota, Wilber Wm. Riley, Fairbury
Leg. Dist. No. 32	John C. Gewacke, Geneva Leonard J. Germer, Hebron John J. Sullivan, Clay Center
Leg. Dist. No. 33	Don Brock, Hastings Al Blessing, Hastings
Leg. Dist. No. 34	Charles F. Adams, Aurora Donald R. Sampson, Central City W. W. Norton, Osceola
Leg. Dist. No. 35	Charles Paine, Grand Island Richard L. Huber, Grand Island
Leg. Dist. No. 36	Harvey M. Wilson, Kearney J. C. Tye, Kearney Ward Minor, Kearney
Leg. Dist. No. 37	William H. Meier, Minden Leon A. Sprague, Red Cloud Robert H. Downing, Superior Leon Samuelson, Franklin
Leg. Dist. No. 38	Thomas F. Colfer, McCook Hugh W. Eisenhart, Cambridge Robert E. McKelvie, Alma
Leg. Dist. No. 39	William A. Stewart, Jr., Lexington Richard E. Person, Holdrege Cloyd E. Clark, Elwood
Leg. Dist. No. 40	John H. Evans, Broken Bow
Leg. Dist. No. 41	E. A. Ondracek, Greeley E. L. Vogeltanz, Ord Cyril P. Shaughnessy, St. Paul Norman E. Stephens, Loup City

Leg. Dist. No. 42	Arthur A. Weber, Bassett
Leg. Dist. No. 43	John C. Coupland, Valentine Lawrence E. Mitchell, Rushville
Leg. Dist. No. 44	James A. Lane, Ogallala Robert J. Bulger, Bridgeport R. L. Smith, Chappell
Leg. Dist. No. 45	Murl M. Maupin, North Platte
Leg. Dist. No. 46	Daniel E. Owens, Benkelman Frederick E. Wanek, Grant Guy Curtis, Imperial
Leg. Dist. No. 47	Ivan Van Steenberg, Kimball
Leg. Dist. No. 48	Robert M. Harris, Scottsbluff
Leg. Dist. No. 49	Gordon C. Shaffer, Jr., Chadron Robert R. Wellington, Crawford W. E. Mumby, Harrison Glen A. Fiebig, Alliance

The President of our Association, at the request of the Legislative Council, asked that a study be made as to amending our state Constitution. Mr. R. Robert Perry made this study for the committee. It is assumed that the Legislative Council will make a report in this connection to the next legislature. At this time, it does not appear appropriate for this committee to make any recommendations upon this subject.

Bert L. Overcash, Lincoln,
Chairman
Chauncey E. Barney, Lincoln
Leo Eisenstatt, Omaha
Herman Ginsburg, Lincoln
Richard E. Hunter, Hastings
Raymond E. McGrath, Omaha
George McNally, Schuyler
Robert D. Mullin, Omaha
R. Robert Perry, Lincoln
Bryan Quigley, Valentine
Robert A. Skochdopole, Omaha
George A. Skultety, Fairbury

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Administrative Agencies. Einar Viren is the chairman. You will find the report on page 14 of your program.

REPORT OF COMMITTEE ON ADMINISTRATIVE AGENCIES**Einar Viren**

Mr. Chairman, Members of the House of Delegates: The report of the Administrative Agencies Committee is reasonably short. I am not going to read it. Suffice it to say that I am certain that the legislative committee will be requested to offer certain legislation following some additional meetings to be held by the Committee on Administrative Agencies as it will exist after the new President appoints it in connection with a number of items that have come up since the report has been submitted.

One of those arises out of a situation involving the State Liquor Control Commission and the Administrative Agencies Acts. I will not go into it at great length for the simple reason that it is now the subject of litigation in the District Court of Lancaster County, and a writ of mandamus was issued requiring the Liquor Control Commission to accept a petition for reconsideration of the issuance of a license in the City of Omaha in which the City of Omaha failed to give the published notice. I would assume that the state will appeal it to the Supreme Court, and if it does, the counsel for the parties involved, of whom I happen to be one (and not only called in on it), will take it up in the Supreme Court. However it does require, I think, some legislative correction.

There will also be a matter of proposed legislation concerning the State Railway Commission and the abominable situation that exists there.

CHAIRMAN McCOWN: You have heard the report. Is there a motion to approve?

THOMAS R. BURKE, Omaha: I move it be approved.

IVAN VAN STEENBERG, Kimball: I second the motion.

CHAIRMAN McCOWN: All in favor say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Committee on Administrative Agencies

It is with a great deal of pleasure that your Committee on Administrative Agencies makes its report for the period from its appointment to October 1, 1964.

The work of the committee, particularly that performed by Samuel Van Pelt, has been to cross-index LB 82, which is a recodi-

fication of Chapter 75 as it appears in the 1963 Cumulative Supplement.

This committee hopes to meet prior to the meeting of the new legislature to recommend changes in LB 82 for clarification and revision.

It is, therefore, the unanimous recommendation of this committee that it be continued, with instructions from this association to pursue those matters referred to it by the President, and other matters which would properly come within the scope of this committee's jurisdiction.

Einar Viren, Chairman
Paul P. Chaney
J. Max Harding
Harry R. Henatsch
James W. Hewitt
Elmer J. Jackson
Ralph E. Svoboda
Samuel Van Pelt

CHAIRMAN McCOWN: The next item on your agenda is the report from the Committee on American Citizenship. Chairman of that committee is Dewayne Wolf. He has reported to me that Mr. Irons will make the report but he will not be available this morning so we will pass to the next item on your agenda.

The report of the Committee on Atomic Energy Law, Mr. Richard Wilson, chairman. You will find the report on page 34 of your agenda.

REPORT OF COMMITTEE ON ATOMIC ENERGY LAW

Robert H. Berkshire

My name is Robert Berkshire. Dick Wilson asked me to present the report of the Committee on Atomic Energy Law. The report is in the program, on page 34.

I just might add that I have been serving on the Governor's Radiation Advisory Council for the past year and was just reappointed to another four-year term. That law is now going through its formative stages and there will probably be some amendments that will be proposed but they are not ready to be proposed to this session of the legislature.

At the present time the committee has no recommendations to make, but I do move that the committee report be adopted.

CHAIRMAN McCOWN: Thank you, Mr. Berkshire. Incidentally, is that a special committee?

MR. BERKSHIRE: Yes.

CHAIRMAN McCOWN: I suggest that with a special committee you also move that the committee be continued. With that amendment is there a second?

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

CHAIRMAN McCOWN: You have heard the motion. As many as favor the motion will say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Committee on Atomic Energy Law

Nothing has been presented for the committee to take action on this year.

A member of the committee who also serves on the Radiation Advisory Council feels that legislation passed at the 1963 legislature has resulted in the State Board of Health's establishing policy and adopting rules and regulations contrary to the intention that this should be done by the Radiation Advisory Council. There may be legislation offered to implement changing to the original intention.

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

CHAIRMAN McCOWN: The next report is the report from the Committee on Cooperation with the American Law Institute, John C. Mason, chairman.

SECRETARY-TREASURER TURNER: John Mason is out of the city. The report simply summarizes the activity of the committee and contains a recommendation which has been in effect for a good many years, that this Association be again represented at the meeting of the American Law Institute.

With the chairman's permission I will move that that portion of the report be adopted.

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

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

CHAIRMAN McCOWN: As many as favor will say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Committee on Cooperation with the American Law Institute

The Nebraska State Bar Association was represented at the annual meeting of the American Law Institute held in Washington, D. C., on May 20 to May 23, 1964, by David Dow, a member of the State Association's Committee on Cooperation with the American Law Institute.

The Nebraska State Bar Association has cooperated fully with the American Law Institute in its many projects over a period of years, and the members of the Association are generally familiar with the important work carried on by the American Law Institute. Therefore an extensive résumé of this work is not deemed to be necessary. The Joint Committee on Continuing Legal Education of the American Bar Association and the American Law Institute is continuing its extensive efforts to improve the legal education services and materials available to lawyers throughout the United States.

In the opinion of the committee the contribution of the American Law Institute in the development and advancement of jurisprudence in this country continues to be worthy of the utmost cooperation and support from our state association and each of its members.

Your committee recommends that the Association be represented at the next annual meeting of the Institute, and that the expenses of the delegate from this Association be paid by the Association.

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

CHAIRMAN McCOWN: Next is the report of the Committee on County Law Libraries, Mr. William Meier, chairman. You will

find their report on page 35 of your program. Is Bill Meier here? Is any other member of the County Law Libraries Committee present? If not, the report will be passed at this time.

Next 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

Mr. Chairman and Members of the House of Delegates: There was no written report of the Committee on Crime and Juvenile Delinquency. Therefore I am submitting this oral report.

During the past year the committee held no formal meetings. At the request of President Wright, members of the committee have met regularly with the Nebraska Committee for Children and Youth. The purpose of these meetings has been to conduct a continuing study of the laws concerning minors and particularly of the laws pertaining to the juvenile courts. There are some apparent inconsistencies which might well need corrective legislation. At this time, however, these meetings have been in the discussion stage so no positive recommendations can be made. It is suggested that this cooperation be continued with the Committee for Children and Youth.

It has also come to the attention of the committee that the Judicial Council is presently working in two areas of criminal law. One study is concerned with the furnishing of counsel for indigent defendants, with the thought of extending our present laws on this subject. The other is concerned with the development of a post-conviction remedy for convicted persons in addition to those remedies presently provided by state law. The service of this committee has been offered to aid in this study.

Since the committee has no affirmative recommendation it is suggested that this report be received and placed on file.

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

HARRY B. COHEN, Omaha: Mr. Chairman, I have a question. About two or three weeks ago I got a report from a reporter of one of the local radio and television stations about some question on the waiver of the privilege rule in connection with matters involving children. Do you know anything about that?

MR. VITAMVAS: I do not, no.

MR. COHEN: I wonder where that came from?

MR. VITAMVAS: The question was on the waiver of privilege rule with reference to children. Is that correct, Harry? He wonders where this came from, and I do not know. In the Attorney General's office we have received no information concerning this either. Normally the reporters call us and say "What about this?" but I haven't heard a thing.

SECRETARY-TREASURER TURNER: Some organization, and I do not know the name, went on record, Harry, as favoring legislation which would waive the attorney-client privilege and the physician-patient privilege with respect to matters involving juveniles. If that is introduced I assume it would be a matter for investigation by the Committee on Legislation.

CHAIRMAN McCOWN: Is there a second to the motion that the report be received and placed on file?

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

CHAIRMAN McCOWN: All who favor will say "aye"; opposed the same. The motion is carried.

CHAIRMAN McCOWN: Gentlemen, the next item of business is a report of the Committee on Economics of the Bar and Professional Incorporation. I think there may be some extensive discussion on this. I hope you will take the opportunity to read the report on page 56 thoroughly. It deals primarily with the adoption of a state-wide advisory minimum fee schedule which is set forth in the report. I think it is important and that you should be familiar with the over-all program as proposed in this report. I will therefore declare the House recessed for a matter of fifteen minutes.

[Recess]

CHAIRMAN McCOWN: We are going to make one swing back to an item of business which was passed over prior to this time. Mr. Fred Irons is now present and is ready to present the report of the Committee on American Citizenship. You will find that report on page 29 of your program. It contains two specific recommendations. Mr. Irons!

REPORT OF COMMITTEE ON AMERICAN CITIZENSHIP**Frederic R. Irons**

I will not read the report because it is in the printed bulletin.

It is proposed to the House of Delegates that the functions of the Committee on American Citizenship be expanded to include the following purposes:

1. To inform the general public as to, and to improve the public understanding of, privileges and responsibilities of American citizenship and generally of the American form of government.

2. To inform the general public as to, and improve the public understanding of, Communist tactics, strategy, and objectives, and the dangers therein which threaten the American form of government and the constitutional liberties of American citizens.

I think, Mr. Chairman, that this is a continuing committee. I therefore move that the recommendations of the committee be accepted.

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

LEO EISENSTATT, Omaha: I second the motion.

CHAIRMAN McCOWN: Is there any discussion? As many as favor the motion say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Committee on American Citizenship

For the past several years at least, the Committee on American Citizenship has had for its main purpose the sponsorship of trial demonstrations for high school youth throughout the judicial districts and counties of Nebraska. The purpose of this program has been to assist Nebraska lawyers in presenting accurate and purposeful trial demonstrations to the young citizens of our state, thereby displaying the process of law and the protection offered by the law to American citizens.

A recent survey of the Committee on American Citizenship strongly indicates that the members of the committee want to expand the responsibility of the committee beyond the high school students.

It is therefore proposed to the House of Delegates that the

functions of the Committee on American Citizenship be expanded to include the following purposes:

1. To inform the general public as to, and to improve the public understanding of, privileges and responsibilities of American citizenship and generally of the American form of government.
2. To inform the general public as to, and improve the public understanding of, Communist tactics, strategy, and objectives, and the dangers therein which threaten the American form of government and the constitutional liberties of American citizens.

Dewayne Wolf, Chairman
 Thomas F. Colfer
 Dale Cullen
 Robert V. Denney
 George B. Dent, Jr.
 Joseph J. Divis
 Robert H. Downing
 James E. Fellows
 Raymond Frerichs
 James F. Green
 Robert M. Harris
 Frederic R. Irons
 Daniel D. Jewell
 Warren C. Johnson
 Clarence C. Kunc
 Frank J. Mattoon
 W. E. Mumby
 L. F. Otradovsky
 Ronald K. Samuelson
 Carlos E. Schaper
 James I. Shamberg
 Richard L. Spittler
 Arthur A. Weber
 Charles L. Whitney
 C. R. Worrall

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Economics of the Bar, Mr. Tom Davies, chairman. The report is on page 56 of the program, as I advised you before.

The Chair wishes to take this opportunity to comment about the Institute on Legal Economics which was conducted in the Nebraska Continuing Education Center about three weeks ago by the Junior Bar Association, Howard Moldenhauer, chairman. It was an extremely effective and valuable institute. Those who attended

felt it was thoroughly worthwhile. I want to commend the members of the Junior Bar and those who had charge of that particular program.

Tom Davies, chairman of the Committee on Economics of the Bar!

REPORT OF COMMITTEE ON ECONOMICS OF THE BAR AND PROFESSIONAL INCORPORATION

Thomas M. Davies

Mr. Chairman, Members of the House of Delegates: If you feel that the legal profession has been in the headlines lately on this \$18.00 an hour, you can imagine that the chairman of this committee feels he has been in the front lines!

Evidently the Associated Press picked up a copy of the Association pamphlet, because I had a call from a Mr. Armstrong of the Associated Press and all he wanted to talk about was \$18.00 an hour. A lot of the things that I said did not get in his report, of course. I said that Lincoln and Omaha already had \$18.00 an hour as a minimum or a suggested item. That did not get in. I said that Nebraska was 'way low on minimum fee schedules, which it is. That did get in on one of the reports but not in on another published notice. There were a number of other things. I stated that the probate schedule had been kept the same, and that did not appear. So I do want you to know that I made a try anyway to cut down the general idea from the headlines that said \$18.00 an hour.

This minimum fee schedule is the Omaha schedule, with the exception of probate. We have kept the state schedule on probate. There are some mistakes here that I want to go through with you on. There have been some questions raised. First I want to say that this is advisory only, and again under the Canons of the American Bar Association this applies to individuals as well as to local bar associations. I assume that some local bar associations are going to want to take this recommended schedule and modify it. This is absolutely your privilege. If you feel there are some provisions here that you cannot live with, or that you would like your own present schedule, then you should continue your present schedule.

I do want you to know that the Omaha group has done a tremendous job. They have also prepared a manual which we didn't have the space or the money to print. I want to tell you some of the people in Omaha who have worked on this: Tom Burke, Leo Eisenstatt, Jim Fitzgerald, Howard Moldenhauer, Al Ellick, John

Fike. If I have missed some of the Omaha people I am sorry. I should have had the other names. They have done a tremendous job and what we have done is just take over their job, with the exception of the probate schedule.

Here are the questions that have been raised. Turn to page 64 to the definition of "gross value." The last sentence, which reads "The non-probate assets shall be included in the gross value for determination of fees at 50 per cent of their value," ties in with the Omaha schedule and not with the state schedule, so that should be deleted from this report.

On page 61 under "B—Particular Actions," under "Divorce," B 5 down under f., this appears in the Omaha schedule. Dale Fahrnbruch and Barney Pierson have raised a question as to this language. All I can say now is that it says "Reasonable charges should be made to recipient of a property settlement or alimony on the basis of results obtained, the value thereof to the client, and the time and skill required." This is taken from the Canons of the American Bar Association. The question is raised that under a Nebraska Supreme Court decision this might be in error.

I would recommend that we pass the report, if this is your view, containing this provision but that we check it out, and if we find it does conflict with the Supreme Court of Nebraska decision we will either delete it or change it.

Are there any questions on that?

LEO EISENSTATT, Omaha: Do you have the citations on the authority?

MR. DAVIES: No, I do not, Leo, but we will get it and get it to you. That Supreme Court case did say that a contingent fee was bad in a divorce case. Our language here doesn't go that far but we would like to review that case to see if any of our language is in conflict with it.

MR. EISENSTATT: The reason I raised the question is that when our Omaha Committee was working on it I thought we had given consideration to every Nebraska Supreme Court decision. There was, I know, no attempt to have a contingent fee on divorce matters.

MR. DAVIES: No, it does not say contingent fee.

Dale Fahrnbruch, what was your idea on this? Do you remember that case?

DALE FAHRNBRUCH, Lincoln: I do not remember the case specifically but I think this would encourage lawyers to be getting

divorces and seeing how much money they could get. I raised the question as to whether or not that's against public policy, under that contingency fee case. It seems to me that the reason behind that clause was that if you had a contingency fee it would encourage the divorce so the lawyer could get his money. I'm wondering about the same thinking behind this particular language, about the results being obtained. I agree that if you got a bigger case you should have more money but I am wondering about the value of it to the client or the recipient.

MR. COHEN: Do you have reference to the \$100 retainer?

MR. DAVIES: No, just to the language that says "Reasonable charges should be made to recipient of a property settlement or alimony on the basis of results obtained. . . ." That's the language that is being questioned, Harry, "and the value thereof to the client." And certainly on the last language "the time and skill required" there could be no question about that.

Those are the only comments. We do have a misprint on the last page, page 70. A part of the manual has gotten in after the \$500,000 fee schedule; between the \$500,000 line and "the Committee recommends" is a misprint and is something that will appear in the manual.

I would like to recommend, Mr. Chairman, the adoption of the proposed fee schedule and also of the manual that goes along with it, that you don't have in front of you, but it is an excellent manual that has been prepared by the Omaha Bar Association and outlines some of the items. It borrows profusely from the Canons of Ethics and other matters that are involved, and also has some good information that was given to you on the Economics Institute as to the operation of a law office, time keeping, and so forth.

The question has been raised by George as to whether or not we have the permission of the Omaha Bar to use the manual. I am sure we do because we had a number of members of the committee on our committee and they all said they were very much in favor. Isn't that right?

FRANCIS P. MATTHEWS, Omaha: I think I can speak for the Omaha Bar, and I think we would be very glad to have you use it.

MR. DAVIES: Thank you very much, sir.

I will be glad to answer any questions.

I would just like to second what Hale said, that those of you who missed the Junior Bar presentation on economics of the bar

missed one of the finest institutes we have had because it was directed right to your pocketbook, gentlemen. In other words, it was how to run a law office more efficiently. It wasn't just a matter of getting more fees. It was a matter of doing a better job for our clients.

CHAIRMAN McCOWN: I think first I will ask for a second to the motion before we get into discussion.

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

CHAIRMAN McCOWN: The motion has been made and seconded, and I suggest that prior to the discussion on the issue perhaps we might want to establish some ground rules for the House.

As you will note from this schedule, there are a number of individual items. I am sure that any one of us would find some items of disagreement with one or another. We may want to establish ground rules about whether or not you want to make amendments to individual items or whether amendments shall be limited to certain items. I don't want to shut off the discussion in any respect about individual items, but I think you are going to be here all day if you want to talk about each individual item on the schedule.

With those preliminary remarks I will merely suggest that the discussion is now open.

JAMES I. SHAMBERG, Grand Island: I have one question. Tom, when you recommend that this schedule be published, perhaps I am begging the question and quibbling with words, but is it the recommendation that it be an open publication for everybody's use, or that it be merely published for the use of the lawyers of Nebraska?

MR. DAVIES: I will answer the way I feel, that it will be an open published schedule that you can reach for and show to a client. I think this has a tremendous advantage. I think a minimum fee schedule should be so used—at the discretion of the individual lawyer, of course.

CHAIRMAN McCOWN: I assume that distribution will be the same as any other distribution of State Bar material to the members of the State Bar Association. Is that correct, Tom?

MR. DAVIES: That is correct. Of course, as you know, the state schedule was distributed the same way.

CHAIRMAN McCOWN: I should perhaps make one other comment. Ethically speaking, under the decisions of the American

Bar Association committee as well as our own State Advisory Committee, any minimum fee schedule may be *advisory* only. The language of the committee and its decision of about 1959, that varied to some degree from previous decisions of this particular subject, were merely that habitual undercharging or advertising of undercharging might be evidence of misconduct. But there has never been a decision of the committee which would authorize any minimum fee schedule to be a *compulsory* schedule.

I think also it should be kept in mind that a minimum fee schedule is exactly that. It is an advisory minimum fee schedule. There could be a lot of comments in the discussion as to whether, in many respects, we in Nebraska have treated a minimum fee schedule as a maximum fee schedule, which has been true, I am sure, in many instances. But I think it is also clearly correct and should be brought to the attention of the House that each local bar association also has its own right and authority to modify, change, or reject entirely if it so desires the advisory state-wide schedule adopted by this Association. That is entirely up to each local bar association.

Now, further discussion?

MR. DAVIES: I will ask Hale to tell the story about the lawyer who displayed the minimum fee schedule.

CHAIRMAN McCOWN: One of the complaints which was made to the American Bar Association Ethics Committee in connection with this sort of thing and in connection with a proposed compulsory schedule referred to a Puerto Rican lawyer who posted a sign in his office. He took the advisory minimum fee schedule of his local bar association and had it framed and hung it on the wall of his waiting room. Then he had a little sign immediately underneath it which said, "This is what any other lawyer in town would charge you. I charge half of this."

MR. COHEN: Do you think it would be necessary to preface adoption of the report to the effect that it is only an advisory minimum fee schedule but that it does not take precedence over any other fee schedule of local bars.

MR. DAVIES: I think that is inherent. I don't think that is necessary, Harry, but if you feel it is I certainly would accept it as an amendment.

The question was: Should we say that this is advisory only? I think all fee schedules are. It is not compulsory on a local bar association, and there is no question but what it is not because it is

not even compulsory on an individual. But if you want to make that in the form of an amendment I will accept it.

MR. COHEN: I would like to make that in the form of an amendment, otherwise I think it might be interpreted as the minimum schedule of the State Bar Association for all localities.

CHAIRMAN McCOWN: The amendment, as I understand it, Harry, is that the schedule be referred to as the minimum fee schedule of the State Bar Association and that there be specific provision made in the schedule stating that it is subject to amendment, change, review, or modification by any local bar association, or the adoption of separate schedules. Do I hear a second to the amendment?

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

CHAIRMAN McCOWN: This is purely on the amendment. All those in favor will please say "aye"; opposed the same. As so amended the discussion is now open.

GEORGE W. HAESSLER, Wahoo: Mr. Davies, are you ready to get to specific items on the schedule?

MR. DAVIES: Well, we hoped that we wouldn't get that far. I don't want to cut you off, but I don't want to defend individual items because I am afraid we would be here all day if we did.

MR. HAESSLER: It is not a matter of wanting to defend. I just wondered if I could ask you, as chairman . . .

MR. DAVIES: All right, sir.

MR. HAESSLER: If you had had any problems in your probate schedule of Schedules 2 and 3 regarding jointly owned property, where all you really have is an inheritance tax determination. I would just like to suggest that in our little town of Wahoo we have tried to follow the state schedule (I am sure every office in town) verbatim since it was adopted in 1958, but we get quite a few Lincoln, Omaha, Fremont lawyers and we find that the greatest disagreement (at least they tell us that the greatest disagreement) in their town is this schedule on jointly owned property. I even had one man try to tell me that a Lincoln lawyer told him that you could have an inheritance tax determined down there anywhere for \$50.00 because all it is is one petition and one hearing. I just wondered if the committee had any problem on this, or if there was a lot of different thinking on it. We have had a little of it in our local bar because of all these disagreements we are hearing about.

MR. DAVIES: I can answer from my own experience. If it is being done in Lincoln for \$50.00, my clients are certainly paying a lot more than they should. I don't think it is being done. I think the Lincoln attorneys are definitely following the schedule, as far as I know, and I think the out-state lawyers, as far as I can determine, are too. This is not a change, I want to point out to you; this is the same schedule we have been operating under. It is my opinion that the lawyers in this state are following this schedule. I am sure this is true in Lincoln.

L. F. OTRADOVSKY, Schuyler: In that connection I notice that this schedule follows the Omaha schedule and that the members of the committee are from towns the size of Fremont, Beatrice, and larger; and I was wondering to what extent the committee has made a study or contacted lawyers in towns, say, of 5,000 and under with respect to their views about this fee schedule.

MR. DAVIES: I'll answer this way, Mr. Otradovsky. I didn't name the committee, so we got the committee as it was. I am sure this was not intentional, that there were no lawyers from smaller communities.

I think the answer I would give you is that you should go over this fee schedule with your local bar very thoroughly. If you can find that there are provisions here that you cannot live with, then you should amend. Your local fee schedule then should be amended.

CHAIRMAN McCOWN: I think perhaps we might be a little more fundamental than that, Mr. Otradovsky. I am sure the Omaha committee had in mind the studies that have been made in Minnesota, Missouri, Illinois, and many other states, which established I think fairly conclusively from the figures that overhead costs and so forth of attorneys in small communities were approximately the same as those in the city; that basically automobile expense was higher but proportions of total overhead to gross were approximately the same in all instances. I think the state committee also had in mind that prior to the adoption of any state-wide schedule in Nebraska we had the rather strange experience of having some 96 counties in which the charges for doing the same sort of legal work varied; for example, the one I recall particularly was adoptions. There were minimum fee schedules for adoption in Nebraska which varied from \$15.00 to \$125.00 for the same thing.

Now, surely there are some differences in cost of operation and so forth, but so far as the public is concerned I think it is a difficult problem to try to explain why in a small community, or in some instances in larger communities, the cost of a certain item of legal

business is 'way below or 'way above what it is in the general area of the state.

I think that very probably we need to treat this, again, as it is intended, as a *minimum* fee schedule, not a *maximum* fee schedule. Those are some of the considerations I am sure the Omaha committee probably did not consider directly because they were considering only the question of application in Omaha, but the state committee I am sure had those things in mind and some of those reports before it.

MR. DAVIES: I would like to say also that there certainly was not any intent to impose a Lincoln and Omaha schedule out-state, but I would advise the out-state bar associations to take a very close look at this because I think that the Omaha Bar has given it a lot of attention, and I think if you don't use it, or use most of it, you will be making a mistake.

ALEX MILLS, Osceola: Tom, I come from the little town of Osceola. In our county, and I think primarily in the district, we have been sticking to the advisory schedule of the state. As far as I know, most of them appreciate it very much, and with a few minor exceptions, adoptions or perhaps abstract examinations, as far as I know in our area it is followed pretty much by all of them.

MR. DAVIES: One thing that was brought out at the institute was very important. When lawyers have a bad press or people have some idea against lawyers it is because, as lawyers, we don't talk fees soon enough so that people know what they are getting into. This state schedule will be a vehicle that you can reach for in your book and pull it out and say, "This is what at least most of the lawyers in the state are doing." I think you will find by and large your clients are going to be very well satisfied.

ROBERT J. BULGER, Bridgeport: Tom, I notice in your definition of "gross value" on this probate schedule you include the value of all real and personal property *after* mortgages, liens, or other encumbrances. It appears to me that that is really not tying the fee to the work involved, because when you have an estate that is heavily encumbered and obligated it actually involves more work for the lawyer in the probate of it rather than less. The fact that you deduct all the liens, etc., in arriving at your figure, take it to an absurdity you could have an estate that is on the verge of being insolvent and under this definition it would justify a very little fee comparatively and would entail a terrific amount of work.

MR. DAVIES: My answer to that is that I think generally our definition is sound, Bob, but you are right. Again we get back to

the fact that this should be only a minimum. If you get into an estate where there isn't much value and there are a lot of mortgages, then you should charge more.

MR. BULGER: Well, I am talking from the hick-town lawyer point of view. We are confronted in a lot of our smaller counties with county judges who are not lawyers and a lot of them follow this fee schedule as a guide and follow it quite literally. So the lawyer who is practicing before a county judge who is not a lawyer oftentimes finds he is bound by this schedule more than you are perhaps in larger places. On this type of thing we could get into a ridiculous situation where we would have a terrifically difficult estate and get practically no fee from it.

CHAIRMAN McCOWN: Perhaps the "extraordinary services" definition would take care of that.

LEO EISENSTATT, Omaha: How do you explain, then, an estate which, say, has no debts but only \$1,000 of assets compared with one (what is the difference so far as the time is concerned?) one that has a net after debts of only \$1,000?

I think that the reason that deduction was put in there was to consider the size of the estate, the net estate rather than the difficulties in handling or processing or trying to eliminate, adjust, or compromise the liabilities in the estate. This is another matter. It is just an attempt to get the size of the estate in line with the fee. If you have a lot of extra work involved in trying to settle and compromise those debts and liabilities, it is an entirely different situation.

CHAIRMAN McCOWN: I think, too, we might call attention, Leo, to the fact that in your schedule and part of the matter which is being adopted, if it is adopted, is a definition of what are "ordinary services" in probate matters and also a definition of what are "extraordinary services" in probate matters, what things are covered by the regular fee and what things would be specifically allowed additionally for unusual or extraordinary services that may be required. I am not sure whether the definition of "extraordinary services" gets in here or not.

JOHN E. NORTH, Omaha: Hale, I think the point he is raising is a very good one. When the executor is appointed to handle this estate, the attorney represents not only the beneficiary's interest but also the creditors' interest, and he should be charging for the service he is rendering to that creditor. Consequently the fee schedule should be based on that proposition.

MR. DAVIES: Jack, may I answer that. You don't charge the creditor. In other words, if you have a house that has a value of \$15,000 and it has a \$13,000 mortgage on it, no matter how you treat it you still have only a \$2,000 asset as far as the beneficiary is concerned.

MR. NORTH: If you have a \$200,000 estate and \$190,000 in debts and you get that \$190,000 to that creditor by selling those assets at their fair value, he is the one who gets the maximum benefit from your efforts.

MR. DAVIES: And you wouldn't be charging him. Well, I think it gets back to what Hale said, that it is a question of "extraordinary services" if you get the unusual that you have posed or that Bob Bulger has posed.

CHAIRMAN McCOWN: Is there further discussion? The question has been called for. I don't want to shut off any discussion.

DWIGHT GRIFFITHS, Auburn: Tom, getting back to your suggestion about questioning the phraseology of the note f. under 5 B with respect to divorce fees, where the contingency question was raised . . .

MR. DAVIES: That is on page 61 in the middle of the page.

MR. GRIFFITHS: I had the impression from past research that the court has also held that where the trial court makes an allowance to the wife as attorney's fees, attached to the cost and charged to the husband, that that is intended to cover all services. If you are representing the wife and you take the property settlement into consideration there may be a conflict with that line of decision. This is strictly off the cuff and from memory. I am only suggesting that when you check your phraseology for the one purpose you also check for decisions as to whether the court has held, as I believe it has, that an allowance to the wife for attorney's fees is to cover all services rendered to her in that court action.

MR. DAVIES: I think that is a good point. I know that the Lancaster County committee—this is off of minimum fees—one of the big problems has been in lawyer-client relationships of the lawyer for the plaintiff collecting his fee, as awarded by the court, and then also keeping whatever retainer was paid to him. Of course the fur flies here, and this is one of the many complaints.

MR. GRIFFITHS: It is my recollection, Tom, that the Supreme Court has passed on that.

MR. DAVIES: We will check it out, then. Thank you.

WILLIAM B. RIST, Beatrice: Mr. Chairman, I don't want to belabor an item if the House doesn't want to consider it further but I would like to add my small say to what Mr. Bulger brought up on this definition of "gross value." It seems to me that if the size of the estate has any relevance to the fee we charge, it ought to be the gross estate because I don't see how in a good many instances you are going to be able to be adequately compensated under this area of "extraordinary services," particularly, as Mr. Bulger has pointed out, when you have a good many courts where you have lay judges who are not as amenable to that consideration.

CHAIRMAN McCOWN: Do you want to propose an amendment?

MR. RIST: Mr. Chairman, I propose to amend the report of this committee as respects the definition of "gross value," that it read to include "the value of all real estate and personal property" and delete therefrom the language after "mortgages, liens, or other encumbrances."

CHAIRMAN McCOWN: You have heard the amendment. Is there a second?

MR. BULGER: I'll second the motion.

CHAIRMAN McCOWN: On the amendment only. As many as favor will say "aye"; opposed the same sign. The Chair will ask that those in favor will please raise their right hand; those opposed. The amendment is carried.

The question has been called for on the motion as amended. Is there any further discussion? As many as favor will say "aye"; opposed the same sign. It is adopted.

[The report of the committee follows.]

Report of the Committee on Economics of the Bar

The Committee on Economics of the Bar has reviewed the Advisory Fee Schedule adopted by this association in 1959 and has compared it with the fee schedule adopted by the Omaha Bar Association. The committee suggests the following fee schedule:

MINIMUM FEE SCHEDULE, NEBRASKA STATE BAR ASSOCIATION

HOURLY CHARGES—CONSULTATION AND OFFICE WORK

Hourly minimum.....\$18.00

Throughout this schedule the recommended minimum charges seek to reflect an hourly rate of \$18.00. In each case where a recommended minimum is recognized, the individual lawyer should also keep track of his time expended. If more time is expended than the suggested minimum, the charge may be computed on an hourly basis. Whether those fees produce that amount will vary, dependent upon the personal work habits of the lawyer and the efficiency of the law office.

The young and inexperienced lawyer may not be worth the full recommended hourly minimum and ordinarily will not receive such a fee for the stated charges herein. He should charge accordingly less for unlisted services. On the other hand, the experienced lawyer, on matters within his special competency, will and should charge substantially more than the suggested minimum. For services which are hereinafter enumerated, both the younger and the more experienced lawyer should charge a comparable fee, inasmuch as the results obtained will be similar, with the young lawyer, perhaps, spending more time.

Remember: It is not anticipated that the hourly charge will be applied to all matters. The hourly charge is an amount that, on a cost accounting basis, you must recover on the average for every hour, whether you are engaged in retainer, contingent fee, or fixed fee work. It is a guide to knowing your cost of doing business. Your charges must reflect it, even though in specific cases they may be considerably higher or lower. After all, your charge is a professional fee for a professional service and, even though based upon an hourly charge, must reflect all of the additional elements set forth in Canon 12, as well as time.

A lawyer's day is assumed to consist of six (6) hours billable time. Wherever a per day or per diem charge is indicated, a six (6) hour day is intended.

OFFICE WORK

A. Bulk Sales Law Compliance:

1. For seller _____	\$ 35.00
2. For buyer _____	80.00

B. Collections:

1. Wholesale accounts:

a. On first \$100 recovered _____	33⅓%
b. Excess of \$100 to \$500 _____	25 %
c. Over \$500 _____	15 %

2. Retail accounts:
 - a. On the first \$40 collected 50 %
 - b. On the excess over \$40 33 $\frac{1}{3}$ %
 - c. Skip or stale claims 50 %
3. For suit:
 - a. A suit fee of\$ 20.00
 - Plus on amount recovered 33 $\frac{1}{3}$ %

Note: Suit fees are not contingent and do not include disbursements.
4. Attorneys listed in approved legal directories may charge according to approved schedules of such organization.

C. Consultation and Office Work:

1. *Initial consultation, office or telephone\$ 7.50
2. Consultation, per hour 18.00
3. Office work, per hour 18.00
4. Telephone calls, at least 3.00

*Note: This fee is inserted in the schedule to encourage persons to see lawyers whenever confronted with a legal problem.

D. Corporations:

1. Organization of a business corporation; preparing articles of incorporation; by-laws; minutes of first meeting of stockholders and directors, and attendance thereat, notice of incorporation, etc.\$ 250.00
2. For additional services, such as advice on tax and other problems, transfers of property to the corporation in connection with its organization, preparing articles of incorporation with unusual features, such as enumerated powers of corporation, classification of stock, conversion features of stock, restrictions upon sale of stock, amendment of by-laws, etc., per hour 18.00
3. Amendment of articles of incorporation of business corporation 75.00
4. Attendance of counsel at meetings of stockholders or directors or any corporate committee, per hour 25.00

5. Qualifying a foreign corporation to do business in this state, securing appointment of resident agent, etc.	150.00
6. Dissolution—voluntary and not requiring any court action, including preparing minutes, transfers, etc.	150.00
7. Profit sharing and pension plan trusts, including initial qualification with I.R.S.	500.00
8. Incorporation of non-profit corporation; drafting by-laws and conducting first meeting	200.00
E. Drafting Instruments:	
1. Affidavits	15.00
2. Bill of sale	15.00
3. Chattel mortgage and note	17.50
4. Conditional sales contract, personal property	17.50
5. Deed, any form	15.00
6. Installment contract for sale of land	35.00
7. Leases:	
a. Residential	15.00
b. Commercial, printed form	20.00
c. Commercial, specially prepared	50.00
d. Farm, printed form	15.00
e. Farm, specially prepared	50.00
8. Mechanic's lien	25.00
9. Mortgages, real estate:	
a. Mortgage and note, printed form	25.00
b. Assignment of mortgage	15.00
c. Extension of mortgage	15.00
d. Release of mortgage	15.00
10. Notice to quit:	
a. Drafting only	10.00
b. With service	20.00
11. Partnership agreement, including analysis of the problems, drafting articles of co-partnership, study and counsel as to partnership vs. corporation	200.00
a. Simple partnership	125.00

12. Partnership dissolution—statutory provision	150.00
13. a. Power of attorney, printed form	15.00
b. Power of attorney, specially prepared	20.00
14. Purchase agreement—real estate—printed form	15.00

F. Tax Work:

1. Federal income tax returns:	
a. Wage or salary only, and no itemized deductions	15.00
b. Single return, long form, itemized deductions, at least	25.00
c. Business partnership return (schedules extra)	50.00
d. Corporation return, at least	50.00
(Schedules extra)	
e. Where return involves retirement income credit, add	10.00
2. Gift tax returns, at least	35.00
3. Appearance before taxing authorities:	
a. Attendance and argument before local revenue agent, at least	75.00
b. Attendance and argument before any division of the Bureau of Internal Revenue or Treasury Department, or State Tax Commission, per day, at least	150.00
Note: In fixing charges for tax services, consideration should be given to the amount involved, the complications and the savings in tax accomplished, and also as to the question of whether hearings are held locally or elsewhere. In any event the minimum charges to be made should be at least, per hour	18.00

FEDERAL COURTS

A. United States Supreme Court and United States Court of Appeals:

1. Appearances in these courts will generally involve such special circumstances that fees based upon a standard charge per day have not been recommended.

B. United States District Court:

1. Legal services performed in connection with trials in the United States District Court should be at least equal to those in the Nebraska District Courts and should, in most instances, be somewhat greater to reflect the additional responsibility and larger sums involved.

C. Bankruptcy Matters:

1. Voluntary petition, statement of affairs, schedules, summary of debts and assets, first meeting, for:
 - a. Bankrupt not engaged in business _____ 200.00
 - b. Bankrupt engaged in business with no assets or nominal assets _____ 225.00
 - c. Bankrupt engaged in business with more than nominal assets _____ 250.00
2. Involuntary petition, order of adjudication and reference, first meeting, where no contest _____ 300.00
3. Debtors petition under Chapter XIII (Wage Earner's Plan), statement of executory contracts, state of affairs, summary of debts and assets, plan, first meeting, review claims filed _____ 200.00
4. a. Preparing and filing claims with referee _____ 15.00
 - b. If collection is made, collection fees are to prevail with credit being given for preparation charge.

NEBRASKA SUPREME COURT

Appearance, argument only _____\$ 200.00
 Motion for rehearing or any other motion _____ 125.00

Preparation for Supreme Court appearances should be charged at an hourly rate somewhat greater than the recommended minimum to reflect the additional responsibility involved.

Note: Where matters in any court require attendance at points distant from the lawyer's office, the additional time and expense involved should be taken into consideration.

NEBRASKA DISTRICT COURTS

A. General:

1. Pleadings:

- | | |
|--|----------|
| a. Petition (exclusive of interview and investigation) | \$ 50.00 |
| b. Answer or otherwise pleading to petition | 50.00 |

2. Motions:

- | | |
|---|--------|
| a. Conferences, preparation for, and drawing motion, before trial | 50.00 |
| b. Conferences, preparation for and drawing motion for summary judgment, before trial | 100.00 |
| c. Conferences, preparation for and drawing of any motion for new trial, for amended findings or for judgment notwithstanding the verdict, at least | 100.00 |
| d. Court appearance in any of above motions uncontested, at least | 25.00 |
| e. Court appearance in any of above motions, contested, at least | 75.00 |

(Note: This suggested fee is not intended to be charged for motions for more time to plead or for the most simple motions to strike or for more specific statement. The charge is to be made only where the motion is material to the cause of action.)

3. Discovery Procedure:

- | | |
|--|--------|
| a. Preparation of or answering interrogatories, at least | 50.00 |
| b. Application for production of books and papers, order fixing time and place of hearing and notice, at least | 50.00 |
| c. Appearance at deposition hearing, per hour | 25.00 |
| Minimum fee per deposition—local | 75.00 |
| Minimum fee per deposition—out of county | 125.00 |

4. Pretrial Conference:

- | | |
|---|-------|
| Attendance at pretrial conference, at least | 75.00 |
|---|-------|

5. Court Appearances, Civil Cases:

- | | |
|---|-------|
| a. Court call | 20.00 |
| b. On motions not otherwise covered herein, uncontested, at least | 25.00 |

c. On motions not otherwise covered herein, contested, at least _____	75.00
d. Trial, per day, at least _____	175.00
e. Trial, sitting in with another attorney, per day, at least _____	125.00

B. Particular Actions:

1. Accounting, suit for, at least _____	300.00
2. Attachment or replevin: Preparing petition, affidavit, and bond for attachment or replevin and securing writ, at least _____	200.00
3. Change of name, at least _____	100.00
4. Criminal cases: Trial work, per day, at least ____	250.00
5. Divorce, separate maintenance, or annulment:	
a. Uncontested, no property settlement, at least	250.00
b. Uncontested, property settlement, at least ____	300.00
c. Hearing on order to show cause, contempt proceedings, etc., at least _____	50.00
d. Defense—uncontested, no property settle- ment _____	150.00
e. Defense—uncontested, property settlement	200.00
f. Obtaining approval and release of child sup- port lien _____	125.00

(Note: It is to be noted that the foregoing suggested minimum fees do not anticipate any contested proceedings.

Reasonable charges should be made to recipient of a property settlement or alimony on the basis of results obtained, the value thereof to the client, and the time and skill required.

A preliminary retainer of \$100.00 is recommended before petition is prepared.)

6. Driver's license, proceedings to restore, at least	125.00
7. Habeas corpus, at least _____	250.00
8. Injunctions, at least _____	300.00
9. Negligence actions:	
a. If handled on a contingent fee basis for the plaintiff:	

- | | |
|--|------|
| (1) On amount recovered, if settlement is reached before commencing action, or after commencing action, but before trial preparation | 25 % |
| (2) On amount recovered, if settled after trial preparation, or on judgment if case is tried | 33⅓% |
| (3) On amount recovered after appeal to Supreme Court | 40 % |

The foregoing are regarded as minimum charges and are, of course, exclusive of costs and disbursements.

- b. If the matter is not handled on a contingent fee basis, then the charge shall not be less than that provided elsewhere in this manual for the handling of matters of a similar nature.
10. Foreclosure of real estate mortgages, land contracts or mechanics liens and quiet title actions where amount involved is \$1,000 or more—
 \$1,000 to \$5,000 200.00
 Plus 2% on all value exceeding \$5,000

11. Partition actions

1. It is recommended that fees be allowed ranging from 7 to 10 per cent of the total sales price, with % of said amount designated as attorney's fees and ⅓ of said amount as referees fees with additional allowances to be made for extraordinary services.

No special schedule is made of fees to be allowed in the foreclosure of bond or note issues. Fees to be allowed in such cases should be substantially in excess of fees provided for in ordinary foreclosure actions.

OTHER COURTS AND TRIBUNALS

CIVIL CASES

A. County and Municipal Courts:

1. The district court schedule should serve as a guide for comparable services in county and municipal courts after due recognition of the

somewhat lower scale of charges which the lesser amounts generally involved may require.	
Trial work, per day, at least _____	100.00
2. Forcible entry and detainer action, uncontested	50.00
B. Traffic Violation and Minor Criminal Cases:	
1. Appearance _____	25.00
2. Trial, per day, at least _____	100.00
C. Appearance Before Federal, State and Local Boards, Councils, Agencies, etc. (Other Than Tax Matters) Per Hour, At Least _____	
	25.00
D. Workmen's Compensation Court:	
1. Per diem, trial before one judge _____	125.00
2. Per diem, trial before court en banc _____	175.00
3. Lump sum settlement _____	150.00

ESTATE PLANNING AND DRAFTING OF WILLS AND TRUST AGREEMENTS

The following recommended minimum fees for drafting instruments do not contemplate any services in connection with analysis of estates, tax planning in connection therewith, consultation or assistance in connection with inter-vivos gifts, or analysis of or assistance in changing life insurance arrangements. All such services may be involved in "estate planning." The minimum fee therefore should be based on the minimum hourly charge. Maximum fees should be based on time involved, value of estate, complexity of problems, and result accomplished (Canon 12).

1. Drafting and execution of simple will with no contingent beneficiaries and no administrative powers _____ 25.00
2. Add to the minimum fee suggested in paragraph 1 an appropriate charge—
 - (a) Where contingent or additional beneficiaries are named, or detailed administrative powers are expressed.
 - (b) Where will contains a "formula" marital deduction clause.
 - (c) For each trust created in the will.

3. Drafting and execution of inter-vivos trust agreement. No minimum fee is set because of the complex problems involved in most inter-vivos trust agreements.

PROBATE AND ADMINISTRATION:

I. Administration of Estates of Decedents

A. Estates Involving Regular Administration

1. Ordinary Legal Services—

Ordinary legal services rendered to a personal representative of the decedent's estate would include those services rendered during the administration as follows:

- (a) Preparation and filing of petition for probate, notices, affidavits, service of notices and preparation for hearing;
- (b) Special administration proceedings where conducted as part of regular administration;
- (c) Proof of will or in the event of intestacy, attendance at and participation in the hearing appointing administrator;
- (d) Preparation and filing of inventory;
- (e) Processing of uncontested claims;
- (f) Sale of personal property;
- (g) Collection of receivables without suit except receivables arising from business, trade or profession of deceased;
- (h) Sale of real estate to pay debts under power of sale in will;
- (i) Obtaining personal property tax clearance from county assessors and county treasurers involved and adjustments of personal property tax problems not involving contested hearings;
- (j) Preparation of federal and state estate and inheritance tax returns or, where such return is made by anyone other than the attorney, reviewing such returns in detail and seeing to it that any needed changes are made; advance income tax planning for estate and preparation of or assisting personal representative or accountant in

preparation of income tax returns where no extraordinary problems are involved either in the planning or in the returns.

- (k) Applications, orders and hearings for partial distribution;
- (l) Preparation and presentation of interim and final account and petition for final settlement and final decree, including notices, affidavits and service in connection therewith;
- (m) Transfers of securities to heirs and legatees;
- (n) Transfers of real estate to devisees or heirs;
- (o) filing of the requisite clearances from taxing authorities;
- (p) Arranging for payment of all court costs, fees and expenses in connection with the administration of the estate and the filing of appropriate receipts in connection with the final decree;
- (q) Entry of discharge of the personal representative and exoneration of the fiduciary's bond.

* * *

As a general rule, ordinary legal services rendered to a personal representative would include all formal proceedings rendered in administration of decedent's estate and including the itemized services as above set out and including any and all other services rendered, excepting only those services hereinafter defined specifically as extraordinary services where additional fees may be considered.

2. Definition of "Gross Value"—

"Gross Value" includes the value of all real estate and personal property after mortgages, liens or other encumbrances, and in addition, the non-probate assets which are reportable for Nebraska inheritance or federal estate tax purposes, but only to the extent of the value of such assets considered in the determination of the respective tax (contributions by survivor would be deducted). The non-probate assets shall be included in the gross value for determination of fees at 50 per cent of their value.

The asset valuations to be used in making the above computation will be those values as reported for federal estate tax purposes, where a federal estate tax return has been filed. When changes are made in values so reported, the fee should be adjusted to coincide with the values as finally determined for federal estate tax purposes.

In the absence of a federal estate tax return, then the asset valuations shall be those approved by the county court in connection with a Nebraska inheritance tax determination.

If there is neither an estate tax return filed nor a Nebraska inheritance tax determination, then the assets values shall be those set out in the inventory of the estate.

It is not expected that this probate schedule will satisfy every fee problem in the administration of estates of decedents. Reference to Canon 12 at pages 2 and 3, supra, in conjunction with Paragraph D, pages 14-4 infra, is suggested.

3. Attorneys fee—

The following minimum fee schedule would apply against the gross value of the estate for the rendition of ordinary legal services as above defined.

Probate, Administration, Clearing Jointly Owned Property of Federal and State Inheritance Taxes, and Separate Proceedings for Determination of Taxes.

Schedule I.

Probate and Administration

5% on the first \$5,000.00 of gross value with a minimum of \$100.00.

3% on the next \$10,000.00 of gross value.

2½% on all over \$15,000.00. No fee less than that received by the executor or administrator.

Schedule II.

Estate consists of less than \$60,000.00 of gross value and is made up wholly of jointly owned property.

Minimum fee of \$50.00 up to \$5,000.00 value, plus 1% on the excess above that amount.

Schedule III.

Estate consists of more than \$60,000.00 made up wholly of jointly owned property.

The fee shall be 2% of the gross value.

Schedule IV.

Where estate consists of property which must be probated and jointly owned property.

The aforesaid property will be separated, the respective rate applied to each and the total thereof shall constitute the fee, Schedule I rates applying to property which must be probated and Schedule II or III applying to jointly owned property.

Short Form Probate and Determination of Heirs

Fee shall be 2% of the gross value of estate up to \$10,000.00.

Fee shall be 1¼% of gross value of estate over and above \$10,000.00

Minimum fee _____ \$ 100.00

Construction of Wills in District Court Proceedings

Additional fee of ½ of 1% on gross value of estate.

Minimum _____ \$ 100.00

4. Extraordinary Services defined—

Extraordinary services for which it is contemplated that charges in addition to the foregoing schedule (Par. 3 *supra*) may be considered, subject to the approval of the court, are as follows:

- (a) Will contests
- (b) Contested claims
- (c) Contested heirship determinations
- (d) Contested tax claims or returns
- (e) Any other contested matters
- (f) Carrying on decedent's business or collection of receivables arising out of business
- (g) Sales and mortgages of real estate (except real estate sales to pay debts under power of sale in will), minimum fee for license to sell—\$200.00

- (h) Judicial accounting and proceedings involving partnership property
- (i) Proceedings for construction of the will
- (j) Liquidation of holdings in corporation in which estate has substantial interest or sale of going business
- (k) Special proceedings to discover, recover or conserve assets
- (l) Performance of executor's duties in connection with inexperienced executor appointment
- (m) Extended search for unknown or missing heirs
- (n) Advance income tax planning for estate and preparation of or assisting personal representative or accountant in preparation of income returns where extraordinary problems are involved either in the planning or in the returns
- (o) Where a testamentary trust or trusts are involved
- (p) Such other services as the court would deem to be extraordinary

5. Fees for Services to Personal Representative only—

It should be borne in mind by the attorney that fees for services will be allowed by the county court only where the services of the attorney are rendered to or on behalf of the personal representative. To the extent that services are rendered to legatees, devisees, distributees, heirs or other fiduciaries, the fees allocable thereto should be charged to the respective recipient.

B. Estate Involving Ancillary Administration

1. Foreign Administration—Nebraska Ancillary
The same determinations and considerations set out in "A" above shall apply in the computation of attorney's fee in connection with his handling of an ancillary administration of a decedent's estate in Nebraska. Gross value will only include those assets subject to the ancillary administration.
2. Nebraska Administration—Foreign Ancillary
In computing an attorney's fee in a Nebraska administration where there is a foreign ancillary administration, the same computation is made as though there was no ancillary and

then credit is given for 75% of the amount of the fee charged by the foreign attorney against the fee as computed.

Example— Nebraska fee	\$5,000.00
Foreign attorney's fee	
\$1,000—75%	750.00
	<hr/>
Net Nebraska fee	\$4,250.00
	<hr/>
	<hr/>

II. Birth Certificate:

1. Delayed and corrected certificates _____\$ 25.00
2. Adoptive birth Certificate, not in connection with adoption proceedings _____ 25.00

III. Guardianships:

1. Securing appointment, filing bond and inventory in voluntary proceedings, at least _____\$ 50.00
2. Securing appointment, filing bond and inventory in contested proceedings, at least _____ 100.00
(Note: If inventory exceeds \$10,000.00, an additional reasonable charge should be made.)
3. Proceedings for appointment of guardian and compromise of tort claim (including closing of guardianship, if possible) _____ 150.00
4. Application to sell, mortgage, or lease one tract of real property, at least _____ 150.00
5. Additional properties, same application, at least ____ 25.00
(Excluding services done on sale itself.)
6. Application for sale of personal property _____ Reasonable
7. Preparation and filing of annual account, minimum _____ 25.00
8. Preparation and filing of final account and securing discharge of guardian:
 - a. Where amount subject to distribution is less than \$10,000.00, at least _____ 100.00
 - b. On amounts from \$10,000.00 to \$50,000.00, an additional _____ 1%

- c. On guardianship assets in excess of \$50,000, such additional amounts as may be reasonable and commensurate with the amount and value of work done.

IV. Adoptions:

Simple	\$ 100.00
Where consents are required	150.00

V. Testamentary Trust Matters:

1. Securing appointment and qualifying successor, at least	100.00
2. Annual account, at least	25.00
3. Procedure under Uniform Fiduciaries Accounting Act	250.00
4. Final accounting and discharge of trustee	250.00

EMINENT DOMAIN PROCEEDINGS

If charged on a flat-time basis the charge should be governed by the same considerations as in the case of other services, taking into account the amount and problems involved and the experience and skill of the attorney.

If charged on a contingent basis the percentage should be dependent on the particular circumstances including the stage the attorney enters the proceedings, whether before or after award, how far the case has to be carried, such as settlement before trial, trial in the district court or through appeal to the Supreme Court and whether the percentage is to be based on the amount of the total award or simply a percentage of the additional amount over what the state or other condemnor may have offered to pay. Any such contingent fee should not be less than 10% of the full amount if obtained prior to trial on the merits and ordinarily not more than 50% on the basis of the amount of increase obtained by settlement or trial over the amount offered by the state.

Where the amounts involved are very small, the cases can often be handled, if handled at all, only on a less-than-cost basis, unless a number of property owners involved in the same project are represented by one attorney.

REAL ESTATE TRANSACTIONS AND TITLE EXAMINATIONS

INTRODUCTION:

This revised schedule provides realistic fees for drafting real estate instruments, examinations of titles and closing real estate transactions. It provides the lawyer with a fee commensurate with the professional services rendered and the responsibilities involved, and it removes this portion of law practice from the pay category of a mere scrivener or clerk.

Both buyer and seller benefit from an adequate fee schedule because:

(1) In the case of buyers, careful consideration of the choice of the form of ownership is important. The buyer's estate is being planned. Sole, joint or tenancy in common ownership may be called for depending upon the buyer's other assets and his wife's assets, and his overall estate planning. Often consideration has to be given to gift, death and income taxes. Once ownership has been established one way, subsequent switching of ownership may result in unexpected tax liability.

(2) Sellers must consider the impact of income taxes and be advised in such a way as to minimize them. Installment sales provisions of income tax laws and spacing of the payments so as to avoid high income tax brackets may be advantageous.

(3) By paying a realistic and fair fee, buyers and sellers can demand and will receive prompt and detailed service in a matter which is of utmost importance to them.

(4) The buyer receives from the lawyer a written opinion for which the lawyer is fully responsible, based on a careful examination of the record title.

(5) Because this type of work will now bring in an adequate fee the lawyer can afford to complete the work promptly.

Lawyers will also benefit from the schedule because:

(1) It will compensate lawyers with a fee more in line with the time and responsibility involved; and, accordingly, lawyers will more readily accept and more promptly perform this type of work.

(2) Real estate transactions often involve long conferences, for which the lawyer will receive more nearly adequate compensation.

By making certain that real estate brokers, bankers and building and loan associations in the area are familiar with this sched-

ule, the bar association can effectively insure its success. Since much of the real estate work comes to the lawyer through these persons, either a joint meeting should be arranged or a special bar committee should be appointed to acquaint them with this new schedule.

SALES AND PURCHASES:

For complete representation of seller or buyer, including office conferences, drafting or reviewing of purchase contract and other instruments, including deed, mortgage and note, exclusive, however, of abstract examination\$45.00

It is apparent that the amount of the purchase price should be given consideration in the determination of the charge to be made. While no precise formula is suggested as regards the relationship of the fee to be charged and the purchase price, the amount of the latter is a factor which affects the degree of professional responsibility assumed and as a result, the charge to be made.

TITLE EXAMINATIONS:

The attorney is and will be held liable to his client for loss which ensues as a proximate result of his want of the knowledge and skill requisite to the proper performance of his professional responsibility in the examination of abstracts of title or from failure to exercise due care. As a consequence, it is desirable that the charge for his services bears a direct relationship to the extent of his legal responsibility. The following schedule is designed to establish a minimum charge, giving consideration to the risk involved:

The minimum charge shall be determined in accordance with the following schedule:

Purchase Price	Charge
Not exceeding \$10,000.00	\$25.00
\$10,001 to \$50,000.00	\$25.00 plus $\frac{1}{4}$ of 1% (.0025) in excess of \$10,000.00
\$50,001 and over	\$125.00 plus $\frac{1}{8}$ of 1% (.00125) in excess of \$50,000.00

Examination of abstracts for loan purposes shall conform to the above schedule, with the dollar amount of the mortgage being substituted for the purchase price. However, attorneys examining abstracts for a regular client engaged in the business of making

mortgage loans or issuing title insurance may have an arrangement which represents a reasonable and proper fee for the work done by them.

SCHEDULE SHOWING DIFFERENCE BETWEEN ATTORNEY'S FEES AND OWNER'S TITLE INSURANCE PREMIUM

Price	Attorney's Fee	Title Insurance Premium
\$ 10,000.00	\$ 25.00	\$ 35.00
15,000.00	37.50	52.50
25,000.00	62.50	87.50
50,000.00	125.00	175.00
100,000.00	187.50	325.00
250,000.00	375.00	612.50
500,000.00	687.50	1,125.00

The committee recommends:

1. The adoption of the proposed fee schedule.
2. That the Executive Council be requested to authorize publication of the schedule as adopted and an accompanying manual.
3. That the committee be continued.

Thomas M. Davies, Chairman
 Alfred G. Ellick
 C. C. Fraizer
 Herman Ginsburg
 Thomas Marshall
 Hale McCown
 Alexander McKie, Jr.
 Bert L. Overcash
 Ray C. Simmons
 Gerald L. Strasheim

CHAIRMAN McCOWN: The next item is the report of the Committee on Judiciary, Mr. James Ackerman, Chairman. Mr. George Haessler of Wahoo will make the report. You will find it on page 35 of your program.

REPORT OF COMMITTEE ON JUDICIARY

George W. Haessler

With the adoption of the Merit Plan for selection of judges in 1963 the principal work of the Judiciary Committee appears for the

time being to have been completed. No matters have been referred to the committee by the President or the House of Delegates during the year.

There have been informal discussions of possible technical amendments to the Merit Plan legislation but these discussions have not led to any program of action.

The committee recommends to the House of Delegates that it be continued as a standing committee for the year.

I move adoption of the report.

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

ALEX MILLS, Osceola: I second the motion.

CHAIRMAN McCOWN: Is there any discussion? As many as favor the motion will say "aye"; opposed the same. Carried. Thank you very much.

[The report of the committee follows.]

Report of the Committee on Judiciary

With the adoption of the Merit Plan for selection of judges in 1963, the principal work of the Judiciary Committee appears for the time being to have been completed. No matters have been referred to the committee by the President or the House of Delegates during the year. There have been informal discussions of possible technical amendments to the Merit Plan legislation, but these discussions have not led to any program of action.

The committee recommends to the House of Delegates that it be continued as a standing committee for the coming year.

James N. Ackerman, Chairman
Milton R. Abrahams
Wilber S. Aten
Chauncey W. Barney
Paul P. Chaney
Thomas F. Colfer
Henry W. Curtis
George W. Haessler
James M. Knapp
Joseph H. McGroarty
Alexander McKie, Jr.
Robert D. Moodie

Tracy J. Peycke
R. M. Van Steenberg
Farley Young

CHAIRMAN McCOWN: Next is the report of the Committee on Lawyer Referral, Mr. Alfred Ellick, chairman. You will find the report on page 21 of your program.

REPORT OF COMMITTEE ON LAWYER REFERRAL

Alfred G. Ellick

Mr. Chairman and Members of the House: Omaha is the only city in the state in which there is a formal lawyer referral service being operated, so that is the only place where we can look for statistics as to whether or not such a service is worthwhile.

It is the opinion of the Omaha committee that the establishment of the lawyer referral service here has been worthwhile and that it is doing a good job.

The statistics shown on page 22 of the report cover the first eight months of this year. The number of referrals is up about 75 per cent over the same period of time a year ago. To supplement the figures here, you might be interested in knowing that about three or four days after we sent this report in to George Turner we got a report from a lawyer in Omaha to the Omaha Referral Service who had been sent a client through the service in November, 1962. This happened to be a soldier down at Offutt Air Force Base who had bought a piece of phonographic equipment under an installment sale contract and felt he had been taken advantage of. As a result of that one referral this attorney ended up with 25 similar clients, all soldiers at Offutt Air Force Base. He closed out his last case in October of this year. The fee for each one of these clients ran between \$40.00 and \$60.00 apiece. So his total "take" from those clients was approximately \$1,000.

The referral service, however, by no means is going to make any attorney very rich. What it does do is provide a means whereby people who do not know a lawyer can obtain the services of an attorney and can be assured that the initial interview will cost them a certain fixed amount. In Omaha the schedule is \$7.50 for a half hour interview. That is a little bit below our regular hourly minimum fee schedule but we have taken that into consideration and we think that to encourage the use of the referral service this is warranted. Most clients are usually people of rather moderate means.

In Omaha they have started an advertising program. We are going to run 13 ads during the year in the *Omaha World Herald*. The first one was run in early October and this reads: "Consult your lawyer on all your legal problems: To draw your will; when you buy or sell a house; before you sign any legal paper. If you don't have a lawyer call the Omaha Bar Association Lawyer Referral Service." So this Referral Service is a vehicle through which the Bar Association can point out to members of the public the wisdom of consulting a lawyer when a legal problem arises. It is a fine method of showing what lawyers can do for people who have legal problems.

The American Bar Association puts out a wealth of material for any community that wants to establish a referral service. They have three separate pamphlets which you can send to the members of your local bar association. In other words, if any association in the state is thinking of such a service you can send out one of these pamphlets to each one of your members and it tells what the service is and how it works. Then if you decide to adopt the service the American Bar has manuals on publicizing the service and setting it up with forms and things of that nature. Our state bar committee is also ready and willing to help any local bar association that wants to establish such a service.

I will be glad to answer any questions if anyone has any to ask.

CHAIRMAN McCOWN: Mr. Ellick, I assume you move the adoption of the report. This being a special committee, do you also include in that that the committee be continued?

MR. ELLICK: Yes, we will make a motion to both of those effects.

CHAIRMAN McCOWN: Is there a second?

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

CHAIRMAN McCOWN: As many as favor say "aye"; opposed the same. Carried.

[The report of the committee follows.]

Report of the Committee on Lawyer Referral

This committee has held no formal meetings during the year but it has expressed its willingness to assist any local bar association in setting up a lawyer referral service. Such a service now operates only in Omaha although interest in this very worthwhile bar activity seems to be spreading.

The experience in Omaha indicates that three parties benefit from a lawyer referral system. First, the public benefits because competent legal help is made readily available for a modest fee. Second, the individual lawyer benefits because he has a new source of clients—clients who usually would not otherwise bring their legal problems to lawyers. Third, the profession benefits through the improvement of its public image and because a referral service provides a perfect vehicle, through ads and other promotional activity, for informing the public of the wisdom of consulting a lawyer when a legal problem arises.

The Omaha referral service is strictly a bar association function but it operates out of the same office and in close cooperation with the Legal Aid Society. It is frequently discovered that a client who seeks help from the legal aid attorney is really not indigent and can well afford the initial \$7.50 fee which members of the referral panel agree to charge for a half hour interview. In such a case the client is referred to the attorney whose name is next on the referral list. The appointment for the initial interview is made either by the secretary in the legal aid office or by volunteer help. All attorneys on the referral panel are asked to report the total fee collected from each client. The statistics for the first eight months of 1964 are as follows:

Total number of referrals	265
Number of clients who failed to appear	28
	<hr/>
Number of active referral cases	237
Number of cases closed during period (regardless of when the referral occurred)	145
Total fees collected	\$ 3,540.15
Average fee per closed case	24.42
Number of closed cases in which fee collected exceeded minimum of \$7.50	46
Highest fee collected	\$ 250.00

Since there are about 100 lawyers on the referral panel it can be seen that each lawyer will be referred three or four new clients a year.

The American Bar Association Committee on Lawyer Referral will supply any local bar association with an abundance of pamphlets, forms, and other material relating to the setting up and operation of a referral system. Our Nebraska State Bar committee is likewise willing to assist in any way possible.

Alfred G. Ellick, Chairman

James D. Conway
W. A. Day, Jr.
John R. Dudgeon
Kenneth H. Elson
Daniel D. Jewell
Donn Raymond

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Legal Education and Continuing Legal Education, Mr. Richard Hunter, Chairman. You will find the report on page 44 of your program. Incidentally, it is an interesting report and it is an extended one in your program. You will find the results of that questionnaire which are extremely interesting, if you haven't already looked at them. I hope that you have.

REPORT OF COMMITTEE ON LEGAL EDUCATION AND CONTINUING LEGAL EDUCATION

Harold Rock

Mr. Chairman and Delegates: I am Harold Rock. Dick Hunter just got back from a trip to Mexico and he won't be here until later this evening.

I am not going to read the report to you. It is rather brief. We do recommend two things: That the Association adopt a resolution of appreciation to Dr. Knox, who carried on this survey with John Gradwohl. We will prepare it and present it to the Resolutions Committee.

We further recommend that we utilize the matters turned up by the survey in continuing and planning our future legal education projects.

I will try to answer any questions anyone might have. If not, Mr. Chairman, I move the adoption of the report.

CHAIRMAN McCOWN: Thank you, Mr. Rock. Is there a second?

M. M. MAUPIN, North Platte: I second the motion.

CHAIRMAN McCOWN: All those in favor say "aye"; opposed the same sign. The motion is carried. The resolution to those helping in the survey will be prepared and presented by the Resolutions Committee.

[The report of the committee follows.]

Report of the Committee on Legal Education and Continuing Legal Education

The committee scheduled and assisted other committees and sections of the Association in conducting the following continuing legal education programs during the past year.

December 5, 6, and December 12, 13, 1963, Annual Tax Institute, Tax Section, Ogallala and Omaha, Nebraska.

May 6, 1964, 1964 Tax Law Clinic, Tax Section and ABA, Omaha, Nebraska.

May 7, 8, 1964, ABA Regional Convention, Omaha, Nebraska.

June 17-19, 1964, Bridge-the-Gap Clinic, Junior Bar Section, Lincoln, Nebraska.

November 12, 13, 1964, Uniform Commercial Code Program, Committee on Continuing Legal Education, Nebraska State Bar Association, Omaha, Nebraska.

All the clinics and programs were well attended and the committee believes there is an ever increasing interest in continuing education. The committee has attempted to stress the necessity for the distribution of complete and detailed papers and materials at the clinics, the cost of which has been supported in the past by a modest admission fee. The committee is of the opinion that this should be continued and expanded in future years.

The most important work of the committee was the completion of a survey of the bar of Nebraska to determine the extent and nature of the interests of lawyers in continuing legal education. This survey was accomplished through the cooperation of the office of Adult Education Research of the University of Nebraska. The committee is deeply indebted to Dr. Alan B. Knox, Head of the office of Adult Education Research, for his work in conducting and compiling the results of the survey. The committee believes that the preliminary report prepared by Dr. Knox is of sufficient interest to the members of the Bar that it has caused the report to be published as a part of the report of the committee.

The committee recommends that the Association adopt a resolution of appreciation for the work of Dr. Knox and his staff in preparing this report.

The committee further recommends that the Association, through this committee, utilize the content of the preliminary survey and the final project report in planning future continuing legal education programs.

Richard E. Hunter, Chairman

A. Lee Bloomingdale
Thomas R. Burke
David Dow
James A. Doyle
John M. Gradwohl
Donald P. Lay
John C. Mason
John E. North
Harold Rock
Flavel A. Wright

CONTINUING LEGAL EDUCATION SURVEY OF NEBRASKA
BAR MEMBERS: A PRELIMINARY REPORT OF INTER-
ESTS AND CHARACTERISTICS OF NEBRASKA
LAWYERS

Dr. Alan B. Knox
Head, Adult Education Research
University of Nebraska

INTRODUCTION

During 1964, the Continuing Legal Education Committee of the Nebraska State Bar Association and the Office of Adult Education Research of the University of Nebraska cooperated on a survey of the interests and characteristics of Nebraska lawyers related to continuing legal education. This is a preliminary report to the committee. This preliminary report is primarily a descriptive presentation of some basic data from the survey, along with several illustrations of the types of analysis that can be accomplished in the future, as an aid to planning CLE programs. An additional preliminary survey report to the hundreds of Nebraska lawyers who contributed so willingly to make the results possible, is contained in the October 1964 issue of the *Nebraska State Bar Journal*. The *Journal* article describes the research procedure, the frequency of responses to the major survey questions, and an analysis of the representativeness of returns.

During the coming months the Continuing Legal Education Committee should consider the questions regarding the development of CLE programs, which can be answered at least in part by data from the 1964 survey. The results of subsequent analysis will also be included in the final project report. In addition to these two reports, the committee will have a set of the data cards that were prepared from the anonymously completed survey questionnaire forms. The data in these cards will enable the com-

mittee in the next few years to utilize the opinions of Nebraska lawyers in developing even more effective programs of continuing legal education. The computers, electronic data processing equipment, and familiarity with survey research data analysis procedures available at the University of Nebraska provide an additional resource available to the committee, in this regard.

SUMMARY

In the fall of 1963, the Nebraska State Bar Association approved the recommendation of the Continuing Legal Education Committee that a survey be conducted to better understand the interests, opinions, and characteristics of Nebraska lawyers related to continuing legal education. A copy of the proposal was contained in 43 NEBRASKA LAW REVIEW 202-206 (1964). As a preliminary stage of the survey, a set of abstracts of research and articles related to continuing legal education was prepared and mimeographed. Copies are available free of charge from the Office of Adult Education Research, 526 Nebraska Hall, University of Nebraska (Knox and Associates, "Continuing Legal Education," 1964, 46 pp.). A questionnaire form was prepared after consultation with leaders in the Association; was pre-tested in Council Bluffs, and was sent in May to 1,872 Nebraska lawyers. A small random sample of NSBA members was selected for interview, as a check on bias due to non-returns. Six hundred and twenty-seven of those receiving a questionnaire completed and returned it. Fifty-one of the fifty-two scheduled interviews were completed.

The responses to completed questionnaires were compared with those from an ABA survey reported in the February 1964 issue of the *Practical Lawyer*; with information about the total NSBA membership; with those who were interviewed; and with those who had attended prior CLE programs. The results of the Nebraska survey were similar to the ABA survey, especially for lawyers from the West North Central Region of the U.S. In general, the characteristics of the Nebraska lawyers who returned questionnaires were sufficiently similar to the total membership of the State Bar Association that it seems warranted to generalize the most marked findings to the total membership. This procedure would be least justified for lawyers over 65 years of age and for topics directly related to degree of interest in participation in CLE programs. The questionnaire data provides an excellent basis for generalizing to those most active in recent CLE programs. Compared with one-third of the total membership who returned survey questionnaires, 95 per cent of the lawyers who had attended a sample of CLE programs during the previous year did so.

The sub-population of lawyers who in the past have attended the most CLE programs included somewhat higher proportions of lawyers in the following categories: residence in Lincoln; connected with a larger firm; higher income; and participation in legal associations, especially the NSBA.

The areas of legal practice in which the most lawyers were interested in learning more in CLE programs were those areas in which most lawyers were spending more than one-third of their time. These areas included probate, trial practice, estate planning, personal income tax, real estate, automobile negligence, corporation legal counsel, commercial law, and estate tax.

Almost all of the lawyers who expressed no interest in learning more about an area of practice were spending less than 10 per cent of their time in the area. About an equal number of those expressing high interest in learning more about an area of practice were spending little time in the area, as was the case of those spending much time in the area.

Of those lawyers expressing much interest in several illustrative topics, those spending much time in the area differed from those spending little time primarily by being slightly younger, connected with a larger firm, more active in organizations, and more prior participation in CLE programs.

Finally, in response to the last question, calling for any observation that the lawyer wanted to make, many helpful suggestions were made regarding ways in which future CLE programs could become even more useful and convenient to Nebraska lawyers.

HIGHEST INTEREST TOPICS IN RELATION TO CHARACTERISTICS

The lawyers' responses regarding relative interest in learning more about each of the 58 areas of practice provides an indication of relative interest in general topics for future programs of continuing legal education. As a basis for planning future CLE programs, it would be helpful to know if the major interest in a topic was expressed by lawyers spending much time specializing on the topic or by lawyers spending little time but interested in devoting more. It would also be helpful to know if the characteristics of those interested in a topic differed substantially from the total Bar Association membership. As a way of illustrating the type of information that can be obtained for each area of practice from this kind of analysis, one area was selected in which there was both a high proportion of lawyers spending much time and a high proportion expressing much interest in learning more about

the area. The area was automobile negligence (91 lawyers are spending more than a third of their time in this area, and 189 lawyers expressed much interest in learning more about it).

For this illustrative area of practice, the total population of lawyers in the survey was subdivided into four sub-populations. Sub-population 1 consisted of lawyers who were spending less than 10 per cent of their time in the area and indicated no interest in learning more about it. Sub-population 2 was those who were spending more than a third of their time and were not interested in learning more about it. Sub-population 3 was those spending less than 10 per cent of their time and were much interested in learning more. Sub-population 4 was those who were spending more than a third of their time on the area and were much interested in spending several days learning more about it. These four sub-populations were compared regarding such characteristics as age, community size, size of firm, level of personal income, organizational participation, and participation in CLE programs.

For the auto negligence area of practice, the number of lawyers in each sub-population was as follows:

Sub-Population	Time	Interest	Number of Lawyers
1	Lo	Lo	214
2	Hi	Lo	6
3	Lo	Hi	33
4	Hi	Hi	42

The number of lawyers in sub-population 2 is too small for meaningful analysis, but for this illustration will be included.

The "high-time-high-interest" group were in general youngest with more than half under 35 years of age, and the "low-time-high-interest" group were, as a group, only slightly older. The oldest group was those lawyers spending much time in this area but expressing little interest in learning more, with almost half over 65.

There was, in general, no significant difference between the four groups regarding size of community, except that a much higher proportion of the "low-time-high-interest" group practiced in towns with under 2,500 population. (27 per cent compared with 5 per cent for the "high-time-high-interest" group.)

Spending much time in this area of practice is clearly associated with specialization within a larger firm as indicated by the fact that about half of those in the two high time sub-populations were connected with firms employing four or more lawyers. By comparison, more than 60 per cent of the "low-time-low-interest" group were practicing by themselves as were almost half of the "low-time-

high-interest" group. There was, however, no significant difference between the four sub-populations in average amount of personal income.

Regarding the number of organizations that the lawyers attended regularly, there was no significant difference between the four groups. When examining only organizations other than the NSBA, connected with the legal profession, there was also little difference between the four groups, with the exception that the low time but high interest group was active in fewer organizations (more than three quarters were active in only one or two compared with less than half of the "high-time-high-interest" group). The two high interest groups were, however, more active in the NSBA than were the low interest groups, and this was especially true for the "low-time-high-interest" group.

Participation in prior CLE programs was quite different for the two high interest groups. The high time group had averaged about six programs in the previous three years compared with about three for the low time group.

AREAS OF LEGAL PRACTICE

Respondents were requested to respond to a list of 58 areas of legal practice, indicating for each the approximate proportion of time spent in that area. The list of areas, along with the number of respondents who indicated that they spend more than one third of their time in the areas, is presented in the October 1964 issue of the *Journal*. However, this section of the preliminary report provides a more detailed analysis for the nine areas of practice in which most lawyers spend much time, compared with the nine areas of practice in which fewest lawyers spend much time.

TABLE 1—AREA OF PRACTICE

Area of Practice	Number of Persons Selecting Topic as One of Top Choices	Proportion of Time Spent in Area				Number of Checks in Much Interest Column
		10%	10-33%	34-66%	66%+	
Highest Interest						
Probate	196	324	230	101	18	232
Trial Practice	144	440	158	59	16	218
Estate Planning	129	434	192	42	5	251
Personal Income Tax	117	447	191	30	5	182
Real Estate	98	400	230	38	5	149
Auto Negligence	91	402	181	70	21	189
Corporation Legal Counsel	72	447	182	31	13	146

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Commercial Law	50	472	181	19	1	125
Estate Tax	49	567	85	16	5	162
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Lowest Interest						
Adoption	—	649	24	—	—	7
Reclamation	—	671	2	—	—	5
State & County						
Welfare	—	659	13	1	—	10
Miscellaneous U.S.						
Tax	—	648	18	6	1	47
Unemployment						
Compensation	—	666	4	2	—	6
Aeronautics	2	671	2	—	—	10
Food & Drug	2	668	5	—	—	9
Investigations &						
Adjusting	2	607	56	8	2	25
Military Justice	2	665	6	2	—	7
						<hr/> T. 126

One generalization that seems to be strongly supported by the foregoing comparison of highest with lowest frequency area of practice is that lawyers were primarily interested in learning more about areas of practice in which they were already heavily engaged, rather than about areas in which they were currently spending little time but might be interested in spending more.

SELECTED CHARACTERISTICS OF NEBRASKA LAWYERS RELATED TO PRIOR CLE PARTICIPATION

For persons interested in planning programs of continuing legal education, a central question is: How do lawyers who have in the past been most active in CLE programs differ from those who have been somewhat less active? This section of the report provides comparisons between prior CLE participation and characteristics such as community size, age, size of law firm, income, activity in community organizations, activity in the Bar Association, and future career plans.

Degree of prior participation in programs of continuing legal education during the previous three years as categorized in four levels—none; low (1-5 programs); middle (6-9 programs); high (10-15 programs).

TABLE 2—PER CENT OF CLE PARTICIPATION BY
COMMUNITY SIZE

CLE Partic. Past 3 yrs.	COMMUNITY SIZE					
	Total	Under 2500	2500- 5000	5,000- 10,000	10,000- 50,000	Lincoln Omaha
No	10	9	2	6	12	2 13
Lo	57	68	68	56	62	55 48
Md	24	18	24	29	19	25 29
Hi	9	5	5	10	8	18 9
	100%					

The differences in prior CLE participation related to community size were small, the primary difference being the higher percentage of Lincoln lawyers in the high category.

TABLE 3—PER CENT OF CLE PARTICIPATION BY
AGE OF LAWYERS

CLE Partic. Past 3 yrs.	Under 35	35-44	45-54	55-59	60-64	65+
No	6	12	8	4	3	24
Lo	52	56	58	71	63	59
Md	32	23	24	15	21	15
Hi	10	10	10	10	13	2

There were no substantial age related differences in participation with the exception of the oldest lawyers, who accounted for about half as much participation.

TABLE 4—PER CENT OF CLE PARTICIPATION BY
SIZE OF LAW FIRM

CLE Partic. Past 3 yrs.	NUMBER OF OTHER LAWYERS					
	One	Two	Three	Four	5-10	More than 10
No	8	14	2	9	8	
Lo	57	41	50	30	40	29
Md	26	31	31	49	33	50
Hi	9	4	14	12	19	21

There was a strong tendency for lawyers connected with larger firms to have attended more CLE programs during the previous three years.

TABLE 5—PER CENT OF CLE PARTICIPATION BY
PERSONAL INCOME LEVEL

CLE Partic. Past 3 yrs.	Less than \$5,000	\$5,000- 7,000	\$7,000- 10,000	\$10,000- 15,000	\$15,000- 20,000	\$20,000- 40,000	\$40,000- or more
No	29	6	10	7	8	10	6
Lo	53	62	61	64	49	52	53
Md	12	23	25	20	29	25	29
Hi	6	9	4	9	14	13	12

There was a slight tendency for lawyers at higher income levels to have attended more CLE programs.

TABLE 6—PER CENT OF CLE PARTICIPATION BY ACTIVITY
IN COMMUNITY AFFAIRS

CLE Partic. Past 3 yrs.	Consistent Leader	Occasional Leader	Frequent Participant	Occasional Participant	Never Participant
No	8	6	7	11	27
Lo	50	59	59	58	46
Md	24	22	28	24	23
Hi	18	13	6	7	4

There was a tendency for lawyers who have not been active in CLE programs to describe themselves as persons who never participate in local community affairs.

TABLE 7—PER CENT OF CLE PARTICIPATION BY MEMBERSHIP
IN LEGAL PROFESSIONAL ORGANIZATIONS
OTHER THAN NSBA

CLE Partic. Past 3 yrs.	NUMBER OF ORGANIZATIONS				
	None	One	Two	Three	Four or more
No	23	15	7	3	5
Lo	55	68	61	50	33
Md	20	13	26	30	33
Hi	2	4	6	17	30

Clearly, participation in CLE programs is strongly associated with membership in legal profession organizations other than the Nebraska State Bar Association. Only 23 per cent of those in no other organizations had participated in six or more CLE programs in the previous 3 years, compared with 63 per cent of those in four or more organizations.

TABLE 8—PER CENT OF CLE PARTICIPATION BY
ATTENDANCE AT NSBA MEETING

CLE Partic. Past 3 yrs.	ATTENDANCE AT MEETINGS		
	Frequently	Sometimes	Almost Never
No	3	10	33
Lo	48	77	63
Md	33	12	4
Hi	16	1	—

The association between CLE activities and attendance at NSBA meetings was one of the strongest observed in the data from this survey. Almost all lawyers who frequently attend NSBA meetings were active in CLE programs whereas very few of the lawyers who almost never attended NSBA meetings participated in more than several CLE programs.

TABLE 9—PER CENT OF CLE PARTICIPATION BY
FUTURE PLANS

CLE Partic. Past 3 yrs.	Continue In Priv. Practice	Change to Priv. Practice	Start Special- izing	Continue Special- izing	Continue in Pres. Position	Change to Another Position
No	8	7	16	12	12	8
Lo	59	73	16	48	67	61
Md	25	13	42	21	12	31
Hi	8	7	26	19	9	—

A higher percentage of those lawyers who planned to specialize in the near future had participated in a high number of CLE programs in the previous three years. Sixty-eight per cent had taken part in six or more CLE programs. To a lesser extent, participation in CLE programs was associated with continuing to specialize.

ADDITIONAL ANALYSIS

The results of the survey of Nebraska lawyers have to date been gratifying. The high order of cooperation was indicated by the time spent by several members of the CLE committee in the preparation of the questionnaire, the fact that all of the Council Bluffs lawyers who were asked to participate in the pre-test of the questionnaire did so, the fact that interviews were completed with all but one of the Nebraska lawyers selected for interview, and by the one-third completion rate for the mailed questionnaires. Perhaps the most striking indication of interest and cooperation in the survey was the fact that almost all of the Nebraska lawyers who had recently participated in CLE programs completed and returned a questionnaire.

However, the most important part of the survey remains to be completed; and that is the use of the results. One use of the survey results is to report the findings to the NSBA membership. This has been accomplished in part by the article in the October 1964 issue of the *Nebraska State Bar Journal* and will be accomplished further as some of the findings from this preliminary report and from the final report are reported by the CLE committee to the NSBA membership. The major potential use of the data collected in the survey, however, consists of additional analysis as a partial basis for decisions regarding the development of CLE programs in Nebraska. In practice, many questions arise in the process of planning CLE programs, some of which can be "asked of the survey data." For this use of the survey results, the role of the CLE committee is central. During the next few months, researchers in the Office of Adult Education Research will be conducting additional analyses of the survey data in preparation for the final report. If, during this period, the members of the CLE com-

mittee identify questions that can be answered by the survey data, an effort will be made to incorporate them into the final report. Following the final report, we will be pleased to meet with the committee to explore ways in which data from the survey can be most useful in the planning of effective programs of continuing legal education for Nebraska lawyers.

CHAIRMAN McCOWN: The next item is the report of the Committee on Legal Aid, Mr. William D. Blue, chairman. The report you will find on page 30 of your program.

REPORT OF COMMITTEE ON LEGAL AID

William D. Blue

Mr. Chairman, Gentlemen: During the last year there were four free legal aid agencies functioning in Nebraska: Sidney, Scottsbluff, Lincoln, and Omaha.

In Lincoln last year the Lincoln Community Council, in response to a request from the Lincoln Bar Association, established a committee to conduct a study of the operations of the Legal Aid Bureau in Lincoln and to make any needed recommendations as to any improvements or any changes which should be made. The study was made and recommendations were submitted to the Lincoln Bar Association. As of now no action on the recommendations has been taken. So the Legal Aid Clinic in Lincoln has functioned pretty much as it has in the past, with offices in the Law College building. It is sponsored by the College of Law jointly with the Lincoln Bar Association and the Lincoln Barristers' Club.

The great changes in the legal aid picture in Nebraska have taken place in Omaha, because in September of 1963 the first full-time legal aid office was opened in the City of Omaha. This was the result of the joint efforts of the Junior League of Omaha, the United Community Services, the Omaha Bar Association, the National Legal Aid and Defenders Association, and Creighton University School of Law. The staff now consists of one full-time attorney-director and a legal secretary, with offices in the A. C. Nelson Center for Community Services.

The figures on the work of the legal aid office in Omaha are rather impressive. They had an income from various sources from September 1, 1963, to August 31, 1964, of \$18,929.50. This represented donations from the Junior League, the National Legal Aid and Defenders Association, the Bar Association, and United Community Services. The United Community Services was the biggest donor, with \$7,062.38.

From September 1, 1963, through August 31, 1964, there were a number of cases open. New cases totaled 866. Some cases were disposed of. And as of August 31, 1964, there were 504 active cases. The largest number of cases dealt with family problems, 551, followed by cases involving the economic problem, of which there was a total of 155. There were 95 cases which were consultation only; 116 consultation and referral; 25 cases were closed without court action; court action was taken in 45 cases; and 85 cases were terminated after partial action. Certainly it is an impressive record for this agency which has been in operation only a little over one year.

This is a permanent standing committee, and I move the report of the committee be accepted and filed.

CHAIRMAN McCOWN: Is there a second?

MR. MAUPIN: I second the motion.

QUESTION: What is the experience in cities like Lincoln and other large cities?

MR. BLUE: As to the figures, you mean? I have the figures available but I don't have them with me. For once I didn't put the figures in as to the operation of the Lincoln Legal Aid Clinic, so offhand I can't tell you. As I recall, though, I think there were about 150 cases handled last year at the Legal Aid Bureau in Lincoln.

CHAIRMAN McCOWN: Any further discussion? As many as favor the motion will say "aye"; opposed the same. Carried.

[The report of the committee follows.]

Report of the Committee on Legal Aid

Your Committee on Legal Aid respectfully submits the following report:

During the past year four free legal aid agencies were operating in the State of Nebraska. These are located at Sidney, Scottsbluff, Lincoln, and Omaha.

Last year at the Lincoln Community Council, in response to a request from the Lincoln Bar Association, a committee was established to conduct a study of the operations of the Legal Aid Bureau in Lincoln and to make any needed recommendations as to any improvements that could be made in the legal aid service in Lincoln. This study has been made and recommendations submitted to the Lincoln Bar Association.

The Legal Aid Clinic in Lincoln, as in the past, has conducted its functions with offices in the Law College building. The Lincoln Legal Aid Clinic is sponsored by the Nebraska University College of Law, the Lincoln Bar Association, the Lincoln Barristers' Club, and the Lincoln Community Chest. The procedure and work of this clinic during this past year has been the same as it has in the past.

September, 1963, marked the opening of the first full-time legal aid office in the City of Omaha. This opening was the result of the joint efforts of the Junior League of Omaha, United Community Services, Omaha Bar Association, The National Legal Aid and Defenders Association, The Creighton University School of Law. The staff consists of one 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
Jack R. Knicely
Winsor C. Moore

CHAIRMAN McCOWN: The Chair would like to inquire as to whether there will be any proposal that the minority report of the Committee on Procedure be adopted. If so, I would like to suggest a proposal in change of order so that we can complete some of the other matters before lunch. Is there anyone who intends to request the adoption of the minority report of the Committee on Procedure? In that case we will call on the Committee on Procedure, Mr. William Mueller, chairman. You will find the report on page 14 of your program.

REPORT OF COMMITTEE ON PROCEDURE

William P. Mueller

Mr. Chairman, Gentlemen: The Committee on Procedure was contacted by the District Judges Association in regard to proposed legislation concerning the changing of the instruction procedure in the District Court of Nebraska. In effect this amendment or change would require exceptions to be taken to the instructions prior to the time that the jury withdraws for their deliberation.

In the event that you did not take exception or, if your exceptions were not proper, this question could not then be raised on appeal. In effect it would be similar to the federal rules in that regard.

The committee, after fully considering the matter, by a six to four vote with two members absent, was of the opinion that there should be no change in the instruction procedure. You will note that there is a minority report, and I think they set out their position fully as to why they feel that exceptions should be taken. I will not go into any detail. I am sure you have all read it. It is the recommendation of the Committee on Procedure that no changes be made in the present instruction procedure in the District Court of Nebraska.

It was also discussed, and it is also the recommendation of the committee, that "Pattern Civil Instructions" be adopted in the State of Nebraska. To my knowledge there has been no study conducted, at least by the Bar Association. I believe a certain segment of the Bar has perhaps conducted a study, or at least started to, but as far as I know the State Bar Association has done nothing in that regard as to studying or setting up a "Pattern Civil Instructions" method.

It is the recommendation and we move that the Committee on Procedure report be adopted by the Bar.

CHAIRMAN McCOWN: Is there a second?

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

CHAIRMAN McCOWN: All in favor say "aye"; opposed the same. Carried.

[The report of the committee follows.]

Report of the Committee on Procedure

The Committee on Procedure respectfully submits the following report:

The committee was contacted by the District Judges Association in regard to proposed legislation which would require that exceptions be taken at trial time to the instructions given by the district court. The proposed legislation, generally, would require counsel to take exceptions to the instructions given or refused by the court prior to submission of the cause to the jury. The legislation would provide that if exceptions were not so taken error could not be predicated on the instruction given or refused for appeal purposes. The legislation proposed by the District Judges Association is, in general, the same legislation as was submitted in Legislative Bill No. 76 which was killed by the Judiciary Committee of the 72nd Session of the Legislature of Nebraska.

The committee, by a vote of 6 to 4, with two members absent, recommends that no change be made in the existing law relating to the procedure in the district court concerning instructions.

A resolution was passed, unanimously, by the committee, recommending adoption of "Pattern Civil Instructions" for use by the district courts of the State of Nebraska. It is urgent this recommendation be presented to the Nebraska State Bar Association with a request that appropriate action be taken by the Association in relation thereto.

This committee further recommends:

1. That the members of the Association be requested to submit to the committee for study and action any problems arising in connection with procedural matters.
2. That the report of the committee be adopted.

William P. Mueller, Chairman

MINORITY REPORT

It will be remembered that in 1962 this committee adopted a recommendation that certain legislation be enacted in connection with district court procedure, which legislation would provide, in substance, that if exceptions were not taken to instructions given by the court prior to jury submission, error could not be later predicated on matters of instructions not excepted to. The legislation recommended by the committee carried general language that a reasonable time should be provided attorneys in which to inspect the instructions with a view to making exceptions thereto.

The concern of this committee in this matter was evoked by a number of considerations. The high number of reversals of cases by our Supreme Court on errors of instructions was and is a primary motivation, especially when viewed in the light of the cost of retrials, this being a matter of concern not only to the bench and bar, but also to the public at large. The desirability of finality of litigation is an objective devoutly to be desired from the standpoint of all three segments as well. The reversals and necessary retrials of cases that have been otherwise tried properly are difficult of understanding by laymen, and they come to be regarded as "technicalities" or "loopholes" in the language of the man on the street. They have not served to heighten public regard of the processes of the law nor the reputation of either bench or bar.

It is felt that a dual responsibility is involved and that both the judges and the lawyers must shoulder this responsibility in

a spirit of cooperation, to the end that reversals of cases on errors of instructions shall be reduced to an absolute minimum, if the same can be achieved by legislation which will not place undue hardships either upon the attorneys engaged in the trial of lawsuits or upon the judges so involved. We believe it is practical to do this.

It is felt that in virtually all stages of the trial, trial judges call for and receive the conflicting views of attorneys on both sides. Attorneys submit to the court, either on their own initiative or on the court's request, briefs on disputed points of law. Even in matters of admissibility of evidence, courts often excuse the jury and listen to the arguments of the attorneys on either side. This is typical and proper, and an embodiment of the spirit of our adversarial system of trials. It would seem that only in the matter of jury instructions are the attorneys not required to state their exact position, and the burden to instruct the jury falls completely upon the shoulders of the trial judge. This, we feel, gives the bench just cause for complaint, as cases are often reversed only for errors of the court and not because of errors of attorneys.

A proposed adoption of Rule 51 of the Federal Code of Civil Procedure has met with complaints by the trial bar. It is felt that for an attorney to be required to analyze instructions at the same time as he is listening to the court give them and then, within a matter of seconds or minutes, to formulate his exceptions to them and to point out to the trial court where the errors, if any, may lie, works an undue hardship upon the practitioners of the trial bar. It is felt that this objection is just and should be taken certainly into account in the drafting of any proposed legislation in this field. It is further felt that the combined efforts of the bench and the bar of the State of Nebraska can certainly give birth to legislation that will achieve the desirable objective without undue hardship on either the trial judges or the practicing lawyers. It is felt that the following proposed legislation will be helpful to the bench in that it will require the attorneys on both sides of the case to point out to the court errors of instructions at a time when it is still possible to remedy the mistake. It is felt that certainly a lawyer, who has "lived with" his case far longer than the trial judge, is in the best possible position to recognize any errors of instructions which genuinely and substantially prejudice the rights of his client.

Reflection shows the advantages to the attorneys perhaps even outweigh the advantages to the judges. Requiring the court to inform the attorneys by presenting a copy of the proposed instructions to them in advance of argument will allow the attorney to

argue the instructions of the court with a certainty as to what those instructions will be.

Too often has a lawyer argued that the court will probably instruct thus and so, only to learn to his consternation that either the instruction is not being given at all, or is being given in a manner far different from that which he expected. This uncertainty causes lawyers to be hesitant to argue instructions; and the arguing of instructions of the court and the applications of the facts thereto are generally considered to be the most beneficial aspects of final argument; it is simply a request that the jury follow the charge, and is an appeal much more dedicated to reason and logic than to passion and prejudice.

It is felt that such legislation would be particularly advantageous to the occasional trial practitioner, who, by virtue of his lack of experience, is not astute enough to stand by while "built-in" error glides into the case, secure in the knowledge that even an adverse verdict will not seriously damage the rights of his client, and knowing that he will have a "second shot" should he not hit the mark on the first one. Under the legislation proposed in this report, the occasional trial practitioner will enjoy the justice of hearing his adversary state his views in the presence of the court, and not be in the uncomfortable position of feeling that an astute adversary has "something up his sleeve" that will remain unrevealed until the motion for new trial is subsequently filed.

In conclusion, we the undersigned submitting this minority report believe that it is part of our responsibility to support the practice of settling civil instructions prior to the charge to the jury, with counsel being given a reasonable time, no less than two hours, to study the instructions and to make objections thereto or be limited on appeal to the objections made. We believe this is part of the responsibility of the trial bar to the trial judge. We believe this is a part of our responsibility to our client and to the public at large to achieve the goal of a prompt, efficient adjudication of client's rights.

Hans Holtorf
Charles E. Kirchner
Milton Murphy
Warren C. Schrempp

CHAIRMAN McCOWN: Next is the report of the Special Committee on Oil and Gas Law, Paul Martin, chairman. You will find the report on page 31 of your program.

REPORT OF COMMITTEE ON OIL AND GAS LAW**Paul L. Martin**

The items which the committee recommends are shown in the report. Probably the more interesting of the several items is the recommendation for the extinguishment of dormant, abandoned severed mineral interests that encumber the titles to so much western Nebraska land. If the report is approved we will prepare and submit to the Committee on Legislation of the Nebraska State Bar Association drafts of legislative bills to cover all four of our recommendations.

The committee therefore 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 any problems arising in connection with oil and gas law and desirable legislation to be presented to the legislature of the State of Nebraska.

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

ROBERT J. BULGER, Bridgeport: I second the motion.

CHAIRMAN McCOWN: All those in favor will say "aye"; opposed the same. The motion is 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 oil and gas industry in Nebraska has shown some decline during the past year but is still a major enterprise of the state. New development during the year has been better than the year preceding and several new major fields have been discovered. The program for the drilling of new wells during the coming year is estimated to be somewhat curtailed, and a great deal of the present production is from secondary recovery and its many problems.

Your committee feels that the statutes of Nebraska covering the activities of the industry are in excellent shape but that there are a few matters which should receive the approval of the Nebraska State Bar Association and the legislature of 1965.

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 offices of county clerk and register of deeds are 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 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 pipeline 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 Section 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 liens; providing further, that the lien follows the property.

4. The committee also recommends legislation for the extinguishment of dormant, abandoned severed mineral interests that encumber the titles to so much of Western Nebraska land. We recommend extinguishment of said dormant interest after 35 years of severance, provided notice of continued claim of ownership is not filed in the office of the county clerk, giving the name and address of the claimant, action to extinguish said interests to be similar to the cancellation of expired oil and gas leases by publication and actual notice where the parties can be located.

If this report is approved we will prepare and submit to the Committee on Legislation of the Nebraska State Bar Association drafts of legislative bills to cover our recommendations for further consideration by the committee on legislation.

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, draft of the proposed legislation.
4. That the members of the Association be requested to submit to the committee for investigation, study, and action, any 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, Sr.
Hans J. Holtorf
John D. Knapp
Hammond McNish
Robert G. Simmons, Jr.
R. L. Smith
Ivan Van Steenberg

CHAIRMAN McCOWN: Next is the report of the Committee on Public Service, Patrick W. Healey, chairman. You will find the report on page 40 of your program.

REPORT OF COMMITTEE ON PUBLIC SERVICE

Patrick W. Healey

The Committee on Public Service has continued to expand its program of public service and public relations for the Bar Association in many areas. The primary project, I would think, of the Committee on Public Service has been the Law Day observation. Law Day reached new heights in recognition and observation this year under the very fine leadership of Joe Vosoba as chairman and Bill Hastings as vice chairman, and the committee would like to extend its deepest thanks for their efforts.

Law Day was carried out in many ways, as set forth in detail in the written report.

I think there has been a real break-through in the last few years in public recognition of the importance of this Law Day observation. Just one startling example: We note that editorials in the publications throughout the state amounted to 55 editorials on the subject of Law Day this year compared to 19 the year before and three the year before that.

We have recommended that in the future the chairman and vice chairman of Law Day be appointed as early as possible to get a rapid and early start. The chairman and vice chairman have

already been appointed and have agreed to serve for the coming year.

We have also made available to television stations at no cost an excellent series of one-minute animated film messages on legal subjects prepared by the American Bar Association as part of the work of the committee.

We have continued to provide radio stations throughout this state with one-minute radio tapes on legal subjects which have been used very extensively by some 26 stations. We would like to express the thanks of the Bar Association to these stations that have given free time to carry these public service tapes, and such resolutions have been prepared and are in the hands of the Resolutions Committee.

We have also, in the committee, developed a program of awards to increase public awareness of the legal profession and its service to the public.

There is to be a President's Award given to a member of the Bar in recognition of outstanding contributions to furtherance of public understanding of the legal profession and confidence in the profession.

There is also a Medal of Appreciation to be given 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 under which it operates.

These awards are to be presented at the dinner at the annual meeting tomorrow night.

We would recommend that the committee continue a vigorous program of public relations and service. We would like to express our thanks to The Carroll Company, public relations counsel, for their fine assistance during the year and recommend that they be continued. We would like to give our particular thanks to George Turner and his staff for valuable assistance.

We would recommend approval of the report of the committee.

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

M. M. MAUPIN, North Platte: I second the motion.

CHAIRMAN McCOWN: All those in favor will say "aye"; those opposed the same. Carried.

[The report of the committee follows.]

Report of the Committee on Public Service

The committee during the past year has continued to expand its program of public service and public relations in many areas.

Discussion of the program of the committee must begin with Law Day, U.S.A., which has each year become more meaningful and more valuable to the profession and the public. Through the vigorous leadership of Joe T. Vosoba as Law Day chairman and William C. Hastings as Law Day vice chairman, this program has reached new heights in terms of activity and public response. The value and function of law in everyday life was emphasized through the use of billboards, mail stickers, leaflets, a proclamation by the Governor, display cards, and a one-minute movie trailer used in several theaters. Response and enthusiasm by the news media was most gratifying. A tremendous increase in editorials in regard to Law Day (55, as compared with 19 and three in the two preceding years), as well as increased use both of state press releases and local news stories, tell the story of the increased recognition by news media of the significance of the Law Day observation. Many newspapers developed feature stories, with photographs, emphasizing local aspects of Law Day activity. Television and radio coverage was extensive, using locally and state-developed programs as well as national materials.

The Lincoln Bar Association sponsored a fine luncheon addressed by Lee White, Special Assistant to the President. Among other fine special events were a meeting of the Tenth Judicial District Bar Association in honor of Law Day, a dinner in Gage County honoring judges with 50 years of service, and a banquet for the Ninth Judicial District Bar with a speaker who had practiced law in Cuba under Castro. In Washington County flags were flown on Main Street in honor of Law Day.

The committee wishes to express deep appreciation to Joe Vosoba and Bill Hastings, as well as the fine Law Day leadership in most of the counties which developed local programs and publicity too extensive to mention. County chairmen in over 60 counties this year reported the activities in their counties, as compared with 38 last year.

The committee recommends that in future years a Law Day chairman and vice chairman be designated as early as possible to allow an early start in appointing committees and county chairmen. The committee also recommends early planning of special events and cooperation with fraternal and civic groups in developing programs.

Furthering an expanded program of public relations, the committee has made available to television stations throughout the state, at no cost to the stations, an excellent series of one-minute animated film messages, produced by the American Bar Association. We are still expanding the coverage of these fine public service messages.

The committee has continued to provide radio stations with one-minute radio tapes, "It's The Law," produced by the committee and dealing with legal subjects of public interest. Special thanks are due to Warren Urbom, who has assisted the chairman in reviewing and editing proposed scripts. These scripts are now used by 26 stations, and the committee is working to broaden participation.

As has been reported in the *Nebraska State Bar Journal*, the committee working with the Executive Council has developed a program of awards to increase public awareness of the legal profession and its service to the public. The President's Award is to be given to a member of the Bar in recognition of outstanding contributions to furtherance of public understanding of the legal system and confidence in the profession. The Medal of Appreciation is 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.

The committee has made recommendations as to the recipients of these awards in this first year of the program's operation.

Continued use of the legal pamphlets and jury manuals has been gratifying, and the committee intends to work towards their wider use and availability.

The committee plans a vigorous program of public relations for the coming year, and will submit to the executive counsel its budget for the purpose of carrying out the program. The assistance of The Carroll Company, professional public relations counsel, has continued to be of great value and the committee recommends that the Carroll Company be retained for the coming year.

Particular thanks are due to George Turner and his staff for invaluable help and assistance during the year.

Patrick W. Healey, Chairman
Tyler B. Gaines
William C. Hastings
Richard A. Knudsen

Edmund D. McEachen
C. Russell Mattson
Robert A. Nelson
George C. Pardee
William B. Rist
Joseph C. Tye
Warren Urbom
Joe T. Vosoba

CHAIRMAN McCOWN: Next is the report of the Committee on Unauthorized Practice, Mr. Albert T. Reddish, chairman. You will find the report on page 41 of your program.

REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

Albert T. Reddish

I will not belabor you with reading the full report. There is one critical element, however, which I will read from the report:

A decision of the United States Supreme Court strikes at the heart of our profession—the decision of the Supreme Court in Virginia, *State Bar v. Brotherhood of Railroad Trainmen*, decided April 20, 1964. The majority ruled that the states cannot enjoin the union from recommending specific attorneys on the ground that this activity is protected as part of the union's rights of free speech.

I believe a number of us are familiar with the activities of runners for labor unions who act as feeders for certain attorneys. We have had cases in Nebraska on that problem. The most recent that I recall is the *Lush* case in which the Supreme Court found the man guilty of contempt of court for his activities.

In this decision in the United States Supreme Court this year, Justices Clark and Harlan dissented, characterizing the Brotherhood plan as one which "degrades the profession, proselytes the approved attorneys to certain required attitudes, and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." They further stated the decision appears to "overthrow state regulation of the legal profession and relegates the practice of law to the level of commercial enterprise."

The American Bar Association, following the denial of the motion for rehearing, issued this statement: "The American Bar Association, in spite of all of this, firmly supports the Canons of Professional Ethics in their present form. The Association still

commends to the organized Bar firm adherence to the Canons of Ethics and suggests that each Association advise its membership that, so far as the conduct of the individual lawyer is concerned, this decision is not a 'license to solicit' and that soliciting or any other violation of the Canons will, as before, result in disciplinary action."

Gentlemen, this requires renewed and revived efforts to inculcate, to adhere to, and to enforce the Canons of Ethics of the Bar, to maintain our professional position within the state and within the United States. It is a critical problem and I urge each member of the House and each person present to devote full efforts to preserving the Canons of Ethics and our professional conduct and attitudes.

Getting down to the recommendations of the committee: First, establishment and maintenance of professional conduct and philosophy among lawyers and those applying for admission to the bar.

Second, if debt adjustment legislation appears likely in Nebraska, that it be prohibitive in scope.

Third, 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—this is relating to simulated process—and to provide such prohibition in each instance where it is proved the creditor, its agent, or representative, has used simulated process.

Fourth, enactment of legislation making it a misdemeanor to print for use, to make available for distribution, distribute, promote, or sell simulated process forms for use in debt collection activities.

Fifth, favorable action of former recommendation that the Bar investigate the employing of state Bar general counsel.

I move the adoption of the report, and further move that the report be printed in its entirety in the proceedings of this meeting.

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

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

CHAIRMAN McCOWN: Any discussion? As many as favor the motion will say "aye"; those opposed the same. The motion carried.

[The report of the committee follows.]

Report of the Committee on the Unauthorized Practice of Law

The most critical development in unauthorized practice occurred in the decision of the United States Supreme Court in Virginia, *State Bar v. Brotherhood of Railroad Trainmen*, decided April 20, 1964. The Court, through Justice Black, sustained the Brotherhood-counsel system, whereby the union channeled members' personal injury cases to pre-selected lawyers. In effect the majority ruled that states cannot enjoin the union from recommending specific attorneys on the ground this activity is protected as part of the union's right of free speech.

Justices Clark and Harlan dissented, characterizing the Brotherhood plan as one which "degrades the profession, proselytes the approved attorneys to certain required attitudes, and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." The minority believes the decision appears to "overthrow state regulation of the legal profession and relegate the practice of law to the level of a commercial enterprise."

The Nebraska State Bar Association joined with the American Bar Association and nearly every major bar association in the United States in filing an amicus brief in support of the petition for rehearing. Although the Court accepted the amicus brief, it denied rehearing June 1, 1964.

The American Bar Association thereafter advised state and local associations:

The American Bar Association, in spite of all this, firmly supports the Canons of Professional Ethics in their present form. The Association still commends to the organized bar firm adherence to the Canons of Ethics, and suggests that each association advise its membership that, so far as the conduct of the individual lawyer is concerned, this decision is not a "license to solicit" and that soliciting or any other violation of the Canons will, as before, result in disciplinary action.

The Brotherhood decision, and the *N.A.A.C.P. v. Button* decision before it, emphasize the importance of Canon 47, which provides that no lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

Business Planning. Directing attention to the problems of the *Brotherhood* case is a plan our secretary, George H. Turner, nipped in the bud. A new Lincoln firm advertised general business planning activities, including furnishing of legal advice and services. On being advised of the unauthorized aspects of the program, the firm agreed to desist from offering legal services. Its answer was

sufficiently ambiguous, however, that its activities, as well as those of similar firms, must be carefully watched.

Debt Adjustment. This committee is convinced that some debt adjustment firms scrupulously avoid performing or offering to perform legal services. Legal services, however, are inherent in the nature of the debt adjustment activity. Public opposition to debt adjustment continues. In 1963 a proposal to license and regulate firms was killed in legislative committee, in part after opposition to the proposed bill by this committee. The committee understands similar legislation may be reoffered at the 1965 session. The committee believes it best to leave the regulation of unauthorized practice of law to the courts; if, however, any legislation is enacted, it favors legislation similar to that passed by Kansas and approved by the United States Supreme Court in the *Skrupa* case, which prohibits debt adjustment except as an ancillary to the general practice of law.

Simulated Process. Simulated process is ever present as a device to frighten debtors, and as an affront to the dignity of the courts and law. Because of inapplicability of the criminal sanctions of the Nebraska statutes to foreign collectors, the committee believes the Nebraska statutes should be amended 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 or its agent or representatives has used simulated process. Further, lay agencies continue to distribute and sell collection forms which include simulated process in its most objectionable dress. South Dakota recently enacted a law which makes it a misdemeanor to print for use, sale or distribution, to distribute, make available for distribution, promote or sell simulated process forms for use in collection of obligations. Such a bill should be considered by the Nebraska legislature.

Nonresident Lawyers. A nonresident of Nebraska recently hung his shingle in Omaha. He advised he intended to establish residence in Nebraska, and to qualify for admission to the Nebraska bar, but so far as the committee can ascertain failed to do either. His shingle no longer hangs.

Investigation remains the most neglected task of the committee. General Bar counsel seems the only reasonable solution.

The committee recommends:

First, establishment and maintenance of professional conduct and philosophy among lawyers and those applying for admission to the bar.

Second, if debt adjustment legislation appears likely in Nebraska, that it be prohibitive in scope.

Third, 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 representative, has used simulated process.

Fourth, enactment of legislation making it a misdemeanor to print for use, to make available for distribution, distribute, promote or sell simulated process forms for use in debt collection activities.

Fifth, favorable action of former recommendation that the Bar investigate the employing of State Bar general counsel.

Albert T. Reddish, Chairman
Charles W. Baskins
Bevin B. Bump
Edward F. Carter, Jr.
Raymond M. Crossman, Jr.
Peter E. Marchetti
Walter H. Smith

CHAIRMAN McCOWN: Next is the report of the Committee on Medico-Legal Jurisprudence, George Boland, chairman. Both Mr. Boland and Bob Fraser, who was to make the report, are unable to be here, as they are in attendance at the NATA seminar at the moment and have requested that since the report contains no specific recommendations other than a suggestion that a meeting be had, some member of the House move that the committee report be accepted and placed on file. Do I hear such a motion?

MR. MAUPIN: I so move.

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

CHAIRMAN McCOWN: As many as favor the motion will say "aye"; opposed the same. The motion is 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 the Omaha Club on September 21, 1964. The items of discussion revolved around the cooperation between the doctors and the lawyers having to do with the court appearances of the doctors and the amount of their charges for re-

ports and court appearances. It was agreed that generally speaking there is good cooperation between the doctors and the lawyers but that there have been in the past year a growing number of complaints of a lack of cooperation between attending physicians for plaintiffs and plaintiffs' lawyers. It appears that in some instances it is extremely difficult and sometimes impossible to obtain the cooperation of the doctor for his attendance at a trial. It is the suggestion of the committee that the President of the Nebraska State Bar Association write a communication to the President of the Nebraska Medical Association offering the cooperation of the lawyers to make the appearance of medical witnesses in court as cooperative as possible to fit in with the doctor's schedule and likewise conform to the court commitments of the attorneys and at the same time urgently request a closer cooperation by the doctors with the lawyers.

Some complaints have been received by plaintiffs' attorneys in regard to what is claimed to be an exorbitant charge for medical reports regarding patients attended by plaintiffs' doctors. It is recognized that some charge should be agreeable for medical reports but that the charges be held within reason.

It is noted that there has been some considerable activity in the taking of depositions of attending physicians by both plaintiff and defendant counsel in the light of Legislative Bill 282 adopted by the 1963 session of the Nebraska State Legislature. It is believed that attorneys are continuing to take greater advantage of the provisions of this act so that it may be used in discovery procedures.

During the past year communication was had from a Special Committee on Medico-Legal Jurisprudence from the Sixteenth Judicial District. The committee responded to the request and gave such advice as was available and considered appropriate.

It is suggested that a meeting of the Medico-Legal Jurisprudence Committee of the Nebraska State Bar Association meet with a like committee of the Nebraska State Medical Association with the thought in mind that such a meeting would promote a spirit of cordial relations and would be advantageous to members of both professions interested in this particular field.

George B. Boland, Chairman
Joseph P. Cashen
Robert G. Fraser
Harry L. Welch
Charles E. Wright

CHAIRMAN McCOWN: Next is the report of the Committee on Uniform Commercial Code, Daniel Stubbs, chairman. You will find the report on page 26 of your program.

REPORT OF COMMITTEE ON UNIFORM COMMERCIAL CODE

Daniel Stubbs

Mr. Chairman, Gentlemen: Because the Commercial Code as adopted in 1963 was the 1958 version, and the Permanent Editorial Board has several amendments to be made to insure uniformity, the Executive Council decided to continue this committee to make sure that these amendments were presented to the legislature next year. That work is progressing. The bills are prepared and it will be done, actually, by having the Revisor of Statutes submit these bills as part of his report, and those recommendations of Walt James are then introduced by the Judiciary Committee, which ought to make our work much easier.

Our recommendation is that the committee be continued for one more year to see this particular job through. I move the adoption of that recommendation, Mr. Chairman.

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

DALE FAHRNBRUCH, Lincoln: I second the motion.

CHAIRMAN McCOWN: All those in favor will say "aye"; opposed the same. Motion is carried.

[The report of the committee follows.]

Report of the Committee on Uniform Commercial Code

This committee was re-appointed for this year in order to present to the 1965 legislature the 1962 amendments to the Code recommended by the Permanent Editorial Board. This is necessary to achieve and keep uniformity among the several states.

In addition, the original enactment of the Code in Nebraska repealed Chapter 88, Articles 2 and 3, R.R.S. of Nebraska in error. Your committee will offer a bill to correct the error.

The legislative bills to accomplish these purposes are now being prepared by legislative counsel and will be offered as the recommendation of the State Bar Association.

It is recommended that the committee be continued for one year for the purpose of presenting these matters to the legislature.

Daniel Stubbs, Chairman
 A. Lee Bloomingdale
 John W. Delehant, Jr.
 Robert C. Guenzel
 Walter D. James
 Barton H. Kuhns
 Winthrop B. Lane
 John C. Mason
 Arthur C. Sidner
 Flavel A. Wright

CHAIRMAN McCOWN: Next is the report of the Committee on Publication of Laws, Bob Denney, chairman. You will find the report on page 21. Is there any member of the committee who wishes to move the acceptance of the report?

ROBERT A. BARLOW, Lincoln: I'll so move. I think I am still on that committee.

CHAIRMAN McCOWN: Is there a second?

ALFRED W. BLESSING, Hastings: I second the motion.

CHAIRMAN McCOWN: As many as favor the motion will say "aye"; those opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Committee on Publication of Laws

The Committee on Special Publication of Laws has continued its efforts to have the legislature send to each clerk of the district court in every county in Nebraska a copy of all bills that are introduced and the data each day showing the progress of the bill through the legislature, so that the district court clerks will have available in each county as a public record, the record of the legislative acts, so that every citizen of the State of Nebraska would know from day to day what laws are enacted, what laws are killed, what laws are amended, and which laws are passed with emergency clauses to the end and purpose that one would be able to know from the time of the convening of the legislature until the Session Laws are published, under what laws the people of the State of Nebraska were being governed.

The final recommendations of the Legislative Council Committee on Legislative Processes is as follows:

That the clerk of the district court in each county receive a complete set of bills, amendments, and daily journals; and that where there is more than one legislative district in a county another set would be provided for

each legislative district, with the Senator therefrom deciding where it should be placed; and that the law schools at the University of Nebraska and Creighton University also receive this complete service.

Your committee believes that with a diligent follow-up this project can be completed successfully.

It is the recommendation that this committee be continued to complete this project.

Robert V. Denney, Chairman

CHAIRMAN McCOWN: Next is the report of the Committee on Cooperation with Law Schools, Charles E. Oldfather, chairman. The report is on page 39.

REPORT OF COMMITTEE ON COOPERATION WITH LAW SCHOOLS

Charles E. Oldfather

The practice of publishing biographical sketches and photographs of the two law school groups of seniors has been continued in the *Bar Journal*, and our committee recommends that this practice be continued for the coming year.

There are growing up in a few other states either statutory or informal arrangements which enable law students to do a limited amount of actual court practice under the supervision of members of the bar. We discussed this somewhat but felt that our committee was not yet ready to recommend anything in this regard for Nebraska. However, we do recommend that future committees give further consideration and study to this area.

There have been no particular problem areas this year in reference to the law school and the Bar. However, the deans of the law schools and the members of the committee feel there is merit in having a committee available in the event of such occasions or events. We therefore recommend that the committee be continued.

I move adoption of the report.

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

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

CHAIRMAN McCOWN: Any discussion?

CHARLES F. ADAMS, Aurora: Mr. Chairman, on the utilization of these law students, I would call the attention of the House to a portion of the report of the Advisory Committee where the same

area is being considered. There is a place for the use of law students, and I think your recommendations are proper, but there is a little additional information in this other report.

CHAIRMAN McCOWN: Any further discussion? As many as favor the motion will say "aye"; opposed the same. The motion is 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. The committee discussed and considered statutory and informal arrangements being used in other states to enable law students to do limited court practice under the supervision of members of the Bar. The committee recommends that this area be watched and given further consideration by future committees.

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

Charles E. Oldfather, Chairman
Robert D. Baumfalk
David Dow
James A. Doyle
Deryl F. Hamann
Robert R. Moran
Robert D. Mullin

CHAIRMAN McCOWN: Next is the report of the Committee on Military Law, Mr. James Nanfito, chairman. You will find the report on page 28 of your program.

REPORT OF COMMITTEE ON MILITARY LAW**James A. Nanfito**

The military requested the appointment of this committee. In the past year it has found good use for the committee, as the report will indicate. Therefore the committee recommends that the report be adopted and that the committee be continued in force for another year.

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

JAMES M. KNAPP, Kearney: I second the motion.

CHAIRMAN McCOWN: As many as favor the motion will say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Special Committee on Military Law

This committee has been in existence a short time and at the present is being accepted as the medium of exchange of ideas between the military and the civilian. The committee was organized for the purpose of investigating and reporting to the Association on any matters concerning military law and military personnel stationed within the State of Nebraska which might merit action on the part of the Association. Its purpose to some extent is being accomplished in its relationship with the various branches of the military services presently within the state.

Numerous contacts with the Army, Navy, and Air Force resulted in a special conference and briefing of this committee by the Judge Advocate Section of the Strategic Air Command at its headquarters in Omaha on May 13, 1964. Discussions were held on the following subjects:

(1) Of special interest to all of us members of the committee was the discussion held on Public Law 87-693, passed September 25, 1962, 42 U.S.C. 2651-2653, entitled "Third Party Liability for Hospital and Medical Care." Where governmental hospital and medical services are provided to a member of the armed forces injured by an act of a third party, the value of these services is to be repaid to the government. If the armed forces are not able to directly collect from the tortfeasor, then the office of the United States district attorney is to do the necessary in the collection of the same. If suit is filed by a civilian attorney on behalf of an enlisted man or an officer, then the armed forces are to make

available to the attorney all military records, personal and medical, and to have the medical personnel available as witnesses, all subject to the subrogation rights of the government to the extent of the reasonable value of the care and treatment furnished or to be furnished. At the time of the conference this reasonable value, with the approval of the Comptroller General of the United States, has been set at \$40.00 per day.

(2) The North Atlantic Treaty Organization agreement provided a healthy discussion concerning the reciprocal rights of foreign officers stationed at Strategic Air Command. The NATO agreement provides that an officer of a foreign country to be stationed at Omaha is allowed to bring to Omaha his own supply of liquor. But, immediately United States Customs, United States Immigration and Naturalization presented an obstacle and then came the Nebraska Liquor Control Commission. This latter commission can approve liquor to be brought into the state only through a bonded warehouse, through a licensed wholesaler and then through a licensed retail outlet. Yet, the foreign officer is to have his liquor, duty free and tax free.

(3) In the field of military justice, the committee was informed of the new system of punishments doled out by the commanding officer under the provisions of Article 15 of the United States Code of Military Justice and by this method would eventually eliminate the summary courts in the military justice program.

(4) Of interest to the Association is the new proposed amendment in military law that an officer or enlisted man about to be discharged by an administrative hearing must be represented by a qualified attorney during the course of the hearing.

At the present time inquiries are made of the committee to answer a few of the problems of the military. We do serve a useful purpose in assisting our fellow attorneys presently in the military service. As time goes on, we feel that the purpose of organizing the committee will be accomplished. **It, therefore, is the recommendation of the committee that the committee be continued in force.**

James A. Nanfito, Chairman
Frederick A. Brown
William C. Campbell
Raymond A. Jensen
Jack Knicely
Gerald S. Vitamvas

CHAIRMAN McCOWN: Is there any member of the Committee on County Law Libraries present? The report is on pages 35 and 36. William H. Meier is chairman.

REPORT OF COMMITTEE ON COUNTY LAW LIBRARIES

Harry N. Larson

The report appears on pages 35 and 36 of the program. The committee did not hold any meetings during the year.

The recommendations of the committee appear at the close of the report as follows:

It is recommended (1) that the committee continue the effort on behalf of the Association to develop cooperation of the District Judges Association to encourage the establishment and improvement of the county law libraries as contemplated by the statutes; and (2) that the committee assist the Secretary of the Association in compiling a reliable list of the county law libraries now existing in the state.

I move the adoption of the report and those recommendations.

CHAIRMAN McCOWN: You have heard the motion. Also I assume your motion would include that the committee be continued.

MR. LARSON: Yes sir.

CHAIRMAN McCOWN: Is there a second?

ALFRED W. BLESSING, Hastings: I second the motion.

CHAIRMAN McCOWN: All those in favor will say "aye"; opposed the same sign. The motion is carried.

[The report of the committee follows.]

Report of the Committee on County Law Libraries

The committee has endeavored to enlist the aid of the District Judges Association in implementing the statutory authority for the establishment and improvement of county law libraries in the state. Nothing definite has as yet been accomplished along this line. We believe that cooperation between the Bar Association and the District Judges Association is necessary to assure the establishment of sound county law libraries throughout the state.

Neither the Bar Association nor the State Library has ever had an accurate list of the county law libraries. Local bar associations from each county should advise George H. Turner, Secre-

tary of the Association, if they have a county law library, the location thereof, and the official in charge. This will assure that the local county law library will receive the volumes of state publications to which it may be entitled.

It is recommended (1) that the committee continue the efforts on behalf of the Association to develop cooperation with the District Judges Association to encourage the establishment and improvement of the county law libraries as contemplated by the statutes and (2) that the committee assist the Secretary of the Association in compiling a reliable list of the county law libraries now existing in the state.

William H. Meier, Chairman
John S. Elliott, Jr.
Kenneth H. Elson
Soren S. Jensen
Harry N. Larson
Russell E. Lovell
William H. Norton
Harvey M. Wilson

CHAIRMAN McCOWN: Gentlemen, I commend you! You have accomplished the schedule. It is now twelve o'clock on the dot, as I see it. That is the morning schedule.

I would suggest that we reconvene at two o'clock promptly. I could say one-thirty and then wait fifteen minutes for you all to get back here, but I would prefer to make it two and have everyone here promptly at two o'clock. I recognize that some of us have luncheon habits which sometimes interfere. I trust we are not like the gentleman who said his net income was not equal to his gross habits. I hope you will get back at two o'clock.

[The session adjourned at twelve noon.]

WEDNESDAY AFTERNOON SESSION**November 11, 1964**

CHAIRMAN McCOWN: Gentlemen, my watch says two o'clock and I promised to get us under way at two. The Chair declares a quorum present.

The first item of business scheduled is the report of the Committee on Federal Rules of Procedure, Mr. William Spire, chairman.

**REPORT OF COMMITTEE ON FEDERAL RULES OF
PROCEDURE****Dean G. Kraiz**

Bill Spire was called back to the office and he asked me to give his report, which consists only of the request and recommendation that the committee be continued. I so move.

CHAIRMAN McCOWN: The motion has been made that the committee be continued. Is there a second?

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

CHAIRMAN McCOWN: It has been moved and seconded that the committee be continued. All in favor say "aye"; opposed the same. The motion is carried.

CHAIRMAN McCOWN: The next item of business is the report of the Committee on Title Guaranty Insurance, Mr. Herman Ginsburg, chairman.

REPORT OF COMMITTEE ON TITLE GUARANTY INSURANCE**Herman Ginsburg**

Mr. Chairman, Members of the House of Delegates: Those of you who have read the report of the committee I think will get the notion pretty clearly that the committee isn't quite 100 per cent sold on what it is recommending.

The fact of the matter is that there are two problems involved: No. 1 is: Do we need a lawyers title guaranty fund? No. 2: How do you go about it if you answer No. 1 in the affirmative?

We have answered question No. 1 in the affirmative. We feel that it is necessary, but there are some terrific problems involved in No. 2: How do we go about it?

I believe I can say that the experience in most of the surrounding states of comparable population is that a bar the size of the

Nebraska Bar probably can't sustain a title guaranty fund of its own. The trend is for area groups, and in that respect the fund in Kansas and the fund in Colorado both are very anxious to have Nebraska affiliate with them.

The difficulty is this: We like the method of operation of the Colorado fund. It operates to a greater extent like the Florida fund where the lawyer gives the opinion and furnishes the title policy along with it as a part of his service, and you eliminate some of the problems of ethics that are involved where you just have a title insurance company and you tell your client that you recommend that he get title insurance. As I mentioned, the Colorado fund has tried to operate in the method of the Florida fund, which is the most successful.

Kansas has created a regular title insurance company. I use the word "regular" so you will know it is comparable to Lawyers' Title or Kansas City Title, or any of these other title insurance companies.

The difficulty is that the Colorado fund has not been very successful, for a number of reasons. I won't take the time to go into it, but as of right now they are having a great deal of difficulty getting their policies accepted by lenders and they are in somewhat—I don't want to be sued for slander or anything like that—of a financial difficulty. They are trying to sell additional stock in the State of Utah and in New Mexico, trying to increase their prestige in their business in that method. They are very anxious to have Nebraska join with them.

The Kansas fund is sound and is doing a good business and is accepted. I have with me a list of all the companies, lenders, loan companies, mortgage companies, title companies who are accepting the Kansas policies. The company is well operated and financially sound. It is for that reason that you will notice in our report that we said that unless something better came up we recommended Nebraska affiliate with the Kansas organization.

The problem is this: If the Kansas company comes over into Nebraska to sell stock, they are going to have to get an SEC clearance. They are going to have to comply with the Nebraska Blue Sky law, and things of that kind which they don't want to do. They have made the suggestion that the Bar of the State of Nebraska organize a company under the Nebraska Insurance Code, which requires \$100,000 capital, \$25,000 surplus, and then, of course, we figure that you have to have some undivided profits, so it would require about \$150,000 to organize a company. Then the idea was that the two companies would merge. The Kansas company

and the Nebraska company would merge and we would really have a very nice operating company.

Since our report was prepared you will notice that in the report we suggested we negotiate with the Kansas company, which is called "Kansas Insured Titles," which is the lawyers' company in the State of Kansas. I sent a copy of our report to the president of that company and I have received back a certified copy of a resolution adopted by their company. I think I will take the time to read it in part. I won't read the whole thing; it is rather lengthy; but the conclusion of their resolution is as follows:

BE IT FURTHER RESOLVED that the Board of Directors of Kansas Insured Titles, Inc., appoint a special committee, and that such committee be, and is hereby authorized to enter into negotiations with an appropriate committee of the Nebraska Bar Association leading to some sort of mutually satisfactory affiliation with the company proposed to be established in the State of Nebraska with similar aims and purposes as Kansas Insured Titles, Inc., or such joint cooperative effort to said end, that said special committee may recommend, subject to the approval of the Board of Directors of Kansas Insured Titles, Inc., and, if required by law, the approval of the stockholders of Kansas Insured Titles, Inc., and of the Insurance Department of the State of Kansas."

That concludes all I want to say except one thing. We are now in a position where we can't just be talking any more. We either have got to put up or shut up. If we are interested in going ahead, then we must recognize that we are confronted with the fact that the Bar is going to have to go out and set up a company and raise a minimum of \$150,000 of capital. If it isn't your feeling that that can or should be done, then by all means you should refuse the recommendation which your committee has made.

As you will notice, the recommendations of the committee are: (a) That the committee be continued; (b) That it be authorized to enter into negotiations with Kansas Insured Titles, Inc., to affiliate with such company, subject of course to final approval by the House of Delegates or the Executive Council of this Association; and (c) That the committee be directed to report at the next meeting of the House.

Mr. Chairman, I move the adoption of the recommendations of this committee.

CHAIRMAN McCOWN: Gentlemen, you have heard the motion. Is there a second?

THOMAS M. DAVIES, Lincoln: I second the motion.

CHAIRMAN McCOWN: Is there any discussion?

HARRY B. COHEN, Omaha: May I ask a question? If we were to organize a separate Nebraska corporation would the capital stock be limited to lawyers?

MR. GINSBURG: That would be the idea, yes. In Kansas I might say they limited it to lawyers and abstractors. The result was, however, as I recall it, Mr. Collins told me they only got about 10 per cent from abstractors and 90 per cent from lawyers.

MR. DAVIES: Would they be willing to make this the Kansas-Nebraska Title Company? I assume they would.

MR. GINSBURG: Oh yes. They are very eager. They have no pride. They are willing to call it Kansas-Nebraska or Nebraska-Kansas or Midwest, or anything we want to come up with.

DALE E. FAHRNBRUCH, Lincoln: Mr. Chairman, I would move that we take each of the committee's recommendations separately so we can have a final decision as to whether the Nebraska Bar should have its own title insurance company or whether we should become affiliated with the Kansas company.

MR. GINSBURG: Mr. Chairman, may I say with regard to what Mr. Fahrnbruch has just said, I have no objection to taking it separately but I think you misunderstand. We are not recommending that under any circumstances we form a Nebraska company and stop there because we don't think there is enough business to justify it.

MR. FAHRNBRUCH: This I understand, but I think we ought to have a vote by the House here as to whether we want to go in mutually or whether we ought to go separately.

CHAIRMAN McCOWN: I think, if that is the case we should ask Mr. Ginsburg to report the background as to why the committee initially determined that Nebraska alone should not proceed with its own. Perhaps we might solve the problem by having Herman discuss it before we have any motion to that effect.

MR. GINSBURG: All I can say is that the committee, from the information we have obtained from surrounding states, has ascertained there just wouldn't be enough business to justify it.

The State of Colorado, I forget the exact figures but they have been losing approximately \$30,000 a year. Kansas has not been making any money and they have a bar much larger than ours. Several other states, I just don't recall right now, haven't been able to do it on their own business.

As I recall, the total title insurance premiums in the State of

Nebraska run approximately \$200,000. That is for every company licensed in the State of Nebraska. We figured that we couldn't at the most get one-fourth or maybe as much as one-third of that total business, and it just would not justify it.

Do you realize that the salary you have to pay to the executive—I believe they call him the executive vice president in Colorado—is something like \$21,000 or \$24,000 a year. You've got to have somebody who knows something about insurance operations to operate it. It can't be operated by just a lawyer. You couldn't get a company with \$50,000 or \$60,000 gross income and pay \$25,000 a year to an operating head and then have your other expenses and expect to come out. The reason we are so certain about that is the fact that these companies that have already existed now for three, four, and five years are so eager and anxious to get other states to affiliate with them.

CHAIRMAN McCOWN: I will treat Mr. Fahrnbruch's comment as a motion to submit the resolution separately and will ask if there is a second to that motion.

JAMES I. SHAMBERG, Grand Island: Point of information, please. Mr. Chairman, I am wondering what the prior action has been of the House of Delegates. Have we gone on record in previous years as definitely agreeing that we *should* have a title guaranty insurance company? Perhaps we have at some prior meeting that I did not attend. I am wondering if that isn't part of the problem here, as to whether the decision has already been made, and now we are just trying to figure out a way to have it.

CHAIRMAN McCOWN: I will ask Herman to respond to that. Your recollection is better than mine on this, Herman.

MR. GINSBURG: I want to leave myself a way out, but if you will notice our report starts out by saying that the House of Delegates has already decided. It has been assumed by this committee that it was the concensus of this House that a lawyers' title guaranty fund or committee be created. That is my recollection of the action that was taken, I think, two years ago.

CHAIRMAN McCOWN: That is my recollection also. I wasn't positive on it, though.

Do I hear a second to the motion that the recommendations be submitted separately? I declare it has failed for want of a second and submit the initial motion which has been made and seconded, that the recommendations and report of the committee be approved and adopted.

MR. SHAMBERG: Mr. Chairman, there has been some discussion here wondering whether this report shouldn't be given more consideration, in view of the question that has been raised as to whether or not there is a definite decision made that we go into title insurance. As I see it here, if this committee report is adopted in toto the negotiations proceed and the only thing that is to be passed upon is the finality of it. I didn't come here, frankly, prepared, perhaps not understanding it correctly, to commit the other lawyers in my general community to taking part in a title insurance company. Of course if we don't have the practically unanimous backing of the Bar it may not be the wisest undertaking.

CHAIRMAN McCOWN: I think that is probably true, except the remainder of that recommendation should also be called to their attention: "Any final arrangements to be subject to the approval of the House of Delegates or the Executive Council of the Association." I don't want to shut off any discussion.

MR. GINSBURG: Mr. Chairman, I hope I will be forgiven for this but I am very much interested in Mr. Shamberg's point because I feel, in all fairness to the committee, if it isn't the opinion of the membership that this is something we need, then I think the committee shouldn't be wasting its time nor the time of the Kansas organization in a lot of work, and if the House of Delegates feels that we don't need this, after all of the talk that has been had in previous years, then I think the House ought to vote this down now and get rid of the thing.

MR. DAVIES: Mr. Chairman, I strongly feel that we need it. I think Herman Ginsburg and his committee have done a good job and they have worked on it for a long time. We have had this before us for some time. I think there are a lot of us who feel that if we don't do this now the title business of the lawyers is going to go down the drain. I strongly feel this way.

CHAIRMAN McCOWN: The question has been called for. All those in favor of the motion and recommendations of the committee will say "aye"; opposed the same sign. The motion is carried and the matter is adopted.

Thank you very much, Herman. Incidentally, Herman and his committee have done a tremendous amount of work on that particular project over a period of the last two years at least.

[The report of the committee follows.]

Report of the Special Committee on Title Guaranty Insurance

Implementing the report of this committee made to the previous session of the House of Delegates and approved by it, further investigation has been made as to a practical approach to the establishment of a lawyers title guaranty company for the members of the Nebraska Bar. It has been assumed by the committee that it was the consensus of this House that a lawyers title guaranty fund or company be created. The research by this committee does not at all indicate that there is any unanimity among the members of the Bar on this score; however, the previous action of this House indicates that it is the majority wish that such an organization be created.

Along that line, the committee has made investigation as to the possibility of the creation of a Nebraska company; and it is the opinion of the committee that it would not be feasible for the Nebraska Bar alone to create such an entity. Investigation as to the results in other states has disclosed that, except for the most populous states, the creation of such an entity by a local state bar association is extremely difficult and fraught with financial hazards. It is the opinion of this committee that joinder or cooperation with a lawyers fund or company already in existence would be much preferable. Some of the funds and companies already in existence in neighboring states are presently in the process of planning affiliation with other state bar groups in the interest of creating companies that would cover a region or area sufficient to create reasonable anticipation of the success of such entities.

After considering the avenue available to the Nebraska Bar, it is the unanimous opinion of this committee that, unless a better solution can be found before final implementation, the Nebraska Bar should work out arrangements to affiliate with the Kansas company, operated and owned by the lawyers of the State of Kansas, and known as "Kansas Insured Titles, Inc." The details of such affiliation will have to be worked out by a successor committee; but this committee can report that this Kansas company has indicated that it would welcome any reasonable affiliation with the Nebraska Bar. Kansas Insured Titles, Inc., has been a successful operation and is under able and aggressive management; and, we believe, offers the best opportunity available to the members of the Nebraska Bar at this time.

The committee wishes to stress, however, that this would not, in and of itself, offer a solution to all problems involving the practice of real estate law by unauthorized persons nor would it ultimately solve the law problems in this field of practice. Insofar,

however, as lawyer-owned companies have been of benefit in helping to alleviate some of these problems, it is the opinion of this committee that some sort of a mutually satisfactory affiliation with Kansas Insured Titles, Inc., offers the most advantage to the Nebraska Bar.

The committee therefore makes the following recommendations:

(a) That the committee be continued.

(b) That the committee be authorized to enter into negotiations with Kansas Insured Titles, Inc., a lawyers title guaranty company of the State of Kansas, to affiliate with such company; any final arrangements to be subject to the approval of the House of Delegates or the Executive Council of the Association.

(c) That the committee be directed to report the results of such negotiations at the next meeting of the House.

Herman Ginsburg, Chairman
John R. Fike, Vice Chairman
Robert D. Baumfalk
Henry A. Gunderson
Willis Hecht
Fred P. Komarek
Norris G. Leamer
Albert T. Reddish

Edmund R. Sturek and Clement B. Pedersen did not participate in the foregoing.

CHAIRMAN McCOWN: Next is the report of the State Advisory Committee, Mr. Raymond Young, chairman.

REPORT OF STATE ADVISORY COMMITTEE

Raymond G. Young

I just want to bring our report up to date. You will see in the printed report that at the time of its preparation there were two records in the hands of the Advisory Committee for review, one from District No. 11 and one from District No. 6. Both of those matters have since been decided. Besides that, the Advisory Committee has received two more records for review, one from District No. 2 and one from District No. 3. Both of those cases are now under examination.

You will see also that reference is made to one case which has been argued in the Supreme Court but not yet decided at the time

of the mailing of this report. The decision has now been made. It was a judgment of disbarment. I believe a motion for rehearing is pending.

There is nothing in our report which requires any action on the part of this House. I do, however, want to call attention to what we have to say about Canon 27 and I trust that everyone, every member of this House, will familiarize himself with the two matters which we emphasize. The bold face type listing or other distinctive listing in telephone directories is a violation of Canon 27. Likewise newspaper announcements. The ordinary form of newspaper announcement is a violation of Canon 27. There shouldn't be any newspaper announcements. I call attention in that connection to the fact that it is the duty of a committee on inquiry, upon having information of or receiving charges of conduct appearing to be unprofessional, to institute an investigation. In other words, if the committee on inquiry receives information from whatever source that a Canon is being violated, it is its duty to go into action and make at least an informal investigation.

There being nothing required to be done on the part of the House I assume this report will be received and filed.

CHAIRMAN McCOWN: We have a motion that the report be received and filed. Is there a second?

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

CHAIRMAN McCOWN: All in favor will say "aye"; opposed the same.

I would call the attention of the House to the portion of the report of Mr. Young's committee which I think perhaps many members of this House may not have been aware of, that the State Advisory Committee does and has issued advisory opinions on matters of ethics, which I am sure they are more than willing to release to local bar associations or individual members of the bar in connection with these matters which Ray has mentioned specifically. This is an activity that requires a good deal of time on the part of the Advisory Committee. It isn't that they are asking for any additional requests, I am sure, but I think all of you ought to be aware of the fact that these advisory opinions are issued by the State Advisory Committee and are available to the members of the Bar of Nebraska. It is a great service that is being performed by that committee in addition to the grievances issued, the responsibility for which they also have.

[The report of the committee follows.]

Report of the State Advisory Committee

The Supreme Court appointed William J. Baird of Omaha to succeed Raymond M. Crossman, deceased, and Bert L. Overcash of Lincoln to fill the vacancy created by the resignation of Frank D. Williams.

The work of the Advisory Committee, the Committees on Inquiry, and the disciplinary activities may be summarized as follows:

REVIEWS

The Advisory Committee has reviewed one record from District 11 and one from District No. 6, and has those matters under consideration.

SUPREME COURT

In the Supreme Court two cases are pending before referees. One case has been argued in the court but not yet decided.

ADVISORY OPINIONS

Many informal opinions have been given relating largely to special situations. The high lights of the opinions and interpretations which may be of general interest are as follows:

1. The publication of a professional card in a local newspaper is a violation of Canon 27.

2. The committee again announced its policy of declining to render an advisory opinion in a matter which may come before it for review of the findings of a committee on inquiry.

3. A lawyer may not ethically advertise a business service or a tax service in the yellow pages of the telephone directory.

4. Boldface type or other distinctive listing in telephone directory violates Canon 27.

5. The committee reviewed the ethical limitations on a lawyer's preparation of an article on a general legal subject for newspaper publication and determined that the publication of such an article, if of general interest, with no attempt to advise any one on his individual problem, with no advertising and no laudatory comment, is not prohibited by the Canons.

6. A county attorney may not properly defend a juvenile accused of crime even though the proceeding is in a county other than that of the county attorney's residence.

7. Neither a county attorney nor his partner may advise or represent a landowner in condemnation proceedings in the attorney's county but such attorney may represent a landowner in such proceedings in another county.

8. A city attorney, as such, is not precluded from representing a landowner in a condemnation suit in the county, the proceedings not adversely affecting the interests of the city, it being the duty of the county attorney to act for the state in such matters.

9. The committee reviewed the permissible activities of law students.

COMMITTEES ON INQUIRY

The districts in which no action by committees on inquiry has been required are 1, 5, 7, 8, 9, 12, 14, 15 and 18.

In District 2 formal hearing in one case resulted in dismissal of charges for insufficiency of evidence.

In District 3 (Lincoln) recent charges in two cases are being investigated. Three minor matters were disposed of without formal action. In one case hearing was had, complaint prepared and forwarded to the clerk for review by the advisory committee.

In District 4 (Omaha) charges in two cases carried over from last year were dismissed after consideration by the committee. Since October 1, 1963, formal charges were filed in 20 matters. Three were withdrawn by complainant, four were dismissed after hearing, and eight were dismissed without formal hearing but after investigation and consideration by the committee. Four cases are under consideration by the committee, one formal hearing is pending.

In District 6 there was one formal hearing. Report and complaint were sent to the Secretary of the Association for review by the advisory committee.

In District 11 formal charges against two lawyers were heard. Report and complaint were forwarded for review by the advisory committee.

In District 13 the principal concern of the committee has been the investigation of the extent to which Canon 27 is being violated by publication of lawyers' names in boldface type in telephone directories. It is believed that this problem is in process of satisfactory solution.

In District 16 action on charges in one matter is being withheld pending completion of litigation now in the Supreme Court.

In District 17 four minor matters were disposed of without formal action.

CANON 27

Canon 27 prohibits advertising, direct or indirect. For the information of the Bar, the committee again brings to its attention some of the practices which by authoritative interpretation have been held to be in violation of that Canon.

Telephone Listings. Boldface type listing or other distinctive listing in telephone directory or in city directory violates Canon 27.¹

The listing of lawyers' names in distinctive type is "regarded as inconsistent with the object and purpose of Canon 27 as well as with professional dignity and good taste."²

The American Bar Association committee has ruled that names of partners and associates of law firms may not be shown under firm listing in a telephone book.³

Newspaper Announcements. The use of a newspaper as a medium for announcing the opening or removal of a law office, the formation of a law firm, the admission of a partner or associate,

¹ A.B.A. Opinions 223, 284, 295; Drinker, *Legal Ethics*, 214, 246; Association of Bar of City of New York, *Opinions* 428, p. 228, and 746, p. 449.

² A.B.A. Opinion 295, 45 A.B.A.J. 1175.

NOTE: There seems to be a considerable lack of knowledge of the existence of this ruling, and not without some reason. In 1931 and again in 1934 the American Bar Association condemned, as advertising, boldface type or other distinctive form of listing in the classified section (Opinions 53 and 123), and in 1941 ruled against such listing in either the classified or the non-classified (alphabetical) section (Opinion 223). Upon reconsideration in 1942, Opinion 223 was overruled insofar as it applied to the non-classified section but reaffirmed in its application to the classified section (Opinion 241). A great many individual lawyers and local and state bar associations protested the removal of the ban against such listing in the non-classified section. Accordingly, in 1951, in order to secure uniformity and not to be behind any in maintaining professional standards, the American Bar Association overruled Opinion 241, and reinstated Opinion 223. (A.B.A. Opinion 284, holding that the ban against boldface type or other distinctive listing applies both to the classified and non-classified sections.) Opinion 284 was adhered to in Opinion 295 in 1959. The rule as stated has been clear and unequivocal since 1951.

³ *Id.*; Opinion 646, 49 A.B.A.J. 954.

and like matters is a violation of Canon 27,¹ and has been repeatedly disapproved.² The appropriate method is to send by mail a simple, dignified announcement card which complies with the Canon and the Opinions of the American Bar Association committee.³

The announcement may be made in a legal journal.⁴ No departure from the rules can be justified by local custom.⁵

The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are by rule of the Supreme Court constituted the Canons of Ethics and the ethical standards of the legal profession in this state. Supreme Court Rules, Article X; Association By-Laws, Article V, 4. Strict adherence to such Canons and standards is the surest guaranty of public respect and esteem for the members of our profession. A violation by one member is an injury to all.

It is the duty of a committee on inquiry, upon having information of or upon receiving charges of conduct appearing to be unprofessional, to institute an investigation. Rule XI, 3, 5.

The committees on inquiry are to be commended for their promptness and efficiency in the performance of their duties.

It is the recommendation of the Advisory Committee that members of committees on inquiry be vigilant in causing serious or substantial departures from the rules in their respective districts to be corrected.

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

CHAIRMAN McCOWN: The next order of business is the report of the Committee on Resolutions. Mr. Cohen!

¹ A.B.A. Decisions, 140A, 142A, 146A; C-447, 47 A.B.A.J. 777; Drinker, *Legal Ethics*, 240 (1953).

² 1960 Report, N.L.R., Jan. '61, p. 254; 1961 Report, N.L.R., Feb. '62, p. 244; 1962 Report, N.L.R., Feb. '63, p. 307; 1963 Report, N.L.R., Feb. '64, p. 261.

³ A.B.A., 146A; Drinker, 232.

⁴ A.B.A., 141A.

⁵ A.B.A. Decisions 4, 107, 115, 293; Drinker, 219.

REPORT OF RESOLUTIONS COMMITTEE

Harry B. Cohen

Mr. Chairman, Members of the House: The first resolution is a resolution of the Public Service Committee, and it is to this effect:

RESOLUTION NO. 1

WHEREAS the Nebraska State Bar Association as a public service prepares and distributes to radio stations throughout the state informative programs dealing with legal subjects of interest to the layman; and

WHEREAS Radio Station _____, despite the extensive demands upon its time for public service programming, has continued to make regular and faithful use of such programming in the public interest;

NOW THEREFORE the Nebraska State Bar Association does hereby express its appreciation and thanks to Radio Station _____ and declares its intention to continue to provide informative material which is not only in the public interest but of the highest possible broadcast quality.

NEBRASKA STATE BAR ASSOCIATION

By _____
Floyd E. Wright
President

Date _____

I move the adoption of this resolution, the blank space to be filled in in each instance with the name of the station. I have here a list. There are twenty-six in number. Specific separate resolutions for each station have already been prepared, signed, and delivered to the committee for distribution and mailing upon adoption of this resolution by the House.

I move adoption of the resolution.

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

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

CHAIRMAN McCOWN: All those in favor will say "aye"; opposed the same sign. The resolution is adopted.

KAWL - York
KVSH - Valentine
KRFS - Superior
KSID - Sidney
KOLT - Scottsbluff
KNEB - Scottsbluff
KEVR - Scottsbluff
KBRX - O'Neill

KFIB - Omaha
KODV - North Platte
KWRV - McCook
KBRL - McCook
KFOR - Lincoln
KRVN - Lexington
KHOL-FM - Holdrege
KRNY - Kearney
KGFV - Kearney
KMMJ - Grand Island
KHUB - Fremont
KTNC - Falls City
KGMT - Fairbury
KTTT - Columbus
KJSK - Columbus
KXXX - Colby, Kansas
KWBE - Beatrice
KCOW - Alliance

MR. COHEN: The next resolution I have reads as follows:

RESOLUTION No. 2

I, Robert R. Moran, do hereby certify that I was directed by the members of the Bar Association of the Sixteenth Judicial District of the State of Nebraska, at a meeting held on October 14, 1964, duly called, to certify the following resolution adopted at that meeting to the Secretary of the Nebraska State Bar Association, which resolution is as follows:

RESOLVED that the Sixteenth Judicial District Bar Association urges the enactment of legislation which would authorize the establishment of a public defender system on a judicial district basis; and it was further

RESOLVED that a copy of this resolution be forwarded to the Secretary of the Nebraska State Bar Association for referral to the House of Delegates for appropriate action.

DATED October 21, 1964

(Signed) Robert R. Moran

It seems to me from what I heard this morning from one of the other reports that this is being undertaken now by the Advisory Committee, or is it?

CHAIRMAN McCOWN: No.

MR. COHEN: I was under the impression that some division of the Nebraska State Bar Association was undertaking this work, but I don't think it hurts anything to adopt this resolution. It is a good movement and I think it will be implemented. I don't know whether it is on the state level alone because I understand it will be

implemented. We have a federal statute on it now, public defenders on the federal basis. This is probably for a state basis.

ROBERT R. MORAN, Alliance: Mr. Chairman, may I speak? We have a problem in the sparsely settled areas of Nebraska with respect to adequate representation of indigents in criminal cases. Under the opinion of the Advisory Committee, for example, out of the eleven practicing attorneys in Alliance only three are ethically qualified to represent persons charged with crimes. We feel that that is not fair to the three who are qualified to be expected to handle these cases on an assigned counsel basis. At our meeting in Alliance we found that the situation was pretty much the same throughout the Sixteenth District. I know that Bob Bulger down in Bridgeport has essentially the same problem. Now we can't justify a county public defender system because the case load in these counties is just not sufficient to persuade county courts to adopt the county public defender system. We thought this was the answer to a grave problem and that is the reason for forwarding this resolution.

MR. COHEN: May I ask a question? Don't we have a statute on an affidavit of poverty where the court appoints defenders?

MR. MORAN: Yes, sir, we do. District judges are not all parsimonious, but counsel is never adequately paid when he does a good job. At least this has been my experience. It is too much of a burden on three men out of eleven in Alliance, for example. When you go over this district in the sparsely settled areas you have the same problem.

CHAIRMAN McCOWN: What is the recommendation of the Resolutions Committee?

MR. COHEN: I move adoption of the resolution.

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

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

CHAIRMAN McCOWN: Is there any further discussion? As many as favor the resolution will say "aye"; opposed the same. The resolution is adopted.

MR. COHEN: I have a resolution offered by Charles E. Oldfather which reads as follows:

RESOLUTION No. 3

RESOLVED that this body go on record as favoring the passage of legislation at the next session of the legislature which would increase the

number of judges of the Nebraska Workmen's Compensation Court from three to four, and request that the Legislative Committee cause such legislation and any desirable harmonizing legislation to be prepared and introduced.

(Signed) Charles E. Oldfather

CHARLES E. OLDFATHER, Lincoln: I introduced this resolution primarily at the request of the three judges of the Workmen's Compensation Court, and I know that they either by correspondence or directly have talked to many of you about it. Let me say that although it came up through their requesting me to do it, I do favor the adoption of the resolution.

As you know, the number of judges in the Workmen's Compensation Court has been the same since that court was established either in 1935 or 1936. You also know that it is a state-wide court that services all the counties or all the workmen's compensation matters in the state.

Judge Novicoff furnished me with some statistics which showed how, at five-year intervals, the volume of work has increased in the Workmen's Compensation Court from 1940 to the present time. For instance, they now have over 100 applications for rehearing filed each year. As you know, that requires three judges to hear them, and while some of them are settled, many of them are settled immediately before they are heard when the three judges are out in the state in the county where the accident occurred.

Their number of cases filed and settlements is now over 900. It goes without saying that we are becoming a more industrial state and we have more employees. Workmen's compensation has come to involve more money-wise, and there is just no question but what there is a tremendously increasing load of work in the Workmen's Compensation Court.

Judge Novicoff called my attention to three special situations which, not necessarily in themselves determinative, show reasons why he expects an even greater increase in the volume of their work over the natural increase we will have from becoming more industrial.

One of those is the case of *White v. Nebraska Workmen's Compensation Court* where, as I understand it, the Supreme Court in effect held that a party who, following a first period, even though he has gotten everything he wanted from the court, can still, if the case is to go further, keep it in your Workmen's Compensation Court for a rehearing. This has served to increase their volume of rehearsings.

As you know, in the last session of the legislature the definition of the term "accident" was substantially changed and apparently is resulting in an increased amount of litigation in Compensation Court, and litigation of the type which is apparently time-consuming from the lawyers' and the trial judges' standpoint. Judge Novicoff tells me that he runs into lots more extended medical testimony and medical questions in connection with the new definition of "accident" than they ever had to deal with before.

Five or six years ago the questions of motions, special appearances, discovery, and that sort of thing were practically unheard of in the Workmen's Compensation Court, but as these cases have become more complex and involved more money, there has been a demand from lawyers that these procedures be utilized. Under the rules of the court now they do accept this sort of thing and treat them much as they are treated in the district court. Needless to say this has put an increased load on the judges because each one of these has to be heard and dealt with in some manner.

Compensation court judges advise me that they think the addition of another judge will probably cost \$30,000. I assume they are talking about \$30,000 a biennium, or every two years. They called my attention to the fact, which I guess I hadn't thought of for a long time, although I know, that they do collect a substantial amount of money from the self-insurers and workmen's compensation insurance carriers. That goes into the general fund, and then what the Workmen's Compensation Court needs for a budget is appropriated out by the legislature. If you compare the figures, though, of what goes in and what comes back to the Workmen's Compensation Court, 'way more remains in the general fund than is used for the Workmen's Compensation Court budget. So in a sense this would be giving an increased court back to the people who are paying in for this kind of service.

CHAIRMAN McCOWN: Mr. Oldfather, may I ask why the number is four rather than the odd number of five?

MR. OLDFATHER: One of the reasons I put into the resolution this business about "harmonizing provisions" is that at the present time, when you have a rehearing, all three judges hear it, although I understand that technically under the law a majority of the court, which is two, can hear a rehearing if the three judges agree. I have been involved in lots of rehearsings and I have never seen a two-judge rehearing. If it is to be increased to four I think one of the technical problems is deciding what the rules are to be for rehearing.

MR. COHEN: May I ask a question? At the present time the appointees, as I recall it, aren't they on a political basis; two of them have to be of the predominant party and the other the opposite?

MR. OLDFATHER: I understand that is right. There can't be three Republicans or three Democrats. There must be at least one of each of the two political parties.

MR. COHEN: Wouldn't that be hard to harmonize with four?

MR. OLDFATHER: I think their idea is that probably there would be two of each party.

CHAIRMAN McCOWN: I was thinking more about the problem where you have a hearing when they are divided 2-2. What happens then?

MR. OLDFATHER: I think one of the harmonizing provisions they want is that in no case would it take more than three of the four judges to hear a rehearing. Those were details, though, that I thought were not too important to be settled at this time, and that is the reason I made reference to "harmonizing provisions."

CHAIRMAN McCOWN: Is there any further discussion? As many as favor the adoption of the resolution will say "aye"; opposed the same sign. The resolution is adopted.

I will take this opportunity, with the unanimous consent of the House which I trust I have, to introduce Mr. Lewis Powell, President of the American Bar Association who is visiting us. Lewis, would you care to come up and say "hello" at least to the House?

[The audience arose and applauded.]

REMARKS

Honorable Lewis F. Powell

Mr. Chairman, Members of the House: I know you will be relieved to hear I am not going to make any speech. I am more or less on a busman's holiday here this afternoon, enjoying the opportunity not to have any responsibility. I'll just sit over here in the corner and listen for a few minutes and then I am going to sneak out. I will chat with you all tomorrow. It is very nice being here with you. I'll probably be seeing you later on. Thank you.

MR. COHEN: I have a letter here that was just handed to me by Mr. Pierson who is the chairman of the Real Estate Trust and Probate Section of the Bar Association. There are two let-

ters, really. There is one from Mr. Cecil W. Orton, chairman of the Bar Coordinating Committee of the Nebraska Title Association. He is County Attorney of Dakota County, Dakota City, Nebraska:

Dear Mr. Pierson: As Chairman of the Bar Coordinating Committee of the Nebraska Title Association, I am wondering if I could impose upon you as Chairman of the Real Estate Trust and Probate Section of the Bar Association and as a Delegate to the House of Delegates from that Section, to introduce a resolution or take some other appropriate measure to have the Nebraska Bar Association endorse our proposed Abstractors Licensing Bill.

It is my understanding that this matter came up after the report of the Legislative Committee went to the printer and that the only way that it could be considered at the Bar Association meeting is to have it introduced in this manner.

Copies of the proposed Licensing Bill were forwarded by me for each member of the Legislative Committee of the Bar Association to Mr. Bert Overcash. At present I do not have any other copies of the Bill, but will have one available for you at a later date. I am forwarding herewith a summary of the proposed Bill.

Another letter is addressed to Mr. Pierson by Soren S. Jensen of the firm of Swarr, May, Royce, Smith, Andersen & Ross of this city:

Our firm represents the Nebraska Title Association. One of the Association's main projects for the coming year is the passage of an Abstractors Licensing Bill in Nebraska.

We have been working with the Legislation Committee of the Nebraska Bar in connection with this program, but I was recently advised that the Real Estate Section has a Legislation Committee. I talked to John Fike of Omaha, a member of the Section, and he advised me that there was such a committee but he was not sure exactly who was chairman this year.

Mr. Fike further advised me that it was his idea that the committee was mostly an observer and like most of the committees of the Nebraska Bar referred all legislative matters to the committee designed for consideration of such matters.

However, he suggested that I contact you and advise you of this project, and if you or members of the Real Estate Section would be interested in more materials or information about this proposal we shall be glad to cooperate with you in every way. Also we would solicit your support for this measure as a member of the House of Delegates.

I am going to ask Mr. Pierson to report on the position taken by the Real Estate, Trust and Probate Section.

CLARENCE M. PIERSON, Lincoln: The Council of the Real Estate, Trust and Probate Section discussed this measure and determined that this Section is not prepared to sponsor any resolutions in connection with this matter.

I think it comes to us with too short a notice. Because of these requests from these gentlemen, I felt it ought to be presented here so the House of Delegates would have it before them if there is somebody here who is interested in sponsoring a resolution. But the Section is not interested.

MR. COHEN: Do I understand you, then, Mr. Pierson, that the Section does not advocate the adoption of a resolution favoring this bill?

MR. PIERSON: We are not prepared to sponsor a resolution.

MR. COHEN: Well, do you want, or do you not want to sponsor one? Preparation for one is a little different. This is coming up at the next legislative session and they are going to have a bill, and they are asking for our help if we can have one. I mean, is there anything against our sponsoring a bill?

MR. PIERSON: I think not, but the Real Estate Section is not now prepared to ask the House of Delegates or the Bar Association to adopt a resolution sponsoring this legislation.

CHAIRMAN McCOWN: May I suggest that a motion to refer the proposed resolution to the Real Estate and Probate Section with authority to recommend to the Executive Council action on it might be appropriate.

MR. COHEN: I so move, Mr. Chairman.

M. M. MAUPIN, North Platte: I second the motion.

CHAIRMAN McCOWN: Any discussion? As many as favor the motion say "aye"; opposed the same. The motion carried.

MR. COHEN: That is the report of the Resolutions Committee.

CHAIRMAN McCOWN: Next is the report of the Trustee of the Rocky Mountain Mineral Law Foundation, Mr. Paul Martin, chairman.

REPORT OF TRUSTEE OF ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Paul L. Martin

The Rocky Mountain Mineral Law Foundation has been in existence now for ten years, and with the admission of Stanford University Law School the Foundation now represents thirteen law schools, nine state bar associations, the Mineral and Natural

Resources Section of the American Bar Association, six mining associations, and three oil and gas associations.

A list of the activities of the Foundation is shown in the report and I am not going to take the time to read those to you. But perhaps the project of most importance to the members of the Bar in Nebraska is a study of water law. An allocation of \$10,000 has been made by the Executive Committee to a committee undertaking this study, and while the details of the plans are not as yet worked out, such a program can be of extreme value to all of the lawyers in all the states which are members of the Rocky Mountain Mineral Law Foundation. There is nothing in the field of legal research that could benefit more the interests in the Middle West.

I think it has been a marvelous organization. My work with it has been rewarding, and I have enjoyed every minute of it. I do hope that some of you, or a lot of you, will take an opportunity to mix a vacation next July and go to the University of Denver for a three-day session of the Rocky Mountain Mineral Law Foundation there and attend the institute, and then next year at the University of Colorado. It changes location every year. I know you would enjoy it. I think it is an organization well worth while.

CHAIRMAN McCOWN: I assume you move that the report be received and placed on file. If there are no objections it will be received and placed on file.

I might say, as a matter of personal privilege of the Chair, that we will extend our congratulations to Paul Martin, who is the newly elected president of the Rocky Mountain Mineral Law Foundation. I suggest that an acknowledgement of Paul's service might be appropriate at this time.

[The report of the trustee follows.]

Report of the Trustee of the Rocky Mountain Mineral Law Foundation

The Rocky Mountain Mineral Law Foundation has now been in existence for a period of ten years, each year increasing its activities and services to the Bar of the Middle West and the oil industry in general.

With the admission of Stanford University Law School, the Foundation now represents thirteen law schools, nine state bar associations, the Mineral and Natural Resources Section of the

American Bar Association, six mining associations and three oil and gas associations. Professor Howard Williams, a nationally known authority on oil and gas law is the new trustee representing Stanford University.

The principal activities of the Foundation during the past year have been the following:

Rocky Mountain Mineral Law Review.—The first volume of the *Review*, containing two issues, has been printed and distributed.

Law of Federal Oil and Gas Leases.—During the past year the Foundation has completed the editing of the manuscripts for the treatise and in March of 1964 the treatise, containing approximately 1,000 pages, was distributed by the publisher.

American Law of Mining.—Since the last Institute meeting, two supplements to the *American Law of Mining* have been distributed by the publisher, and a third supplement, which will be distributed this fall, was sent to the printer about July 1st. All of the textual matter is now complete.

Ten Year Index to Proceedings.—In the spring of 1964 the Foundation staff undertook to reindex the nine volumes of the proceedings of the Rocky Mountain Mineral Law Institutes. The index for the tenth volume will be combined with the prior nine volumes and will complete a ten year index to the proceedings, to be published this fall.

Gower Federal Service Publication of Past Decisions.—This project, which was begun in 1961, was completed in the fall of 1963, and complete sets of the past decisions have been distributed to all subscribers.

Scholarships.—Scholarships of \$200.00 each were awarded to students at eleven of the member law schools.

Index to Mining and Oil and Gas Law.—Several years ago the University of Wyoming Law School, under a research grant from the Foundation, compiled an index of all legal periodical literature concerning mining and oil and gas law. During the past year the Research Director of the Foundation completed the editing of the index, and it is now being printed and will be ready for distribution soon.

Research Center.—The material in the Research Center has been revised and new indices for this material have been prepared and distributed to attorneys throughout the Rocky Mountain area.

Since this revision, use of the material in the Center has increased very materially.

Electronic Data Retrieval Program.—During the past year the Foundation has contributed \$2,000.00 to Denver University's program for storing decisions of the Interior Department electronically, and is it continuing to cooperate with Denver University College of Law and the Denver University Computer Center with the hope of developing ultimately a practical method of using the computer for researching decisions of the Department of the Interior.

Perhaps the project of most importance to the members of the Bar generally in Nebraska, is a study of water law. An allocation of \$10,000.00 has been made to a committee undertaking this study and while the details of the plan are not, as yet, worked out, such a program can be of extreme value to all of the lawyers in all of the states which are members of the Rocky Mountain Mineral Law Foundation. There is nothing in the field of legal research that could benefit more of the interests in the Middle West.

The annual institute for the year 1965 will be held at the Law Center of the University of Denver. In 1966 it will be held on the campus of the University of Colorado. These institutes provide a wonderful opportunity for members of the Bar to combine a mountain vacation with an institute that all will find extremely interesting.

Our present Executive Director, Glen E. Taylor, is doing a remarkable job of continuing the excellent work of the Foundation and has a staff competent to carry on the program.

Incidentally, at the institute held in Salt Lake City in July, I was named as President-Elect to take office in July of 1965. The job will be quite a challenge and I will do my best not to bring discredit upon the Bar of the State of Nebraska.

Paul L. Martin

CHAIRMAN McCOWN: Next is the report of the Committee on World Peace Through Law, Joseph Tye, chairman.

REPORT OF COMMITTEE ON WORLD PEACE THROUGH LAW

Joseph C. Tye

Mr. Chairman, Gentlemen: This is a special committee, the principal purpose of which is to cooperate with the American Bar Association Committee on World Peace Through Law, of which Charles Rhyne is chairman.

Many people have been heard to say that we in Nebraska are perhaps not interested in this committee, but I challenge your thinking to the fact that we are. In times of war we furnish our fair percentage of men to fight, and I think in times of peace we ought to have just as fair and reasonable a percentage interested in it.

This is a most admirable program, and if the profession in this country can bring about some consideration and settlement of world affairs in this manner rather than by combat, certainly the profession will be entitled to stand high.

This being a special committee, Mr. Chairman, I move the adoption of the recommendation of the committee that the committee be continued.

CHAIRMAN McCOWN: Is there a second?

JOHN E. NORTH, Omaha: I'll second the motion.

CHAIRMAN McCOWN: Is there any discussion? As many as favor the motion will say "aye"; opposed the same. The motion is carried.

[The report of the committee follows.]

Report of the Special Committee on World Peace Through Law

Your Committee on World Peace Through Law has continued to receive information from the ABA committee and has endeavored to cooperate in the program of the ABA committee by making the information available to members of this Association and to publicity agencies.

The conference held in Athens, Greece, in 1963 adopted four steps toward establishing world peace through law.

1. A world center.
2. A global work program.
3. Adoption of general principles.
4. A general proclamation.

A temporary World Peace Through Law Center has been established at 400 Hill Building, Washington, D.C., 20006. Bulletins are being prepared and mailed monthly. The United Nations International Law Commission met on May 11, 1964, in Geneva. A conference was addressed by representatives from several countries; officers of the commission were elected; and ninety-five proposed committees were agreed upon to work in various fields of the law with every country participating in the world peace movement.

The permanent World Peace Through Law Center is to be established and memberships are now available ranging from \$10.00 per year to \$100.00 per year. Complete information may be obtained from the Center's temporary headquarters, 400 Hill Building, Washington 6, D.C. Charles S. Rhyne, Esquire, is chairman of the ABA committee.

The International Law Commission met during July of this year, considering principally the invalidity and termination of treaties. It is proposed that this Commission meet for a total of twelve weeks each year, eight in the summer and four in the winter.

As a part of this program, a conference on trade development was held in June, which conference was attended by delegates from 119 countries. The conference is to convene at intervals of not more than three years. At the meeting this year, the conference approved general and special principles governing trade relations and policies and adopted recommendations relating to international commodity arrangements and preferences. The conference also recommended the adoption of an international convention governing the transit rights of the land-locked countries for trade purposes.

Through this endeavor, every effort is made to bring about a better understanding between the nations of the world in the hope that the basic objective may be reached, i.e., World Peace Through Law.

This is a special committee and it is recommended that it be continued for the purpose of receiving information and cooperating with the ABA Committee on World Peace Through Law and for the purpose of affording the members of this Association direct contact with this world-wide endeavor.

Joseph C. Tye, Chairman
Wilber S. Aten
LeRoy E. Endres
Margaret R. Fischer
Robert G. Fraser
Frank C. Heinisch
Norman M. Krivosha
Francis J. Melia
Joseph R. Seacrest
Lawrence I. Shaw
V. J. Skutt
Harry A. Spencer
Antonia F. Tavaréz
Joseph T. Votava

CHAIRMAN McCOWN: Next is the report of the Committee on Joint Conference of Lawyers and Engineers. Mr. Francis L. Winner is chairman. The report is going to be submitted by Mr. Dean Kratz.

REPORT OF COMMITTEE ON JOINT CONFERENCE OF LAWYERS AND ENGINEERS

Dean G. Kratz

This is a special committee which was formulated two years ago with the assigned task of drafting and adopting an engineering-legal interprofessional code.

After two years the committee has adopted and is presenting to this group such an interprofessional code, which has already been adopted by the Professional Engineering Society.

The proposed code is included in the report of the committee on page 17. I won't read it or summarize it. It is enough to say that it presents recommended conduct between engineers and lawyers in their relationships with each other.

The committee has two recommendations to make to this group: (1) That they adopt the Engineering-Legal Interprofessional Code; and (2) inasmuch as this was the sole assignment of the committee that the committee be dissolved.

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

ALFRED W. BLESSING, Hastings: I second the motion.

MR. COHEN: Mr. Chairman.

CHAIRMAN McCOWN: Mr. Cohen.

MR. COHEN: Since the committees have adopted this Code, wouldn't there be a necessity for continuance of the committee, like we have with other interprofessional groups, like the doctors and lawyers?

MR. KRATZ: Well, I think there might be, Harry, although when the committee was set up it had this assignment and that was all.

CHAIRMAN McCOWN: It would presumably be a new committee under that situation, but I would suggest that we might amend the motion to discharge the committee with the thanks of the Association.

Is there any further discussion? As many as favor the motion will say "aye"; opposed the same. It is adopted.

[The report of the committee follows.]

**Report of the Committee on Joint Conference of Lawyers
and Engineers**

The committee submits herewith as a part of its report a proposed engineering-legal interprofessional code. It is the recommendation of the committee that this code be approved and that the committee be discharged.

F. L. Winner, Chairman
Dean G. Kratz
R. R. Perry

**ENGINEERING-LEGAL INTERPROFESSIONAL CODE
PREAMBLE**

It is recognized that a substantial part of the practice of engineering and of law concerns the problem of persons who need the combined services of both the engineer and lawyer. The engineer as a technical advisor, and the lawyer as the legal advisor, frequently find they have a joint interest in serving the same client. This joint interest is magnified when the attorney at law serves as an advocate for his client whether he be plaintiff or defendant in any claim or advisory proceeding in court.

It is with the public's interest in mind that proper principles concerning the functions of the engineering profession in relation to the practice of law, and the functions of the attorneys at law in relation to the engineering profession, be set forth and agreed upon by both the Nebraska Society of Professional Engineers and the State Bar Association of Nebraska. Both the profession of engineers and the profession of law are obligated to respect and honor each other. Either profession should not tolerate incompetency, corruption, dishonesty, or unethical conduct on the part of any of its members. On the other hand, each profession should strongly support and encourage a high standard of ethics consistent with public interest.

Where the services of the two professions meet and overlap in the serving of the interest of a single client, it follows that the service to be given to the client by one profession may be more effective and co-operative if its workings, philosophy, ethics, and province are fully understood by the other profession. Both pro-

fessions will profit by a greater mutual understanding. Therefore, to better serve their clients, to increase the benefits to the public, and to develop a mutual understanding, the following inter-professional Code of Co-operation is adopted by the Nebraska Society of Professional Engineers and the State Bar Association of Nebraska.

1. *Engineers and the Practice of Law.*—The engineering profession recognizes and agrees that it has an obligation and duty not to engage in the practice of law. It recognizes that the rules of practice do not permit an attorney to accept employment by or through an intermediary. The engineer, or his representatives, should not deal or settle directly with any client represented by an attorney without the consent of the attorney. The engineer may properly interview witnesses or prospective witnesses, so long as they are not parties to the action, without the consent of opposing counsel or parties. At no time should the engineer or his representatives advise a client to refrain from seeking legal advice or against the retention of counsel to represent his interest. An engineer may be permitted to fill in the blanks of any forms previously drafted by counsel, but he is forbidden to draw or draft any legal instruments either in part or in their entirety. Consequently, the engineer should refuse to draft a resolution for a municipality or a corporation, to draft a contract for any client, or to draft any instruments necessary to obtaining a bond issue. Similarly, the engineer should not attempt to advise his client as to his legal rights in any controversy or any project which would include, among others, the situations above mentioned.

2. *The Attorney and the Practice of Engineering.*—The legal profession recognizes that the engineer is primarily concerned with the engineering technicalities of any given project. The attorney at no time should attempt to advise or counsel a client concerning the engineering technicalities of any project whether it be actual construction or a study made prior to construction. The attorney should look to the engineer to obtain the technical facts and the professional opinion or conclusion that may be ascertained therefrom. It is recognized that it is becoming increasingly necessary for attorneys to consult with engineers in order to properly prepare a defense for a law suit or for their technical advice in other legal proceedings. It is to be understood, however, that under our system of jurisprudence the lawyer is the advocate for his client and his client's cause. Ours is the "adversary system." The lawyer does not and cannot properly and ethically represent both sides to a dispute. It is our American belief that the truth and facts can best be ascertained and justice most satisfactorily administered to

each client in a dispute at law, if he presents his point of view and all the facts which tend to prove his case separately before a neutral person, a judge, jury, or administrative official, who can properly weigh the testimony and ascertain the facts under existing law.

3. *Interprofessional Conference.*—Considerable misunderstanding can be avoided by an interprofessional conference between the engineers and the attorneys early in a project or in litigation. The conference is extremely helpful in deciding the province of each profession in a project or in gaining a detailed and full understanding of the matters involved in the litigation. Such conferences should be held at a time and place mutually convenient for both the engineer and the attorney. If the conference concerns an engineering project, the engineer and the attorney should co-operate by outlining the respective steps that each will take and then follow up by coordinating their efforts towards completion of the project. If the conference concerns pending litigation, the engineer should be ready to fully disclose all the facts in the case and the attorney should be ready to indicate the matters about which the witness will be interrogated. If the attorney plans to serve a subpoena on the engineer he should notify him, if at all possible, in advance of the actual service. While the administration of justice by the court and various administrative bodies cannot always accommodate the litigants, attorneys, or witnesses, however, if it is at all possible, the attorney should notify the engineer in advance, when he is to testify and to keep him advised of any changes in this respect as they arise. The engineer, of course, should always be prompt in his attendance in court and before the various administrative bodies unless circumstances are such that they would actually constitute a legal excuse.

4. *The Engineer as a Witness.*—The engineer, when testifying in court or at any administrative hearing, should at all times maintain the honor and dignity of his profession. His answers to questions should be concise and objective. It is recognized, of course, that many times questions cannot be answered by "yes" or "no" and that the answer must be qualified. The engineer should at all times try to put his testimony in a language that would be understandable to the jury of laymen. The engineer as a witness should so state if he does not know the answer to a question. He should not attempt to answer by speculating, conjecturing, volunteering testimony, or by giving answers not responsive to the question propounded.

5. *The Attorney's Examination of the Engineer.*—The attorney, when examining or cross examining the engineer as a witness,

should prepare and propound his questions in such a form and manner as will permit a clear understanding and a forthright answer. He should co-operate with the engineer by minimizing, as far as practicable, the time required for the engineer's attendance in court. The attorney should avoid all questions which would badger or browbeat the engineer. It is to be expected that should an attorney use such questions the court or administrator will not tolerate such tactics.

6. *Technical Reports by the Engineer.*—The engineer must appreciate the importance of promptness in providing the attorney with technical information, particularly if there is pending litigation of extreme importance to the legal rights of the client. A correct, accurate technical report oftentimes makes possible the settlement of the case out of court to the mutual satisfaction of the parties involved in the litigation. A delay in giving such a report may prejudice the client's opportunity to make a proper settlement. The engineer is not to be required to give a technical report concerning a client except upon proper authority. The attorney, when requesting a technical report, should clearly specify the information desired and indicate whether or not it is to include opinions and conclusions of a technical nature. The attorney should always strive to give the engineer adequate time in which to prepare a comprehensive report in order that a satisfactory result may be obtained.

7. *Compensation for Services of Engineers.*—The engineer is entitled to charge accepted and going rates as compensation for his professional services after they have been rendered. The engineer is also entitled to require that satisfactory arrangement be made for the payment of his services in furnishing any reports, attending any conferences, making investigations, or rendering any other professional services when requested by an attorney. This right may be waived by the engineer when, in his judgment, the person or corporation involved is unable to make payment. The attorney should make the necessary arrangements and should take the necessary steps to see that an engineer who testified in legal proceedings as an expert legal witness is adequately compensated for his services. The charges that the engineer makes for reports, conferences, and testimonies should never be made contingent upon a recovery. The fact that a claim has been made or a law suit is pending should not in any way influence the fee charged by the engineer as an expert witness. The engineer's fee for such services should be consistent with the reasonable fee schedule of the locality or community for like services and a like amount of time spent by the engineer.

8. *Attorney Fees.*—Fees set by the attorney for representing a client should be consistent with the reasonable fee schedule of the locality or community. Fees should be based on the importance of the legal work, the expenses involved, and the time consumed in rendering the service. Under no circumstances should the engineer attempt to estimate or set the fee to be paid to the attorney as compensation for his professional services.

9. *Interprofessional Understanding.*—Both the engineering and legal professions are essential to our present day society. The aims of both professions in that regard are essentially parallel. Each of our professions has a duty to develop an enlightened and tolerant understanding of the other in the best interest of the public as well as the reputation of the two professions. By this joint action in adopting this Interprofessional Code of Co-operation, the members of each profession seek to eliminate misunderstanding and at the same time to develop the honor and dignity of the two professions.

It is the hope of the Nebraska Society of Professional Engineers and the State Bar Association of Nebraska that by this joint code of interprofessional co-operation, the two professions will join hands in increased understanding and co-operation.

CHAIRMAN McCOWN: Next is the report of the Committee on Law Office Management, Howard Moldenhauer, chairman.

REPORT OF COMMITTEE ON LAW OFFICE MANAGEMENT

Howard H. Moldenhauer

Mr. Chairman: During the past year members of this committee have kept fairly close contact with activities in the economics of the law and law office management field, both as conducted by the Standing Committee on Economics and Law Practice of the American Bar Association and as engaged in in other states, and we are studying many of these programs which have been initiated in other states in this field.

I would particularly point out the comment in our report that the committee would welcome inquiries from any local bar associations that might be interested in obtaining speakers or panel speakers to discuss topics on law office management. This is a fairly new field, really, and many members of this committee are quite knowledgeable in many of the aspects of law office management.

It is, therefore, the recommendation of the committee that it be continued for another year.

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

M. M. MAUPIN, North Platte: I second the motion.

CHAIRMAN McCOWN: Any further discussion? As many as favor the motion say "aye"; opposed the same. The motion is adopted.

The Chair would also want to comment that Mr. Moldenhauer, who has just made the report, was also the individual in charge of the Law Office Economics Institute presented at the Kellogg Center about three weeks ago, which was an extremely successful undertaking. You did an excellent job with it, Howard.

CHAIRMAN McCOWN: We have now reached a point at which the procedure of this House is somewhat different than it has been in the past. Those of you who have been on the House for more than one term at least or for one preceding term will recall that we used to have a Friday session of this House at which we received reports of the sections, and we had to try to get a quorum together on Friday afternoon after the conclusion of the meeting in order to have the final session of the House. This year we have altered that. The reports of the sections are now made, and will be made at this time.

The first is the report of the Section on Real Estate, Probate and Trust Law, Barney Pierson, chairman.

REPORT OF SECTION ON REAL ESTATE, PROBATE AND TRUST LAW

C. M. Pierson

Mr. Chairman, Members of the House of Delegates: The Section on Real Estate, Probate and Trust Law had no section meeting during the past year because of the regional meeting. It was concluded by our section, as well as by many of the other sections, that because we were having the regional meeting it would be difficult to have a section meeting. I am sorry that we didn't have a section meeting in spite of the fact that we had the regional meeting because this particular section deals with many things that ought to be continuing, such as the title standards and that type of thing.

The only meeting we have had is the meeting provided for the selection of the membership of the Executive Committee. The members of the committee for the ensuing year will be hold-overs, George Skultety, Albert Reddish, C. M. Pierson, Frank Mattoon; and new members George Farman of Ainsworth and John R. Cockle

of Omaha—these two members to replace John Fike of Omaha and Fred Richards of Fremont.

The officers have been selected and they are: C. M. Pierson, chairman; Al Reddish, secretary; and Frank Mattoon, vice chairman.

CHAIRMAN McCOWN: In the absence of objections the report will be received. The Chair might add that perhaps because of the indicated activity of this section for last year, this noon they were designated as in charge of the program at next year's Bar meeting. So next year the Real Estate and Probate Section will be in charge of the program at the annual meeting.

Next is the report of the Section on Corporations, Mr. Bert Overcash, chairman. Is Bert here? Is a member of the Executive Committee of the Corporation Section here?

Next is the Tort Law Section, Bob Mullin, chairman. Mr. Schatz will make the report on behalf of that section.

REPORT OF TORT LAW SECTION

Albert G. Schatz

Mr. Chairman, our Section on Tort Law, of which Mr. Mullin was chairman, was not called upon to perform any duties this year so we have nothing to report other than the fact that we have selected as chairman for the coming year Mr. Bernard B. Smith of Lexington, Nebraska. That is all I have to report.

SECRETARY-TREASURER TURNER: Did you elect any new members to the Council?

MR. SCHATZ: No sir. The members that are now on will all be hold-overs, if that meets with the pleasure of the House.

CHAIRMAN McCOWN: In the absence of any objection, the report will be received.

Next is the report of the Section on Taxation. Jack Stewart is chairman. Bob Veach will be reporting for that section.

REPORT OF SECTION ON TAXATION

Robert R. Veach

Mr. Chairman, I am pinch-hitting for Jack, who cannot be here.

The report of our section is as follows: The section held its annual Institute on Federal Taxation in December 1963. The insti-

tute was held in Ogallala and in Omaha, and attendance was excellent at both places.

R. D. Moodie of West Point and Leo Eisenstatt of Omaha were elected to three-year terms on the section's Executive Committee, to succeed the two members whose terms expired. Members whose terms have not expired are Albert Reddish, Robert Veach, Roger Dickeson, and John W. Stewart.

At the midyear meeting of the section, which was held in Lincoln in June, the resignation of Roger Dickeson as a member of the Executive Committee was accepted, and John Gradwohl was elected to serve the balance of his term.

About twenty-five lawyers who have been active in the work of this section were invited to serve on this Special Planning Committee for the 1964 Tax Institute. They met in Lincoln with the Executive Committee in June and decided to hold the institute in one city only this year and to bring in one or more nationally known authorities on federal taxation as speakers.

The 1964 institute will be held at the Prom-Town House Motor Inn in Omaha on December 10 and 11. In addition to papers and discussions on 1964 changes in the Internal Revenue Code, new developments during the year in income, estate, and gift taxes, and the popular Twenty Questions Panel presented by leading members of the Nebraska Bar, the institute will also feature Joseph Trachman, an eminent tax lawyer from New York City, and Rudy Herzog, Associate Chief Counsel of the Internal Revenue Service in charge of litigation, from Washington, D. C.

The Executive Committee and the Special Planning Committee voted not to join with the accountants in presenting a tax meeting similar to the 1963 Great Plains Tax Institute but instead to work with the bar associations of Iowa, Missouri, Kansas, and perhaps other states in an effort to develop a multi-state tax institute for lawyers.

The Executive Committee and the Special Planning Committee suggested that the Executive Council of the Nebraska State Bar Association be asked to consider establishing dues at \$1.00 per year for membership in the Tax Section, and that a section membership roster be maintained in the office of the Secretary of the Nebraska State Bar Association.

CHAIRMAN McCOWN: In the absence of objection the report will be received.

Next is the report of the Section on Practice and Procedure. Mr. Warren Urbom is chairman. Is any member of that section ready to report?

If not, we will pass to the report of the Junior Bar Section. Jim Hewitt is the chairman of the Junior Bar Section.

REPORT OF JUNIOR BAR SECTION

James W. Hewitt

The Junior Bar Section has completed a year which, in our opinion, has been both successful and stimulating. As we carried out our program of work for the year we have been most willing recipients of a great deal of assistance from George Turner and Dean David Dow, and I wish to acknowledge their efforts at this time.

The Executive Committee of the section was gratified at the response to the third annual Bridge-the-Gap program held at the Nebraska Center in Lincoln on June 17, 18, and 19. Fifty-three registrants attended, and the expenses of the program were defrayed by the registration fee so that it was not necessary for Bar Association funds to be tapped for any deficit. The two and one-half day program stressed the practical aspects of the active practice and served to give the new lawyers a good grounding as they embarked upon their legal careers. Those firms which had engaged University of Nebraska graduates were solicited to pay their new associates' registrations, and the response from the bar in this regard was most encouraging and no doubt contributed significantly to the increase in attendance. Harold L. Rock of Omaha and John C. Gourlay of Lincoln were in charge of the program and arrangements.

On October 9 and 10 the Junior Bar Section presented the eighth annual institute for practicing attorneys in conjunction with the University of Nebraska College of Law. Howard H. Moldenhauer of Omaha was in charge of the program, which dealt with "The Economics of the Practice of Law and Law Office Management." The institute, held at the Nebraska Center in Lincoln, was attended by over 150 attorneys and was enthusiastically received. Three outstanding out-of-state authorities in the field of legal economics were obtained for the institute through the cooperation of the American Bar Association's Committee on Legal Economics.

The Junior Bar Section is continuing to give its attention to high school career day programs in an effort to encourage worthy and talented students to seek a career at the bar.

The section has encouraged its members to volunteer for service on Nebraska State Bar Association committees, and both Floyd Wright and Harry Cohen have been extremely cooperative in appointing Junior Bar members to committee posts. I would add parenthetically that Mr. Cohen's appointments have not been made as yet but we have received every indication that this will be done. Virtually every State Bar committee now has at least one Junior Bar member.

Throughout the year the section has cooperated with the American Bar's Junior Bar Conference, and several members are serving on national committees. James Knapp of Kearney is currently the Eighth Circuit representative on the Executive Council of the Junior Bar Conference.

The section held its annual meeting on October 9, at which time Claude E. Berreckman of Cozad and Alfred J. Kortum of Gering were elected to the Executive Committee of the section, replacing James W. Hewitt of Lincoln and David B. Downing of Superior, whose terms have expired. The organizational meeting of the Executive Committee, at which the section officers for the coming year will be chosen, is to be held on November 12 at four-thirty o'clock. Report of the election results will be furnished to Mr. Turner's office following the election.

CHAIRMAN McCOWN: In the absence of objection the report will be received and filed. Thank you very much, Jim.

The Chair might add parenthetically that I wish the senior members of the Bar had the energy, the activity, and the interest of the Bar at heart as actively as does the Junior Bar Section.

MR. COHEN: Mr. Chairman, their activities will be noted in the appointments to committees.

CHAIRMAN McCOWN: You now have a public pledge as well as a private one.

MR. HEWITT: Fine!

SECRETARY-TREASURER TURNER: At this time I ask the consent of the House to include in the proceedings of this session of the House whatever report may later be submitted by the Section on Corporations and the Section on Practice and Procedure, and also include the officers of the Junior Bar Section that are to be reported later.

MR. MAUPIN: I so move.

MR. DAVIES: I second the motion.

CHAIRMAN McCOWN: All those who favor say "aye"; opposed the same. Carried.

MR. COHEN: How about the Committee on Joint Conference of Lawyers and Accountants?

SECRETARY-TREASURER TURNER: There was no report.

MR. COHEN: I move it be continued.

CHAIRMAN McCOWN: The motion is that the Committee on Joint Conference of Lawyers and Accountants be continued. Is there a second?

MR. DAVIES: I'll second the motion.

CHAIRMAN McCOWN: All those in favor will say "aye"; opposed the same. Carried.

At this time we have reached the point of presentation of any matters any section or committee wishes to bring before the House of Delegates plus any unfinished business. The Chair is open to any suggestions on any matter of business which any member of the House wishes to raise.

HARRY B. COHEN, Omaha: I was very much interested in the recommendation of the Taxation Committee about the creation of a membership roster of the section and the payment of dues. It has always been a mystery to me, frankly, and I think I have been active in the Bar Association for many, many years, as to what are the qualifications for membership in these various sections and how do people get on as members. There are no provisions in the rules for appointment. It is just voluntary. All you have to do is write a letter to somebody and say "I am going to be a member of this section." I really don't know how it is done. I think something ought to be done along the line of creating a status of membership in the various sections, how one gets on as a member, and whether or not some nominal amount should be charged as dues just to defray some of the expenses. My personal opinion is that I don't think they ought to charge anything. I think your dues to the Bar Association should take care of it. I believe you will find as you go through some of these sections that many become members of several sections, which I think is good, and which is also true of the American Bar Association. But in the American Bar Association, if you recall, you have to identify yourself by sending in a card to become a member of these sections. It is a sort of registration. We have never done this.

Frankly, I don't know how anybody ever got on as a member. It has been a mystery to me.

SECRETARY-TREASURER TURNER: I don't recall the year but the very first year in which this Association met by sections a registration card was passed out to those who attended the programs of the various sections. You will recall in those days each section presented a program at the annual meeting. After that had been done once, no one saw any particular need for it.

I would quite agree with President-Elect Cohen that it would be well, because these people who are interested in the individual sections have no way of making themselves known. They might be potential candidates for the executive committees of the sections. It would be a comparatively easy thing during the course of the next year to mail out cards on which all members of the Association can indicate the sections with which they wish to be identified. If there are special publications applicable to that section, they would of course receive them. If the President-Elect decides to do that, we'll do it!

CHAIRMAN McCOWN: May I suggest it might be appropriate, if Harry has any question about the feeling of the House in connection with the matter, that a motion that the Executive Council be authorized to establish such rules or procedures as may be deemed appropriate for the establishment of memberships of sections would be at least an advisable background for Harry in the work he is discussing. Is there such a motion?

JOHN E. NORTH, Omaha: I so move.

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

CHAIRMAN McCOWN: All in favor will say "aye"; opposed the same. Carried.

Now as to the membership fees part of that, I would suggest that it might be appropriate that the President or the Executive Council be authorized to make recommendations this year as to the membership charges or fees, if any, and bring them to the House the next time. In other words, at the moment I think we are limited under the motion to simply creating membership classifications and rules, but I think it might be appropriate to request a report by the President and the Executive Council to the House at the next meeting as to membership fees for sections. Does anyone want to discuss that?

JAMES I. SHAMBERG, Grand Island: Could that be left to the sections?

CHAIRMAN McCOWN: The thing you probably don't want to do is take action on it at the moment or leave it up to the sections because it is a matter of over-all policy which this House ought to control as to whether or not *any* section is to have membership fees.

As you have heard here today, there are both sides to the issue. Some feel there should be no membership fees; others feel that if you get members without any fees at all you are going to get many people who will say "Put me on such-and-such a section" or sign up for many of the sections—people who are not active at all and don't intend to be. It is a matter that I think should be taken up later after you have had an opportunity to determine it and have a committee more or less investigate the pros and cons of this membership thing and then report to the next meeting of this House.

MR. SHAMBERG: Point of information. I do believe that our rules that we recommended amending today in changing the dues also state that there shall be no dues charged for membership in any section. So it probably should be initiated just the same way as the change in dues was. I think our rules of procedure call for the Executive Council to commence that. Is that not true?

CHAIRMAN McCOWN: I think you are correct that there is a provision in our present rules that there shall be no membership fees for the sections. A recommendation from the Executive Council to the House the next time would give us an opportunity to determine whether a change should be recommended on that.

Unless there is objection, the Chair will regard it as unfinished business to be passed over until next year.

Is there any other business that any member wishes to bring before the House?

MR. DAVIES: Mr. Chairman, did we adopt the report of the Committee on Judiciary? I don't have it checked.

CHAIRMAN McCOWN: Yes sir.

If there is no further business, the Chair expresses his appreciation for your cooperation in moving the meeting of the House as rapidly as you have. You are to be commended for the action which you have taken in getting it through in this fashion. Thank you very much.

The House will stand adjourned until next year or a special call.

[The House of Delegates adjourned at two-fifty o'clock.]

NEBRASKA STATE BAR ASSOCIATION

THURSDAY MORNING SESSION

November 12, 1964

The sixty-fifth annual meeting of the Nebraska State Bar Association, convening in the Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at ten-ten o'clock by President Floyd E. Wright of Scottsbluff.

PRESIDENT WRIGHT: The sixty-fifth annual meeting of the Nebraska State Bar Association will now come to order.

We will open the meeting with an invocation by Father LeRoy E. Endres, Jesuit Counsellor for the Law School of Creighton University. Father Endres:

INVOCATION

Father LeRoy E. Endres, S.J.

O God, Thou hast said, "Happy are they whose way is blameless and who walk in the way of the Lord." Happy are they who observe Thy decrees and who seek Thee with all their heart. Thou hast commanded that Thy precepts be diligently observed. O that we may be firm in Thy ways in keeping Thy statutes, that we may keep Thy laws and do Thou not forsake us. With our lips may we declare all the ordinances of Thy sacred wisdom. In Thy goodness, O God, be propitious to Thy servants in this convention, that we may live by and keep Thy words.

Open our eyes that we may consider the wonders of Thy law, that our souls be consumed with longing for Thine ordinances at all times, that Thy decrees be our delight. Let them be our counsellors. Remove us from the way of falsehood and favor this convention with the knowledge of Thy law. Let Thee, O God, be our portion, for we have sworn that we shall uphold Thy law. May we find Thy favor because we are pledged to uphold the law. Direct our footsteps according to Thy law, and let no iniquity have any dominion over us or our deliberations.

Make Thy face to shine on these, Thy servants, who are to be keepers of Thy law and officers of the law of the State of Nebraska. Grant that we may hate and abhor iniquity, but grant us a love for Thy law. For Thou hast said that there is great peace for those who love Thy law and for them there is no stumbling.

Therefore, O God, we beseech Thee to direct our actions by Thy holy inspirations and carry them forward by Thy gracious

assistance, that every work of this convention may begin from Thee and through Thee be successfully completed, who lives and reigns forever and ever. Amen

PRESIDENT WRIGHT: Now we will have an address of welcome from Francis P. Matthews, President of the Omaha Bar Association. Francis!

ADDRESS OF WELCOME

Francis P. Matthews

Mr. President and Fellow Lawyers: Those of you who have had the good fortune, such as I once had, of attending one of the seminars put on from time to time by the Bar Association of the City of New York may have been impressed, as I was, by the inscription carved into the mantelpiece which I believe is in the main meeting room or lounge of that organization's headquarters building.

I took the trouble to check into the background of that inscription and find that it was a quotation taken from a talk given by Mr. Harrison Tweed when he assumed the presidency of that organization in 1945. You who have seen it will recall that it reads, and I quote: "I have a high opinion of lawyers. They are better to work with, to play with, to fight with, or to drink with than most other varieties of mankind."

Each year, as my years of practice accrue, I find myself a more ardent believer in and supporter of that proposition. It expresses a sentiment which I am sure is shared by all of the members of the Omaha Bar Association, and there are about 500 of us as of now. Each year you do us honor by coming to Omaha for this annual meeting and giving us this opportunity to express appreciation of that honor, and to tell you something about the progress we have made during the past year in our association.

I am not going to take unfair advantage of that opportunity. I am merely going to call your attention to some of the reports which were submitted yesterday to the House of Delegates and to note that in reading those reports you will see reference to some of the achievements we have accomplished during the past year in fields such as lawyer referral, legal aid, and economics of the bar, to name a few, and I cite those reports and that progress simply to emphasize to you our belief that as we become more active in our local bar association programs we become more effective and qualified as an association to help and assist, participate in the programs put on by the Nebraska State Bar Association, and tell you

that it is our desire, and we pledge ourselves as an organization, to assist enthusiastically whenever and wherever we are given the opportunity to do so.

So on behalf of the approximately 500 members of the Omaha Bar Association it is my very great pleasure and privilege to welcome you from out-state Nebraska to Omaha for this sixty-fourth annual meeting of the Nebraska State Bar Association. Like Mr. Harrison Tweed, we feel that you are "better to work with or play with or fight with or drink with than most other varieties of mankind," and I advise you that we are prepared to proceed in whatever one of those departments you select at any time.

Now that we may proceed toward the work which is lined up for us this afternoon and tomorrow, I'll conclude this very formal annual function of the President of the Omaha Bar Association by saying very simply but very sincerely to each and every one of you, "Welcome to Omaha!"

PRESIDENT WRIGHT: Your program states that the response to this address of welcome will be by James F. Begley of Plattsmouth. I am sorry to tell you that Mr. Begley became ill. I understand it is not serious but he was unable to be here today, so I have asked Vance Leininger of Columbus if he would respond to this address of welcome. Vance!

RESPONSE

Vance Leininger

Mr. President, Fellow Members of the Bar Association: I am sure we all regret the circumstances that make it necessary for me to pinch-hit for Jim Begley and we wish him a speedy recovery.

It has been a belief of mine that one of the reasons for our consistently well attended meetings of this Association is the festive atmosphere, and the atmosphere of warm and sincere hospitality that is extended to us every year by our host city, its civic and business institutions, and particularly by the Omaha Bar Association. We have also noted through the years that our ladies have been royally entertained in the course of our Bar Association meetings in Omaha, and you will note from your program that this year is no exception.

So on behalf of the members of this Association and their ladies, it is my privilege to extend to the City of Omaha, its emissaries, and the Omaha Bar Association our sincere thanks and appreciation for another royal welcome, leading to another two

days of not only hard work but comradeship and fraternization. I think, fellow members of this Association, this should be your opportunity to demonstrate the appreciation of the entire Association, and will you join me in doing so at this time.

ADDRESS OF THE PRESIDENT

Floyd E. Wright

Next on the program is the President's Annual Address, required by the bylaws of the Association. What I will now say should be so considered. I wish, however, only to call your attention to the great accomplishments of the Nebraska State Bar Association, to the activities and programs that must be carried on in the future and to the necessity for further revenue for the Association.

During the past several years there has been a constant improvement in the status of the legal profession in Nebraska and elsewhere. The lawyer has more business and generally is more adequately compensated for his services. He makes more money. His public relations are better. He is more highly regarded in his community. He has reason to be proud of his profession. This has come about because of a constant improvement in the administration of justice and because of the better qualifications of the lawyer to render service to his clients and to the public.

Some of this improvement has been brought about by the better education given a student by the law schools. The law graduate is now better qualified to engage in the practice of law and becomes a competent and successful lawyer in a much shorter time after his graduation. Principally, however, the improvement in the administration of justice has been achieved because of the activities of the various bar associations, the American Bar Association, the state bar associations, and numerous local bar associations. Lawyers have become more interested in the activities of the bar associations in the improvement of the administration of justice, in the quality of legal services rendered, and in the improvement of their public relations. They have been willing to give much of their time, not only for the improvement of themselves, but to carry on the activities of the bar associations for the improvement of the profession.

The Nebraska State Bar Association has been one of the leaders of the state bar associations. It was one of the first to become integrated. It early commenced programs of continuing legal education. It was probably the first of the state bar associations to take these programs throughout the state in order to reach all the

lawyers. After many years of effort, the Association has accomplished the adoption in Nebraska of the Merit System for the Selection of Judges. This has been a goal of most state bar associations but has been accomplished by only a few. Bar Association meetings, clinics, and institutes are well attended. A large number of the state's lawyers participate in Bar Association affairs. I cannot refrain from saying at this time that much of the success of the Nebraska State Bar Association has been due to George Turner who, for many years, while acting as our Secretary and Treasurer, has actually been the director of the association.

During each of the last three years the Association has spent more money than it has received in dues. Fortunately there had been a surplus so that the Association did not go into debt, but this surplus has now been used. During the coming year the activities of the Association must be either curtailed or the dues must be increased.

The Executive Council of the Association at its meeting in September unanimously voted that, subject to the approval of the House of Delegates, the Supreme Court should be asked to amend the rules governing the Association so as to provide for an increase in membership dues. I might say that yesterday, at the House of Delegates meeting, this was approved without a dissenting vote.

I would at this time like to tell you why this seemed necessary. The increase to be asked would not make the dues out of line with dues paid by members of other state bar associations.

Perhaps the most important activity of the Bar Association is its program of continuing legal education. This year the Committee on Continuing Legal Education caused a survey of the members of the Association to be made in order to determine the wishes of the lawyers throughout the state as to the kind of programs that should be provided. This survey, the result of which is shown in your program, should be of great aid to the Committee on Continuing Legal Education as well as to many of the other committees. It shows, among other things, that the lawyers of the state are interested in many of the areas of the practice of law which have not heretofore been touched upon in the past clinics and institutes. The program of the Committee on Continuing Legal Education should not be curtailed; it should be broadened and enlarged.

This year the annual tax clinic can be held only in Omaha by reason of the lack of funds. In past years it has been held in two and three different cities of the state. Many lawyers out-state depend upon this clinic to keep abreast of federal tax questions

and will, this year, be compelled to travel to Omaha in order to participate in the clinic.

There are local bar associations in most of the judicial districts of the State of Nebraska and also many county and city bar associations. These associations meet frequently, generally once a month. Some educational program is generally provided at such meetings. The State Bar Association should be able to supply such programs. There could be no better way to take programs of continuing legal education to the lawyers of the State of Nebraska. This year's report of the Special Committee on Law Office Management states: "The committee would welcome inquiries from any local bar association interested in obtaining speakers or programs on the subject of law office management." I am sure that other state bar committees would likewise be willing to supply speakers and material for educational programs to local bar associations throughout the state. Through this method programs on many subjects could each year be brought to the members of our Association, many of whom are often unable to travel great distances for such programs.

The Nebraska Legislature will be in session shortly after the first of the year. Legislation has always been a problem, as well as one of the principal activities of the Bar Association. There is no group as well qualified as the lawyers, by education and experience, to know the legislative needs of the state. We used to feel that the lawyers had little or no influence with the legislature, but because of the fine work of the Association's Committee on Legislation and other committees this is no longer true. Probably no other group now has as much influence.

Many of the reports of the committees of the Association contain legislative proposals and it is necessary that the Association pay attention to all bills introduced in the legislature. The Committee on Legislation has appointed subcommittees in each of the legislative districts. Each is composed of prominent lawyers in the district. All proposed legislation will be closely watched by the committee and all legislators contacted by members of the committees with respect to important matters in which the Bar Association is interested. At past sessions of the legislature this has taken a great deal of the time of the chairman of the Legislative Committee and of the committee members, more time than these men should be asked to give for the Bar Association. In many states the state bar association hires a lawyer to look after legislative matters for the association during the session of the legislature. The Nebraska State Bar Association should be in a financial condition to do the same, so as to relieve the Legislative Committee of the too heavy burden now placed upon it.

The Nebraska State Bar Association has been very proud of its accomplishment in securing the adoption of the Merit System for the Selection of Judges in the state, and has good reason to be. This, however, was not the entire answer to the problem of obtaining the best qualified persons for judges. Unless the positions are made attractive to qualified lawyers by adequate salaries and an adequate retirement system, much of the expected benefit from the Merit System will be lost. The Committee on Judiciary must always remain active. It must make every effort to see that the Merit Plan is successful and must work at all times for more adequate compensation for our judges.

In recent years the Special Committee on Law Office Management and the Committee on Economics of the Bar have been very active. The Committee on Law Office Management participated with the Junior Bar Section in a highly successful institute held in Lincoln only last month. A special committee of the Omaha Bar Association is preparing a secretary's manual which can be of great value to all lawyers. The Committee on Economics of the Bar has this year made a study of various advisory fee schedules and has suggested a minimum fee schedule for the Nebraska State Bar Association. If adopted, and it was adopted yesterday, this schedule will be of great benefit to the lawyers throughout the state. The State Bar Association should have funds with which to print and distribute to all its members this secretary's manual and the minimum fee schedule.

The Committee on Public Service has done outstanding work during the past year, particularly with respect to Law Day, U.S.A. Law Day, U.S.A. was instituted by the American Bar Association in 1957 and already has become a very important day. The program does much to bring respect for law and for the courts.

This committee has instituted a program of awards to increase public awareness of the legal profession and its service to the public. These awards will be made at the annual dinner this evening, one to a member of this Association in recognition of outstanding contributions to the furtherance of public understanding of the legal system and confidence in the profession, and one, a medal of appreciation to an individual not a member of the Bar for outstanding service in helping to create a better understanding of the legal profession and the system of law and justice within which it operates. The budget of this committee is substantial but the money could not be better spent for the benefit of the Nebraska State Bar Association. The program of this committee should not be curtailed but should be enlarged.

The committees on inquiry, appointed by the Supreme Court for the various judicial districts, and the Committee on Unauthorized Practice of Law are kept busy throughout each year. It is necessary that these committees function for the protection of the public from both those who are not lawyers and not qualified to render legal services, and from those lawyers who lack the ethical standards required of lawyers. Many complaints come to these committees and it is necessary that the members of the committees spend considerable time in the investigation of these complaints. Many times the complaints are so complicated, or require so much time in investigating, that it becomes a great burden upon the committee members. In the past the State Bar Association has, on occasions when it seemed necessary, employed investigators for the benefit of these committees. These committees should be able to feel free to call upon the State Bar Association for help in the investigation of those complaints, made to them, which require extensive investigation. The State Bar Association should have ample funds to give this help to the committees when called upon.

I have mentioned only a few of the committees, but all of the some thirty committees of the Association render essential service to the Association and to the lawyers of the state. The activities of none of the committees should be curtailed, but all should be encouraged to expand their activities.

The State Bar Association of every state has about the same problems and similar committees. The American Bar Association has committees similar to all of the committees which we have in our Association. These committees are staffed by prominent lawyers throughout the United States. There are several Nebraska lawyers now serving on committees of the American Bar Association. The American Bar Association makes great effort to coordinate the work of its committees with those of the state associations. Conferences of state bar presidents are held twice each year. Programs are provided by all of the American Bar Association committees each year at its annual meeting. The American Bar Association can be, and is, of great value to the state association. Each state committee can learn from the experiences of similar committees of other states, thus making its work easier and more efficient. Much material for the various committees of the state bar associations is available from the American Bar Association. The Nebraska State Bar Association should be able each year to send certain of its committee chairmen to the annual meeting of the American Bar Association at the expense of the Association. In this manner, not only would the chairman be greatly helped in planning and carrying on the activities of his committee, but the

Nebraska Bar Association would also make a substantial contribution to the American Bar Association and to the bar associations of other states.

Each year it seems that there are further activities required of the Association. The Committee on Procedure this year has recommended the adoption of Pattern Civil Instructions in Nebraska. This has been an activity of a good many of the state bar associations, and such instructions have been adopted in several of the states. To obtain such Pattern Instructions requires a tremendous amount of work upon the part of the Bar Association and the lawyers throughout the state. I am advised that in the states where Pattern Instructions, in civil cases, have been adopted, the lawyers are quite well satisfied with them. It has resulted in lessening the work of both the lawyers and the judges in the trial of civil cases. It has speeded the trials and lessened the number of appeals and has thus brought about an improvement in the administration of justice.

Several recent decisions of the Supreme Court of the United States have had the effect of handicapping the law enforcement processes. These decisions are, no doubt, correct and necessary to protect the constitutional rights of the citizens. These decisions, coming at a time when crime in the United States is on the increase and when there is much talk of moral decay, cause a serious problem, a problem which most certainly should be considered by all state bar associations. There is no one else, other than the lawyers, capable of coping with the problem. Perhaps we in Nebraska need a new criminal code. The American Law Institute has prepared a model penal code which is a monumental work. The Nebraska State Bar Association should make a study of the need in Nebraska for a revision of the criminal code. Certainly, the lawyers should be able to cope with this question and to bring about a better enforcement of the criminal laws.

Also, since the decision of the Supreme Court in the *Gideon* case, the bar associations of all states are concerned with the problem of supplying the indigent person, charged with crime, with counsel. Little has been done with regard to this question in Nebraska. Many of the local bar associations, however, are vitally concerned with the question, particularly those in the counties where there is not a public defender. Some plan must be worked out whereby it can be assured that all persons, charged with a serious crime, can have legal advice and counsel from the time they are first charged with the crime.

I have enjoyed very much being your President during the past year. I will, however, be glad to turn over the office to Harry

Cohen, who has worked long and hard for the Association. He has tremendous energy and I am sure he will have the support of the lawyers. Under his administration I am sure there will be a continued improvement in the administration of justice in the state and that we as lawyers will become better able to serve our clients and the public.

We will next have the report of the Secretary-Treasurer, George Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Your President has pretty well made the Secretary-Treasurer's financial report because his description of the financial condition of the Association is correct. I can only add that the books of the Association have been audited as of the close of the fiscal year, August 31, by the firm of Peat, Marwick, Mitchell & Company of Lincoln, and they submit the following report:

We have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the year ended August 31, 1964. 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 considered necessary under 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, 1964.

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, 1964, 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.

There follows a detailed statement of all receipts and expenditures of the Association during the year covered by the audit, and that detailed report will be published in the proceedings of this annual meeting.

PRESIDENT WRIGHT: Next is the report of the Executive Council, which will be quite brief.

REPORT OF EXECUTIVE COUNCIL

Floyd E. Wright

The Executive Council has carried on the routine duties during the year. The reports of all committees are contained in your program and give you a good idea of what has been done by the Association during the past year.

I think you should all be interested in the survey that was made among the lawyers by the Committee on Continuing Legal Education. We expect this to be of great help in knowing how to proceed in the coming years with this program.

During the year the Executive Council cooperated with the American Bar Association in connection with the regional meeting of the American Bar Association which was held in Omaha. One of our members, Robert Mullin, was the chairman of this meeting and did an excellent job. I understand that the American Bar Association officials were very pleased with the program and with the meeting.

The Association joined with a good many other states in the filing of a brief *amicus curiae* in the case of the *Brotherhood of Railroad Trainmen v. the Virginia State Bar Association* for a rehearing in that case but we were unsuccessful.

The President-Elect, Harry Cohen, represented the Association in Washington at the National Forum on Presidential Inability and Vice Presidential Vacancy, which was sponsored by the American Bar Association.

Dean Dow of the University represented the Association at the annual meeting of the American Law Institute.

Paul Martin was again appointed as the Nebraska representative in the Rocky Mountain Mineral Law Institute, a very fine organization of which Paul Martin is now the president.

We, of course, during the year were concerned with an increase in dues, about which I have already talked.

During the year we lost one of our delegates to the American Bar Association by a change in the rules of the American Bar Association which entitled us to only one Association delegate. We had had two for just one year previous to that time.

We were saddened during the year by the loss of one of our members of the Executive Council, Clarence Haley, who for a great many years was very active in Nebraska State Bar Association affairs. His position on the Executive Council was filled by Wendell E. Mumby of Harrison, Nebraska.

I believe that is all I have to report on the Executive Council.

Next on the program is the report of the American Bar Association Delegate, John J. Wilson.

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE**John J. Wilson**

Mr. President and Members of the Nebraska State Bar Association: The American Bar Association today is bigger than it ever has been. In the last ten years the Association has grown from about 50,000 membership to about 118,000 members. Nebraska is represented by more than 50 per cent of its members in the American Bar Association.

As most of you know, and in case you don't know, the American Bar is made up of nineteen sections, which gives every lawyer an opportunity to learn and to work. There are committees from those sections well represented by Nebraskans.

The President of our Association, Mr. Wright, has told you of some of the work of the American Bar Association, and rather than delve into some of the work for next year, since the President of the American Bar Association, Mr. Powell, is going to discuss that this noon, I will leave that to him.

There is going to be a rewrite of the Canons, trying to modernize them, and I know Mr. Wright is going to discuss that today. But the American Bar is trying to work with the local bars of the larger cities, the state bars, and they have held these regional meetings, such as we had in Omaha last May. It gives every lawyer in the country an opportunity to see the workings of the American Bar at not too great a distance to travel. I am sure that anyone who wants to improve his thinking and his knowledge of law by being a member of the American Bar Association has that opportunity. There is a section for any field that you want to work in, whether you attend the annual meetings or not. Every section has a report of what has taken place. One of the greatest investments that a lawyer makes today in his knowledge of law is being a part of and working in the American Bar Association. There are some pamphlets on the table out on the mezzanine that you are welcome to. If you are not a member, there are applications and the boys will be glad to take your application for membership. I am sure it is money well spent.

The American Bar is an organization of lawyers, for lawyers, and working with lawyers, and I am sure that the more you know about it—attend the meetings if you can—you will improve yourself and be more helpful to your clients.

It is a pleasure to report that the American Bar is doing a great job with their Center for Continuing Education in Chicago.

The Committee on Public Service is trying to be very helpful to the different TV programs, trying to straighten out some of the misconceptions of what some people thought might be the law on such shows as "Defenders." They will furnish counsel to any station that wants a program reviewed. In other words, we are trying to display to the public what law is and how the courtroom scenes should be conducted, something different from what they used to be. These scenes on TV were ridicules of court practice. The Public Service Committee is trying to straighten that out.

Also the Committee on Public Service now has a column once a month called "The Family Lawyer" in over 300 large newspapers. They have appeared in our Nebraska papers. I think they help the public realize that they need lawyers instead of being afraid of them.

PRESIDENT WRIGHT: The next order of business is the report of the House of Delegates by Chairman Hale McCown.

REPORT OF CHAIRMAN OF THE HOUSE OF DELEGATES

Hale McCown

Mr. Chairman, Ladies and Gentlemen: The House of Delegates met on Wednesday, November 11, 1964.

The Statement of the President of the Bar Association and the Report of the Secretary-Treasurer were received and approved.

Reports of all committees and sections were received and all recommendations of committees, as made in their reports shown in your program, were approved.

A revised state-wide advisory minimum fee schedule was unanimously approved with specific authorization to local or regional bar associations to modify, alter, or omit all or any portions of the schedule, and with a request to the Supreme Court to modify the rules accordingly.

The House unanimously approved a resolution directing the officers of the Association to petition the Supreme Court for a change of the rules to provide for an increase in annual membership dues for senior active members from \$20.00 to \$35.00; for junior active membership for members admitted less than five years from \$10.00 to \$17.50; and for inactive membership dues from \$5.00 to \$7.50.

The officers were authorized to establish requirements and classifications for section membership in this Association and the maintenance of section membership rolls.

The House approved a resolution authorizing preparation and submission of legislation authorizing a public defender for judicial districts, and also approved a resolution recommending an increase in the number of judges of the Nebraska Workmen's Compensation Court from three to four and other appropriate adjustments to the statutes to implement this change.

The business of the House was concluded, subject to any special call, until the next annual meeting of the House.

PRESIDENT WRIGHT: Next we will have the report of the Judicial Council by Honorable Edward F. Carter, the chairman.

REPORT OF THE JUDICIAL COUNCIL

Honorable Edward F. Carter

Mr. President and Members of the Association: As we reported to you at the 1963 meeting of this Association, the Judicial Council submitted twenty proposed bills to the regular 1963 session of the legislature. All were enacted into law.

The Judicial Council has met from time to time since the last meeting of this Association and has several important matters before it for final action.

While all proposed changes in the law are important, there are three that are of unusual interest. I shall briefly state their nature.

The first is a proposed bill providing for the removal of judges who have become disabled from performing their duties for any reason. We think such a bill becomes more important since the adoption of the Merit Plan for the Selection of Judges. This matter has been in the hands of a subcommittee of the Judicial Council composed of Harry Henatsch, chairman, Flavel Wright and Judge Herbert A. Ronin, members. I have assurances that the report of this committee will be available for the Council at its next meeting.

The second is a proposed bill providing for a post-conviction procedure in criminal cases. This matter was referred to the Council by the Supreme Court for research, study, and report. The Council referred this matter to a committee of the Bar consisting of the following: Judge Herbert A. Ronin, chairman, Richard H. Williams, Henry M. Grether, Joe T. Vosoba, L. F. Otradovsky, Norman M. Krivosha, and Glen A. Burbridge. This committee has filed its report and recommendations with the Council. The report recommends a cumulative procedure in the court where the convict was tried with a right of appeal to the Supreme Court. It provides for the filing of a petition, notice to the county attorney,

and a prompt hearing. In this proceeding the trial court is to determine if the conviction or sentence is void for any reason that cannot be reached by habeas corpus or other provided remedy. An order consistent with the findings of the court is authorized which is subject to review by appeal. The proposed bill will be considered at the next meeting of the Council.

The third proposed bill which I deem worthy of special comment here relates to the appointment of legal counsel at preliminary hearings, the method of payment of legal fees, and related matters. This matter was also referred to the Council by the Supreme Court for research, study, and report. The Council also submitted this matter to a subcommittee selected from the Bar. The committee appointed is: Judge Ralph Slocum, chairman, Paul L. Douglas, Melvin H. Kammerlohr, Edward F. Carter, Jr., William G. Line, Ivan A. Blevins, and Charles Kimball. I have the assurance of the chairman that this committee will have its report and recommendations ready for the next meeting of the Council.

The next meeting of the Council will be held on Monday, November 23, 1964, in the Supreme Court consultation room, State House, Lincoln. The session, as are all sessions, is an open meeting for anyone desiring to express his views on any matter under consideration. We appreciate the work of the lawyers who assist in the work of the Judicial Council. The only compensation they receive is the satisfaction they get from the public service they render to their profession in the improvement of the administration of justice. The problems are not easy to solve and the work unprofitable. They receive too little commendation for what they do. Yet we have never had a member of the Bar reject an opportunity to serve. It speaks well for the profession and earns the gratitude of the Judicial Council.

Again I would like to impress upon you the necessity for sending in your suggestions for constructive improvement of our procedural law. The Judicial Council is largely dependent upon the Bar for suggested changes that are motivated by their experience in dealing with the situations in which our procedural laws seem inadequate.

Now, Mr. President, with your consent I would like to mention a matter outside the scope of this report.

The Judicial Council has been in existence since 1937. During that time we seemed to have gained the confidence of the legislature, in that in the last ten years I don't think we have had a bill proposed by us rejected by the legislature. I like to think that we have built up their confidence by our consideration of these matters

in the public interest, that they know we give them careful attention and that the bills proposed are carefully drawn. We do not want to lose that confidence.

On the other hand, we must reject some things that are proposed, and we do, particularly if they are outside of the matter of procedure in the administration of justice. These men on the Council devote a lot of time to it and they could devote much more. We have felt called upon to refer these matters for the consideration of committees of the Bar to make preliminary research and report. As I have indicated in this report, they have done well and we have been truly helped a great amount by their efforts in this particular field. As the work of this committee broadens out we are going to have to call on members of the Bar more and more, and we hope that members of the Bar will continue to take interest in this particular line of work.

As I say, we have not lost a bill in years. I think it speaks well, not only for the Council but for the lawyers that participate in it. But we don't get the help from the lawyers generally in pointing out things that are not proper in the procedural statutes of this state. The lawyers run into these deficiencies more than we do, and if they will just make it a point to report those things to us for our consideration, where change is needed the Council will certainly give it careful consideration.

We appreciate the help we have had from other members of the Bar, not only in presenting these matters to the Judiciary Committee of the legislature but in other respects as well. We would like to commend those who have participated, and we would like to encourage those who have not, if they are called upon to give us help in this particular field.

PRESIDENT WRIGHT: I notice that next on the program is an announcement as to Group Life Insurance. Mr. Walter Black of the John Hancock Mutual Life Insurance Company.

ANNOUNCEMENT AS TO GROUP LIFE INSURANCE

Walter Black

Thank you, Mr. President. Members of the Nebraska State Bar Association: I represent the John Hancock Life Insurance Company of Boston, Massachusetts, the chief underwriting company for your group coverage. I am happy to say that this year, so far, our claims have amounted to only \$50,000. Unless something happens between now and the end of the year we should—I am making this statement unofficially—expect a good reflection in the dividend structure.

Ordinarily, at this time of the year, we have an open enrollment for thirty days. This year the company and your committee decided to hold that over until next spring, probably the month of June. Prior to graduation from law schools in Nebraska, we expect to extend a series of educational letters on the value of the group coverage. That, then, would also carry an open enrollment for the same period of time.

I have no authority to do this; I can't make the Admirals of the Nebraska Navy; but I certainly can ask each of you to accept the responsibility of assisting in the promotion of the group coverage to the young man, the middle aged man, and those of us who are oldsters. You perhaps have some sons who are in law school now. Begin to talk to them the moment they are graduated, qualified. They can ill afford to pass up the low cost coverage. It is lower, as a result of the group, than any term coverage we can buy with any company. If you haven't sons in law schools, you have neighbors who have, or you know members of the Bar who are practicing in your city. Promote and suggest wherever you have an opportunity. We could well use, your Association could and the company, 200 or 300 more members. Keep that in mind and let's boost the enrollment next spring!

PRESIDENT WRIGHT: Next is the announcement of new officers. Mr. Turner!

ANNOUNCEMENT OF NEW OFFICERS

George H. Turner

Mr. President, Members of the Association: Pursuant to the Constitution, the Executive Council met more than ninety days ahead of this annual meeting and made nominations for President-Elect, a Member of the House of Delegates of the American Bar Association, and a Member-at-Large of the Executive Council.

As you know, your President-Elect, who assumes office tomorrow, is Harry E. Cohen of Omaha.

The President-Elect Nominee is Herman Ginsburg of Lincoln.

The Member of the Executive Council at large is Wendell Mumby of Harrison.

No opposing candidates filed to contest their selection; consequently they are automatically elected as the officers indicated.

PRESIDENT WRIGHT: Last on the program we have a more sobering matter, and I will ask Mr. Robert Beatty to report for the Committee on Memorials.

REPORT OF COMMITTEE ON MEMORIALS**Robert H. Beatty**

Mr. President, Ladies and Gentlemen of the Bar: Since the adjournment of the last annual meeting of this Association and the convening of this meeting, God in His infinite wisdom has taken from the membership of this Association, forty-eight lawyers, as follows:

Ernest H. Allen, York
Edgar A. Baird, Omaha
John N. Baldwin, Omaha
Paul E. Boslaugh, Hastings
James L. Brown, Lincoln
Charles E. Bruckman, Hastings
George P. Burger, Fairbury
Coburn Campbell, Miami, Florida
Lloyd E. Chapman, Lincoln
Jack Devoe, Lincoln
Frank E. Edgerton, Aurora
William J. Frenzer, Omaha
Barney W. Gill, Omaha
Ray E. Griffin, Alta Dena, California
Clarence E. Haley, Hartington
Frank A. Hebenstreit, Falls City
Frank C. Heinisch, Omaha
Lynn D. Hutton, Norfolk
Clark Kuppinger, Kansas City, Missouri
Thomas W. Lanigan, Grand Island
Earl J. Lee, Fremont
Louis Lightner, Columbus
N. Murray Longworth, Omaha
John U. Loomis, Cheyenne, Wyoming
Luther C. Martin, Seattle, Washington
H. F. Mattoon, Beatrice
George N. Mecham, Anaheim, California
O. W. Miller, Lincoln
F. H. Mize, David City
Joe F. Morehouse, Omaha
D. R. Mounts, O'Neill
Edwin J. F. Myers, Broken Bow
L. Ross Newkirk, Omaha
Frank G. Mintz, Omaha
Richard J. O'Brien, Houghton, Michigan
Thomas P. Patterson, St. Paul, Minnesota

Magdelene Craft Radke, Lincoln
Frank M. Rain, Belleville, Illinois
Alfred D. Raun, Walthill
John E. Ray, Hastings
Harry W. Shackelford, Omaha
Ernest E. Spencer, Indianola
Richard Steele, Creighton
Paul S. Sutton, Omaha
Joseph F. Tvrdy, Omaha
Joseph T. Votava, Omaha
John H. Wiltse, Falls City
Sheldon Wingerd, Aberdeen, South Dakota

It is indeed fitting that the membership of our Association should at this time pause to pay tribute to the memory of these distinguished lawyers.

It has been well stated that "Law is the enforcement of justice among men; that Lawyers are officers of the Court and a necessary and inherent part of the machinery designed for the administration of Justice."

A lawyer is charged with the multiple responsibility of a faithful discharge of his duties, both to his clients, to society, the state, and nation. To merit the title of "Lawyer" one must be guided by an unwavering adherence to the highest virtues of fidelity, honesty, and integrity. Nothing less can measure up to the true stature of a lawyer. We believe that every member of our Bar whose names I have just read possessed every quality to entitle him to the name "Lawyer."

It would be impossible on this occasion to recite the individual contributions each of these departed members of our profession made to the law, the administration of justice, and the greatness of America. Each of them to the extent of their respective capacities contributed their best efforts toward such ends.

This State and Nation will, for generations to come, reap great benefits from the contributions these lawyers made to our society. We cherished our contacts and associations with them in life, and their passing will create a void in the lives of their families as well as all who came into contact with and knew them well.

No finer memorial can be erected to their memory than the knowledge that they possessed those great qualities which entitled them to membership in this Association.

Robert H. Beatty, Chairman
Judge E. B. Chappell
George B. Hastings

I suggest that we now stand, and in reverent supplication through a moment of silent prayer, invoke the eternal blessings of our all-merciful God upon the souls of our departed brothers.

[Silence] Amen.

PRESIDENT WRIGHT: This concludes the program for this morning. I am sure you will all enjoy luncheon this noon and I hope you will all attend.

We will now recess until this afternoon. The first of the meetings on the Uniform Commercial Code will commence at two o'clock in this room. We are adjourned.

[The session adjourned at eleven-fifteen o'clock.]

* * *

ANNUAL ASSOCIATION LUNCHEON

November 12, 1964

PRESIDENT WRIGHT: Ladies and Gentlemen: Before we start with our program and before I introduce our speaker this noon, I would like to make a few introductions. I had hoped that we would have at our head table the chairmen of our various sections, but I was unable to contact all of them. We have two at our head table, and I would like to introduce them at this time. First, Barney Pierson, who is chairman of Real Estate, Probate and Trust Law. This section will be in charge of the annual program next year. I would like to introduce Barney Pierson at this time.

Mr. Warren K. Urbom, who is chairman of the Section on Practice and Procedure.

I had hoped to have had Bert Overcash here. He is not only the chairman of the Section on Corporations but also has served as chairman of our Committee on Legislation. I haven't seen Bert. Is he in the room? I think we keep him so busy during the year that he doesn't have time to attend the meeting here but has to take care of his own private practice.

Is Mr. James W. Hewitt present? He is chairman of the Junior Bar Section. I guess not.

We have with us the presidents of three other state bar associations as our guests at our meetings, and I would like to introduce them at this time.

On my right, Judge Brown of Wichita, Kansas, who is President of the Kansas State Bar Association. Judge Brown!

Next to him we have Dick Bostwick, who is the President of the Wyoming State Bar Association.

We also have Howard Remley from Iowa, the President of the Iowa State Bar Association.

Then on my right we have Ed Murane, who is chairman of the House of Delegates of the American Bar Association.

Now it gives me great pleasure to introduce our speaker today who, first, is a great lawyer. He is a member of a large and prominent law firm in Richmond, Virginia. He has been active in bar association affairs, his city bar, his state bar, and the American Bar Association. He is a native Virginian and is at the present time the President of the American Bar Association.

It gives me great pleasure to introduce to you at this time, for his address to us this noon, the Honorable Lewis F. Powell, Jr.

ADDRESS

Honorable Lewis F. Powell, Jr.

Mr. President, Ladies and Gentlemen, Distinguished Guests: It gives me a great deal of pleasure to be back in your city and indeed in this room. I was here just six months ago at the regional meeting of the American Bar Association, one of the more successful meetings that we have had. Many of the lawyers in this room contributed greatly to the success of that meeting, and it is a real pleasure to see you again and to be back with you.

I was present this morning when you had reports on the American Bar Association from your delegate, Jack Wilson. He spoke of the membership of the American Bar Association. It hardly need be said that your national organization derives its strength from two sources, first, of course, the individual lawyers of whom there are some 118,000 across the country. These are the people who put up the dues that enable us to function. But equally important are the some 1,500 state and city-wide bars across the country which support the American Bar Association in various ways. All of these are important.

I suppose it is fairly obvious that the state bar associations, fifty of them, constitute the real backbone from the organized bar. So every president of the American Bar Association welcomes the opportunity to meet with state bar associations such as your fine Nebraska Association here today. I think it is fair to say that your Association has been one of those in the forefront in its generous and full support of the American Bar Association. You have contributed many of the leaders for many years in the ABA. I can't take your time here to name all of them, but I would like to mention George Turner, Jack Wilson, Clarence Davis, Hale McCown, Laurens Williams, and many others. On behalf of the American Bar Association I would like to thank each of you individually, and also your Association for your fine cooperation and support.

I expect to talk for two or three minutes about some of the programs currently being carried forward by the ABA which I think will be of interest. It is a fairly serious type of talk, so it occurred to me that perhaps you might enjoy a lawyer story before we get into that serious talk.

This is a story that was told by a member of the Supreme Court of Florida when I was attending the Florida Bar Association

meeting not so long ago. He represented that it was a fairly accurate story of something that really happened. Of that I cannot vouch.

In any event, this involved a railroad in Florida which was having a rather bad experience in a small community as a result of a young lawyer there suing the railroad with conspicuous success. General counsel for the railroad lived in Jacksonville, and when his dissatisfaction reached a certain level he decided that the next time the railroad was sued he would go down and conduct the defense himself. He didn't have to wait very long. A suit was instituted by this young lawyer, but this time it seemed to be a fairly small case. The claim was for \$1,000 for the loss of a prize cow which was said to have been hit by the railroad.

The general counsel went down and conducted a very intensive investigation prior to the trial. The night before the trial he was in a pretty desperate frame of mind because he had been unable, even with the railway claims agent assisting him, to find a single witness to the accident.

Very much contrary to what he wished to do, he called up the counsel for the plaintiff and suggested they meet the next morning before the trial hour to discuss settlement. They did, and after negotiations they agreed to settle the case for \$500. The general counsel was secretly delighted. He wrote out a check with appropriate release clause on the back, and handed it to the young lawyer. Then he said, in effect, "My young friend, you have been pretty rough on the railroad. I don't think I ought to give you any advice, but as an older lawyer I think I should. You might be interested to know that you had the railroad completely at your mercy. We didn't have a single witness. You would have been able to recover the full value of your client's cow."

The young lawyer said, "Sir, now that we have reached the point where we are giving each other advice, perhaps it may be of interest to you to know that last night my client's cow came home."

I am afraid that is the end of the fun part of this program.

I do want to tell you about three things your ABA is doing, things of which I am proud and I think each of you will be proud, things which seem to me to be in the public interest.

The first one I will mention briefly because we are just getting started with it. This is our student loan fund. For many years we have tried to find an appropriate medium for helping law students in the law schools across the country. At long last we

have created a student loan fund. The American Bar Association has contributed \$100,000 to it. The Law Student Association has contributed another \$10,000, and we find to our pleasure that through an agreement with one of the great banks in New York this modest contribution of \$110,000 will enable many law students across the country to borrow \$3,000. We have found that the deans of the law schools have received this program with the greatest enthusiasm.

I think it is fair to say that the Board of Governors and the officers of the American Bar Association recognize a high degree of responsibility to our law schools. We have a real determination to see that the better students do have an opportunity to attend law school, those who wish to do so, and in this small way we are trying to compete with the fellowships and the scholarships and loan funds which, as all of you know, are available to students who wish to go into the sciences, medicine, and engineering. I therefore think that the loan fund is a constructive step forward, and we hope to support this down through the years and expand it as the need indicates.

The second area of activity which I thought would be of interest to you is a project which was authorized by the Board of Governors and House of Delegates at the New York meeting, to study and recommend minimum standards for the administration of criminal justice. We created a new special committee under the chairmanship of Judge J. Edward Lumbard, Chief Judge of the Second Circuit Court of Appeals. This committee is now in process of forming associate committees across the country.

Some of you may recall—indeed it is possible that some of you in this room participated in the American Bar Association project of the late 1930s when Judge Parker of my circuit and Judge Arthur T. Vanderbilt, later of the Court of Appeals of New Jersey, promulgated recommended standards for a similar procedure that had a tremendous effect on the whole development of the civil side of our law. It is hoped that this new project will do, on the criminal side, what the Parker-Vanderbilt project did two decades ago on the civil side.

It is hoped that standards can be recommended that will cover the entire spectrum of the administration of criminal justice, ranging from the police function all the way through to sentencing, probation, parole, and post-conviction remedies.

I noticed in the press this morning that there was a meeting here in this hotel yesterday of the Nebraska Association of County

Attorneys, which was addressed by Mr. Ronan from Phoenix, Arizona. The subject of his speech was the crime situation in our country today. I think those of you who have had any occasion to look into this will share the concern expressed yesterday by the speaker, namely that our country does face a crime crisis. Mr. Ronan is quoted as saying that "Crime will be a major social problem for the next twenty years." I think we can be perfectly certain that it is a major problem today, with crime increasing in 1963 over 1962 by more than 10 per cent—this is major crime all across the country—and the latest FBI figures for the first six months of this year show an increase over last year of more than 15 per cent. It may interest you ladies and gentlemen in this state to know that this increase is not to be found merely in the large urban centers. Indeed, the rate of increase in crime in rural areas was 9 per cent, and here I talk about major felonies, the sort of crimes that are punishable by sentences of a year or more.

Nobody suggests that the criminal justice project of the American Bar Association will get to the root causes of crime. We do hope that the project which we are planning to complete within three years will improve the administration of criminal justice and in that way will have a favorable impact on the crime situation in our country.

I will add just one word while I am discussing this subject. I think those of you who have followed the criminal law will perhaps agree that within the past decade or so, and indeed quite recently, the trend of judicial decisions has been in favor of the party accused of crime. I think every lawyer will also agree that a person accused of crime must have, indeed lawyers must see that he has, the rights guaranteed to him by our Constitution. So lawyers welcome this increased concern for the rights of individuals accused of crime.

On the other hand, as is so often the case, the pendulum may possibly have swung too far. It may be that we now need to concentrate our attention more on the rights of society in general and on protecting the rights of those who are the victims of crime.

I come now to the third activity of the American Bar Association which I wanted to mention here this afternoon. This relates to a subject peculiarly within the interest and knowledge of lawyers. It concerns the Canons of Ethics of the legal profession.

Some of you may recall that at the August meeting of the ABA in New York, the House of Delegates authorized a new special committee to study the Canons of Ethics with a view to making such changes and additions as may be indicated. In view of the vast

changes which have taken place in the public responsibilities of lawyers, the House of Delegates of the ABA thought that the time had come for a critical re-evaluation of the ethical standards of our profession. Closely related to the content of the Canons is the problem of their enforcement. There is a growing dissatisfaction which I find across the country with the adequacy of the discipline maintained by the legal profession. This is quite evident in the Missouri survey conducted by Prentice-Hall. One of the really disquieting statistics of that survey was that about 27 per cent of the lawyers interviewed expressed the opinion that perhaps as many as 50 per cent of the lawyers with whom they associated violated the Canons of Professional Ethics.

There was a survey in New York City that came up with a figure of 20 per cent. I am perfectly certain these surveys are not scientific. Indeed, they couldn't be, and I personally doubt whether the figures are valid in any scientific way, yet I think there is this general recognition that we need to refreshen and refurbish our interests in the Canons of Professional Ethics.

There was an article published by E. Blythe Stason in the *American Bar Journal* last year in which he reviewed the records of disciplinary proceedings in the fifty states for the seven-year period ending in 1962. He found that the total number of disbarments in all fifty states aggregated sixty-eight, and the total number of suspensions on the average for this seven-year period was only slightly in excess of that figure. No one really knows whether those figures are realistic or not, but Dean Stason did express the opinion in a rather restrained fashion to the effect that he was somewhat surprised to have found that in a profession numbering 285,000 lawyers so few would have needed disciplinary penalties.

Strengthening the Canons and improving disciplinary procedure are merely means toward an end. The real objective quite obviously is to encourage and maintain a higher level of professional standards. It has been said, and I think correctly, that the legal profession "presupposes a better developed moral awareness, and in day-to-day practice presents more occasions requiring resort to conscience than any other profession."

The instilling of this type of moral and ethical awareness in a profession which now numbers, as I said, more than 285,000 members is a not inconsiderable task. The process must commence as early as possible.

And here I would like to emphasize the important role and opportunity of the law schools. In addition to far stricter admis-

sion policies with respect to character qualifications, the importance of thorough courses on legal ethics can hardly be overemphasized. Nor should they be confined solely to the study of the Canons, as it seems to me this approach is unduly restrictive. The need is for broadly based courses dealing specifically with both the ethics and the professional responsibilities of a lawyer.

Now a word in closing: I think that fair-minded persons will agree that the type of activities I have mentioned (and there are many similar ones being conducted by your Bar and by the state bars across the country and by your national organization) are in the general public interest as well as in the interest of lawyers. They reflect the awareness by the legal profession of its public duty and responsibility. Indeed, in my view no other profession at any time in our history has been more sensitive nor more alert to its broad responsibilities.

And yet we know this is certainly no time for complacency or self-congratulations. The bar—both lawyers and judges—continues to be under attack and criticism. While much of this criticism is uninformed and, in my view, destructive, some of it may serve as a spur to appropriate self-evaluation and to greater concern for our responsibilities, both to clients and to the public.

It is clear that the most effective way to accomplish all of this is by full support of the organized bar at all levels. This means support of our national, state, and local bars. And here I emphasize that the interests of all three of these are indivisible and that the strength of each is important to the well-being of all. In short, our overriding concern must be to strengthen the organized bar as a whole. Only in this way can we preserve and maintain the unity of our profession which is so essential to its strength, character, and fundamental quality.

PRESIDENT WRIGHT: Mr. Powell, on behalf of the Nebraska State Bar Association I want to thank you very much for coming to Omaha, attending our meeting here, and giving us this fine address.

* * *

INSTITUTE ON THE UNIFORM COMMERCIAL CODE

THURSDAY AFTERNOON SESSION

November 12, 1964

The first session of the Institute on the Uniform Commercial Code was called to order at two o'clock by Chairman Richard E. Hunter.

CHAIRMAN HUNTER: Gentlemen, may we have your attention please. Largely through the efforts of the Nebraska State Bar Association the last session of the legislature adopted the provisions of the Uniform Commercial Code. The Committee on Continuing Legal Education has been assigned the task of presenting the numerous substantive and procedural changes that have been brought about by the adoption of the Code.

The committee and the Bar Association are deeply indebted to Mr. Rodney Shkolnick of the Creighton University Law School and to Harold Rock of Fitzgerald, Brown, Leahy, McGill, and Strom here in Omaha.

At this time I would like to present one of the co-chairmen who has done a great deal of work in connection with this institute, Mr. Harold Rock. Harold!

HAROLD L. ROCK, Omaha: Thank you. It is really gratifying to see such a crowd. I am sure you all realize the importance of the topics we are going to present.

Rod Shkolnick was originally scheduled to make the introductions today, but he is down in St. Louis with the Moot Court team, and I understand the Creighton Moot Court team won last night, so they will be going on. Rod will be here tomorrow, however, to help with the introductions.

We have five experts here from the East to present the topics to you. The experts helped us arrange the program to best present the Code to you. There will be breaks. You can see by the program that this is quite a long session. After about an hour or so we will have a ten- or fifteen-minute break but we will ask that you come back as quickly as possible, especially tomorrow, because some of the topics are short; the speakers have come from a long distance; and we would like to be able to start promptly and get as much out of it as we can. We don't have very much time to start out with.

The speakers would appreciate your raising your hand to ask questions and breaking in at any time you feel a question coming

on. An informal atmosphere is what we are trying to create, so as the questions arise, please ask them.

The man I am to introduce today is Mr. William B. Davenport of the firm of Raymond, Mayer, Jenner & Block. Mr. Davenport has talked to people in Nebraska on two previous occasions. About a year ago he spoke at the Creighton Institute on the "General and Sales Provisions of the Code." He spoke here at the American Bar Association's regional meeting that we had in May. Many of you have seen him before and will appreciate why we have asked him back.

Today he is going to talk on "The Code Approach and Sources of the Law" and then go right into "Sales" without a break. The break will come, as I said, in about an hour.

Mr. Davenport is a graduate of the University of Illinois, 1950. He is a partner in the firm of Raymond, Mayer, Jenner & Block of Chicago, a member of Subcommittee No. 1 of the Permanent Editorial Board for the Uniform Commercial Code. He is a co-author of the *Illinois Code Comments* to the Illinois Uniform Commercial Code. He is Vice Chairman of the Committee on Uniform Commercial Code, Section on Corporation Banking and Business Law, of the American Bar Association. I present Mr. Davenport!

THE CODE APPROACH AND SOURCES OF THE LAW

William B. Davenport

Thank you very much, Harold. It gives me a great deal of pleasure to address you members of the Nebraska Bar Association, of which organization my senior partner, Anan Raymond, was once the President.

I would like to talk to you this afternoon on the Code and, as Harold told you, just break in any time with questions. I would rather answer them as we go along. Most of you, I think, know about the Code. It was one of the most monumental legislative drafting projects that was ever undertaken. The drafting bodies are the National Conference of Commissioners on Uniform State Law and the American Law Institute. I think all of you are acquainted with both of these organizations.

The proposal of the concept of a Code was originally made by Mr. William A. Schnader in 1940. In 1938 efforts had been made to introduce a federal sales act in Congress. The Commissioners did not want this to happen, and they said that they would undertake a redrafting of the Uniform Sales Act. That, gentlemen, is how the Code began.

The project received impetus. In 1944 they expanded it to cover the other subjects. There were seven prior commercial acts, and it was thought that if they could incorporate these in one Code, that Code could be submitted to all the states and all states could have the benefit of all the uniform acts.

The first draft of the Code came out as the 1952 Official Draft. That was approved by the American Bar Association. The Code was first introduced in Pennsylvania. Pennsylvania had been wont to accept uniform acts without question, and this they did with the Code. They promptly enacted it in 1953 without a single dissenting vote in the legislature.

However, New York took a different look at it. New York was a "doubting Thomas." The legislature there wanted to study it. So they turned the Code over to an adjunct of theirs, the New York Law Revision Commission. That commission studied the Code and came out with a very comprehensive report in February 1956 recommending many changes. Because of the standing of the New York Law Revision Commission, the draftsmen of the Code realized they had to take cognizance of its work, and so the Editorial Board was reactivated and they redrafted many provisions of the Code. The 1957 Official Edition was the result of that, and that was the version that was adopted in Massachusetts originally.

There were some other minor changes, notably in Articles 8 and 9, and this resulted in a new edition called the 1958 Official Text. It is this third draft that was enacted here by your Nebraska legislature. It is also the version which was enacted by the Illinois legislature.

The current version of the Code is the 1962 Official Text. This incorporates the recommendation of the first report of the Permanent Editorial Board. The Permanent Editorial Board is a body activated by the draftsmen of the Code to keep the Code up to date as new commercial practices come into being, to modernize it to see that it doesn't get out of date like the other uniform acts did. If there is a decision rendered by any court of last resort that renders a provision of the Code doubtful, the Editorial Board wants to clear that up.

They are also making recommendations with respect to the variations of the Code that have been made by the twenty-nine enacting states to date. They are in the middle of a new report, Report No. 2, which I think will come out next month, and I believe there will be no changes recommended as a result of that draft. So the 1962 Official Text is the current text of the Code. I was under the impression from reading the program that your Com-

mittee on the Uniform Commercial Code had planned to recommend enactment of the 1962 Official Text at the next session of the legislature, but I understand that possibly that recommendation may be held up.

I know that in Illinois our own feeling was that we should let one session of the legislature go by before making any changes in the Code, and we have done that. However, at our next session of our legislature we are going to propose the 1962 amendments to the Code.

Now as to the structure and content of the Code: The concept of the Code is that it governs the commercial transaction from beginning to end, from the purchase of goods until the time the check in payment of those goods is honored by the bank and the account of the drawer buyer is debited.

Going down it, Article 1 contains the general provisions that apply to all Articles. It integrates all of the other acts and in effect makes the statute a Code. A part of that I am going to talk to you about.

Article 2, Sales, is a modernization and expansion of the Uniform Sales Act. I won't say any more about that since I will be detailing that also.

Article 3, Commercial Paper, is a rearrangement and a condensation of the text of the NIL, with few new provisions, needed to reestablish uniformity. You might ask: If all the states enacted the NIL, why do we need an Article 3, Commercial Paper? Gentlemen, the NIL was drafted in the course of about six months. It was badly organized. It has numerous provisions, for instance, on the presentments, which were scattered throughout. Also as a result of judicial interpretations there were conflicts between courts of last resort on eighty of its sections. So the draftsmen of the Code wisely included Article 3 in the Code covering commercial paper. This is short term commercial paper.

It also took out of Article 3 the investment securities, stocks and bonds, and it gave them a new statute to which all the strict requirements of negotiability of commercial paper were not to be applicable.

Article 4, Bank Deposits and Collections: This is a revision and expansion of the American Bankers' Bank Collection Code, and also incorporates statutes that govern deferred posting and banks' relations with customers, such as stop orders and stale checks. There have been a lot of non-uniform statutes on the books of

several states, and Article 4 takes the best of these and puts them into Part 4, which deals with customer relations.

Article 5, Letters of Credit, is an embodiment of decisional law and banking practices with respect to letters of credit, designed to provide more certainty in the law governing their use and encouraging their wider use. The letter of credit, gentlemen, is analogous to a credit card. For instance, if you hold an American Express Credit Card you can go anywhere over this country and use it. You are in effect substituting the very desirable credit of the American Express Company for your own questionable credit—at least at a distance from home.

This is exactly what the letter of credit does. The buyer out in Los Angeles, or a buyer in a foreign country, may know the Omaha National Bank, but it may not know the customer of the Omaha National Bank, Joe Bloe. So it is willing to take the Omaha National Bank's letter of credit saying that it will honor drafts drawn against Joe Bloe if certain documents, and so forth, are submitted with it. I don't know the volume of the letter of credit business that your banks in Omaha do, but certainly the adoption of the Code should encourage that by providing a firm basis for it.

In Chicago the counsel of two of our largest banks, the First National and Continental Illinois, have mentioned to me that their letter of credit business has increased since the adoption of the Code. They won't say "because of" but they will say "since the adoption of the Code."

Article 6, Bulk Transfers: This provides a uniform bulk transfer law designed to replace the varying bulk transfer laws of all fifty states. During the period from 1896 to 1919 all fifty of our present states adopted bulk transfer laws, beginning with Louisiana in 1896. These were varied. There was no uniformity at all in this area, and the merchant doing business in several states needs to know what his rights are in other states. He can't keep track of fifty or fifty-one laws, but he can become familiar with one law. So the Code in this area does answer a real need.

Article 7, Documents of Title, is an assimilation of the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act, and those provisions of the Sales Act dealing with documents of title. There is quite a reduction of text of those three acts, inasmuch as there is considerable duplication in them. There are also some added provisions designed to enhance the negotiability of negotiable documents.

Article 8, Investment Securities, is, as I mentioned, an adaptation of the Negotiable Instruments Law and the Uniform Stock

Transfer Act to cover most types of investment securities—i.e., stocks and bonds. It eliminates some of the technical requirements in negotiability that existed under the NIL. That is a more specialized Article, particularly one which investment bankers and lawyers representing them are interested in.

Perhaps the most important Article and the one in which there is the most interest is Article 9, Secured Transactions. This establishes an integrated, comprehensive structure of chattel security law, replacing among the uniform acts the Uniform Trust Receipts Act, the Uniform Conditional Sales Act, and statutes governing chattel mortgages, accounts receivable financing and factors liens. This was a hodge-podge of prior chattel security law that left gaps and overlaps. The chattel mortgage and the conditional sale, for example, were frequently interchangeable. Yet whether one or the other was valid depended on what you called it and whether it was acknowledged or not. This was a senseless distinction and the Code abolishes that and establishes a system along the line that is governed by classification of collateral; in other words, functional. This is a more modern and, I think you will all agree, a common sense approach. We have particularly liked Article 9 in Illinois, and I am sure that once you gentlemen have come to know it and come to work under it you would never think of reverting to your former system.

Article 10, Effective Date and Repealer: This is just a schedule of the laws repealed. It provides the effective date and the schedule for the transition. I understand that there was an inadvertent repeal possibly of some statutes here in Nebraska, and I understand also that your committee report is going to recommend a clarification of that at the next session of your legislature.

What about the effect of the Code elsewhere? As I mentioned earlier, the Code has been adopted in twenty-eight other states and the District of Columbia. We expect that twelve more states will adopt it in 1965. I wouldn't be surprised if you find it in Minnesota, perhaps North Dakota, Washington, and some of the southern states, among others.

It is presently the governing commercial law in twenty-two states, including New York, Illinois, Ohio, and most of the large commercial states. The largest state in which it has not presently been adopted, which is of commercial importance, is Texas. I imagine there will be a movement to get it enacted in Texas also this year.

What has been the effect of the Code generally? The standing of the sponsoring bodies has been such that the courts have used it

to supply a rule of decision in non-Code states and also in pre-Code transactions in Code states. So it is quite possible, gentlemen, that your own Supreme Court here in a pre-Code transaction may apply a Code provision. Therefore it behooves you to get familiar with it now and to know about it instead of waiting until next September when it actually goes into effect.

There is a Third Circuit case, the case of *Fairbanks Morse v. Consolidated Fisheries*, where the Court took it as a restatement of the law. They said, "One of the joint sponsors of this Code was the American Law Institute who have drafted the restatements of the law which are well known to all of us. In the absence of any precedent elsewhere we think that the Commercial Code is a restatement of commercial law as representing current legal thinking."

In Oregon the Supreme Court, in a pre-Code case on which there was no Oregon common law, took the rule that was embodied by 3-406 of the Code and they said, "This is a declaration of legislative policy that is to go into effect at a future date. We don't see any reason why we shouldn't follow it in this transaction, although it is not governed by the Code."

So your own Supreme Court may well follow the lead of these courts.

Now to get into Article 1, which deals with the General Provisions. The bread-and-butter Articles of the Code are Articles 9, 6, and 2. Institutes that have been held on legal education for the bar throughout the land have emphasized those three Articles—generally Article 9, then Article 6, and more recently Article 2 has come into its own as being a bread-and-butter Article. But whatever Article you practice with daily, wherever your practice takes you, be sure that you are familiar with Article 1, because the definitions in 1-201 are fundamental and you ought to know those. You ought to be thoroughly familiar with Article 1, as well as whatever other article or articles you work with daily.

Article 1 coordinates and integrates the eight substantive articles in the Code. It supplies principles of construction, general definitions, and general rules governing commercial transactions.

I think it is convenient here, although it is not divided in the draft itself, to divide it into two categories: (1) those which apply to the statute itself and its construction, and (2) those which apply generally to all commercial transactions encompassed by the Code.

Let's go just for a moment quickly through these general provisions relating to the Code itself and its construction. Every statute has a title. Every statute generally has a statement of purpose. One purpose of the Code is to make uniform the law among the various jurisdictions. Your own Supreme Court, in *International Milling Co. v. North Platte Flour Mills*, interpreted a similar command in the Uniform Sales Act in what I regard as an exemplary manner. I think that decision is important to you because it indicates that the decisions now on the books in Pennsylvania, Rhode Island, Massachusetts, and Arkansas, where the Supreme Court has been deciding some cases here lately, can be looked at with considerable assurance that your own Court will follow them because of this command and because of its interpretation of the command in the Uniform Sales Act.

The Code also establishes rules of construction. It is to be liberal. The Code frequently, in several sections, states "unless otherwise agreed." There was some concern over that, that that might have a contrary rule; you couldn't agree to the contrary if it didn't say that, but that concern is eliminated.

In Section 1-102(4) there is also a rule concerning the number and gender of words.

One of the first questions that is asked with regard to a new statute is, "What variation is permitted by agreement? How can the parties change the rule? Can they change the rule provided by the statute?" Well, 1-102(3) states this, and this is one cardinal rule with which you should be familiar: "Effect of the Code may be varied, with two exceptions: (1) except as otherwise provided in the Code, and (2) except that obligations of good faith, diligence, reasonableness, and care prescribed by the Code may not be disclaimed by agreement, but the parties may determine by agreement reasonable standards by which the performance of those obligations is to be measured."

The variations that are limited or prohibited by Articles 1 and 2 are few in number. One of these is in the "conflict of law" Section 1-105; others are in 2-210; another one is the Section on Unconscionability, which was, at least until recently, one of the most controversial sections of the Code; another is 2-316 on disclaimer of warranties.

Another rule is that when the Code requires action to be taken in a reasonable time, any time not manifestly unreasonable may be fixed by agreement.

Another important rule for you to remember is that the applicability of supplementary general principles of law will supplant

the Code. The Code is what we call a "displacing statute." The principles of law and equity supplement its provision and apply "unless displaced by" its "particular provisions." In other words, the doctrine of the invalidating cause of mistake or estoppel or bankruptcy will apply unless the Code supplants it. Of course when we get into bankruptcy there may be some conflicts, and that will be discussed, I think, principally by the speakers tomorrow in the area of Article 9.

The Code provides that there is to be a liberal administration of remedies.

The Code also contains a severability provision, which is a standard provision in any act.

The Code also provides that section captions are a part of the Code. I think that is in accord with the decision of your Court here, at least dictum in a decision. In a doubtful case, that will serve to limit the subject matter and to provide a frame of reference.

Gentlemen, as I mentioned earlier, the general definitions, forty-six in number, are fundamental in working with the Code; particularly I'll get down here to the element of notice. The key definitions which I have listed by subsection and which are important are: (6) Bill of Lading, which is expanded to include bills issued by freight forwarders and by contract carriers. The UBLA applied only to bills issued by common carriers. (9) The buyer in the ordinary course of business, the fellow about whom you are going to hear a lot when you are dealing with Articles 2, 7, and 9. Then we have (10) the definition of "conspicuous," a Code developed concept that is especially important with respect to drafting contracts, and it is important in Article 7 and Article 8 when you are dealing with restrictions on transfer of stock certificates and with notations of an issuer's lien. They must be conspicuous. This concept of conspicuousness is more or less an embodiment of the judicial dislike of fine print. I think that is what it amounts to. All of the courts have exhibited this tendency. In your own court here there is a decision where, in ruling against a party who had prepared a form, the court noted that the clause was in fine print and was off to one side of the contract. This concept of conspicuousness embodies that decision, in effect.

(15) Document of title is a much broadened definition. Professor Lamey will talk to you about that tomorrow.

(17) Fungible. There is a change there, in that goods may be made fungible by agreement.

(20) The term "holder" is particularly significant under Articles 3 and 7, and Mr. Goodwin will discuss that with you tomorrow, and Professor Lamey, as the term becomes important there. A holder in due course must first be a "holder." He cannot be in due course if he is not a "holder."

Next (25) - (27) is the question of notice and knowledge in subsections 25 through 27 of 1-201. Gentlemen, I think those are very important provisions. When does someone have notice? The Code proceeds on a concept of *actual* notice. They don't want anybody held on constructive notice. The only time you have that is in Article 9, and in all cases not there. Emphasis is at times given to the *sending* of notice or the giving of notice, in which case it is not always material whether notice arrives; and receipt of notice, in which case *receipt* is the important thing.

You should be mindful of an exception in subsection (26). There is a Nebraska variation, and this is the only variation in Parts 1 and 2. Your Code here, I think, has only four variations from the 1958 Official Text, and compared to what other jurisdictions, like California and New York have done, that is remarkable. In Illinois we had three variations. Pennsylvania is the only state that has a pure, unadulterated Code. There is not one departure from the Official Text. I think Illinois is second and Nebraska must be third. But I would like to make an observation at this time on the Nebraska variation in subsection (26).

With respect to the receipt of notice, the normal concept of receipt of notice under the Code is that it is received *when* it comes to the attention of the addressee or it is duly delivered at a place of business through which the contract was made, or at any other place held out by the party to the contract as the place of receipt of such communications.

The Nebraska variation, which is an addition to subsection (26), provides for receipt of notice when it is published at least *once* in a legal newspaper published in, or of general circulation in, the county where the transaction has its situs. I regard this as a very unfortunate one, for this reason: The Code has carefully distinguished between the "giving of notice" and the "receipt of notice."

For example, under Section 3-508 notice of dishonor of a negotiable instrument need only be given. Notice is usually given when it is deposited in the mail seasonably, properly addressed, with postage prepaid. It will usually be received when it is given in that manner, but under the Code it doesn't make any difference if it isn't received as long as it is given.

Likewise, a notice of a bulk transfer need only be given under Section 6-105.

On the other hand, under Section 2-309 notice of termination of a contract must be *received* by the other party. The giving of it alone may not be sufficient; you've got to make sure that he received it. In that case you protect yourself by sending it registered mail, in which case you can prove both the giving and the receipt.

Similarly, under subsection (3) of 9-312 a competing secured party financing inventory must have received notification of a subsequent purchase money security interest.

The Nebraska variation gives publication in a newspaper the effect of receipt under the Code. The suggestion that a party to a contract can be said to have received notice of something merely because a notice appeared in some newspaper is contrary to the entire purpose of the requirement of receipt and it defeats the principle of actual notice under the Code. Now, I can't believe that any of you gentlemen want to see anybody who is handling a commercial transaction charged with notice merely because something appeared in a newspaper, whether he saw it or not. I don't think that is right. I think that your Committee on the Uniform Commercial Code, when it does recommend amendments, when it does adopt the 1962 Official Text, would be wise to include in its recommendations the restoration of the 1958 Official Text in subsection (26). I think it might well expand its recommendations to include the clear advisability of deleting what, to many, seems unwise.

Going on to subsection (28), there is a definition of "organization" there. Gentlemen, that includes every conceivable legal entity of any kind. I don't think that any of you, if you looked at it, could find anything possibly excluded from it.

The word "person" in subsection (30), which includes an individual or an organization, is demonstrably all-inclusive.

In subsection (37) we have the definition of "security interest," of key importance in Article 9 and also important under Article 2. Mr. Henson and Mr. Tomaschoff will dwell on that tomorrow afternoon.

The definition of "value" (44). There is essentially no change from the term as it is defined in prior acts, but the clarification is that the taking of delivery under a pre-existing contract, or converting a contingent obligation into a fixed one, constitutes the taking of value.

Lastly, the definition of "warehouse receipt" (45) is defined to include receipts issued by a field warehouse.

These general definitions are subject to additional definitions contained in other articles which apply to specific parts or specific articles. So keep in mind in working with them that they are always subject to construction in context and to definitions in specific articles.

Now to discuss the general provisions applying to all transactions encompassed by the Code.

What about the applicable law? You are drafting a contract that involves parties in two different states. It is normal to pick one state or the other. The parties under the Code may choose the applicable law when the transaction bears a reasonable relation to Nebraska and also to another state or nation. If you have somebody here and somebody there, you won't have any problem under the Code. That choice will be enforced. I think you can be confident that it will be.

Absent agreement, however, the Nebraska courts may apply the Code to the transaction if it bears an "appropriate relation" to Nebraska. This was done by the Massachusetts court in the case I cited there, *Skinner v. Tober Foreign Motors, Inc.* He bought an airplane, I think in Massachusetts, and it was flown over to Connecticut. The buyer lived in Connecticut and nobody had provided anything about the applicable law. The Code wasn't yet in effect in Connecticut; it was in Massachusetts; and whether a modification was effective depended upon the statute of frauds; and the court applied the Massachusetts Uniform Commercial Code and it made all the difference in the world. So it can become important to choose applicable law, particularly as long as all the states don't have the Code.

The limitations upon the freedom of parties—there's a typographical error there. It says "use" and it should be "choose"—to choose the applicable law as contained in subsection (2). The rationale is that the rights of the third parties are not affected; in other words, by stipulating some law you can't affect your creditors adversely.

Section 1-107 effects a change in your law here as it did in our law in Illinois. It provides that a writing signed and delivered by an aggrieved party after a breach, renouncing a claim based on that breach, is perfectly valid even though not a nickel was given for it. Previously in Illinois, and I think here in Nebraska, you also had that rule.

Another important change in commercial transactions, particularly for you who try commercial cases, is a change in the rules of

evidence. Third party documents are prima facie evidence. A document in due form: Let's take a bill of lading issued by an ocean carrier or a railroad. That's offered in evidence and appears in due form, and it is required by the contract in question. This document, this bill of lading, issued by the railroad is prima facie evidence of its own authenticity and of the facts stated in the document. Consequently, no authenticating witness is necessary. You can see how that is going to reduce the expense of litigation. If the document is brought into question, however, if the other side against whom it was introduced shows that it was altered or it was never issued, then you are going to have to proceed, of course, to call in an authenticating witness and explain it. That likelihood will be remote in most cases, I think we all agree.

The fundamental concept of the Code is this in Section 1-203: the obligation of good faith in performance or enforcement of a contract rests on all parties, and the courts rely on that frequently in their decisions. If you will read the decisions in the Uniform Laws Annotated you will notice . . . Yes sir, do you have a question?

QUESTION: I would like to go back to that last section for just a moment.

MR. DAVENPORT: Oh surely!

QUESTIONER: That becomes a rule of evidence in *any* case. Suppose you get a personal injury suit and a bill of lading is an issue or becomes a material fact. Can you use this as a rule of evidence in that event?

MR. DAVENPORT: I'll tell you what. A personal injury case would not be within the scope of the Code. But I would say this on it. The courts have often taken the Code as a basis for changing their thinking. This could conceivably happen. The Code by itself would not cover that situation, and in that case I think you would need an authenticating witness. This would not be a commercial transaction and you wouldn't have a contract; in other words, you've got to have a commercial contract for the shipment of goods in order to invoke this rule.

QUESTION: The subject of the litigation must be a commercial contract?

MR. DAVENPORT: Right! It must be a commercial contract or one to which the Commercial Code applies. Courts have, as I noted, extended use of the Code as the basis of representing current thinking and the Commercial Code will probably have influence upon the courts far beyond the realm of commercial law.

The next thing is the question of time. What is reasonable and what is seasonable are defined by the Code. A seasonably taken action is action taken within the stated time, or if no time is stated, a reasonable time.

Another important section of the Code is Section 1-205 dealing with the "course of dealing and usage of trade." It defines the "course of dealing" as a sequence of previous conduct between the parties to a particular transaction which is to be fairly regarded as establishing a common basis of understanding for interpreting their expressions in other conduct with regard to the transaction in question. In other words, if the parties have bought and sold a commodity over a period of years and they enter into a new contract dealing with that, the court will refer to this as a course of dealing.

This is to be distinguished from a course of construction under that particular contract. That is dealt with in Section 2-208; in other words, how they behave under that particular contract. They may have had none before or they may have had several, and their course of conduct under the particular contract may vary from their prior course of dealing.

You also get into the question of "usages of trade," which is the Code substitute for the word "custom." Section 1-205 sets all of those out and it sets up rules for construction when you are dealing with them, and they are important because they can modify a contract or can give it significance.

Section 1-206 contains a residual statute of frauds. You probably won't meet that Section very often because just about everything is taken care of in Sections 2-201 that deals with sale of goods, 8-319 that deals with investment securities, and 9-203 that deals with secured transactions.

When you have a question as to whether you should perform under a contract or tender performance, you might take a look at 1-207. If you want to do so without waiving your rights, this tells you how you can do it. It establishes the words that you can use. It is without prejudice to your right to cancel, for instance; you are accepting delivery without prejudice to your right to cancel the contract for late delivery, or something of that kind.

Lastly, in Article 1 the Code deals in general terms with the option to accelerate at will. This is called the "insecurity clause." It has been so called by your State Supreme Court since 1886. At least that is what it is known as. You have an option to accelerate payment or performance for "no cause," or if you believe that

the performance is impaired, or you feel insecure. The courts have varied as to whether that can be arbitrarily exercised. Do you have to have any cause, or can you just say "I feel insecure" and go ahead and seize possession of the collateral? The Code adopts the rule that your Supreme Court had before the Code. There must be a good faith belief that the prospect of payment or performance will be impaired. Once the clause has been invoked it is upon the other party to show that it was improperly invoked.

SALES

Now, gentlemen, to go over to the subject of sales, Article 2 is a re-enactment and substantial addition to the Uniform Sales Act.

The Uniform Sales Act was promulgated by the Commissioners on Uniform State Law back in 1906. It became outmoded. There was conflict in some of its sections as a result of judicial interpretation. It had not kept current with current commercial methods. Moreover some of the concepts of contract law were not in line with business practices; for instance, with regard to the firm offer.

The result in pre-Code sales law was more frequently to defeat the reasonable expectations of business men than it was to fulfill those expectations. So the draftsmen of the Code proceeded on the premise that Article 2 should fulfill those reasonable expectations, not defeat them. The draftsmen of the Code, in effect, said, "Let's abolish a lot of these senseless technicalities of the law that defeat those expectations." They proceeded to do that in the areas of consideration and formation of contracts. That, I will discuss.

I might mention here that the text of the Sales Act, if you delete the documents of title sections, which were transferred to Article 7, you had sixty-five sections of the Sales Act left, and the Code expands those to 104. It is by far the longest article of the Code from the standpoint of both number of sections and text.

Article 2 is more than one-fourth of the Code. Now what does Article 2 include? Sales of goods is the answer. It is, of course, possible that its provisions may be extended by analogy to leases of goods.

Now, what is excluded from Article 2? The exclusions are secured transactions, covered by Article 9; investment securities, which are covered by Article 8.

Article 2 does not repeal or impair any statute regulating sales to consumers, farmers, and so forth. I do understand that you have some such statutes here in Nebraska. That has been no secret confined to the borders of Nebraska here in the last several months.

The definitions in Article 2—these are in addition to those contained in Article 1—are:

Receipt of goods. This is very important. It means taking physical possession of the goods. The question of where the risk of loss is may depend upon whether the buyer has received the goods or not.

Another very important distinction which Article 2 draws, gentlemen, is this next one—merchants. Merchants and non-merchants are very carefully distinguished in the Code. The quickest summation I can give you is: "A merchant is the sophisticated business man acquainted with business ways of doing things; the non-merchant is the ordinary consumer." Some people may be merchants for one purpose and non-merchants for another.

The term "goods," defined in Section 2-105, includes all things which are movable at the time of identification to the contract for sale (other than the money in which the price of the goods is to be paid, investment securities, and things in action.) It also includes the unborn young of animals and growing crops, and other identified things attached to realty, as those items are discussed in Section 2-107.

The goods to be severed from realty are covered in Section 2-107. This fills a gap that existed in the Sales Act.

A contract for the sale of timber, minerals, or the like, or a structure to be severed by the seller is a sale of goods. If the buyer is to sever, however, the contract is one affecting real estate, and all the rules of the statute of frauds applicable to real estate transactions apply to that contract.

A contract for the sale of crops and other things attached to the realty and capable of severance without material harm is one for the sale of goods without regard to who is to do the severing.

The use of the term "fixtures" you will note is carefully avoided in Article 2. It is not avoided in Article 9, as you will find out tomorrow.

We might note also that third party rights under the law relating to realty records are protected under subsection (3), and when you have a contract for the sale or the purchase of some item attached to the realty, under the Code you can record this contract as one affecting an interest in realty.

The next subject, the "form, formation, and readjustment of contract" is, I think, the most interesting one and the most discussed one under the Code. Let's take first the statute of frauds.

There are a lot of intriguing changes that are made here. The amount, \$500.00 is retained. The objective term "price" is substituted for the subjective term "value." You can argue about value all day long, but I don't think you can argue about what the price was all day long.

The memorandum under the Code must indicate that a contract for sale has been made and must show a quantity. It is not enforceable beyond that quantity. Under the Code you could have a contract if all you had was only the quantity, because the Code, ladies and gentlemen, can supply every other term that is to be included in the contract of sale, can supply the time and place of delivery, the warranties, and almost every other term. This is not to say that this is a desirable way of doing business but it is to point out to you that it is conceivable that if you just had a slip of paper signed by the party to be charged, showing a quantity of goods, that is a contract which your courts could enforce, and I think without a great deal of difficulty.

As between merchants, a written confirmation received and not objected to within ten days satisfies the statute as to the recipient if that written confirmation is sufficient as against the sender. This means that a receipt of a confirmation cannot now sit back, as he could under pre-Code law, and wait to see which way the market went before he decided whether he wanted a contract. Under the Code he will either have "to fish or cut bait" within ten days, either declare himself as having a contract or not having a contract. That, I think you will all agree, is a desirable improvement in the law.

We had in Illinois some very bad cases of this kind where oral contracts were made which produced some very unusual results. The Code abrogates that rule and deprives the party receiving the confirmation of the statute of frauds if he doesn't object to it.

What can be a substitute for the memorandum other than a written confirmation? You can have an admission of contract in pleading, testimony, or otherwise in court.

Another substitute is payment for and acceptance of the goods. Performance is limited to the goods actually received and the amount actually paid. The part received and accepted or the part paid can no longer serve as a basis for claiming a contract for a larger quantity. The fellow who ordered one Chevrolet car from General Motors the day before Pearl Harbor and got shipment for it could not, under the Code, next week claim that he had ordered twenty-five cars and ask General Motors where the other twenty-four were and assert that General Motors couldn't plead the statute

of frauds because they had a part performance to bind the contract. That, I think, is another very desirable improvement in commercial law. If they have paid for it and received it, if they have accepted it, you know they had a contract for that much. If there is no writing you don't know what existed beyond that.

Now the area of offer and acceptance. This constitutes a part of the addition to the Code. The Uniform Sales Act left the subject matter of offer and acceptance to common law. This was unsatisfactory because, as I said earlier, it defeated the expectations of businessmen in their transactions, and I'll demonstrate how.

First, as to the means of acceptance: The offeror can still control it. If he doesn't say how it shall be made, anything that is reasonable, any means of acceptance reasonable under the circumstances can be used. A telegram can be accepted by a letter response, or vice versa, if that is reasonable under the circumstances.

The Code also covers the subject of unilateral contracts. An offer to buy goods for prompt shipment invites acceptance either by promise to ship or by prompt shipment of conforming or non-conforming goods. The shipment of non-conforming goods is not acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation. Now if the seller does not so notify the buyer, the seller's act of shipping non-conforming goods constitutes both an acceptance and a breach at the same moment.

Another very important area dealt with by the Code is what we call the "battle of the forms" in Section 2-207. Section 2-207 abolishes what has come to be known as the "mirror image rule," the concept that the terms of an acceptance, repeating the terms of an offer, must reflect those terms precisely; in other words, must mirror the image of the offer. Under the Code you can have a contract, although the terms of the offer and the acceptance are different. This is possible. This is an innovation; it's a change. It is a change from your law here in Nebraska, and I think it is a change from the law in most of our fifty states, if not all. The English common law was certainly to the contrary, and the law of all of our states, with one exception, was modeled on that common law.

Under the Code either the offeror or the offeree can control the formation of any contract upon his terms. The offeror can expressly limit acceptance of the offer to its terms—those terms or none. You cannot add any. If any are added and the acceptance is not expressly conditioned, you have a contract on the offeror's terms. The offeree, on the other hand, can take the oar and say, "All right, I am going to be the master of this contract. I am ex-

pressly conditioning my acceptance. If you don't give me what I want, we are not going to have any contract." But if the offeree doesn't expressly condition his acceptance and he uses language of acceptance, he may have a contract even though he has got different or additional terms. So we lick the problem of contract formation, at least under the Code. We have a contract formed even though there are different or additional terms in the acceptance than were contained in the offer. You can see right away this poses a problem. What terms are in that contract is the next logical question.

The additional terms, where the acceptance is not expressly conditioned, are treated as proposals for addition to the contract. Between merchants—these sophisticated businessmen who know the ways of the business world—the offeree's proposals become part of the contract unless (1) the offeror expressly limited his acceptance, (2) unless the additional terms materially alter the contract, or (3) unless the offeror has already given, or within a reasonable time gives, notice of objection. If you have a "cash ten days" provision in the offer and a "cash twenty days" in the acceptance, and the acceptance is not expressly conditioned, the offeror has already indicated his objection to the twenty day term and you have a contract with the ten day payment term, or credit term.

I would recommend for your reading, to those of you who have problems in contract drafting or sales contracts and you want to get your terms, I recommend to you your reading of the two decisions which I have cited there: The *Doughboy Industries* and the *Roto-Lith* case.

The *Doughboy Industries* case is very interesting because the clash of forms in that case was so violent that the court was moved to remark that "it was the legal equivalent of the irresistible force colliding with the immovable object." There was a direct contradiction in terms. You will find the opinion very interesting reading and also you will find some language in there that will be helpful to you in drafting a contract to get a similar result under the Code.

Subsequent conduct of the parties, even though they have sent these forms back and forth—I have clients and I am sure you ladies and gentlemen all do too, who don't bother to read these forms. They just exchange them, they begin shipping goods, accepting money, and they behave like they have a contract, even though the documents on their face do not show a contract and even though they haven't read much of the fine print, perhaps, on the backside of the form. The Code supplies the terms of their contract for them. In subsection (3) of 2-207 it states what those terms will

be. Terms on which the forms agree are included; all the ones on which they don't agree are excluded, and then the Code fills in on the other terms.

Another innovation of the Code is its attack upon the doctrine of consideration in two areas: First, let's take the firm offer, which I mentioned to you earlier. The Code provides that an offer by a merchant to buy or sell goods in a signed writing, which by its terms gives assurance that it will be held open, is not revocable for lack of consideration during the time stated or, if no time is stated, for a reasonable time; but in no event may the period exceed three months. Previously, when you had a firm offer, the offeror could revoke the offer before he got an acceptance. He wasn't bound by it. He could always say, "Well, it was given without consideration," and that argument was accepted by almost all courts. If he had an acceptance before notice of that revocation got to the buyer, your ordinary rules of contract law applied. But the fact that he could revoke the firm offer often worked to the disadvantage of the buyer, and the courts refused to protect the buyer in that situation, even in many cases on the doctrine of promissory estoppel.

Another area in which the Code has modified the doctrine of consideration is the modification of a contract of sale already made. You can modify such a contract under the Code without any additional consideration.

Suppose that the parties agree on a certain price which the buyer thinks is pretty steep but nevertheless he agrees to it. Suppose that the buyer subsequently gets in shaky financial condition and he says to the seller, "Well, you had better lower your price or I am not going to buy. I know you can sue me for breach, but I may go under and it won't make any difference anyway even if you can establish breach. Now, if you will be sensible and cut the price 25 per cent we can have a deal."

The seller thinks it over and he thinks it is to his advantage under the circumstances to do this. Although he doesn't really like to, he is going to do it under the circumstances because it is his best alternative. So he modifies his contract in compliance with the statute of frauds, we'll say, if there is such a problem, and that contract as modified stands. The seller can't come back later and sue the buyer for the difference between the original contract price and the reduced contract price. This is a change in the law.

The Code also in the area of contract law provides its own parol evidence rule; this in Section 2-202. I have pretty well set it out there and the only observation I'll make to you in addition

to it is that it inverts the usual parol evidence rule as we know it. A contract is presumed not integrated until the court finds otherwise. If a court finds that this contract, or this writing, was intended as a final exclusive statement of the bargain of the parties, it will not let any other evidence in, but it must make that finding first.

Lastly, in the area of contract formation—or this really is contract readjustment—we have the problems of delegation of performance, assignment of rights under the contract. The majority of the common law rules for this, and there are five of them, are set out in detail in Section 2-210. At this time I call only your reference to them. If you have a problem in that area, you can probably find the answer there.

It is about ten after three and I told Harold I thought it would be appropriate if we would take a break at this time. I think you have had enough for the time being.

[Recess.]

MR. ROCK: Gentlemen, at the end of this period there will be an additional question and answer period for any questions you may think of as you go along that don't seem pertinent at the time, but Mr. Davenport will be very happy to be interrupted and to discuss any problem that occurs to you as we go along.

MR. DAVENPORT: Thank you, Harold.

If you do have any questions, please do interrupt me. I like it that way myself, to have it as we go along.

I just had a chat with Dan Stubbs during the interim and Dan very politely didn't take offense with what I said about the Nebraska variation but he told me something about 1-201 (26) that I didn't know. Apparently there is a general statute that in this situation provides, where you have a published notice, that they still have to send a notice through the mail to the person against whom the notice is published. I am still not sure that this is equivalent to "receipt of notice" as defined in the 1962 Official Text. I doubt it and suggest a reexamination of the matter.

Are there any questions anybody would like to raise on this? I just heard one gentleman down here say he was going to have to re-learn the law of contracts. I think that is probably true. I had to. I think all of us who have been out of law school for quite a while will have to re-learn a little bit. Those who are just coming out of law school, however, are getting this as a standard course.

If there are no questions, then I'll go ahead to the next topic on page 9, which is the obligation and construction of the contract. I will cover the areas which I think are the most important, and perhaps the others that are less important more rapidly.

I would tell you, gentlemen, the first area you are going to meet is the drafting of contracts, so learn Part 2 of Article 2, the part I have just covered first. You are going to get into drafting them before you get into litigation. Part 7 deals with litigation; that is remedies, and so forth. But you are going to be faced with the drafting of contracts for your clients, or redrafting them under the Code. So become acquainted with Part 2 and also Part 3 first.

Part 3 deals with the obligation and construction of the sales contract. The general obligation, of course, is clear: The buyer is to transfer and deliver the goods; the seller is to accept and pay for them. The Code has a provision of general applicability here which is not really new. It has been widely discussed. At one time I think it was controversial as creating a "shocking" change in the law. I don't think it is either shocking nor do I think it is any change in the law. Let me read to you: "If the court, as a matter of law, finds the contract or any clause of the contract to have been unconscionable *at the time when it was entered into*, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of the unconscionable clause as to avoid any unconscionable result. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." So under that you may have an entire agreement or merely one clause that is held unenforceable if the court finds it was unconscionable when entered into.

Now this isn't novel at all. The courts in Illinois for over one hundred years have developed this doctrine of unconscionability. Your own Supreme Court of Nebraska has recognized the doctrine. It is nothing new. This is merely an embodiment of a common law rule that has been developed in the several states.

One of the most famous cases cited in the Official Comments is *Campbell Soup v. Wentz* which, if you wanted to give it a Perry Mason title, you could call "The Case of the Recalcitrant Carrot Growers." Campbell Soup drew a contract with some farmers in New Jersey that the Court found was just too one-sided. All the risks were placed on the farmers. These were Chantenay red carrots, and of course they were hard to get. Campbell Soup

needed them and it sought specific performance of the contract when the farmers wouldn't deliver. The court found this was a very appropriate case for specific performance, but would not enforce the contract on the ground that it was unconscionable. The Campbell Soup Company learned from that decision and they re-drafted their contract, and in a subsequent case they did get specific performance.

The common law doctrine has been applied, I think, in cases of oppressiveness or unfair surprise. You've got a one-sided contract. I think you can tell just from your own sense of fairness what is one-sided. The courts frown upon that type of contract. So I think the results are predictable under the Code on the basis of the decisions that are now on the books in which this doctrine has been developed.

QUESTION: Would that still apply in the event you had a bona fide purchaser?

MR. DAVENPORT: A bona fide purchaser?

QUESTIONER: The unconscionable result. You have a contract and then let's say the seller assigned his interest to a bona fide purchaser. Does the unconscionable result theory . . .

MR. DAVENPORT: I think in that case my own off-the-cuff conclusion would be that the party to whom that contract was assigned would have read it before taking it, and I think the answer is probably "yes" that he would stand in the shoes of the person who assigned him the contract.

Options respecting cooperation: The Code provides that either party may specify particulars of performance. The buyer may be the one, for example, to choose from a selection of goods, and in events of that kind where the details of performance are left to future action of the parties, the contract is not rendered vague or indefinite because of this freedom. The Code in general permits pretty open contracts in many directions.

Now the price: The price under the Code may be payable in money or otherwise. It can be payable in goods. It can also be payable in real estate. The Code has a very liberal open price term, and businessmen particularly like this. Counsel for the steel companies like this contract because they like to sell on the basis of their list price at the time they get the purchase order. The purchase order may have one price and they may provide seller's list price in effect when the order is received. So they have an open price. The Code enforces this open price term. This is to the ad-

vantage of businessmen. Some courts took what might be regarded as a narrow-minded view and held such contracts indefinite because the price wasn't fixed. Your Nebraska Supreme Court, on the other hand, took a very liberal view in this case and said the open price term was all right, and the Code continues that rule.

The provisions concerning delivery and shipment: I am going to pass over these very rapidly. They are pretty much the same as they were under the Sales Act. They are spelled out in more detail in those sections that are mentioned there, under Item e under 3 on page 9. The Code for the first time gives definite meaning to standard shipping terms like F.O.B., F.A.S., C.I.F. You can enter into this contract with these shipping terms and you can know exactly what they are and it won't have to depend upon what some court may decide later. F.O.B. was regarded as a price term by several courts. The Code makes it a delivery term. It has nothing to do with price; only delivery. F.O.B. point of origin, F.O.B. point of destination—those are delivery terms.

The same with payment. There is very little change with respect to the law with regard to payment. In the absence of agreement, payment is due at the time and place at which the buyer is to receive the goods. Again this comes under the concept of receipt of goods.

The risk of loss under an F.O.B. point of origin term may have already passed to the buyer, but he isn't obligated to pay until the goods get there, and the reason for that is he has his right of inspection and he can look at those goods before he pays for them, even though the risk of loss has already passed to him. This clarifies the split in the decisional law in some states prior to the Code.

The Code also for the first time covers a situation of delivery by documents.

It also provides that payment can be made by a letter of credit term and specifies the details of that provision in Section 2-325.

Another area of great importance is the quality provision under the Code, the warranty and disclaimers. Gentlemen, Sections 2-312 through 2-318 are very important to you. In addition to Part 2, learn these sections, because these sections will be important to you who have clients who buy or sell personal property, and I think all of us have clients who do one or the other, or both.

The Code warranty of title: Essentially there is no change from what it was under the Sales Act. There is a warranty against claims of infringement, like patent or copyright infringe-

ment, in the case of a merchant seller. That merely codifies the common law of many states. We had a decision in Illinois in 1888 that a seller of goods warranted to the buyer that he could use them freely without any fear of a patent infringement, suit, or a threat. The Sales Act didn't contain any provision on this, but the Code makes it clear, and it is only reasonable that it should. Goods that a buyer can't use because of a patent infringement suit aren't worth very much to him.

In the area of express warranties, they are clarified and broadened.

The description of goods in samples or models made part of the basis of the bargain are express warranties. Under the Sales Act they were implied warranties, and that is particularly important in the area of disclaimer of warranties. There was a case in the Third Circuit, for instance, involving *Consolidated Fisheries v. Fairbanks Morse*. Fairbanks Morse sold Consolidated a motor described as a 1,156 kilowatt motor. The motor would not generate 1,156 kilowatts and the buyer was understandably disappointed. There was a disclaimer of implied warranties in the contract and the seller contended that this disclaimer excluded the implied warranty of description. The Court got around that by saying it was an express, not an implied warranty, and the disclaimer didn't cover it.

As was the case under the Sales Act, there need be no specific intention to make a warranty.

An affirmation, on the other hand, merely of the value of goods or opinion does not create a warranty.

There was a New York case, for example, where an overzealous seller said that his overalls would "wear like iron." A disappointed buyer took that claim literally and sought to enforce it in the courts. Of course you know what the court did with that.

We had an Illinois case where an ardent book salesman sold a set of Balzac's books to a housewife upon the representation that "the works of Balzac were nice books, books that her children would love to read, and they would be nice to have in the library." I think she may have found out that her children were too fascinated with the works of Balzac. The court said that was her problem, that she should have known better, and that this was merely the book salesman's opinion. I think that seems to be a fair decision, and I believe you get the same result under the Code.

Under implied warranty of merchantability, the criteria of merchantability are supplied for the first time. They are detailed in subsection (1) of 2-314. The warranty is implied only in the case

of a "merchant with respect to goods of that kind." This is a change in text only. It is made clear that the serving for value of food or drink, whether consumed on the premises or elsewhere, is a sale of goods. This codifies, incidentally, a prior Nebraska decision on the subject. Other sale cases are left open. Whether it is a sale or service, you have quite a bit of law developing currently on whether the transfer of blood plasma by a hospital or a doctor is a sale or a service. The courts are not agreed on transactions like this, whether they represent sale or whether they represent primarily service. This type of litigation will continue with the one exception, a service of food.

Now we come to the warranty of fitness for a particular purpose in Section 2-315. The warranty is made where the seller at the time of sale has "reason to know"—this is a less stringent standard than under the Sales Act; the only requirement is that the seller have "reason to know"—at the time of the sale of the particular purpose for which the goods are required and that the buyer is relying on his skill.

The warranty of merchantability and the warranty of fitness for purpose are distinguished under the Code. You go into a shoe store and you say to the salesman, "I want a pair of shoes." If you want these for ordinary walking, we've got the warranty of merchantability involved. But you go into the shoe store and you say, "I am a mountain climber and I want a good pair of shoes to be used for mountain climbing." If he sells you shoes for that purpose, you have made your purpose known to him and if he sells you shoes not fit for this purpose, he has breached his warranty in this case.

The Code eliminates the exception which was contained in the Sales Act for goods sold by "patent or other trade name." A sale by patent or other trade name, if you buy a toothpaste by the name of Crest, for instance, this is merely one fact in determining whether this was a sale for a particular purpose.

Next is the very important area of disclaimers and limitations of warranty. The Sales Act did *not* cover this area, and for this reason it is important that you know that the Code *does*. It sets up requirements before a disclaimer may become legally effective against the person against whom it is to operate. These requisites are established in 2-316 (2).

A warranty of merchantability may be excluded orally. If your salesman says, "We don't warrant the merchantability of these goods," and the buyer goes ahead and takes them, it is the

buyer's problem. If the merchant says nothing about it, the implied warranty is there. The warranty may also be excluded in writing, but if it is excluded in a document, the disclaimer must be "conspicuous." We go back to our definition in 1-201(10) and you get an idea there of what is meant by conspicuous.

The warranty of fitness for purpose can be excluded only by a conspicuous writing. You cannot orally disclaim that warranty; it must be done by writing and it must be done conspicuously. The purpose of this is, if goods are going to be sold without warranties, the draftsmen of the Code want the buyers to be aware of this, or at least negligent if they weren't aware, because the seller put it in conspicuous type. So the Code does not prohibit the use of disclaimers, but it makes sure that a buyer against whom they operate should have noticed them, that they will be prominent, and it will be his fault if he didn't notice them. On the other hand, if the seller puts the disclaimers in and they are not conspicuous, they will probably not be held effective against the buyer. So the importance of adhering to those Sections, particularly 2-316, I think is clear to you.

We have a section also that deals with construction of warranties, 2-317. There is frequently a conflict between express and implied warranties. They may cross cut. Section 2-317 sets up rules there. It is generally the factor that predominated in the mind of the buyer in buying the particular goods. If it was a sample, or if it was enumerated specifications, generally they will control. In any event, the rules are set forth there in Section 2-317.

Now we have the concept of privity, as to which the Code makes no change in Nebraska law. I think Nebraska common law has already gone beyond the Code. The Code provides that the seller's warranty in Section 2-318, whether express or implied, extends to any natural person in the family or household of the buyer or a guest in his home if it is reasonable to expect that such person, such natural person, may be affected by the goods and that person is injured in person by breach of the warranty. This is a limitation which the seller cannot get around. He cannot limit his warranty to the particular buyer.

QUESTION: How about the manufacturer's liability to the consumer?

MR. DAVENPORT: Jack, that is governed still by the developing case law. This is not within the ambit of Section 2-318. The Code does not prevent any change in the law on that. That currently is being developed judicially by the courts in all states, particularly California and New York.

QUESTION: There seems to be a discrepancy between 1-102 (3) and some of these disclaimers that are described here. That is the case where care and negligence may be involved. Is there any way to reconcile them?

MR. DAVENPORT: Well, I don't at the moment understand here what the . . .

QUESTIONER: I mean this: The buyer says, "You've got an old potato digger out in your field. I want to buy it."

The seller says, "All right, but I can't guarantee it in any way except title." Is that legal?

MR. DAVENPORT: Certainly. In that particular case you are talking about second-hand goods. It is very common to sell second-hand goods on what we call an "as is" basis. The United States Army sells all of its war surplus goods "as is, where is," which means all they guarantee is title and you take whatever you get on it. This is a sale of somewhat the same kind. You said a potato digger out in the field, you take it as is, I guarantee nothing. Nothing in the Code prevents that.

QUESTIONER: I was wondering about 1-102(3) which says you can't disclaim for negligence or care.

MR. DAVENPORT: I don't understand what would be negligent there, sir.

QUESTIONER: The negligence in the matter of selling the person who might be injured by that potato digger.

MR. DAVENPORT: No. Now you are talking about something else. You wouldn't have any negligence in the matter of sale. You would be telling him that he has no warranties on it. Now, the law of negligence may come in in some other way. In other words, if the seller knows there is something wrong with that machine and he doesn't tell the buyer, this is probably within the realm of the law of negligence. This is something else; in other words, where the law might imply an affirmative duty on the part of the seller to warn the buyer of a particular defect. I don't think we are talking about the same thing. But it is a good question.

The next area is "Title, creditors and good faith purchasers." The Code abandons the "title" concept in favor of the "specific issue" approach. Under the Sales Act, title was the predominant or the central factor. The court found title and then decided every other question—risk of loss, right to action for price, and every other incident. The case law that developed under the Sales Act

was a hodge-podge of inconsistencies and confusion, because the results weren't consistent with the theory on it. The court sometimes would find title had passed and then in very similar situations they would find it had not passed. The Code wisely departs from that central concept.

The location of title as a determinant of the rights of the parties is de-emphasized under the Code. The Code deals with the "specific issue," issue by issue. The risk of loss of goods is dependent upon operative facts other than the location of title. They are set out in 2-509 and 2-510.

The right to an action for a price is dependent upon concepts other than whether the title had passed. Generally, where you are dealing with goods that are unaccepted, the primary criterion is resalability of the goods. So the role of title drops out under the Code. It is a specific issue situation.

Title will still be important under the Code, generally in situations where you have the rights of third parties involved. For instance, if the state levies a sales tax—I don't think you have a sales tax here in Nebraska—but the point at which title passed will be important in determining which state can collect the sales tax. We have a lot of this litigation between Illinois and Missouri. Our Department of Revenue wants the money and so does the Missouri Department of Revenue. In this situation the Code applies. Similarly the criminal liability for theft may well depend upon where the title to property lay at the time; the question of insurance. So questions of title will still be important in these areas. But where you've got the issue between the parties, the Code generally has some specific provision that covers it in terms of operative facts and not title.

The rights of creditors under the Code is covered in Section 2-402. Creditors have the same rights against the goods sold and remaining in the possession of seller as they did under the Sales Act, with the possible exception of the case of retention of possession in good faith and in the current course of trade by a merchant-seller for a commercially reasonable period of time. In some trades the seller may keep the goods a couple of days for the buyer. There may be reasons why this is done in the trade. This is customarily done in the business by all sellers. If you have a creditor of the seller levying on the goods in the meantime, the buyer would probably have protection under this provision and would prevail over the creditors of the seller.

A key section of the Code is Section 2-403 which constitutes a fundamental expansion of protection to good faith purchasers for

value and buyers in ordinary course: The good faith purchaser for value—and that term you can get by taking several definitions and combining them, a person with a voidable title has power to transfer good title to a “good faith purchaser for value.” When goods have been delivered under a transaction of purchase, the purchaser has such power, although the transferor was deceived as to the identity of the purchaser; the delivery was for a check subsequently dishonored—and you have many cases on this in Nebraska, at least three or four; this is a codification of your Nebraska law; though the transaction was to be a cash sale, or the delivery was procured through fraud punishable as larceny under the criminal law.

The provision with respect to the buyer in ordinary course represents the greatest change from prior law. This is the fellow who comes in to a jeweler, let's say, and buys a wrist watch. He buys it for cash. He buys it because he needs it. Of course the business of the jeweler is to sell watches.

Let's take the case where you take your watch in to the jeweler for repairs. This is a magnificent Swiss timepiece, and after he finishes the repairs the jeweler puts it in the showcase. Somebody comes along and sees it and says, “What a nice looking timepiece that is! I've been looking for one like that.”

The jeweler sells him your watch! Does that purchaser get good title? Not before the Code, but under the Code he will. This is the concept of entrustment. Entrustment of possession of goods to a merchant dealing in goods of that kind gives him power to transfer all the rights of the entruster to a “buyer in ordinary course of business.” Entrusting includes any delivery which is any voluntary parting with possession and also any acquiescence in retention of possession. You may learn that somebody else gave the jeweler the watch without authority, but you don't do anything to get it back. We don't take the concept, however, as far as the thief. Somebody steals your watch and takes it in to the jeweler and then the jeweler sells it to the buyer in ordinary course. You can get your watch back in that case. But where you take it in yourself, the Code visits the consequences of the jeweler's mortality or immortality upon you because the theory is that you should know him better than the fellow who comes in later and buys a watch from him; or the chances are that since you took it to him for repairs you knew something about him or you bought from him. Anyway, you are vouching for his integrity, and if he does you wrong it is your hard luck and you cannot get the watch from the subsequent buyer in ordinary course. That is a funda-

mental change in the law and it is one of the most discussed changes under the Code.

Do you have any questions up to this point? That doesn't appear to shock too many people. I thought it might.

QUESTION: In regard to this matter of some one else putting it there, you have to know that he took it. For instance, like in this watch case. If my son did take the watch there and I don't know that he has done that, am I still stuck?

MR. DAVENPORT: I would say "No," but if you learn that he has done it and you don't do anything to retrieve it, "Yes."

Any other questions?

QUESTION: What about the sale being an unusual practice of the entruster? In other words, if you take an automobile to a mechanic who has never sold an automobile, who does nothing but repair work . . .

MR. DAVENPORT: Oh no, this has to be a seller, a merchant who sells goods of that kind—a jeweler in my hypothetical case who sells watches but he also repairs them. It has to be a buyer in the ordinary course of business, which means the seller must sell goods of that kind. If the seller has never sold goods of that kind this is not a transaction in the ordinary course of business.

The next area of the Code or the part that is dealt with is the concept of performance. We have a few innovations here, ladies and gentlemen. The Code goes back to the earlier concept, that is, the pre-Sales Act concept, of identification. Identification means nothing more than earmarking the goods for a particular contract, and you can identify them in any manner that you want to. The question is: At what point are they earmarked for this particular contract? When they are, we have identification. Sometimes it is made at the time the contract is made, sometimes it is made either by the buyer or seller at a subsequent date. The effect of identification is that the buyer obtains an insurable interest.

Another innovation we have in the Code is in Section 2-502. This is the buyer's rights to obtain the goods on the seller's insolvency. This is subject to certain provisions. Even though the goods have not been shipped, a buyer who has paid a part or all of the price of goods in which he has a special property under Section 2-501 may, on making and keeping tender good, a tender of any unpaid portion of their price, recover them from the seller if the seller becomes insolvent within ten days after the receipt of the first installment on their price. This means that the buyer is distin-

guished from a general creditor by identification. If he has paid the seller money and he hasn't got identified goods that he can point to, he is a general creditor in the seller's insolvency. If, however, you have identification at that point, he can show certain goods earmarked for the contract, he then has a special property interest and can recover these goods.

At this point I should caution you that this can conceivably involve a possible conflict with the Bankruptcy Act, and this is one of the subjects that has been covered in the law review articles. It does exist because the buyer frequently will be trying to get those goods from the seller's trustee in bankruptcy, and in many cases I think as a practical matter he can, because if he has paid just a small part of the price, if he pays the balance to the trustee, the trustee will get more for them that way than he could at a liquidation sale in bankruptcy, since they traditionally bring much less than fair value, or what might be deemed the market value. So I think the buyer's chances in that situation are, as a practical matter, generally pretty good.

The Code then deals in the next sections of Part 5 with the tender of delivery and shipment. We have the same basic obligation that we had in the Sales Act; namely, that the seller place and hold conforming goods at the buyer's disposition and give the buyer any notification necessary to enable him to take delivery. Particularly in a large quantity or truckloads it is good to tell the buyer that the goods are coming so he can have the bins, or places available in which to store them. The Code provides specific rules for tender where you have shipment, delivery of goods in possession of the bailee, delivery of documents covering goods, and the Code still makes the tender of delivery a condition precedent to the buyer's duty to accept and pay for the goods.

The Code introduces what is another innovation in the concept of cure. It is an innovation in statutory law. You will find it well embedded in the decisional law. The new sections of Article 2 are really just a codification of decisions that have been made on it. This, again, illustrates the function of a code as a restatement. It takes the best decisions, or what are regarded as the best decisions, and then enacts them into statutory law.

The seller here has a right to cure a defective performance. It provides that where any tender or delivery by the seller is rejected because nonconforming, and the time of performance has not expired, the seller may seasonably notify the buyer of his intention to cure and may then, within the contract time, make a conforming delivery. It means the buyer can't hold him in breach merely be-

cause he flubbed the first time. The Code does provide that that first delivery must be in good faith, so the argument here that some people have made, that this sanctions deliveries by the trial and error method, doesn't hold.

Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable, with or without money allowance, the seller may, if he seasonably notifies the buyer, have a further reasonable time to substitute a conforming tender. A seller who in good faith makes a defective performance might, for instance, tender a deficiency in quantity or an excess in quantity with the thought, "Well, I'll let the buyer deduct this from his invoice," or "the buyer can pay me additionally and there will be no complaint on it." This sometimes happens. Sometimes the buyer is unreasonable in rejecting for trivialities, like one pound out of a ton or something, and the seller wants to give him credit for the one pound and the buyer says, "You haven't performed, I'm not going to take it." The courts have a way of dealing with the unreasonable buyer in that situation, and the Code deals similarly with him.

QUESTION: Is this one of the rules that can be specifically made not applicable by the terms of the contract?

MR. DAVENPORT: Yes sir. You can do it either way. You can provide for a contractual right of cure that transcends this, or you can provide against any right of cure. That is correct.

The Code also continues, in effect, the rules in the Sales Act principally governing the tender of payment and inspection. The tender of payment by the buyer is still conditioned upon the seller's duty to tender or to complete delivery. Tender by check will ordinarily be sufficient. The seller may insist on cash, and since commercial transactions are normally handled by taking checks today, the seller cannot force the buyer to commit a forced breach by refusing to take a check. If the seller in that situation wants cash, he has got to give the buyer additional time to get it, and the buyer is not in default if he tenders the seller a check and the seller unreasonably refuses to accept it. The buyer still has the right, before payment, to inspect the goods at any reasonable place and in any reasonable manner. The courts have always enforced vigorously that right of the buyer, and the Code continues that right and enforces it.

Now the area of breach, repudiation, and excuse: We have here in Section 2-601 what some have called the perfect tender rule, in that with the buyer's rights on nonconforming delivery he can reject the entire goods, he can accept them all, or he may ac-

cept any commercial unit or units and reject the rest. The perfect tender rule is cut down in effect, ladies and gentlemen, by the right to cure which I have just discussed. In this situation let's say it gives the buyer the choice. If the buyer is tendered ten barrels of lard, the contract calls for ten barrels of lard, and upon looking at them he finds that two of them are spoiled or have something wrong with them and he says, "I am not taking these, but I will take the eight."

The seller says, "You either take them all or you don't take any."

The buyer says, "No, I am taking the eight."

The seller says, "If you do, I am going to hold you to a contract for the entire balance. You are buying all ten."

Under the pre-Code law the buyer was in somewhat of a quandary. If he accepted part of them on what was regarded as an indivisible contract he would be held liable for the price of the two that were spoiled. Under the Code, since a barrel of lard would constitute a commercial unit, the buyer can take the eight and let the seller worry about the other two. If he pays at the contract rate, the two spoiled barrels are the seller's problem.

It is important for the buyer to know the manner of rejection. How do you reject nonconforming goods? Rejection must be made within a reasonable time after delivery or tender, and the buyer must seasonably notify the seller. If he rejects without telling the seller, he has in effect made an ineffective rejection, and under 2-606 this constitutes acceptance. So when you are advising a buyer who is rejecting the goods, you want to tell him to be sure to notify the seller or else he will be held liable for the price in an action for them, as an action for accepted goods.

A buyer in physical possession and without a security interest in the goods, must hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. You tell him, "I don't want them, I am holding them, you come and get them." A non-merchant buyer has no further duty; in other words, if somebody ships something to your house, you order an item of household furniture and you reject it, you tell the seller you don't want it and this is all you have to do. He has to come and get it. All you are obligated for is to hold it for a reasonable length of time to enable him to do that.

But when we are dealing with the merchant-buyer we've got other problems. This is the sophisticated businessman who knows the trade customs and trade usages and is held to a higher standard

by the courts. A merchant-buyer after rejection must follow reasonable instructions from the seller, and in the absence of instructions he must make reasonable efforts to sell the goods for the seller's account if the goods are perishable or if they threaten to decline in value speedily. The effect of this section is to adopt a well known case decided by the Supreme Court of Rhode Island which involved a shipment of peaches, and the buyer could not induce a stubborn seller to be reasonable and so went ahead and resold them. The seller claims this was acceptance. The Supreme Court of Rhode Island said, "Under the circumstances it was not. You are a stubborn seller. This is your problem."

A merchant-buyer is entitled to reimbursement from the seller out of the proceeds of this sale for reasonable expenses in caring for and in selling the goods. If the seller gives no instructions within a reasonable time after notification of rejection, the buyer can do one of three things: (1) he can store the rejected goods for the seller's account—he can take it to the warehouse and send the seller the warehouse receipt; (2) he can reship the goods to the seller C.O.D.; (3) he can resell them for the seller's account and account to the seller. We have the problem under Section 2-605 of the effect of the buyer's failure to state defects. The effect in those two situations which I mentioned at the bottom of page 12 and top of 13 is that the buyer waives his objections where he doesn't specify them in those circumstances, and he cannot rely on them later in any action for the price.

The concept of acceptance under the Code: When does it occur? It occurs when the buyer, after reasonable opportunity to inspect the goods, signifies that the goods are conforming or that he will retain them. You also have acceptance when, as I stated just a moment ago, you fail to make an effective rejection. It may be defective because it wasn't in a reasonable time or you didn't tell the seller. You have an acceptance when the buyer takes any action inconsistent with the seller's ownership and the seller ratifies that action of the buyer as an acceptance.

What are the consequences of acceptance? The buyer must pay at the contract rate for accepted goods. Acceptance precludes rejection and, if it's made with knowledge of nonconformity it cannot be revoked for that reason unless acceptance was on—and right there, gentlemen, the word "assertion" is a typographical error; please insert the words "on the reasonable assumption that"—the reasonable assumption that the nonconformity would be seasonably cured.

Acceptance does not impair any other remedy for nonconformity; in other words, the buyer may take the goods and tell the

seller, "I'll take them but they don't conform. They were late in delivery; the quantity was deficient; or the goods aren't up to the warranty." The buyer must notify the seller of claimed breach; in other words, if he accepts a defective tender, or a tender that is nonconforming on any ground and he is going to claim damages for it, the buyer has got to tell the seller, or he will not be able to rely on that in any subsequent action for the price or any other remedy. He won't have any other remedy. Of course, the burden remains on the buyer to establish the breach.

Another innovation of the Code is contained in Section 2-608. This is the concept of revocation of acceptance. This concept is substituted for that of rescission in the Uniform Sales Act. Section 69-1 (d) of the Sales Act is deleted. It doesn't appear anywhere in the Code. With its elimination, out goes the doctrine of rescission.

You had a case here in Nebraska which I think is pretty well famous in sales law casebooks over the country, *Henry v. Rudge & Guenzel*, which involved a lady who bought a pair of shoes and they were defective and she injured herself in a fall. She took the shoes back, got her money back and then sued for personal injury, and the court held that this was a rescission and abrogation of the contract, there wasn't anything left to sue on, for breach of warranty or anything else. There are like decisions, we have them in our courts in Illinois, and there are others in the states over this broad land. The draftsmen of the Code thought this was a rather harsh doctrine and so abrogated it and specified circumstances under which a buyer may revoke his acceptance. They also specify when revocation of the acceptance must be made and the effect of it. It is the same as if the acceptance didn't occur.

Another innovation of the Code is the right to adequate assurance of performance. The right of each party at his expectation of receiving due performance will not be impaired. A buyer who has ordered precision parts, let's say tool parts, from a seller and he learns on reliable authority that this seller has been making defective parts on several other contracts. This, in the commercial world, gives the buyer reasonable grounds to be apprehensive that he is going to get the same kind of tender. So he, on following the procedure set forth in the Code, can tell the seller that he has these grounds and he demands adequate assurance. Under the Code he is entitled to this, and if the seller doesn't give it, the seller at that point can be held for an anticipatory breach of contract. The effect of this provision is to write an insecurity clause into every sales contract. But the concept is that either party is entitled to receive due performance. If, before the date of per-

formance, he learns some reason why he won't get it—it may be insolvency, it may be shipments to other sellers, it may be any one of several grounds—he can then ask the other party to render an adequate assurance of performance.

The Code also covers in Section 2-610 the doctrine of anticipatory repudiation and retraction. This for the most part is a codification of the common law and it incorporates that into the Code.

Section 2-612 covers the subject of installment contracts, and those are somewhat detailed. At this point I just mentioned to you the fact of the coverage, and there are rules for it. This subject of installment contracts, anticipatory breach, and right to adequate assurance of performance are all lumped together, in that they all involve similar problems. This is 2-609 through 2-612 of the Code. Those sections are inter-related and they are all designed to take care of various facets of the problem of anticipatory repudiation.

The Code also covers excuse for the first time in statutory law, the subject of casualty to identified goods, the failure of means of transportation or means of payment, where it provides that substitute means of transportation must be employed when available. It also provides what the seller can do where the means of payment fails. It also covers a situation of failure of presupposed conditions. In this area it draws upon the Restatement of Contracts rather heavily in Sections 2-615 and 2-616. Where there is a cause there, the crop is destroyed or something, the seller has several requirement contracts. He can prorate his orders among customers and he can do other things. The buyer in this situation has a chance to withdraw from the contract upon notice given by the seller under 2-615, and he can go elsewhere on it. The seller is excused, but the buyer, if he wants to, can also get out of it, and he can line up a new source of supply that will fulfill his contract. This certainly is a desirable improvement in the law.

Lastly we get into the area of remedies. This is Part 7 of the Code. Quite properly it deals with litigation on the contract. I think the draftsmen of Article 2 have done a pretty good job in arranging it in logical order. First, in Part 1, you talk about terms and general things; in other words, the subject matter. Then you discuss form, formation of contracts; then what are the obligations of that contract; how do you perform it; what is breach, repudiation? Now we are down here to where we are through all of that and breach has occurred, so what can the seller do, what can the buyer do, and how do we litigate on this contract?

The seller's remedies and the buyer's remedies are both amplified under the Code, considerably expanded. This is one fact that

you should remember. In other words, the Code provides an expansion of remedies for both the buyer and the seller. The seller can withhold delivery of the goods. He can stop in transit, as he could under the Sales Act, except that the right is extended to breach situations other than insolvency where you are dealing in carload, truckload, planeload lots, where it doesn't impose too serious an obligation on the carrier to stop that shipment. For dealing in less than carload lots this imposes a terrific burden on the carrier, and in that situation the right is confined again to insolvency.

Under the Code the seller can complete the manufacture of goods. This change produces a commercially desirable result. The seller may find it to his advantage; it is economically sounder to complete manufacture of the goods than it is to cease manufacturing and sell the incomplete product for salvage. So, again, the Code permits what is a more common sense result.

Section 2-706 covers the procedure on resale of the goods. This will be the primary remedy of the seller under the Code. Where there is a breach, he will normally resell the goods, and if he does this in the manner specified by 2-706 the difference between that resale price and the contract price is the measure of his damages. He doesn't have to prove anything more. If he doesn't follow that procedure, though, he is going to be limited for an action for damages as provided in Section 2-708. This is the general rule on damages for non-acceptance. The seller can also, in the case of accepted goods and goods which are not resalable, recover the price. Again, this is the ability to resell, which is made the primary criterion of whether an action for the price is available.

Another remedy of the seller is cancellation of the contract. He can just cut it off at that point and terminate it, and let the buyer go, and forget about it.

There is a new and exclusive remedy provided by the Code in the insolvency situation. This wasn't dealt with under the Sales Act as it is under the Code. Where the buyer receives goods on credit while insolvent, the seller can reclaim them on demand made within ten days of the buyer's receipt of the goods. Where you have a written misrepresentation of solvency to the particular seller, within three months, this limitation does not apply. The seller's right to reclaim is subject to the claims of buyers in ordinary course, and here in Nebraska to lien creditors. In Illinois we knocked out that phrase "or lien creditors."

The Code has been generous with the seller in extending his remedies; it is similarly generous with the buyer. The buyer can cancel the contract; he can recover any part of the price paid; he

can cover and have damages under Section 2-712; or he can recover damages for non-delivery under 2-713.

With respect to recovery of goods, if the goods have been identified in insolvency situations, he may have recovery as provided in Section 2-502.

QUESTION: In regard to that 2-502, the buyer would have to pay the balance of the purchase price?

MR. DAVENPORT: Yes sir.

QUESTIONER: Suppose you made a contract today that called for \$1,000 down and payment of the balance January 1, and the fellow goes bankrupt. Does he have to pay the balance before it is due?

MR. DAVENPORT: I think the answer to that in this situation is clearly "Yes, if he wants it," and normally in that case he will; he won't wait. It says "on tender of the price," because in that case you generally will not be dealing with the seller but you will be dealing with his trustee in bankruptcy. He has to wind up that estate, and this is the practical reason why you are not going to be able to rely on your contract in that situation.

Recovery of the goods: The Code also provides for the remedy of specific performance. To get specific performance, you will note in Section 2-716 the goods need not be identified. The Code also provides for the replevin of goods in a situation where the buyer cannot cover; that is, by going out and buying the same goods on the market.

Also on rightful rejection or justifiable revocation of acceptance, the buyer has a security interest in the goods in his possession, or control for payments that he has made on the price or for expenses in caring for or storing the goods.

The term "cover" used in the Code is a statutory concept but it is one that has been well developed in the decisions. A buyer when he learns the seller isn't going to perform simply goes out and buys the same goods elsewhere. If he buys at the same price as his contract with the seller, he probably hasn't suffered any damages except nominal expenses. If he pays more, his damages of course are clear.

There is one change with respect to the rule of damages. In cases of non-delivery and repudiation the rule is that it is the difference between the market price at the time the buyer learns of the breach and the contract price rather than at the time that was set for delivery, as it was under the Sales Act.

In the damage in the case of accepted goods there is no change from the Sales Act. It is the difference between their actual value and their value had they been as warranted. A buyer can also recover incidental or consequential damages.

I mentioned previously specific performance and replevin. A new remedy that the buyer has is deduction of damages from the price that is extended from breach of warranty to breaches of all kinds, deficiency in quantity, late delivery, any other kinds of breaches.

If the buyer, however, is going to deduct something from the price because of these breaches, his right to do so is conditioned on his notification of the seller. If he doesn't, he himself will be held in breach. So giving notice to the seller that the buyer is going to deduct damages is important.

The Code also covers the contractual modification with respect to damages or remedies. It provides for liquidation of damages. Section 2-718 states rules with respect thereto where you have earnest money deposits. You also can provide for remedies in addition to, or in substitution of, those provided in the article. Frequently sellers provide that the buyer's remedies shall consist exclusively of the right to return the goods for repayment of the purchase price, or repair and replacement of the defective goods.

One of the final sections, Section 2-722, establishes liberal rules for the suability of third parties. The goods may be in a warehouse; they may be in the possession of a carrier. There are many disputes between carriers and the parties to a sales contract as to who owns the goods. Either party can bring an action, and he can with the consent of the other, bring it for the benefit of "whom it may concern." If the other party happens to own the goods, the recovery of the suing party is held in trust.

The Code also establishes in Sections 2-723 and 2-724 rules of evidence and procedure on contracts. An action based on anticipatory repudiation coming to trial before the time for performance would never happen in Chicago. It might happen here in Nebraska. At least, certainly as I know it, it is a rare situation.

It also provides for substitute market prices and places in Section 2-723. Also in Section 2-724 it makes market quotations admissible in evidence, and in so doing I think adopts the rule of case law here in Nebraska before the Code.

Finally, Article 2 contains in Section 2-725 a statute of limitations. The Code did not contain one. The period is four years

after accrual of the cause of action. The period may be shortened but not extended. The cause of action accrues at the time of breach. Where the breach occurs before the effective date of the Code, it will be governed by your pre-Code statutes; where the breach occurs after the effective date of the Code, Section 2-725 will be the applicable statute of limitations.

Gentlemen, that covers Article 2 somewhat at length. You've been very patient in listening to me all afternoon and you are entitled to some relief. If there are any questions at this time I'll be very happy to answer them. Thank you.

[The session adjourned at four-thirty o'clock.]

FRIDAY MORNING SESSION**November 13, 1964**

The second session of the Institute on the Uniform Commercial Code was called to order at nine-fifteen o'clock by Chairman Rodney Shkolnick of Omaha.

CHAIRMAN SHKOLNICK: The first speaker of our session this morning will deal with the subject of "Commercial Paper, Bank Deposits, and Collections under the Uniform Commercial Code," basically Articles 3 and 4. Our speaker has asked me to announce that he will take a five-minute break in the middle of his speech between the two subjects, and he requests that you hold your questions until the end of his presentation.

Our speaker this morning is Mr. Murdoch K. Goodwin, Vice President and General Counsel of the Federal Reserve Bank of Philadelphia. Mr. Goodwin is a graduate of the University of Pennsylvania, has published numerous law review articles concerning the Uniform Commercial Code and banking aspects under the Code; he is a member of the subcommittee of the Permanent Editorial Board of the Uniform Commercial Code of the American Law Institute, and also is a member of the Uniform Commercial Code and Banking Committees of the American Bar Association, the Section on Corporations, Banking and Business Law of the Pennsylvania Bar Association, and a member of the Committee on the Uniform Commercial Code of the Pennsylvania State Chamber of Commerce. In order that we may proceed without further delay, I will now turn the podium over to Mr. Murdoch Goodwin!

COMMERCIAL PAPER, BANK DEPOSITS AND COLLECTIONS**Murdoch K. Goodwin**

Mr. Chairman, Fellow Members of the Bar: I cannot resist, first, just a word about the experience in Pennsylvania under the Uniform Commercial Code, where it has been in effect since 1954, because it is far better than the hodge-podge we had had previously, which consisted of the Uniform Sales Act, the N.I.L., a bank collections act, the Uniform Warehouse Receipts and Bills of Lading Acts, the Uniform Stock Transfer Act, and on security we had at least five statutes plus some common law devices. Today the Code supersedes all these statutes and in one enactment covers the sale, storage, distribution, and payment for goods, plus the collateral security required in the financing of any such transactions. In other words, the consensus in Pennsylvania has been from the beginning, and continues to be, that the Code is advantageous to

Pennsylvania, even though other surrounding states may have preferred to retain the laws of the horse-and-buggy days. But of course that situation has rapidly improved with the adoption of the Code by every state bordering on Pennsylvania, with the one exception of the State of Delaware.

It is significant, too, that there has been relatively little litigation under the Code, except in insolvency proceedings, where the parties have everything to win and nothing to lose by litigating. These conclusions are equally applicable to Article 3 on commercial paper and Article 4 on bank deposits and collections, which are characterized by simple uniform rules under which the parties have greater certainty of rights resulting in a greater measure of security.

I should emphasize that many of the old rules of the N.I.L. are continued but their applicability to new situations is clarified. New situations have been taken care of, obsolete practices have been omitted, and the material has been rearranged and condensed. For instance, the 196 sections of the N.I.L. have been reduced to 79 in the Code, although I must admit that some of this has been done by the use of subsections. But 1,300 printed lines of the N.I.L. are reduced to 885 in the Code. Undoubtedly some of you are familiar with the fact that 80 sections of the N.I.L. had different meanings in different states, and the Code is designed to rectify this situation.

Let me emphasize, however, that it is unnecessary to relearn the law of negotiable instruments because the Code has not drastically changed commercial practice. A check is still a check, and only the good ones will be paid—we hope. Working with the Code, however, will demonstrate a greater facility with which answers may be found and by which modern business practices may be adopted. So I hope that there will be an opportunity to answer questions not only on the statute but the experience under the statute.

I suppose, however, that I ought to qualify that commitment to answer questions by the story of the after-dinner speaker who had been proceeding for about five minutes when suddenly there came a shout from the rear of the room, "Sit down! You're stupid!"

The speaker politely disregarded the interruption, when again came this cry, "Sit down! You're stupid!"

This time he determined that he ought to squelch this fellow if it happened again, and of course it did happen again, with the cry "Sit down! You're stupid!"

So the speaker replied, "And you're drunk!"

"Yes," came the retort, "but tomorrow morning I'll be sober and you'll still be stupid."

We ought to observe, first, that the law of negotiable instruments is a mass of detail unrelieved by any stimulating policy questions. To the fullest extent possible I will attempt to avoid being tedious by making no reference whatever to the section numbers of the statute. I believe that the outline which I have furnished amply supplies any deficiency in that respect.

Article 3 covers commercial paper. No longer is the subject to be called "bills and notes." This of course will provide a field day for the law publishers in republishing all their books on the topic.

The article covers the form of an instrument and defines negotiability. It covers negotiation and endorsement, the rights of holders, the liability of parties, the subjects of presentment, notice of dishonor and protest, and the discharge of parties.

Article 3 applies to all negotiable instruments but its provisions are subject to those in Article 4 on bank deposits and collections, in the event of any conflict between the two articles.

In addition, Article 3 applies to those nonnegotiable instruments which are not payable to order or to bearer. Such non-negotiable instruments may not be held by a holder in due course, but they do pass by endorsement and the endorsers have the usual liabilities pertaining to that relationship.

I remember when I first began to practice law that one of my first assignments was a definition of the rights and liabilities of parties to a nonnegotiable instrument, and I think I had to go back to some old case in 1796 before I could find any definition of what those relationships were. The article does not apply to money, to documents of title like a warehouse receipt or a bill of lading, which are covered by Article 7, or to investment securities, which is the subject of Article 8. But in this latter case of securities all of you are familiar with the methods by which the courts have stretched the provisions of the N.I.L. in order to apply them to corporate and municipal securities for the purpose of reaching a desired result.

Dealing first with form and negotiability of instruments, the basic concept of a negotiable instrument has been retained. It must still be signed by a maker or drawer, contain an unconditional promise or order to pay a sum certain in money, be payable on demand or at a definite time, and be payable to order or to bearer.

Other sections define what is meant by money, a sum certain, and the other elements of this definition. For instance, a promise or

order to pay is not conditional because the instrument is subject to implied conditions, or because it states its consideration, or the transaction which gave rise to the instrument, or because it refers to a separate agreement for rights of prepayment or of acceleration, or because the instrument states that it is secured, or indicates the account to be charged, and in the case of the governmental issue, merely because payment is limited to a particular fund or particular source. But a promise or order continues to be conditional if it states that it is subject to any other agreement or, except in the case of the governmental issue, states that it is to be paid only out of a particular fund. Many of you will recognize that these provisions are intended to give full credit to commercial understandings and avoid giving courts and lawyers a field day in mental gymnastics, such as occurred under the N.I.L.

Continuing, a sum payable is a sum certain even though it is to be paid with interest, or in installments, or with different rates of interest before or after default, or with a stated discount or premium to be charged if it is paid before or after maturity, with exchange or less exchange, or with costs of collections and attorneys' fees.

Again, an instrument is payable at a definite time, even though it is payable on or before a stated date, or at a fixed period after sight, or even though it is subject to any acceleration by the holder, although of course the holder must exercise good faith in exercising this power of acceleration and he can't do it just because the obligor's rich uncle died, or because he considers that the obligor may be spending too much time at the races. But an instrument is still payable at a definite time, even though it is subject to extension at the option of the holder, although in this instance the maturity date cannot be extended by the holder without the consent of the obligor.

Furthermore, negotiability is said not to be affected by any omission of the statement of consideration, or of the place where it is drawn or payable, or by a statement that collateral has been given for the instrument, or even that the collateral secures other obligations of the obligor, or because it contains a promise to maintain, protect or give additional collateral, or authority to confess judgment on default, or waiver of laws intended for the benefit of the obligor, or by the fact that the instrument is under seal, undated, antedated, or postdated.

Now as to the incomplete instrument, you will recall that under the N.I.L. an instrument both undelivered by the maker and incomplete could not be enforced against him, even though he

signed it. The Code reverses this result, and an undelivered, incomplete instrument, if it is signed, imposes a liability on the maker in favor of the holder in due course. This is known as the "janitor's retirement fund." If Joe Zelch insists on signing checks in blank and leaving them in the drawer of his desk overnight, he ought to be liable on those checks when the janitor takes them and cashes them at the local tavern. The loss should be on Joe and not on his innocent bank of deposit.

An instrument payable through a bank only designates the bank as a collecting bank to make a presentment.

With respect to instruments payable *at* a bank, the sponsors of the Code offer a choice of two alternatives: One is to make it a draft, or like a draft, drawn on the funds of the maker at the bank; the other option states that the instrument payable at a bank is not an order on the bank to pay it. Nebraska adopted the latter alternative, so that in your state the draft payable at a bank is not an order on the bank to pay it, and in this respect I would suggest that you make a mark on page 17 at the top because when I wrote the outline I was following the option adopted by Pennsylvania and New York and not the option which I found out yesterday was adopted here in Nebraska.

With respect to negotiation and endorsement, any transfer of an instrument gives the transferee all the rights of the transferor in that instrument. This is the continuation of the shelter provision of the N.I.L., whereby a holder in due course transmits his rights in that status unless the transferee has engaged in fraud, illegal action, or had notice of a defense or an adverse claim to the instrument in his capacity as a prior holder. But the continuation of the shelter provision will continue to insure the holder in due course with the free market to which he is entitled.

Endorsement is required for the negotiation of items payable to order. The transfer of an instrument not payable to bearer, when made for value, gives the transferee the right to the endorsement of his transferor. Negotiation, therefore, constitutes either the delivery of an instrument already payable to bearer, or the delivery of an instrument payable to order, bearing any necessary endorsement, because once an instrument payable to order is endorsed in blank, it is payable to bearer and is negotiated by delivery unless especially endorsed.

Words of assignment or guarantee which accompany the endorsement do not affect that signature as an endorsement.

In summary, take for example the check of X drawn to the order of Y on bank D. The endorsement of Y is required to nego-

tiate the check. If Y transfers to Z, Z is entitled to Y's endorsement, and thereafter the check is payable to bearer unless it is especially endorsed.

Now the rules of special endorsements of the Code change the dogma that pertained under the N.I.L. to the effect that once paper was bearer paper it was always bearer paper. Special endorsements specify the person to whose order the instrument is payable, and further negotiation requires that endorsement. The rule of the N.I.L. prohibited the transformation of bearer paper to order paper. Under the Code, a holder may convert a blank endorsement into a special endorsement. Thus, after Y endorsed the check to Z, Z could change that bearer check to order paper by converting Y's endorsement in his favor only by writing over Y's endorsement "pay only to Z," and thereafter the endorsement of Z is required for the further negotiation of the instrument. So the matter of negotiation is now controlled by the last endorsement regardless of the original form of the instrument.

Similarly, restrictive endorsements are continued but with somewhat different results. Restrictive endorsements are those which are conditional, which purport to prohibit further transfer, which use the words "for collection," "for deposit," "pay any bank," or which state that the endorsement is for the benefit of the endorser or another person.

The general purpose of restrictive endorsements is to require that payment on the instrument be applied consistently with the endorsement, and the Code recognizes this, but no restrictive endorsement under the Code prevents further negotiation which reverses the result under the N.I.L. A later holder under the N.I.L. used to hold the proceeds that he collected in trust for the person intended to be benefited by a restrictive endorsement. The rule has been changed because often that endorsee was really only a trustee for a third person who was not a party to the instrument at all, so that an endorsement "pay T in trust for B" when delivered to T should permit the trustee to sell the trust asset to a holder in due course.

This results in two sets of rules: One set of rules applying outside the check collection system and the other set of rules applying within the check collection system. Outside of the check collection system only the first taker under an endorsement which states that it is for the benefit of the endorser or another person is affected by such endorsement. This insures the trustee with his free market. He can sell the item and he is the only one affected by that endorsement. But subsequent transferees of other types of restrictive

endorsements outside of the check collection system must give value consistently with a restrictive endorsement. Thus if I am silly enough to pay someone for a check on which some prior holder has endorsed "for deposit," when I collect the proceeds of that check I am accountable to that prior endorser for what I collect.

However, within the check collection system only the bank of deposit where an instrument is left for collection, or the payor bank to whom the holder presents it for payment, is required to pay consistently with a restrictive endorsement. Intermediary collecting banks and payor banks which are not the bank of deposit are not affected by restrictive endorsements, except those of their immediate transferee.

Applying these rules to check collections, assume that Z is the last holder of the check drawn by X on Bank D. Z may endorse "for deposit only" and deposit that check for collection in Bank A. Bank A may send the item on for collection to Bank B, from B to C, which makes presentment to the drawee Bank D. Bank A is the only one affected by that endorsement "for deposit." Banks B, C, and D need pay no attention to it, whereas formerly they were responsible if the proceeds were not received by Z.

Note that a payor bank, which is not the bank of deposit, discharges an instrument bearing a restrictive endorsement if it pays the holder and any other claimant to that instrument must obtain an injunction to stop the payment or provide indemnity to stop the payment.

Negotiation furthermore is effective although it is made by an infant, by a corporation acting in excess of its powers, or by any person without legal capacity, when it is obtained by fraud or duress or as part of an illegal transaction or in breach of duty. The holder in due course of that instrument can still enforce it. This makes his rights clear, even though the transaction of negotiation might have otherwise been subject to rescission before the instrument was acquired by a holder in due course. The N.I.L. had a similar rule, but it was restricted in its application to the endorsements of infants and of corporations acting in excess of their powers.

As to the rights of holders, a holder may negotiate an instrument, enforce it, or discharge it even though he is not the owner. Any other claimant to the instrument must provide indemnity to stop the payment.

The holder in due course is defined substantially as he was under the N.I.L. but the definition is considerably clarified. The

holder in due course is one who takes the instrument for value, in good faith, without notice that it is overdue or has been dishonored or of any defense against the instrument or adverse claim to it. The payee may be a holder in due course, thus settling a long drawn-out controversy. But purchase at a judicial sale, under legal process, by taking over an estate or by purchasing as a bulk transaction, does not make the purchaser a holder in due course.

Other sections define what is meant by value and notice in the definition of "holder in due course." A holder takes for value to the extent that he performs the agreed consideration. It is this, of course, which qualifies the payee as the holder in due course. Or he takes for value when he takes the instrument in payment of, or security for, an antecedent claim, or when he gives a negotiable instrument in exchange or makes a binding commitment to a third party.

In this connection the use of the word "value" must be distinguished from the word "consideration," the word "consideration" being used in connection with whether a defense exists by the obligor against the holder.

Observe that a purchaser of an instrument has notice of a claim or defense to it if the instrument is so incomplete or shows evidence of forgery or alteration as to raise questions as to its validity or origin.

Not long ago I had an inquiry about a check which had been issued to the order of two joint payees. It was delivered to one of them. He scratched out his co-payee's name and took the check to Bank A, which paid him for it. Then Bank A presented the check to Bank B on which it was drawn. Bank B paid it. Then the depositor questioned the payment, pointing out to the bank that the co-payee's endorsement was not on the check. So the bank reinstated its depositor's account and then made a claim against Bank A which had presented it. "Oh," said Bank A, "we are a holder in due course. We gave good money for that check."

Oh no. When Bank A bought that instrument there was evidence on its face to raise questions about its ownership. So B couldn't be a holder in due course.

The purchaser of an instrument has notice of a claim or defense if he has notice that the obligation of any party is voidable, like the failure of the original consideration; or if he has notice that a fiduciary has negotiated the instrument in breach of the fiduciary duty; if he has notice that an instrument is overdue; if he has reason to know that any part of a principal amount that is

overdue or of an uncured default; or that an acceleration has been made; or that demand has been made of a demand instrument; or when he takes a check drawn and payable in the United States more than thirty days after date.

On the other hand, knowledge of the following facts is not notice of a defense or adverse claim to the instrument: Merely that it is antedated or postdated; or merely that it was issued or negotiated in return for an executory promise, unless the purchaser knows of a default under the basic contract; or merely that he knows that some party signed for accommodations; or that it was incomplete when delivered; or the mere fact that some prior party was a fiduciary without in fact knowing of a breach of the fiduciary duty; or that there has been any default in the payment of interest.

The holder in due course continues to take free of all claims of other persons and of all defenses except the following: Infancy, incapacity, duress or illegality of the transaction, misrepresentation which has induced the signature of a party who had neither knowledge nor opportunity to ascertain its essential character—and that, of course, is a definition of fraud—or he also takes subject to any discharge in insolvency proceedings. Much of this last list is new, but it does seem to follow the best decisions of the courts.

Finally, the holder who is not a holder in due course is subject to all valid claims to the instrument and of all defenses unless he can bring himself under this shelter provision as a transferee of a holder in due course, which I described earlier.

The liability of parties has not been materially changed. A person is not liable on an instrument unless he signs it, but that signature may be made by an agent, and the agent who signs his own name without disclosing the principal and without indicating that he acts as a representative of some principal, himself is personally liable on that instrument.

A maker or acceptor still engages that he will pay the instrument according to its tenor.

The drawer engages that on dishonor he will pay its amount to the holder. All parties admit the capacity of the payee to endorse.

An endorser engages that on dishonor he will pay the instrument according to its tenor at the time of his endorsement to any subsequent holder. He may use the words "without recourse" and he thereby may insulate himself against that undertaking, but the mere use of the words "without recourse" does not insulate him or

protect him against any liability for breach of warranty which may occur on his negotiation of the instrument. Endorsers, as usual, are liable to each other in the order in which they endorse, unless they otherwise agree.

As to accommodation parties, an accommodation party is one who lends his name to another party. He is usually liable in the capacity in which he signs. He is always a surety, and no recourse to its principal is first necessary in the case of the accommodation maker or acceptor, although accommodation endorsers are liable only after there has been presentment, notice of dishonor, and protest.

The phrase "payment guaranteed," or its equivalent, signifies an undertaking to pay without resort by the holder to any other party. The phrase "collection guaranteed," or its equivalent, requires that judgment be entered and execution issued against the party primarily liable. These provisions are new in the statute but they do seem to state the ordinary commercial understanding. Words of guaranty waive presentment and notice of dishonor.

Both Articles 3 and 4 contain warranties, and because the warranties of the two sections are identical I am going to defer the detailed consideration of the warranties until we get to Article 4. Let me say at this point, however, that there are two kinds of warranties under the Code. The first kind is one which never existed under the N.I.L. Warranties for the first time run in favor of one who pays or accepts an instrument. The N.I.L. had no such warranties, and it was necessary to supply the deficiency by a contractual form of endorsement.

The other type of warranty is of course the warranty that runs from transferor to transferee. And notice that in both types of warranties, the warranty is not only to the immediate party but to subsequent holders.

Then I should mention the adoption by the Code of the rule of finality of acceptance or payment under the doctrine of *Price v. Neal*, to the effect that payment or acceptance of any instrument is final in favor of a holder in due course or of a person who changes his position in reliance on the payment. You can't say, "I made a mistake. I shouldn't have paid you and now I want my money back." The rule, however, does not affect liability for breach of warranty on presentment for payment or acceptance. In other words, the maker is supposed to know his own signature but he isn't supposed to know that of an endorser, and if there has been a forgery of an endorsement, there has been a breach of warranty of

title, and the man who paid by mistake can still recover back on the breach of warranty, despite the rule of *Price v. Neal*.

This rule applies particularly to drawee banks. Even if the drawer of the check, who was X in our example, did not have funds on deposit in Bank D, if Bank D paid that check to the presenting Bank C, it has no recourse unless there has been a breach of warranty.

This rule is exemplified by a very recent case from the Federal Court of Appeals in the Tenth Circuit. A debtor who was indebted to a bank in Arkansas brought a check of a third party to the bank and offered it in payment for his debt. The check was drawn on a bank in Oklahoma, so the Arkansas bank called the Oklahoma bank on the phone and asked if the check was good. The reply was, "Well, it is good now but we don't know how long it will be good."

So the Arkansas bank returned the debtor's note to him and then sent an officer with this check, who used his automobile to go to the Oklahoma bank where he presented the check across the counter. The Oklahoma bank insisted that this officer endorse the check in the name of his bank, which he did, and then they delivered to him a cashier's check. Later on the same day it was discovered that the maker's signature on that check was forged. So the Oklahoma bank stopped payment on its cashier's check. Then the Arkansas bank sued the Oklahoma bank.

The court said the rule of *Price v. Neal* applied here. The Oklahoma bank was supposed to know its *depositor's signature*. The Oklahoma bank said, "We have the endorsement of the Arkansas bank. That constitutes a warranty to us as to genuineness of signatures."

Oh, no. When the Arkansas bank returned its debtor's obligation to him, they became a holder in due course and thereby made no warranty whatever about the genuineness of the maker's signature. So recovery on the cashier's check was permitted.

The rules on imposters have been redefined. Many of you know how the rules of the N.I.L. in the case of imposters made the determination as to whether instruments so endorsed were bearer paper or were forgeries, depending upon whether the endorsement was by a fictitious or a nonexistent person not intended to have any interest in the issue. This caused all sorts of problems, including a distinction in the cases between where the fraud was practiced face to face or where it was practiced by mail. Generally, the courts said that where the obligor handed the instrument

to the imposter in the same room with him, he intended that imposter to have the power to endorse the instrument in the name of the person who was named as payee; but when the instrument was mailed to the imposter, generally the courts said that the only intention of the maker here was that the person named as payee should endorse. So in that case when the imposter endorsed it we had a forged instrument, while in the first case we didn't have a forged instrument.

It is now provided that an endorsement by any person in the name of the named payee is effective if the imposter has induced the maker or drawer to issue the instrument to him in the name of the payee. Stated that way you get the same result where the fraud was practiced by mail as where it is practiced face to face.

No longer than two weeks ago this rule was applied in a Philadelphia County court case where—and here I will try to simplify the facts—a woman who owned real estate jointly with her husband, from whom she was estranged, introduced another man to a title company as the joint tenant of the real estate. Together they signed a mortgage on the real estate. The title company issued its check, which was endorsed by the two of them, and of course they got the proceeds. Then it was discovered that the so-called husband was not the husband at all. He had never heard of the transaction. So the title company sued its bank to recover the amount as having been paid on a forged endorsement. But the rule of imposter stopped the recovery because it was the title company which had caused the transaction, not the innocent bank. If the *title company* was going to be negligent and subject itself to this type of transaction, it should bear the loss and not the bank of deposit.

Secondly, an endorsement by any person in the name of the named payee is effective if the maker intends the payee to have no interest in the instrument. A corporate treasurer has authority to sign checks. He makes out checks payable to persons to whom he knows his employer owes no funds. Then he endorses the checks in these names and cashes them. Here the treasurer knew that the named payee had no interest in the instrument, and the loss is on the employer and not the bank of deposit. This, of course, is a continuation of the result under the N.I.L.

But the rule of the Code goes further: An endorsement by any person in the name of the named payee is effective if an employee or agent of the maker or drawer supplies him with the payee's name intending the payee to have no interest in the instrument—here the fraud is not by someone who has authority to sign

the checks. In this case an employee or agent of the employer, by means of fraudulent vouchers or otherwise, provides names and addresses of persons to whom he knows the employer owes no funds. Not knowing of the fraud, the treasurer makes out the checks and mails them. When the employee intercepts them and cashes them, the employer now bears the loss when his account at the bank is charged.

These last two provisions cover the cases of Payroll Padding Pete who, either with authority signs an instrument with fraudulent intent, or signs an instrument not knowing of the fraud of the employee who padded the payroll. The Code adopts the policy that the employer who employs such persons should bear the loss and not the innocent bank of deposit.

In this connection I wonder if any of you know the story of Clarence Dillon who was in his office one day signing a great stack of checks, and he was signing them in such a hurry that he obviously afforded himself no time to read them. His friend sitting at his desk was amazed at this proceeding and he finally interrupted and said, "Clarence, do you always sign checks without reading them?"

Mr. Dillon looked up and said, "Good gracious! I thought these were affidavits!"

You should know that any person who, by his negligence, contributes to a material alteration or the making of an unauthorized signature may not assert that defense against a holder in due course, or drawee or payor who pays in good faith. In these circumstances the holder of the instrument can even enforce it as it was altered and beyond its original tenor.

This rule is new in the statute. It applies, for instance, to the classic case of the signature stamp used to sign checks, which is improperly safeguarded. When the janitor decides to supplement his retirement pay by using this signature stamp to make out other checks payable to him, which he cashes at the local tavern, the loss is on the employer who has improperly safeguarded that signature stamp. His negligence created the situation and, again, the employer should bear the loss.

The reverse of that situation is the one about which I received an inquiry not very long ago about a company doing business in a southern state and issuing money orders. Some people broke into the office and stole the forms of the money orders and then they went further and blew open the safe in which the machine was kept for signing the money orders. Then, of course, they proceeded

to make up a number of these money orders and cash them throughout the state. The immediate inquiry was the legal liability of the company on these money orders. Legally they were not responsible. These were pure forgeries. There was no negligence involved in this situation—quite the reverse of the janitor's retirement fund.

Without intending any particular pun, the rules of material alteration have not been materially changed. Material alteration is any change that changes the contract of the parties. It permits enforcement in original tenor of the instrument only, unless there has been negligence of the obligor. If the holder does the alteration fraudulently, a discharge results.

Incomplete items in the hands of a holder in due course can be enforced in the method in which they have been completed. As to certified checks, the certification of a check is an acceptance. When it is requested by the holder, the drawer and prior endorsers are discharged, but a bank has no obligation to certify a check.

Rules of conversion are laid down. An instrument is said to be converted when a drawee refuses to return it when it has been delivered to him for acceptance, or when any person refuses to pay an instrument or return it when it has been delivered to him for payment, and conversion occurs when an instrument is paid on a forged endorsement.

This is a new rule in the statute, and it means that the drawee bank, for instance, which pays a check on a forged endorsement is liable to the true owner of that instrument, and no longer will the courts have to worry about privity of contract.

The measure of the drawee's liability is the amount of the instrument. In any other action the amount of the instrument is presumed to be the measure of damage. While I don't quarrel too much with it because it could be a natural result, the Supreme Court of Massachusetts had a decision under this rule not very long ago in the case of *Stone and Webster* where the maker of the check had made out a check payable to its creditor but before he could send it one of its employees stole the check, and of course he cashed it at Bank A. Bank A presented it to Bank B on which the check was drawn. When the drawer found out about this, it sued Bank A, which had cashed the check, and not the drawee bank. The court said that this statute did not create a cause of action against the cashing bank unless there was, under some other rule of law, already a cause of action recognized. I can understand that. But then the court went on to justify the Massachusetts rule to the effect that the action should have been against the drawee bank

by saying that if they didn't hold that way there would be circuitry of action. Well, you know what happened. The drawer turned around and claimed against this drawee bank, because there was no defense to it, and then the drawee bank had to turn around and sue the cashing bank, which had been the defendant in the first suit. So the result doesn't make much sense to me, but anyhow that is what the court said.

Subject to provisions regarding restrictive endorsements, a depository bank or collecting bank which in good faith deals with the instrument on behalf of one who is not the true owner, is liable in conversion to the true owner only for the amount of the proceeds of the check remaining in its hands.

We had a case on this in Philadelphia County about two weeks ago. There was a construction job being conducted by a general contractor and a subcontractor. The financier of the construction issued checks payable to the subcontractor which he delivered to the general contractor. The general contractor decided this was a pretty good way to make some recoveries of claims he had against the sub. Instead of delivering the checks to the payee he brought the checks to his own bank, endorsed them in the name of the subcontractor, and then deposited them in his own bank, which we will call Bank A. Bank A presented them to Bank B which paid them. Then the general contractor closed out his account and went bankrupt. Then the subcontractor found out about these transactions and sued Bank A which had accepted the checks for deposit and had collected them by presentation.

But the court said that, because Bank A no longer had any funds in its hands which represented the proceeds of these checks, there was no liability in conversion to the true payee of those checks. And an intermediary bank or payor bank, which is not the bank of deposit, is not liable in conversion merely because it handles instruments bearing restrictive endorsements.

Article 3 has specific rules on presentment, notice of dishonor, and protest. The need for presentment is redefined. Presentment for acceptance is usually necessary to charge the drawer and endorsers of a draft. Presentment for payment is necessary to charge endorsers, but the rule of presentment for payment to charge drawers is slightly changed. It used to be that if a draft was drawn on an account at a bank, or payable at a bank, as distinguished from a check, and there was an unreasonable delay in making the presentment to the bank so that the bank went insolvent in the interim, the drawer of that draft was completely discharged, even though he had provided no funds at the bank to pay the draft.

While, if the instrument was a check, the drawer of the check was discharged only to the extent that he was deprived of funds by the unreasonable delay in making the presentment when the bank went insolvent. Drawers of checks and drafts are now treated alike and they are both discharged only to the extent that they are deprived of funds by reason of delayed presentment. If they are not deprived of funds, the drawers are not discharged.

The same rule applies to acceptors of drafts, and even of makers of notes payable at a bank. It used to be that if I had an obligation or a note which was payable at a bank and I provided the funds at the bank in anticipation of the presentment of my note, and there was a delay in making the presentment and the bank went insolvent, I received no relief whatever because I lost the funds that I had provided to pay the draft. Under the rule of the Code the maker of the note payable at the bank is discharged to the extent that he also is deprived of funds. But of course if the note is not payable at a bank, no presentment is necessary at all because in this case it is the obligor's obligation to hunt up his creditor and pay him.

Notice of dishonor is necessary to charge any endorser but, again, the drawers, acceptors of drafts, or makers of notes payable at a bank are discharged only consistently with the rule on presentment.

The need for protest has been redefined. Protest of dishonor is necessary only to charge drawers and endorsers of any draft which is either drawn or payable outside of the United States. In effect, this redefines the Inland Bill as one which is both drawn and payable within the United States and will relieve parties, particularly banks, of a great deal of mechanical routine through which they go every day in protesting hundreds of items without any really great significance. Although, of course, protest will continue to have evidentiary value. Furthermore, I would not suggest any change in present practice until the change in the rule becomes more widely known and until the Federal Reserve System finds out about the change in the statute and brings its regulations up to date.

Time of presentment is usually determined by the due date, or within a reasonable time after date or issue when it is payable after sight or on demand.

Reasonable time for presentment is determined by the circumstances and usages of trade. Thirty days after issue is presumed reasonable as to domestic uncertified checks with respect to the

liability of the drawer. Therefore, to be a holder in due course of a check, anyone cashing a check over thirty days old must prove it did so within a reasonable time as determined by the circumstances. Seven days after endorsement is presumed reasonable for presentment with respect to the liability of the endorser.

As to method of presentment, the Code is quite flexible and defines presentment as merely a demand for payment or acceptance. It lists certain permissive methods which include presentment through the mail, through a clearing house, at the place of acceptance or payment specified in the instrument, or at the place of business of the acceptor or payor. But these methods are not all-inclusive, and they do not eliminate presentment by the traditional method of messenger, for instance, such as the Arkansas bank adopted in the case that I reviewed. This flexibility of method of presentment becomes particularly important in the case of the check processing center, with whose development many of you are undoubtedly familiar, because mechanized handling of checks will accelerate centralized processing at places where expensive electronic machines can be assembled.

Presentment is necessary to charge prior endorsers. That is the duty of the presenting bank, but the requirements of presentment now vary from state to state with the adoption of the Code in so many jurisdictions. The Code is so flexible that it even specifically says that presentment of checks may be made at any place at which the drawee bank requests that the presentment be made. Therefore, under such circumstances, presentment to a check processing center under the Code is a valid presentment. On the other hand, Section 73 of the N.I.L. requires that presentment be made at the place specified in the instrument. Therefore, in order to make a valid presentment of checks to a bank which is doing business at a principal office and a number of branches, the checks must all be split up and presented to these separate offices on which they are drawn, because presentment to a check processing center under Section 73 is not a valid presentment under the N.I.L.

New York thought so seriously of the problem that it amended its N.I.L. last year in order to take care of only the interim of about a year before the Code became effective there in September of this year.

An accepted draft or note payable at a bank, as distinguished from a check, must be presented at that bank, and of course the party to whom presentment is made may require exhibition of the instrument at the place specified and identification of the person

making the presentment. The maximum time for acceptance is the close of business on the day following the day of presentment. But the holder may in good faith grant one additional day for acceptance. But payment must be made before the close of business on the day of presentment. Dishonor occurs on failure to accept or pay within the prescribed time.

Finally with respect to Article 3, I will mention the codification for the first time in the statute of the very helpful rule of common law called "vouching in." We had it in Pennsylvania prior to the Code. I don't know whether the courts of Nebraska had occasion to recognize the rule or not. It might be stated something like this: That the defendant in a suit to which a third party is answerable may, by giving the third party notice of litigation and an opportunity to defend, bind the third party of any determination of fact in the first suit.

Usually the issue which arises between banks, for instance, is whether or not there has been a forgery of the payee's endorsement. If there was a forgery, a forgery, a warranty made by all prior parties in favor of the drawee bank has been breached. Usually a presenting bank is in the same jurisdiction as the drawee bank and is subject to suit.

But how does the presenting bank protect itself against these prior parties from whom it receives the same warranty but who are possibly not in the same state and not subject to the service of a writ? The presenting bank in this situation can serve a notice by mail on the prior parties that the issue of forgery has been raised in a suit and require them to come in and defend the suit or be bound by the determination of a fact of forgery in that suit. Notice how you cross state lines in a way in which service of process is never possible.

As I said, we had this rule in Pennsylvania prior to the Code and I remember using it on behalf of the Federal Reserve Bank of Philadelphia against the Federal Reserve Bank of New York, because we have to keep our accounts straight, too. Since that time the Federal Reserve Bank of New York has thought so highly of the proceeding that it has returned the compliment on at least a dozen different occasions.

That brings us to Article 4 on bank deposits and collections, and I would suggest that we take a break until ten-twenty.

[Recess.]

Article 4 treats the check collection system and the relationships between banks and depositors as a process which is entitled to its own rules. It continues, enlarges, and clarifies the provisions of any bank collection code. The article defines the relationships in the deposit and collection of an item like the following: X, a resident of Albuquerque, New Mexico, purchases goods from Y, a supply house located in Portland, Oregon. In payment for these goods, X sends his check drawn to the order of Y against his deposit which he maintains with Bank D in Albuquerque. Y deposits the check at the First National Bank of Portland, which we'll call Bank A. Bank A sends the check to the Federal Reserve Bank of San Francisco, which we'll call Bank B. Bank B sends the check to Bank C in Albuquerque, which is expected to make presentment to Bank D.

Relationships are thereby created between the following: Between X, the drawer of the check, and Y the payee; between Y and Bank A, the bank of deposit; between Banks A, B, and C; between Y and Banks B and C; between Banks A, B, and C on the one hand and Bank D on the other; and between Y and Bank D. Article 4 defines these relationships and the rights and liabilities between the parties and it will facilitate the daily handling of millions of checks in a way in which the N.I.L. or some other bank collection code could not possibly perform the function.

Remember that unless Article 4 conflicts with Article 3, the provisions of Article 3 also apply, as for instance, what constitutes the presentment of an item. Items which are covered by Article 8 on investment securities are also subject to that article, and if there is any conflict between Article 4 and Article 8, the terms of Article 8 will govern. The reason for this is that instruments like bonds are handled by banks for collection purposes. Article 8 states different requirements for the transfer of securities from those of Articles 3 and 4, and therefore the terms of Article 8 must govern in a situation of that character.

The validity of a bank's action in handling any item for presentment, payment, or collection is governed by the law of the place where the bank is located. Remember our example: The check of X to the order of Y drawn on Bank D. Y deposits in Bank A. A is both a depository bank and a collecting bank. A sends the item to B. Bank B is both a collecting and an intermediary bank. B sends the item to C. C is the collecting, intermediary, and presenting bank. And D, the drawee, is the payor bank. A is governed by Oregon law, B by the law of California, and Banks C and D by the law of New Mexico, and it is interesting, since I first devised

this example, to note that all four banks are either now or will shortly be subject to the terms of the Uniform Commercial Code.

The rules of Article 4 may be varied by agreement, except that a bank may not disclaim by contract its liability for any lack of good faith on its part or for its failure to exercise ordinary care. This may require the re-examination of legends on deposit tickets, the terms of cash letters, or the acknowledgements of collection letters. Otherwise, however, the parties can by agreement determine what shall be the standards of good faith and what shall constitute the exercise of ordinary care, the purpose of this being to anticipate changes in conditions and improve methods so that present practices don't become frozen.

The Federal Reserve regulations, on the other hand, as distinguished from these other types of agreements which are binding only between the parties, their operating letters and clearing house rules have the effect of agreements that are binding on all parties who submit their items to the check collection process. Certainly the Federal Reserve regulations have quasi-legal authority under the Federal Reserve Act pursuant to which the Board of Governors has issued its regulations G and J. So it is appropriate that these regulations should have some force of law, since otherwise it would be impossible in the example that I gave to bind together in one agreement the parties that were scattered all the way from New Mexico to Oregon.

The basic rule of action by banks is the exercise of ordinary care. If that action conforms to Federal Reserve regulation, ordinary care is said to have been exercised, while conformity to a banking usage or a clearing house rule raises the presumption of the exercise of ordinary care. The measure of damages for failure to exercise ordinary care is the amount of the item less what was not realizable by the use of ordinary care.

Let me emphasize the importance of definitions, many of which carry over from Article 3. However, for our purposes this morning we need mention only several of them here. The midnight deadline of a bank is midnight of the next banking day following the banking day on which an item was received, or from which the time for taking action commences to run. An illustration of this midnight deadline would be the receipt of this check by Bank D in Albuquerque from Bank C, not through the clearing house but through the mail on Monday morning. If Bank D takes certain other action, the time of returning the check in the event of insufficient funds would be midnight on Tuesday.

Now "settle" may mean payment, but not necessarily. This word "settle" or "settlement" is a new phrase in legal terminology. It includes payment in cash, by a clearing house settlement, or by a remittance, but it may be provisional or it may be final. It includes the current practice of conditional or provisional credits, which are extended each day in huge amounts, pending determination as to whether the items really are payable.

The branch office of a bank is a separate bank for the purpose of computing the time within which and the place at which action may be taken. Notice that this definition of the branch as a separate office is not for *all* purposes but only for the limited purpose of giving the branch the time limits which are available to separate banks and to designate the branch as the place at which stop payment orders or notices which might affect its status as a holder in due course must be given.

Continuing, a bank may fix 2:00 P.M. or later as a cut-off hour for handling items and making entries. Any item received after the adoption of this cut-off hour is treated as being received on the following banking day. Each check has to go through a series of processes, and without the cut-off hour it would be necessary for every bank to employ a night force in order to complete the entries in the books before the opening of business on the following morning.

The process of posting is defined as the usual procedure of a paying bank in making its determination to pay an item according to its usual routine, including the following steps, regardless of the order of their accomplishment: The verification of signature, comparison with the amount in the balance of the depositor, marking the item paid, charging it against the account, or even an opportunity to correct or reverse an entry with respect to an item.

Furthermore, a bank is excused from acting after the time limits prescribed in Article 4 if the delay is caused by interruption of communication, the suspension of payments by another bank, war emergencies, or other circumstances beyond its control. If a collecting bank acts in good faith to secure payment it may allow one additional banking day without the discharge of other parties. You will remember that under Article 3, when presentment was made for payment, there was a flat dishonor if the payment was not made on that day, but when an item was in the check collection process under Article 4 the presenting bank may, in good faith, allow one additional day, which under Article 3 is available only when the presentment is made for an acceptance.

A collecting bank must send items by reasonably prompt method, pursuant to instructions or based upon the kind of item, the number, the cost, and the method generally used by banks to make a presentment. A collecting bank can send an item directly to a payor bank but may only send an item to a payor which is not a bank if special instructions authorize it, such as the rules of some clearing houses which permit sending items directly to responsible institutions like insurance companies. Otherwise, without such instructions, items not payable by or through a bank are presented by sending notice that the item is held for payment or acceptance.

Now for the procedure for collection by depository and collecting banks. Each bank in the collection process is said to be the agent or sub-agent of the owner prior to final settlement by a collecting bank unless a contrary intention appears, and these agency relationships pertain regardless of the form of endorsement, or a lack of endorsement, and even though it may appear that a particular bank is the owner of an item.

This eliminates the prior litigation about the effect of endorsements for deposit or for collection on the agency status of subsequent banks. This rule of agency is basic, since it clarifies the results on which the courts of various states have been at odds. You may recall there was a so-called Massachusetts rule and a so-called New York rule. If my recollection serves me correctly the Code adopts what was the Massachusetts rule.

Y deposited X's check in Bank A; A sent it to B; B to C; and C presented to Bank D. But suppose C negligently failed to make presentment until the third day after receiving the item from Bank B, and by this time X, the maker, has filed a stop-payment order. Under the rules of some courts the owner of the item, Y, as payee, has no relationship and no privity of contract with Bank C. He may only make a claim against Bank A, the bank of deposit. Under the Code, no longer does the depository Bank A have any responsibility for the defaults of Banks B and C. If it chooses a responsible bank it has no responsibility, and that is the significance of the agency relationship.

A contrary intention can rebut this agency relationship, as where other documents or a legend on the item establish that it was bought by some bank, like Bank A, the bank of deposit. But even in this case, however, the subsequent banks on the chain of collection, B and C, would be the agents of Bank A, and A could sue C. Otherwise, however, this agency relationship pertains, even though credit has been given on the item with the right to withdraw or has in fact been withdrawn.

The rights of the owner of the item are, of course, subject to the claim of any collecting bank resulting from advances it may make and the right of setoff. This will protect banks against the attachment of proceeds by a creditor of the depositor in the hands of the bank that made the advance.

Reflecting the rules on restrictive endorsements, an item endorsed "pay any bank," or words to that effect, may only be acquired by a bank. This locks the item in the check collection process until the item is returned to Y, the depositor, or until it has been specially endorsed by a bank to a person which is not a bank.

Ordinary care by a collecting bank is further defined as acting before its midnight deadline following the receipt of an item of notice or payment. Now, within that time a collecting bank is expected to make presentment. You will notice that C was late because it didn't make the presentment until the third day after receiving the check. Within that time the collecting bank is expected to send notice of dishonor, to return an item after dishonor, to settle for when itself receives final settlement, to make a protest, or give notice of loss or delay of the item in transit.

In the example that I gave, Bank C, of course, had the responsibility of making a presentment and of making protest if Bank D didn't do so. A, B, and C all have the responsibility for sending notice of dishonor, returning the item for non-payment, settling for it, or giving notice of loss or delay in transit. Unless a bank itself fails to carry out any of these duties, it is not responsible for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for the loss or destruction of an item in the possession of others, and it may follow the instructions received only from its immediate transferor, thus adopting a chain of command theory which eliminates the questions about authority of instructions which might be received from others.

You will remember that under Article 3 the endorsement of a payee is required for the negotiation of an item which is payable to order. A bank of deposit, under Article 4, may supply its customers' endorsement unless the instructions require the payees' own endorsement. This speeds up the check collection process instead of requiring the reversal of entries and the return of the item to the depositor for his own endorsement. This is an example, again, of how the terms of Article 4 may govern the terms of Article 3.

Nor is a collecting or payor bank, which is not a bank of deposit, put on notice by or affected by any restrictive endorsement

except that of its immediate transferor. Notice how consistent this is with the rules on restrictive endorsements under Article 3.

And most important, any method of transfer between banks which identifies the transferor is sufficient for the further forwarding of the item. This section will enable the simplification of bank endorsements, which may now be reduced to the transit number and routing symbol, the date, and the words "pay any bank."

All of you at one time or another have had occasion to examine the reverse side of a check after it has been through the check collection process, and the gobbledegook on there was so undecipherable that you couldn't tell what banks endorsed them, the date of the endorsement, or even the order of endorsement. This simplification of endorsement is particularly possible because the warranties that I am about to discuss arise notwithstanding the absence of endorsement or words of warranty. The words "prior endorsements guaranteed" are no longer necessary in an endorsement.

As I said earlier, the warranties of Article 3 and Article 4 are identical, although they are phrased a little differently because they are intended to meet different factual situations. And for the first time warranties run in favor of one who pays or accepts an instrument. Each payor or acceptor receives warranties from each collecting bank who obtains payment or acceptance from the presenting bank, Bank C; from each prior collecting bank, Banks A and B; and from the depositor, Y. The warranties are these: That there is good title to the item and authority to obtain payment; that there is no knowledge of an unauthorized signature of the maker or drawer, except that a holder in due course does not give such warranties to a maker, a drawer, or to an acceptor if the holder in due course took after the acceptance, or if he obtained the acceptance without knowledge of an unauthorized signature. These exceptions relate to and reflect the rule of finality of payment under *Price v. Neal* to the effect that payment is final to a holder in due course, or a person who changes his position in reliance on the payment, unless there has been a breach of warranty.

You will recall that under the finality of payment rule if Bank D paid the check drawn by X, and X's account was insufficient, Bank D could not recover back from any of the prior parties, but if the endorsement of Y was forged, Bank D could recover on the breach of warranty.

The third warranty to a payor or acceptor is that there has been no material alteration, with the same exceptions in the case of

the holder in due course, as to the maker and drawer, and as to the acceptor, with respect to an alteration prior to the acceptance if the holder took thereafter, or with respect to an alteration after acceptance.

Again these warranties run not only between the parties but from all prior parties to all subsequent parties. Thus in the case of the forged endorsement of Y, Bank D may elect to sue the depositor, Z, who did the forgery, or the depository Bank A, Bank B, or Bank C.

The warranties between transferor and transferee are broader and they are more absolute. Every transferee and subsequent collecting bank receives the following warranties from any collecting bank and from the depositor: That there is good title and authority to obtain payment; the absolute genuineness of all signatures; that there has been no material alteration; that no defenses exist to the instrument; and that there is no knowledge of any insolvency proceeding. Notice again that the warranties of the collecting bank to subsequent holders run to all subsequent parties, so that a bank can sue a remote prior collecting bank for the customer. Thus if D should recover against Bank B for the breach of warranty of title because the payee's endorsement was forged, Bank B can turn around and sue Bank A, because Bank B received the same warranty. These warranties pertain regardless of the absence of endorsement or words of guaranty. Every collecting bank remains liable for their breach, despite the fact that it has made remittance.

Damages for the breach may not exceed the consideration received by the customer or the collecting bank. And most important, a claim for this breach of warranty must be made within a reasonable time, since otherwise the person liable is discharged to the extent of any loss he might suffer by reason of the delay. Thus if the forger of Y's endorsement to Z, who deposited the item with Bank A, continued to maintain a sufficient account in Bank A for six months after Bank D should have claimed the breach of warranty against Bank A, Bank A is discharged from the breach of warranty to Bank D.

Remember that a bank has a security interest in an item and accompanying documents and their proceeds if any credit given for the item has been withdrawn, or to the extent of the entire credit if the depositor had the *right* to withdraw, or if the bank makes an advance against the item. If credit is given on several items at one time under one agreement this security interest remains on all the items. Receipt of final settlement is a realization on this security

interest. But until that final settlement or until relinquishment of the item, except for collection purposes, the security interest continues under Article 9 without the requirement of any security agreement, without any requirement for filing a financing statement, and with priority over all conflicting security interests against the item and the documents.

Remember, this security interest can make the bank a holder in due course, or it can be a holder in due course under the shelter provision of Article 3, and this shelter provision is most important. Often a collecting bank like A, B, or C may not have extended value, but ultimately if Y is a holder in due course each of the subsequent banks succeeds to that status. Therefore, if Bank D made a final payment of an item which was not properly payable, it can only record if it can find a breach of warranty by a prior party. Whether or not you have a holder in due course is important because that determines the nature of the warranty which is made to the payor.

That brings us to settlement and payment. You will recall that settlement may be provisional or it may be final. The current banking practice is to extend provisional settlement or credit pending determination as to whether an item really will be paid. Most of them will be paid. As to those not paid, the collecting bank, like A, B, or C, which does not receive final settlement, can revoke its credit if it returns the item or sends notice of dishonor by its midnight deadline, after it learns the facts. Furthermore, the right to charge back is not affected by use of the credit extended by a bank or even its own failure to exercise ordinary care. Thus if C had given Bank B a provisional credit on the item, it can revoke that credit when Bank D dishonors the check of X.

Dealing first with what a collecting bank may do: A collecting bank can take the following in settlement for an item even though it may not be a final settlement. This list I prefer to call a list of authorized remittances. It may accept the check of the paying bank drawn on another bank. If the payor and the presenting bank belong to the same clearing house, a cashier's check may be accepted. If the paying bank maintains an account with the presenting bank, authority to charge that account may be accepted, and when the obligor is not a bank a cashier's or certified check is acceptable. These rules recognize the realities of check collections, for if the collecting bank forwards these remittances for payment before its midnight deadline, the collecting bank is not liable in the event of non-payment of that type of remittance. The owner of the item is considered to be best served by trying to collect promptly and not engaging in semantics as to what is an authorized set-

tlement. As a matter of fact, the collecting bank can accept *any* type of remittance, even though it is not one of those so-called authorized remittances, and if it accepts it and forwards it for payment by the payor on that remittance instrument before its midnight deadline, it is not liable in the event of non-payment. In other words, the risk is on the owner, and it goes far beyond the A.B.A. Collection Code in that respect.

If these remittance instruments are paid by the payor of them, the settlement is said to become final, and it is important to fix the time of final settlement and when a collecting bank itself becomes responsible. Final settlement is said to be made when any type of remittance instrument is paid by the payor of that instrument, or if an unauthorized remittance has been specially authorized, the settlement becomes final when that type of remittance instrument is received by the presenting bank, or the settlement becomes final and the collecting bank itself becomes responsible if it fails to present, forward, pay, or return the remittance instrument before the expiration of its midnight deadline.

As to payment by drawee banks, in order to determine their responsibility for the discharge of an item, specific rules are laid down for determining when an item has been paid. These rules determine the accountability of the drawee to the holder. Although payment does not necessarily mean that remittance has been made in all cases.

A drawee makes a payment as distinguished from a final settlement when it does any of the following: When it pays an item in cash, and of course this is a final settlement as well; or it makes a payment, as distinguished from final settlement, when it makes a settlement without reserving the right to revoke the settlement; or when it completes the posting process.

You will recall from the definition of "posting" that it is a process which includes the examination of the item, comparison with the customer's account, and even the completion of the machine operations posting; or a drawee bank becomes accountable when it makes the provisional settlement without revoking prior to the time permitted by the clearing house rule or before its midnight deadline under Article 4.

This last rule on provisional settlement which is not revoked deserves special mention because that procedure and the rule on the posting process are the rules which will apply to most items. Very few items are paid in cash, and very few banks make a settlement which is not subject to revocation.

An item received through the clearing house involves the extension of provisional settlement. If the item was received on Monday morning and the clearing house rule requires that it be returned by 2:00 p.m. on Tuesday, the settlement made on Monday morning becomes final at 2:00 p.m. on Tuesday unless the item has been returned by that time. If the item is received by mail on Monday morning and a provisional settlement is made on that day, the bank has until midnight on Tuesday to return the item or give notice of dishonor and revoke the settlement. If that settlement is not revoked before 2:00 p.m. on Tuesday under the clearing house rule, or before midnight on Tuesday under the midnight deadline rule of Article 4, the item is considered to be finally paid at those times even though the posting process has not been completed. When this occurs, the provisional settlements between the prior collecting Banks A, B, and C become final, and the direction of flow is now reversed.

In the first place, we had the check proceeding from A to B to C to D. Now we have the credits firming up in the reverse direction. On final payment under the rules as to the payment of remittance drafts or the finality of provisional settlement, the credits entered on the passage of the item to the drawee are firmed up and the collecting bank whose settlement became final itself becomes accountable for the amount of the item. This finality of settlements makes the provisional credit given by Bank A, the bank of deposit, to its customer, available for withdrawal as of right when the bank learns that the settlement becomes final. If the item is drawn on the bank where it is deposited, the credit is available on the opening of the second banking day following the date of deposit, if the item is in fact paid. When money is deposited it is available for withdrawal by the customer on the next banking day.

These rules are reflected in what happens when a bank becomes insolvent. But here I must emphasize that we are talking only about state chartered banks, because you will recall that the United States Supreme Court has determined that Congress preempted the field with what happens when a national bank becomes insolvent. As to state banks, a drawee or collecting bank which becomes insolvent before payment of the item is obligated to return it to the owner. Second, if a payor bank pays an item without making a final settlement (such as final posting without remittance) the owner of the item has a preferred case against that insolvent drawee bank. If a collecting bank which receives final settlement on an item before itself making a remittance goes

insolvent, the owner of the item has a preferred claim against that collecting bank.

With this framework we are ready for the rules as to payor banks. Article 4 adopts the rule of deferred posting, and if a drawee bank makes an authorized settlement before midnight of the day of receipt of an item, it may revoke that settlement before its midnight deadline either by returning the item or sending written notice of dishonor if the item is held for protest or is otherwise unavailable for return, unless the clearing house rule requires a shorter time. But this practice permits time to banks to sort and prove items and defer the final posting until the day following their receipt. But notice the necessity that where an item is not deposited at the drawee bank, that the drawee make an authorized settlement for this demand item in order to have the right to revoke before the midnight deadline or before the expiration of the clearing house period, the authorized settlement being those things which I prefer to call the authorized type of remittances, such as the check of the payee bank on another bank, a cashier's check if they belong to the same clearing house, or authority to charge an account. Any other type of remittance would not be authorized, and there would be no right of revocation under the deferred posting rule, so that the rule will induce paying banks to make the authorized types of remittances.

On the other hand, if an item is presented to a drawee bank for credit on its books in another account, the drawee can return the item and send written notice of dishonor and revoke any credit within its midnight deadline without making any authorized type of settlement in the first place.

Retention of a demand item by a drawee, whether it is properly payable or not, beyond its midnight deadline without making a final settlement and without returning the item makes the drawee accountable for its amount in the absence of a breach of warranty. The drawee is liable on other types of items which are not demand items, like time items and documentary drafts, for their retention only when they were properly payable in the first place. I would suggest being careful about the application of rules of conversion to holding any kind of an item too long.

In summary, so far as demand items are concerned our drawee becomes accountable in at least five different ways: If it makes an unauthorized type of remittance which isn't paid, it is accountable; if it retains an item beyond its midnight deadline; if it completes the posting process; if it makes a settlement without reserving the right to revoke the settlement; or if it makes the provisional settlement and fails to revoke it before the proper time.

Closely related to rules on final payment by a drawee bank are the rules of how effective are stop-payment orders, service of writs of attachment against the bank account, notices of adverse claims to checks, or the exercise by a payee bank of its right to settle against the depositor's account. If a bank has already accepted or certified an item, paid it in cash, settled without reserving the right to revoke the settlement, completed the process of posting or otherwise evidenced a decision to pay, or become accountable under the rules as to final payment and revocation of credits, the stop-payment order, writ of attachment, the setoff, or the notice of adverse claim comes too late to be effective. And notice that the rule as to the posting process is supplemented by action indicating a decision to pay an item, in which event the attachment of the account or the setoff comes too late.

Many banks still use what is called sight posting, where the posting clerk makes the examination of the check as to form and signature and she compares it with the balance in the account, and then she sets the check aside in a pile intending to make the ledger entry at a later time. This is sufficient to defeat the determination of the bank officer upstairs in the banking department that he is going to exercise setoff against this account. The account is to be reduced by the amount of that check.

Recently the Massachusetts Supreme Court had a decision on this situation. The bank had an account which, by reason of various circumstances that the opinion recites, required a great deal of special handling. An attachment was served against the account by 2:00 p.m. on the first day of the month. The day before four checks had been presented for payment against the account, and the officer in charge of it had totaled them up to \$7,000 and made a pencil notation against the balance on the ledger card to the effect that that balance was to be charged with the \$7,000. Then he stamped the checks indicating they were to be paid. The actual entry in the ledger was not made until the day after the service of the writ of attachment, but it was nevertheless determined that what had occurred prior to the date of the service of the writ was sufficient to defeat the writ of attachment. The bank had indicated its decision to pay those checks.

These are situations in which the courts have had all sorts of difficulty. It is hard enough to determine whether a drawee bank has paid a check without complicating the situation with writs of attachment, rights to exercise setoffs, or adverse claims to ownerships of checks, and the Code goes a long way towards clearing these problems up.

Furthermore, legal process and notice, including stop-payment orders, must be allowed a reasonable time for the bank to act on it. This emphasizes the importance of a branch being designated as a separate bank for such purposes, since otherwise the stop-payment order delivered to the principal office at 2:00 p.m. might make the bank liable for paying the check at the branch at 3:00 p.m. on the same day.

But subject to the last rule, a bank may pay, accept, or certify items on the account of a customer in any order convenient to the bank. This last rule is most important in protecting banks against unjustified claims of their depositors. It is impossible to state any rule for the order of payment of checks, particularly because of the indeterminate number of combinations of large and small checks in relationships to the varying balances in the account. A depositor is expected to have funds on hand to pay all the checks he writes and not be invited to claim that the bank should have paid one check in preference to another.

The relationships between customers and banks of deposit are sharply defined. A bank may charge its customer's account with any proper item according to the original tenor, even though an overdraft is created. A bank in good faith which pays the holder can charge the customer's account with the original tenor if the check was altered or even with the amount by which it was altered if there has been any negligence on the part of the maker. An item which has been completed, which was incomplete when it was first delivered, can be treated according to the way in which it was completed unless the bank has notice that the completion was improper. Notice how consistent this is with the rules on material alteration in Article 3.

Damages for wrongful dishonor are only those proximately caused, but it is said that this includes damages for arrest and prosecution.

Stop-payment orders may be oral but they must be confirmed in writing before the expiration of fourteen days. The written stop-payment order is effective for six months, when it may be again renewed.

You recall that under Article 4 a bank may not disclaim its liability by contract for any lack of good faith on its part or its failure to exercise ordinary care. This means that no longer may stop-payment orders contain a provision which releases the bank from liability if it pays the check in disregard of the stop-payment order. But even though the bank can't protect itself by contract, and even though it pays the check, it hasn't lost everything under

the Code because the Code says the bank is subrogated to, or succeeds to the rights of any holder in due course against the maker, or it is subrogated to the rights of the payee or other holder against the maker either on the check or under the transaction that gave rise to the check, or it is subrogated to the rights of the maker against the payee or other holder of the item under the original transaction. What this really means is if the maker had no right to stop payment on the check in the first place the bank can enforce that check as a holder in due course against him or it can take the position of the payee who was entitled to payment under the basic contract; and if the maker *did* have the right to stop payment the bank can recover from the recipient of the payment under the original transaction.

A bank may, but need not pay a check more than six months old.

Incompetence of a customer of a bank does not affect the power of the bank to deal with the item if the bank does not know of the adjudication of incompetence. Death or incompetency do not revoke authority to accept, pay, or collect items until the bank knows the facts and has an opportunity to act on them. Even though the bank knows of the death of its depositor it may continue to pay his checks for ten days after death unless some party of interest stops payment. But this last rule will do considerable toward simplifying the administration of decedent's estate which can now be relieved of administering claims of the gas company or the corner grocery to whom the depositor issued checks prior to his death.

Depositors owe duties to their banks. A bank's customer has a duty to examine promptly the statement of account and notify the bank promptly of any unauthorized signatures or alterations. His failure to do so precludes him from asserting those facts against the bank if the bank suffers a loss by reason of the delay. Let's assume that X should learn thirty days after Bank D paid his check that somebody forged his name. Z, who is the forger, still has an account at Bank A where it remains for three months. If X does not report the forgery for four months he may not claim reinstatement of his account.

If the same wrongdoer repeats an unauthorized signature or alteration after the first item was available to the customer for fourteen days, the customer is precluded from asserting those facts against the bank on the later items if he failed to notify the bank about the first one. Let's assume that Z forged a check on the 1st of January, which was returned to X with his statement on the 1st

of February. On the 15th Z repeats the forgery of X, but X has not yet reported the first one to his bank. He may not complain about the payment of the second item.

However, a bank is still required to exercise ordinary care in paying items, and its failure to do so means the customer can assert the irregularities against the bank even though he failed to notify the bank. Thus if the signature on the check was so unlike the signature of X and the bank made no effort whatever to examine the signature, X would not be precluded from claiming reinstatement of his account from Bank D.

Irrespective of any of this, Article 4 contains a flat statute of limitations. A customer is bound to report forgeries of signatures and alterations of his checks within one year, and he is bound to discover and report unauthorized endorsements within three years.

Most important, if a payee bank like Bank D has a defense against the claim of its customer and it waives it, it may not assert the forgery or alteration against prior parties. This rule is new so far as statute law is concerned. Decisions in some states indicate that the bank can waive a defense about the failure of its depositor to notify of forgery, reinstate his account, and then claim against the prior collecting banks on a breach of warranty. Under the new rule the drawee gives in to its depositor at its own expense, and public relations in this area can be pretty expensive.

Finally, as to documentary drafts: Article 4 provides the first statutory authority for complete handling of collection items which are accompanied by documents and securities and other papers to be delivered when the draft is honored. A bank which accepts the documentary draft for collection or which presents it must notify its customer of non-payment or non-acceptance within a reasonable time, even though the bank purchased the draft or extended credit on it, the reason for this being that this draft might be the first of a series to be drawn under an underlying contract and the depositor is supposed to be notified of the early default.

When instructions require the presentment of a draft on arrival, or when the goods arrive the collecting bank may wait a reasonable time for the arrival of the goods. Refusal to pay or accept because of the non-arrival of the goods is not a dishonor, but the bank must notify its customer of that fact.

Now for the basic rule of what presenting banks must do with documentary drafts. A bank presenting a documentary draft may deliver the accompanying documents to the drawee only on payment, unless the obligation of the drawee on acceptance is payable more than three days after presentment.

Last year the National Bank of Alaska got into trouble on this rule. A builder in Alaska bought prefabricated houses from a seller in Switzerland. The seller shipped the goods on ocean bill of lading and then sent a draft for the purchase price accompanied by the ocean bills of lading to the National Bank of Alaska for presentment. Somehow the bank permitted the drawee to have the bills of lading before the payment of the draft. Well, you know what happened. The buyer got his goods, then he went into bankruptcy. So the Swiss seller sued the bank in Alaska and recovered the amount of the draft because its basic responsibility was to hold onto those goods until payment.

A presenting bank has no obligation as to goods represented by documents, except to follow reasonable instructions, and if it does so it is entitled to reimbursement for expenses, including indemnity or prepayment for them. If it does not receive instructions regarding the goods after dishonor it may store, sell, or deal with them in any reasonable manner. If it does sell it has a lien on the goods or their proceeds for the expenses incurred, like that of the unpaid seller's lien.

CHAIRMAN SHKOLNICK: Our next speaker this morning to cover the areas of bulk transfers primarily with a look at documents of title will be Professor William L. Lamey from the Loyola University School of Law in Chicago.

Professor Lamey has been an active member of the committees of the State and Chicago Bar Associations on the Uniform Commercial Code and has appeared as a panelist many times at law school and bar conferences dealing with the Code.

In addition to being Professor of Law at Loyola he is the General Counsel of the University, and prior to entering his present service was a member of the legal departments of Montgomery Ward & Company and Standard Accident Insurance Company of Detroit.

Without further delay I will turn the podium over to Professor Lamey.

BULK TRANSFERS AND DOCUMENTS OF TITLE

William L. Lamey

After you have attempted to teach the subject of the Code to sophomore law classes for better than ten years, you appreciate being able to talk to a non-captive audience. When you teach and you look down at the fifty or sixty students in the room and you know that every one of them wishes that the course was an elective

so they could take something soft, like future interests, you appreciate being able to discuss these matters with a group whose professional life is not dependent on a knowledge of this Code, although there may be some of you, when you looked at it the first time, who felt it was as bad as the 1954 Internal Revenue Code as amended. After listening to the speakers who have preceded me and will follow me, I am sure you are gradually coming to the conclusion that actually it is not nearly as bad as appearances would indicate. I think you will find you don't have too much new matter to learn and that you have almost nothing to unlearn.

This is particularly true with respect to Articles 6 and 7. When your chairman first called me and asked me to discuss these with you today, I told him that I would prefer to devote most of the time to Article 6 because, from my experience on other panels, I have found that this has the greatest interest for most practitioners. So with your indulgence I will use most of the time on Article 6 and then will merely hit some of the highlights, as I see them, in Article 7; and if your chairman permits it at the end and if time allows, I'll try to answer questions that you may have on either of them.

All of you, of course, are familiar, I am sure, with the history of bulk sales legislation. The typical fraudulent conveyance statute which penalizes a transfer for less than valuable consideration or with an intent to defraud creditors was inadequate to cover the situation of the creditor who extended unsecured credit to a merchant on the assurance or security, using the term non-technically, of his inventory. As long as this inventory was sold from day to day, the creditor was in a position to watch and to move when he felt that the so-called security was getting to the danger point. But if he awoke on a bright morning to find that his debtor had sold the entire business, lock, stock, and barrel, to a bona fide purchaser for value, he had no recourse at all except, of course, against the debtor who, if he was solvent and honest, might pay the debt, but otherwise he would be unable or unwilling to, and the result was that such a creditor was without relief. The Fraudulent Conveyance Statute wouldn't apply because there was consideration, and there was no intention on the part of the good faith purchaser to defraud the seller's creditors. So you got bulk sales legislation.

Basically the bulk sales acts, which predated the Code, were of two forms: One, the type enacted in Pennsylvania and in a minority of states imposed not only the duty on the buyer, the bulk purchaser, of notifying the creditors of the seller, but in addition imposed on him the duty of accounting for the consideration or pro-

ceeds of the sale. He had to pay off the creditors, in other words, to the extent of the consideration. The majority view, however, and the statutes enacted in most states including your own of Nebraska and mine of Illinois, were merely notice statutes. They did not impose a duty of accounting on the purchaser, and all you had to do was to give the creditors of the seller notice. In this respect, when the Code, Article 6, was drafted, there was such a marked difference of opinion as to which approach should be adopted that the drafters incorporated Section 106 in Article 6 as an alternative section. Section 106, briefly, requires the purchaser to account to creditors for the amount of the purchase price.

Of the some twenty-eight or twenty-nine states that have adopted Article 6, only nine have adopted 106. As you might expect, those nine are states which previously had legislation similar to Pennsylvania's. Nebraska is not in that minority. You have not adopted 106, and consequently you are still merely in the area of notice. You do not have to account.

Before we get into the question of coverage of the statute, let me point out very briefly the conflicts of law rule here. There are two things that you should remember: No. 1, that Article 6 is one of the few general provisions which cannot be modified or waived by contract, and the reason is obvious: It is not intended to protect the immediate parties to the transaction; it is intended to protect creditors. Consequently, representing a seller or a buyer, as the case may be, you may not contract away those creditors' rights. The second point, more truly a conflict point, is that this article covers any bulk sale or any bulk transfer in which the goods transferred are located within your state, without regard actually to the residence of the parties, the buyer, or the seller.

Beginning at that point, then, let's consider what transactions are covered by Article 6. A bulk transfer is defined as any transfer in bulk not in the ordinary course of business of the major parts of the materials, supplies, merchandise, and other inventory of an enterprise subject to the act. A number of those terms in that definition themselves require definition. Although I assume that you have learned by now that practically every article and comma in the Code is defined in the Code, the term "out of the ordinary course of business" is not. So what transaction is outside the ordinary course of the transferor, the seller's business, is going to depend upon the local law. If my memory serves me, your present Bulk Sales Act uses the same terminology. Consequently whatever precedent you may have in Nebraska relative to what kind of a transaction is within or without the seller's ordinary course of business should control.

There are two fairly recent cases, both decided by the Federal District Court in the northern district of Alabama, both involving automotive dealers. In one case the seller was located in Georgia; in the other case, in Alabama. In each case the dealer sold the major part of his stock in trade, which happened to be used cars, to another dealer. The same court held that in the Georgia case this transfer, by virtue of the custom in that industry in Georgia, the custom of selling bulk used cars to a wholesaler seasonally or with some regularity, was within "the ordinary course of business." The same court, on the other hand, looking at the Alabama law and applying it, held that a similar sale under the Alabama precedent was *not* "in the ordinary course of business" and therefore should have been handled under the bulk sales law. For those of you who might be interested in reading those two decisions you might take a look at 212 Federal Supplement 897, and 219 Federal Supplement 140.

To move on, then, to the next term which should be considered, and that is the term "major part," major part of the seller's supplies and so forth. Your present statute, again if my memory doesn't fail me, does not use this terminology. Article 6 does. Therefore I would assume you probably have no local precedent on what constitutes a major part. There has been some difference of opinion among the courts in those states where that phrase previously was employed, but the majority decisions most certainly have held that to constitute a major part requires more than 50 per cent; in other words, the sale must involve more than 50 per cent of inventory to fall within the definition of "major part" under Article 6.

I think I might point out two caveats or two possible problems to you which I suspect have not arisen under your present act. If we assume that "major part" means more than 50 per cent, what is the situation where a seller is a general mercantile retail establishment and the seller owns two stores, maybe one in Lincoln and one in Omaha? He is intent on selling out completely in Lincoln, and he does so. But let us assume that, the Lincoln store being smaller, his inventory sold at Lincoln is less than 50 per cent of his gross inventory including the Omaha establishment. Is this a bulk sale within the meaning of Article 6?

I can cite you an Illinois case which held that so long as he sold out more than half of the one operation, the Lincoln store, this was "major part" within the meaning of the statute, and that consequently that sale, though it did not constitute more than 50 per cent of his gross or entire inventory, *was* within the Bulk Sales Act.

You might take a look, if you like, at 248 Illinois Appellate 475, and 225 Illinois Appellate 201.

Also suppose that in a particular instance a seller negotiating for the sale of a major part of his inventory sells it to two or more buyers more or less simultaneously. Is it within the act? Under the definition of "major part," as we in Illinois have construed it, we have held it is. It is, though neither sale itself involved the sale to one seller of more than 50 per cent. You might take a look at 338 Illinois Appellate 212. I cite these Illinois cases to you because I suspect that you have no precedent here on these two points in the light of your wording of your old act.

I suppose it goes without saying that this transfer covers only a bulk transfer of goods. We are not involved in a sale of securities, of commercial paper, of documents of title insofar as that might constitute a businessman's inventory. We are concerned with a sale of goods, and basically with the sale of inventory.

The Code specifically provides that a sale of equipment, a substantial part of the seller's equipment, is not a bulk sale unless it is coincident to a sale in bulk of the major part of his inventory.

That leads us to this last phrase in the definition—what are the enterprises subject to this article? Here we get another distinction between the line of old statutes and Article 6. Many of the old statutes, such as yours, covered, and clearly covered, not only a bulk sale of inventory but also a bulk sale of equipment. The Code has taken the position that the only creditor risk involved, and which should find statutory solution, is the sale by one whose principal business is a sale of merchandise from stock. This eliminates farming and it eliminates from the coverage of Article 6 all service industries. So hereafter you will not be required to comply with Article 6 if, for instance, you are representing a seller or a buyer of a contracting business or of a hotel or any other type of service business or, of course, a professional man. Only if the principal business is a sale of merchandise from stock are you within the coverage of Article 6. This, to the best of my knowledge, is a major change from your present statute. It is a major change from the present statutes in many cases.

It is true that a manufacturer may be covered under this definition of "enterprise" subject to the article, but only in a case where his principal business is a sale from stock. I submit that there are relatively few manufacturers who would so qualify, possibly a bakery operation, retail, or conceivably, I suppose, a large wholesale bakery, but by and large you will not find it necessary to

concern yourself with the article in dealing with the sale of a manufacturing enterprise.

Assuming that you are generally within the statute, are there any excepted transfers? The answer is "yes," the very same ones that are set out in Article 2 of the Nebraska Bulk Sales Law as it exists now.

Transfers for security: Transfers, I might add, in satisfaction of a lien or an existing security interest but not, of course, transfers in satisfaction of a pre-existing unsecured debt. This is not excepted. Any transfer under judicial authority is excepted. Transfers by executors, by receivers, and the like are excepted.

There are two situations, however, which are new, two exceptions. One involves a Nebraska purchaser who has a place of business in Nebraska, who assumes the seller's debts, who is solvent after the assumption, and who gives public notice of the transfer. In that situation there is no necessity further to comply with Article 6, and the reason is obvious: The creditors of the seller are better off than they were before. Now they've got two debtors—they've got the assuming purchaser and they've got their original debtor. If the assuming purchaser is solvent, as he must be, despite the assumption, the creditor is just that much better off.

The second exception not covered by your old act but incorporated in the Code specifically is the case of the successor business. Normally where the individual entrepreneur, for instance, decides to incorporate, or a partnership decides to incorporate, and they transfer all the assets of the business to the new corporation, is it within the article? The answer is that it is not within the article provided the new business entity, the corporation, assumes the obligations, provided public notice is given, and provided further that the transferor, the partnership or the individual who transfers his assets to the corporation, gets from the successor only such an interest in the business, the new business, as is subordinate to the creditors of the old.

In other words, let's assume that you have been very successful, you are going to incorporate. You are going to transfer all the assets to the new corporation. If you take, in return for that transfer, stock in the new corporation, you've got no problem at all because as a stockholder you know that your claim is subordinate to the claims of creditors.

Suppose, on the other hand, for reasons best known to yourself, you decide to capitalize the new company at less than the total

value of the assets transferred to it, and you take from the new corporation equity, stock, and notes or debentures which would to the extent of the face value of those instruments make you a creditor of the corporation. Looked at only from the point of view of Article 6, without reference to any tax consequences, you would have to be sure that those notes or those debentures were subordinated to the claims of the creditors of your business at the time of the transfer. If they are, if that is the situation, and if you give public notice, you are protected.

You did not see fit to adopt the 1962 amendment which defined what is meant by "public notice" in both these cases. Therefore you would be left to the normal rule as to public notice or as to notice under the Code, reasonable. The amendment specifies that to give public notice as here required you must advertise weekly for two consecutive weeks in a paper of general circulation in the locality of the seller's place of business. Certainly if you do that, even though you don't have that definition in your statute, you would be complying, I am sure, with this requirement.

Moving on, then, to the assumption that we've got a case which is definitely within Article 6, what do you have to do? At this point the requirements are essentially what they are under your old act. First of all, you must work out a schedule of property or inventory. Actually, under Article 6 this inventory or schedule of assets to be sold is less demanding than your old statute, for the simple reason that it does not require you to show the seller's cost price. All you have to do is, in effect, to show the assets to be conveyed, with sufficient detail to be reasonably identifiable.

The second document which, representing a buyer, you must insist on, is a sworn list of creditors. This is exactly as it is under your old statute. The sworn list of creditors must contain the name and address of the creditor and the amount of his claim where known. There is one distinction, that under Article 6 unliquidated claims must be stated, must be shown, and the question has been asked and I think the Comment indicates that this would include even contingent claimants, such as tort claimants. So long as anyone is known to the seller to be making a claim against him, whether he feels the claim is bona fide or not, this party's name should appear on that sworn list of creditors. Of course, the buyer is entitled to rely, acting in good faith, on the sworn list which he gets from the seller.

But this good faith may turn out to be a mirage, particularly since we all know that from the time you get up in the morning until you go to bed you've got tax problems. Consequently if a

seller does not include taxing authorities on his sworn list of creditors, it would be my serious suggestion to you, representing a buyer, that you nevertheless serve the notice, about which we will talk, on the federal and local taxing authorities. I call your attention to *U. S. v. Goldblatt*, 317 U.S. 662 in which, under an old bulk sales act, the court held that a businessman purchaser of a business knows that *any* businessman is so involved with I.R.S. in the way of this tax or that tax, in the way of withholding, that the failure to notify I.R.S. of a proposed bulk transfer cannot be said to have been in good faith, and consequently don't forget Uncle Sam when it comes to the notice in these cases even though the seller does not include the government. If he doesn't owe them anything, fine. If he does owe them anything you have protected yourself and your client. Local taxing authorities, also. I noticed, just running through your statutes, for instance, that Section 658 of Chapter 48 requires in Nebraska that in the event of any bulk sale the Commissioner of Labor must be notified in advance by the buyer, and on failure of notice the *buyer* will be liable for the amount of unpaid unemployment taxes or contributions which the seller may have incurred before the sale. So don't forget your local taxing authorities, even though the seller has not included them in his sworn list of creditors.

Having gotten the sworn list and the inventory or schedule, it is incumbent upon the buyer to retain it for six months or, in the alternative, to file it in the public office designated for the filing of security interests under Article 9, Section 401. As your 9-401 stands at the present time, although I understand there is some agitation for amendment to it, this would mean in the case of a bulk sale that the buyer, if he elected, could file the schedule and the list of creditors with the county clerk in the county in which the seller resides, if he is a resident of Nebraska; and if he is not a resident of Nebraska, then with the county clerk of the county in which the goods to be disposed of are located.

Having done this, having gotten the sworn list of creditors, then comes the notice. I have attached to my outline, and I would rather assume it is probably set out in your outline, a form of notice that is in common use in Illinois, which can be purchased, as a matter of fact, from any legal stationery store in the state, the form of notice which it is incumbent upon the buyer to send to every creditor on the sworn list. He must send it at least ten days before the payment of any part of the consideration or before he takes possession of any part of the inventory. Under the original draft of the Code which you adopted, this must be served either personally or by registered mail. You didn't include certified mail,

although under your current act, the old statute, you could serve your notice either by registered or certified mail. Article 6 as adopted here limits it to personal service or registered mail. So use one or the other, at least until this section is amended.

Now what about the forms? There are two forms of notice, the short form and the long form. The short form requires only three statements, in effect: It requires a statement that a bulk transfer is about to take place; it requires the names and addresses of the transferor and transferee; and it also requires any other names and addresses under which the transferor has done business for the past three years; and in addition a statement that the bills, the creditors of the transferor, will be paid when they come due.

The Comment to this section indicates that it was the intention of the drafters to enable the buyer to use a simple form of notice when he had a solvent and an honest seller, and he knew that that seller would pay the debts when they came due. If you have implicit confidence in not only the integrity but the solvency of the seller, you could use the short form. You could use the short form, I suppose, if by agreement with the seller you are going to hold out from the consideration the amount represented by the claimants on the sworn list.

I have in mind, however, a situation in Illinois now before the district court there in which a buyer used the short form. We'll take round figures. The sale price was \$100,000. The sworn list of creditors indicated that there were some \$60,000 in obligations. The buyer sent the short form to all the creditors. He thereupon paid over the difference between the \$60,000 indebtedness and the \$100,000 purchase price. But before any number of the other creditors had presented their bills to him, which he had advised them to do in the short form, the Internal Revenue Service slapped a levy on the \$60,000 still remaining in the buyer's hands. The levy was for considerably less than \$60,000, but the problem of our friend is simply this: If the government's claim is good to any part of this \$60,000, and if what is left after the government gets through is insufficient to meet the claims of the creditors, is he going to be liable for the amount over? I suspect that he will be, because in that short form he had told them, "These bills will be paid when they are due. Send them to me." He's getting them and he in my opinion will be liable for the amount over. Therefore, my only advice to you is *never* use the short form! Use the long form. Actually the long form is not too much longer than the short form. You have to include in the long form what is included in the short but, in addition, you do have to indicate the location and description of the goods and the estimate of the seller's total debt. You

also must include the location where that inventory and sworn list of creditors may be examined, either at the buyer's place of business or in the office of the appropriate county clerk. You must further indicate in the long form whether the transfer is to pay existing debts, and if it is, who the creditor is, who is getting paid, and the amount of those debts, or you must indicate if the transfer is for new consideration, and if it is for new consideration then you've got to state the amount of it and the place and time it is proposed to make the payment. This is the long form. Use it. This is my recommendation.

So now we have compliance, we've got the notice out. At this point, as a buyer you are entitled to sit back and wait the running of the ten-day period. Don't make any payments to the seller at all, even though the list of creditors is much less than the consideration, because if you do and if it develops that he has erroneously or otherwise misstated the amounts due, you are in trouble. So wait out the ten days and see what happens.

Now what can happen? This is the part that no bulk sales act answers. Put yourself in the position of the attorney who is now called up by the creditor. He says, "I got the notice. What am I going to do?" Frankly, I don't know what he is going to do. One of the suggestions is to have a letter written, a formal letter, directed to the would-be purchaser, telling him that the debt is genuine, that it is so much, and that you are serving notice on him to hold for this creditor the amount of the indebtedness owed him. It doesn't mean a thing, except psychologically. It does have some psychological effect, but the buyer is under no legal obligation to withhold. The only thing you can do, of course, if your debt is due is try to get judgment in a hurry and levy, or if you can establish some basis for assuming that your client, the creditor, is going to be defrauded, that the seller will secret the proceeds, will leave the state, or that he is insolvent, then of course you can get the appropriate remedy in the nature of some equitable relief to impound the proceeds or even to attach the inventory before it is transferred.

What about the case where there has not been compliance? What is the liability? Article 6 merely says that such a transfer in violation of the article is ineffective against creditors of the transferor. Your statute, I believe, uses the word "void." In my opinion there is no difference. The sum and substance of it is that you in Nebraska will be able to use the same remedies in the event of a violation of this article after its effective date, representing creditors of the seller, that you are able to use under your old statute. Your courts apparently have imposed a trust, in the nature of a

trust at least, on the buyer for the benefit of the creditors. They have enabled the creditor to garnishee a buyer. They have enabled him to levy directly on the goods in the hands of the buyer. All those remedies will still be available to you after Article 6 becomes effective.

Of course as far as a subsequent transfer of the goods is concerned to a bona fide purchaser, this would take the inventory itself out of your reach, because the bona fide purchaser will be protected.

You will notice, I think, from reading the article that auction sales are now covered under it. The auctioneer is the one who is going to stand in the position of a bulk sale buyer. He is the one who must see that the inventory is prepared, who must get the sworn list of creditors, and who must send notice to each of those creditors on the list. The purchasers out in front of the auction table are protected. They are protected whether or not they know it is a bulk transfer within the meaning of the statute. But the auctioneer will be liable for non-compliance to all the creditors of the seller as a class up to the net proceeds of the auction. In other words, the auctioneer must do everything that the buyer has done in the individual or private transfer.

Lastly I merely want to mention your statute of limitations under Article 6. It is six months, six months from the time that the buyer takes possession of the property. One warning—well, there are two, actually—if the transfer has been concealed, that six-month period doesn't start to run until the creditors know, or should have known, that the transfer has taken place.

The other exception is in the instance of bankruptcy. If a petition in bankruptcy is filed against the seller within six months of the transfer, and assuming of course that there has been no compliance with the Bulk Sales Act, then the trustee in bankruptcy will have two years from the date of the filing of the petition in which to exercise the remedies of a creditor against the bulk sales purchaser.

That, very rapidly, admittedly, and perhaps too cursorily would entail what I propose to say about Article 6.

As far as documents of title are concerned, just a few notes. Frankly, in my opinion this article makes relatively little change in the law as we have known it before, particularly under the uniform statutes, one of which I understand you have, the Warehouse Receipts Act. It consolidates the warehouse receipts and the bills of lading act and otherwise, as I say, makes little change. It is subject to special federal and local legislation regarding the

subject. So if a Nebraska statute requires a licensing of grain elevator operators and applies specific rules relative to their obligations, that statute is not abrogated by Article 7 of the Code. The document of title covered by Article 7 is defined as a document of title purporting to be issued by or addressed to, in the case of a delivery order, a bailee, and purporting to cover goods in the bailee's possession which are either identified or which are part of fungible portions of an identified mass.

The documents generally are of the same form that they were before. They are negotiable or non-negotiable. They are negotiable if they are made out to bearer or to the order of a designated person. They are non-negotiable if they are not. The fact that the warehouse receipt, for instance, may specify that the goods will be delivered only upon receipt of the warehouse receipt endorsed by the party named in it, does not make that a negotiable warehouse receipt. To be negotiable it must have been made out to his order, just as under Article 3 with respect to commercial paper.

The interest and rights acquired by due negotiation are what they were before. The only thing you must watch out for is what is meant by "due negotiation." By due negotiation is meant the transfer of a bearer document or the transfer of a negotiable document properly endorsed to one who gives value for it in good faith and without notice. But there is one major change here at this point from the old law, and that is that one who does not negotiate in what is called the regular course of trade or in the regular course of a secured transaction, does not duly negotiate, and therefore the taker does not take by due negotiation.

The examples given in the Comments I thought were rather amusing. The drafters said that they saw no commercial necessity for allowing either a tramp or a professor to negotiate documents of title because, as a matter of fact, he normally does not store or ship supplies of cotton, sheet steel, and the like. Probably true. So in order to have due negotiation the one negotiating must not only be negotiating in proper form but he must be doing so in the course of trade or as part of a regular security transaction. When it is duly negotiated, of course, the one who gets it, gets all right, title, and interest in the goods, in the document, and the obligation of the bailee in respect to delivery.

The bailee's obligation to deliver remains the same as it was under the prior law.

The issuer's liability for misdescription or for non-delivery has been clarified, but basically it is the same—he is liable. If he

issues a document or if his agent does, even without authority, which misdescribes the property or indicates that property has been delivered to the bailee when in fact it hasn't, the issuer of the document is going to be liable.

In respect to the duty of care, the statute imposes a reasonable man's standard, except where federal law, for instance, such as the Carmack Amendment, imposes a much higher standard, an absolute duty for all practical purposes for loss or damage to the goods. The act further provides, however, that though you cannot waive or eliminate this duty of care by contract, you can limit the *recovery* for breach to a stated amount, with this exception, that the holder, or rather the shipper, or the bailor in the case of the warehouse receipt, must have the opportunity to secure greater coverage, to extend the limits of liability upon payment of an additional charge, so long as such is not contrary to the tariff in application either under the federal or under your local statutes.

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FRIDAY AFTERNOON SESSION

November 13, 1964

The third and final session of the Institute on the Uniform Commercial Code was called to order at two-fifteen o'clock by Chairman Harold L. Rock of Omaha.

CHAIRMAN ROCK: We may as well get under way. I have been asked by Glenn Prentiss from Lincoln, with Lawyer's Cooperative Publishing Company, to draw a name from this box for a set of Anderson's work on the Code. Here goes nothing! Lansing Anderson, 417 East Avenue, Holdrege. You can pick them up out at the desk, Mr. Anderson.

We have a registration of about 950 at this Bar meeting, which is a new record, as far as I am able to ascertain.

The first part of this afternoon's program will be an "Introduction to Secured Transactions," which will last about one-half hour. Then we will go into "Financing Small Manufacturers, Retailers and Consumers," and then to "The Practical Use of Forms and Filing Procedures."

To present the first and last parts we have with us today Mr. Ray David Henson, Counsel for Continental Assurance Company in Chicago. He is chairman of the Committee on Uniform Commercial Code of the Corporation Banking and Business Law Section of the ABA. He is a member of the subcommittee on Secured Transactions of the Permanent Editorial Board for the Uniform Commercial Code.

He graduated from the Illinois School of Law, is a member of the American Judicature Society, Scribes, and the Royal Institute of Philosophy. He edited *Landmarks of Law* published by Harper & Brothers in 1960.

This is just a small selection from his record. I had a devil of a time getting that. I had to get it from another publication. I pleaded and begged and couldn't get anything from him. Mr. Henson, along with the other men, are all fine gentlemen.

Last night William Davenport, whom you saw yesterday, who is about seven feet tall, and I went in a Volkswagen out to the airport to pick up Mr. Henson, Mr. Tomaschoff, and Professor Lamey, whom you met this morning, and it takes a real nice group to get into a Volkswagen when they are all that big.

Without further ado I give you Mr. Henson, who will introduce you to secured transactions. Then we will meet Mr. Tomaschoff.

INTRODUCTION TO SECURED TRANSACTIONS

Ray David Henson

Thank you. It is a great pleasure to be back in Omaha for the third time in a year on behalf of a cause so worthy as the Commercial Code. It is nice to see some of you again. I suspect, however, that those who came to the first two meetings wisely avoided this afternoon. Be that as it may, my outline which I have sent out is one I must admit that I submitted the last time I was here, knowing we wouldn't follow it at all then. It is one I have used at meetings ranging from one to three hours. Obviously, we can't cover it in thirty minutes, but we will hit a few high points in it. In any event, it is rather a reference work, if you are interested in coordinating certain sections of the Code.

I have been asked several times today, yesterday, and on previous visits what books could be recommended on the Code, and if you don't mind I would like to spend a minute on that because I am sure you have found that since the Code has been passed here you are deluged with invitations to purchase quite a number of books, most of them selling for what strikes me as an exorbitant price. However, to be helpful, I would eliminate the more expensive books, unless you are terribly interested, and recommend the *Uniform Commercial Code*, official Text and Comments Edition, which I notice has been printed as your official version of the statutes in Nebraska. Since you are bound to have that, there is no excuse for buying another copy.

You will find that the Official Text which is published now, I believe, for \$6.00, the 1962 version, contains very helpful Comments. If you read that you can coordinate everything you are interested in.

However, I am sure you will want more. There is an excellent book called *Banks and the Uniform Commercial Code*, written by Carl W. Funk of Philadelphia. Carl is a first-rate lawyer and he writes readable prose, which is no mean accomplishment, as you know. I guarantee you would understand what Carl has to say. He wrote this book originally for bankers, but I can't think of a lawyer who couldn't profit by what is in it. It is extremely lucidly put together and has excellent forms. His forms don't contain all of the old nonsense that we are used to. They are right up to the minute. They state exactly what is going on, and in terms anyone could understand. That's *Banks and the Uniform Commercial Code*, by Carl Funk, published by the Pennsylvania Bankers Association, Box 152, Harrisburg, Pennsylvania. The book in its current edition is tied to the 1962 Official Text of the Code.

I gather from reading the report of your Uniform Commercial Code Committee in the official program of this meeting that you will be adopting the amendments which were proposed in 1962 by the Permanent Editorial Board so your Code will be right up to date, and you can use Carl's book with profit. Interestingly enough, Nebraska was the only state enacting the Code last year which enacted the 1958 version. I am not sure why you did that. I am sure you had a good reason. If you will bring it up to date you will be able to get along with everyone else who uses the same material.

The third book I would like to recommend is one in which I have a personal interest. Be that as it may, I would like to recommend it anyway. If you belong to the American Bar Association's Section of Corporation, Banking, and Business Law, you have received an invitation within the past few weeks to purchase a book called *Uniform Commercial Code Handbook*. This book sells for \$4.00 in hard cover. The American Bar Association section wanted to perform a service for the members of the Association and for lawyers in general, and therefore put out this book at \$4.00. If you should ever have a bar association meeting and want to distribute a book, this book will be made available at actual cost from the American Bar Association, Section of Corporation, Banking, and Business Law, in Chicago. You can order a copy of the handbook for \$4.00, no extra charge for postage, from the Association in Chicago if you wish.

I think it is an excellent compilation of some of the leading articles which have appeared on the Uniform Commercial Code. Every article of the Code is covered by one or more articles. There are several forms, but we are not featuring them. We are, however, trying to perform a service by giving you readable articles which were authoritative in every case, I hope, and we brought them together at what is the most modest price of anything on the market, including the paper-bounds. Our first printing of 5,000 copies, which came out last month, is practically exhausted. We will be printing it again. If you don't have a copy I hope you will order one. I think you will like it.

I certainly hope you will join our ABA section because we try to keep everyone up to date on the Code through the *Business Lawyer* which, I believe you will agree, is an excellent publication.

To get into Article 9, I think you must face this as nothing revolutionary, but Article 9 does allow the parties to a transaction to contract with each other in a manner providing security as the parties wish. So long as they exercise good faith there is prac-

tically nothing which they cannot do. There are certain requirements in the Code which cannot be waived, mostly relating to the debtor's rights after default, but in general the parties can do whatever they wish to do, and whatever they decide upon will be enforced.

Article 9 includes practically every kind of consensual security interest in personal property under one statute. It replaces existing acts regulating chattel mortgages, conditional sales, assignments of accounts receivable, trust receipts, factor's liens, and so on.

Article 9 does not touch real estate, except that it regulates security interest in fixtures, as they are separately financed. Article 9 does include leases and consignments which are intended as security devices.

Article 9 does not displace certain regulatory acts. It wouldn't displace a retail installment sales act, if you had one, and possibly next year you will have something for Article 9 not to displace.

Article 9 does not apply to certain specific transactions, such as security interests which are perfected under a federal statute, but, as you know, very few of the federal statutes, if any, do much more than provide a means for perfecting a security interest; they do not tell you how to enforce it. Article 9 supplies any deficiencies in the federal acts. Nor does Article 9 apply to wage assignments or equipment trusts covering railway rolling stock, although the Code does apply to conditional sales of rolling stock. Article 9 does not apply to the sale of accounts, contract rights, or chattel paper as part of the sale of a business out of which they arose.

It does apply in general, however, to sales of accounts, contract rights, and chattel paper even though those are sales and not assignments for security only. The reason for this is that it is usually impossible to tell by the form of a transaction whether it is in fact an assignment for security or a sale of that kind of collateral. The only difference in Article 9 between a sale and an assignment for security of contract rights, chattel paper, or accounts is on default. On default if you have a sale, rather than an assignment for security, the debtor, as we would call him in Article 9, is not liable for a deficiency or entitled to a surplus, whereas the reverse would be true if you had an assignment which was purely for security purposes.

If Article 9 applies, if you are dealing with a consensual security interest in personal property which is not specifically excluded, it applies without regard to *form* of device chosen. You may obviously continue to use conditional sales contracts or chattel

mortgage type contracts. There are various reasons for which location of title is important. I suppose your state tax applies to personal property, or it might. In any event, the title to personal property is occasionally important, and the device you choose may determine where the title is, but as far as the incidents of Article 9 are concerned, it doesn't matter where title is. The distinctions which are made in Article 9, among various types of collateral, are based primarily on the particular kind of collateral involved and its use.

Article 9 substitutes a new set of terms which are, within ordinary usage of language, descriptive of the relationships involved. These new terms replace the old terminology, which had a various sort of history. We now say "secured party," "debtor," "security interest," "security agreement," "financing statement," and "collateral." With the use of this terminology you can accomplish whatever kind of secured transaction you wish without worrying about which pigeonhole it should have gone into once upon a time. That is, a trust receipt transaction or a factor's lien transaction may once have presented a problem. Now you simply enter into whatever you wish, use the proper terminology under the Code, and all will be well, perhaps.

The creation of a security interest requires three things: (1) an agreement that it attach; (2) the giving of "value" by the secured party; (3) the acquisition of "rights" in the collateral by the debtor. When these events have occurred the interest is said to attach. That is not necessarily a particularly important term. However, I think the concept of attachment is the rough equivalent of an unrecorded chattel mortgage, at least in Illinois; that is to say, a security arrangement which would be good between the parties might not be good as against third parties unless something else took place.

The kind of agreement which is necessary to create a security interest may be oral, in the case of a pledge, otherwise it must be in writing, and it must be signed by the debtor in order to be good against the debtor or third parties. This is a kind of statute of frauds. The Code does not recognize equitable security interests. The obtaining of a legal security interest is so perfectly simple under the Code that there is no excuse for recognizing equitable interests, and the Code does not do so.

The principal object, of course, in taking a secured transaction is to have a "perfected" security interest. That is normally one which is good against a trustee in bankruptcy. The terms "perfection" or "perfected" in the Code are used in various ways. They

do not always indicate the same kind of situation as regards all third parties. But "perfection" and "perfected" are *never* used in any sense that means less than a security interest which is good against a trustee in bankruptcy.

To illustrate what I mean, a purchase money security interest in consumer goods is said to be perfected simply by the seller's retention of a security interest in the goods, a typical conditional sale transaction, without any filing. This is true as against everybody, except a neighbor of the consumer who purchases for value and in good faith. In that kind of transaction, unless the secured party has filed he has no right to follow the collateral into the hands of the third party. The normal method for perfection is, of course, by filing. This makes it perfectly possible, as it always has been under any type of statute or variety of statutes, to have conflicting perfected security interest in the same collateral. That is, a situation which was certainly not uncommon in Illinois was the purchase of property on conditional sale, which required no filing or recording, followed by a chattel mortgage covering the same property to a different third party. The chattel mortgage would have been recorded and you would have had conflicting perfected security interests in Illinois, much the same as you can have them under the Code, except in Illinois we had no means of resolving those conflicts because we were dealing with separate propositions. Under the Code the method of resolving these conflicts is expressly provided. It may seem to be complicated, and in the abstract the rules for determining priorities *are* complicated, but when you apply them to a particular fact situation I don't think they are too difficult to understand.

Where filing or transfer of possession of collateral is necessary for perfection, that act may occur before the other events necessary for attachment have occurred, so that perfection is accomplished when the last of the events necessary for attachment and perfection has occurred. That is, under a notice filing system it is quite common in important financing involving, for example, inventory or equipment, to file first and wait ten days to see if anything has happened, or perhaps not wait ten days but at least wait long enough to have the record searched to make sure nobody else has already filed against the same property, and then you can release the collateral to the debtor or pay your value or whatever it is you have left to do.

You may cover after-acquired property by a security agreement, with exceptions for crops which become growing crops more than a year after the security agreement is executed, and with an exception for consumer goods other than accessions unless they are

acquired by the debtor within ten days after the secured party gives value. But in general, after-acquired property may be covered.

The security agreement is not invalid or fraudulent against creditors because the debtor may use or commingle or dispose of collateral, or collect or compromise accounts, or use or commingle proceeds, without specific accounting to the secured party or without replacing collateral. This rule of the Code abolishes the rule of *Benedict v. Ratner*, which purported only to state a rule of New York law and not a matter of federal bankruptcy law. This rule validates a lien on a shifting stock of merchandise, and of course it has a much broader application but it does make possible a sensible financing of inventory which has been perhaps very difficult, if not impossible, in certain situations under any acts existing before the Code.

Where filing is required to perfect a security interest, the instrument filed is called a "financing statement." It is a very brief document, or may be. It need contain only the names, addresses, and signatures of the debtor and secured party; a description of the types or items of collateral (and if crops or fixtures are involved, a description of the real estate concerned); and a statement that the proceeds or products of collateral are claimed, if that is the fact. This, in other words, is roughly the equivalent of a memorandum of lease which is recorded or filed in a real estate transaction. A memorandum of lease normally would give no more information than the names of the lessor, the lessee, where the property is located, and the term of the lease. That, roughly, is what a financing statement must give, but no more. It will not state the amount of the maximum outstanding debt, for example, any more than a statement which was filed under the Uniform Trust Receipts Act would have stated the maximum amount of the debt. You could not tell at any one time how much was outstanding; you simply knew that this financing was going on between the entrustor and the trustee. This is the same situation under the Code.

Any description of real or personal property is sufficient if it reasonably identifies what is described. You do not, then, have to use a serial number description on a financing statement. You should if you can, but obviously the Code covers a very wide range of transactions and in many instances it is absolutely impossible to describe the collateral accurately. You may do it by item if possible but you may also do it by type; that is, if you are financing accounts you don't list all the existing accounts and wonder what will happen when tomorrow's come in. You simply file and say that the collateral is accounts. You wouldn't say accounts past,

present, future, because you are not financing past accounts. I have heard this at so many meetings. Accounts are either existing or they are future. If they are past, nobody is doing anything with them. You need say no more than simply accounts.

As to the place of filing, the Code sets out three alternatives. One basically provides for fixture filing locally in the real estate records, with central filing for every other security interest; one basically provides for fixture filing locally and farm filing locally, consumer filing locally, and business filing centrally; and the third alternative requires dual filing, where the business has an office in only one county in the state.

To speak perfectly frankly, the only reason for dual filing in any state apparently is that certain county recorders have been fearful of losing business and have raised such a storm that some alternative had to be designed to accommodate them if their pressure was sufficient to influence passage of the Code. You will find, I am afraid, that in several instances where dual filing is required there have been mistakes in it, and the result of filing in the wrong county is that you are just out. You either file properly twice or your security interest is no good. I think that is a mistake.

I noticed in Referee Strasheim's article in a recent issue of the *Nebraska Law Review* that it is his impression you are going to change the filing rules in Nebraska next year. I sincerely hope so because it seems to me some of your rules won't work.

I attempted to explain why I thought so in a rather lengthy footnote to a rather pedestrian effort I contributed to your recent *Law Review*. I really don't think it will work for collateral other than goods. I think that is all that was in the draftsman's mind, and I hope you will select one of the alternatives from the Official Text. It has been our experience that states which have experimented in the filing rules have usually come up with something missing somewhere.

That is on my mind because I just finished this week reading proof for Report No. 2 of the Permanent Editorial Board in which all of the filing rules varying from the Code's requirements have been disapproved, not surprisingly. But in every case I think some flaw is pointed out; there is some kind of collateral which the rules as changed simply don't provide for. If I were you I would give some thought to adopting one of the official alternatives.

It seems to me we are delighted in Illinois with central filing for business transactions. The Code doesn't say central filing for business transactions. That is simply the way it works in fact, and

it turns out quite well. Springfield, of course, is not Chicago, and a lot of Chicago lawyers didn't like it in the first place but we got such marvelous service from the Secretary of State and from one of our private companies which supplies information that we find it works splendidly. You don't have to wonder; you have only to search one place, and only one in the state, in order to handle a business transaction.

The problem of filing is one I can't make any suggestions for out here so I wouldn't attempt to be specific about where to file.

But if you have filed and if your statement states a maturity date of five years or less, the filing is effective until maturity date plus sixty days. If the statement states no maturity date or indicates the obligation is payable on demand, in the 1962 version, or states a maturity date in excess of five years, the effectiveness is for five years only. In any event, the secured party may file a "continuation statement" within six months before the end of the effective period, or before the expiration of the sixty-day period if there is one, and this continues the effectiveness of the filing for another five years. This does not require the cooperation of the debtor.

I would like to spend a couple of minutes on financing patterns, which is another portion of this outline, as my time has obviously quite run out. I would just like to point out that the classification of collateral, if collateral is goods, depends to a considerable extent on the use to which the goods are put. For example, if you have a refrigerator in the hands of its manufacturer or a dealer selling refrigerators, that refrigerator will be inventory. If you have a refrigerator in the hands of a physician in his office, used for keeping medicines cold, it will be equipment. If you have the same refrigerator in the physician's home, for ordinary consumer use, then of course it is consumer goods. But if the security interest is properly perfected in the refrigerator used in the physician's office and he subsequently moves it home, the security interest will continue to be perfected although the use or location of the collateral changes.

I think the collateral under the Code can be divided roughly into three categories: (1) goods, (2) paper collateral, and (3) intangibles. While I don't have time to go into them, I have gone into this to some extent in the outline.

Goods are subdivided into (1) consumer goods, (2) equipment, (3) farm products, and (4) inventory. I think in general what are covered by these various categories are really almost self-explanatory. There may be one or two surprises, but not many.

The collateral involving paper rights includes (1) chattel paper, which is the usual conditional sale or chattel mortgage or lease transaction, where the person who owns the obligation transfers it to a financier. That is, a store selling refrigerators takes conditional sales contracts from buyers. The store needs to get some money. It finances these conditional sales contracts at the bank. When these contracts are refinanced they are chattel paper.

Also, (2) instruments, such as negotiable instruments where obviously the paper itself represents the right, or a stock certificate. And (3) is a document, which includes bills of lading and warehouse receipts. Of course documents come in both negotiable and non-negotiable form. In general, in transactions involving "paper" collateral you would have to have a transfer of possession in order to have an effective security interest, although filing is provided in certain instances.

Intangible collateral includes (1) accounts, (2) contract rights, and a catch-all category called (3) "general intangibles." General intangibles catches anything which isn't otherwise provided for under the Code. That is, Article 9 purports to be comprehensive, and it is. If you come up with the kind of collateral which doesn't fit any place else, it *has* to be a general intangible. There has to be a way that you can take a security interest in it. If you read the rules on general intangibles they are not really too involved. This is a comprehensive system and I think with a little work under it, it won't be difficult for you at all.

CHAIRMAN ROCK: It is difficult to present all of the Code thoroughly in the time we have, a day and one-half, but I am sure you will agree that so far the speakers have done a bang-up job.

Our next speaker today was scheduled to be Mr. Durmont McGraw from Chicago. Mr. McGraw had an emergency at home and was unable to come but he sent one who, I am sure, is a grand substitute. The substitute will try to work from Mr. McGraw's outline, varying where he feels it necessary for his presentation.

He is a graduate of George Washington University, getting his M.B.A. from the University of Chicago Business School, his J.D. from the University of Chicago School of Law. He is chairman of the Illinois State Bar Association's Subcommittee on Secured Transactions of the Uniform Commercial Code Committee. He is an associate of the Chicago firm of Mayer, Friedlich, Spiess, Tierney, Brown & Platt.

Sometime during his talk we will take a short break and then get right back.

I present to you now, Mr. Erwin A. Tomaschoff.

**FINANCING MANUFACTURERS, RETAILERS
AND CONSUMERS**

Erwin A. Tomaschoff

Let me start out by saying that, as Mr. Rock pointed out, I was brought in on this just in the last day or so and have had very little advance notice for preparation, so that if I happen to stumble along the way I trust you will bear with me.

Also, I might note that I have taken the liberty of reorganizing somewhat Mr. McGraw's outline that you have in your blue booklet. Due to the fact that we started late and there is a lot of material for us to cover, and especially since we want to leave time for a question and answer period, I might have to skim over some of the material toward the end of the outline.

The title of my topic really covers the entire gamut of Article 9, with the exception of farm financing. Now, Article 9 is not constructed so as to provide a distinct scheme of secured financing for manufacturers, retailers, or consumers. It is not a specialized statute for any one of these three. It sets up a scheme to be used flexibly, as Mr. Henson pointed out, for any one of them. Thus, for example, the basic pattern that is set up for obtaining a security interest in business equipment is, with certain exceptions that I will point to later, the same as that set up for consumer goods. Similarly, the general requirements as to perfection, and so forth, are, with some minor exceptions, the same whether the secured party is a lender or a seller, and whether the debtor is a manufacturer, a retailer, or a consumer.

Therefore, in order to avoid repetition, I'll devote myself in the major portion of my discussion to the problems of financing manufacturers. However, everything I say in this regard will, except as I may point out otherwise when I specifically mention retailers, be equally applicable to the financing of retailers. As we shall see, they often have the same kind of financing problems. Similarly, my discussion of business equipment financing will be equally applicable to consumer financing, except for the specific differences that I will point out as we go along.

In order to provide a framework for our discussion, let's assume that the Widget Company, a manufacturer of widgets, comes to the First State Bank of Omaha and tells the bank that it needs a loan right away and will be needing additional funds from time to time for working capital and various other purposes. Let's as-

sume, further, that this Widget Company is far from being an A-1 credit risk, so that the bank is not willing to lend on an unsecured basis. Finally let's assume that the Widget Company owns no real estate, so that the bank will have to look solely to the personal property of the company for collateral.

This gives the company and the bank basically three types of collateral to work with: The equipment of the company, the inventory of the company, and the accounts and chattel paper of the company.

Let's look at these types of collateral one by one and, since I understand that most if not all of you have attended some prior sessions on secured financing under the Code, and since Mr. Henson is going to take up the topic of forms and filing, I am going to try, to the extent that we have time, to discuss not only the mechanics involved but also some of the problems and pitfalls that the financier may face.

First, let's take a look at the financing of equipment. Equipment is defined, in Section 9-109 (2), as goods used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency, or other goods which are not included in the definitions of inventory, farm products, or consumer goods. In other words, the term "equipment" under the Code is basically synonymous with our everyday use of the term.

Let's take the simplest situation first: Assume that the Widget Company already owns some equipment, say some widget-making machines, which are right there in its plant, and let's assume further, at least for the moment, that none of this equipment would come under the category of fixtures. We will talk a little later about fixtures and some of the additional problems that may arise if equipment is affixed to real estate.

In equipment financing, the Code basically follows a pattern with which you are all familiar—that of the traditional chattel mortgage. As in the case of the other types of collateral under the Code, four conditions must be met before the First State Bank has a security interest in the equipment which is good against the Widget Company and its creditors: The debtor must have rights in the collateral, there must be an agreement that the security interest attach, the secured party must have given value, and, finally, the secured party must perfect its security interest, which generally entails the filing of a financing statement or taking possession of the collateral.

In our example, the Widget Company already owns the equipment and therefore has the requisite rights in the collateral. The First State Bank will be giving the requisite value when it makes its loan and would, by the way, be considered as having given value even if it were to take the collateral as security for an existing debt, in view of the definition of "value" in Section 1-201 (44).

What remains then to be done is the taking of a security agreement and the filing of a financing statement, since the State Bank certainly doesn't want to take possession of the widget-making machines. Mr. Henson will shortly be covering the topic of forms and filing, so I'll say just a very few words about the security agreement and the financing statement.

The security agreement requirements of the Code are very simple. There is no need for any magic words or seals or acknowledgements. All you need is a statement saying "I hereby grant," a description of the collateral, and the signature of the debtor. You will, of course, want to include other provisions to take care of all kinds of contingencies, but this is not a requirement for the validity of the security agreement. Furthermore, in view of the fact that Article 9 has a very comprehensive Part 5, which sets out the rights of the parties on default, the security agreement can omit a great deal of the "small type" language that previously appeared in chattel mortgages about what the secured party may do if there is a default.

As to the financing statement, let me just say at this stage that the desirable pattern is to try to get the financing statement on file and to make a search of the filing records first, before making any loans, so as to be sure that no prior financing statements covering the same collateral are on record. In this way you can be almost, but not completely, sure of avoiding conflicting priority problems. When we get to a discussion of purchase money security interests you will see why you cannot be one hundred per cent sure on this point.

As I mentioned earlier, this type of financing usually gives rise to the fewest problems. Next to the possessory pledge transaction, where you have share certificates pledged to you, it is probably the simplest type of transaction.

Let's move on to a little different and somewhat more complex situation. Assume that the Widget Company now comes to the First State Bank of Omaha and tells the First State Bank, "We want to purchase fifteen widget-making machines from the XYZ

Corporation." Here we get into the area of purchase money financing.

Section 9-107 states that a security interest is a purchase money security interest to the extent that either (a) it is taken or retained by the seller to secure all or part of the price, or (b) it is taken by a person who, by making advances or incurring an obligation, gives value to enable a debtor to acquire the collateral, if such value is in fact so used.

The first type of transaction that this definition covers, using pre-Code terminology, is the conditional sale of equipment by a seller.

The second type of situation that the purchase money security interest definition covers is that where a bank, coming back to our old friend the First State Bank, says to its customer, "All right, you go ahead and order the equipment and make a down payment, and we'll pay the balance." In this situation the bank, by making advances (i.e., giving value) which enable the debtor, the Widget Company, to acquire the collateral, brings itself within Section 9-107. On this point I want to stress that if the bank is the one that is doing the financing directly—that is, if the seller sells on open account and the bank is paying the bill—then the bank should be sure that the funds are applied in the manner required, because if they are not so applied, the bank doesn't have a purchase money security; it has a security interest but not a purchase money security interest. The most certain way to do this probably is to have the buyer, the Widget Company, submit the invoice with its down payment to the bank and to have the bank remit the funds directly to the XYZ Company, which is the seller.

As a third possibility, let us assume that the XYZ Company makes the sale directly under a conditional sale contract. Then, of course, our banker friend can come into the picture by lending against or purchasing the conditional sale contract, which is then chattel paper and which I will talk about in more detail later.

What are the benefits of a purchase money security interest? Why try to get a purchase money security interest? There are two major advantages. One of them is that, under Section 9-312(4), a purchase money security interest in collateral other than inventory (note that this provision does *not* apply to inventory) takes priority over conflicting security interests in the same collateral, provided that it is perfected at the time the debtor obtains possession or within ten days thereafter.

For an example of Section 9-312(4) in operation, let's come back to our three friends, the Widget Company, the XYZ Corpora-

tion which is selling widget-making machines, and the First State Bank. If the XYZ Corporation sells the machines to the Widget Company and if it files within ten days (note that it doesn't have to file right away) then it would take priority over any financing statement that the First State Bank or any other financier had previously filed. Generally, as you know, if two conflicting interests are both perfected by filing, the "first-to-file" rule applies, so that whoever gets on the record first takes priority. However, by filing within ten days, the XYZ Corporation, as a purchase money financier, can come ahead of the First State Bank or any other financier who claims under an after-acquired property clause in a prior filing.

The second major advantage of a purchase money security interest arises under Section 9-301 (2). Here, again, a purchase money security interest in collateral *other than inventory* is protected for a period of ten days without filing against intervening transferees in bulk or lien creditors of the debtor. Thus, for example, assume that the XYZ Corporation today sells machines to the Widget Company, delivers the machines, and takes a conditional sale contract, but does not as yet file a financing statement, and two days from today a lien creditor obtains a judgment lien on all machinery of the Widget Company. Even though the XYZ Corporation has not yet filed, its security interest would, under Section 9-301 (2), come ahead of that lien creditor, provided that it files within ten days after the collateral came into the possession of the debtor.

What this means, in effect, is that the purchase money secured party not only has a priority position over an existing non-purchase money secured party who may claim a conflicting interest, but also has a ten-day period of grace for filing, which is not available in the case of any non-purchase money security interest, because generally perfection is effective as of the date of filing—that is, if perfection is by filing.

As to this type of transaction, I might also point out at this stage that if the bank is purchasing a conditional sale contract covering a sale by the XYZ Corporation to the Widget Company, it will, of course, probably want to remain outside of any disputes that may arise between the buyer and the seller. Therefore, the bank will probably require a clause to be put into the conditional sale contract saying that the buyer waives all claims and defenses against any assignee of the seller. This is permissible under Section 9-206 (1) of the Code, unless there is some other statute (e.g., a retail installment sales act) which specifically states otherwise. It is effective, so far as the bank is concerned, to the extent that the bank, at the time of the assignment, knows of no existing claim

of defense, but is not effective against any defenses that could be asserted by a holder in due course of a negotiable instrument under Section 3-305, such as incapacity, duress, illegality, and the like. But if the buyer merely asserts that the goods were defective, then, provided the waiver language is strong enough, the bank, as a purchaser of the paper, has a right to payment.

A variation of the conditional sale type of financing which enables a manufacturer to acquire equipment is that of lease financing, which has become quite popular in recent years. Now lease financing—and this can get a little tricky—always involves at least one secured transaction, namely that of the lessor pledging or selling the lease to the bank. However, it may also involve a secured transaction at another level if the lease is held to be a lease taken for security purposes; in other words, if it is not a “straight” lease.

As to what lease transactions fall within the provisions of Article 9, and are considered to be secured transactions, Section 1-201 (37), which defines the term “security interest,” provides that whether the lease itself is intended for security, and is therefore covered by Article 9, is to be determined by the facts in each case. This in itself is not, of course, of much help to a lawyer who is trying to make up his mind. However, there are a couple of guidelines in Section 1-201 (37), namely that (1) the mere inclusion in the lease of an option to purchase the leased property does not of itself make the lease one intended for security, and (2) a provision in the lease giving the lessee the option to become the owner of the property at the end of the lease term for no additional consideration, or for a nominal consideration, definitely does make the lease one intended for security, and therefore makes the lease transaction subject to the provisions of Article 9. There are, of course, many possible combinations of option provisions, and the determination has to be made in each case in light of the facts. This is something that one could talk about for quite a while, but I think that, in a nutshell, the word to the wise is that, unless it is clear that a lease is a “straight lease,” that it doesn’t amortize the entire life of the property, and that there isn’t any implied option tagged on, caution dictates that it be treated as one intended for security for the purposes of Article 9, and that a financing statement be filed naming the lessee as a debtor.

Insofar as you may be worried about the possible tax consequences of treating a lease as a security device, a recent decision of a bankruptcy referee in a Pennsylvania reclamation case, where the referee found that the lease was intended for security and relied heavily on the provisions of the federal tax regulations, indicates that the courts, in construing the Commercial Code, and the

Treasury Department, in construing the Internal Revenue Code, will probably see eye to eye anyway on this question. For those of you who are interested, that decision is *In the Matter of Royer's Bakery, Inc.* (No. 2) (E.D.Pa., 1963), and it is reported in C.C.H. *Installment Credit Guide*, paragraph 99,274.

When the lease is once made and the banker comes into the picture, and he either buys the lease or lends against it as the collateral, then it is clear at that stage that this is an Article 9 transaction. As Mr. Henson pointed out, the lease, regardless of whether it is a straight lease or a security device, has by definition become chattel paper, and both sales and pledges of chattel paper are covered by the Code.

Let me make a couple of comments on some other aspects of lease financing. Just as in the conditional sale contract the bank probably will require some kind of waiver of the rights of the buyer against the seller's assignee, here again, in most leases, where the bank is relying on the credit of the lessee, it is traditional to put in a so-called "hell or high water" clause which says that the lessee, once the lease has been assigned, will pay the rentals regardless of what happens.

Yet another question relating to the assignment of leases and the taking of a lease as security is the question of whether the bank in taking a lease should be satisfied with merely taking an assignment of the rentals or whether it should also take a security interest, if this is a pledge transaction, in the underlying property. This, of course, will be a matter for credit judgment. If you are dealing with a blue-chip credit you won't worry about it, but if you are worried about collapse, you will probably take not only the lease rentals but also a security interest in the underlying property.

Now let me very briefly mention the assignment of security interests. We have already discussed the situation where the seller retains a security interest and then assigns it to the bank. This means that the former secured party is no longer the true secured party, or the true party in interest. If there is a financing statement already of record showing the original secured party, it is highly advisable that the record be changed. This can be done by filing a statement of assignment signed by the original secured party stating that he has assigned his interest to the new secured party. The filing of an assignment is desirable for several reasons, among them that, after all, the new secured party wants to be the one who controls the record. He doesn't want any termination statements filed without his knowledge or consent. He wants to be in a position to file continuation statements, if necessary, without

having to rely upon the former secured party. If it is known at the outset that the conditional sale contract will be assigned, it is possible for the seller to note on the original financing statement that the security interest is being assigned, and in that case the bank will right-away become the secured party of record. Let me point out, in this connection, that insofar as the security interest against the original debtor (i.e., the buyer of the equipment) and his creditors is concerned, Section 9-302(2) expressly provides that the security interest is not impaired by virtue of failure to file an assignment.

We have been talking about equipment financing but, so far, I have studiously avoided any discussion of equipment that may be a fixture. Let us, therefore, turn for a moment to fixtures. In addition to certain special rules of priority with respect to fixtures, which I will discuss in a minute, the major differences between the financing of fixtures and other types of equipment are as follows: First, under the provisions of Section 9-401 a financing statement must be filed in the office where a mortgage on the real estate concerned would be filed or recorded; that is, if what you are dealing with is fixtures, you have to file in the realty records instead of in the personalty records. Secondly, the financing statement, in order to be valid, must, under the provisions of Section 9-402, include a description of the real estate concerned, which is, of course, a reasonable requirement.

Now as to the special rules of priorities relating to fixtures, these are set out in Section 9-313. Since I don't have the time to go into much detail, I'll refer you to two recent articles which are worthwhile reading if and when you get involved in fixture problems. The first one, the most recent article, is Homer Kripke's article in 64 COLUMBIA LAW REVIEW 44. The second one, by Peter Coogan, appears in 75 HARVARD LAW REVIEW 1319.

However, despite time limits imposed upon me, I think I will try to sketch out for you the highlights of Section 9-313. First of all, it is clear that the Code makes no attempt to determine whether goods are deemed to be fixtures, except to the extent that 9-313 does say that goods incorporated into a structure, such as lumber, bricks, tiles, cement, glass, metal work, and the like, are *not* covered by Article 9 unless the structure itself remains personal property. In fact, the section goes on to say expressly that the law of this state, Nebraska, other than the Code, will determine whether and when other goods, that is goods other than those incorporated into a structure, become fixtures.

Secondly, I want to stress that 9-313 also expressly states that

the Code does not prevent the creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate. In other words, it certainly does not affect pure real estate transactions, and it gives you the possibility of perfecting an interest in fixtures under either the Code or real estate law.

Assuming that a determination has been made that goods are, or may be, fixtures in a particular case, then there are three different situations which may arise and three different rules of priority. The first rule is that a security interest in goods which attaches and is perfected before they are affixed to realty takes priority over all claims to the realty, whether prior or subsequent to the fixture transaction. In other words, if you obtain a perfected security interest in the fixtures before they are put into the real estate—that is, you have met all four requirements for perfection: (1) the debtor has the requisite rights in the collateral, (2) you have a security agreement, (3) you have given value, and (4) you have filed a financing statement—if all four requirements have been met before the property is put in, then you come ahead of all persons who have or may claim an interest in the real estate. Since the fixtures financier is adding to the value of the real estate, this would appear to be an eminently fair rule.

The second rule is that, if the security interest attaches to the goods before they become fixtures but is not perfected before they become fixtures—that is, you have taken all three steps requisite to attachment: The debtor has rights, the security agreement has been signed, and value has been given, but you haven't made your filing—then so long as the security interest is not perfected, so long as there has been no filing, it does *not* take priority over the intervening claims of a subsequent purchaser for value of any interest in the real estate, of a creditor with a lien on the real estate subsequently obtained by a judicial proceeding, or of a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances—all if and to the extent that any of these adverse claims arise without knowledge of the security interest in the fixtures, and before the security interest is perfected.

The third and final fixtures priority rule applies if the goods are already on the property when the borrower comes to you and wants to borrow money. Here you have some additional problems because not only are you subject to the intervening adverse claims that I have just mentioned in the previous example until such time as you have perfected your security interest but, in addition, your interest in the fixtures is invalid, even if perfected, against any person with an interest in the real estate at the time the

security interest attaches who has not in writing consented to the security interest or disclaimed an interest in the goods.

What these three rules mean in practical terms is that, in order to be protected against all third parties, the secured party should be certain that his security interest in the fixtures is fully perfected at the time of the making of the loan and, in addition, if the goods are already in place at the time of the loan, he should obtain a written consent or agreement to subordinate from any third party, such as an owner, mortgagee or lessor, who might at that time have an interest in the real estate. Unless he does all these things, the fixtures financier opens himself up to challenge by persons claiming an interest in the real estate.

Under subsection 5 of Section 9-313, the secured party, to the extent that he has priority under the foregoing rules, has the right on default to remove the collateral from the real estate. However, he may do so only on the condition that he reimburse any encumbrancer or owner of the real estate, other than the debtor, for the cost of repair of any physical injury to the real estate—that is, if you have to tear something out and you damage the wall, you have to pay for the damage—but not for any diminution in value of the real estate which is caused by his removal of the fixture, because the secured party's right to take the fixture out would be illusory if he had to pay the person who has an interest in the real estate the equivalent value of what he has taken out.

Finally, on the subject of fixtures, let me say that all too often it is not at all clear whether the property is or is not a fixture. In these borderline cases it is clear that the cautious thing to do is to spend the extra dollar or so and to file a financing statement both in the real estate records and in the appropriate personalty records. In that way you are covered whichever way a court may go when trouble arises.

We have talked so far only about equipment financing and we still have to talk about inventory, accounts and chattel paper financing. Let's turn, therefore, to inventory financing.

Suppose the Widget Company also wants to borrow against or to finance its inventory. This inventory will consist of finished widgets, raw materials, and supplies which go into making the widgets. Here again, as before, we have the same requirements of having to get a security agreement, giving value, and filing a financing statement, except that here there is an alternative method of perfection which we will turn to in a minute, namely possession by the secured party or by a bailee for the secured party.

When we start talking about inventory financing, we come into the area of what is often called the "floating lien" created by the Code. This so-called "floating lien" is made possible by the after-acquired property provision of Section 9-204(3) and the future advances provision of 9-204(5). These provisions, combined with the continuance of the security interest in proceeds of collateral under Section 9-306, provide an extremely effective framework for the financing of inventory and/or accounts. I might add that use of the "floating lien" concept can, of course, be made in the financing of equipment, but it is much less frequently used there than in the case of inventory and accounts.

Under Section 9-204(5), I should note, future advances may be secured by the collateral even though the advances are not obligatory, so long as they are covered in the security agreement. If the security agreement says future advances are secured, that is sufficient for the purposes of the Code.

Mr. Henson has already made mention of Section 9-205, which expressly negates the so-called "dominion" rule of *Benedict v. Ratner* by providing, in summary, that giving the debtor freedom to deal with and dispose of the collateral, not requiring him to account for the proceeds, and so forth, does not render the security interest void for purposes of Section 70e of the Bankruptcy Act.

Section 9-108 attempts to cope with yet another bankruptcy problem. It attempts to minimize the "new value" problems created by the preference section, that is Section 60a, of the Bankruptcy Act. Section 9-108 provides that after-acquired property shall not be deemed to be security for an antecedent debt if the debtor acquires his rights in the collateral either (1) in the ordinary course of his business or (2) under a contract of purchase made pursuant to the security agreement and within a reasonable time after new value is given.

As I have said, Section 9-205 would appear to take care of the "dominion" problems arising under Section 70e of the Bankruptcy Act, since *Benedict v. Ratner* was based on an interpretation of state law. However, substantial questions have been raised as to the efficacy of Section 9-108 in coping with the bankruptcy preference problem, since Section 60a of the Bankruptcy Act clearly makes voidable any transfer made "for or on account of an antecedent debt" within four months of bankruptcy. So, the question is whether the Code provision will succeed in getting around the "new value" requirement in the event of the bankruptcy of a debtor.

There is an article, by Nahum Gordon, which fully discusses this last problem in 62 COLUMBIA LAW REVIEW 49. He takes the view that Section 9-108 does not accomplish what it set out to do. Others have taken a contrary view. This means that, in practical terms, where there is a revolving mass of collateral—and I should at this point stress that this applies equally to accounts and to inventory—the secured party may not be protected against the assertion of a voidable preference by a bankruptcy trustee despite the provisions of Section 9-108. As a result, many lenders are continuing to use a revolving-loan system, under which, instead of making a one-time term-loan repayable in installments over, say, five years, they follow a procedure where there is a constant flow-back of money, most often into a cash collateral account from which periodic releases of cash or new loans are made to the debtor, thereby minimizing the possibility that newly acquired collateral is not covered by the giving of “new value” as the collateral turns over.

Furthermore, the secured party should probably not be too smug about his protection, under the “floating lien” concept, against intervening lien creditors (which term includes a bankruptcy trustee), because there is nothing in the Code that protects the secured party as to his future advances, unless they are made pursuant to a commitment, if, for example, there is an intervening judgment lien. In other words, you may provide in your security agreement that it covers future advances, but if, without your knowledge, a judgment lien comes into the picture and you continue to make advances, then any property which comes under the judgment lien will not be covered by an advance made after the lien has attached. The same can, of course, be said of federal tax liens because of the element of so-called inchoacy involved. Since I do not have time to go into this problem in detail, I suggest that you take a look at Sections 9-301 and 9-303(1) and consider their inter-relationship.

We have talked so far only about perfection by means of filing. For the sake of completeness, let me refer briefly to some other methods of special significance in inventory financing, and these involve the use of documents of title, such as negotiable and non-negotiable warehouse receipts and bills of lading, and also the use of field warehousing. As to documents of title, these were, I understand, covered by Professor Lamey this morning. As to field warehousing, I just want to add a word of caution and to say that, since the field warehousing device relies upon ostensible possession by an independent bailee, and since this possession is all too often illusory, and further since the Code provides a very simple means of perfection by the filing of financing statements, it is highly desirable, wherever possible, to back up the field warehousing device

with a Code filing. (Possession of the collateral by the secured party or by a bailee is, of course, always a valid method of perfection under the provisions of Section 9-305.)

Let's turn next to the subject of priorities in inventory financing, and at this point I am going to briefly recap for you the operation of the so-called "first-to-file" rule, which I mentioned earlier in my discussion of equipment financing, and which is equally applicable there and in accounts financing. Section 9-312(5)(a) states, in effect, that, with the exception of purchase money security interests, which we will turn to in a minute, if two secured parties have perfected their security interest in the same collateral by filing, then priority is determined by the order of filing, regardless of which security interest first attached. (The "first-to-file" rule does not, of course, apply if any of conflicting security interests were perfected by a method other than filing—Section 9-312(5)(b) tells us that, in such case, they rank in order of perfection.)

Thus, for example, assume that Bank A gets the first financing statement on file covering all inventory of the Widget Company. Bank A hasn't as yet entered into a security agreement and it has made no loans. Now, along comes Bank B and also files a financing statement on all inventory of the Widget Company. Assume that Bank B is the first one to make loans, and the first one to get a security agreement. Bank B has, therefore, perfected first, but under the "first-to-file" rule, Bank A would nevertheless prevail to the extent of any loans subsequently made by it because it had been the first to file—that is, unless Bank B were to qualify as the holder of a purchase money security interest. The moral of the story is that it would be foolish for Bank B to make a loan under these circumstances. What Bank B should do is to first search the record and, if there is any financing statement ahead of its own on which there is no loan outstanding, it should request the debtor, the Widget Company, to go back to Bank A and require it to terminate its financing statement. The debtor has the right to obtain a termination statement from the secured party when there is no outstanding obligation, and here there was none. If, on the other hand, a loan had already been made by Bank A, or if the Widget Company wished to finance its inventory through both banks, it would be incumbent on Bank B to first enter into an agreement with Bank A, spelling out their relative priorities, as permitted under Section 9-316.

Now, we have already talked about the purchase money priority on equipment, and that discussion was equally applicable to consumer goods. However, Section 9-312 states a somewhat differ-

ent rule with respect to a purchase money priority in collateral which is inventory. Here, in order to get a purchase money priority, the inventory financier has to fulfill a number of conditions. First, he has to perfect his security interest before the debtor receives possession of the collateral. He has no ten-day grace period such as that in the case of equipment, and the purchase money priority comes into play only if the security interest is perfected at the time the debtor obtains possession of the collateral. Secondly, the purchase money security holder gets priority only to the extent that all parties who had previously filed with respect to inventory or who, even if they haven't filed, are known to him to claim an interest in the inventory, have received notice of the prospective purchase money financing before the debtor receives possession of the collateral. This means that an existing inventory financier who had filed would have advance notice of the fact that someone else is planning to finance inventory, and he could take whatever steps he deemed necessary to protect himself.

I had hoped to talk about Section 9-306 which deals with proceeds, but I am afraid that I shall have to limit myself to drawing your attention to it. Section 9-306, by the way, also deals with the problem of what happens to returned or repossessed goods where, for example, there is one secured party who is financing inventory and another secured party who has been financing chattel paper or accounts. It resolves the conflicts between those parties.

I might briefly mention that there is a provision, in Section 9-314, covering "accessions," which means goods affixed to or which become a part of the original collateral. The priority rules relating to accessions are very much the same as those relating to fixtures, so that I certainly won't cover them in detail in the limited time that we have left.

Also, we have Section 9-315 which deals with the situation where collateral is commingled or processed. Take, for example, the situation of the cake-mix manufacturer, with one financier financing his sugar, one his flour, and another his eggs. By the time the ingredients get into the cake-mix it is difficult for the parties to unscramble their security interest. Section 9-315 does not unscramble the cake-mix, but it does provide that the secured parties share in the product in accordance with the ratio of the original value of each financier's property that went into the product.

As I have briefly mentioned before, there may also be situations where there are several financiers of the same debtor, each of whom is financing the same type of collateral. Here, Section 9-316 specifically provides a means for resolving the problem by saying

that any of the priorities provided for in Article 9 can be varied by agreement. Thus, for example, where there are several banks involved in financing the inventory of one borrower, they would be wise, unless it is possible to identify their specific inventory, to sit down together and try to work out some kind of simple document which says, "This belongs to me and that belongs to you," so that a fight between them doesn't start if the debtor defaults.

As for accounts and chattel paper, the term "accounts" is defined in 9-106, and they are basically what you know as open accounts. "Chattel paper," on the other hand, is a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. In other words, chattel paper can take the form of a conditional sale contract, a lease, or a chattel mortgage and note combined.

I shall have to skip the major portion of my discussion of accounts financing. However, I do want to stress that what I said about possible limitations on the "floating lien" concept of the Code, in the course of my discussion of inventory financing, is equally applicable to accounts, since here too we have collateral that is constantly being turned over. Also, I should mention at this point that there are some rather complex areas of possible conflicts between inventory and accounts financiers, which I don't have the time to go into. You might wish, in this connection, to consult an article by Peter Coogan and Nahum Gordon appearing in 76 HARVARD LAW REVIEW 1529.

With respect to chattel paper, there are two possible means of perfection: By taking possession or by filing under the permissive filing provisions of Section 9-304(1). However, there is only one way of perfecting an interest in accounts, as such, and that is by filing, because there is nothing to take possession of.

As between possession and filing with respect to chattel paper, if you, as the secured party, file and you leave the chattel paper in the possession of your assignor, then you will be protected against his trustee in bankruptcy and his lien creditors, to the extent that you have also given value and taken a security agreement. However, since you have left the chattel paper in your assignor's possession, you will not be protected against any bona fide purchaser of the chattel paper who comes in and purchases it or lends against it in the ordinary course of his business and who takes possession of the paper without knowledge of the security interest claimed by you, by virtue of your filing. Thus, if you do leave chattel paper in the possession of your assignor, you should be sure to stamp the paper or note on the paper that the assignment has been made to

you, so that no subsequent financier can claim that he took without notice of your prior security interest. If, however, you are claiming the chattel paper merely as proceeds of inventory, you would not, under the second sentence of Section 9-308, be protected against any such subsequent purchaser even if you have made such notation. Therefore, in this case you should always take possession.

Even if you are taking possession of the chattel paper, remember that very often these documents are executed in several counterparts. Therefore, if you are relying on perfection by possession, you had better be sure that you have all the counterparts, or that all the counterparts left in the debtor's possession clearly indicate that you have the original; otherwise your possession of only one counterpart may not be sufficient.

That is all I have time to say about financing the manufacturer. Turning now briefly to retailers, including dealers, practically all of the concepts that we have already discussed apply equally to retailers or dealers, as well as to the manufacturer. For example, the dealer or the retailer may finance his equipment in the same way the manufacturer does. The dealer or retailer may also borrow against his inventory. Finally, the dealer, more frequently than the retailer, may finance his accounts and his chattel paper. The mechanics and problems involved are generally the same as those relating to the financing of manufacturers.

While on the subject of retailer financing, I suppose I should mention that automobile dealers and other large-item dealers are likely to use floor-plan financing, which is really just one variation of inventory security arrangements. In the case of automobiles, I understand that you have in Nebraska an exclusive title-notation statute that requires the noting of a lien on the certificate of title. Therefore, as soon as a certificate of title is issued, the only way of perfecting a security interest is by noting the lien on the certificate, and filing under the Code is not required. However, while the automobiles are still on the dealer's floor, they constitute his inventory, and a filing is required to perfect a security interest in them, unless they are held by the dealer for a period not in excess of 21 days under the trust receipt provisions of Section 9-304 (5).

As for consumer goods, these are defined, in Section 9-109, as goods used or bought for use primarily for personal, family, or household purposes. Just about everything that I said about financing equipment applies equally to consumer goods, with the qualifications that I'll make in a minute about filing, after-acquired property clauses and procedures on default,

First, however, let me stress again that, as Mr. Henson has already pointed out, the provisions of regulatory statutes, such as retail installment sales acts, the usury laws, and the like, are by no means superseded by the provisions of the Code, and the Code specifically recognizes that they take precedence over any provision of the Code.

One basic distinction between equipment financing and consumer goods financing is the provision of 9-302(1)(d) which states that it is not necessary to file a financing statement in order to perfect a purchase money security interest in consumer goods—not any interest but a *purchase money* security interest—with the exception of fixtures and motor vehicles required to be licensed, in which case a filing or notation on the certificate of title must be made.

In this connection you have to bear in mind, as I believe Mr. Henson has already pointed out, that, under Section 9-307(2), if the purchase money consumer goods financier doesn't file, he takes the risk of a neighbor purchasing free and clear, if he buys without actual notice, for his own use, and before a financing statement is filed. Therefore, whether to file or not is, of course, a credit decision. A good rule of thumb to follow is that if the collateral is a big item it is worthwhile filing. The cost of filing certainly isn't very great.

Another distinction between equipment financing and consumer goods financing arises under Section 9-204(4), which limits the effectiveness of after-acquired property clauses in security agreements covering consumer goods.

I do not have the time to discuss the default provisions of Article 9, which are set out in detail in Part 5 of the article. However, I do want to point out that Section 9-505 has a special provision relating to consumer goods, which limits the right of the secured party to retain the collateral in satisfaction of the debt if 60 per cent or more of the debt or of the purchase price has been paid by the consumer. I don't know what the situation is here in Nebraska, but in Illinois there is an even more stringent provision in the Retail Installment Sales Act, and that provision would, of course, control where the original secured party is a seller.

I am sorry that our late start forced me to cut my remarks short. I have necessarily omitted a discussion of many other interesting aspects of Article 9, but I hope that I have given you some insight into the highways and byways of the article.

In closing, I want to stress that, although I have brought to your attention primarily problem areas, I have not done so with

any intention of expressing dissatisfaction with the Code. After working with the Code for almost two and one-half years I, for one—and I am sure most lawyers in Illinois would agree with me—am very happy with it. The Code hasn't solved *all* of our problems in the area of secured financing, but it has solved a great many of them and has created very few new ones. It certainly has made life a lot easier for us, as I am sure it will do for you.

CHAIRMAN ROCK: Now Mr. Henson will give us the area of forms and filing procedure, where it is easy to make mistakes. I think he will clear it up for you so you will never make a mistake in it.

PRACTICAL USE OF FORMS AND FILING PROCEDURE

Ray David Henson

The way I propose to tackle this project is by a series of examples which I trust are somewhat practical. Before going into that I would like to get a few preliminaries out of the way.

For one thing, what about using a financing statement as a security agreement? If you use, in Nebraska, the same type of form that most Code states are using, and your outline sets out the kind of forms we are using in Illinois for financing statements, they are very simple, you see. They contain no words granting a security interest on the face of the financing statement itself. Therefore the only case which has arisen on this point, which came up in Rhode Island, said that if there is no security agreement, the financing statement will not take the place of one. That makes perfectly good sense. The financing statement, if you are using a standard form, states nothing except the names of the parties and their addresses and the description of the collateral and their signatures. This does not qualify as a security agreement.

You may, on the other hand, if you wish, file the security agreement as a financing statement. You will notice that the requirements in the Code are very simple as to what the financing statement *must* contain, but it doesn't say what all it *may* contain, if you wish. So you may use the security agreement itself. Most secured parties do not do so, for various reasons. One is they don't care to disclose all the terms of their transaction. As a practical matter, if you are using an old chattel mortgage form, which you may continue to do, but you shouldn't, there won't be any provision for the secured party to sign it, and there very likely will not be any place for the secured party's address, so that the agreement itself will not, in fact, qualify under the Code as a financing statement.

You will notice in the form, which is set out at the end of this material, a provision for the secured party to sign. That is because, when I drafted this form for a bank I represent, the bankers told me that they found it had psychological value if they signed the agreement along with the debtor. If your bank feels that way about it, then of course you can provide for the secured party to sign, but there is no requirement that the secured party sign the security agreement itself. He must sign the financing statement. However, the form I have given you here will not qualify as a financing statement, even if signed, unless you add an address of the secured party.

Moreover, if you file the security agreement itself, you will obviously disclose the date on which the interest is to terminate. If you file without stating a termination date on your financing statement, it will be good for five years. There is some merit in that.

In all Code states, so far as I am aware, the recording offices keep reasonably good files so that you can find out quite quickly whether there is a financing statement on file against a particular debtor, or a number of debtors. If you file the security agreement, then the recorder's office has to go to the trouble of preparing a financing statement to put in the appropriate file because they always, from my experience, are uniform size files. Therefore you run the risk of the filing officer's girl misspelling the name of the debtor. This won't invalidate your security but it may lead to some other practical problems which could well be avoided if you used the proper forms.

One problem which is not otherwise discussed is: What happens if the owner of the collateral is not the debtor? That situation does arise from time to time in rather a suretyship proposition. If the debtor is not the owner of the collateral, then you will find in 9-105 (1) (d) that the term "debtor" as used in Article 9 means the owner of the collateral in provisions dealing with the collateral and may, in fact, have a broader application; and the owner of the collateral must sign the financing statement even though the debtor is someone else.

You may run into practical problems about where to file. If you have any question about filing once, twice, or thrice—why, just file! Some lawyers continuously raise questions about "Where should I file?" as if there were only one place on the face of the earth where you could file to perfect a security interest. You could file every place in creation, if you wanted to, and it wouldn't adversely affect your security at all. It will be just as

good if you file in every county in Nebraska as if you file in only one. You don't lose anything. There is no point in repetitive filings if only one is required, but there are situations where it might be difficult to determine whether there is only one place to file.

Be careful about using photostatic copies of the financing statement if you have to file more than once or in more than one state. As far as the draftsmen of the Code are concerned, they think that photostatic copies, or other photographically reproduced copies, are properly accepted and ought to be filed. Personally, I see no reason why that shouldn't be so, and I am satisfied that no court could possibly say it was insufficient if the parties agreed to it expressly in writing.

However, we have had one case on the point in Pennsylvania before a splendid referee: It is a case called *In Re Kane*, where he said a photo copy was not a proper financing statement to file and therefore the security, of course, was no good, and it went to the trustee. I think most of the attorneys general of the United States have disagreed with the referee, and I think the attorneys general are right.

The only reason for stipulating that bankruptcy follows the transactions in the example I have given is not because it is likely to be a fact but simply because I wanted to put in a stipulation requiring the maximum amount of protection. You can sometimes get by with doing less than the maximum under the Code, but if bankruptcy comes about, then you'll want to have done all you can, and that is why I put bankruptcy in.

1. We start out with a manufacturer of a line of clothing for men, women, and children. First the company borrows from Bank A, using certain stocks which it owns as collateral for the loan. What kind of collateral are we dealing with? Instruments under the classification in Article 9.

Is it necessary to search the records before making a loan on instruments which are pledged? No, it is not, because the piece of paper, the stock certificate, represents the rights. You cannot file satisfactorily and accomplish anything with regard to a stock certificate. You have to take possession of it, because the certificate represents everything in itself. The same thing would be true if you were lending against a promissory note which somebody transferred to you physically as a pledge.

You have a pledge here, so what kind of security agreement could you have? You could have an oral one. Obviously, how-

ever, in dealing with a bank I think that is unlikely. I suspect you will have a written security agreement, and that is all for the good on both sides. A financing statement is of no value and should not even be bothered with.

2. The company borrows from Bank A, using accounts as collateral. The kind of collateral obviously is accounts, as defined in Article 9.

Must we search the records before making a loan? Yes, you must because there may be a prior security interest of record covering these accounts. You can perfect an interest in accounts only by filing, so if you examine the records and find that there is no prior filing, you will be safe. As a practical matter, you should file first and have a search of the records made to determine whether there is a prior security interest in the debtor's accounts. If none, you can proceed with your financing and under the first-to-file rule you will be safe.

The security agreement should spell out all the terms of the arrangement between the parties. You would describe the collateral, which would be present and future accounts, or simply accounts. You should determine, in the security agreement, whether you have a revolving credit arrangement, as I think it is usually called; that is, if you are lending against accounts today, as those accounts are paid down must the money be paid over, or the checks turned over in specie to the bank and then a new loan as new accounts come in, that kind of thing, or whether you choose to have an agreement which specifies that the bank is lending \$100,000 for five years against all the accounts which the debtor has during that five-year period.

Mr. Tomaschoff was alluding to certain problems which have been raised in connection with this kind of an arrangement under the Code. It happens to be one which interests me, for some peculiar reason, and since I happen to disagree with everybody who says this is invalid, I have spent eighty pages explaining why in a piece which I trust the *Columbia Law Review* will print.

But I see no reason why this kind of thing is not valid in bankruptcy, for a variety of reasons which are complicated, although simple—if I have them—and I think it is perfectly justifiable. It just depends upon how you look at things where you come out. If you want to invalidate every piece of security in the United States, I dare say that is possible by congressional act in bankruptcy, but if you don't want to do that but want to take a different attitude, I think it is just as simple. I think it is only fair,

though, as Erwin pointed out, to mention that questions have been raised particularly in regard to accounts and inventory financing in bankruptcy.

There is no Code requirement that specific assignments of new accounts must be made to the lender. You might, however, wish to require that under your security agreement.

Do you want the right to notify account debtors; that is to say, the people who are obligated initially on the accounts? You may if the security agreement provides, and in any event you may notify them after default. The reason for this provision in the Code is, very simply, that in certain kinds of businesses it is customary for an assignee of accounts to notify and collect directly. In other kinds of businesses this is unheard of. If Brandeis Store is assigning its accounts, I feel reasonably certain no bank who buys them is going to notify the account debtors. That just isn't done in the case of a store of that kind. But there are other businesses, such as automobile financing, where a different scheme prevails. You may do whatever the security agreement provides.

The financing statement would claim a security interest in accounts and undoubtedly proceeds. If you are using the standard form, you simply check a box down at the bottom which says "proceeds of collateral are also covered." Put an X in the square, and that covers the proceeds which arise as the accounts are paid. If you are claiming proceeds of *any* character, all you need put on the financing statement is "proceeds" to claim them by specific provision in the Code, because proceeds of course may be a wide variety of things—they might be cash, checks, turned-in merchandise, returned goods, and various other things.

The Code applies to both sales of and loans against accounts. That is worth noticing, although in this case we have specified a secured transaction and not a sale.

3. The company has entered into a contract with the United States government to supply uniforms for the Armed Services, and moneys to be earned under this contract are assigned to Bank B as collateral for a loan. What kind of collateral are we dealing with here? This is contract rights. Contract rights are defined in 9-106 as rights to payment under a contract which are not yet earned by performance. Contract rights are not a terribly important source of financing but as in a case of this sort they do have some value and they arise under contracts where performance takes place over a period of time and money is payable as the performance takes place. So if you want a security interest in this kind of collateral, you claim on your financing statement "contract rights arising un-

der a contract dated so-and-so between the United States government and the debtor" or words of that general variety, and you claim "proceeds" again by checking the box, because as the contract is performed, contract rights turn into accounts and the accounts are, of course, proceeds of the contract rights and you must claim both.

In dealing with the United States government in a situation of this kind you must comply with the Federal Assignment of Claims Act, but that does not excuse Code-filing. That is an entirely different proposition. I just point out that the federal act is involved.

I think you must file here, obviously to come ahead of Bank A which has already claimed accounts. If you have filed on contract rights which turn into accounts as performance takes place, you will take precedence over an earlier financier claiming merely accounts, because a security interest in accounts does not attach until the accounts arise, and of course as they arise in this case they are already covered by a security agreement specifically providing for them. If you have any doubt about a conflict between secured parties, then the secured parties ought to enter into a subordination agreement between themselves. This is common and there is no reason why it shouldn't be done in any case where there is a potential conflict between two lenders. It is easier for the lenders to get together and decide that while one of them has claimed all accounts and the second only a particular area of accounts, the second lender is advancing money against those restricted accounts and he ought to have a good security interest in them. If the first financier won't agree to that, then the second financier ought to stay out of the deal because he is buying trouble.

4. The company borrows from Bank A using as collateral 10,000 pieces of costume jewelry intended ultimately to be attached to dresses which will be manufactured, and the jewelry is delivered to the custody of the bank. This custody may, of course, be a sort of field warehouse transaction or it may be something else. It might be because the bank has a large vault.

What kind of collateral are we dealing with here? Inventory. This inventory may be subject to a prior interest. The mere fact possession is transferred does not mean that the person who takes possession of this kind of goods has a superior interest. After all, there are interests in goods which arise because a filing has been made. You don't have the same problem here that you have with instruments, so you must search the records to make sure there is no prior interest before you take possession. Otherwise, you take possession subject to rights of prior parties, if any.

The security agreement may be oral or written but, again, it is highly unlikely that a bank would allow an oral agreement in this kind of transaction. No financing statement is required, however, because the property is physically transferred. So long as you can get the property without a prior financing statement of record claiming it and get it into your possession, you needn't worry and you needn't file it.

5. The company borrowed from Bank B using its inventory as collateral. Obviously the kind of collateral we are dealing with here is inventory under the definition in Article 9.

Must you search the records? Yes. If you search the records you may not find any reference to the pledge of ornaments which otherwise would have been inventory and would have fallen under this security agreement.

It is possible for the bank to take possession of the collateral through a field warehousing arrangement, but it would be unusual, I suppose, speaking generally. Of course it is common under certain situations.

You do need a security agreement describing the inventory by type. I assume you could not describe it satisfactorily by item. That would normally be an impossibility in inventory financing. You can say "all inventory of . . ."—whatever the general types of inventory you are financing may be. In the financing statement you will describe this inventory as "inventory of such-and-such a class," or "all inventory," if such is the fact, and claim "proceeds," and I assume in the case of a manufacturer "products" because the hope is that this inventory will be turned into products which are available for sale. You simply scratch two boxes on the financing statement. This is a revolving proposition, obviously, and policing may be some kind of a problem.

6. The company buys six new sewing machines from Vocal Machine Company under a conditional sale arrangement. This kind of collateral is equipment. Do you need a search? You do not, because here you are dealing with a purchase money security interest. The security agreement will be a conditional sale contract of whatever kind the parties wish to enter into.

On the financing statement the collateral should be described by make and number, assuming these machines are numbered. Then there is no question about what the parties' transaction covers. While the parties could say "equipment," and that is a technical term which has meaning and certainly would include these machines, that is too broad a description and it will simply involve

this secured party in subsequent requests for release of collateral in which he actually has no interest whatsoever in fact. It is very bad practice for secured parties to claim more collateral than they have an interest in. It creates problems for everyone concerned. It doesn't help anyone. This collateral can certainly be described specifically and ought to be described by item.

The financing statement must be filed within ten days after the delivery of the machines to the debtor. If so, there is a ten-day relation back period because of a purchase money transaction, and the security interest will be good against any conflicting security interests which would otherwise cover equipment under an after-acquired property clause, or as against transferees in bulk and lien creditors.

7. The company buys four more new sewing machines. These are purchased from Pfist Company with funds advanced by Bank A. Again we are dealing with equipment collateral. Again we need no search because this is a purchase money transaction. The security agreement which could be used might be along the lines of the one set out in your program today. The financing statement, again, should describe the machines by make and number, and the secured party should make sure that the financing statement is filed within ten days after the delivery of the goods to the debtor. On the standard form of financing statement there is a blank showing "assignee." If by any chance Pfist Company has retained a security interest and wishes to assign it to a bank before a filing is made, you may of course show the assignee on the face of the financing statement. Then either party may sign it. However, in this situation it specifies that the funds have been advanced for the purchase by the bank. This is the other aspect of a purchase money security interest that Erwin discussed earlier; that is, a purchase money interest arises either where the seller takes or retains a security interest in goods sold, as in Example 6, or in this case where a third party advances funds which are in fact used to pay for the goods. The bank must make certain that the money it has advanced here actually goes to the seller of this merchandise or the bank will not have a purchase money security interest; it will have a security interest but it might be subject to prior liens. The bank, of course, may make its check payable to the seller of the goods or might pay against documents of title.

8. The company acquires two new cutting machines of advanced design: (a) One is leased from Machine Leasing Corporation under a lease for five years with no option to purchase; (b) the other is leased from Equipment Leasing Corporation under a lease for eight years with a clause in the lease providing that if,

at any time, the lessee desires to purchase the machine, 80 per cent of the rent paid will be applied toward the purchase price. The estimated useful life of the machines is ten years. Machine Leasing Corporation assigns to Bank C its interest under the lease as security for a loan. In both situations we are dealing with collateral which is inventory, as to the manufacturers, and the resulting paper is chattel paper; that is, the lease is chattel paper. The lease is chattel paper when the lessor uses it for his own financing purposes, whether the lease is in itself a security agreement or is, in fact, a straight lease.

As Erwin pointed out, Section 1-201 of the Code sets forth certain criteria in determining whether a lease is intended for security, but you can't quite answer the question dogmatically in the Code, I don't believe, because there are too many problems involved.

It is perfectly clear that the machine which is leased for five years with no option to purchase is a straight lease. I don't think there could be any question about that, in which case, of course, no financing statement needs to be filed with regard to that transaction.

When Machine Leasing Corporation assigns its interest to the bank under the lease as security for a loan, the bank must file a financing statement and must claim an interest in chattel paper and proceeds arising from it. That is to say, the lease is chattel paper when the lessor of the machine transfers it to a bank for its own financing, and since you want the lease payments as they come due, they are proceeds and must be claimed.

As to the Equipment Leasing Corporation, the lease between Equipment and the company is a security interest, I think, because of the 80 per cent equity which the buyer is acquiring in the goods. I think this example is in line with *In the Matter of Royer's Bakery No. 2*, which is another bankruptcy case in Pennsylvania. There have been two cases on lease transactions, in both of which the leases were said to be simply disguised conditional sales and therefore in the absence of filing, with regard to the lease, it is an invalid secured transaction when bankruptcy turns up.

The lease, then, being a security agreement, you must file a financing statement in the second case and describe the machine by make and number to be protected against the creditors of the company and conflicting security interests.

9. The company buys a delivery truck under a conditional sale arrangement. This kind of collateral is equipment. Do you

need to search? No, because again we are dealing with a purchase money security interest, this time one retained by the seller. The security agreement will be a standard conditional sale contract.

Now, do you need a financing statement? No, I don't think you do in Nebraska because, as I understand, you have a certificate of title law, and I so read Section 9-302(1) of your Code, in which case you perfect not by filing a financing statement but by noting the security interest on the certificate of title.

10. The company borrows from Bank D using its equipment as collateral. Again we are dealing with equipment, and this may include fixtures. Do you need a search? Yes, you do. You should check both the Code records and the real estate records to make sure, if you are claiming an interest in all equipment, that you don't find a prior security interest as to one kind or another; that is, fixtures or non-fixtures. You obviously must have a security agreement and you must have a financing statement describing the fact that you are claiming an interest in all equipment owned by the debtor and, while you don't need to say it on the face of the financing statement, it would be good form to do so, that you wish to cover after-acquired property as well.

We had a case in Massachusetts last year, *National Cash Register v. Firestone & Company*, which came out 100 per cent as the Code ought to be interpreted on this matter of what you claim on a financing statement, which simply gives notice, versus the security agreement which states a great deal more. That case is to be found, if you are interested in reading it, in 191 N.E. 2d 471 and in C.C.H. *Installment Credit Guide*, Section 99-405.

You may, of course, include after-acquired property in these arrangements under Section 9-108. It perhaps is worth mentioning that in one bankruptcy case, again by my favorite referee, Referee Hiller in Pennsylvania, he upheld the secured party in his right to claim after-acquired equipment in a case called *In Re Newkirk Mining Company*, which is reported in a rather inaccessible place. 54 BERKS COUNTY LAW JOURNAL, 179. At least in Pennsylvania they are good enough to report the Referee's decision so you know what is going on. That is not a practice we follow in Chicago, I am sorry to say, so even though *Berks County Law Journal* may not be in all of your libraries there probably is some place where you can find it.

11. The company buys new office furniture from Offices, Inc., under a conditional sale arrangement. Here, again, we are dealing with equipment. Do you need a search? No, because we are dealing with purchase money collateral again. The security agreement

will again be a conditional sale contract. The financing statement should describe the equipment as accurately as possible—that is, desks, as identified, chairs, and so forth—and should be filed within ten days after delivery to avoid having this equipment fall under Bank D's earlier security interest claiming *all* equipment, assuming after-acquired property was claimed under the earlier equipment interest.

12. The company acquires 1,000 bolts of fabric from Rolling Mills, Inc., paid for by funds advanced by Bank E. Here we are dealing with inventory. Do you need a search? Yes, and that search will disclose the interest of Bank B in the inventory. You have to have a security agreement. The financing statement must be filed, and Bank B must be notified and told that purchase money financing covering certain bolts of fabric is about to take place. This must be done before the debtor gets possession of the collateral. If it is done, then the secured party in this instance will take priority over the earlier security interest in the inventory.

I don't have time to go over the rest of the examples, but I would like to say a few words about the security agreement, which is in your book on page 41 and following. This is not a terribly artistic form but I think it is a little improvement over some I have seen in my day. You will notice at least that it doesn't begin with "for value received" and it doesn't end with "in witness whereof" and that the debtor doesn't "give, grant, bargain, sell, release, remise, mortgage, alien, and quit claim" his interest in the property. He simply grants a security interest. You don't need any magic words but you do have to *grant* an interest, whatever terms you choose to put it in.

As I said before, this is not suitable for a financing statement unless you have an address of the secured party, and there is no requirement that the secured party sign the security agreement. I simply provided it and didn't take it out because of its being an agreement of a bank in Chicago.

You will notice there is a blank to describe the collateral—not much room but maybe you won't need very much. Another blank shows where the collateral is located—that may be quite important for filing purposes in some instances.

Without going into all the terms contained here, you will notice it covers after-acquired property, which may replace portions of the collateral involved. Future advances are covered, even though there is no commitment to make them. Cross collateral situations are covered by this security agreement.

On the warranties, which are on page 42, warranties (a), (b), and (c) are perfectly obvious; (d) or (e) should be stricken if inapplicable; (d) is intended to be used in the case of purchase money security interests so that the bank can take a valid purchase money security interest by paying the seller of the goods directly; (e) is intended to cover a fixture situation by specifying that either the collateral is not and will not become a fixture, or if you delete it that it will become a fixture and you should describe the real estate concerned and give the name of the record owner.

The Code does not require that you give the name of the record owner if you are filing a financing statement covering a fixture, but we have discovered in Illinois that in some of our counties property isn't indexed in any satisfactory way except on the grantor-grantee index, and if you don't know the record owner you are somewhat up the creek. So you cannot, again, take full advantage necessarily of what the Code says about adequacy of description, or perhaps you can; that is, any description is adequate if it reasonably identifies what is described. It may be that an adequate description is a street address of real property in Nebraska. We sometimes get by with that in Chicago on, say, mechanics liens, but it is quite common to give both a street address and a legal description so that one way or the other you are bound to get into the right file and protect your fixture interest.

You will notice in the next to the last paragraph on page 43, or perhaps third from the last paragraph, beginning "Upon default by the Debtor" it provides, as Erwin suggested earlier you might do, that the bank shall have all of the rights and remedies of a secured party under the Uniform Commercial Code, and so on. There isn't any need to set out all those remedies. In fact, there isn't any need to say this much. The statute says you've got them; you don't have to say it; it is just true. The problem we have found in short forms such as this is that the debtors don't know what those remedies are and some of our forms do set out at some length what remedies a secured party has on default. I am not sure that any debtors ever read that fine print so I don't know whether it is of any value to tell him what rights he may have if he doesn't choose to bother to read them. Anyway, this is a rather common provision, that the secured party has the rights given him by the Code, and so on.

This form goes on to say the bank may require the debtor to assemble the collateral and make it available, and so on. This provision is inserted because Section 9-503 provides that if this provision is in the security agreement the secured party has this

right. If it is not in here, the secured party has no right to require the debtor to assemble the collateral.

Further on you will find a provision that any notice of sale, and so on, is reasonably given if it is given five days in advance. Again the Code simply specifies "reasonable" time, and while you don't have to specify any particular number of days in the security agreement, it has become rather common to say five days because there appears to be no question but that this is a reasonable time. You should state something; otherwise you have an open question as to notice which must be given prior to sale.

I think we are going to have a few minutes for questions, and very few, but I would like to say it has been terribly nice to be back with you again and I appreciate very much your coming out.

CHAIRMAN ROCK: I see we do have some questions. If you will just address them to the speaker you want to answer them we will entertain them now. Does anybody have a question?

RICHARD E. HUNTER, Hastings: Is there any advantage to indicating on the financing statement that it is a purchase money transaction?

MR. TOMASCHOFF: No.

QUESTION: Are there any states that require the recording be in the real estate records if you are on a fixture problem; they must be so filed?

MR. HENSON: Every state, yes, including Nebraska.

CHAIRMAN ROCK: Are there any others?

QUESTION: I would like to ask: Say you have a filed financing statement that would be generally applicable to all future advances. Could you then by a separate simple agreement cover the security as you make the advances?

MR. HENSON: Yes.

QUESTION: I have a question. This law goes into effect in Nebraska the 2nd of September, 1965. Assume a case where you are selling a business under an installment contract, selling the real estate, fixtures, stock of merchandise. You have already made this transaction prior to the effective date of September 2 and you want to take advantage of some of the provisions of this Code—for instance, the floating lien on the inventory, etc.—but there is no new consideration. Where are we going to be in that situation?

MR. HENSON: Just where you are right now, I think. Wait until after the magic day.

QUESTIONER: It would either take a new agreement or a new consideration?

MR. TOMASCHOFF: Well, so far as the Code is concerned, value is good, even if it is an antecedent debt, so you don't have to get new consideration for that. However, you might have preference problems because of the "new value" requirements of the Bankruptcy Act.

MR. HENSON: If you last more than four months you have no bankruptcy problem. There is no Code penalty for late filing, although you may lose your priority.

QUESTIONER: But as against other creditors selling merchandise, for instance.

CHAIRMAN ROCK: You're all right with those. It's 60(a) where the question arises.

QUESTIONER: The buyer, of course, continues to buy merchandise from other people. This floating mortgage. . .

MR. TOMASCHOFF: Let me illustrate the point that I am trying to make. In Illinois we had a factor's lien act which enabled us to get a floating lien. Nevertheless, after the date of the Code we felt we no longer could rely as to new stuff coming in on the old act. Therefore, you would have to perfect under the Code.

If you have a chattel mortgage type situation where the collateral is in existence prior to the effective date of the Code and a full interest has been granted, then it continues effective, but where things continue to happen after the Code you had better comply with the Code.

QUESTIONER: Would that be by a financing agreement or security . . .

MR. TOMASCHOFF: Your existing agreement would probably be a good security agreement. You would, however, want to file a financing statement.

QUESTIONER: Would you put the financing statement on record disclaiming a lien on the fixtures?

MR. TOMASCHOFF: On the fixtures you don't have a Code problem to begin with if you have properly perfected under prior law.

QUESTIONER: But on the stock purchase, that's the thing I am interested in. How would you protect the original seller here?

MR. TOMASCHOFF: You would have to perfect a Code security interest in the revolving stock, but even then, as I have pointed out, you may have preference problems under the Bankruptcy Act.

CHAIRMAN ROCK: Thank you very much.

[The Institute on Uniform Commercial Code adjourned at four o'clock.]

NEBRASKA STATE BAR ASSOCIATION
Statement of Cash Receipts and Disbursements
Year ended August 31, 1964

Receipts:

Active members' dues	\$40,050
Inactive members' dues	5,250
Reinstatements	207
Bridge-the-Gap program	120
Institute on new legislation	411
Expense refunds	383
Group insurance dividends	13,092
	<u>59,513</u>

Disbursements:

Salaries	\$ 7,406	
Payroll taxes	537	
Printing and stationery	690	
Office supplies and expense	664	
Telephone and telegraph	72	
Postage and express	2,276	
Directory	1,088	
Officers' expenses	1,062	
Executive Council	635	
Judicial Council	170	
Nebraska Law Review	7,014	
Nebraska State Bar Association		
Journal	\$2,126	
Less receipts for advertising	603	1,523
Public service	8,133	
Less receipts for pamphlets and racks ...	216	7,917
American Bar Association regional		
meeting, Omaha	690	
American Bar Association meetings	5,942	
Annual meeting	6,041	
Less reimbursements and exhibit space	505	5,536
Committee on Inquiry	1,349	
Committee on Uniform Commercial Code	122	
Committee on Legal Education and		
Continuing Legal Education	230	
Advisory Committee	243	

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements, Continued

Disbursements, continued:

Committee on Economics of the Bar and Professional Incorporation	15	
Institute on New Legislation	194	
Bridge-the-Gap program	100	
Aid to local bars	38	
Tax Institute	3,024	
Less reimbursements and registration receipts	<u>1,343</u>	1,681
Taxation Section	45	
Merit Plan	70	
Law Day U.S.A.	1,020	
State ex rel Nebraska State Bar Association, Rhodes	668	
Insurance	66	
Maintenance expense	262	
Auditing	256	
Dues and subscriptions	75	
Group insurance administrative expense	<u>1,555</u>	<u>51,211</u>
Excess of receipts over disbursements		8,302
Cash balance at beginning of year		<u>1,146</u>
Cash balance at end of year*		<u>\$ 9,448</u>
Cash balance at end of year consists of:		
Checking account		\$ 3,448
Certificate of deposit		6,000
		<u>\$ 9,448</u>

* The cash balance at August 31, 1964, is stated exclusive of time certificates of deposit, owned by the Association, at cost and maturity value of \$6,000.

NEBRASKA STATE BAR ASSOCIATION

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. Mothersead	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 Falloon	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			

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	94.	1945-48	Robert B. Waring	Geneva
25.	1918-18	A. C. Wakely	Omaha	95.	1944-46	George L. DeLacy	Omaha
26.	1918-22	Fred A. Wright	Omaha	96.	1945-47	Virgil Falloon	Falls City
27.	1919-19	R. E. Evans	Dakota City	97.	1945-49	Leon Samuelson	Franklin
28.	1919-22	Geo. F. Corcoran	York	98.	1946-48	Harry W. Shackelford	
29.	1919-20	L. A. Flansburg	Lincoln				Omaha
30.	1920-20	W. M. Morning	Lincoln	99.	1946-48	Paul F. Good	Lincoln
31.	1920-27	Anan Raymond	Omaha	100.	1947-48	Joseph T. Votava	Omaha
32.	1921-21	Alfred G. Ellick	Omaha	101.	1947-48	John E. Dougherty	York
33.	1921-23	Guy C. Chambers	Lincoln	102.	1947-55	Lyle E. Jackson	Neligh
34.	1922-24	James R. Rodman	Kimball	103.	1948-49	Robert H. Beatty	
35.	1923-26	E. E. Good	Wahoo				North Platte
36.	1924-26	Robert W. Devoe	Lincoln	104.	1947-50	Frank D. Williams	Lincoln
37.	1924-24	Fred A. Wright	Omaha	105.	1947-50	Thomas J. Keenan	Geneva
38.	1925-28	Paul Jessen	Nebraska City	106.	1948-51	Laurens Williams	Omaha
39.	1925-27	Clinton Brome	Omaha	107.	1949-51	Joseph H. McGroarty	
40.	1927-29	Charles E. Matson	Lincoln				Omaha
41.	1927-28	Fred S. Berry	Wayne	108.	1949-54	Wilber S. Aten	Holdrege
42.	1928-29	Robert W. Devoe	Lincoln	109.	1948-49	Abel V. Shotwell	Omaha
43.	1928-30	T. J. McGuire	Omaha	110.	1949-55	Paul L. Martin	Sidney
44.	1928-34	Harvey Johnsen	Omaha	111.	1949-55	Joseph C. Tye	Kearney
45.	1929-31	E. A. Coufal	David City	112.	1949-51	Earl J. Moyer	Madison
46.	1929-29	Anan Raymond	Omaha	113.	1950-60	Harry A. Spencer	Lincoln
47.	1930-32	Paul E. Boslaugh	Hastings	114.	1950-56	Paul P. Chaney	Falls City
48.	1930-30	J. L. Cleary	Grand Island	115.	1950-59	Paul Bek	Seward
49.	1931-33	W. C. Dorsey	Omaha	116.	1950-52	Clarence A. Davis	Lincoln
50.	1931-31	Fred Shepherd	Lincoln	117.	1951-55	Barton H. Kuhns	Omaha
51.	1932-34	Richard Stout	Lincoln	118.	1952-57	Thomas C. Quinlan	Omaha
52.	1931-32	Ben S. Baker	Omaha	119.	1951-52	George B. Hastings	Grant
53.	1933-35	Barlow F. Nye	Kearney	120.	1952-53	Laurens Williams	Omaha
54.	1933-33	J. J. Thomas	Seward	121.	1953-54	J. D. Cronin	O'Neill
55.	1934-36	Chas. F. McLaughlin	Omaha	122.	1954-57	Norris Chadderdon	
56.	1934-34	John J. Ledwith	Lincoln				Holdrege
57.	1935-35	L. B. Day	Omaha	123.	1954-56	John J. Wilson	Lincoln
58.	1935-37	James M. Lanigan	Greeley	124.	1955-56	Wilber S. Aten	Holdrege
59.	1935-38	H. J. Requarte	Lincoln	125.	1955-58	F. M. Deutsch	Norfolk
60.	1935-38	Raymond M. Crossman		126.	1955-64	Clarence E. Haley	
			Omaha				Hartington
61.	1935-40	F. H. Pollock	Stanton	127.	1955-58	R. R. Wellington	Crawford
62.	1935-41	T. J. Keenan	Geneva	128.	1955-64	Alfred G. Ellick	Omaha
63.	1935-39	Walter D. James	McCook	129.	1954-55	Jean B. Cain	Falls City
64.	1935-37	Roland V. Rodman	Kimball	130.	1955-57	Hale McCown	Beatrice
65.	1936-36	J. G. Mothersead	Scottsbluff	131.	1956-62	C. Russell Mattson	Lincoln
66.	1936-36	James L. Brown	Lincoln	132.	1956-58	Barton H. Kuhns	Omaha
67.	1937-39	David A. Fitch	Omaha	133.	1957-59	Paul L. Martin	Sidney
68.	1937-39	Raymond G. Young	Omaha	134.	1957-60	Richard E. Hunter	Hastings
69.	1937-41	M. M. Maupin	North Platte	135.	1957-64	John R. Fike	Omaha
70.	1937-41	Golden P. Kratz	Sidney	136.	1957-64	Thomas F. Colfer	McCook
71.	1938-42	Sterling F. Mutz	Lincoln	137.	1958-63	William H. Lamme	Fremont
72.	1938-42	Don W. Stewart	Lincoln	138.	1958-61	Carl G. Humphrey	Mullen
73.	1940-46	George N. Mecham	Omaha	139.	1958-60	Joseph C. Tye	Kearney
74.	1940-42	Abel V. Shotwell	Omaha	140.	1959-	Charles F. Adams	Aurora
75.	1940-42	Frank M. Colfer	McCook	141.	1959-61	Flavel A. Wright	Lincoln
76.	1941-43	Virgil Falloon	Falls City	142.	1959-60	Thomas C. Quinlan	Omaha
77.	1941-43	Joseph C. Tye	Kearney	143.	1960-61	Hale McCown	Beatrice
78.	1941-47	Earl J. Moyer	Madison	144.	1960-63	Ralph E. Svoboda	Omaha
79.	1937-37	C. J. Campbell	Lincoln	145.	1960-	Herman Ginsburg	Lincoln
80.	1938-38	Harvey Johnsen	Omaha	146.	1960-	James F. Begley	
81.	1939-39	James M. Lanigan	Greeley				Plattsmouth
82.	1940-40	E. B. Chappell	Lincoln	147.	1961-64	George A. Healey	Lincoln
83.	1942-45	Fred J. Cassidy	Lincoln	148.	1962-	Lester A. Danielson	
84.	1941-41	Raymond G. Young	Omaha				Scottsbluff
85.	1942-48	Max G. Towle	Lincoln	149.	1962-	Floyd E. Wright	Scottsbluff
86.	1942-42	Paul E. Boslaugh	Hastings	150.	1962-	John C. Mason	Lincoln
87.	1942-45	John E. Dougherty	York	151.	1961-	Vance E. Leininger	
88.	1942-49	Yale C. Holland	Omaha				Columbus
89.	1943-45	Robert R. Moodie		152.	1964-	Fred R. Irons	Hastings
			West Point	153.	1964-	Wm. J. Baird	Omaha
90.	1941-45	B. F. Butler	Cambridge	154.	1964-	Tracy J. Peycke	Omaha
91.	1943-46	Frank M. Johnson		155.	1964-	W. E. Mumby	Harrison
			Lexington	156.	1964-	Hale McCown	Beatrice
92.	1944-49	Floyd E. Wright	Scottsbluff	157.	1963-	Harry B. Cohen	Omaha
93.	1945-50	John J. Wilson	Lincoln				



*An attorney and his client meet with Thomas Quinlan
at The Omaha National Bank*

When There's a Will ... We Have a Way!

Many attorneys bring their clients to The Omaha National Bank as the *first step* in preparing a will. Thomas Quinlan and other members of the Estate and Trust Department frequently offer suggestions to provide important financial management of the maker's affairs during his lifetime... and a more substantial estate for his heirs.

The skilled personal services of The Omaha National's Estate and Trust Department—the full facilities of The Omaha National Bank—are available at all times to you and your clients. Let us know how we can be of service!

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Nebraska's Largest Bank

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