

1963

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1963

George A. Healey

Nebraska State Bar Association, president

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Hale McCown.....Beatrice

ELECTED DELEGATES

FIRST DISTRICT:

Dwight Griffiths.....Auburn

SECOND DISTRICT:

Walter H. Smith.....Plattsmouth

THIRD DISTRICT:

Robert Barlow.....Lincoln
Thomas M. Davies.....Lincoln
Dale E. Fahrnbruch.....Lincoln
Charles E. Oldfather.....Lincoln

FOURTH DISTRICT:

William J. Baird.....Omaha
Thomas R. Burke.....Omaha
Clayton Byam.....Omaha
John W. Delehant, Jr.....Omaha
Peter E. Marchetti.....Omaha
Robert D. Mullin.....Omaha

Harry B. Otis.....Omaha
Edson Smith.....Omaha
Rudolph Tesar.....Omaha

FIFTH DISTRICT:

George W. Haessler.....Wahoo
Alex Mills.....Osceola

SIXTH DISTRICT:

John M. Brower.....Fullerton
Vance E. Leininger.....Columbus

SEVENTH DISTRICT:

W. E. Garrison.....Nelson

EIGHTH DISTRICT:

Philip H. Robinson.....Hartington

NINTH DISTRICT:

Daniel D. Jewell.....Norfolk
Elmer C. Rakow.....Neligh

TENTH DISTRICT:

Lansing Anderson.....Holdrege
Fred R. Irons.....Hastings

ELEVENTH DISTRICT:

Richard L. DeBacker.....Grand Island
James I. Shamberg.....Grand Island

TWELFTH DISTRICT:

James M. Knapp.....Kearney

THIRTEENTH DISTRICT:

M. M. Maupin.....North Platte
Ivan Van Steenberg.....Kimball

FOURTEENTH DISTRICT:

Henry W. Curtis.....Imperial

FIFTEENTH DISTRICT:

Samuel C. Ely.....Ainsworth

SIXTEENTH DISTRICT:

Wendell E. Mumby.....Harrison

SEVENTEENTH DISTRICT:

Robert J. Bulger.....Bridgeport

EIGHTEENTH DISTRICT:

William B. Rist.....Beatrice



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**NEBRASKA STATE BAR ASSOCIATION
HOUSE OF DELEGATES
WEDNESDAY MORNING SESSION**

November 6, 1963

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

CHAIRMAN McCOWN: Gentlemen, if you will come to order we will try to determine if we have a quorum. The roll call being the first order of business, I will ask the Secretary to call the roll.

[Roll call by the Secretary.]

SECRETARY-TREASURER TURNER: There is a quorum present, Mr. Chairman.

CHAIRMAN McCOWN: The Chair being in no doubt, we will declare a quorum present.

The first order of business is the approval of the calendar as the order of business of this House. Do I hear such a motion?

FREDERIC R. IRONS, Hastings: I so move.

CHAIRMAN McCOWN: Is there a second?

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

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

I should perhaps first give you an explanation of why I am appearing here instead of the Chairman of your House of Delegates, Herman Ginsburg. Herman went to the hospital last week and was released yesterday. As I understand it, he is getting along very well, but I am substituting for Herman during his incapacity. I trust you will bear with me, in view of the fact that I have not had an opportunity to do more than briefly review the reports on the agenda and order of business of this House.

The first order of business is the statement by the President of the Association. Mr. George A. Healey, our President, has asked that George Turner read his statement to you at this time.

STATEMENT BY THE PRESIDENT OF THE ASSOCIATION

George A. Healey

Gentlemen of the House of Delegates: The program which your last annual meeting approved has, as nearly as possible, been car-

ried out. Some of the Association committees and special committees had exhaustive and detailed work to do, which has been done.

Particular recognition should be given to the Committee on Legislation, as well as the Committee on the Merit Plan, but I am pleased to state that all committees functioned well.

I shall call your attention to only one committee report to which I think the House should give scrutinizing attention, and that is the report of the Committee on Procedure in connection with workmen's compensation procedure.

I trust that you members of the House will have a successful and fruitful meeting.

CHAIRMAN McCOWN: The next item is the presentation of the report of the Secretary-Treasurer, Mr. George Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman and Members of the House: The year closes on the 31st day of August. Our books have been audited by Peat, Marwick, Mitchell & Company, who state that they have examined the statement of cash receipts and disbursements for the year ending August 31. "Our examination was made in accordance with generally accepted auditing standards which we deemed applicable to the cash receipts and disbursements method of accounting, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances."

They state that in their opinion the books are in good shape. They have also audited only for information purposes the Daniel J. Gross Memorial Fund and find that all funds of that trust are properly accounted for.

We had total receipts during the year of \$51,469; total disbursements of \$51,276, making an excess of receipts over disbursements of \$193.00. Most of that, of course, is accounted for by the very heavy expenditure in financing the Merit Plan campaign. Out of this year's receipts we paid out slightly over \$8,000 of moneys derived from dues in addition to the contributions received. Of course some of the expenditures were in the last biennium, but without that anticipated expense during this biennium I think your Association is completely solvent.

I might add that a copy of the detailed audit report will be included in the proceedings of this meeting.

CHAIRMAN McCOWN: Do I hear a motion that the report be received and placed on file?

IVAN VAN STEENBERG, Kimball: I so move.

CHAIRMAN McCOWN: It has been moved. Any second?

MR. OLDFATHER: I second the motion.

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

Prior to proceeding with the committee reports I suggest that each committee chairman, in making his report, proceed to the podium immediately in front and use the microphone here. If by any chance arrangements have been made to change the individual who is to make the report, please let me know. I have information that is current so far as I know as to who will make the reports of the various committees.

The first order of business and the first report of committees is that on Revision of Corporation Law, a special committee, Mr. Bert L. Overcash, Chairman.

REPORT OF SPECIAL COMMITTEE ON REVISION OF CORPORATION LAW

Bert L. Overcash

Mr. Chairman, Members of the House of Delegates: As most of you know, the work of this committee we feel has now been completed with the passage of L.B. 173. This committee was originally instituted as a special committee in 1957. We took on the assignment of revising and modernizing all the corporation laws; we've repealed a number of obsolete laws; and with the passage of the new Business Corporation Act we feel that the work of this committee is substantially accomplished and there is no further reason for the continuance of this committee.

I want to thank the individual members of this committee for their conscientious assistance. This has been a long-time endeavor, and I think we now have an improved situation with reference to the corporation laws of Nebraska.

CHAIRMAN McCOWN: Mr. Overcash, I assume you move that the report be accepted, including the recommendation for discontinuance of the special committee. Is there a second?

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

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

[The report of the committee follows.]

Report of the Special Committee on Revision of Corporation Law

This committee is pleased to report that the proposed Business Corporation Act, approved by the Association at the last annual meeting, with some minor changes, was enacted into law at the current session of the legislature. A memorandum has been prepared and distributed to the bar delineating the changes which L.B. 173 made in the proposed act, which was printed and distributed in pamphlet form to members of the bar in July, 1962. This pamphlet copy as thus amended will provide the bar with a permanent reference to the source of the various provisions of this new act.

The committee feels that the assignment given it in 1957 has now been substantially discharged and, therefore, recommends that this committee of the Association be discontinued.

Bert L. Overcash, Chairman
W. J. Baird
Edmund O. Belsheim
A. Lee Bloomingdale
David Dow
James A. Doyle
Robert G. Fraser
C. E. Heaney, Jr.
Warren C. Johnson
Barton H. Kuhns
Donald E. Leonard
Roland A. Luedtke
Howard H. Moldenhauer
Francis V. Robinson

CHAIRMAN McCOWN: Mr. Overcash also has the next report on the agenda, which is the report of the Committee on Legislation.

REPORT OF COMMITTEE ON LEGISLATION

Bert L. Overcash

Mr. Chairman, Members of the House of Delegates: I assume you have read this report so I am not going through it in any detail. I merely want to call your attention to the fact that the legislative program that your group approved two years ago was carried into effect by the committee. There was only one bill in the legislature that we were not successful in, and that was the collection agency bill.

We have had the assistance of various special committees that were interested in particular legislation.

In this report we make several recommendations. We call attention to the great volume of work that is placed upon your Legislative Committee, some 800 bills introduced at a session, bills that must be reviewed and studied; and we have a series of recommendations.

It is the feeling and conviction of this committee that the Bar Association must take steps to strengthen its legislative activities. Our first recommendation is that there must be some means of coordination of the state group with local bar associations and local agencies. As most of you know, it is pretty difficult for a state committee to go to individual members of the legislature and get anywhere in asking them to support legislation when there is nobody from their home district who is taking the same position we are. We think that in order to have an effective legislative program it is going to be necessary to have some system of local support and local cooperation. If the lawyers in X County will contact their senator they are more effective than any state representative.

So our first recommendation is that the Legislative Committee be authorized to create some liaison arrangement, either with local attorneys representing local areas or with local bar associations. There is some diversity of judgment in this respect. For instance, in certain cases there are local bar associations that can give us effective assistance. I can remember, in the past sessions, the Scottsbluff bar tendered us some support. The Omaha group did. In other areas maybe we ought to have some one individual in each of your districts that you represent, but in any event there has to be some system whereby we get the support locally of the bar.

The second recommendation that we have relates to the matter of personnel. It is an important and a time-consuming matter to represent the Association. We think that it is time that this Association grew up and arranged to employ the necessary personnel for continuous representation during the session. We think that on a long-time basis our profession would be well served if we strengthened it to the point of having someone in continuous contact with the legislature, handling the liaison with the local groups, and handling matters within that area. That is the second recommendation.

The third recommendation of our committee is that each of you and each of the local bar associations give consideration to the problem of representation in the legislature. As you know, we don't have a fair representation of lawyers. The lay members of the legislature complain that they don't have the professional assistance that a fair representation of lawyers should give them. So we think

it is important for each of you in the local bar associations to stimulate interest in representation by lawyers in the legislature.

Now those are the three recommendations, and I would like to supplement those in my report by a few additional remarks.

In connection with the employment of representation of the Association, I think this group might well give consideration to our over-all problem of maintaining our Association and its headquarters. Most of you have probably read items in the papers from time to time about complaints that the Bar Association is sponging on the State House by utilizing personnel and facilities. In my opinion we should look forward to the time when we are a self-sustaining professional group with enough paid personnel to carry on our activities to see that we do a good job. I know that the various presidents of this Association in recent years have been overburdened with work, and I think this group should give some consideration to the matter of personnel and the matter of a headquarters for our group.

One of the things that will be coming up before your group is the matter of a foundation. It has been my idea for several years that if we created a foundation maybe the lawyers would want to leave some money to it, and we might create a fund so we could build a headquarters. A number of states have done that. Anyhow I suggest to you that I don't think there would be anything more important that you could consider than the over-all matter of the professional status of our group, its representation, and its headquarters.

I might also add that in the special session there have been several bills affecting the Association. So far as I know they have been killed. One of the special committees took care of one of the bills. The matter of debt counseling came up again, and also the matter of a constitutional amendment to require the Supreme Court to render advisory opinions.

Mr. Chairman, I move that the report and the recommendations of this committee be approved.

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

MR. DAVIES: I second the motion.

CHAIRMAN McCOWN: Is there any discussion? As many as favor approval of the report will say "aye"; opposed the same sign. Carried.

[The report of the committee follows.]

Report of the Committee on Legislation

This committee is pleased to report that the legislative program approved by the House of Delegates at the last annual meeting was generally enacted into law at the current session of the Legislature. Included among significant measures supported by this legislative committee and adopted by the legislature were judicial salary bills, the new Business Corporation Act and the Uniform Commercial Code. Among the measures opposed by this committee and defeated in the legislature were bills requiring detailed informational filings with deeds and a proposed act authorizing the regulation of debt counsel.

The position of this committee as to certain matters pending in the legislature did not meet with legislative approval. L.B. 477, authorizing the licensing of collection agencies, was passed notwithstanding the Bar Association's objection thereto and the Association's attempt to make certain amendments to such act. The committee supported certain salary increase proposals for key personnel affecting the practice of law, including the Railway Commission, which were not approved by the legislature.

As everyone knows, the volume of legislative work has substantially increased in recent sessions and the problems of adequate representation of professional groups and associations has become an important undertaking. The current session yielded in excess of 800 bills for study and consideration. While every attempt was made to spread the responsibility among all of the members of the committee and, in certain cases, enlist the assistance of other committees of the Bar Association, it was not possible to discharge the responsibilities of the legislative committee in the most effective manner.

Your legislative committee believes that the time has come when the organization of the Bar Association concerning legislative matters must be strengthened.

The first recommendation of the legislative committee in this regard concerns local bar association participation and coordination with the state association in legislative matters. Every member of the legislature looks to and is responsive to the desires and needs of his own constituency. Therefore, any effective representation of professional groups and associations must have the benefit of such active local support. **We, therefore, recommend that the state association enlist the assistance of local, county, and regional bar associations in establishing an effective legislative committee in each area that will work in cooperation with the legislative committee of the state association.**

The vice chairman of this committee believes that the organization of local support should be placed in a key man for every legislative district instead of having the state association work through local and area bar committees. He also suggests that the secretary of the state association sit with the state committee and the administrative personnel of the association be utilized in carrying out the legislative program.

Our next recommendation concerns the day-to-day representation of the state association during the legislative session. Most professional, business, and other groups have either a full- or part-time representative who is continually active throughout the session. It is not reasonable to expect similar service by volunteer committee members under the existing arrangement. There is a definite need for the Bar Association to select and employ personnel to represent it during the legislative session to the extent needed.

Those who have held important offices in the state association also realize that the duties and responsibilities of such officers and the various committees have greatly increased in recent years. The thought has been expressed many times that the Association should have some full-time personnel to assist in many of its duties. The need in this regard might also properly be considered in connection with the need for continuous representation during sessions of the legislature.

The second recommendation of your legislative committee is that the Executive Council of the Association give consideration to the employment by the Association of personnel to administer and coordinate the activities of the state and local association legislative committees and provide continuous and effective representation of such groups during legislative sessions.

The third recommendation of the legislative committee concerns the problem of electing lawyers to the legislature. There is at present, and has existed for a number of sessions, a significant lack of representation by lawyers in the legislature. This is no doubt due to the very heavy economic sacrifices involved in such public service. The situation is complicated by the lack of adequate staff personnel in the legislature to provide professional service. Many lay members of the legislature have expressed regret that the legislature does not have a fair representation of lawyers. By reason of this situation, those few members of the bar who have been serving in the legislature are necessarily burdened with an unreasonable amount of requests for technical assistance.

Your legislative committee believes that the state association, working in conjunction with the various local bar associations,

should do everything possible to stimulate increase of legislative service by members of the bar. While there may be nothing concrete that can be done in this connection, we believe that the various bar associations should remind their members of the important service that can be rendered in the legislature and the value that such service can be to the lawyer as a background for legal and other public service.

Bert L. Overcash, Chairman
 Herman Ginsburg, Chairman Emeritus
 Chauncey E. Barney, Vice Chairman
 Richard E. Hunter
 Raymond E. McGrath
 Robert D. Mullin
 R. Robert Perry
 Bryan Quigley
 Lewis R. Ricketts
 William A. Sawtell, Jr.
 Robert A. Skochdopole
 George A. Skultety

CHAIRMAN McCOWN: Thank you very much, Mr. Overcash. I hope I will be pardoned if I say that in my opinion the Committee on Legislation has one of the most difficult and extensive jobs. It requires the most work of any committee of this Association.

I want to express my thanks personally to Bert Overcash as chairman of that committee.

The next item is the report of the Committee on Administrative Agencies, Einer Viren, Chairman. Is any other member of that committee prepared to present that report? If not, we will pass on to the next report, the report of the Committee on American Citizenship, Mr. Fred Irons, Chairman.

REPORT OF COMMITTEE ON AMERICAN CITIZENSHIP

Fred R. Irons

Mr. Chairman and Members of the House: I'll not read this report. I will say that most of the activities which have been carried on by this committee are in connection with the American Legion's program of County Government Day. I would suggest that if any of you do not have a program of trial demonstration or communist instruction in your county that you advise this committee and they will see to it that something is done in that county.

I move the recommendation that the committee members continue to be selected on the basis of judicial districts and that the committee be continued.

CHAIRMAN McCOWN: Is there a second?

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

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

[The report of the committee follows.]

Report of the Committee on American Citizenship

During this past year, the Committee on American Citizenship has participated in the following activities:

Trial demonstrations have been continued, as in past years, to give our high school students an accurate picture of the guarantee of freedom afforded by the law. Reports from committee members are yet incomplete, but it is estimated that students in half of our counties received the benefit of trial demonstrations this year. Attempts are being made by many of the committee members to enlist local attorneys in each of their districts to assist the program during this next year.

Instruction on communism, as proposed by the American Bar Association, has been adopted by the committee as one of its objectives. Our purpose is to encourage and support our schools and colleges in the presentation of adequate instruction in the history, doctrines, objectives and techniques of communism. The Nebraska Department of Education and the American Legion have circulated teaching suggestions to the high schools. This committee has started a file on available inexpensive source materials which could be used as a part of a civics or world government course. A mail survey of high schools is contemplated for next year.

Radio Free Europe fund received the endorsement of the state Bar Association. The chairman of this committee and the president of the association each served on the State Sponsoring Committee.

It is recommended that committee members continue to be selected on the basis of judicial districts and that the committee be continued.

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
 Fred 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: Next is the report of the Committee on Cooperation with the American Law Institute, which, I discovered in checking my program when I got here this morning, is my own report.

REPORT OF COMMITTEE ON COOPERATION WITH THE AMERICAN LAW INSTITUTE

Hale McCown

Essentially the recommendation is that the committee be continued with instructions from the Association that the expenses of the delegate of this committee to the American Law Institute be paid by this Association.

Is there anyone who would kindly move for me that the report be approved?

MR. IRONS: I so move.

CHAIRMAN McCOWN: Is there a second?

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

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

[The report of the committee follows.]

Report of the Committee on Cooperation with the American Law Institute

In accordance with the action of the House of Delegates, the Nebraska State Bar Association was represented at the annual meet-

ing of the American Law Institute held in Washington, D.C., May 21 through May 26, 1963, by the chairman.

The members of the Nebraska State Bar Association are generally familiar with the work of the Institute, and space does not permit a complete resumé of current activity. In addition to the regular work of the Institute, a new special advisory committee is now working on a proposed complete revision of federal estate and gift tax laws.

Currently work is proceeding on drafts of the second restatement on torts and conflict of laws, as well as model penal code and a restatement of the foreign relations law of the United States. A study of the division of jurisdiction between state and federal courts had reached the stage of tentative draft No. 1 at the time of the annual meeting of the American Law Institute.

The contribution of the Institute in the development of law and jurisprudence continues to be a tremendous contribution to the profession and the public. It is the opinion of your committee that the work done by the American Law Institute fully justifies the continued cooperation of the Nebraska State Bar Association and each of its members.

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

Hale McCown, Chairman
Richard L. Berkheimer
James A. Doyle
Henry M. Grether, Jr.
Walter D. James, Jr.
Barton H. Kuhns

CHAIRMAN McCOWN: The next report is the report of the Committee on County Law Libraries, Mr. William H. Meier, Chairman. This is a special committee. Mr. Meier!

REPORT OF COMMITTEE ON COUNTY LAW LIBRARIES

William H. Meier

Mr. Chairman, Members of the House: I shall not read the body of the report, since it is printed in the program. I would like to call your attention to the fact that two years ago the legislature adopted our recommendation that the county law libraries be made official and that they be placed under the supervision of the district judges of their respective districts.

In this last session, through the great help of the Bar Committee on Legislation, we were able to have the statute on county law libraries amended so as to provide for placing in each county law library, free of cost, all of the state publications, the session laws, the revised statutes, and the state reports, so that these working tools will be available in each of the county law libraries.

The committee now recommends "that efforts be made by this committee in behalf of the Association during the coming year to establish closer relations with the District Judges Association to implement the statutory authority for establishment and improvement of county law libraries in this state."

On behalf of the committee I move that the report be adopted and that the committee be continued.

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

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

CHAIRMAN McCOWN: All in favor say "aye"; opposed the same. Carried. Thank you very much, Bill.

SECRETARY-TREASURER TURNER: As Bill has told you, the last legislature passed an act providing for distribution of certain state publications without cost to county law libraries. However, we have no way of knowing in the State Library where the county law libraries are, who is in charge, so we don't know who to put on the mailing list.

When you get back to your own home, if you do have a county law library, ask whoever is in charge to notify the Nebraska State Library if they wish to be placed on the free distribution list; otherwise they just won't get the books.

[The report of the committee follows.]

Report of the Committee on County Law Libraries

The committee was successful in obtaining the introduction of L.B. 166 by Senator Don McGinley in the 73rd session of the legislature and the passage and approval thereof by the governor. This bill is one of the bills recommended by this committee and approved by the House of Delegates. It recognizes the county law libraries as official recipients of the free distribution of the Supreme Court Reports and the Session Laws and the Revised Statutes of Nebraska, which are basic needs of such libraries. The chairman and members of the legislative committee of the Association were most helpful in keeping our committee advised regarding progress

of this bill and represented the Association before the legislative committee.

The county law libraries are under the supervision of the judges of the district court of the county in which the library is located. For this reason it is important to the bar that the judges know of the interest of the local bar in the county law library.

We recommend that efforts be made by this committee in behalf of the Association during the coming year to establish closer relations with the District Judges Association to implement the statutory authority for establishment and improvement of the county law libraries of this 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: The next report is that of the Committee on Crime and Delinquency Prevention, Mr. Gerald Vitamvas, Chairman.

REPORT OF COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Gerald S. Vitamvas

Mr. Chairman, Members of the House: The report of the Committee on Crime and Delinquency Prevention is rather short. I assume you have read it. This being a standing committee, a motion to continue would be out of order since it is automatically continued.

Without further ado I move that the committee report be adopted.

CHAIRMAN McCOWN: You have heard the motion. I think perhaps it is advisable that we read merely the portion dealing with the recommendations. Will you do that?

MR. VITAMVAS: "It is recommended by the committee that the committee continue to study juvenile court procedure and the proper procedures to deal with the juvenile problem."

As you know, at the last session of the legislature a number of bills were introduced. While the members of the committee studied this legislation there was insufficient time to take a positive stand

before the committee's hearings. Hence the Association did not take a positive stand, and no recommendation was made to the Committee on Legislation.

I looked them over and some of the members looked them over, and the bills were toned down considerably from those that were originally proposed. For this reason, since there seem to be a number of bugs in it, we should continue with that problem.

It is set forth that "It is further recommended that the committee consider the problem of civil suits against public officers—particularly law enforcement officers and prosecuting officials."

At the present time, under state law, there is no authority on the county necessarily to pay the charge if county attorneys are sued in civil actions as individuals, even though they are performing their duty. Our office, the Attorney General's office, has defended the members of the Supreme Court from various suits and has defended various county officers and district judges. We think this problem is a serious one and that it should be studied with consideration for legislation at the next session of the legislature.

CHAIRMAN McCOWN: You have heard the motion for adoption and approval of the report. Is there a second?

RICHARD L. DeBACKER, Grand Island: I second the motion.

CHAIRMAN McCOWN: Is there any discussion? Those in favor of the motion say "aye"; opposed the same. The report is adopted.

[The report of the committee follows.]

Report of the Committee on Crime and Delinquency Prevention

This committee held one meeting during the year. At this meeting the committee heard a report on the juvenile court legislation which had been passed by the legislature. Copies of the proposed legislation had been forwarded to the members of the committee prior to passage but there was insufficient time to study the bills and take any formal committee action on these bills prior to their passage.

The attention of the committee was called to the proposed legislation concerning search and seizure, the suppression of evidence, and the Uniform Criminal Extradition Act. The problem of civil suits against state and county prosecutors and law enforcement officials was discussed. The attention of the committee was directed to a civil suit against a deputy sheriff for an act which was committed as a part of his duty and which was subsequently found to be in his favor. The problem here was that he was forced to

provide for his own defense, which was a burden he could ill afford for an act committed in the performance of his duty. A further discussion was directed toward the procuring of liquor by minors and how to cope with this problem.

It is recommended by the committee that the committee continue to study juvenile court procedure and the proper procedures to deal with the juvenile problem. It is further recommended that the committee consider the problem of civil suits against public officers—particularly law enforcement officers and prosecuting officials.

Gerald S. Vitamvas, Chairman

CHAIRMAN McCOWN: The next report is the report of the Committee on Economics of the Bar and Professional Incorporation. No report of the committee is in the program. Mr. Alexander McKie, Jr., is chairman. Is Mr. McKie here? Any representative of that committee here? If there is a report I assume it would be appropriate to continue the committee. Has a report been made?

SECRETARY-TREASURER TURNER: There has been no report from the committee.

CHAIRMAN McCOWN: There having been no report from the committee, in order to at least find out if they have a report it would probably be appropriate to have a motion that the committee be continued. Do I hear a motion?

MR. DAVIES: I so move.

Mr. Chairman, along with that I assume that a lot of the lawyers here may have seen the minimum fee schedule of the Omaha Bar Association but some of you may not have. That is a very excellent document and I would like to suggest that, if possible, the Association give it wider distribution, mimeograph it and send it around. Is that within the province of this committee?

CHAIRMAN McCOWN: I think it is entirely within the province of this House to make such a recommendation.

THOMAS R. BURKE, Omaha: It's for sale.

CHAIRMAN McCOWN: Mr. Burke, I understand, advises us that it is for sale if anyone wants to acquire a copy of it. I assume that our recommendation therefore, if it were to be made, would simply be that they either cut their price or change it. I assume, Tom, that under the circumstances we probably better pass the recommendation to the committee that they simply take such action as may be advisable to obtain . . .

MR. DAVIES: Either that or suggest that there be some publicity so that lawyers generally know that it is available.

CHAIRMAN McCOWN: With your permission we'll amend the motion to give the information to the bar that the schedule is available from the Omaha Bar Association for a slight fee. What is the price for your schedule?

ALFRED G. ELLICK, Omaha: Mr. McCown, I might explain a little bit, if I may, if you want to hear it. I didn't mean to get involved this deeply but last year our Omaha Bar Association, through a committee, spent a lot of time developing a minimum fee schedule and a manual on economics of the bar. Mr. Burke and Mr. Moldenhauer were two of the persons who did, I would say, most of the work on this manual.

We had it printed and sent to each member of the Omaha Bar Association but we were finding that some of our lawyers in Omaha who, for one reason or another, did not feel they wanted to join our Association, were asking for free copies of the manual so we put a price on it of \$2.50. We don't have enough copies to send to every member of the state bar, but the material is certainly available to the state Bar Association if the Association wishes to have it printed at its expense and distributed.

That is the situation. Anyone who wants a copy for the price of \$2.50, which is about the cost of getting the thing printed, can buy one, but we don't have enough copies actually even to sell to every member of the state bar.

Have you anything to add, Mr. Burke?

MR. BURKE: I might say that it fits into the desk book, Al.

MR. ELLICK: Yes, it is in looseleaf form, fits into the desk book, and has some forms in it to compute—for example, your office overhead and how much you should charge per hour to arrive at a certain income, and a great deal of material on general office practice and procedure. I think it has been quite helpful on the general problem of the lawyers making a living.

LANSING ANDERSON, Holdrege: Where can you get it?

MR. ELLICK: If you want a copy, write to Mrs. Lorene Gore, who is the secretary of our Omaha Bar, at 702 South 38th Street, Apartment 11, Omaha.

CHAIRMAN McCOWN: Thank you very much, Al. I think we will separate this into two matters. First, the simple motion that the special committee be continued. Do I hear such a motion?

MR. BURKE: I so move.

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

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

The second motion, Tom—with your permission I will make an amendment, that the information that the Omaha Bar Association has prepared on a minimum fee schedule be referred to the appropriate committee of this Association with the recommendation that that committee consult with the Omaha Bar Association with respect to determining the availability and method of distribution of some of the work of the Omaha Bar Association to this Association. Do I hear a second to that?

ALEX MILLS, Osceola: I second the motion.

CHAIRMAN McCOWN: All those in favor please say “aye”; opposed the same. Carried.

CHAIRMAN McCOWN: Next is the report of the Special Committee on the Joint Conference of Lawyers and Accountants.

MR. DAVIES: Hale, I am a member of that committee but I don't have the . . .

CHAIRMAN McCOWN: Would you mind referring to the report on page 36 of your program? If you wouldn't mind, Tom, simply read at least the recommendation portion of the report.

REPORT OF SPECIAL COMMITTEE ON JOINT CONFERENCE OF LAWYERS AND ACCOUNTANTS

Thomas M. Davies

Mr. Chairman, Members of the House of Delegates: This, in my opinion, has been a good committee. It has been a committee in which some of the rough edges as between the two professions have been aired, and rather frank talk has gone on.

There is a suggestion that we go ahead and continue having a meeting with the Certified Public Accountant Society, a meeting such as we had on taxation in Lincoln. That is merely a suggestion.

The recommendation is: “The meeting further resolved that the respective state organizations of the two professions be requested to continue the existence of their respective Joint Conference Committees.”

I will so move, Mr. Chairman.

CHAIRMAN McCOWN: Is there a second?

JOHN M. BROWER, Fullerton: I second the motion.

CHAIRMAN McCOWN: All those in favor will please say “aye”; opposed the same. Carried. Thank you very much, Tom.

Included in that motion I assume is the motion that the committee be continued, it being a special committee.

MR. DAVIES: Yes, put that in.

[The report of the committee follows.]

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

The Joint Conference of Lawyers and Accountants, which was created in 1951, and which consists of two equivalent committees composed of representative members appointed by the President of the Nebraska Bar Association and the President of the Nebraska Society of Certified Public Accountants, held its annual meeting on August 15, 1963, at the Schimmel Indian Hills Inn, located in Omaha, Nebraska. Both professions were well represented.

No violations of any kind were brought to the attention of the joint conference during the current year and no request for advice with respect to the rendering of services, by a member of either of the two professions under particular circumstances, was requested during the current year. It is apparent that the members of both professions performed services in accordance with the statement of principles with respect to the performance of services in federal income tax matters, adopted in 1941 by the American Bar Association and the Certified Public Accountants Society.

The meeting resolved, notwithstanding the fact that members of the bar did not attend the Great Plains Tax Institute held in 1963, in expected numbers, that conducting of the Great Plains Tax Institute should be continued under the sponsorship of both professions and the University of Nebraska. It was suggested that the Nebraska State Bar Association urge its members to attend the next institute. Attention was called to the article appearing in the July 1963 issue of *The Journal of Taxation* with respect to the United States Supreme Court decision in the case of *Sperry v. The Florida Bar*, 10 L. Ed. 2d 428, 838, —S. Ct.—(1963), and the article appearing in the August 1963 issue of *The Journal of Taxation* with respect to the New York Court of Appeals decision in the case of *Blumenberg v. Neubecker*, 12 N.Y.2d 711, 186 N.E.2d 122 (1963).

In the *Sperry* case, the Supreme Court of the United States held that a patent attorney who had been admitted to practice before the Patent Office could represent Florida clients before the Patent Office and render opinions on patent matters to Florida clients. The court further held that in this respect the law of the state must yield when incompatible with federal legislation. In the *Blumenberg* case, the New York Court of Appeals held that a joint lawyer-accountant retainer agreement was enforceable, and

that such an agreement does not in effect constitute a splitting of fees between a lawyer and a non-lawyer, so long as the accountant confines his services to accounting matters and the lawyer confines his services to legal matters. Among other things, the court in its opinion stated: "It is of no consequence that their retainer was effected by a single agreement or that their compensation was to be equal or that it was specified in a lump sum contingency percentage, as long as the fee provided for the accountant was to be for accounting services rendered by him, and the fee for the lawyer for legal services which he was to perform."

It was suggested that the local bar association and the local chapters of the Certified Public Accountants Society of both Omaha and Lincoln should hold annual joint meetings in the two cities. It was also suggested that such meetings be similar in scope to those held annually in Omaha by the Omaha Chapter of the Medical Society and the Omaha Bar Association. The representatives of both professions determined to follow through with their respective Omaha and Lincoln organizations.

The meeting further resolved that the respective state organizations of the two professions be requested to continue the existence of their respective joint conference committees.

Harry B. Cohen, Chairman
Robert K. Adams
James W. R. Brown
Thomas M. Davies
Roger V. Dickeson
Frank J. Mattoon
Eugene L. Radig
Paul A. Rauth
John W. Stewart

CHAIRMAN McCOWN: Next is the report of the Special Committee on Lawyer Referral, Mr. Alfred Ellick, Chairman.

REPORT OF SPECIAL COMMITTEE ON LAWYER REFERRAL

Alfred G. Ellick

Members of the House: I think the report is self-explanatory. Your committee has most been concerned with the operation of the lawyer referral program in Omaha because that is the only city now where we have any lawyer referral program.

You might be interested in noticing from the report that the program in Omaha has now been in operation for exactly one year,

starting in November 1962. The total number of active referral cases has been 154. The average fee per case has been about \$36.00, and the highest fee collected by any one lawyer from a referral up to August 31 was \$970.00. Since then we have received word of a fee of a much higher amount which a lawyer received from a referral matter.

I think you all understand that this lawyer referral is not legal aid; it is simply a service whereby people who do not know a lawyer can call the referral service and be referred to a lawyer on the referral panel.

We have just sent out, about ten days ago, the announcement to the members of the Omaha Bar that they may sign up for the second year of the referral program as panel members. As of last night we had received 85 applications for membership on the panel. Last year we had a total of 90, so it looks like our panel will be larger this year than last.

We charge \$5.00 for a registration fee, and the matters are referred to members of the panel in alphabetical order. We think it has been a worthwhile program. It serves a public relations purpose, and also I think is a fine vehicle for publicizing the services that a lawyer can render. We have done very little advertising in Omaha. We have had one ad in the *Sun* papers, so most of the referrals have simply come by word of mouth.

The American Bar Association has a great deal of material to provide to any community or city or bar association that wants to set up a referral service. They all have the same forms and same application cards so you can almost take the Bar Association booklet and set your service up with very little work on your own part; so if any of your local bar associations want to consider referral service, our state committee will be glad to help, and the American Bar will also be delighted to send you all of their material.

I would be glad to answer any questions. Otherwise, Mr. Chairman, I will move that the committee be continued.

CHAIRMAN McCOWN: Is there a second?

EDSON SMITH, Omaha: I second the motion.

CHAIRMAN McCOWN: Is there any discussion?

MR. DAVIES: I have a question for Mr. Ellick. We have a special committee of the Lincoln Bar that is starting this year. Are your governmental agencies, particularly the county attorney's office and city attorney's office, working with the lawyer referral when they get requests?

MR. ELLICK: Yes. We have tried to educate them to refer

any requests for attorneys, as people call in and want an attorney, to call the lawyer referral service.

MR. DAVIES: Have they been doing that?

MR. ELLICK: Yes, they have been cooperating very well. In Omaha—I don't know if this is true in Lincoln or not. I think it is—our county attorney cannot accept private cases while he is in the county attorney's office. So they get many requests for names of attorneys. Their office is a great source of our business.

CHAIRMAN McCOWN: Any further discussion or questions? If not, as many as favor the motion will say "aye"; opposed the same. Thank you very much, Al.

[The report of the committee follows.]

Report of the Committee on Lawyer Referral

In November 1962 a lawyer referral service was commenced in Omaha under the sponsorship of the Omaha Bar Association. Ninety lawyers volunteered to serve on the referral panel, each paying a registration fee of \$5.00. A limited publicity program was undertaken to inform the public that anyone who desired legal services, but was not acquainted with an attorney, could call the secretary of the Omaha Bar Association and be referred to a member of the referral panel. Each panel member agreed to grant a half hour consultation for \$7.50. The statistics for the first ten months of operation (that is, through August, 1963) are most interesting:

Total number of referrals	187
Less number of clients who failed to appear at attorney's office	33
Number of active referral cases	154
Number of cases closed to Aug. 31, 1963	116
Number of closed cases in which fee collected exceeded minimum of \$7.50	33
Total fees collected	\$4,162.66
Average fee per case	36.00
Highest fee collected	970.00

The Omaha program has been supervised by the Omaha Bar Association Lawyer Referral Committee chairmanned by W. A. Day, Jr. The secretary of the Association, Mrs. Lorene Gore, has been of inestimable help.

There is no other formal referral service in operation in the state, although it is undoubtedly true that in smaller communities many referrals are informally made through the clerks of the

courts, officers of local bar associations, and other persons who are acquainted with members of the bar. In cities of larger size, however, where many new residents who do not know an attorney are constantly moving into the area, a formalized referral service can be of real benefit to both the bar and the public. Your committee will continue to watch the progress of the referral service in Omaha and will stand ready to assist other local bar associations which may wish to inaugurate such a service for their communities.

Alfred G. Ellick, Chairman
 John R. Dudgeon, Vice-Chairman
 James D. Conway
 Kenneth H. Elson
 Daniel D. Jewell
 M. M. Maupin
 Francis L. Winner

CHAIRMAN McCOWN: At this point I think it is perhaps appropriate for me to explain once again for those of you who may have been late in arriving the reason for my presence here, which is that Herman Ginsburg, Chairman of this House, went to the hospital for an operation last week and returned home only yesterday. His doctor has not permitted him to attend. I am simply substituting for Herman in that situation. It, however, does give me an opportunity, which I think is appropriate at this point, to suggest that a resolution of this House expressing its appreciation for Herman Ginsburg's services as its chairman during the past year, its regret at his absence, and its wishes for a speedy recovery be sent from this House. Do I hear such a motion?

MR. IRONS: I so move.

CHAIRMAN McCOWN: Is there a second?

MR. MAUPIN: I second the motion.

CHAIRMAN McCOWN: All those in favor will say "aye"; opposed the same. We will request the Secretary to advise Mr. Ginsburg accordingly and hope that he will be back very shortly.

CHAIRMAN McCOWN: Next is the report of the committee on Legal Education and Continuing Legal Education, Mr. John E. North, Chairman.

REPORT OF COMMITTEE ON LEGAL EDUCATION AND CONTINUING LEGAL EDUCATION

John E. North

The report begins on page 21 and there is no need to go into it again except to mention that the major complaint in connection

with continuing legal education in the state is that the programs do not consist of subject matter which is entirely satisfactory to every single member of the bar, and consequently, in developing the programs, the problem is presented as to just exactly what the subject matter should be.

In that connection the committee thought it might be well to survey the Bar members and to conduct an intensive survey. We have done this. If we put on a program, either here at the Bar or at one of the various law schools, we do give questionnaires out and have the people attending answer the questionnaire. But here is the problem you run into: If you are giving a program on estate planning and you put out a questionnaire, everybody who is there is interested in estate planning and they will indicate an interest in estate planning. If you have an institute on trial techniques, everybody who is there will indicate they are interested in trial techniques. That is only natural. So we thought what we would really be interested in is not the needs of those who are attending the institutes but the needs and desires of those who are not attending, and the only way that could be accomplished would be through a survey.

Alan Knox, who is with the University of Nebraska, has agreed to do the basic work in connection with the survey, and he indicates that the budget for services rendered by the Adult Education Research Department would be about \$420.

The committee has recommended that such a program be embarked upon and that it have the financial support of the Nebraska State Bar Association. We are making that as a recommendation to the Executive Council. George Turner or others may have some more definite information on how effective such a program would be.

CHAIRMAN McCOWN: I assume that you move the adoption of the report including the recommendation, Jack.

MR. NORTH: Yes.

CHAIRMAN McCOWN: Is there a second?

MR. BURKE: I second the motion.

CHAIRMAN McCOWN: Is there any discussion? Incidentally, you will notice a rather extensive specific recommendation which Jack has covered very hurriedly, which seems to me to be very detailed and very specific and broad in their outline. As you know, the recommendation merely goes to the Executive Council, which has control of expenditure of funds as such, and the Executive Council will, of course, determine the expenditure assuming the

budget is able to stand it, etc., based on the recommendation of this House.

Is there any further discussion on this particular report? If not, as many as favor the motion will say "aye"; opposed the same. The motion is adopted.

[The report of the committee follows.]

Report of the Committee on Continuing Legal Education

The Committee on Continuing Legal Education held several meetings during the current year and aided cooperating sections and institutions in formulating the following continuing legal education programs for the current year:

October 4, 5: New Legislation, University of Nebraska, Lincoln, Nebraska

October 16, 23, 30, November 13, 20: Uniform Commercial Code, Creighton University, Omaha, Nebraska

November 6: Trial Techniques Clinic, N.A.T.A., Omaha, Nebraska

November 7, 8: Corporation Law, State Bar Association, Omaha, Nebraska

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

May 7, 8: American Bar Association Regional Convention, American Bar Association, Omaha, Nebraska

The Committee on Continuing Legal Education desires to present the type of program which would be most attractive to members of the Nebraska Bar; consequently, the committee suggests that a study be made under the direction of Alan B. Knox, of the University of Nebraska, for the purpose of determining the interests of Nebraska lawyers and also their needs. Attached to this report is the proposal prepared by Alan B. Knox which the committee has recommended be pursued with the financial support of the Nebraska Bar Association. The Executive Committee is requested to approve this survey.

John E. North, Chairman

A. Lee Bloomingdale

Thomas R. Burke

David Dow

James A. Doyle

John M. Gradwohl

Richard E. Hunter

Donald P. Lay
John C. Mason
Howard H. Moldenhauer
Flavel A. Wright

1963 NEBRASKA SURVEY
CONTINUING LEGAL EDUCATION

Alan B. Knox, Adult Education Research
526 Nebraska Hall, University of Nebraska

A. *Background.* This proposal has been prepared in response to a request from the Continuing Legal Education Committee of the Nebraska Bar Association. The essence of the request was an expression of interest in knowing more about the interest and needs of members of the Nebraska Bar Association, relative to educational programs designed to increase their competence as attorneys. Two meetings and several individual conferences have been held with members of the Continuing Legal Education Committee to discuss objectives and procedures appropriate for the proposed project. This proposal describes the project as a basis for initial consensus and guidance of the project.

B. *Objectives.* This survey is designed to provide for the committee answers to the following questions, in a way that will both contribute to decisions regarding what programs of Continuing Legal Education to develop, and increase participation in such programs when they are developed.

1. What is the distribution of attorneys regarding amount of time spent within major areas of legal practice for Nebraska attorneys (including activities with firms and institutions other than law firms such as banks, companies, universities)?

2. What areas of increased competence are identified by members of the Nebraska Bar as most needing programs of continuing legal education?

3. How are areas of interest in continuing legal education related to characteristics of attorneys (e.g. years of practice, specialization)?

C. *Procedure.* The general plant and timetable for the survey might be as follows.

1. Preparation of study proposal.

2. Preparation by committee members of a list of major areas of legal practice.

3. Preparation by committee members of a list, grouped within the major areas of legal practice, of what they consider to be representative competencies and knowledge to be developed by Nebraska

attorneys. The competencies within each area of practice or legal activity should be representative of a total listing of all competencies associated with that area, but should be a minimum representative sample. Each competence should be stated as a description of what a highly successful and knowledgeable attorney would know or be able to do regarding that competence.

4. Preliminary responses to the list of competencies by a panel of about ten law school faculty members and successful attorneys for the purposes of determining agreement on classification of competencies.

5. Development by Adult Education Research of the survey questionnaire.

6. Interviews with ten selected prominent and successful members of the Nebraska Bar regarding the interests and activities of Nebraska attorneys in continuing legal education, for comparison with survey results.

7. Mailing of questionnaire to the Nebraska Bar Association mailing list of active members with Nebraska mailing addresses, by the Bar Association.

8. Reminder on questionnaires by Bar Association including both postcard and local follow-up.

9. Preparation of summary of characteristics of Nebraska attorneys by the Bar Association, for comparison with returned questionnaires, as a check on bias due to selective returns (e.g. age, geographical location, type of legal practice).

10. Coding, tabulation, and analysis of questionnaires.

11. Preparation of Report by Adult Education Research.

12. Use of survey results by Continuing Legal Education Committee.

D. *Questionnaire.* The anonymous questionnaire form would be organized for efficient reply and data processing, and would have the following sections.

1. Legal practice—a list of major areas of legal practice, following each of which the respondent would indicate the average number of hours in a typical month that he devotes to the activity. (Categories that are most identifiable in legal practice should be used.)

2. General interest in continuing legal education—an open-ended question asking the respondent to describe in his own words the one or two legal topics he would most like to learn more about.

3. Specific representative topics—a list of representative topics, each consisting of a brief description of a specific area of knowledge or competency that would be possessed by a highly successful and com-

petent attorney, but probably not by one who was less so. The respondent would check for each topic the one of the following three phases that most nearly described his interest in learning more about the topic.

- a. none—now know or am able to do all that I want or need to in this regard.
- b. some—would be interested in devoting several hours to this topic.
- c. much—would be interested in devoting several days to this topic.

4. Relative interest in major areas—one or two topics that are equivalent in importance, scope, and complexity might be selected from each major area of legal practice. The topics might be presented in sets of three, only one from any area of practice. The respondent would be asked to select the one of the three that he would be most interested in pursuing in continuing legal education. This procedure would allow more precise conclusions regarding relative interest in various subject matter areas.

5. Background Information—respondents would respond to a brief series of questions dealing with section of the state and size of community in which he lives; nature of practice (whether he is connected with a firm, practices by himself, or works for an organization other than a law firm); and years since being admitted to the bar.

6. Previous Participation as an Indication of Interest in Continuing Legal Education—respondents would respond to a brief series of questions dealing with number of programs of continuing legal education in which he engaged during the previous five years; degree of participation in local, state, and national bar association activities; degree of self-directed study and reading of advance sheets, legal journals, and other materials not directly connected with specific legal matters; and expression of preference regarding methods of increasing legal knowledge and competence (e.g. legal workshops, self-directed study, correspondence study, informal discussion with other local attorneys, etc.).

7. Comments—respondents might be provided with an opportunity to make any comments or suggestions they wish regarding any aspect of continuing legal education including educational interests they may have that are not directly related to the practice of law.

E. *Analysis.* The major phases of analysis of data from the survey would be as follows.

1. Comparison of the summary of characteristics of the attorneys on the total active Nebraska Bar Association mailing list with Nebraska addresses (about 2,000) with comparable information from those who return questionnaires, as a check on representativeness of the sample.

Even if the sample is not representative, those who do return questionnaires may be safely assumed to be those most interested in continuing legal education and the conclusions might safely apply to them.

2. Tabulation of the separate items on the total questionnaire.

3. Cross-tabulation of interest in continuing legal education topics compared with characteristics of legal practice, background information, and experience in continuing legal education.

4. Comparison of the questionnaire responses with the results of interviews with ten prominent and successful attorneys. This comparison would help to answer two questions.

- a. how well can a few prominent and successful members of the Nebraska Bar predict the activities and interest reported by the membership?
- b. what gaps emerge between the areas of increased competence and knowledge that the interviewees say that the members need, and the interests in continuing legal education that the members themselves express?

F. Arrangements. Three units might contribute to the success of the proposed survey—members of the Continuing Legal Education Committee, the Nebraska Bar Association, and researchers connected with the Office of Adult Education Research at the University of Nebraska. The roles of these three units are referred to throughout this proposal but by way of summary, might be briefly noted as follows.

1. Committee members.

- a. describe general objectives and expectations for survey.
- b. discuss and approve general plan for survey.
- c. prepare list of areas of legal practice, and within each a description of representative competencies.
- d. arrangements with Bar Association.
- e. arrange for about ten law school faculty and successful attorneys to respond to list of competencies as a basis for classification.
- f. arrange for interviews with about ten prominent attorneys, interviews to be conducted by staff from Adult Education Research.
- g. react to preliminary findings from survey.
- h. use final results from survey in developing and encouraging continuing legal education.
- i. arrange for local follow-up.

2. Bar Association.
 - a. handle stuffing of questionnaires into envelopes, addressing, postage and mailing of questionnaires.
 - b. printing and mailing of post card reminders.
 - c. preparation of summary of characteristics of total Bar Association membership (consultation with Adult Educational Research on variables).
3. Adult Education Research.
 - a. prepare study proposal.
 - b. prepare form for classification of competencies by ten faculty and attorneys.
 - c. development of questionnaire.
 - d. interviews with ten Bar Association members.
 - e. preparation of questionnaire and delivery of 2,100 copies to Bar Association for mailing.
 - f. preparation of copy for reminder post cards.
 - g. coding, tabulation, and analysis of questionnaires.
 - h. preparation of report.

The budget for the services rendered by the Office of Adult Education Research would be as follows.

Preparation of Questionnaire	\$80.00
Duplication of Questionnaire and materials	50.00
Secretarial	65.00
Data Processing	
Coding Questionnaires	50.00
IBM Card Punching	75.00
Tabulation	20.00
Analysis and Report	80.00
	<hr/>
	\$420.00

CHAIRMAN McCOWN: Next is the report of the Committee on Legal Aid, Mr. William D. Blue, Chairman.

REPORT OF COMMITTEE ON LEGAL AID

William D. Blue

Mr. Chairman, Members of the House of Delegates: Your Committee on Legal Aid respectfully reports that at the present time in Nebraska there are four free legal aid agencies or clinics or bureaus in operation. These are located at Sidney, Scottsbluff, Lincoln, and Omaha.

Recently the Lincoln Community Council, in response to a request from the Lincoln Bar Association, established a committee to conduct a study of the legal aid services and of the legal aid bureau in Lincoln. This is to determine the need for legal aid services in Lincoln and to recommend means to improve and reorganize the free legal aid services in Lincoln. This committee has embarked upon the study and is now undertaking extensive surveys in an honest attempt to improve the free legal aid services in Lincoln.

Omaha has already done this, and organized free legal aid services on a full-time basis became available in Omaha again on September 1, 1963. Off and on, through the cooperation of Creighton and the Omaha Bar Association, some sort of free legal aid services have been available at various times in Omaha, but for several years, until September 1, 1963, this service was not available. On this date the Legal Aid Society of Omaha, Inc., a non-profit corporation was organized under the laws of the State of Nebraska. They opened offices in the A. C. Nelson United Community Services Building. This is at 18th and Harney Streets in Omaha. This office is open daily from 9:00 A.M. until 4:30 P.M. and is under the direction of Miss Colleen Buckley, who is an attorney-at-law, a 1962 graduate of the Creighton University School of Law. Miss Buckley's staff includes a full-time legal secretary and volunteer receptionists. Senior law students from Creighton will regularly assist in interviewing clients and performing the customary duties of law clerks.

This Omaha Legal Aid Society was organized under the leadership of a committee of the Omaha Bar Association of which Mr. Alfred G. Ellick was chairman. The financing of this operation for the first three years has been assumed and been assured through generous grants from the Junior League of Omaha, the National Legal Aid and Defenders Association, the United Community Services, and the Omaha Bar Association. It is anticipated that ultimately the major cost of organized legal aid in Omaha will be assumed by the United Community Services.

James A. Doyle, who is Dean of the Creighton University School of Law, is the Society's first president.

I move, on behalf of the committee, that this report be adopted by the House of Delegates.

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

MR. FAHRNBRUCH: I second the motion.

CHAIRMAN McCOWN: All those in favor will please say "aye" . . . excuse me, any discussion?

MR. ELLICK: Mr. Chairman, there should be one correction made in the report. The chairman of the Omaha Bar Association Legal Aid Committee is not myself, it is Mr. Clayton Byam, who is smiling over there. It was that committee that did the work.

CHAIRMAN McCOWN: The secretary has noted the correction. Thank you, Mr. Ellick.

All those in favor please say "aye"; opposed the same. Carried.

CHAIRMAN McCOWN: Next is the report of the Committee on Administrative Agencies, a special committee. Einar Viren is chairman.

REPORT OF COMMITTEE ON ADMINISTRATIVE AGENCIES

Einar Viren

Mr. Chairman, Ladies and Gentlemen: The committee on Administrative Agencies in the last year did some work. We didn't get all of it accomplished because we couldn't get the cooperation of the legislature.

The special committee of the legislature studied a complete recodification rather than a revision of the statutory provisions governing the State Railway Commission. The committee met on several occasions and tried to reconcile the proposed bill, particularly the rate-making sections of that bill, and were unable to do so.

The chairman of the committee, together with several members of the committee and other counsel who are not members of this particular committee but who likewise are interested in L.B. 82, appeared before the Judiciary Committee of the Nebraska Legislature and requested a postponement of the bill for two years so that all the interested parties, including this committee, could further study it.

For reasons we have never been able to ascertain, the bill was pushed through the legislature and was passed and signed by the Governor, then to find out that it had omitted the enforcement provisions in the penalty sections. They did not reconcile the four rate-making provisions in the bill to any degree. Consequently, as it now stands we have a piece of legislation that for apparently some personal reasons of certain senators was pushed through the legislature, and it is not good.

"It is 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 that would properly come within the scope of the committee's jurisdiction," and most certainly a complete review of L.B. 82 to the end that we can get some legislation that those of us in the legal profession who deal with that particular section of the statute and more so those who are affected by it will have something they can work with and live under.

I move the adoption of the report.

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

MR. VAN STEENBERG: 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, Einar.

[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, 1963.

In conjunction with the Judicial Council Subcommittee, this committee approved the final draft of what was passed by the legislature and became L.B. 274, providing for appeals from administrative agencies other than those exempt thereunder.

In addition thereto, the members of your committee worked substantially on L.B. 82. This bill is a revision of the code relating to the State Railway Commission. The bill, as amended, was passed by the legislature and of course will become effective. It will require considerable review, particularly in relation to certain of the sections therein concerning rate-making. This committee should be continued and directed to pursue L.B. 82 for a clarification and further revision of those particular statutes.

Therefore, it is 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 the committee's jurisdiction.

Einar Viren, Chairman

CHAIRMAN McCOWN: The next item is the report of the Committee on Procedure, William Mueller is chairman. The report will be given by Mr. Hans Holtorf.

REPORT OF COMMITTEE ON PROCEDURE

Hans J. Holtorf

Mr. Chairman, I note that on page 57, the next to the last line of the report, we left out a word: "However where the case load of the judicial district is heavy there is *no* support for this proposal." We should insert the word "no."

The committee's recommendation is "That the members of the Association be requested and advised to submit to this committee for study and action any problems arising in connection with procedural matters," and that this report be adopted. It is incumbent that the committee be continued, as is noted by the language.

The report is quite complete. The addendum which reports on these recommendations with reference to workmen's compensation matters—you will have to follow it through because it was not indented in the subparagraphs, and it makes it a little difficult to read, but the main part of it is on page 56. If you will read 2-A that would be the changing of the statute the way we recommend it.

I move the adoption of the report.

CHAIRMAN McCOWN: Is there a second?

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

CHAIRMAN McCOWN: Your attention is particularly called to the President's message of this morning with a suggestion that the report be thoroughly considered. Is there any discussion?

CHARLES F. ADAMS, Aurora: Mr. Chairman, as I understand the motion this is going to put this Association on record for this whole report. I believe it is pretty complete and comprehensive and I want to be quite sure that we know what we are voting on. As I understand it, the recommendation is to adopt this proposed legislation and to offer support for this proposed legislation. Is that right?

CHAIRMAN McCOWN: As I understand it that is the recommendation.

MR. HOLTORF: We recommend that the legislative committee take this under consideration, and move its adoption.

CHAIRMAN McCOWN: Yes. It is a recommendation, I think, to the Committee on Legislation for the approval by this House of the particular matters that are referred to. I think you probably should at least review in detail the major portions of the recommendation at least.

MR. HOLTORF: I can simplify it very briefly. What this all boils down to, we are giving you all sides of the argument; we did a lot of work on it, but under the present procedure, after you have had a hearing in the one-judge court, you can appeal to the three-judge court or you can waive that rehearing if both parties agree. In other words, if neither party insists on the rehearing, go directly to the district court and try it there with evidence, etc., in which case you then go to the Supreme Court.

All right, under the present method, if you have a rehearing then you appeal on the record to the district court. What the district court can do to that record is very limited. This is set forth on page 55 under 1-B-3. In other words, it amounts to nothing. The only thing is that if at that point the defendant does not reduce the award in any manner, the plaintiff is entitled to an attorney's fee. Then when it goes to the Supreme Court, if again he does not reduce the award, he is entitled to an attorney's fee. All it does is delay the matter for the plaintiff if it goes all the way. All we are doing is cutting out the appeal to the district court if you have a three-judge hearing and go directly to the Supreme Court. You already have a record. In order to do that you have to change the language, and that is the only thing we are doing. We are not changing anything else. The Supreme Court still has the right of review de novo on the record. That is actually all this boils down to.

CHAIRMAN McCOWN: Is there further discussion or question? Are you ready for the question? As many as favor the motion will say "aye"; opposed the same. The Chair is not in doubt; the motion is carried.

[The report of the committee follows.]

Report of the Committee on Procedure

The Committee on Procedure respectfully submits the following report:

A resolution was passed by this committee recommending to the legislative committee a revision in connection with workmen's compensation court appeals which revision would, in effect, provide for appeal direct from the compensation court, en banc, to the Supreme Court of the State of Nebraska, with the Supreme Court still reviewing the facts. In that connection, the Committee on Procedure is submitting herewith a copy of the proposed revision, in detail, for submission of said report to the House of Delegates as an aid and help to the House in order to determine that the afore-said revision be accepted for passage.

The committee is still working on a proposed bill with special

regard to service of process by a plaintiff in a suit against a minor under guardianship or against an incompetent person under guardianship.

This committee also has under consideration the possibility of a third party practice to be adopted in this state and, further, has under consideration adoption of the United States court rule of allowing attorneys, representing the respective parties in litigation, to sign the pleadings. No action has been taken, however, on these latter two problems.

It is therefore the recommendation of this committee:

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

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

William P. Mueller, Chairman
Kenneth H. Elson
Lyle C. Holland
Hans J. Holtorf
Daniel D. Jewell
Charles E. Krichner
Milton C. Murphy
Albert G. Schatz
Warren J. Schrempp
Bernard B. Smith
Thomas A. Walsh
Francis L. Winner

CHAIRMAN McCOWN: Next is the report of the Special Committee on Oil and Gas Law, Paul Martin, Chairman.

REPORT OF SPECIAL COMMITTEE ON OIL AND GAS LAW

Paul L. Martin

Mr. Chairman and Gentlemen: The report that you will find on page 45 is too long to read. I am just going to call your attention to one or two little matters. The last session of the legislature passed an interesting bill affecting us in the west end of the state providing for condemnation of underground storage for gas purposes.

The Kansas-Nebraska Natural Gas Company started proceedings to acquire the Huntsman Field, which is our big gas field in Cheyenne County. They bought it from the Marathon Oil Company and are now condemning the interest of those that they haven't

purchased with the idea of bringing in gas from the Kansas and Wyoming fields to store so it can be used to supplement the local supply during the season when gas is at its lowest ebb.

It has been very interesting work. There hasn't been very much in the way of new litigation involving the oil and gas industry, but the committee has kept abreast of matters and we think that it ought to be continued.

We make the following recommendations: "(1) that the committee be continued; (2) 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."

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

CHAIRMAN McCOWN: Is there a second?

MR. DAVIES: I second the motion.

CHAIRMAN McCOWN: Is there any discussion? As many as favor the report 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:

Since the last report of the committee, the 1963 legislature of the State of Nebraska has been in session. Only one legislative act of particular interest to the oil and gas industry has been passed. An act of the legislature now provides for the acquisition of a partially depleted gas structure for the storage of natural gas to be available for use during the season of the year when the demand is the highest. The Kansas-Nebraska Natural Gas Company, Inc., has started proceedings to acquire the Huntsman Field from the Marathon Oil Company, so as to bring in gas from Kansas and Wyoming fields into the storage basin, having the gas available during the winter months. The Kansas-Nebraska Natural Gas Company bought the working interest in this field of the Marathon Oil Company and the majority of the interests of the royalty owners on a basis by which the owners are to be paid for the estimated recoverable gas still remaining in the partially depleted field. Condemnation proceedings are now being prepared to acquire the few small interests which have not been acquired by the gas company. A hearing was held before the Nebraska Oil and Gas

Conservation Commission in September for a determination of the amount of the recoverable gas on which a severance tax should be based.

During the year 1962, 37 matters came before the Nebraska Oil and Gas Conservation Commission. The majority of those were routine, but a few are worthy of note. Three cases were brought before the commission in an effort to respace older fields in the Panhandle producing area. During the middle '50s, these fields had been drilled on a 20-acre space pattern, and operators wish to continue development utilizing a 40-acre well density. The three applications were approved by the commission.

Eighty acre well spacing was approved for one newly discovered Nebraska field, and six cases establishing special field rules modified the well testing provisions of previously issued special field rule orders.

The most significant series of matters to come before the commission involved approval of unitization agreements and secondary recovery programs by water flood. More than 60 injection projects are now operating within the State of Nebraska, and secondary oil now constitutes 30 percent of Nebraska production.

An interesting case involving the use of drafts in the payment of delay rentals in oil and gas leases was decided by the Supreme Court of the State of Nebraska in the year 1963 in the case of *Willan v. Farrar*, 119 N.W.2d 686. In this case, one of first impression in Nebraska, the court quieted title in the plaintiff to oil and gas leases and held (1) where a personal check has been accepted by a lessor, the lessor is obligated to present the check for payment and cannot declare the lease terminated unless payment is refused; (2) where a lessor accepts delay rentals after the time specified for payment of the lease or retains the payment for an unreasonable time before returning it, he thereby waives strict performance and is estopped to claim termination of the lease.

The law relative to oil and gas is still comparatively young in the State of Nebraska. The Nebraska State Bar Association has, over the past few years, been very active in studying proposed legislation affecting the industry and is to a large extent responsible for the effective procedure of the Oil and Gas Commission. The Association will still have the responsibility of promoting legislation in the State of Nebraska to protect the interests of the public as well as the oil and gas interests.

The committee makes the following recommendations: (1) that the committee be continued; (2) 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
P. M. Everson
P. J. Heaton, Sr.
Hans J. Holtorf
John D. Knapp
J. Hammond McNish
R. L. Smith
Ivan VanSteenberg
Floyd E. Wright

CHAIRMAN McCOWN: Next is the report of the Committee on Unauthorized Practice. Mr. Reddish!

REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

Albert T. Reddish

Thank you, Hale. The committee report is too long to read. I do request, however, that it be placed in its entirety in the proceedings of the House of Delegates and that the report of the proceedings not be limited to my ineffective remarks here.

I think the major problem is the problem of investigation. Last year this committee recommended that the Executive Council investigate the employment of general counsel for the Bar. I do not know what, if any, action has been taken on that. We point out in our report that lack of time and financial resources impairs the efficiency of the committee. The committee continues to believe employment of general counsel by the Bar desirable to aid investigation and prosecution not only of unauthorized practice but of grievance complaints and of other litigation in which the Bar may be engaged.

This would be in cooperation with the Attorney General. I have discussed this personally with Clarence Meyer and he has indicated that he believes it could work out quite well. In states where they have general counsel, such as Texas, Wisconsin, Ohio, Indiana, Michigan, and Kentucky, the Attorney General's office, as well as the Bar Association, the public, and the courts have found the general counsels to be of great aid to all concerned.

The report of the Committee on Legislation points up the same problem. I have discussed this also with Bert Overcash where they recommend continued effective representation before the legisla-

ture. I don't know how many of you have seen the session laws but they are just about as thick this year as your '61 cumulative supplement with 800 bills introduced, and I don't know how many passed. The general counsel could perform effectively in that sphere as well as the investigation, enforcement, and litigation problems. You have already heard Bert Overcash's remarks in this field and I believe they tie in quite directly with this committee's recommendation.

The committee recommends:

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

Second, 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 or its agent or representative has used simulated process.

Third, placing of a representative of the Unauthorized Practice of Law Committee on each conference committee with other professional or lay groups.

Fourth, active education of young lawyers and law students and awareness of all lawyers of the campaign against unauthorized practice of law, its purpose of protection of public welfare, and avoidance of participation in unauthorized practice of law by all lawyers.

I would further move, Mr. Chairman, that the report as printed in the program be included in the proceedings. I move the adoption of the report.

CHAIRMAN McCOWN: Is there a second?

WALTER H. SMITH, Plattsmouth: I second the motion.

CHAIRMAN McCOWN: Is there any discussion?

MR. BULGER: I would like to ask a question. Could I have a little more detail on the second recommendation, particularly as to what the present situation is?

MR. REDDISH: Several years ago the Unauthorized Practice of Law Committee, Bob, recommended that where simulated process had been used in an effort to collect a debt that the statute provide that in a case to collect, or get judgment on that debt, if it appeared that simulated process had been used in the effort to collect the debt, that the creditor on obtaining judgment could not use any provisional remedies for collection.

This committee recommended that to the House of Delegates. The House of Delegates adopted the recommendation, the report. The Committee on Legislation presented a bill to the legislature

which provided that where simulated process was used that it constitute a misdemeanor. And the second section provided that where there had been a conviction of misdemeanor for use of simulated process that they could not use provisional remedies.

Now that entails several problems. The first is that you have to get your conviction, which entails taking the matter first to the county attorney and getting him to act, which is sometimes difficult, but more serious is that we have no way to reach those who are using simulated process from outside our state's borders. We have had eight instances referred to the committee about state use of simulated process in the past year. In three of those instances we have referred them to the U.P.L. committees of the other states and they have obtained agreements from the firms which had used simulated process that they would not use simulated process in future instances. So we are getting cooperation outside the state borders from that end but we don't have this prohibition against provisional remedies.

I don't know how many of you are familiar with simulated process but it is a horrible and frightening example. I think, Bob, you referred one to me one time. The report says we haven't had any from Nebraska. Just after this report was sent in, I received one from Omaha, so we are going to turn that over to the Douglas County attorney's office and hope that they are able to follow up on it.

But that is the background for our recommendation that the conviction of misdemeanor not be a condition to prohibition of use of provisional remedies for collection.

CHAIRMAN McCOWN: Has it become detailed to the extent of method of proving that the creditor or his agent has used a simulated process?

MR. REDDISH: I haven't heard of any litigation, no, we don't recommend any particulars. We feel that is within the scope of the legislation committee.

CHAIRMAN McCOWN: Is there further discussion or further question of Mr. Reddish? If not, 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 the Unauthorized Practice of Law

This has been primarily a year of consolidation for the Unauthorized Practice of Law Committee.

H. H. Perry, Jr., then chairman of the American Bar Association Unauthorized Practice Committee, spoke at the luncheon at the mid-year meeting of the Nebraska Bar. Your chairman has appeared before several lay and professional groups to discuss unauthorized practice in general and specific problems related to the listeners' fields.

Legislation. In cooperation with the Association's Legislation Committee the UPL Committee chairman appeared before legislative committees in opposition to bills to license and regulate debt adjustment firms and to license and regulate collection agencies. The legislative committee killed the debt adjustment licensing bill. The legislature passed an act to license collection agencies. The committee does not oppose the theory of licensing collection agencies, but did oppose the particular bill because of seeming inadequacies and because the committee deemed it desirable for the Nebraska legislature to await a proposed uniform act being drafted by the National Conference of Lawyers and Collection Agencies. Although the collection agency bill was amended to meet some of this committee's objections, it should be carefully reviewed when the proposed uniform act is finally presented.

Simulated Process. The committee has had little intrastate problem with simulated process, perhaps because of its vigorous activities in this field in the past and because of legislation expressly outlawing simulated process. Inadequacy of the present legislation is pointed up through repeated instances of simulated process originating outside Nebraska, which are outside the scope of the Nebraska legislation. The committee believes existing legislation should be amended to eliminate the requirement of conviction as a condition to deprivation of resort to provisional remedies to enforce collection of a debt. In several cases where simulated process has originated outside Nebraska, the committee has received full cooperation from the UPL committees of the other states in eliminating simulated process at its source.

Wills and Estate Planning. The committee investigated complaint against a retired county judge for drafting wills for charge while he served as county judge. Although unauthorized practice apparently existed in this case, no action was taken because of the age and state of health of the retired judge. The committee is continuing to consider complaints against a banker in central Nebraska and against life insurance underwriters in the will-drafting and estate-planning fields.

Debt Adjustment. There appear to be three debt adjustment firms active in Nebraska. The United States Supreme Court recently sustained the constitutionality of a Kansas act prohibiting

debt adjustment except when practiced by lawyers in connection with the practice of law. The committee has received several complaints against two of the Nebraska firms. These require more substantial investigation than the committee has been able to devote to the complaints.

Investigation. Lack of time and financial resources impairs the efficiency of the committee. The committee continues to believe employment of general counsel by the Bar desirable to aid investigation and prosecution not only of unauthorized practice but of grievance complaints and of other litigation in which the Bar may be engaged.

Lawyer Activities. Each lawyer should always recall Canon 47 of the Canons of Ethics 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. It would be difficult for unauthorized practice of law to exist without the aid, whether conscious or unconscious, of a lawyer.

The committee recommends:

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

Second, 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 or its agent or representative has used simulated process.

Third, placing of a representative of the Unauthorized Practice of Law Committee on each conference committee with other professional or lay groups.

Fourth, active education of young lawyers and law students and awareness of all lawyers of the campaign against unauthorized practice of law, its purpose of protection of public welfare, and avoidance of participation in unauthorized practice of law by all lawyers.

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

CHAIRMAN McCOWN: Next is the report of the Committee on the Judiciary, Joseph C. Tye, Chairman.

REPORT OF THE COMMITTEE ON THE JUDICIARY**Joseph C. Tye**

Gentlemen, I think it is unnecessary for me to make much of a report. The report in the program is brief. We are happy to report a satisfactory year for this committee. We cooperated with the special Committee on the Merit Plan. Depending upon your viewpoint, it may have been or may not have been a successful campaign, but most of us were very happy with the outcome of the Merit Plan.

This committee then turned its attention to the salary bills and supported all of those bills for increase in salaries for the judges. I believe that all of the judges of our state were fairly well pleased with the results. They all received some increase in salary, not quite as much as some of them would like to have had, but we did get something for them.

In the report, perhaps I was a bit presumptuous but I did say, and I think every member of the bar has a right to feel, that the judges of this state should be grateful to the members of the profession for our continued interest in the bench and our attempts to get them reasonable compensation.

The committee, I presume, will continue with studies with reference to increased salaries and anything else with reference to the judiciary.

The committee is a standing committee and I presume will continue. I think, Mr. President, the only thing we need is a motion to adopt the report. I so move.

CHAIRMAN McCOWN: Is there a second?

MR. BURKE: I second the motion.

CHAIRMAN McCOWN: Any 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 Judiciary

As reported last year, this committee worked in conjunction with the Committee on Merit Plan for Judicial Selection. The adoption of the Merit Plan by the voters of Nebraska at the last general election was most gratifying to a majority of lawyers and judges.

This committee then turned its attention to judicial salaries. Support was given to all of the salary bills for the judiciary, and although we were not entirely satisfied with the salary increases

granted by the legislature with reference to some of our judges, we do feel that our efforts were not in vain.

Strong support was given L.B. 23, which resulted in an increase of salaries for Supreme Court justices and district judges. Special thanks are due James N. Ackerman, who appeared before the legislative committee in the absence of the chairman, and we are certain that Jim made a proper and forceful presentation on behalf of the bar and judiciary.

Support was also given L.B. 702, which increased the salaries of county judges, and L.B. 340, which increased the salaries of the judges of the Workmen's Compensation Court.

Each member of your committee gave generously of his time and efforts in support of these salary bills.

This being a standing committee, it will continue to function under your suggestions and those of the officers of this Association. We do humbly say that we feel the judiciary should be grateful to the Bar Association for their continued interest in the bench and our endeavors to obtain adequate compensation for the judges of our various courts.

Joseph C. Tye, Chairman
Milton R. Abrahams
James N. Ackerman
Wilber S. Aten
Paul P. Chaney
Thomas F. Colfer
Henry W. Curtis
George W. Haessler
Virgil J. Haggart
Hans J. Holtorf
James M. Knapp
Joseph H. McGroarty
Alexander McKie, Jr.
Robert D. Moodie
Farley Young

CHAIRMAN McCOWN: Mr. Tye, while you are here would it be possible for you to take up your report for the Committee on World Peace Through Law, scheduled on the afternoon agenda?

REPORT OF COMMITTEE ON WORLD PEACE THROUGH LAW

Joseph C. Tye

Yes, Mr. President, I don't think I need a great deal of prepara-

tion to make this report either. I am not going to indulge in the presumption that you cannot read or will not read the report.

I think for many years a lot of us had the feeling that this program of World Peace Through Law was something for city lawyers and fellows particularly on the East Coast perhaps, that we in Nebraska had no special interest in it. I had something of that feeling at the outset myself, but reading many of the programs and the activities of the A.B.A., particularly the Athens Conference this last year, I am convinced that each and every one of us ought to take an interest in this program of World Peace Through Law. The A.B.A. is doing a great job. I think each and every one of us ought to know something of this program. It is a real opportunity for the lawyers of the world to attempt at least to bring about peace.

The Athens Conference was a splendid affair and they made some great advances. They are going to continue the work and there will be further world conferences. Of course it was very interesting to me to read the report of the A.B.A. about this conference. All nations were represented except those nations behind the Iron Curtain. One gentleman wrote his apologies and said that he would like very much to attend, and he wanted the members of the conference to understand that he was not staying away because of his own personal feeling.

I move the adoption of this report and suggest that the committee be continued.

CHAIRMAN McCOWN: The adoption of the report, including continuation of the committee, has been moved. Is there a second?

MR. IRONS: I 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

This committee, appointed by your President, has continued to study and try to keep abreast of the World Peace Through Law movement throughout the world. We recognize that it has been thought by many of the members of our Bar Association that the Nebraska State Bar Association could do little, if anything, in connection with the world peace movement. It is our feeling that such an assumption is not true, particularly since many of the members of our Bar Association are now traveling to foreign countries. Those members of our Bar, by being acquainted with the

World Peace Through Law movement, may do a great deal in their contacts with individual citizens and organizations in foreign countries.

The first great step was taken this summer, when a conference was held in Athens, Greece. Lawyers from 105 nations attended this conference. Lawyers were present from practically every nation in the Americas, Asia, Australasia, Africa and Europe, and it is notable that the invitees from the Soviet Union and most of the satellite countries did not appear. Among the latter, only Yugoslavia had a registered delegate. One lawyer invited from the Soviet bloc wrote expressing regret that he could not be present, for reasons which he said were "not personal."

This conference was a private, professional undertaking. It was the largest nongovernmental assembly of world leaders of the bar ever held. A.B.A. President Sylvester C. Smith, Jr., attended and addressed the conference. Henry R. Luce, publisher of *Time*, *Life* and *Fortune* magazines, stated that he saw the conference as a turning point in the quest for a means to avert war.

Although the conference was initiated by the American Bar Association, it was concluded that the conference should not be sponsored or in any way financed by the United States Government, or any other governmental institution or organization; the conference, therefore, stands as the greatest private, professional undertaking of its kind in the world to date. The Ford Foundation and the Carnegie Foundation gave financial support to the conference, and U.S. Lawyers made voluntary contributions, totaling more than \$70,000.00.

The "World Law Day" and a "World Rule of Law Year" programs were established, during which there will be a concentrated program of education, research, and cooperative action by all organizations and institutions concerned with international law.

Your committee urges each and every one of you to keep abreast of this world-wide movement. If it continues as it has started, it can only do good in the world, and it will certainly place the members of our profession in the position which they justly deserve, if peace through law should result.

Continuance of this committee is recommended for the purpose of cooperating with the A.B.A. Committee on World Peace Through Law and for the further purpose of bringing information with respect to this most important effort to the members of this Association, and making available speakers on the subject, upon request.

Joseph C. Tye, Chairman

Wilber S. Aten
Leroy E. Enders
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. Votova

CHAIRMAN McCOWN: I note Mr. Stubbs is in the House. We will therefore call for No. 26, the report of the Committee on Uniform Commercial Code, Daniel Stubbs, Chairman.

REPORT OF COMMITTEE ON UNIFORM COMMERCIAL CODE

Daniel Stubbs

Mr. Chairman, Gentlemen: This committee was created over three years ago and has been continued with substantially the same membership ever since. The purpose, in the first instance, was to study and report on the Commercial Code. Later the committee was instructed to obtain its adoption by the legislature. This has been done.

The committee now recommends, with a sigh of relief, that it be discharged, and I so move, Mr. Chairman.

CHAIRMAN McCOWN: This is an unusual report. I would suggest, with the permission of Mr. Stubbs, that the motion be amended to say that the committee be discharged with the thanks of this Association for a job well done.

MR. BULGER: I second the motion.

CHAIRMAN McCOWN: Is there any further discussion? If not, as many as favor the motion as amended will say "aye"; opposed the same. Thanks very much, Dan.

[The report of the committee follows.]

Report of the Committee on Uniform Commercial Code

The work of this special committee was completed with the enactment of the Uniform Commercial Code by the legislature of Nebraska in the 1963 Session. The act becomes effective on September 1, 1965.

The committee recommends that it now be discharged as a special committee of the Bar Association.

Daniel Stubbs, Chairman
A. Lee Bloomingdale
John W. Delehant, Jr.
Robert C. Guenzel
Lynn O. Hutton, Jr.
Walter D. James
Barton H. Kuhns
Winthrop B. Lane
John C. Mason
Ben F. Shrier
Arthur C. Sidner
Frank D. Williams

CHAIRMAN McCOWN: The report of the Committee on Publication of Laws. Bob Denney is chairman and Bob Barlow is going to make the report.

REPORT OF COMMITTEE ON SPECIAL PUBLICATION OF LAWS

Robert A. Barlow

Mr. Chairman, Members of the House of Delegates: Mr. Denney is in New York and asked me to give the report on his behalf.

I have been on this committee since it was formed, approximately three years ago. We worked out, initially, the speeding up of the publication of laws following adjournment of the legislative session. Akin to that, we embarked on a project whereby a copy of all bills introduced during a legislative session would be kept in each county of the state in the office of the clerk of the district court, and then the amendments as they came forward out of the committee and on the floor, the journal, and a final reading copy. The clerk also would take care of keeping this material intact, particularly with reference to bills passed with an emergency clause.

For two years this committee has come before the House of Delegates recommending that this kind of system be worked out. Much work has been done by Attorney General Clarence Meyer. The district court clerks have been contacted and the District Judges Association. The committee met with the Executive Committee of the Legislative Council; everything has gone along fine; everybody thinks it is a good idea; but we haven't got it accomplished at all. There seems to be some reluctance in the office of the Clerk of the Legislature to allow this to happen. They seem to indicate it would cost money. However, there is the fact that many

of these legislators now send copies of the bill to the county sheriff, the county clerk, and various other people, and they could actually cut down by putting it in one central location.

It is, therefore, suggested or recommended in this report that members of the Association attempt to persuade their legislators that this would be a good idea.

One other matter came before the committee a year ago and has not been completed. It was suggested that the two law schools might consider as a joint project a revision of the index to the Nebraska Statutes.

It is recommended by the committee that this committee be continued for two purposes: To continue to work on the legislative materials going to each county, and also to explore further the business of the revision of the index to the Statutes.

I move that the report be adopted with the recommendations.

CHAIRMAN McCOWN: Is there a second?

MR. MAUPIN: I second the motion.

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

[The report of the committee follows.]

Report of the Committee on Special Publication of Laws

The Committee on Special Publication of Laws has met and reviewed the recommendations of the committee made to the Nebraska State Bar Association at the 1961 and 1962 annual meetings of this association.

The gist of this recommendation for the past two years has been: To request the legislature to 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 someone would be able to know from the time of the convening of the legislature until the session laws are published under what laws we are now being governed.

In working on this recommendation the committee has been advised that sufficient funds to carry out this program are not available and that such a program is not necessary.

The recommendation of the committee has the unanimous support of the District Judges Association and the unanimous support of the committee, but up to the present time we have been unable to accomplish the project.

The committee also considered a revising of the index for the Nebraska Statutes, the project to be prepared by the two law schools of the State of Nebraska. This project has not been completed; contact has been made with the two law schools; and it is the recommendation that this committee be continued to complete this project.

It is further the recommendation of the committee that the entire membership of the Nebraska Bar Association be requested to contact each individual legislator from their respective districts, and especially the Budget Committee of the Nebraska Legislature, for the purpose of making funds available to furnish the laws to the clerk of each district court as hereinbefore set forth.

Robert V. Denney, Chairman
Dixon G. Adams
John Dudgeon
Henry Grether, Jr.
Winthrop B. Lane
Alexander McKie, Jr.
Warren K. Urbom

CHAIRMAN McCOWN: At this time I would like to call attention to the fact that I passed over the resolutions portion. To the knowledge of the Chairman there were no resolutions pending, but I believe it is appropriate at this time that I inquire as to whether any resolutions are ready for introduction. The record will simply show that no resolutions are presented—fortunately or unfortunately.

Is there any other committee chairman or representative of any of the committees that are scheduled for reporting this afternoon who are present and who can report on a portion of the afternoon agenda?

PAUL L. MARTIN, Sidney: No. 35.

CHAIRMAN McCOWN: Paul, I am sorry. I didn't notice you had another one. The report of the Trustee of the Rocky Mountain Mineral Law Foundation, Paul Martin, Chairman.

REPORT OF THE TRUSTEE OF THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Paul L. Martin

Mr. Chairman, Gentlemen: If you have time, read that report. The Rocky Mountain Mineral Law Foundation is an extremely interesting program. With the acceptance of the University of North Dakota Law School for membership, the Foundation now represents nine industry associations, twelve law schools, and ten bar associations including the Mineral and Natural Resources Section of the American Bar Association.

The Foundation at the present time is at Boulder, the University of Colorado. It may be moved within the next year or two to the new Law Center in Denver.

We have a budget of over \$100,000 a year that is spent in legal research in the oil industry. It is a program that is really worthwhile. It hasn't cost the Bar Association of Nebraska a penny, but we have been in it all of the time and I think we are to be congratulated for the interest we have shown in the Foundation.

I am not going to read the whole report but take time to see what has been done.

CHAIRMAN McCOWN: I suggest that a motion from a member of the House to accept the report and place it on file is in order.

MR. VAN STEENBERG: I so move.

CHAIRMAN McCOWN: Is there a second?

MR. IRONS: I second the motion.

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

[The report of the trustee follows.]

Report of the Trustee of the Rocky Mountain Mineral Law Foundation

Entering the tenth year since its organization, the Rocky Mountain Mineral Law Foundation has gained national recognition through its publications, its research activities, and its institutes for continuing legal education.

The Ninth Annual Institute was held in Boulder, Colorado, on the campus of the University of Colorado, in July 1963. Attendance was excellent, and the program was very well received.

The Tenth Institute will be held in Salt Lake City, Utah, on the University of Utah campus, on July 14th, 15th, and 16th of next year.

With the acceptance of the University of North Dakota Law School for membership, the Foundation now represents nine industry associations, twelve law schools, and ten bar associations, including the Mineral and Natural Resources Section of the American Bar Association.

In 1959, the Foundation commenced publication of the *Gower Federal Service* which reports decisions of the Director of the Bureau of Land Management and the Solicitor of the Department of Interior, current statutes and regulations concerning federal oil and gas leases, current leasing forms, and other information of interest. This service was expanded to include Outer Continental Shelf lands and the *Gower Federal Service-Mining*, containing public land decisions of the Solicitor, the Director, the Bureau of Land Management, and the hearing examiners with respect to the general mining laws, together with reports of pertinent judicial decisions. The Foundation staff is preparing a subject matter index for all volumes of the *Gower Federal Service* to supplement the present index. The *American Law of Mining* has been completed except for two short chapters on taxation and operating agreements. The Foundation will continue to supplement the treatise.

The treatise on the law of federal oil and gas leases covering the legal problems involving the leasing of the federally owned or controlled lands is substantially completed. This is being prepared under the supervision of David R. Phipps and Glen E. Taylor. This treatise is being published by Matthew-Bender & Company and will be presently available.

To fill a void in the library of the oil and gas mining attorney, the Foundation has commenced the publication of the *Rocky Mountain Mineral Law Review*. This should be a very interesting work available to all attorneys interested in these subjects.

Under the direction of the Scholarship Committee, scholarships of \$200.00 each were awarded to nine of the member law schools.

The Research Grant Committee is supervising grants previously made to the University of Colorado for an annotation on selected oil and gas operating agreement forms, and to the University of Denver for an analysis of proposals submitted in Congress during the past 20 years affecting mineral location laws and procedures, and to the University of Wyoming for an analysis and index of law review and other legal periodicals on oil, gas and mining law.

The Foundation continues to collect various state rules, regu-

lations, unpublished memoranda, research papers and theses and briefs of significant problems and cases and makes these available to institute registrants and Foundation members at cost. A new research director, a graduate of the University of Wyoming College of Law, has been employed to supervise this program. The Foundation is also working closely with the University of Denver, Colorado, College of Law in setting up its electronic data retrieval program in oil and gas law.

Ultimate responsibility for the Foundation's progress must rest in the hands of the Executive Director. David R. Phipps, a former Nebraskan, has continued the excellent work of his predecessor, but resigned in February to re-enter the private practice of law. However, we are exceedingly fortunate in having his excellent work continued by the present Executive Director, Glen E. Taylor.

The Nebraska State Bar Association can be proud to have been an integral part of the Rocky Mountain Mineral Law Foundation and I hope that the State of Nebraska will continue to send a good representation to the annual institutes and will take full advantage of the services of the Foundation.

Paul L. Martin

JOHN R. FIKE, Omaha: Mr. Chairman, I can report on Item No. 32, if you like.

CHAIRMAN McCOWN: Fine! Mr. Fike will report for the Committee on Title Guaranty Insurance, a special committee.

REPORT OF COMMITTEE ON TITLE GUARANTY INSURANCE

John R. Fike

Mr. Chairman and Members of the House: I'll not read the report. It is rather short and was prepared by Herman. If at your leisure you would care to read it you will find, in the first paragraph, the germ of an idea of what this committee was appointed for and what its function is supposed to be. Briefly, it is to look into the situation of the encroachment, you might say, of the commercial title insurance companies into the real estate business.

Many lawyers are not cognizant of what is going on all over the country, but there is quite a serious problem that is presenting itself and many of the states are devising ways and means of combating that particular situation.

Herman points out to you, at the end of that first paragraph, that if you are interested in this problem you can find quite a bit of valuable information in the report of a special committee of the American Bar Association. This is the little pamphlet that the

special committee of the American Bar Association has put out. It is a fairly compact report. It gives you the problem, it gives you some of the methods of approach, and what is being done in other states in connection with it.

I think it is a fair statement to say that it is the concensus of this committee that something should be done, and the committee then has been trying to figure out what we would do. Herman has again pointed out that there are two or three methods of approach to it. One would be the organization of a local or Nebraska title insurance company to back up lawyers' opinions.

Another approach would be joining with other states that have already adopted such a program. Kansas, for instance, is operating such a company. Colorado is operating one; Missouri is operating one. There are possibilities of joining up with those states in their program.

It is the recommendation of the committee that it be continued to make a further study, and I so move, Mr. Chairman.

CHAIRMAN McCOWN: Is there a second?

MR. ADAMS: I'll second the motion.

CHAIRMAN McCOWN: Before presenting the question, I think it might be appropriate—John probably has more information than I on the particular point—I believe that some eleven states or state bar associations have already adopted and have in operation lawyers title guarantee companies.

There are two varying types of them. One is the Florida plan which essentially is a trust arrangement, which is not proper in some other states because of the corporation laws or the trust laws, as the case may be; the other is basically the Ohio corporation plan. Ohio operates under its State Bar Foundation, which is the owner of the stock of its title insurance company. The preferred stock was held originally by the lawyers and is held by the lawyers; the common stock is held by the Ohio Bar Foundation.

Approximately a year and one-half ago the Ethics Committee of the American Bar Association wrote an opinion with respect to the ethical considerations involved in the matter. Last week the Illinois Ethics Committee also wrote an opinion along basically the same line and on the same area, outlining the ethical considerations involved, depending on the type of approach which you take to this title guarantee problem.

I do think it is definitely a matter that is coming as far as the lawyers in most states are concerned. I think it is a matter that ought to be one of concern to all of us.

Are there any specific questions or further discussion?

MR. DAVIES: Hale, what are the ethical considerations in setting up such a thing?

CHAIRMAN McCOWN: Almost all of them are involved in the method of the charge for it, the question as to whether there is a conflict of interest and kickback of fees. Rather than go into detail on them I am sure you can all check those opinions.

For example, in Florida there is no charge as such for the title insurance. It is given by the lawyer to back up his own opinion. There is no separate charge at all for it. They simply charge basically for the abstract work and then the lawyer himself furnishes, as an additional security to his client, the policy of title insurance. However, there is a reserve fund from which, after a period of time, a portion of what the lawyer pays comes back to him. But that does not involve a kickback since, on their operation, it is something that the lawyer himself is furnishing; there is no separate or other additional charge to the client.

On the other hand, where you have a charge for title insurance as such, then you have a problem of disclosure to your client that there is a charge for title insurance of so much and that you are a member of the title insurance company, indirectly or directly, etc. So it is mostly a matter of disclosure in the other case.

MR. FIKE: Mr. Chairman, I could add to that that the ethical discussion is included in this pamphlet which is put out by the American Bar Association. If any of you are interested in them you may obtain these pamphlets by writing to the American Bar Association. They will distribute them to you.

CHAIRMAN McCOWN: Charlie Joiner of the University of Michigan had most to do with writing that opinion, although it had been started about a year before. I am sure you will find that pamphlet very interesting.

MR. ADAMS: I think John could develop a little further the problem of elbowing the lawyer out of the picture by these title companies. We don't see it too much in the middle states but it is coming.

MR. FIKE: That may be true. Let me give you one little example of that. I happened to attend the midterm American Bar Association meeting in New Orleans last January or February. There were 21 states represented at that meeting. I have forgotten how many men were there but there were 40 to 50 men there who were discussing the problems as they have arisen in their particular territories, how they have progressed in organizing their

insurance companies and getting started. It has some terrific problems.

When they got through the young man who has been engaged to operate and handle this, as the managing officer of the Missouri company, made a little talk. He told about the problem they had had after they had gone through all the pain and suffering of their committee's deciding and then reporting on how they wanted to proceed, had got the bar association behind them, had organized their corporation. They then went to the lawyers and asked them to buy stock in the corporation so they would have money to get going. I have forgotten his figures but roughly there are something like 8,000 lawyers in the State of Missouri with pretty close to 50 percent of them congregated in the large cities such as Kansas City and St. Louis. They went to the St. Louis lawyers and explained to them the problem, what they had done, and how they were proceeding, and asked them to contribute their money to buy stock, since part of the program was designed to help the lawyers perhaps retain real estate business, but mainly for the protection of the public so that they will obtain legal advice in such transactions. They said to the lawyers, "Help protect your real estate business," He said, "They would look at us with a blank look and say, 'What real estate business? We don't have any. In St. Louis it is gone.'"

Right along that line I have here a newsletter that was put out by the special committee of the American Bar Association which, by the way, is working on Pamphlet No. 2, which they say is in preparation now, so there will shortly be a second pamphlet from that committee. Another recommendation they made, for you who are interested in this problem, is in an article in 15 *Alabama Law Review*, page 371, which was published in the spring of 1963. This is an article by Professor John Payne. Right along your idea, "Chick," I have a quotation of his that they gave us. If I read that to you it might give you just a little more of an idea of the problem they are facing. The quotation is this:

This system whereby lawyers, as the heart of the conveyancing process, have examined the record title and have certified to its condition has had notorious deficiencies; but over the years it has given the general public and financial institutions a surprising degree of security in land transfers and, in addition, has been a source of a large, if unspectacular professional income to the Bar. Its abandonment is, therefore, a matter of both general and professional concern, yet in many sections of the United States the system is already dead, and elsewhere it is dying or is in a state of decline.

He elaborates a little more on that. For instance it is very

simple to cite the State of California. California lawyers have no real estate practice. It is dead out there. It is escrow companies and title insurance companies. Does that give you a little more idea?

ALBERT T. REDDISH, Alliance: Mr. Chairman, if I am out of order, tell me. I am a member of this committee. I think I can elaborate one other example from Colorado, if it doesn't overly extend your program.

Recently I was in Denver and a man who graduated from law school with me is practicing there and is attorney for the Presbyterian Hospital. He started out practicing there with a lawyer who specialized in real estate practice. I object to the use of the word "business" in relation to the practice of law. The realtors engage in business and we engage in practice.

The Presbyterian Hospital in Denver was building an addition. The Metropolitan Life was financing it. The Metropolitan Life demanded an abstract of title. They also wanted a title insurance policy but they demanded an abstract of the title. What the title insurance companies in Denver have done, as they have received an abstract and then written a title opinion, they have destroyed the abstracts. They do not have numerical indexes in Colorado. They have kept master abstracts themselves. It is practically impossible in Denver to get an abstract. No title insurance company, although abstract and title guarantee company would be in their name, would prepare an abstract for this hospital.

Finally the hospital had to threaten to form their own abstract company to get an abstract before the man who was formerly the senior partner in the firm that my friend had joined (but later had become the executive officer of one of the title companies and quit the practice of law) finally agreed to prepare the abstract on this one transaction so that Metropolitan Life Company could have their abstract. Now that is what it has gone to in Denver.

CHAIRMAN McCOWN: I think that is the obvious experience in every state in which title insurance companies have taken over the field. I know it is true in Oregon, Washington, and California. There just aren't abstracts any more. You take a title insurance policy or you would have a heck of a time even finding an abstract.

If there is no further discussion, as many as favor the motion will say "aye"; opposed the same. Carried.

[The report of the committee follows.]

Report of the Special Committee on Title Guaranty Insurance

Further study by this committee of the subject assigned to it has indicated that the problems discussed in the previous report of this committee will continue to grow more acute as time passes and the use of title insurance becomes more widespread, as it inevitably will. It must be pointed out that these problems are not just the problems of the bar, but that the problems posed involve the protection primarily of the public interest. The public has neither the knowledge nor the means of being adequately informed as to the meaning, purpose, or effect of the use of title insurance as compared to the abstract use and attorney's title opinion. The public certainly has no awareness of the need of the protection furnished by the lawyer to the parties engaged in a real estate transaction. It is because of these public needs that the study of the problem of lawyers title guaranty insurance is so important. For those who may be especially interested, this committee suggests that a reading of the report of the American Bar Association Special Committee on Lawyers Title Guaranty Funds, which can be obtained from the American Bar Association, would be extremely valuable.

This committee has, during the past year, endeavored to investigate the possibility available to the bar of this state in attempting to take action to comply with the public need in this field. The committee has, along that line, investigated the possibility of the establishment in Nebraska of a lawyers title guaranty fund; and has further considered the possibility of joining with lawyers title guaranty funds already in existence in adjoining states. The lawyers title guaranty funds in existence in adjoining states are generally of two classes; one, a regular title insurance company in all respects similar to a commercial company, but lawyer owned and lawyer operated; and second, a fund which attempts to guarantee the lawyer's opinion and assumes the risks not covered by the lawyer's title opinion. In the latter case the lawyer who writes the title opinion also furnishes the guarantee but no extra charge is made therefor.

A good company of the first kind is Kansas Insured Titles, Inc., which has now been in operation for some period of time and is apparently well seasoned. A company of the second kind is Attorneys Title Guaranty Fund, Inc., of the State of Colorado, which also has now been in operation for some time.

The creation of a Nebraska fund or company or the joinder by the Nebraska Bar in a foreign state fund or company all present serious practical problems upon which the committee has not yet

been able to arrive at a final conclusion. The committee is of the opinion that much further study is required; and, therefore, the committee at this time is not prepared to make a final report.

It is, therefore, the recommendation of the committee that it be continued; and that it be authorized to make further study and report at the next meeting of the House of Delegates.

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

CHAIRMAN McCOWN: Next is the report of the Committee on Atomic Energy Law, Item No. 9 on your agenda, by Tracy Peycke, Chairman.

REPORT OF COMMITTEE ON ATOMIC ENERGY LAW

Tracy J. Peycke

Mr. Chairman, Members of the House of Delegates: This report has the merit of being brief. The work of the committee during the past year was simply watching the enactment of these two statutes, both of which I think have some importance, but I ought to say that the work which represents the effort of the Association with respect to these statutes was pretty much all done by the committee under the chairmanship of Dick Wilson, and our present committee merely observed the passage of two important non-controversial statutes. We have no program or projects that seem to warrant any recommendation. I am sure this field will be one that will be replete with problems from time to time that the committee and perhaps other committees will be concerned with. I think that is our report.

CHAIRMAN McCOWN: Mr. Peycke, the committee being a special committee, do you recommend that the committee be continued and incorporate that as a part of your motion.

MR. PEYCKE: I do if it is a special committee. Yes, I make that motion.

CHAIRMAN McCOWN: Is there a second?

MR. BURKE: I second the motion.

CHAIRMAN McCOWN: Any further discussion? As many as favor the motion say "aye"; opposed the same. Thank you very much, Mr. Peycke.

[The report of the committee follows.]

Report of the Committee on Atomic Energy Law

The matters of concern to the committee have been the consideration and enactment of L.B. 19 and L.B. 41 at the 1963 session of the legislature.

L.B. 19 was approved May 2, 1963, and is the Radiation Control Act. Members of this committee and its predecessors worked with the Advisory Committee to the Atomic Coordinator (the State Director of Health) in drafting this comprehensive bill for the control and development of ionizing radiation.

L.B. 41 removes certain time limitations upon workmen's compensation for occupational diseases. It was prompted by considerations peculiar to atomic radiation. This law was approved April 9, 1963.

The committee supported these bills. They appear to have dealt adequately with the problems in this field at this time.

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

[The Wednesday morning session of the House of Delegates adjourned at eleven-twenty o'clock.]

WEDNESDAY AFTERNOON SESSION

November 6, 1963

The Wednesday afternoon session of the House of Delegates was called to order at one-forty o'clock by Chairman Hale McCown.

CHAIRMAN McCOWN: Gentlemen, there being no necessity for a roll call, the Chair ruling to that effect, rather than defer this we have a request for a report to be taken out of order so that the Chairman can get on to some other things. I'll therefore have the report of the Committee on Law Office Management. Howard Moldenhauer is the chairman.

REPORT OF COMMITTEE ON LAW OFFICE MANAGEMENT**Howard H. Moldenhauer**

Gentlemen, I won't bother to read the entire report. I would only comment that there has been a great deal of interest which seems to have been shown among members of the Bar here in Nebraska concerning the internal operations of a law office, and particularly the relationships between lawyers and their associates. The committee at the present time is considering this problem and is working on a draft of a confidential poll which we hope can be submitted sometime in the future which might give other lawyers some assistance in determining how their internal operations compare with those of other law offices. We have found no other poll comparable to this so we really don't have any guidance. There was a confidential poll taken in Omaha a year ago concerning practices with regard to secretaries, vacation policies, insurance policies, health plans, salary policies, and that sort of thing. We would hope that we can find something which will go beyond this.

I would particularly point out that the Omaha Bar Association adopted a minimum fee schedule last year which includes a portion which is called "Manual on the Economics of the Bar" and this deals with such things as billing practices, interviewing clients, and things like that. It is hoped that possibly other lawyers in Nebraska will become aware of this manual and that somehow it might be made available for them.

We have also kept in close touch with the use of computers across the country so that when they do become practical and feasible Nebraska will be able to take advantage of them.

Mr. Chairman, I move that the report be adopted and that the committee be continued.

CHAIRMAN McCOWN: Is there a second?

ELMER C. RAKOW, Neligh: I second the motion.

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

[The report of the committee follows.]

Report of the Special Committee on Law Office Management

During the past year members of the committee have kept in close touch with publications and activities of the American Bar Association in the area of bar economics and law office management. Some interest has been expressed by members of the Nebraska Bar concerning relationships between lawyers and their

associates and expenses of operating a law office. Although there have been many studies made concerning the income of lawyers and their comparative position among the professions and other income groups, the committee has been unable to find any studies of internal operations or arrangements which would meet the need which has been expressed. Consequently, the committee is at the present time considering the feasibility of preparing a confidential questionnaire concerning the internal operations of the law office in Nebraska, which it hopes to have circulated during the coming year. It is anticipated that, if such a study proves feasible and the response is satisfactory, a later project would be undertaken to ascertain relationships between attorneys and their associates in order that some guidance may be given to practitioners in developing their own arrangement which might be fair to themselves and to their associates. This constitutes a real challenge and will require the cooperation of all members of the Nebraska State Bar Association.

The committee is aware that the Omaha Bar Association has done a considerable amount of work in the bar economics and law office management field and it is hoped that this committee can take advantage of some of these accomplishments. The Omaha Bar Association has developed a "Minimum Fee Schedule and Manual on Economics of the Bar" which, in addition to being a detailed minimum fee schedule, also includes materials designed to assist the lawyer in his client relationships and billing procedures. Although the problem of minimum fee schedules is not a part of this committee's function, it is hoped that the "Manual on Economics of the Bar" portion of the Omaha schedule might be made available to all attorneys in Nebraska. In addition, the Omaha Bar Association has a special committee preparing a manual for secretaries, with the hope that it will result in more efficient and easier training of secretaries in the law office and at the same time be of some assistance to lawyers in providing answers to mechanical and administrative legal problems which sometime prove to be time consuming and unnecessarily perplexing. Some of the members of that committee are common to this committee and there is a close liaison between the two. It is hoped that the entire state Bar Association may be able to take advantage of the work of that Committee.

The committee also has kept in close touch with progress across the nation in the use of computers in connection with legal research, but has no suggestions concerning this at the present time. The committee feels that it is an essential function to continue in close contact with the development of this program in order that

the state Bar Association may be in a position to take advantage of any advancements in this area when they prove economical and feasible.

Howard H. Moldenhauer, Chairman
James W. R. Brown
Thomas R. Burke
John R. Dudgeon
H. B. Evnen
Richard A. Knudsen
Thomas Marshall
Keith Miller
Charles E. Oldfather
Harold Rice
Albert G. Schatz
Charles I. Scudder, Jr.

CHAIRMAN McCOWN: The report of the Committee on Medico-Legal Jurisprudence, Mr. George Boland, Chairman.

REPORT OF COMMITTEE ON MEDICO-LEGAL JURISPRUDENCE

George B. Boland

Mr. Chairman, Gentlemen: My report is quite brief and I might take your time just to read it:

The Committee on Medico-Legal Jurisprudence met at the Omaha Club on August 30, 1963. General discussion was had with reference to the cooperation by doctors with attorneys and by attorneys with doctors. The committee was of the opinion that except in very rare instances there is a close cooperation between the members of the two professions. A particularly friendly trend has been noted since the adoption of the National Inter-Professional Code for Physicians and Attorneys by the Nebraska State Bar Association on October 5, 1960.

It is the recommendation of your committee that a meeting be arranged with a like committee of the Nebraska State Medical Association on the operational effects of the Code and that a similar declaration of policy be made by both associations.

The spirit of cooperation existing between the medical profession and the legal profession was extended by the invitation to and the acceptance by the members of your committee to attend the annual picnic of the members of the Douglas County Medical Association. It was a most enjoyable affair and one which tended to strengthen the feeling of mutual friendship between the attorneys and the doctors.

Detailed discussion was had by the committee in regard to Legislative Bill 282 adopted by the 1963 session of the Nebraska State Legislature having to do with the elimination of the privity of physicians and hospitals upon the filing of a suit for damages for personal injuries or death. It was noted that by the passage of Legislative Bill 282 and the signing of the same into law, Section 25-1207 Reissue Revised Statutes of Nebraska, 1943, will be amended as of October 19, 1963. It was agreed that the passage of Legislative Bill 282 does not obviate the necessity for the foundation for the introduction in evidence of the hospital records. The significant change in the statute by the passage of this act is the elimination of the former privilege.

It is recommended that a committee of the Nebraska State Bar Association meet with one of the Nebraska State Medical Association to work out the details of the application of this act and that representatives of the State Hospital Association be invited to attend such meeting so that members of all professions may be familiar with the rights and obligations of each under the new act; and that the committee be continued.

Mr. Chairman, I move adoption of the report.

CHAIRMAN McCOWN: Is there a second?

LANSING ANDERSON, Holdrege: I second the motion.

CHAIRMAN McCOWN: Any discussion? As many as favor the report will say "aye"; opposed the same. Carried. Thank you very much, Mr. Boland.

No. 23 on your program, the report of the Committee on Liaison with Internal Revenue Service, Mr. Warren Dalton is chairman but Mr. Richard E. Hunter will give the report of the committee.

REPORT OF COMMITTEE ON LIAISON WITH INTERNAL REVENUE SERVICE

Richard E. Hunter

Mr. Chairman, Members of the House: There is no written report of the committee which is scheduled as Item 23 for the reason that there is actually no committee of the Nebraska State Bar Association with this title. The committee is a committee of the Omaha region of the Internal Revenue Service. In the past the practice has been that the current chairman of the Section on Taxation of the Nebraska State Bar is the Nebraska delegate, one of the delegates of the various bar associations in the Omaha Internal Revenue Service region, to a committee formed within that nine-state area. So, as chairman of the Committee on Taxation

during this year, I have been the ex-officio delegate of the Nebraska State Bar Association to the lawyers liaison committee with the Internal Revenue Service.

It was my privilege to attend the 1963 meeting of this committee, together with Mr. Keith Miller, representing the American Bar Association, and Mr. Harry Cohen, both of whom, of course, are of this Association, representing the Omaha Bar.

The purpose of this committee is to work out various problems of practice and procedure and areas of irritation and discontent which exist between tax practitioners and the taxpayer on the one hand, and the Service on the other.

The 1963 meeting was held at the Broadmoor Hotel in Colorado Springs, July 18 and 19. When I said it was my privilege to attend this meeting I am not just using idle language; it really was a privilege.

There were some interesting discussions, the purpose of the committee being to try to work out some of these areas of conflict. I can't report that there were a number of concrete results. Representing the tax practitioner on one side of the table were representatives of the large city or metropolitan area bar associations within the nine-state region. On the other side were the regional commissioners from the Omaha and Dallas region, several of the division commissioners, heads from Washington, and a number of assistant regional commissioners, and several district directors from within the Omaha region.

About the time that this event was taking place the Omaha regional setup was being changed. Nebraska, of course, has now become a part of the Chicago region, and we don't know entirely what changes will be brought about by this change in organization as far as this committee is concerned.

Some of the topics which were discussed at the meeting were problems involving revenue agents contacting the taxpayer directly after a power of attorney designating a taxpayer's agent is on file with the Service. This apparently has become a rather prevalent practice, at least in some areas in the region, and much to the surprise of the lawyers who were there, the Service, having discussed it over a period of a year, was not able to give any assurances to the members of the bar that their agents would in the future refrain from this practice. However, they again have promised to take it up with the powers that be in Washington and see if they can't issue a standard procedure conceding, possibly, that at least they would warn the lawyer or the taxpayer's representative before they contacted the taxpayer directly.

One of the other problems discussed was the problem of vague allegations contained in a 90-day letter. The triangle situation in which the government, the Internal Revenue Service, takes inconsistent positions as far as opposing taxpayers are concerned was gone into very thoroughly, and in general a great deal of time was devoted to the image of the Internal Revenue Service as far as the tax-paying public was concerned.

I might say that these discussions were often very heated and, as I mentioned, probably no concrete results have been obtained so far. I feel, and the members of the Tax Section of the Nebraska Bar feel, that this is a proper way to attempt to work out problems between the Service and the bar associations.

Mr. Chairman, I recommend that this committee be continued, or perhaps I should say that the appointing of a delegate representing the Nebraska Bar Association to the committee, which is a regional committee, be continued under the new setup in the Chicago region, and that the report be accepted.

CHAIRMAN McCOWN: Is there a second?

FREDERICK R. IRONS, Hastings: I second the motion.

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

CHAIRMAN McCOWN: The report of the Committee on Military Law, Mr. James Nanfito, Chairman. There is no report in your program, I believe.

REPORT OF COMMITTEE ON MILITARY LAW

James A. Nanfito

Mr. Chairman, Members of the House: We failed to file a report this time, due to the fact that up until a couple of months ago the military was once more neglecting the committee then all of a sudden decided to dump reams of paper on us. They have, I must say, taken real interest in the committee and have started to ask us to perform little functions. They have done this through the SAC office of the Judge Advocate. We have also found that the Judge Advocates Association, through its committee of liaison with the Bar Association, has also taken an interest in the committee. It is their thought that within the next few months there will be functions that they will ask the committee to perform for them and for the military.

With these things in mind it is the recommendation of the committee that the Special Committee on Military Law be continued for another year, and it is so moved.

CHAIRMAN McCOWN: Is there a second?

MR. RAKOW: I second the motion.

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

Gentlemen, I think I shall declare a ten-minute recess at this moment rather than ask the other committee chairmen to make reports to a practically empty house. May I say at this time, I issue my personal commendation to all those of you who did show up on time. If the rest of them who didn't get here object to any of our actions it is just too bad. We'll declare a ten-minute recess. I would appreciate it if you could be back in ten minutes. At that time I would like to ask all of you to act as sergeant-at-arms to help us round up the rest of the members. Thank you.

[Recess]

CHAIRMAN McCOWN: The members of the House will take their seats, please. The next item on the program is the report of the Committee on Public Service, Mr. Ed McEachen, Chairman.

REPORT OF COMMITTEE ON PUBLIC SERVICE

Edmund D. McEachen

Mr. Chairman, Members of the House: Our written report is quite lengthy and I will summarize it as much as I can. I may expand on the report slightly, since it refers to some exhibits which were too lengthy to include in the published report.

During the past year the committee has carried on a considerably expanded program of public service and public relations for the bar. Our first, and I think our most important, project annually is Law Day. This project, the committee feels, gives us the greatest opportunity to put forth in an affirmative way a favorable public image for the lawyer. Warren Urbom was chairman this year. He did an excellent job of expanding the observance.

I think particular attention should be brought to the Omaha Bar's recognition of Law Day and their observance because it was undoubtedly the most successful Law Day observance in the history of Nebraska. It was highlighted by a public affairs luncheon co-sponsored by the Omaha Chamber of Commerce. It was attended by over 800 civic leaders, attorneys, and other community leaders. It was addressed by the British Ambassador to the United States. By attracting such an important visitor, and also a very charming one, we were able to obtain a tremendous amount of television, radio, and newspaper coverage, all of it reflecting favorably on Law Day, on the attorneys, and on the Bar.

We recommend additional efforts of this kind by other Bars. This is the greatest opportunity we have to really get out and advertise the high ideals of the Bar of the state and nation. The state-wide observance resulted in a considerable increase, not only in the number of counties observing Law Day, but in news coverage and radio coverage. We did find that the use of the Governor's proclamation, which had been regularly taped for radio and filmed for television, is being used less and less as it becomes older and older. We have taped or filmed a new proclamation each year, but we recommend that some consideration be given to a replacement program in this area.

The most important feature of public relations in Nebraska, the most important thing that *can* be done both on Law Day and in the general public relations program, is to develop local liaison with news media. A radio tape, a television film, a newspaper mat will be used by these local newspapers that get a great deal of legal advertising from attorneys, who have a personal relationship with local attorneys, if it is presented to them directly by a local attorney or at least if the first contact is made by the local attorney to obtain publication or use. Thereafter we can handle it direct from the offices of the Bar Association. But unless that first contact is made by someone locally, these films, tapes, and newspaper mats frequently are thrown in the wastebasket and they are wasted. This is an area in which the committee recommends considerable effort in the coming year, an effort to work out some local liaison with newspapers, radio stations, and television stations.

The committee, during the past year, has been involved in the production of radio tapes. We have produced five one-minute radio spots each month. We now have 25 Nebraska radio stations using the tapes in spot announcements. Undoubtedly many of you have heard them. They are entitled "It's the Law." I think our first problem is one of editing scripts and determining subject matter. The first set of tapes—and we have produced five spots for each month; we distribute one tape, each having the five spots on it, to the various participating radio stations—the first tapes had too much criminal law in them. The committee realized it and has worked toward concentrating the scripts on civil legal matters.

We would appreciate comments from those of you who hear the tapes on local radio stations, and we will also appreciate your efforts to get radio stations in your own localities to use the tapes. They are available in any quantity needed.

The committee has developed a proposed awards program which is too lengthy for inclusion in this report, but it is being

presented to the Executive Council with a recommendation that it be adopted. Under the program two awards would be made by the Bar annually. The President's Award will be given to a member of the bar in recognition of outstanding contributions to the furtherance of public understanding of the legal system and confidence in the profession. A medal of appreciation will be presented to an individual, not a member of the bar, who has performed outstanding service in helping to create better public understanding of the legal profession and the system of law and justice within which it operates. It is thought that the medal of appreciation would go to civic leaders, perhaps a journalist, a radio commentator, this type of person who can help a great deal in public understanding of our legal profession and our legal system.

I should make one aside. The committee debated quite extensively about whether members of the judiciary should be eligible for the President's Award. We debated about this only for one reason, because we felt that this might become an award automatically made to a judge each year. We certainly feel that judges should be considered for the award but we should at least let the members of the House know that we are not recommending that this President's Award automatically become an award to be made to the judiciary year after year.

The committee is presently working on a series of one-column newspaper mats based on the same material that is being used in radio scripts. This can be successful and we recommend that it be continued only if we can develop this local liaison with newspapers in order to get these mats published. We find that less than 10 percent are published if they are simply mailed to the newspaper. However, these local, particularly rural, newspapers use tons of junk publication, junk mats that are sent to them, and there is no reason why we can't, by local liaison, by local contact with these people, get this material published, and it can do a great deal of good for the lawyers, I am sure, if it is published.

We are also working with the editor of the *Nebraska Farmer* for development of a new series on the law in that publication. The *Nebraska Farmer* has always been most cooperative and previously carried, for a long period of time, a column edited by the Nebraska Bar Association, prepared and presented to them by the Bar, and we are considering the same type of thing.

The committee, during the past year, has made a study of the television medium by local and state bar associations. Tom Carroll, the public relations consultant to the Bar, and I made a trip to Chicago for a one-day clinic on the use of radio and television by state and local bar associations, held in connection with the Ameri-

can Bar Association annual meeting. We obtained a number of very fine ideas, saw some excellent work being done by other bars, and have brought back those ideas and are working on some additional programs in this area, particularly the production of 20 second and 60 second public service television spots.

The American Bar has produced a number of series—there is a new one out each month—of television spots on legal subjects. They are wonderfully done. They are cartoon spots, very effective. The subject matter has been edited in an excellent fashion. These spots were made available without cost by the American Bar to, I believe, the 100 largest television markets, which included in Nebraska only Omaha. Too, a film was sent to each of the Omaha stations and they are using these one-minute spots.

We can obtain from the American Bar Association additional prints of these for \$3.50 each, and if any of you feel that you would like to undertake the contact of your local television stations concerning the use of these, I think it would be fine for the local bar associations to sponsor the purchase of these A.B.A. tapes for use in other localities where they are not furnished without charge. I think the Bar may make some arrangement for payment for those but that is something that has not been done as yet. We urge you to consider that.

In addition, we are preparing a series of 20 second and 60 second public service television spots. These will be done by use of flash photographs, just snapshots, together with a legal message. This is much cheaper than the cartoon method, quite inexpensive, and we think they will be used very readily by television people. We have discussed this, Tom Carroll and I, with Omaha television executives and we think we have a real television public relations program at least in an embryo stage.

Pamphlets and jury manuals have been receiving a great deal of acceptance, as before. Printing orders indicate that approximately 22,000 of the pamphlets on various legal subjects and 15,000 jury manuals have been distributed during the year.

Again, we recommend local effort to try to increase the acceptance of these pamphlets. By far the greatest use of the legal pamphlets has been in Douglas County where the Omaha Bar has bought the pamphlets from the State Bar, has established racks in the various county offices, in the courthouse, has contacted the banks concerning the use of these. A tremendous number of these pamphlets go out in Omaha. We think the lawyers outside of Omaha can obtain great benefit by trying to increase the use of these pamphlets out-state.

We are presenting a proposed and considerably expanded program of public relations for the coming year. It has been too lengthy for publication. We, however, will continue to meet with the Executive Committee for the purpose of implementing the program which we have recommended.

I think that I should express special thanks to Warren Urbom of Lincoln, who did a wonderful job on Law Day; to Bill Rist of Beatrice, who is a former chairman of this committee and who has continued to work untold hours on radio script programs. It is primarily because of Bill's efforts that this has gotten off the ground. And Dick Knudsen who has spent many hours on the awards program.

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

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

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

CHAIRMAN McCOWN: Any 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 Public Service

During the past year this committee has carried on a considerably expanded program of public service and public relations for the Nebraska Bar.

Law Day U.S.A. has become a permanent and valuable part of our public service program. Warren K. Urbom of Lincoln was state chairman for Law Day U.S.A. 1963, and was successful in extending the observance throughout the state. The committee expresses its great appreciation for the effort and excellent work of Mr. Urbom. The committee also recognizes the excellent effort of the Omaha Bar Association in the 1963 observance of Law Day, highlighted by a public affairs luncheon, co-sponsored with the Omaha Chamber of Commerce, attended by approximately 800 attorneys and community leaders, and addressed by the British Ambassador to the United States. The Ambassador's appearance received extensive television, radio, and newspaper coverage and was most valuable in focusing attention on Law Day.

The state-wide observance was carried on through county chairmen appointed in each of the counties, and again in 1963 the number of counties participating was increased. News coverage continues to improve, and in the area of local news coverage of Law Day a 75 per cent increase in the number of local stories was

noted. Radio and television tapes of the Governor's proclamation again were distributed to all radio and television stations in the state, but the continued use of these tapes for several years has resulted in some decline of their use. The committee recommends consideration of other means of radio and television coverage in the future.

The committee urges local bar associations and lawyers throughout the state to participate actively in future Law Day observances. Only through local efforts can school programs and other significant observances be accomplished with maximum benefits. Local contact with news media, radio and television stations also has been found to result in greatly improved coverage.

The committee recommends that organization for Law Day observance in future years be commenced at the earliest possible date and that the state chairman in the future be assisted by one or more vice-chairmen, who may succeed to the chairmanship in succeeding years, resulting in more continuity of the Law Day program.

As a part of the expanded public relations program, the subcommittee on radio has produced a series of one minute radio spots entitled "It's the Law," now being used regularly by 25 Nebraska radio stations. The committee is working on the improvement of scripts and production methods. The response to this series has been gratifying, and it is recommended that it be continued. Special appreciation is due William B. Rist of Beatrice, who has been largely responsible for the success of this program.

The committee has developed a proposed awards program which is too lengthy for inclusion in this report, but it is being presented to the Executive Council. We recommend it be published in the *Nebraska State Bar Journal*. Under the program, two awards would be made by the Bar annually. The President's Award would 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. A Medal of Appreciation would 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.

Thanks are due Richard A. Knudsen of Lincoln, who has done extensive work in developing the awards program.

The committee is presently working on a series of one column newspaper mats to be sent to Nebraska newspapers for public service publication. The mats utilize the material developed for

radio scripts and include a cartoon illustrating the legal problem or point of law discussed in a brief amount of copy.

Work is being carried on with the editor of the *Nebraska Farmer* for development of a series of special articles on subjects of timely interest. This publication has previously carried columns on various phases of the law, prepared by the committee.

A study has been made by the committee of the use of the television medium by local and state bar associations. The chairman and Mr. Thomas L. Carroll, the professional public relations consultant of the committee, attended a one day clinic on the use of television and radio in Bar public relations, in conjunction with the A.B.A. annual meeting in Chicago, and have consulted with Nebraska television executives for suggestions in development of a plan for the use of television in the over-all public relations program. Plans are being developed for a weekly five minute television feature using local lawyers in the Omaha area. The committee, in its recommendation of the program for the coming year, includes development of a series of 20 second and 60 second public service television spots.

The pamphlets and jury manual prepared by the committee have continued to receive gratifying acceptance. Printing orders indicate that approximately 22,000 pamphlets and 15,000 jury manuals have been distributed during the year. The committee has recommended a review of the material in all pamphlets during the coming year, for the purpose of keeping each current with legal developments, and the development of a new format for the covers. Work of the Omaha Bar Association in distributing pamphlets through racks maintained and supplied by the Bar in various county offices has resulted in wide distribution of pamphlets in the Omaha area. A like program by other local bar associations and lawyers, as well as efforts to distribute pamphlets through banks, is urged.

The committee is presenting herewith a proposed expanded program of public relations for the coming year, too lengthy for publication, and will continue to meet with the Executive Committee for the purpose of implementing the program.

During the year of 1963, the assistance of The Carroll Company, professional public relations firm of Lincoln, Nebraska, has been of great value and the committee recommends that The Carroll Company be retained as consultant for the coming year.

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

Edmund D. McEachen, Chairman

Auburn H. Atkins
 Tyler B. Gaines
 Patrick W. Healey
 James A. Lane
 C. Russell Mattson
 Pliny M. Moodie
 Richard A. Knudsen
 George C. Pardee
 William B. Rist
 Joseph C. Tye

CHAIRMAN McCOWN: The next report has been held over from this morning's schedule, the report of the Committee on Formation of Bar Association Foundation, to have been presented by Jack Wilson who is the chairman of that committee. Mr. Harry Cohen is prepared to make the report for the committee.

REPORT OF COMMITTEE ON FORMATION OF BAR ASSOCIATION FOUNDATION

Harry Cohen

Mr. Chairman and Gentlemen: At the 1962 meeting of the House of Delegates, the Nebraska Bar Association, approval was given for the formation of a foundation. The committee has met and we have come up with a proposed draft of the articles of incorporation. They are in the report.

The articles conform with the requirements of the Internal Revenue laws and likewise conform with the requirements of the nonprofit corporation laws of the State of Nebraska.

With this foundation, if adopted and implemented by the Past Presidents Association, you will be able to make contributions to the foundation which will be tax deductible.

I am sure that all of you know in general what the purposes of a foundation of this character are. It will carry on a lot of good educational work and implement a lot of work of the Association by being able to attract funds for projects or for continuing projects, and we could thereby, I think, do a tremendous job for the bar of the State of Nebraska.

I move approval of the proposed articles of incorporation and move that they be delivered to the Past Presidents Association for implementation.

CHAIRMAN McCOWN: You have heard the motion. Incidentally, Harry, does that include the continuation of the committee as such?

MR. COHEN: No, it does not. It is a further recommendation that the committee be discharged. They have done their job when the articles have been approved.

CHAIRMAN McCOWN: Is there a second to the motion?

JOHN M. BROWER, Fullerton: I second the motion.

CHAIRMAN McCOWN: Any discussion?

ALFRED G. ELLICK, Omaha: Mr. Cohen, would these articles permit the foundation to accumulate funds in case they might at some future time want to build a bar association building?

MR. COHEN: We haven't gone into all the detailed proposals as to what we are going to do with the funds. I think that will be implemented by the Past Presidents Association. If it is necessary to have a bar building of some sort for housing, I think we probably could come within the purposes of the articles. It would not in the least, in my opinion, impair the legality of it as far as the tax deduction is concerned. There was some question on that point, incidentally, in the preparation of these articles, but we all felt that this could be brought about all right. As time comes on we will meet these problems as they come along. The idea is to get the thing started and get it going.

CHAIRMAN McCOWN: Is there 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 Formation of Bar Association Foundation

At the 1962 meeting of the House of Delegates of the Nebraska State Bar Association, approval was given for the formation of a foundation for the Nebraska State Bar Association.

Your committee has prepared articles of incorporation for the Nebraska State Bar Foundation and attach hereto a copy thereof.

Your committee wishes to thank Laurens Williams for his efforts in advising the committee in the preparation of these articles.

We recommend that the attached Articles of Incorporation of the Nebraska State Bar Foundation be approved and that if approved, they be delivered to the Past Presidents Association of the Nebraska State Bar Association for implementation.

We further recommend that this committee be discharged.

John J. Wilson, Chairman

Harry B. Cohen
 Fred T. Hanson
 Louis E. Lipp
 Bert L. Overcash
 John R. Swenson
 Einar Viren
 Frank D. Williams

ARTICLES OF INCORPORATION OF
 NEBRASKA STATE BAR FOUNDATION

The undersigned hereby associate to establish a nonprofit corporation under the provisions of the Nebraska Nonprofit Corporation Act of the State of Nebraska, and pursuant thereto, make, execute and acknowledge Articles of Incorporation as follows:

ARTICLE I

Section 1. The name of the corporation shall be NEBRASKA STATE BAR FOUNDATION, and the duration shall be perpetual.

ARTICLE II

Section 1. The principal office of the corporation is to be located in Lancaster County, Nebraska; its registered office shall be in the State Capitol, Lincoln, Nebraska, and its resident agent shall be GEORGE H. TURNER, State Capitol, Lincoln, Nebraska.

ARTICLE III

Section 1. The exclusive purpose of this organization shall be to promote the following educational, literary, scientific and charitable purposes or any of them, both directly and by gifts or contributions to any other organization whose purposes and operations are exclusively educational, literary, scientific or charitable which is qualified as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 (or corresponding provision of any future United States Internal Revenue law), to be used exclusively for any of the following purposes:

- (a) To advance the science of jurisprudence;
- (b) To promote and improve the administration of justice;
- (c) To uphold high standards for the judiciary and for lawyers;
- (d) To facilitate understanding of and compliance with the law, and to promote the study of law, research therein, and the diffusion of knowledge thereof;
- (e) To cause to be published and to distribute addresses, reports, treatises and other literary works on legal subjects, and to acquire,

preserve and exhibit rare books and documents, objects of art, and items of historical interest having legal significance or bearing on the administration of justice; and

(f) To do and perform all acts and things which are legitimate and are reasonably calculated to promote the interests and carry out the purposes of this organization.

No part of the income or assets of this organization shall inure to the benefit of any member, officer or director, or private individual; and none of the activities, funds, property, or income of the Foundation may be used in carrying on any propaganda or political activity, directly or indirectly, or in attempting to influence legislation, either directly or indirectly, and neither the Foundation nor its officers or directors may, as such officers or directors of the Foundation, contribute to or otherwise support or assist any political party or candidate for elected public office.

ARTICLE IV

Section 1. The members of this organization shall be the Past Presidents of the Nebraska State Bar Association who have an active membership therein.

Section 2. The annual meeting of the members of this organization shall be held at 4 P.M. on the date immediately preceding the annual meeting of the Nebraska State Bar Association in the city where the annual meeting is to be held. Notice of the annual meeting shall be given by at least ten days' written notice by the Secretary to the members of this organization.

Special meetings may be held at any time and place upon the call of the President of this organization or any three of the directors, who shall give at least five days' written notice of any special meeting stating the purpose thereof. At any meeting of the members of this organization, six (6) members shall constitute a quorum.

Section 3. The Foundation shall annually make a report of audit to the Supreme Court of Nebraska and to the Nebraska State Bar Association.

ARTICLE V

Section 1. The affairs of this organization shall be managed by a Board of Directors consisting of ten persons who are members of the Foundation and two ex officio members. The directors shall be elected by the members of the Foundation, except that the President and President-elect of the Nebraska State Bar Association shall be ex officio members of the Board of Directors of the Foundation. In the election of directors, consideration shall be given to the geographical representa-

tion of various sections of the state. The initial directors shall be as follows:

Initial Directors	Address
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Section 2. Directors shall be elected for two year terms, except that (a) one-half of the number of the first Board of Directors shall be elected for a term of one year, and (b) directors elected to fill a vacancy in an unexpired term shall be elected to serve for the remainder of the unexpired term. A director shall serve until his successor has been duly elected.

Section 3. A director may be removed from the board and his successor elected at any time by the affirmative vote of a majority of the members of the Foundation at any regular or special meeting. Any vacancy on the board created by the death or resignation of a member of the board may be filled by a majority vote of the remaining members of the board.

Section 4. Regular meetings of the Board of Directors shall be held at such times and places and upon such notice as may be fixed by standing resolution or by the By-laws of the Foundation. Special meetings may be held at any time upon the call of the Chairman of the board or any three of the directors, who shall give at least five days' written notice of any special meeting stating the purpose thereof. At any meeting of the Board of Directors, a majority thereof shall constitute a quorum. The act of a majority of the members of the Board of Directors present at a meeting at which a quorum is present shall be the act of the Board.

ARTICLE VI

Section 1. The Board of Directors shall elect a Chairman, who shall have such powers and duties as generally pertain to the office of president of an organization and chairman of a board of directors. The Board of Directors shall also elect a Vice-Chairman. The Chairman and Vice-Chairman shall be members of the Board. The Board of Directors shall also elect a Secretary and a Treasurer and

such other officers as it may deem proper. The office of Secretary and Treasurer may be combined and held by one person. The Secretary and Treasurer need not be members of the Board of Directors or the Nebraska State Bar Foundation, but may be elected from among the membership of the Nebraska State Bar Association.

Section 2. The powers and duties of the officers may from time to time be determined or changed by the Board of Directors.

Section 3. All officers shall be elected for one year terms, but may be removed from office at any time by the Board of Directors. An officer may be elected to succeed himself.

Section 4. No person who is a member of, or who advocates the principles of any organization believing in, or working for, the overthrow of the Government of the United States, or the State of Nebraska, by force or violence, and no person who refuses to uphold and defend the Constitution of the United States or the Constitution of the State of Nebraska, may be a member, director or officer of the Foundation.

ARTICLE VII

Section 1. No member, director or officer of the Foundation shall receive or be lawfully entitled to receive any compensation for his services but may be reimbursed by the Foundation for his expenses incurred in activities on behalf of the Foundation.

Section 2. The Foundation may pay compensation in a reasonable amount to employees or agents for services rendered in carrying on the activities of the Foundation, provided such compensation shall be approved by the Board of Directors.

Section 3. The Foundation may not make any loans to its officers, members of its Board of Directors or to its members.

ARTICLE VIII

Section 1. The members of the Foundation may adopt such By-laws for the government of the Foundation, consistent with these Articles of Incorporation, as are designed to carry out the objects of the Foundation.

Section 2. By-laws may be adopted, amended, repealed or added to by a majority vote of the members of the Board of Directors present at any annual or special meeting of the board.

ARTICLE IX

Section 1. These Articles may be amended in the manner provided by law. However, an amendment must be authorized by the vote of at least a majority of the members of the Foundation present at an annual meeting or at a special meeting called for the purpose of con-

sidering any such proposal. Any proposed changes to the Articles of Incorporation shall be sent to the members at the time the notice is sent of any meeting in which proposed changes are to be approved.

ARTICLE X

In the event of dissolution of this Foundation, any remaining assets shall be distributed to one or more organizations described in Section 501(c)(3) of the Internal Revenue Code (or corresponding provision of any future United States Internal Revenue Code).

IN WITNESS WHEREOF, the undersigned have executed these Articles of Incorporation thisday of....., 1963.

Incorporator	Address
.....
.....
.....
.....

STATE OF NEBRASKA)
) ss:
 COUNTY OF)

Now on this day of, 1963, before me, the undersigned, a Notary Public in and for said county, personally appeared

to me known to be the identical persons who executed the foregoing Articles of Incorporation as incorporators and they acknowledged the execution thereof to be their voluntary act and deed.

WITNESS my hand and seal the day and year last above written.

.....
 Notary Public

My Commission Expires, 19.....

CHAIRMAN McCOWN: The next item is the report of the Committee on Merit Plan of Judicial Selection, Mr. Flavel A. Wright, Chairman.

REPORT OF COMMITTEE ON
 MERIT PLAN OF JUDICIAL SELECTION

Flavel A. Wright

Mr. Chairman, the Special Committee on the Merit Plan of Judicial Selection was interested primarily in legislation to implement the Merit Plan. Shortly after the adoption of the Merit Plan by the voters, the committee was contacted by municipal

judges both in Lincoln and Omaha with a suggestion that assistance be given to enacting legislation to put the municipal judges under the Merit Plan. There was also some effort made by some of the county judges in the larger counties suggesting that the county judges should be under the Merit Plan and that legislation should be adopted.

The committee worked with the Judicial Council and bills were prepared, first of all, to set up how the nominating committees were to be constituted; secondly the procedures to be followed by the judges in signifying their intention to stand for re-election; and, thirdly, to place the juvenile court judges, the municipal court judges, and the county judges in counties over 16,000 in population under the Merit Plan.

These five bills were approved by the Judicial Council itself but were not approved entirely by the Supreme Court, which must review all Judicial Council proposals. The municipal court bill and the county court bill the Supreme Court considered to be outside the scope of the function of the Judicial Council; and while the bills were prepared and they did not disapprove them, they did not lend the support of the Judicial Council to those two bills.

The bills were all offered in the legislature and all of them were enacted into law except the one relating to county judges.

The committee rendered service in connection with getting the bills through the legislature, and at the present time I believe I can report all judicial nominating commissions have been appointed. The committee did exert some effort to get some interest among the lawyers to see that qualified persons were filed as candidates for the judicial nominating commissions, and I think now the commissions are filled and the Merit Plan is in full force and effect in the State of Nebraska, not only with reference to the district court judges and the Supreme Court judges, but also with reference to the municipal court judges in Lincoln and Omaha, and the juvenile court judges.

It is the recommendation of the committee that, since the mission assigned to it has been accomplished, the committee be dissolved. Mr. Chairman, I move that the report of the committee be received and that the recommendation of the committee be adopted.

CHAIRMAN McCOWN: Taking a point of privilege for the Chair, I shall amend the motion to some degree by saying that the motion is that the report be approved and that the committee be discharged with the sincere appreciation and very deep thanks of

this Association for a job extremely well done. Do I hear a second to that motion?

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 is carried. Thanks very much.

CHAIRMAN McCOWN: Next is the report of the State Advisory Committee, Mr. Raymond Young, Chairman. I understand Charles Adams will give the report for the committee.

REPORT OF STATE ADVISORY COMMITTEE

Raymond G. Young

CHARLES F. ADAMS: I would like to have Ray Young stand up again so you can all see who is talking. He has been chairman of this committee since 1938 and has done a wonderful job.

Raymond M. Crossman departed this life on May 17, 1963. His death was an extremely severe loss not only to this bar association but to his home city and state. He was an outstanding citizen, a distinguished lawyer, and a conspicuous leader in professional, civic, church, and charitable activities.

His brilliant mind, his devotion to the highest ideals of our profession, and his willingness to serve in every worthy cause won for him the respect and affection of all who were privileged to know him well.

He was vice chairman of this Advisory Committee during the entire period of its existence, continuously from March 1938 (the integration of the Bar became effective January 1, 1938) until the date of his death. We shall greatly miss his wise counsel and the warmth of his companionship.

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

Reviews

The Advisory Committee reviewed two records from District 4. In both cases the findings of the Committee on Inquiry were sustained, and complaints were filed in the Supreme Court; that is, the state Judicial District No. 4.

Supreme Court

In the Supreme Court complaints have been filed and are pending in these two cases from District 4. In a case which origi-

nated last year in the 17th District, a referee was appointed, hearing has been had. Referee's report has not been filed. Reinstatement was denied in two cases. Judgments of disbarment were entered against two lawyers who, by permission of the Court, waived disciplinary proceedings.

Advisory Opinions

In 1956 the committee adopted the practice of setting out in its annual report the substance of the opinions rendered during the year. The summary is published in the *Proceedings*. During the eight-year period more than 70 opinions in very condensed form have thus been made available.

Since the last report, ten advisory opinions have been rendered. The following have been selected as most likely to be of general interest:

1. A study was made of the "collection service" subject, the circumstances under which lawyers may properly refer unpaid accounts of their clients and themselves to such a service, and the propriety of a lawyer owning such a service, or acting as attorney for it.

2. A lawyer, while serving as a member of the state legislature, may not be a partner in a firm which acts as lobbyist in respect of prospective legislation.

3. In the absence of special "circumstances" a lawyer should not permit his name to appear as counsel or as attorney on his client's letterhead used in letters to the general public. The name may be used in connection with the sale of bonds to prospective bidders, or in sending annual reports or correspondence to stockholders.

4. The committee finds no conflict of interest in a city attorney's acting both for the city and for a housing authority.

5. The Advisory Committee adheres to its policy of refraining from expressing advisory opinions in cases in which the propriety of a lawyer's conduct is likely to come before the committee for determination in its capacity as a board of review of the findings of a committee on inquiry. Nor will it express its opinion when the alleged impropriety has become a *fait accompli*. I guess I pronounced that French right.

I might say parenthetically that we have been asked to render opinions on situations where the whole thing has been done and the lawyers in the community are somewhat concerned about whether what this lawyer did was or was not ethical, and we have been

asked to render, and have declined to render, opinions under those circumstances for the reason, as it says in the report, that we might be later required to review the action of a local committee on inquiry.

Committees on Inquiry

The districts in which no matters have required action by committees on inquiry are 1, 2, 5, 7, 8, 9, 12, 14, and 18.

In District 3 (Lincoln) five matters were disposed of without formal hearing. One is under investigation.

In District 4 (Omaha) five matters pending from last year were disposed of, two by formal hearings, three by informal investigations. Since last October, 17 matters have come before the committee. One was withdrawn, two are pending. Fourteen hearings have been held, resulting in the referring of two cases to the Supreme Court.

In District 6 one matter was dismissed for lack of merit. In one case, hearing has been had and determination waits upon receipt of reporter's transcript.

In District 10 at the time of last year's report charges were being held in abeyance because of pending litigation. In that case, criminal charges of fraud and embezzlement resulted in conviction, sentence, and subsequent disbarment. One minor charge is being investigated.

In District 11 charges against two lawyers are under investigation and are awaiting hearings before the committee.

In District 13 charges were considered in two cases. In one there was dismissal for lack of merit. The other resulted in a finding of no violation of the Canons, but was settled as suggested by the committee.

In District 15 one minor matter was adjusted.

In District 16 charges were made in two cases. One was found to be without merit. The other is being held in abeyance because of pending litigation.

In District 17 charges in two cases were dismissed. Charges in three cases are under investigation.

Canon 27

Again the members of this Association are reminded of Canon 27 which prohibits indirect advertising. 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

and like matters has been repeatedly disapproved.¹ The appropriate method is to send by mail a simple, dignified announcement card which complies with the restrictions prescribed by the Canon and by the Opinions of the American Bar Association.² The announcement may be made in a legal journal.³ No departure from the rules can be justified by local custom.⁴

Respectfully submitted,
Raymond G. Young, Chairman
Charles F. Adams
Lester A. Danielson
George B. Hastings
Lloyd L. Pospishil
Frank D. Williams

May I say also that since this report was prepared we have received the resignation of Mr. Frank D. Williams. It will now be up to the Supreme Court to fill two vacancies, the one caused by the death of Ray Crossman and the other by the resignation of Mr. Williams.

May I also say that the function of this committee is two fold in that it deals with disciplinary matters and with advisory opinions. The American Bar Association has two separate committees and the chairman of the House of Delegates, as he has told you, is a member of the Committee on Professional Ethics, which renders very valuable opinions which are released and made available to the profession.

Mr. Chairman, I move that this report be received, filed, and made a matter of record.

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

ELMER C. RAKOW, Neligh: I second the motion.

MR. SVOBODA: May I amend that, Mr. Chairman, to the point that the fine tribute to Mr. Crossman should be sent to the family and the associates of Mr. Crossman by the Secretary of the Association.

CHARLES F. ADAMS, Aurora: I'll accept that amendment.

¹ A.B.A. Decisions 140A, 142A, 146A; 47 A.B.A.J. 777, summary opinion C-447; Drinker, *Legal Ethics*, 232, 240 (1953).

² Drinker 241.

³ A.B.A. Decision 141A.

⁴ A.B.A. Opinions 4, 107, 115, 293; Drinker 219.

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

Is Mr. Winner or any representative of the Committee on Joint Conference of Lawyers and Engineers present? If not, you will find that report on page 48 of your program. The report, as I recall, merely recommends the continuation of the committee. Yes, it recommends that "the committee be continued until such time as the code is in final form and may be submitted to the Bar Association," and "that the committee be continued another year." Do I hear a motion to approve the report?

MR. IRONS: I so move.

CHAIRMAN McCOWN: Is there a second?

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

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

Are there any representatives of the Committee on Cooperation with Law Schools, Mr. Walter Lauritsen, chairman; or the Committee on Federal Rules of Procedure, Mr. William Spire, chairman, who can make reports for those committees? There are no printed reports and none in the program. I am not certain whether any have been filed upon which we can act, and therefore, if there are no representatives from those committees present, those will simply be held over to be taken up, if necessary, on the Friday schedule.

May I call your attention now to the fact that the next meeting of this House is on Friday at four o'clock P.M. immediately following the final session of the institute program on Friday afternoon. I hope that at least as many of you as are presently here will be available for Friday afternoon's program and for the presentation of the section reports which come before the House at that time.

I would call your attention also to the fact that the President's Advisory Council will meet at three o'clock P.M., in approximately 15 minutes, in the Regal Room just off the lobby on this floor. The work of that committee is in connection with implementing the Bar Foundation which you have just approved. All past presidents are reminded that their presence is desired at that meeting.

If there is no further business, a motion to adjourn is in order.

MR. IRONS: I so move.

CHAIRMAN McCOWN: A second?

MR. ADAMS: I second the motion.

CHAIRMAN McCOWN: There being no debatable question, the meeting is adjourned. Thank you very much and I hope you will insert the needle which I have in my hand for all those who were not present here today and see if we can get them here on Friday.

[The Wednesday afternoon session of the House of Delegates adjourned at two-forty o'clock.]

HOUSE OF DELEGATES FRIDAY AFTERNOON SESSION

November 8, 1963

The House of Delegates was called to order at four-fifteen o'clock by Chairman Hale McCown.

CHAIRMAN McCOWN: If the members of the House of Delegates will please take their seats we will proceed with the final session of the House of Delegates.

The first order of business is the report of the Section on Real Estate, Probate, and Trust Law by Mr. George A. Skultety of Fairbury, Chairman. Mr. Skultety!

REPORT OF REAL ESTATE, PROBATE AND TRUST LAW SECTION

George A. Skultety

Mr. Chairman, Members of the House: At the midyear meeting of the Nebraska State Bar Association held in Lincoln on May 24, 1963, the Real Estate, Probate, and Trust Law Section elected officers for terms commencing on November 9, 1963, as follows:

Chairman, C. M. Pierson
Secretary, Albert T. Reddish
Vice Chairman, Fred H. Richards, Jr.

The continuing members and newly elected members of the Executive Committee of the Real Estate, Probate, and Trust Law Section and the expiration of their terms are:

John R. Fike	1964
Fred H. Richards, Jr.	1964
Albert T. Reddish	1965
George A. Skultety	1965
C. M. Pierson	1966
Frank J. Mattoon	1966

At the midyear meeting, the Committee on Drafting of Wills and Trusts gave an outstanding presentation of trust powers annotated to Nebraska. The panel consisted of William A. Sawtell, Jr., John R. Cockle, John M. Harding, Richard Berkheimer, and Oscar L. Clarke. Their treatment of this subject was exceptionally good and they were well received.

Herman Ginsburg brought us up to date on legislative bills that had been passed and others that were then pending.

The midyear meeting was better attended than the previous year. We believe this was due to the preparation of a good program and advance distribution of the program to the members of the Bar. Further improvement can be made in this respect.

The Real Estate, Probate, and Trust Law Section has approved three new title standards, and we propose they be adopted by the House of Delegates.

Before I read them and ask you to act on them separately, I move that this part of the report be accepted and placed on file.

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

JOHN M. BROWER, Fullerton: I second the motion.

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

MR. SKULTETY: I will read you Standard Title No. 68—Mailing of Published Notice:

It is not negligence to refrain from objecting to non-showing of mailing of a copy of published notice to a particular creditor in a probate proceeding when the proceeding otherwise conforms to all applicable statutes and when the time for appeal has expired or a statute of limitation is otherwise applicable.

Comment:

Sec. 30-609, R.R.S. 1943, is a general statute of limitation barring claims and demands against the estates of deceased persons. See further Sec. 30-606.

See further Sec. 30-1415, R.R.S. 1943, and Sec. 30-603, R.R.S. Supp. 1961.

There is no presumption that a deceased person had creditors or claimants against his estate known to the petitioner or personal representative. There is no presumption of the existence of creditors or claimants against an estate entitled to notice by mail.

This standard is not to be construed as signifying that a neglect

or failure to comply with Secs. 25-520.01 to 25-520.03 is a title defect where the two-year period fixed in Sec. 30-609 has not elapsed.

See further: *Farmers Co-op Mercantile Co. v. Sidner*, 175 Neb. 94, 120 N.W.2d 537; *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 N.W.2d 599.

Mr. Chairman, I move the adoption of Standard No. 68.

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

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

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

MR. SKULTETY: Standard No. 69 — Affidavit of Mailing Notice:

It is not negligence for a title examiner to refrain from objecting to the non-showing of mailing of a copy of any published notice to any particular person in any proceeding, when an affidavit appears of record in such proceeding with reference to such publication of notice, which affidavit is in literal compliance with the requirements as to the form of the affidavit prescribed by Sec. 25-520.01 of the Revised Statutes of Nebraska, and the verity of such affidavit shall not be questioned by the title examiner.

Comment:

The statutory requirement for mailing is cumulative and supplemental (Sec. 25-520.03) to the statutes on service by publication generally. There is no presumption that the party instituting the proceeding, or his attorney, knew the post office address of a person appearing in the abstract of title to have had a direct legal interest in the subject of the notice, but not mailed a copy of the published notice. There is no presumption that such a person did not see the notice as published. *Shonsey v. Clayton*, 107 Neb. 695, 187 N.W. 113; *Robinson v. Bressler*, 122 Neb. 461, 240 N.W. 564, 90 A.L.R. 600.

See further: *Farmers Co-op Mercantile Co. v. Sidner*, 175 Neb. 94, 120 N.W.2d 537; *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 N.W.2d 599.

Mr. Chairman, I move the adoption of Standard No. 69.

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

ROBERT D. MULLIN, Omaha: I second the motion.

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

MR. SKULTETY: Standard No. 70 — Foreign Will:

Where a foreign will has been admitted to probate in Nebraska, upon the filing of a duly authenticated copy of the will and order of probate thereof by the foreign court, no requirement shall be made for the furnishing of a further record of the proceeding in the foreign court, when the authenticated copy of the order of probate thereof recites that such will has been duly admitted to probate in accordance with the laws of such foreign state.

I move the adoption of Standard No. 70.

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

IVAN VAN STEENBERG, Kimball: I second the motion.

CHAIRMAN McCOWN: All those in favor please say "aye"; opposed the same. The Standard is adopted.

Thank you very much, Mr. Skultety.

SECRETARY-TREASURER TURNER: Mr. Chairman, if I may make a motion, I move that the House of Delegates request the Executive Council to authorize the re-publication of all standards. Our supply is very limited and I suggest that you request the Executive Council to order them re-published in a form suitable for inclusion in your desk book.

CHAIRMAN McCOWN: Do I hear a second?

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

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

The next item of business is the report of the Section on Corporations, Mr. Bert L. Overcash, Chairman. Is Mr. Overcash present?

SECRETARY-TREASURER TURNER: Mr. Chairman, I understand there has been no meeting of the Executive Committee of the Section. I therefore move that the present Executive Committee and present officers be continued until such time as the Section has had an opportunity to meet.

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

MR. VAN STEENBERG: I second the motion.

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

Next is the report of the Section on Tort Law, Mr. Robert D. Mullin of Omaha, Chairman. Mr. Mullin!

REPORT OF TORT LAW SECTION**Robert D. Mullin**

Mr. Chairman, Fellow Members of the House of Delegates: You will all recall that one year ago the Tort Section put on the program for our state convention. Since that time we have had no formal meeting of the Executive Committee or officers of the Section but in the absence of these formal meetings have stood by to answer any questions which might arise. This will not conclude my report; however, I do move that the present officers continue in office pending the further election of new officers.

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

RALPH E. SVOBODA, Omaha: I second the motion.

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

MR. MULLIN: Just one last thing. During the past 12 months I have attended four institutes, two of them insurance institutes and two of them plaintiff or N.A.C.C.A. institutes, and I mainly observed the teaching techniques that went on there. I do think that when the time comes for another session to be put on by our Tort Section we can come up with a very attractive and enticing program for the members, particularly built around what seems to me the new idea of trial vignettes where, within a space of two days, we could have doctors and trial lawyers go through a whip-lash case, a back case, a head injury case, and similar subjects. I think this might be attractive, and top it all off with probably some oral argument by eminent trial counsel. That concludes my report.

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

The next item is the report of the Section on Taxation, Mr. Richard Hunter, Chairman.

REPORT OF TAXATION SECTION**Richard E. Hunter**

Mr. Chairman, Members of the House: The Tax Section has had a number of meetings during the year, probably the most important one of which was the tax institute held in December of 1962. Some of you may recall that at the last bar association meeting the Tax Section reported to the House that unless the attendance improved considerably at the annual tax institutes, the Tax Section felt justified in discontinuing these because the cost and

the time and effort involved were such that they simply didn't feel that all this effort and expense was justified, based on the fact that the attendance was going down year after year.

I am happy to report that at the 1962 tax institute we had an attendance at both North Platte and Omaha which far exceeded anything they have had for about five or six years. We think perhaps we have hit upon a formula that may insure the success of these tax institutes, at least for a foreseeable period of time in the future, and we are going to do it again this year.

The dates of the 1963 institute are December 5 and 6 at Ogallala at the Elks Club, and December 12 and 13 here in Omaha at the Schimmel Inn at Indian Hills.

One of the things we did that we think has had a great bearing on the success of last year's institute was to take a particular problem in depth and try to develop it, rather than use the scatter gun approach with a large number of papers that we tried to use to appeal to a great number of people. So we are very pleased with the results we had last year and we hope that the thing will continue this year.

This year in May we have the American Bar Association regional meeting in Omaha again; and the Tax Section, together with the bar associations of the States of Iowa, Missouri, and Kansas, in addition to Nebraska, is sponsoring a two-day tax institute which will be held on May 7 and 8 in conjunction with this regional meeting.

On page 36 of your program you will find a report on the Joint Conference of Lawyers and Accountants which deals with the Great Plains Tax Institute which was held in Lincoln this last spring. This committee report recommends that the Bar Association continue its sponsorship. Of course this was the first year for this Great Plains Tax Institute, an institute held by the certified public accountants and the lawyers of Nebraska.

At our June meeting in Lincoln the Tax Section voted *not* to sponsor this meeting again in 1964, due to the fact that we had this A.B.A. regional meeting plus the December institute. Now I don't know whose responsibility this is, Mr. Chairman, to determine whether or not the Bar Association continues to sponsor this enterprise; but at least the Tax Section, I must report to you, is on record as being opposed to sponsoring this with the accountants. And I might add that this has provoked a rather violent argument in the Tax Section itself, but at least we are on record as being opposed to sponsoring this institute in any years in the future, at least as far as '64 is concerned, but I think the motion actually

goes to any other year. It was not a huge success as far as the Bar Association was concerned, but I think it was a success as far as the institute was concerned.

Our section does not elect officers until the last day of the December Tax Institute here in Omaha, so I have no elections to report. That concludes my report. I move adoption of the report.

CHAIRMAN McCOWN: Thank you, Mr. Hunter.

For the information of the group, I think probably Dick was not present at the time the House approved the report of the Committee on Cooperation with the Accountants on Wednesday. The report was approved by the House at that time. However, as I understand it, the sponsorship of the Great Plains Tax Institute does not contemplate a 1964 institute but a 1965 one.

I would suggest that any recommendation on the Great Plains Tax Institute be referred to the Executive Council in connection with any possible 1965 Great Plains Tax Institute.

MR. HUNTER: I so move, Mr. Chairman.

CHAIRMAN McCOWN: With that amendment, 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"; opposed the same. The motion is carried. Thank you, Dick.

Next is the report of the Section on Practice and Procedure, Mr. Warren K. Urbom, Chairman. I don't see Mr. Urbom in the room.

SECRETARY-TREASURER TURNER: Mr. Urbom telephoned that it was completely impossible for him to be here and asked me to make this report to the House.

REPORT OF PRACTICE AND PROCEDURE SECTION

The newly elected members of the Executive Committee of the Section are Harry B. Otis of Omaha, Harold Kaye of North Platte, James Knapp of Kearney. The officers of the Section for the coming year will be Warren Urbom, Chairman, Charles E. Wright, Vice Chairman, and Hammond McNish, Secretary. This is only for the record.

CHAIRMAN McCOWN: Thank you very much.

The next item is the report of the Junior Bar Section, Mr. Jerrold Strasheim, Chairman. Is there any member present?

SECRETARY-TREASURER TURNER: Here again I am to read the report.

CHAIRMAN McCOWN: This is a meeting of substitutes, I might add.

SECRETARY-TREASURER TURNER: Mr. Strasheim found it impossible to be here and he left this report with us:

REPORT OF JUNIOR BAR SECTION

On October 4 and 5, 1963, the Junior Bar Section presented its seventh annual institute for practicing attorneys sponsored in cooperation with the University of Nebraska College of Law.

The institute dealt with legislation passed in this year's session of the Nebraska Legislature. Included were lectures on recent bills passed dealing with criminal law, practice, procedure in the judiciary, workmen's compensation, probate trusts and guardianships, real estate, and loans, installment sales and credit. James Hewitt of Lincoln, David Downing of Superior, and John Gradwohl of Lincoln were primarily responsible for planning and conducting the clinic. As usual, Dean David Dow of the University of Nebraska College of Law was of great assistance.

On June 19, 20, and 21, 1963, the Junior Bar Section presented its second annual "Bridge the Gap" program. This program is designed for recent graduates from the law colleges and has as its objective assisting such graduates to bridge the gap between life as a student in the law colleges and life as a practicing attorney. This program is conducted in cooperation with the University of Nebraska College of Law, and with Creighton University School of Law. The agenda included the following subjects: court mechanics, negligence actions, collections, workmen's compensation, ethics and fees, corporations, probate administration, real property, divorce and adoption, and criminal law. The program was planned and conducted primarily through the efforts of Donald Endacott of Lincoln, Harold Rock of Omaha, and Dean David Dow of the University of Nebraska College of Law.

Distribution of the "Law Career" pamphlet has been continued in the hope that competent high school graduates will be attracted to the study of law.

The annual meeting of the Junior Bar Section was held on October 5, 1963, at which time Thomas Tye of Kearney, Nebraska, and Howard Moldenhauer of Omaha, Nebraska, were elected to the Executive Committee. They will replace Jerrold L. Strasheim and James M. Knapp, whose terms have expired.

On November 7, 1963, the present executive committee of the Junior Bar Section met to elect officers for the coming year. At that meeting James Hewitt was elected chairman, David Downing was elected vice-chairman, and Thomas Tye was elected secretary-treasurer.

Respectfully submitted,
Jerrold L. Strasheim, Chairman
Junior Bar Section
Nebraska State Bar Association

CHAIRMAN McCOWN: I assume your report includes a motion that the report be approved and filed.

SECRETARY-TREASURER TURNER: I so move.

IVAN VAN STEENBERG: I second the motion.

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

Gentlemen, may I express my personal thanks to all of you for remaining after the session on corporation law, and at this hour I express to each of you individually my own personal appreciation for bearing with me as a substitute for Herman. At the last moment I am sure you join with me in wishing Herman well, as we have officially done on Wednesday.

Is there any unfinished business before the House? If not, Mr. Wright, the House of Delegates wishes to recognize our new chairman, Mr. Floyd Wright, the new President of the Nebraska Bar Association who will, I am sure, be happy to accept a motion for adjournment.

PRESIDENT WRIGHT: Do I have such a motion?

RALPH E. SVOBODA, Omaha: I will make that motion.

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

PRESIDENT WRIGHT: The House of Delegates will therefore be adjourned.

[The Friday afternoon session of the House of Delegates adjourned sine die at four forty-five o'clock.]

NEBRASKA STATE BAR ASSOCIATION

THURSDAY MORNING SESSION

November 7, 1963

The sixty-fourth annual meeting of the Nebraska State Bar Association, convening at the Hotel Sheraton-Fontenelle, was called to order at ten-ten o'clock by chairman Hale McCown of Beatrice.

CHAIRMAN McCOWN: Gentlemen, will you take your seats, please. May I present to you Rabbi Myer S. Kripke of Beth El Synagogue of Omaha, who will present the opening invocation.

INVOCATION

Rabbi Myer S. Kripke

God of our Fathers, long before the ancestors of modern man had penetrated veils of ignorance to know Thy nature, men were certain their laws were Thy gifts. Pagans envisioned the gods from unseen divine realms offering man the laws of life. From ancient East to ancient West the heathen and the savage thanked their gods for rules of conduct in society and rules of worship. Shall we then not thank Thee, Lord, as indeed we do in our several faiths, shall we not thank Thee too for the vision of man aspiring to live by Thy law. Thou hast put into our hearts to seek goals and values befitting the children of God. Thou has enlightened our minds and inspirited our wills to seek truth and honor and justice and mercy. Then, guide us, Lord, to laws of justice ennobling man, and guide us, Lord, to that administration of the law which will raise man to a high peak of dignity, justice, freedom, and peace pleasing to Thee. Amen.

CHAIRMAN McCOWN: I am presiding this morning in view of the temporary speech disability of our President. I present to you at this time Mr. Leo Eisenstatt, President of the Omaha Bar Association, who will present the address of welcome to this Association. Mr. Leo Eisenstatt!

ADDRESS OF WELCOME

Leo Eisenstatt

Thank you, Hale. I don't know whether or not this will be an "address" but at least it will be a few remarks.

Mr. Chairman and Gentlemen: The lawyers of Omaha, bonded together in the Omaha Bar Association, once again most cordially

welcome you to our city for the purpose of carrying out your annual meeting.

Being members of this Association we, in a sense, are welcoming ourselves. As a separate subsidiary voluntary association, the Omaha Bar Association, on whose behalf I stand before you most humbly today, takes great pride in wishing this assembly God-speed in its deliberations. May your actions advance the cause of justice and improve the practice of law.

Under the order of the Supreme Court which integrated our Bar,¹ the purposes of the Association are set forth as follows:

For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar, there is hereby organized, created, and formed the Nebraska State Bar Association.

True to your trust, may the objectives so set forth be in substantial measure attained and advanced these next two days.

The 475 lawyers of our Association feel that the pace of modern life, with its breath-taking changes in the scientific and sociological fields, cannot tolerate a passive attitude by the members of the Bar toward their profession. Any cynical downgrading of the benefits of association activity or the lazy man's approach of "let the other fellow do the job" are luxuries we no longer can afford. Our profession stands in a precarious position, and unless we attend to the advancement of our own concerns, no one else will. We must continue to justify our existence to the public or in an irresistible manner the judgments of the market place and the public's demands for satisfactory service will reduce our stature and our very economic survival. I hope that the efforts of all attorneys in the State of Nebraska will be harnessed to the task of improving conditions so that we will in the ultimate better advance the cause of human justice and our own concerns.

Our Omaha association takes great pride in its forward-looking program. We have initiated, completed, or carried forward many excellent programs, enhancing our own interests, the interest of the bar, and the image of the lawyer in the mind of the public:

1. A Legal Aid Clinic has been established and is in active operation, supported by the contributions of our association, the

¹In re Integration of Nebraska State Bar Association, 133 Neb. 283, 275, N.W. 265 (1937).

Omaha Junior League, the National Legal Aid and Defenders Association, and United Community Services. It is the busiest law office in this county. It opened on September 15 and has already had 206 cases to process. I don't think any other office in the state can match that record.

2. Our Lawyer Referral Service has been in existence a little over a year and has advanced to an exciting level of activity and acceptance, and it is covered in detail in the program at page 31.

3. Our Public Service Committee has maintained and established contacts with the news media to the end that the message and activities of the lawyer are now, better than ever, being carried to the public.

4. Our *Manual on Economics* which includes a minimum fee schedule has provided our members with the tools of critical fiscal, financial, and work habits examination and provides a platform for significant financial improvement. In the first year of its operation it has had a significant effect and a beneficial impact upon our membership.

5. We are presently busily engaged with the clerks of the various courts in our community, the Omaha Legal Secretaries, and interested lawyers in the preparation of a law office manual for the new lawyer, the new legal secretary, and as an aid and checklist for the busy lawyer. We have had many interesting programs, including among others the status of electronic retrieval of legal information for the purpose of briefing and research.

We feel that we must not wait for events to overtake us and then run pell mell to catch up. We should anticipate and lead, and we should direct. No opportunity can be missed to make the practice of law more efficient, our lawyers more proficient, and our legal procedures in tune with the times and our environment.

Before concluding I might make a parenthetical reference to an address of welcome I heard in Dallas, Texas, at the American Bar Association by the Mayor. After lauding the virtues of Dallas he stated that if there was any service their city could render to the visiting lawyers they would be happy to provide it. He told of all the various services, and he said if by chance any of them should become involved with the police department and happened to need somebody to help them through the police station, they were free to call upon him. He said he wasn't going to get them out but he would bring a deck of cards and keep them happy while they were waiting.

Our Association stands ready to provide this and any other service to you gentlemen during your stay with us. If there is

anything we can do, feel free to call upon us. We will be happy to do what we can. And so, gentlemen, welcome to the City of Omaha once again, and may our efforts be attended with success. Thank you very much.

CHAIRMAN McCOWN: Thank you very much, Leo. I assure all of you that the welcome of the Omaha Bar Association is, as usual, as traditionally warm as their welcome here, and it continues throughout the convention, I can assure you.

In response we are asking Lester A. Danielson to respond on behalf of this Association. Lester Danielson!

RESPONSE TO WELCOME

Lester A. Danielson

Mr. President, Mr. Eisenstatt, and Fellow Members of the Nebraska State Bar Association: I am pleased to have this opportunity to respond to the warm words of welcome which Mr. Eisenstatt has spoken on behalf of the Omaha Bar Association. We are once again your debtor for the hospitality which is extended to us, as we have been so many times before. On behalf of the visiting members of the Association I express our gratitude for the welcome we have received.

Today, however, I find a further pleasure because I practice in Scottsbluff; and a member of the Scottsbluff Bar, Floyd Wright, is the new President of our Association and we feel honored by his recognition.

CHAIRMAN McCOWN: Gentlemen, the bylaws of this Association provide for an annual address by the President. On this occasion our President, George A. Healey, in view of his temporary speech disability, has requested his son, Patrick Healey, to present the President's address. I am pleased to present to you, for his father, Patrick Healey of Lincoln.

ADDRESS OF PRESIDENT

George A. Healey

PATRICK HEALEY: Thank you, Hale. As Hale has mentioned, my father has had some throat surgery which has temporarily impaired his speech. He has made a lot of progress in regaining it but wasn't up to giving the two-hour speech that he had prepared for delivery here. The first twenty pages or so are simply telling you about his operation. I think I will save that for a little later on. I will go right into the speech, then:

I suppose no better function can be served by the required address of the President of this Association than to review the accomplishments of the Bar Association during the past year and perhaps to indicate programs that need yet to be attained. This, therefore, I intend to do.

I am pleased to inform you that during the past year the Committee on Credentials and Admissions of the American Bar Association allowed Nebraska another delegate in the House of Delegates of the American Bar Association. It is gratifying to note that the additional delegate was made possible by the large number of Nebraska Bar Association members who are also members of the American Bar Association.

In this connection I should here note that the American Bar Association is greatly increasing its facilities for the aiding of and cooperation with state and local bar associations in many fields, although I will not go into detail here regarding this assistance and cooperation.

Rather, let us turn again to our own interests at this sixty-fourth annual meeting. We are here to look ahead, but to do that we will look briefly into the immediate past. The Nebraska Bar, at least during the last three decades, has been notably given over to the principle of continuing legal education, even before that nomenclature became a common term in bar circles. The various bar sections, as they are known today, developed over a period of time. Today we have, according to our Bylaws, six of these sections, one of which takes over a portion of each annual meeting and ordinarily the midyear meeting held in early summer. At the midyear meeting held in May, the Section on Real Estate, Probate, and Trust Law took over most of the morning session with a very educational program under the direction of George A. Skultety, chairman. In the afternoon of that same day the other sections of the Association met for their separate business.

In the early part of May, 1963, a two and one-half day tax clinic was presented at the Nebraska Center for Continuing Education. It was the first program sponsored jointly by the Nebraska State Bar Association, Nebraska Society of Certified Public Accountants, and the Business Administration and Law Colleges of the University of Nebraska. I am certain that a similar joint effort will be made in the future, as indicated by the Annual Institute on Federal Taxation to be jointly sponsored by the same entities and to be held at Ogallala and Omaha in December. A similar Institute by this Bar Association was given in December, 1962.

The Junior Bar Section staged a two-day clinic on new legisla-

tion at the University of Nebraska in Lincoln. It went into an extensive study of the various important new acts of the last legislative session.

You will observe from looking at your program that the Thursday afternoon and Friday sessions of this Association are conducted by the Section on Corporation Law, and will be highly informative sessions in which a lot of time and effort has been put forth by the members of that section.

Since the American Bar Association created a General Practice Section, I commend the idea of forming such a section in this Association and the giving of study as to the feasibility of such a plan.

I would be amiss to fail to mention Law Day 1963. This first day of May each year becomes a larger enterprise of the state and local associations. This past year was no exception, and I should not fail to mention the splendid efforts of the Omaha Bar in conducting Law Day 1963, as well as the promotion of this Day for Law by the various local associations in cooperation with the state Association. This was accomplished in the various counties by speeches, panel discussions by judges and lawyers to various groups, and by radio, television, and newspaper coverage, as well as a Proclamation by the Governor on Law Day, which was televised.

As you know, under the reign of my predecessor, the Honorable Ralph E. Svoboda, a constitutional amendment for the Nebraska Merit Plan of Judicial Selection was started and accomplished. At the convening of the 1963 legislature it was necessary to seek legislation giving effect to this plan. Flavel Wright and his committee worked long and tirelessly to obtain both the constitutional amendment and the needed legislation. The bar of Nebraska is greatly appreciative of the efforts of these lawyers. Recognition for this was given to this Association by the American Bar Association in August of this year when, in the Award of Merit Contest based on the successful campaign for the adoption of the Merit Plan of Judicial Selection, an honorable mention plaque was given to this Association.

Next I would like to make mention of some trust funds that have been made available by the efforts of some lawyers:

First is the Roscoe Pound Fund under the control of the University of Nebraska Foundation. This is a fund established years ago by the donations of lawyers to honor Roscoe Pound and provides, among other things, that it may be used, in part, to pay certain scholarships to law students. It is administered by the University of Nebraska Foundation.

Another trust fund of interest is the Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund. This was created by a provision in Mr. Gross' will, and by other means. It is most interesting to note the following clause in the will of that eminent trial lawyer:

I hereby give and bequeath to the Nebraska State Bar Association the sum of Twenty-Five Thousand Dollars (\$25,000.00), said fund to be administered according to any plan set up by the governing body of said Association because I have an abiding conviction that they are and will be men of character, integrity, and fidelity, and will see that the fund is prudently and justly administered. The use of said fund, which may include either principal or income or both, shall be for charitable and welfare purposes of active practicing Nebraska lawyers, their wives, widows and children.

In this connection, while it has nothing to do with this bequest, as a matter of public record I would like to state that in nearly forty years of practice I have never been approached by an opposition lawyer to sacrifice my client, nor during the thousands of trials in which I have been engaged have I ever had the least suspicion of or evidence that the opposition tampered with the jury, nor have I ever experienced a dishonest judge who sought or received from me any money or favors, and although many times their thinking did not agree with mine or the interest of my client, in not one instance did I ever think or even suspicion that they did not express their honest belief and judgment.

It should be the aim of this Association and its members to expand the corpus of such trust funds by means of bequests in wills, or inter vivos gifts from such lawyers as are amply able to do so.

The legal profession is a profession highly capable of leadership and with a great responsibility to the public which it serves. The Association does closely follow proposed legislation, and its various committees are quite busy during a legislative session. As an example, a bill was heard by committee, in this special session, for a constitutional amendment which would have required the Supreme Court to give advisory opinions on the constitutionality of proposed legislation. The Executive Council of the Association was quickly polled and it decided such a bill should be opposed for the following reasons, among others: In the first place the Supreme Court has enough to do to keep up with its present substantial work load. Above this, however, is the objection that such advisory opinions would not arise from a justiciable controversy and might be given without the benefit of legal advocates on opposite sides of the question presented, so that an opinion could

be given without adequate consideration, research, and the presentation of adverse arguments.

Also a further reason that was obvious was that such a constitutional amendment would tend to break down the separation of powers that does exist, at least, in our state government. The Association opposed this bill and it was killed in committee, and later an attempt to revive it on the floor was also defeated.

I further note from some of the various committee reports that recommendations have been made that the Association hire a counsel or other personnel to administer and coordinate the various activities of the Association. This, I believe, is a matter that might be given thought and study by the future administration so that such machinery might be available at the next legislative session.

In conclusion I wish to state that I have very much enjoyed being your Bar Association President during the past year, and I trust that my services have contributed something to the Association and to the legal profession. For this year, I thank you.

CHAIRMAN McCOWN: Gentlemen, the next order of business is the report of the Secretary-Treasurer of this Association, George H. Turner. Mr. Turner!

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. President and Members of the Association: The books of the Association have been audited for the year closing with August 31, which is the end of our fiscal year, by the firm of Peat, Marwick, Mitchell & Company of Lincoln. They report that the accounts of the Association are in good order.

Our receipts during the year exceeded expenditures, but only very slightly; I think by \$193. The big expense of the Association year was, of course, our Merit Plan campaign. The Association spent between \$8,000 and \$9,000 on that activity, which I think you will all agree was well worth while.

The total receipts for the year were \$51,469; and the total expenses were \$51,276; leaving an excess of receipts over disbursements, as I told you, of \$193. I think we were very fortunate to even come out that well, considering the rather large unusual expenses that we have had.

A detailed statement of all receipts and disbursements has been submitted to the Executive Council and approved, and will be published in the proceedings of this annual meeting.

CHAIRMAN McCOWN: Mr. Turner is also making the report of the Executive Council on behalf of Mr. Healey, the next item of business which follows—the report of the Executive Council by Mr. George Turner.

REPORT OF EXECUTIVE COUNCIL

George H. Turner

All I can report on behalf of the Executive Council is that they were dedicated and diligent actors all during the year. They held approximately four meetings to transact the business of the Association and concluded what we feel is a very successful year.

CHAIRMAN McCOWN: Thank you very much, George.

The next two items on your program I am also substituting for. I think I have become the essential substitute at this convention. I am substituting in place of Mr. Healey this morning; yesterday I substituted for Herman Ginsburg as chairman of the House of Delegates; and this morning I am also substituting for Jack Wilson, to make the report of the American Bar Association Delegates.

I am somewhat reminded of the story of the two confidence men who saw the evangelist in the town in his tent having a very large crowd and a very good collection. They decided it would be quite appropriate that they go into the evangelistic campaign. Unfortunately one of them could not read, and the other one, who could read, did not have a very good voice. Consequently they arranged that when it came time for the Scripture lesson at their tent meeting the one would read the Scripture and whisper it to the one with the voice who would then say the Scripture aloud. So it went something like this:

"The Lord spake unto Moses and said, (whisper)

"AND THE LORD SPAKE UNTO MOSES AND SAID . . .

"Move your thumb!" (whisper)

"MOVE YOUR THUMB!"

"Now you've played hell!" (whisper)

"NOW YOU'VE PLAYED HELL!"

I feel somewhat in that position this morning.

REPORT OF AMERICAN BAR ASSOCIATION DELEGATES

Hale McCown

As indicated in Mr. Healey's speech, the Nebraska Bar Association has obtained an additional delegate this past year to the

American Bar Association and I attended the first House of Delegates meeting in February in New Orleans.

The House of Delegates, as you know, consists of 275 members. Due to our membership we are now entitled to two delegates, and this year therefore had the two. Mr. Jack Wilson has been our delegate for a number of years, I believe for four years previously.

I think a full report is not appropriate at this time other than to indicate that the program of the American Bar Association is moving more and more to the area of cooperation with local associations, feeling that many problems are those which offer solutions primarily at the local level and that the American Bar Association is the organization which can most effectively coordinate the activities of all associations of that kind.

I think one of the things you might be interested in is the dedication of the new American Bar Center wing which was dedicated during the convention in August at the American Bar Center on the University of Chicago campus on the Midway in Chicago. A very impressive program attended by a number of dignitaries from not only our own legal and professional field of this country, but by many foreign countries as well and their representatives of the profession.

As I think most of you know, the American Bar Center has facilities for individual lawyers for research, for answers to programs and problems, that many of you, I think, could take more effective advantage of if you would use them. The facilities are there. They are available for your use and for members of the American Bar Association, and I think it would certainly be appropriate if more effective use and utilization of the programs offered by the American Bar Association was made by members of this association as well.

The membership of the American Bar Association, incidentally, has reached an all-time high. I don't see him in the audience this morning, but Dave Peshkin of our neighboring State of Iowa has been Membership Chairman of the American Bar Association for the past year and has been reappointed and has done a terrific job in connection with membership. I see Dave is here in the audience. Dave, would you stand up so we can say "hello" to our neighbor from Iowa.

Turning now to the report of our House of Delegates, I believe I can make that fairly short.

REPORT OF HOUSE OF DELEGATES

Hale McCown

The House of Delegates met Wednesday, November 6. The statement of the President of the Association was presented, together with the report of the Secretary-Treasurer.

The reports of all committees were approved, with the exception of the report of the Committee on Cooperation with Law Schools and the report of the Committee on Federal Rules of Procedure, which were deferred with no action taken.

The Special Committee on the Uniform Commercial Code, Daniel Stubbs of Alliance, chairman, was discharged with the appreciation and thanks of the Association, its work having been successfully concluded by the adoption of the Uniform Commercial Code at the last legislative session.

The Special Committee on the Merit Plan of Judicial Selection, Flavel A. Wright of Lincoln, chairman, was discharged with the deep appreciation and thanks of this Association for a task well done. The Merit Plan was adopted by the voters of Nebraska last year, as you all know, by constitutional amendment and implemented through the legislative session of the past year. I might add my own personal thanks to Flav for one of the most terrific jobs that has been done by any member of this Association for a long, long time in getting that Merit Plan successfully adopted.

All other special committees were continued for another year.

The House of Delegates will meet again on Friday, November 8, at 4:00 P.M., immediately following the final session of the Institute, at which time the reports of the sections will be received and consideration given to any other business.

I have a personal comment which I desire to make at this time with respect to the House of Delegates which concerned me somewhat. As I say, I was called in to substitute only a few days before, due to Herman Ginsburg's absence in the hospital and his inability to be present at the meeting of the House of Delegates.

Our House of Delegates consists of fifty-three members plus the ex officio members, the Executive Council, etc. Yesterday's session had 32 of those elected delegates present at the House of Delegates meeting at the largest point.

I am concerned about whether or not the members of this Association are sufficiently concerned with their own policy-making body that the elected members of that body do not even bother to attend the meeting of the House of Delegates.

As you all know, our plan for the House of Delegates was adopted only recently, a few years ago, with the thought in mind that there ought to be a smaller group of members of this Association who would give thorough consideration to the affairs and business of the Association and to the policy-making part of the business of the Association. I think we all ought to be concerned with the method of operation as to whether or not the Association and the members of its House of Delegates have reached a point at which the business and concerns of the Association are not of sufficient importance. True, I recognize that there were no controversial issues of any sort arising, but none-the-less I think it is a matter of concern and ought to be a matter of concern to every member of this Association.

At this time we will have the report of the Judicial Council, the Honorable Edward F. Carter, Supreme Court of Nebraska, Chairman. Judge Carter!

REPORT OF JUDICIAL COUNCIL

Honorable Edward F. Carter

Mr. President, Mr. McCown, and Members of the Association: The Judicial Council submitted twenty bills to the 1963 session of the legislature. They were finally acted on by the Council on January 5, 1963. They are designated as L.B. 270 to L.B. 285 inclusive, and L.B. 435 to L.B. 438 inclusive. All were enacted into law by the legislature.

On June 12, 1963, the Council met for the purpose of nominating lawyers to serve on the several nominating commissions in districts where an insufficient number of nominations by petition had been made. A full slate of candidates was procured.

I shall not detail the nature of the bills recommended by the Council for enactment into law. This does not appear to be the time or place to discuss these bills. They are, of course, bills dealing with judicial procedure which purport to simplify or clarify existing procedures.

Ordinarily a lawyer is indifferent to existing procedural laws until he becomes involved in a matter which invokes their use. He then discovers any defects in them. It is when these situations arise that we ask the lawyers to call the attention of the Judicial Council to the defective or unclear statute. Only in this way will the matter reach the attention of the Council.

A few lawyers make it a point to send in matters which they believe require the attention of the Council. We again urge all

lawyers to advise us of defective procedural statutes. Correction in time may avoid serious difficulties in future proceedings.

Lawyers owe something to their profession as well as to their clients. They have a duty to devote some of their time and energy to the improvement of the administration of justice. While I do not like to assume a pedagogic attitude, it would seem that the lawyer should feel a duty on his part to make this contribution to a better judicial system. We shall never attain perfection in this field but we can improve it in the trying.

Since 1939 we have had a Judicial Council. It was established as a clearing house for the consideration of new ideas and the improvement of the old in procedural matters. Many lawyers and judges have devoted time and effort as members of the Judicial Council without thought of monetary compensation. The lawyers as a group appear to be somewhat indifferent to the opportunities for service in the area of procedural law. I again call upon you to more actively participate in the never-ending job of procedural improvement.

I would like to take this opportunity to personally commend the other members of the Judicial Council who give their best efforts and valuable time to the carrying on of this work. Members of the bar who have served on subcommittees and have done research on specific problems should be accorded the gratitude of the bar of this state for their most valuable contributions to the improvement of legal procedure.

In closing this report may I impress upon you the necessity for sending in your suggestions for the improvement of our procedural law as contained in the statutes of this state. I cannot honestly say that we are soliciting work but I can say for the members of the Judicial Council that they seek opportunity to improve the administration of justice in this state.

CHAIRMAN McCOWN: May I take this opportunity on behalf of our President, Mr. Healey, to express the thanks of this Association to Judge Carter in particular and to all members of the Council for the task that they are doing on the Judicial Council.

As I am sure most of you know, Judge Carter has served as chairman of the Judicial Council for a number of years. They do an immense amount of work. They welcome all the suggestions that any of you may have with respect to procedural reform, and the results they have attained in the legislature are literally phenomenal. So far as I know, no bill approved or sponsored by the Judicial Council has ever been killed; all have been passed, to the best of my knowledge. I think it is largely due to the ef-

fective work of that committee and to Judge Carter as its chairman.

The next item of business is the announcement as to group life insurance. Mr. George Bodenmiller will make that announcement.

ANNOUNCEMENT AS TO GROUP LIFE INSURANCE

George Bodenmiller

I know that you are not interested in a lot of statistics and details, but a few items here would be of interest, I am sure, to the general membership of the Bar.

Since the group life insurance plan was installed, underwritten by the John Hancock in 1957, we have paid in death claims, \$480,000; premiums received, approximately \$550,000; and dividends refunded to members, something over \$30,000.

This year, to date, we have received \$123,923 in premium, and claims to date. Our contract year ends on December 1 so we are hoping there won't be any more of you good brothers leaving us. Nine of your members have passed away for a total of \$90,000 in claims to date.

One other thing, with the cooperation of your genial Executive Director, Mr. Turner, and the help of the Sheraton Hotel, we were able to bring you this American Sampler display that you see here to the left of the rostrum. I think you might be interested in a little bit of background. During the aftermath of World War II a subtle and disturbing influence threatened to dull our national spirit. While we had achieved victory and secured peace, we seemed to be losing a sense of perspective about the very values we had sacrificed so much to preserve. Concerned by the drift toward apathy and listlessness, many companies and organizations joined forces in an effort to rekindle an awareness of both the opportunities and obligations of a free people.

At the forefront of this movement was the American Heritage Foundation. In 1947 it started the Freedom Train on a 37,000-mile tour of some 327 cities to generate a new appreciation for and understanding of the principles by which our democratic process is guided.

That same year John Hancock Mutual Life Insurance Company initiated its historical series, the majority of which are represented in this collection. The purpose of the series was to remind people of their stake in America and to encourage them to think about the independence and enterprise that made their nation great.

Now to create this gallery of persons, places, and events, artists were commissioned from among top ranking commercial illustrators and artists, many of whose works hang in museums across the country.

This grouping of seventeen paintings is only part of sixty-six. These are reproductions. The oil originals will be on display at the Nebraska State Fair next September in conjunction with the opening of the new Fine Arts Building at the Fair. Some of the members have asked whether these are typical. Yes. And I think of interest to your group (some of which are here and some are in the big collection of sixty-six) is Noah Webster, Theodore Roosevelt, Thomas Jefferson, The Jury, Abe Lincoln, The Judge, Ben Franklin, Woodrow Wilson, Samuel Adams, and of course the late Chief Justice Charles Evans Hughes.

We invite you to view these, and if you would like a reprint without charge, just sign a card and leave it at the table. Thank you.

The Executive Council has asked, and the company has agreed, to open the enrollment on the group life insurance program for the month of November, so if you haven't joined, you have received a brochure in the mail and we have enrollment cards back at the table. It's a bargain. Hope you take advantage of it. That is without medical up to age fifty, and with evidence of insurability after age fifty. Thank you.

CHAIRMAN McCOWN: Thank you very much, Mr. Boden-miller.

The announcement of the officers of this Association will be made by Mr. George Turner, Secretary.

SECRETARY-TREASURER TURNER: Mr. President, one other announcement. The luncheon of the Association will be held in this room about twelve-fifteen. It helps the management of this hotel greatly if you purchase your ticket early.

The same is true for the annual dinner tonight. Tickets are on sale at the registration desk. Our speaker this noon is Edward Wright of Little Rock, the Chairman of the House of Delegates of the American Bar; and we are greatly honored to have as our guest speaker this evening Justice Charles Whittaker of Kansas City, retired from the Supreme Court of the United States. I am sure none of you will want to miss these two events.

ANNOUNCEMENT OF NEW OFFICERS**George H. Turner**

Now as to the new officers of the Association, under our Constitution and Bylaws it is the duty of the Executive Council to make nominations ninety days prior to this annual meeting and to notify all members of the nominations thus made. Within a period following that, petition nominations may be made in opposition if so desired. In the history of our Association we have never had petition nominations.

Your Executive Council this year, at its meeting in August, recognized two of the most dedicated members of our profession. I think no one has given more in the way of service, particularly in the field of continuing legal education, than the nominee for President-Elect, Harry B. Cohen of Omaha; and as member of the Executive Council At Large, Tracy J. Peycke, also of Omaha, who contributed so much to the campaign for the approval of the Merit Plan of Judicial Selection.

CHAIRMAN McCOWN: The report of the Committee on Memorials, the Honorable E. B. Chappell, chairman, will be given by Mr. Robert Beatty of North Platte. Mr. Beatty!

REPORT OF COMMITTEE ON MEMORIALS**Robert Beatty**

Mr. Chairman, Gentlemen of the Nebraska State Bar Association: I am substituting for Judge Chappell on account of a health indisposition that exists at the present time.

The Nebraska State Bar Association has a solemn and sincere memorial tradition. We meet again to perpetuate that tradition for ourselves and posterity by recording the names and honoring the lives and achievements of those members whose earthly life has been ended by death since we last met. In doing so we record the following names:

Fred W. Anheuser, Omaha
Johnson G. Beam, Lincoln
Darwin J. Bone, Sarasota, Florida
Hugh J. Boyle, Omaha
John O. Brown, Wahoo
Harland A. Bryant, Wahoo
Jean B. Cain, Falls City
Harold E. Coates, Abilene, Texas
James P. Cody, Racine, Wisconsin
Raymond T. Coffey, Omaha

A. O. Colman, Lincoln
Nathan H. Cornell, Schuyler
Edward J. Cranny, Omaha
Raymond M. Crossman, Omaha
H. D. Curtiss, Bassett
Paul H. Eaton, Broadwater
Eugene F. Fitzgerald, Omaha
James J. Fitzgerald, Omaha
James L. Flood, Omaha
Glen T. Gibson, Gibbon
Harry S. Grimminger, Grand Island
John Gumb, Jr., Fremont
Alfred H. Hansen, Omaha
Louis A. Holmes, Grand Island
Harry H. Johnsen, Omaha
Leslie F. Johnson, Omaha
Fred C. Laird, Fremont
William H. Lamme, Fremont
James D. Little, Brea, California
Harry K. Livingston, Tecumseh
James R. Lynch, Bethesda, Maryland
John F. MacKenzie, Omaha
Charles H. Marley, Omaha
Archie D. Marvel, Hastings
Henry W. Peterson, Omaha
Otto F. Reis, Omaha
H. E. Sackett, Beatrice
M. R. Shrader, Lincoln
Mark Simons, San Jose, California
John A. Skiles, Arlington, Virginia
Malcolm R. Smith, South Sioux City
Joseph E. Strawn, Papillion
August Wagner, Columbus
John D. Wear, Omaha
William M. Whelan, Sr., Hastings
Richard O. Williams, Lincoln
Joseph S. Wishart, Lincoln

We realize full well that no mere words, spoken or written here, can separately and adequately recount the individual lives and achievements of these members who were so recently our valued and respected friends and associates. Their lives and sacrifices while living are too intangible to recall except by the Divine and those personally related and beloved by them. Many of these lawyers enjoyed great distinction in the public service and the

practice of their profession. Others served more humbly but all served diligently and honorably.

In memory of the lives and achievements of all of them, we recall that they maintained at all times an honorable and useful position in our great and exacting profession and gave their full measure of duty and devotion to their clients, the courts, and their communities. The death of such persons is always an occasion for grief and regret, not only to those related to or closely associated with them while living, but always in some measure to those who knew them only by association and general esteem. The lives and achievements of such persons are not forever lost because their influence still persists in the contributions they unsparingly gave to better administration of laws, the protection of individual rights, the preservation of good and honest government and the dearly prized American ideals of Freedom.

Now I suggest that we rise with bowed heads and contribute silent prayer to the souls of our departed brothers.

[Silent prayer.]

I thank you very much.

CHAIRMAN McCOWN: Thank you, Mr. Beatty.

Your attention is called to the fact that the Institute on Corporation Law commences in this room at two o'clock this afternoon.

George, do you have additional announcements?

SECRETARY-TREASURER TURNER: I think most of you know it, those of you, at least, who have been through the registration desk; but through the courtesy of the C. T. Corporation we have a very comprehensive analysis of the new corporation law as compared with the old law. They have supplied us, without charge, a sufficient number to supply every lawyer in Nebraska. I urge you to pick up your own copy as well as a copy of the outlines of the speakers. There are plenty of these C. T. Corporation pamphlets available, so if you have some brothers at the bar at home who were unable to attend this meeting, please feel free to take a sufficient number with you to supply your entire bar.

CHAIRMAN McCOWN: Thank you, George.

Now I believe I have completed my duties as substitute. I suggest that we now acknowledge the chairman of this meeting, Mr. George A. Healey, and be dismissed at the same time. George!

[The Thursday morning session adjourned at eleven o'clock.]

ASSOCIATION LUNCHEON

November 7, 1963

[The luncheon session was presided over by Secretary-Treasurer George Turner.]

SECRETARY-TREASURER TURNER: Gentlemen, as you know, this particular gathering is a Bar Association gathering as distinguished from the school alumni meetings which will be held tomorrow. Consequently at this meeting we recognize our visiting Bar officials from neighboring states. I would like very much to introduce them to you at this time.

On my far left is Bill Sahr, the Secretary of the South Dakota Bar.

With him is Bob Driscoll, the President of the South Dakota Bar.

Next is Wiley Mayne of Sioux City, the President of the Iowa Bar.

At my far right is a man who has probably taken more money away from people joining the American Bar Association than anyone in America, the chairman of the Membership Committee of the American Bar Association, Dave Peshkin.

Next is a gentleman who, if he comes one more year, we are going to start charging him dues—Roy Willy. He used to live in Sioux Falls.

Jerry Housel, President of the Wyoming Bar.

And of course our distinguished President, George Healey, of the Lincoln Bar.

Purposely omitted from the table this noon was our very distinguished dinner speaker tonight because we knew you would meet him at that time, but would you extend your greeting, please, to Justice Charles Whittaker, recently retired from the Supreme Court of the United States.

[The audience arose and applauded.]

I am not very good at flowery introductions, but it does give me more than ordinary pleasure to bring to you our speaker of today. He has been my close friend for more years than either he or I like to remember. He is a lawyer from Little Rock, Arkansas, and the very distinguished Chairman of the House of Delegates of the American Bar Association, Ed Wright.

ADDRESS

Honorable Edward L. Wright

Mr. Chairman, Mr. President, Mr. Justice Whittaker, Other Distinguished Guests, Ladies and Gentlemen: George said it gave him more than ordinary pleasure; I'm glad he didn't introduce me as a more than ordinary lawyer.

I bring you greetings from 115,000 of your brethren of the American Bar Association and will give you a brief proprietary report of the group of which a high percentage of you are members.

The American Bar Association is unique in many respects. It is the largest association, voluntary or compulsory of lawyers in the world. Its more than 115,000 members have doubled the membership of less than ten years ago. It owns, and has fully paid for, bricks and mortar in Chicago on the Midway of the 1893 Chicago World's Fair, which houses more than 150 full-time working people.

The American Bar Association is in reality a trio: The American Bar Association, a voluntary group of lawyers; the American Bar Foundation, which is engaged exclusively in research; and the American Bar Association Endowment, a not-for-profit organization to which I will make brief reference later.

The American Bar Foundation has more than 100 full-time employees engaged exclusively in noncompetitive legal research. We do not duplicate the libraries of the great schools or of the appellate courts, although our books parallel them. We have there the greatest collection of unpublished legal writings ever assembled in the world. But they do not gather dust. They are put to practical usage. The American Bar Foundation is at the disposal of every member of the American Bar Association and at the disposal of every organized bar. Put it to your practical use.

The American Bar Endowment, a not-for-profit corporation, is the administrator of the world's largest group insurance program. As I came in the luncheon hall, I saw the advertisement of group insurance in the corridor. The American Bar Association, which pioneered in legal group insurance writings, is not in competition with local bar associations. What we have to offer is supplementary and complementary. More than 52 per cent of the more than 115,000 members of the American Bar Association are members of the group insurance program. We have in force more than \$300,000,000 of life insurance, and disability aggregating many millions of dollars per month. For example, for the benefit of the young men in the room, I cite the fact that a gentleman under the age of thirty may purchase \$10,000 worth of life insurance with

double indemnity for the total sum of \$22.00 per year. Disability insurance is equally cheap.

The Washington office of the American Bar Association is staffed by ten professionals and renders a work little known to the rank and file of the American Bar. This organization reads, screens, classifies, and indexes more than 6,000 of the 20,000 bills introduced at each session of the legislature. It alerts all members of the organized bar individually and collectively with measures which are of public interest to lawyers as such in contradistinction to lawyers as citizens.

Of paramount importance in the Congress today to lawyers as such are two measures, one of which has been sponsored by your own Senator Roman L. Hruska, the Indigent Defendants Bill; and secondly, the increase in pay for members of the federal judiciary and of the Congress.

I wish to plead with every lawyer in this room and with the Nebraska State Bar Association as an entity to support actively both of those measures. The Indigent Defendants Bill—there are several of equal import—would, for the first time, furnish to those accused of crime unable to employ counsel money available for the preparation and investigation of their defense and to pay counsel. The American Bar Association is not interested in furthering the economic advancement of lawyers as such in the defense of criminals, but it is a historic fact that every year millions of man hours are devoted free for the defense of those accused of crime. These bills, any one of which is acceptable, would in effect reimburse the lawyer for his time on a purely overhead basis.

I make a special plea for support of the legislation in Congress which would increase the pay of district judges from the current level of \$22,500 a year to \$35,000 a year. It is interesting to note that the Randall report, the committee appointed by President Kennedy, recommended that district judges receive \$40,000 a year, and the 1954 bipartisan commission appointed by President Eisenhower recommended a like amount. So the bill in Congress today would increase federal district judges \$12,500 a year but below the level that a bipartisan, non-partisan commission has recommended and below the level that a commission of nearly ten years ago thought was reasonable.

In like manner, if it raised the salary of circuit judges, and I do not speak of the chief judge here but simply the circuit judges, the chief judge would get \$500.00 more, from the present level of \$25,500 a year to \$40,000 a year. In like manner the Randall report

and the bipartisan report of 1954 recommended increases of this amount.

The Supreme Court of the United States would be increased from the present level of \$35,000 a year to \$50,000, less than recommended in the Randall report.

Congressmen and Senators would be raised from \$22,500 a year, their present salary, to \$35,000 a year.

Judges, by the very nature of their office, by the discretion that they must maintain at all times in public position, cannot be proponents for pay raises in their own behalf. Adverting to the personal, there are municipal judges in the United States today who are receiving more salary per year than the chief judges of the courts of appeal of the United States. There are probate judges in the United States some of whom are making \$10,000 a year more than federal district judges; and we have appellate judges of state courts who are making more than members of the Supreme Court of the United States.

No one can articulate a just plea for raises except the lawyers on behalf of the judges. In like manner, members of Congress are in a very difficult position of self-encirclement, of being the proponents of a measure which they will vote on to increase their own salaries. They ordinarily are not timid souls on their own behalf when it comes to election, but they are shrinking violets on this subject, and the bar of America is the only organized voice that can muster any popular support in favor of the pay increases.

There can be no question on a matter of judgment, statistics, inflation, or record of the proposition that our judiciary is underpaid. If we expect to hold those who are in the judiciary and expect to attract men worthy to wear the ermine, we must see that they have a modest competence while they are on the bench and an assurance of decency in retirement.

I was interviewed briefly yesterday by a gentleman from the *World-Herald*, and this morning's paper omitted entirely everything I said on behalf of the judiciary. I do not retract or diminish my words on behalf of Congress. The American Bar Association is solidly on record in favor of this measure.

I ask, and I have gone about the country asking individual lawyers to write Congressman Morris Udall of Arizona and Congressman Joel Broyhill of Virginia, the two bipartisan sponsors of this measure, of their support. We ask every segment of the organized bar to go on record in favor of the measure, and to date there has not been a declination.

The American Bar Association historically has taken the lead in the improvement of the mechanics and the finances of the judiciary for more than fifty years. Without our leadership, articulate and intelligent, this measure will not pass. The judges before whom we practice cannot speak for themselves. It is up to us to carry the torch.

Mr. Secretary, my dear friend of many, many years, and that is not a cliché but a fact, I know when the clock has run, and it has run, but I am going to tell one story in concluding.

Nebraska has a very distinguished record in the American Bar Association with John Wilson, Hale McCown, and George Turner composing your representation to the House of Delegates; with Clarence Davis, and many before them blazing the way. You have an unusually fine percentage of all of your lawyers in the American Bar. That being true, I think it behooves me to follow the advice of the young English barrister who was laboring an obvious point.

An old barrister waiting to take his turn to make argument in the next case passed a note to him and said, "Shut up! The old 'bahstard' is with you." Thank you.

SECRETARY-TREASURER TURNER: Ed, on behalf of the Association, our sincere thanks.

Before we recess this meeting to the excellent program which follows this afternoon, there is an announcement to be made by a past President, Ralph Svoboda.

RALPH SVOBODA, Omaha: Thank you, George.

We are in the process of forming the Nebraska State Bar Foundation. If you see me running around here it is because I am getting these articles signed. I have to have a Directors' meeting, and that meeting will be held in George Healey's suite, Room 417, at two o'clock. I want the following to report there so we can get this corporation under way: Laurens Williams, Anan Raymond, Harvey M. Johnsen, John J. Wilson (he will necessarily be absent), Julius D. Cronin, George B. Hastings, Hale McCown, Flavel A. Wright, Barton H. Kuhns, Paul L. Martin.

SECRETARY-TREASURER TURNER: Gentlemen, we are in recess.

INSTITUTE ON CORPORATION LAW

THURSDAY AFTERNOON SESSION

November 7, 1963

The Institute on Corporation Law was called to order at two o'clock by Howard H. Moldenhauer of Omaha.

CHAIRMAN MOLDENHAUER: Gentlemen, the chairman this afternoon, Mr. John Mason, will be a little late so we will go ahead and start.

As all of you are aware, the legislature passed a new Nebraska Business Corporation Act which went into effect last month, and it is in part because of this that the subject for this year's Bar meeting is designated as "Corporation Law." Generally, we will have four people speak about the new act, and we will have four other speakers, who are really experts in their various fields, who will speak on related subjects. Some will report on the new act, some will get into other corporate aspects. I hope you will find that this is a very practical institute and that it will cover a lot of problems which you may run into from day to day.

I would make one other comment at this time about tomorrow morning in particular. The session will start a little early, at nine-fifteen o'clock. It is earlier than usual but we are operating on a pretty tight schedule—I hope that is all that is tight. Although the subject is the "Farm and Ranch Corporation" I think it will interest the city lawyers too because the speaker is really an expert in this field. He has spent the last several years on the farm and ranch type corporation, speaking to farmers and ranchers and lawyers who have dealt with that type of entity. But in dealing with the subject he will also be dealing with the family corporation or the closely held corporation, and some of these concepts will be applicable to any small closely held corporation.

For our first speaker this afternoon we have Bert Overcash from the firm of Woods, Aitken & Aitken in Lincoln, Nebraska. Bert has been the chairman of the Special Committee on Revision of Corporation Laws of the Nebraska State Bar Association, and he has spent several years devoting his life first to the Non-Profit Corporation Act and later to the new Business Corporation Act. I am very pleased to present Bert Overcash.

THE NEBRASKA BUSINESS CORPORATION ACT

Bert L. Overcash

Mr. Chairman, Fellow Corporation Lawyers: I want to say myself that I am very pleased that we have such a large group

here today. I know there was some misgiving at one time by the committee as to whether all the lawyers in Nebraska were particularly interested in the subject of corporation law. This committee, as you know, worked some five years, sending out 2,000 copies of this act, but the response that we got as to changes or corrections or ideas was not great, and we wondered to what extent the lawyers were reading it or giving any attention to it.

I think during this session today and tomorrow we will give you some experts on particular matters that will be of some real value to you. What I am going to do is outline very briefly here today a little of the background for this act and its application. I am also going to call your attention to some of the research material that is available to you which will save you considerable time in the event you get into any problems in this area.

The Model Act of the American Bar Association goes back to 1943 when the Corporation and Banking Committee of the Association was asked to draft an act for a federal corporation. It drafted a proposed act and from there it went on in 1946 to a proposed act for the various states. Since that time there have been various revisions in the acts. They have had the attention of the leading corporation lawyers in the country, and the Model Act has become a generally accepted corporation statute in many states.

This act has simplicity, clarity, and completeness. It attempts to utilize the best material in the various statutes. One of the virtues of this law that I think you will find helpful is the organization. You will remember in July last year our committee, through the Bar, mailed you a pamphlet of the proposed act. In that pamphlet you would have noted the way the act is organized as to material—substantive provisions in one part, formation in another, amendment, mergers, dissolution—so if you want to find something in this field you have a way of getting at it. That is one of the virtues of the act because it is a long act, some 145 sections.

This is the first time in Nebraska that we have ever had a complete act. All the other laws we have had have been merely piecemeal. They haven't been a comprehensive act.

This work in Nebraska started largely as a result of an article in the *Law Review* by Roland Luedtke in which he characterized the Nebraska statutes as a "statutory jungle." As a result of that article and the meeting of this Bar in 1957 this committee was formed.

The committee decided the first thing to do was to get ourselves a nonprofit act and repeal a lot of obsolete special acts. Those things were done in '59 in the legislature. At the same time

we were working on that we were working on the preliminary features of a business act, and we didn't complete the work on the business act until last summer.

The business act that we developed reflected the experiences of the various states that have used the Model Act. We had the advantage of the experience of Iowa, Wyoming, Colorado, Utah, so in drafting our act we not only used the Model Act but we had the benefit of the experience in those states.

In that connection I think you should all realize that there is a very comprehensive publication now available, and which was available to our committee, when you get into any problems on corporate statutes. The American Bar Association published a three-volume work entitled "Model Business Corporation Act Annotated." It came out about a year and one-half or two years ago. It is three volumes. It takes each section of the Model Act, and compares the statutes and gives the sections of all the statutes in the Union. It analyzes and distinguishes them, it has a review of all the law review articles and publications on those points, and in the event you get into a problem involving a particular section of our act or the Model Act, this is a short-cut way to get to the law, and I trust that you will all become familiar with that publication in the years ahead.

As you know, the legislature passed L.B. 173. L.B. 173 has a few changes over the pamphlet copy that the bar committee mailed to you. I have prepared a memorandum that takes the pamphlet we sent to you and compares it with L.B. 173 and shows you the changes in this pamphlet copy that were made by the legislative act. If you want a copy of this you should contact the Secretary of the Association who has the original. I am sure he will duplicate it and provide it to you. I suggest that if you take your pamphlet copy and keep it, the footnotes in this pamphlet will give you the history of the section, where we got the section, what changes we made in it. If you have this pamphlet you can readily identify the differences between the pamphlet and the final act.

I might say to you that for my own convenience I took this summary of the differences and gave it to my secretary and had her go through and make the corrections in the pamphlet copy that are in the memorandum. In one or two cases she made an addition so that the pamphlet copy with these changes will be up to date. The pamphlet will be easier to work with than the legislative bill, because, as you know, the legislative bill is not organized and doesn't have subheadings. There is no index to it, and it is a little bit difficult in a bill this long to readily find the particular section

you want. I am giving you that as a matter of background and the mechanics of working in this field.

One of the problems that we faced in drawing this bill as a comprehensive act was to deal with the impact of this bill on existing corporations. That is the first thing I want to review with you.

As all of you know, in the *Dartmouth College* case many years ago it was held that a charter of a corporation is a contract. As a result of that, all of the states, in their constitutions and in their statutes, have what they call a reserve power; that is, there has been a reservation of a right to amend corporate statutes so as not to involve any constitutional question. We have that in Nebraska in Article XII, Section 1, of our Constitution. It was also in the prior Revision Statute, 21-1154, and it is in the new bill, L.B. 173, Section 133.

This reserve power is not without limitation. I will read a sentence or two from Fletcher: "Under a general reservation of the right to amend, alter or repeal a corporate charter, the legislature is authorized to make any amendment in the charter that is consistent with the object or purpose of the grant, and which does not work a fundamental change in its character, or violate constitutional rights."

Well, the problem, gentlemen, if you are talking about an existing corporation or the extent to which it is subject to the new law or can be subject, is whether or not the impact is of such a fundamental character as to affect what the courts say is a vested right. The matter is discussed in great detail in Fletcher, and I am not going into it any further except to call to your attention that it is not always an easy question.

For instance, here are two or three recent cases as to what constitutes vested rights. In a New Jersey case, *Smith Manufacturing Co.*, an amendment that a corporation can make charitable contributions, which was made applicable to a pre-chartered corporation, was held within the reservation and legal.

In a Wyoming case, extending the life of an existing corporation automatically under a new law is within the reserve power.

However, in a Maryland case, cited in the outline, they had an endowment corporation for the benefit of the University with a board of directors set up in the endowment corporation. The legislature later came along and transferred the administration of this trust to the Board of Regents. The court held that was such a fundamental change in the nature of the corporation as to violate the restriction on vested rights.

So I say to you that you can't categorically say to what extent an existing corporation is subject to this new act. It depends upon whether there is any violation of the vested right of a corporation.

Now let's turn to this act and see to what extent this act purports to apply across the board to existing corporations. The first thing we will deal with is corporations organized under statutes that are repealed. As a part of this five-year program we have repealed a number of business corporation statutes. We have repealed by L.B. 173, our previous Business Corporation Act, entirely. Previously we repealed a series of special acts—bridge companies, real estate companies, educational institutions, professional associations, depot companies, all in Chapter 21 under various articles.

If you have a corporation that was organized under one of these corporations that was repealed, and the vast bulk of the laws have been repealed, the question is: To what extent does this act purport to apply to such corporation?

You will find that in Section 130 of this act we have followed the same scheme that was adopted in 1941 at the last revision. We have provided in this section that all these corporations whose statute has been repealed "shall operate under and be subject to the provisions of this Act." Therefore as a general rule any corporation organized under a repealed act is subject to this law. The result is that so far as we can constitutionally do so, all corporations under repealed statutes are subject to this new law and must comply with it. That is not just a burden; as a matter of fact, those who work in the field find that the new act is so much an improvement over the old that there isn't really any serious disadvantage.

Now let's turn to another group, a smaller group. Suppose you are representing one of the corporations that was organized under a special act, and that special act has not been repealed? Then Section 131 of the new law applies. This again follows the pattern that was used in the 1941 revision. We rewrote what was Section 21-1,157 into 131 of this bill and we adopted the same procedure, the same approach. Those corporations that are organized under a special act, co-ops for instance, anybody in Chapter 21 whose act is not repealed is not per se subject to this act. They may become subject to this act by making a voluntary filing with the Secretary of State, but until they do so I don't believe the courts would hold that this new act applies to them.

I might say to you that there is a great tendency by these special corporations to come under this act. Some of the attorneys who work with cooperatives have suggested to me that they think their act should also be repealed since it is incomplete and is not a comprehensive act.

I think the future will indicate that that is the direction which legislation will take. It was our over-all design in this committee in the five years to get a thorough, complete, comprehensive non-profit act that would apply to all nonprofit corporations, and also a business act that would apply to private corporations, and with very few exceptions beyond that, such as power districts and matters of that kind, there is no reason or no excuse for having a multitude of specific laws on this subject.

Various members of this committee who worked on this are going to appear on the program: Howard Moldenhauer, Lee Bloomingtondale, Bart Kuhns, and others. There may be "bugs" in this new law. We took a long time to work on it. We attempted to eliminate most of them that we could. You no doubt will run into problems. I have heard of several problems already, none of which appear to be very serious. But I think you are going to have to begin to go back when you get a corporation problem and get into the various sections of this act because they more or less cover the waterfront.

There were necessarily determinations of policy in the writing of this law, perhaps fifty or sixty important determinations of policy by the committee. The committee represented various kinds of law practitioners and various segments of business, and we attempted to arrive at a decision that we thought would be appropriate for the Nebraska law. We haven't repealed all of the Nebraska law either. There is considerable of the Nebraska corporation law in this new bill.

Now as to the future: This committee, by action of the Association at this convention, has been discontinued. We feel that the work that was assigned to the committee in 1957 has been substantially completed. I suggest to you that in the future there remain one or two avenues of improvement. I think at some time we should eliminate the constitutional restraints on corporations. As you know, there was an amendment in 1960 that relieved us of some of those, but we need to get away from the requirement of par value of stock, and I think there are some other provisions in the constitution that might well be eliminated in the future, particularly with reference to specific kinds of corporations. But right now there seems to be no necessity for a program of that kind. We believe the new law that we have for the first time in Nebraska will give the various lawyers a comprehensive act in both the nonprofit and in the profit field that you can put your teeth in and use in your everyday practice.

CHAIRMAN JOHN C. MASON: Thank you, Bert. The Bar Association and the state generally are indebted to you for all the

work that you have done in this area. It has been a very big job and Bert has spent many hours, as you all know I am sure, working in this area.

In the great movement westward in this country, which has continued historically up to the present time, Nebraska has been the beneficiary of some Iowa immigrants who have come to the state, not the least of whom is our next speaker, Howard Moldenhauer.

He is a graduate of the University of Iowa and then went to Michigan University for his legal education, where he graduated with a Juris Doctor Degree, which is granted to students who have a high scholastic achievement in the law school.

I first met Howard on a trip back to law schools interviewing for new additions to our own staff. I thought I was pretty smart to be able to capture him. I think I was, although I think I outsmarted myself because I got such a good lawyer that he didn't stay with us. Anyway, he did associate with our firm, was in Lincoln for a while, and then came to Omaha and was a partner in our firm; and later when we folded our tent and silently slipped from the community of Omaha, he transferred to the firm of Gaines, Spittler, Neely, Otis, & Moore, and he has just recently gone into a new partnership under the partnership name of Miller, Moldenhauer & Vandenack.

Howard has done extensive work in the corporate field and has done extensive work on this committee about revising our Nebraska corporate laws. He has also been selected recently to be special counsel to the State of Nebraska on the Missouri River boundary dispute, which doesn't have much to do with corporations I guess, but I think it was a nice honor that he was selected for this position.

He is also a very discreet gentleman. When I told him that I had had a dear aunt die and that I would have to attend her funeral at one-thirty today, I am not sure he believed my story. I think he may have suspected I was in the bar, but when he announced that I was delayed for the meeting, that was the reason and not any other that you might have suspected. However, I appreciate your discretion in the way you announced it.

Howard is going to talk to us on the advantages of the new Nebraska Business Corporation Act and some of the changes which we have from our previous law.

It is a great pleasure to present him to you at this time.

**ADVANTAGES OF THE NEW NEBRASKA BUSINESS
CORPORATION ACT AND CHANGES FROM
THE PREVIOUS LAW**

Howard H. Moldenhauer

When it comes to something as new and mystifying as a new statute, I know we all shudder a little bit, but really in this situation it is not as tough as it seems. It sort of reminds me of the story of the man who was strolling along one day and he came across a little boy drawing a picture. He stopped and asked the little boy what he was doing. The little boy said, "I am drawing a picture of God."

The man looked at him and said, "But nobody knows what God looks like."

The little boy said, "Well, they will when I get through drawing this picture."

Maybe we will know a little bit more about this act when we get through with these sessions.

Many people I know are skeptics about new legislation and are quick to fault it. I know a lot of people have already called to my attention certain discrepancies which they think appear in this act. But generally and over-all it is an improvement and it should make corporate counseling much easier for every lawyer.

Some of the advantages of the new act have already been discussed this afternoon. Generally you will find several advantages and I have tried to break them down into certain categories. For one thing, you will find many more elaborate and explanatory definitions which should help the lawyer. You will find many examples of a greater corporate flexibility and latitude. You will find the treatment of a greater number of corporate situations than appear in the old act. All of these things should allow the lawyer to give more certain advice, more definite advice without having to go back into the books and study some of the common law and waste a lot more time coming up with perhaps the same conclusion which he would have otherwise.

In connection with definitions, you will find several terms defined in Section 2 which were not defined under the old law. For instance, you will find definitions of the domesticated foreign corporation, shares, subscribers, shareholders, authorized shares, and treasury shares. In addition you will find several accounting terms which didn't appear before, terms such as net assets, stated capital, surplus, earned surplus, and capital surplus. These are defined, and distinctions are drawn between them.

The committee of the American Bar Association which originally worked on the Model Business Corporation Act indicated in the preface to one of its revisions that it approached this field of accounting and definitions with a great deal of diffidence, but it finally decided to put them in, primarily to clarify the law with regard to dividends and other distributions to shareholders. I think this act will provide a much needed statutory guide for lawyers and accountants and it might mean that you as lawyers will have to re-educate the accountants a little bit in the light of some of these statutory definitions. I know under our old act you could spend a lot of time trying to figure out just what the stated capital of a corporation was if you wanted to reduce it. Now you should be able to do so much easier.

There are other definitional problems which have been eliminated. Under the old act we had such terms as "principal office," "principal place of business," "resident agent," "office of the resident agent," and every once in a while a lawyer became somewhat perplexed trying to determine whether or not the "resident agent" had to be located at one of the business offices of the corporation or whether he could be located elsewhere.

Under the new act, in Section 11 the terms "registered office" and "registered agent" are used and they are used throughout the act, and you will find that Section 11 clearly states that a registered office may be, but need not be, the same as its place of business. In addition, under the new act you can have a corporation as registered agent; under the old act it had to be an individual.

Another example of clarification is found concerning a situation which you may not run into more than once or twice in your practice, in the area of the definition of mergers and consolidations of corporations. Under the old act, if you read it carefully you probably could distinguish between them, but lawyers must have found some difficulty because there are a great many articles of incorporation on file, or articles of merger and consolidation on file in the office of the Secretary of State, which are described as articles of merger *and* consolidation, and the language used is "the corporations hereby merge and consolidate," and, in fact, one of our foremost corporate sets of forms uses these terms "merge and consolidate," and when you get through you don't really know what the corporations did.

Under the new act, in Section 69, it clearly states that any two or more domestic corporations may merge into one of such corporations. In Section 70 it provides that any two or more domestic corporations may consolidate into a new corporation. This

is the result, really, but a lot of lawyers might have been confused in this.

Section 75 discusses the effect of a merger or consolidation and again indicates that in the case of a merger the single corporation shall be that corporation designated as the *surviving* corporation, and in the case of a consolidation the several corporations which are parties to the plan shall be a *new* corporation. So there isn't much excuse under the new act for lawyers to confuse the terms or fail to distinguish between them. This could be quite important, particularly when you consider some of the bookkeeping problems, the tax problems, fiscal years, income tax returns, and that sort of thing.

In addition, several lawyers have asked me recently if, in a merger or consolidation, you have to have deeds, revenue stamps, recording expenses, and that sort of thing to get the property from one of the former corporations into the new or surviving corporation. Section 75 of the act clearly provides that all of the real and personal property and all other rights of the corporations are taken into, or deemed to be transferred to and vested in, the new corporation without any further act or deed. This again makes it clear to the lawyer exactly what the effect of the merger is and it might eliminate a problem of filings and revenue stamps and a lot of other expenses which he might otherwise have undertaken.

Another area of definition which has been clarified is in connection with preferred and common stock. As you are all aware, in 1960, Section 5 of Article XII of the Nebraska Constitution was amended to provide that a corporation, in its articles, might provide that preferred stockholders shall have no right to vote. However, there wasn't any definition of preferred stockholders, and under the modern day and age when stocks are designated by classes, and where you may have Class A, Class B, and Class C, you have all sorts of different rights attaching to all of the different classes of stocks, and it might be a little difficult to really determine which is the common and which is the preferred stock.

Section 14 of the act, the language of which was taken from the South Carolina law, provides that shares which are not preferred as to dividends or other distributions, including distributions in liquidation, shall not be designated as preferred shares, and shares which are preferred as to dividends or other distributions, including distributions in liquidation, shall not be designated as common shares. This gives the lawyer some guidance and it insures that in the process of complicating the rights of different classes of stock, the Constitution still can be complied with.

Another definition included in the present act, which didn't really exist under our old act, is that of a quorum for stockholders meetings, which is defined in Section 32 as being, unless otherwise provided in the articles, a majority of the shares entitled to vote, represented in person or by proxy, but in no event less than one-third of the shares entitled to vote at a meeting. And then if a quorum is present, Section 33 clearly states that a majority of those shares represented shall be the act of the stockholders unless there is a greater number required.

Under the common law, of course, and a lot of people are not aware of this I think, the shareholders that were actually assembled at a meeting which was properly convened were a quorum, even though they constituted a minority of the outstanding shares. You might have situations where 10 per cent of the stockholders took action which really was binding on the corporation.

Section 21-137 of the old act provided that the articles and bylaws may specify the number of shares necessary for a quorum but it didn't state what a quorum was, and probably the common law was in effect in that situation where they did not include a specific provision. This has been taken care of in the new act by definition. We did have under the old act the definition of a quorum for directors but not a quorum for stockholders.

Of course all of the definitional problems aren't eliminated by this act and I thought I would point out one to you, which probably might never come up, but it is a problem which someone might raise sometime. Section 17 of the act discusses consideration for shares and provides that, in the event of a conversion of shares, or in the event of an exchange of shares, the value of these shares shall be determined according to a certain formula.

There is a doctrine that when a corporation wrongfully refuses to transfer stock, this in effect constitutes a conversion and the measure of damages by the stockholder against the corporation is the market value of the stock. Again the word "conversion" is used in the cases, and the general rule in that situation seems to be that if there is no market value you then look at the book value, in effect the assets and the liabilities and the earning power. I suppose if a corporation wrongfully refused to transfer stock that some lawyer might claim that that formula in Section 17 would apply because it theoretically defines the word "conversion," and this was a conversion, but I doubt that this was intended and I think there is history in the Model Act which would tend to indicate otherwise.

Enough for some of the definitional problems and some of the definitional clarifications in the act.

The act has another really great advantage in that it gives a greater flexibility and corporate latitude to the corporate form. For one thing, the powers of the corporation have been enlarged considerably. Many of them are set forth in Section 4. Some of these existed already at common law and they may have been implied, and in these situations the statutes are generally considered to be declaratory of common law.

For instance, the new act specifically authorizes a corporation to participate in administrative proceedings. This might have been incidental to it otherwise, but it might save a lawyer some problems of checking this out.

The new act authorizes a corporation to guarantee loans of others for corporate purposes. Here again, this probably was the common law rule and the courts were quite lenient in finding corporate purposes, but we have it set forth as a power here and this can save your having to go back to the cases.

A very important example of greater flexibility of the corporate entity is found in Subparagraph 18 of Section 4 where it is clearly stated that a corporation shall have the power to enter into general partnerships, limited partnerships, whether the corporation be a limited or general partner, and other types of associations. Under the common law there was a problem in this respect and a lot of lawyers seemed to keep running into it if they were aware of it, because authority existed for the proposition that a corporation did not have the power to enter into a general partnership. The rationale seemed to be that it was the theory of the legislature and of the law of corporations that the board of directors only could bind the corporation, no individual member could, whereas in a partnership each member binds the entity as a principal.

The statutes provided that the business of a corporation will be conducted by its board of directors and some of the courts felt that such provisions could not be carried into effect where a partnership existed. The natural partner would be acting in an individual capacity and not as an agent of the corporation.

Then along came our General Partnership Act and in Section 67-302 defined a "person" as including "corporations and other associations," and a lot of people thought this naturally authorizes a corporation to be a partner. But in the State of New York they had similar language and they had a case there, I don't think it is cited in your outline, called *Frieda Popkov Corp. v. Stack*, 103 N.Y. Supp. 2d 507, which was decided in 1950, which held that a corporation could not be a general partner. They had an attorney general's opinion in New York to the same effect, although they did have an

attorney general's opinion in New York that under the partnership act a corporation could be a limited partner. Anyway, there was a great deal of uncertainty. This has been removed by the new act which now says that a corporation *can* be a partnership.

I would mention one other power because there seems to be some criticism of it by some lawyers. In Section 4, Subparagraph 6 of the act, the corporation is given power to lend money to employees other than its officers and directors and otherwise assist its employees, officers, and directors. Many lawyers have asked why this provision, and I have pointed out to them that under the old act, Section 21-180, there was also a provision which prohibited loans to officers and directors, and this provision was left to remain in order to avoid some abuses, particularly diversion of the corporate funds with detriment to the corporation, its creditors, and shareholders.

I might mention one more thing—that we still have to be cautious under the new act not to be misled by any particular statutory language. It would be very easy to go off half-cocked. For instance, Section 4, Subparagraph 16, authorizes as a power of the corporation the right to establish pension, profit sharing, stock bonus plans, and stock option plans, and other incentive plans. This might have been inferred previously from the common law under the power to compensate the officers and directors. But you can't stop right there because that section of the act does not explain how you do this.

Section 25 of the act gives the shareholders pre-emptive rights to acquire unissued shares of the corporation except as limited or denied in the articles. And then it states that unless otherwise provided by its articles, the board of directors shall have power to issue and sell shares in performing an incentive option granted its officers and employees or the officers or employees of any subsidiary.

I think, however, that you can't stop there either. I think that this section perhaps must be read also in light of Section 19, which concerns stock rights and options and requires that if such rights or options are to be issued to directors, officers, or employees of the corporation, or of any subsidiary, then their issuance shall be approved by the stockholders. In addition, whenever you are issuing stock to officers and directors or giving them some sort of break which someone else doesn't receive, I think we have to be constantly cognizant of the fact that these people are fiduciaries, and they have certain duties by virtue of the fact that they are fiduciaries.

In the outline I have mentioned just one case, *Hammer v. Werner*, in New York, where the court had a situation where generally there would not have been pre-emptive rights in treasury shares but the court looked at it and said that in this type of situation we've got directors who are fiduciaries, and even though there may not be a pre-emptive right in treasury shares in some of the cases the fiduciary duty might generate what in effect is a pre-emptive right. The court seemed to look at it as a separate right, so I think we have to keep constantly in mind that other circumstances might exist which make it prejudicial to existing shareholders or a breach of duty on the part of directors to sell certain shares to themselves or to other officers without first offering them to shareholders. Usually any profit-sharing or stock bonus plan may involve some elements of self-dealing. You won't find reference to this in the statute but I think we had a great deal of conversation in the committee meetings about these fiduciary duties of directors and how this statute might affect them, and I think it was generally the opinion of most that the duties still remained in existence and there were safeguards for the stockholders in this regard.

So again, when you look at the powers, you have to remember that you could add after every one "the corporation can do this if properly exercised."

Another definite advantage of the act is that under it a corporation may have a one-man or two-man board of directors. Section 36 provides where the shares are owned of record by either one or two shareholders the number of directors may be less than three but not less than the number of shareholders. Under the old act we had to have at least three directors. Under the new act, if there are more than two shareholders, we again have to have at least three directors. But now you can have a one-man solely-owned corporation, that one man constituting the only director. In effect, it gets rid of dummy director situations where the other directors may just be subject to the whim and call of the one stockholder.

Section 35 provides that directors need not be shareholders, so it is conceivable that really Papa could own all the stock of the corporation and Sonny could be the director. We don't have to have the sole stockholder being the sole director, so it appears. This provision was taken from the 1961 amendments to the General Corporation Law of Delaware, and as originally proposed by the committee it read that the number of directors shall be not less than three, except that in cases where all the shares of the corporation are owned beneficially and of record by either one or two

shareholders, the number of directors may be less than three but not less than the number of shareholders.

The words "beneficially and" were later stricken in order to eliminate this problem of determining as a matter of fact whether stock was beneficially owned, and for what number of people. So I suppose now that a corporation could have a one-man board of directors if you wanted it, if the stock is held of record by one person as trustee for several beneficiaries.

I have raised one query in the outline and I am not sure I know the answer exactly, but I know you may have situations where Father wants to put Junior on the board and Junior is only sixteen or seventeen years old. I have just raised that query as to whether or not directors can be minors. Section 51 of the act specifically requires that incorporators must be natural persons of the age of twenty-one or more. There is no such requirement as to directors of any majority. I have mentioned the case of *Myott v. Greer* which was decided in Massachusetts in 1910, in which the Court rejected an objection made that two out of three directors of the corporation were minors. So I think there is a possibility that minors might serve on the board.

Even though again you may have a one man board of directors I point out that you cannot have one person hold all the offices of the corporation. Under the new act, in Section 48 this is made clear because it says that any two or more offices may be held by the same person except the offices of president and secretary. Under the former act, in Section 21-116, it stated that one person may hold any two offices except the office of president and vice president, so under the old act there was always a question of whether or not that "any two offices" meant two or more offices or whether it was just limited to two. Under the new act there isn't this problem.

Another example of flexibility and greater corporate latitude in the new act is the express treatment of actions by shareholders and directors without a meeting. Under the old act, Section 21-1,153, it was clear that we could have action by shareholders without a meeting. But it has always been the idea in corporate law that the directors were a body, they were entitled to the cumulative knowledge of all the directors, and they could act only as a board. I think they can still act only as a board.

However, we have a real change in Section 42, which follows Section 141 (g) of the Delaware Corporation Law, and provides for actions by directors without a meeting. As practicing lawyers we all know many corporations are in the habit of doing that

anyway. This makes it clear there isn't any problem created with it. This is new. It does not appear in the Model Act. It is an example, I think, of the progressive approach which the committee took. This is not to say, however, that a director could represent another by proxy. I doubt if he could. Again I repeat I think they still act as a board and not through the individual directors as such.

These are some of the advantages of greater flexibility. There are a great many more, but time doesn't permit going into all of them.

Now I would like to take up a couple of special types of situations, particularly some of those which I have been questioned about during the past week. There is a change in the organizational meetings after the corporation has been formed, the articles filed and recorded. Under the old act it was probably customary for most lawyers to have the meeting of incorporators and have the incorporators elect the first board of directors. The directors would then issue the stock.

However, we had Article XII, Section 5, of the Nebraska Constitution which, in effect, required that all elections for directors be held by the stockholders, and the stockholders would have the right to cumulate their votes and the directors would not be elected in any other manner. A lot of lawyers raised a serious question as to the validity of the actions of the first board if it were elected by the incorporators and not by the stockholders in accordance with the Constitution. So in order to eliminate this problem Section 51 was included in the act, and it provides that: "Until the directors are elected, the signers of the Articles of Incorporation shall have the direction of the affairs and of the organization of the corporation, and may take such steps as are proper to obtain the necessary subscriptions to stock and to perfect the organization of the corporation, including calling the first meeting of stockholders for the election of directors."

From there you go to Section 55 which was adopted from the Illinois act which has a constitutional provision similar to ours, and it provides that the first meeting of stockholders will be held at the call of the incorporators for the purpose of electing directors, of adopting bylaws, and for such other purposes as shall be stated in the notice of the meeting.

After the election by the shareholders of the first board of directors, then an organization meeting of the board of directors will be held for the purpose of electing officers and for the transaction of such other business as may come before the meeting.

In addition, Section 36 is consistent with this, which provides

among other things that at the first meeting of shareholders, the shareholders shall elect the directors. This is a little bit different in procedure, and I think this has confused some lawyers. I don't believe there should be any problem in connection with it. Instead of having the directors issue the stock, the incorporators will issue the stock. I think the committee indicated in one of its reports that it felt, as a practical matter, that the first board could be elected by the stockholders through proxies furnished to the incorporators. Some lawyers have wondered about the authority of the incorporators to issue stock, but I believe this is clearly inferred from the above sections and it is included within their authority to take such steps as are proper to perfect the organization of the corporation. This procedure should avoid any problems created under Article XII, Section 5, of the Constitution.

In addition Section 16 covers something which I think is a little new, the procedure concerning subscriptions for shares and calls made by the board of directors for payment on subscriptions. This was something which could be quite mystifying to an attorney without other guidance.

There is a very important change in the law which has been effected by Sections 96 and 97 covering procedure for liquidation of assets and business by the court. Under the old act, if there was a deadlock on the board of directors or a deadlock of stockholders, a stalemate could develop, and the cases were in quite a state of confusion as to whether or not a court could dissolve a corporation in the event of deadlock. We didn't have any provision here to that effect.

Under Sections 96 and 97, the district courts shall have the power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that the directors are deadlocked in management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or threatened; or an action in the district court could be brought for liquidation of the corporation if the acts of the directors or those in control of the corporation are illegal, oppressive, and fraudulent. This didn't exist before. A lot of people have said this new act is extremely liberal, that it takes away any protection which the shareholders have; but certainly here is an example where the shareholders are given added protection from an oppressive board of directors.

In addition, if the shareholders are deadlocked under certain situations, an action can be brought in district court to dissolve the corporation; or if the corporate assets are being misapplied or wasted. The court also shall have power to liquidate the assets in

an action by a creditor under certain situations. If the claim of the creditor has been reduced to judgment and an execution is returned unsatisfied and it is established that the corporation is insolvent, a creditor may effect a dissolution of the corporation. The court can dissolve a corporation under certain circumstances upon application by the corporation and also in certain situations in an action by the Attorney General. These sections give some remedy in the event of deadlock or internal dissension. They give additional protection to the shareholders.

There are two sections which I would just like to mention briefly because they were changed from what was originally proposed by the committee. Originally in the act, Section 43 (a) of the Model Act was proposed without change which had to do with derivative actions by shareholders, and there was a great deal of opposition and objection to some of these provisions. Some lawyers thought this was too harsh on the shareholders and that it didn't leave enough protection for the shareholders from oppressive action of the board. So Section 47 was changed materially. The first paragraph remains the same, which in effect provides that no action shall be brought by a shareholder in the right of a corporation unless the plaintiff was a holder of shares at the time of the transaction of which he complained or unless his shares thereafter devolved upon him by operation of law from a person who was a holder at such time. This was probably declaratory of our common law according to the case of *Reils v. Nicholas*.

It is now changed so that if a shareholder owns less than 5 per cent of the outstanding shares, or if his stock has a market value of less than \$25,000, then he may have to put up security for reasonable expenses but not to include attorneys' fees, and if the court, following the termination of such action, finds that it was brought without reasonable cause, the corporation shall have recourse to this security.

There was one other area where some problems may come up. This is in the area of the corporate name. I am sure this might cause a lot of lawyers some consternation. There is a little bit of history to Section 7 of the act. Originally it provides what a name can have, and then it also says the name "shall not be the same as, or deceptively similar to" certain other names. Originally included in this was that it could not be the same as, or deceptively similar to, trademarks or trade names. This was stricken from the act because some attorneys objected to a measure of protection being given names purely because of filings and not based on use and some of the former common law protections which were set up.

Formerly it was clear that the Secretary of State's duty in

accepting these names when filed was administrative and was not discretionary. There is, I suppose, a question as to whether or not this has been changed under the new act. I would point out, and I think there is disagreement possibly on the committee in this regard, that Section 49 of the Model Act had a provision which stated that "If the Secretary of State finds that the Articles of Incorporation conform to law, then the Secretary of State will file the Articles." This language "If the Secretary of State finds that the Articles of Incorporation conform to law" has been omitted from our present act, and this may or may not be of some significance.

In addition, in the Model Act Section 133 provided for appeal from the action of the Secretary of State, and this was omitted from the Nebraska act. There was a great deal of discussion as to what the remedies were, and I believe many members of the committee felt there was still a remedy of mandamus should the Secretary of State wrongfully refuse to accept a corporate name.

One other feature which I would point out, probably a significant one and yet it is such a minor one, is that one important formality has been eliminated from this act, and that is the requirement of acknowledgment in most situations. You don't have to acknowledge your articles or your amendments any more; all you have to do is have them signed. This might save a lot of trouble. It is really a step forward. I would point out, though, don't thereby assume that these were omitted all the way through the act because there are two situations in this act where the requirement of acknowledgment or verification remains. This may have been in error, but if you look in Section 12 and Section 113, which involve a change of location of registered office, you will find one particular situation where you still have to have an acknowledgment and another situation in which you have to have a verification. The Model Act provided for verifications all the way through and not acknowledgments.

I think our time is up. These are only some of the advantages of the act. I think that it will prove easier for everyone to work with, and I hope you will work with it and make suggestions about it, but don't be too critical, particularly of poor ol' Bert.

CHAIRMAN MASON: Thank you, Howard.

I believe, if you would like, we could take five minutes for some questions at this point. Would you two be willing to let them fire away?

Would any of you like to ask any questions at this point about the new act? Well, I knew we had good speakers and that they

were very clear. I am pleased that they have explained everything. We have one question here.

WILLIAM GRODINSKY, Omaha: The reason given for providing for the election of the first board of directors by the shareholders instead of by the incorporators, as under the previous law, is our constitutional provision for election of directors by cumulative voting of the shareholders and in no other manner. Yet in Section 38 is it provided that vacancies on the board of directors may be filled by a majority of the remaining directors. How do you reconcile this?

MR. OVERCASH: Well, that was a very difficult question that the committee had to deal with, and that is a matter of filling vacancies on the board in view of the constitutional provision as to the election of directors.

As you know, from time immemorial vacancies have been appointed on the board of directors. Furthermore, it is a tremendous burden on the corporation to have to call a meeting of the stockholders every time there is a vacancy on the board. The committee labored with this problem. We resolved the problem to provide that in the original instance we would require an election directly by the stockholders. We felt in the second situation, the appointment to fill a vacancy, that the court might distinguish that situation and permit the appointment to be made. I frankly say to you I cannot forecast exactly what the court would hold, but the committee was very reluctant to change our law that we have had all the time in the past and require affirmatively a meeting of stockholders every time there was a vacancy or two vacancies on the board of directors.

Now the courts might require a stockholder meeting under this provision of the constitution, particularly in the light of a certain Illinois decision, but we think there is a possibility the court would not so hold and it would be a great burden on the corporation to have to do this. Therefore we think the chances of upholding the appointment are favorable, and we therefore decided upon that solution.

MR. GRODINSKY: It was said by the speaker that the new act impliedly gives the incorporators power to issue stock. Where there are more than several incorporators it may be expedient to have the stock certificate signed by less than all of the incorporators. Do you see any obstacle in such case to the incorporators designating a chairman and secretary of the incorporators and having such chairman and secretary sign the stock certificate?

MR. OVERCASH: The question is whether or not the in-

corporators, in discharging their duty, could appoint a chairman and a secretary. It would seem to me that under the section that Mr. Moldenhauer read they would have authority to make some delegations of their functions to get it performed. You want to realize that this whole thing arises by reason of the constitutional provision, and we are trying to set up a system here that will have a fair chance of being upheld. I think, in answer to your question, they could make a reasonable delegation.

WILLIAM C. HASTINGS, Lincoln: I notice on here there is nothing all through today and tomorrow on foreign corporations. Is there any chance to ask a question about foreign corporations at this time?

CHAIRMAN MASON: Bill Hastings is asking whether we can have any questions on foreign corporations, which are not really included in the outline material as we have presented it. May I suggest that you do it privately with some of these fellows. Oh, they don't know? Well, if they don't know, I don't know. O.K., raise the question.

MR. HASTINGS: Sections 21-1215, 1216, 1217 were passed specifically in the 1961 legislature, and it was sort of a model act that was drawn which specifically permitted foreign banking corporations to participate in the acquisition of loans or participation in loans with a resident corporate banking institution pursuant to letters of commitment, and to make certain loans through these banks or participation with others. It went all the way through it, certain things they could do, they could make these loans without being engaged in doing business in Nebraska, they could come into the state and inspect property, they could defend actions, they could service a loan—the whole bunch of things that they could do, and they could not be deemed to be doing business in Nebraska. Obviously I think it was passed in '61 for a very real reason, and that was to encourage additional capital to come into the State of Nebraska.

This new L.B. 173 just completely eliminated that and made no provision for it. I have talked to Bert about this. I don't know whether there is any different answer than when we discussed it this summer or not. Apparently that is still not possible for these foreign corporations to do.

MR. OVERCASH: In answer, Bill, to your question, I think I wrote you a rather detailed letter in response to your question. I consulted the members of the committee. There were general provisions in the act that we drafted that *we* thought were sufficient to grant the authority and the exemption that you proposed.

I also called your attention to the fact that if you had brought the matter up before the legislature passed the bill, while it was pending, we would have again reviewed it, but it was our opinion on the committee, and I wrote you the reasons and the details in a letter, that we didn't think that the provisions of the law that were repealed were essential in view of the language that I referred to in the new act. Now, we may be wrong, but that was the feeling of the committee. Probably if you had called it to our attention before the legislature had acted and proposed an amendment, I am sure we would have gone along with you if we thought it was necessary.

MR. HASTINGS: Bert, that is the same thing you told me before. I am not being critical of anything. I am only asking for advice. I think that is the purpose of a meeting of this type, to try to find out. You admitted in your letter that there was no answer to it.

MR. OVERCASH: Well, I have given you a letter that I think covered it. I don't have my copy of the letter here but I called particular attention to certain provisions of this act that we thought were sufficient to cover the same material in the statute you referred to, and the same result. That was the opinion of the committee. I don't know what more we can do.

CHAIRMAN MASON: We will now take a ten to fifteen-minute recess.

[Recess.]

CHAIRMAN MASON: A few of you were unable to obtain outlines. A new box of outlines was discovered during the recess and if any of you are still attempting to get an outline, I believe you will find them now out on the registration table.

I would like to make an announcement. There will be a reception in honor of Professor Polasky and Dean Ladd for the benefit of the alumni of the law schools of Michigan and Iowa at four-thirty this afternoon at 707 City National Bank Building. I don't know whether that is the temporary headquarters of the Colony Club or what. That is where the graduates of those two law schools will meet.

Dick Hunter would like to make an announcement with respect to the tax institute. Dick!

RICHARD E. HUNTER, Hastings: I have two announcements. Turner's Traveling Tax Technicians will take to the road again this year for the 1963 Tax Clinic. If you will care to mark your calendars with these dates, the western end of the trip will be

on December 5 and 6 at Ogallala at the Elks Club starting at nine forty-five A.M. This is Thursday and Friday rather than Friday and Saturday as it has been in the past. And the eastern end of the trip will be in Omaha the following week, December 12 and 13, at the Indian Hills Schimmel Inn.

Again this year we are going to have a part of the program on Friday devoted to the twenty questions. If any of you have questions concerning tax matters that you wish to have answered by the panel, we would appreciate it if you would get them to Al Reddish at Alliance no later than this coming week.

One other announcement, the American Bar Association regional meeting is being held in Omaha this coming spring. In connection with this meeting, and replacing what has been in the past a half day devoted to the Tax Section, the Bar Associations of Kansas, Missouri, Iowa, and Nebraska are sponsoring a two-day tax clinic. The dates are May 7 and 8, 1964. Among the speakers that we plan to have this coming spring at this four-state institute are Laurens Williams, formerly of the Nebraska Bar; and showing what extreme confidence the Nebraska Bar has in the speaker you are about to hear, Mr. Alan Polasky of Michigan will be back with us in the spring on the tax institute.

CHAIRMAN MASON: There has been some inquiry as to where the Articles of Incorporation and the Bylaws are in the outlines, which will be the subject of talks tomorrow afternoon. The Articles of Incorporation are on page 60 and Bart Kuhns' material begins on page 62 through page 81, which covers the Bylaws. Inadvertently the index at the front of our outline did not carry the page number of Mr. Kuhns' material.

Contrary to the movement westward which I mentioned in connection with Howard Moldenhauer, there has also been a movement eastward of certain Iowans, and the University of Michigan Law School has been the beneficiary of one such movement in the case of Professor Alan Polasky.

He was reared in Cedar Rapids, Iowa, where he attended public school. He attended the University of Iowa, both undergraduate and in the Law School from which he was graduated with a J.D. degree in 1951.

He also is a C.P.A. which was granted to him in Iowa in 1948, and he practiced public accounting prior to the time he attended law school. He also instructed at the University of Iowa in accounting.

He is a member of the Iowa and the Illinois bars. He practiced law for a time with the well-known Chicago law firm of Sidley,

Austin, Burgess & Smith. He was a lecturer in business law at Northwestern University at that time. Then he was a professor of law at Northwestern University and since 1957 has been at the University of Michigan Law School. He has been a visiting professor of law at Yale University and also at the University of California at Berkeley.

In addition to his teaching duties and the things associated with that he has been quite active in American Bar Association work, being a member of the Section on Real Property, Probate, and Trust Law; he has been a member of the Council since 1960; he has been vice chairman and director of the Trust Division; vice chairman and director of the Real Property Division; editor of the Section Newsletter; he is also active in the Taxation Section of the American Bar Association.

He is a member of the American Law Institute and is a consultant and a member of the advisory group on the federal gift and estate tax project of the American Law Institute, which is a very interesting project. He is a co-director of the American Bar Foundation; a member of the American Judicature Society, and some other things which I have listed but which he might not like me to list entirely.

His child once was known to remark to a neighbor child about all the various things her daddy belonged to and how he was a professor at the big law school, etc. She said, "In addition to that he is very active in a lot of things around here. He is a Lion, an Elk, and he's a Moose."

The little girl that his child was talking to said, "My goodness, how much does it cost to take a look at him?"

Fortunately it isn't going to cost us anything to take a look at him. He is a very personable fellow, a very smooth sort of fellow; in fact, the incident that I was telling you about when I interviewed Howard Moldenhauer—I was sitting in the office of the University of Michigan Law School and I happened to overhear a couple of the secretaries talking about Professor Polasky and what a smooth fellow he was. One of them looked up and said, "My and doesn't he dress well!"

The other one said, "Yes, and quickly, too."

We are very honored to have Professor Polasky take time out from his very busy schedule to be with us this afternoon, and I present him to you at this time.

**CORPORATE BUY-SELL AGREEMENTS—WITH A
BRIEF LOOK AT THE POTENTIAL USE OF
THE PRIVATE ANNUITY**

Alan N. Polasky

I guess I should thank John for that introduction. Indeed, after hearing him I suppose I should be on my way and get about my work and quit standing around here.

I can't tell you how much I enjoy being here, enjoying your hospitality, taking part in your institute.

Usually when a law professor gets up he can either be pretty dry or he can bring a whole bunch of gimmicks with him. I may be guilty of the former. I am going to try not to introduce too many gimmicks.

The problems I would like to talk to you about are threefold. One of them is the matter of non-tax problems which we find in disposing of a business interest in a so-called closely held corporation. I think all too often we tend to overlook this. We get so enamored with taxes and Section 303 and a few other things that we stop thinking about some of the non-tax factors.

Then, secondly, I would like to review with you, albeit somewhat briefly, the current status of the so-called insurance-funded corporate buy-sell agreement, and some of the factors we ought to consider in choosing between what we call the "entity" plan, the plan whereby the corporation redeems the shares, and the so-called "cross-purchase" plan, where we arrange for purchase of the shares by surviving shareholders. We might even take a brief look at the possibility of having both an entity plan and a cross-purchase plan used in tandem in the same business enterprise.

You will notice that I mentioned "in tandem." I didn't suggest using them together with respect to the same shares. The thing that will get you into trouble is a hybrid plan where you try to combine the features of a cross-purchase plan and an entity plan with respect to the same shares—and you end up hanging your shareholders by the thumbs. When I talk about a tandem plan, I mean that some of the shares are subject to an entity plan, and others may be subject to a cross-purchase plan. But, and I'll keep emphasizing this, with respect to any set of shares, the planned disposition *either* ought to be subject to an entity agreement *or* a cross-purchase, not to both.

Then, third, I would like to spend a little time looking at a somewhat less publicized area, the area of the so-called private annuity. You probably have read some of these blurbs that have

come out about the fact that this is the greatest thing that has ever come down the 'pike. There may be some areas where this device can be useful, but I suggest that it be approached with fear and trepidation.

Unfortunately some people have been selling farmers on the use of private annuities. I don't mean to suggest to you that I am against work for lawyers, but if enough farmers use the private annuity in disposing of farm properties, the law schools may be hard-pressed to turn out enough people to handle all the litigation that is going to result! So, I do want to discuss the private annuity, at least briefly.

In short, I will try to soothe you with respect to the buy-sell agreement and suggest it is a great thing if you set it up right; I am going to try to unsoothe you—if I may use that word—with respect to the private annuity and make some suggestions about non-tax aspects of business dispositions—while watching that clock! This is quite a bit to cover in the time we have.

When we talk about the gift of a so-called business interest, we can talk about the gift of an incorporated business or the gift of an unincorporated business. Let's talk about the latter first. You have all seen the case where a client decides he is going to leave his proprietorship to a specified beneficiary. For example, he leaves the business, let's say, "to my dear secretary and associate, Mable, who has been of great help to me all during the existence of my business," or, more often, "to my dear wife."

This of course can cause problems, as you well know, and one of the problems is: What is meant by "the business"? Now it is not what you think. This individual is giving the financial interest in this enterprise to his secretary or his wife and the question is: What assets are we including here?

For example, this fellow may have a bank account and into it goes each receipt (personal or business); and out of it come all the business withdrawals and all the withdrawals by his wife for groceries, dresses, and everything else. Now, in defining "the business" do we include this bank account, or any part of it?

What about the car, for example, that he uses in his business? He used it partly for pleasure, partly for business. Is it part of "the business"? What about the building in which the business is carried on? Maybe he lives upstairs! All I am suggesting is that as lawyers we've got to define the terms.

Then, even if you can find out what assets he means when he leaves the business to somebody, what about the liabilities? Does this include the accounts payable, for example? Or did he just

bequeath the business assets, with the intent that all liabilities were to be satisfied out of other estate assets? Well, all you've got to do in this case is simply spell it out.

A tougher one, of course, is the case where you have a client who decides he is going to leave the *income* from the business to somebody. Let's suppose, again, that he leaves the income to "my dear wife, Mable, that golden-haired girl in the chorus line whom I married late in my life and who has been a great joy to me; remainder to my son, by my first marriage, who is a New York lawyer."

Again you have a lawsuit brewing, as you can see. The problem is, what does he mean by "income"? Lawyers who have had only a couple of hours of accounting somewhere along the line might say, "I don't know about accounting, but there's a problem, so let's have the will provide that the income is to be determined 'in accordance with generally accepted accounting principles.'" That is just accenting the accountant's problem!

For example, what about depreciation? Are you going to take depreciation into account in calculating income? Many years ago we lawyers started out defining the legal treatment of this accounting concept and came to the conclusion that if the testator left the family castle to the wife for life, you didn't have to provide for depreciation. She got to live there without worrying about a provision for depreciation. Then, after the industrial revolution we got to dealing with corporations and everybody recognized that when a testator left the income from a large business, it made sense to take depreciation into account in calculating "the income."

What happens when a testator leaves to two-flat? He lived upstairs and rented out the lower flat. Is this more like the big corporation or the family castle? Again, this is not a matter for predicting how a court might decide the question! The point is that if you can just foresee this problem, you can spell out the desired treatment in the instrument and we won't have a lawsuit brewing as a result of failure to do so. Even if it is determined that depreciation ought to be provided for, the instrument might well spell out how this is to be calculated. For example, should it be based on straight line, sum of the digits, declining balance, or some other method of depreciation? Or what about depletion? Or what about inventories for that matter?

Every once in a while some fellow bequeaths his little proprietorship, Sam's Store, providing "the income to my wife." Now when you leave the income to your wife, how is this to be calculated? Do we calculate on the old *Fifo* (First In-First Out) in-

ventory? Suppose the accountant said, "Look, you ought to use Lifo and minimize taxes. Assuming there is a switch into a Lifo inventory, we've got to keep the books in accordance with Lifo in order to get the income tax advantage. Does that mean we also use it for calculation of the trust or estate's income in this case? And sooner or later some accountant who has had a couple of drinks starts talking about Nifo (Next In-First Out); or Wifo (Whatever In-First Out), or some such thing!

In short, when we are disposing of "income" or "the business," what are the accounting problems involved? If the client has an accountant, get permission to talk to him and find out what the problems are. There are all sorts of other problems that we could go into, but the point is that we make our own law in this area and all we've got to do is see the problem, spot it, figure out what the fellow wants to do by talking to him, and then spell it out and avoid lawsuits.

Furthermore, when the client wants to leave one of these businesses in trust to be carried on, we've also got to see that the fiduciary has the *power* to continue this business.

You have all heard, I am sure, the sad story about the fellow who left his business as a part of the estate. This happened to be a maternity home. The executor took over on a snowy Friday night; the nurses weren't going to keep on working there unless they got paid; there was no milk on hand. There were fourteen expectant mothers and nine small infants. Well, the executor had a problem. He knew there were principles of fiduciary law involved here. One, you cannot continue the business without authority or you are liable. On the other hand, there is the doctrine "Thou shalt conserve the business as the executor." Of course the prudent thing to do was to get hold of the judge and get an order of the probate court. But you and I know what happens when you try to get hold of a probate judge over the weekend. I suppose this is a case where the fiduciary probably went out and got some milk, paid off the nurses and the like and kept this thing going, at least until Monday morning. Wouldn't life have been simpler with a short but appropriate provision in the will?

But let's take the more normal situation. This client is operating one of these little Mom-and-Pop grocery stores. This is a store that can't quite compete with the A&P anymore but there are people who drop into the place late in the evening. They come in for milk and bread. While they are in there buying milk and bread, they see the anchovies up on the shelf and they buy some anchovies.

The fellow dies and this business is left as a part of the estate. Well, we won't be selling many of these anchovies and we won't have much of a going business unless we keep people coming back in. They come back in for the milk and bread but in a couple of days we are out of milk and bread. Can we continue to buy more milk and bread in order to keep this business going so we can ultimately dispose of the anchovies? Are we carrying on the business at that point or are we conserving it?

We could get into an interesting discussion, like professors like to do, about which way a court might go, and which way a court should go. The point here is, though, that we don't really give a darn about that because if we foresee the problem we can clothe that executor with the power to carry on the business until he can dispose of it appropriately, and we don't have to worry about which way a court might go.

Hodge O'Neal is going to talk to you, I am sure, about problems of the close corporation. But this is another area that leads into our second problem, the problem of disposition. You may have a client who wants to try to hang onto a closely-held corporation, and he may want to leave it in trust because he has built this monument (his business) and it is going to be his memorial. You have all had clients like that, or you will have, I am sure! The problem you run into here, again, is the power of a fiduciary to hang onto this thing. After all, this may be a rather delicate thing. It is likely to be a volatile thing; not the sort of thing that a prudent investor would necessarily go out and invest in. I think again we ought to be explicit and make sure the executor has the power to retain the business interest *and* the power to dispose of it, if it later develops that it is not wise to retain it.

But assuming we have given him the power to hang onto this, and assuming that if we had a proprietorship we gave him the power to incorporate in order to limit liability, you have put your fiduciary in quite a spot here. Suppose, for example, that we name the Friendly National Bank as trustee. Friendly National Bank, even if it holds all the stock, now has several duties. One is the duty of undivided loyalty to the beneficiaries. A second is its duty to treat all beneficiaries fairly and impartially.

Now here is the spot the Friendly National Bank finds itself in: It is the outfit that has been lending money here, it has been the financial advisor, and it is also the depository, the lending agent and the like. On the one hand, it runs into this rule against self-dealing. Can it continue to loan money here? Isn't this dealing with itself as trustee (since it occupies the dual role of fiduciary and lending agency)? On the other hand, if it worries

about this and it doesn't want to lend to the company because it is acting as trustee, then you are cutting off the very source of financial aid that the business would normally have!

Or conversely, suppose that the Friendly National Bank says, "Well, look, we've lent a lot of money here. We don't want to call these loans. We have acted as financial agent for this corporation. Under the circumstances we don't think we ought to act as trustee." Why create a situation which might result in depriving the business of the benefit of the financial supervision of that corporate fiduciary which is in the best position to act as trustee because it knows the most about the business? May it not be suggested that it might be appropriate to include a proper exculpatory clause in the dispositive instrument, thus permitting the bank to continue to act as financial agent as well as a trustee here?

In addition, the Friendly National Bank has that other problem. The testator left the income to "my dear second wife, Mabel, and the remainder to my son John, the child of my first marriage." This is a small business. Pretty soon somebody comes up with an idea for making Mark II widgets and, boy, it looks like a growth company is in the making—though it may prove a bit speculative.

The son says, "That's the thing to do, keep plowing back those earnings. We don't care about dividends, maximize this corporate opportunity."

The widow says, "Just give me my 5 per cent. That is all I'm interested in."

Now how does a fiduciary maintain impartiality here? And, if you think it can get over that hurdle, add the problems generated where the business is incorporated but the trustee doesn't own all of the stock. Suppose it has only a controlling interest, or perhaps a working majority, in the corporation. Now your trustee not only has these duties of impartiality, as between beneficiaries, and no self-dealing, but in addition he has at least a duty of close surveillance of management, if not an obligation to participate actively in management. Actual managerial activity involves duties to the minority shareholders, who are not beneficiaries of this estate; and his fiduciary obligations (the fiduciary obligations of the corporate steward) to them and to the corporation may not be quite compatible with those fiduciary duties owed the beneficiaries.

Again the basic question should not be that of how properly to resolve the trustee's dilemma when the problem arises. The key is to forestall the problem—finesse it—before it arises! You can understand why a trustee might not want to get into this situation! In fact, I think it is a tribute to them that they have

ever taken these things on, and it is not surprising that banks have been quite, shall we say, "interested" in early disposition of this business interest. You've seen that, I am sure, on many occasions.

The point is, if you talk this thing out and see what the problem is ahead of time, if you are willing to put in an exculpatory clause permitting the trustee to act in the best interest of the corporation, and thus exculpate him from his overriding duties to the trust, he can live with the situation and it should work out all right. If your client is unwilling to do this, then maybe this is a situation where the interest should not be retained in trust. But at least work out the problem at the planning stage.

This is all, in a sense, simply leading up to the problem of disposition of a business interest. As you have now recognized, there are situations where, in dealing with a small, closely held corporation, it just doesn't make sense for the client to try to retain his interest after his death.

For example, consider what I like to call the partnership-type corporation. All we really mean by that is there are a bunch of fellows who have gotten together and have incorporated for tax reasons or for purposes of limiting liability; but, internally, these characters still consider themselves to be partners. Look at the way in which they operate. They try to limit the majority rule; they don't want any minority interest frozen out at this point. In addition to this, they provide for certain fellows to be frozen in as officers or directors, and they may vest control in certain people. In addition to blanketing in the officers and directors they may even specify the division of profits by way of dividend policy, salary guarantees and the like. They will probably limit alienability of shares. They will probably provide for winding up the corporation on certain events. And above all, as you probably know, they will probably avoid corporate ritual. These characters can't be bothered with a minute book, annual meetings, and stuff like that.

This might work very well while we've got Able, Baker, and Charlie working together, but Able dies. Now instead of Able we either have his wife involved, which is an anathema to these fellows, Baker and Charlie, or we've got the Friendly National Bank, and it doesn't have quite the same attitude that Able had toward these departures from corporate "democracy." And removal of Able from the picture creates obvious problems with respect to the previously agreed division of managerial controls and profits! It doesn't mean you *can't* work it out, but, at least, it suggests visualizing whether or not substituting the wife or the fiduciary in place of Able, the deceased shareholder, is feasible, and what

modification of the existing arrangement would be necessary. Many times retention, in such a situation, doesn't make sense. It would be wiser to provide for a buy-out and free the business from this possibility of a difficult relationship.

Having decided that we are dealing with a closely held business, a highly personal affair, which doesn't easily bear the interposition of some stranger (whether it be a wife or whether it be a corporate fiduciary), and having decided it would make sense, upon the death or retirement or disability of one of these fellows, to provide that his shares shall be sold to the survivors, or that his shares shall be sold to the corporation, there is an attempt to work out a buy-sell agreement. Incidentally, the time to work this thing out is not when old Able is gasping his last and is therefore in a rather poor bargaining position. You ought to work this thing out while they are all hale and hearty, and, preferably, while they are all still insurable.

The buy-sell agreement has a number of advantages. We are sure that somebody is going to be obligated to buy these shares. We can work out an acceptable price at this point. We can and should work out a vehicle for funding it because, after all, this isn't going to make much sense if we work out a perfectly sensible buy-sell agreement but haven't provided any means for a pay-out.

In addition to working out a market for the shares, transfer of the shares for cash may materially ease any liquidity problems. You have all seen estates composed primarily of an interest in a closely held business. The result of it is that it may be quite difficult to pay debts, taxes, expenses, and the like. This is one means of providing liquidity, and it does provide for the continuation of the business by the survivors without the interposition of his wife or the Friendly National Bank, etc.

Of course we are going to have to decide who is going to be able to purchase it. Is it going to be a pro rata purchase by the survivors? Do we want to allow some young guy to buy in?

We've also got to decide what circumstance will give rise to a buy-out. Is it just on death? I suppose, in most cases, it ought to provide for a buy-out on retirement, and indeed more and more we realize we have to provide for it upon disability as well.

We have got to decide to what extent the obligation to buy is going to be binding. If it is simply precatory, where the decedent's estate may offer the shares and where the corporation may purchase if it desires, the agreement is not worth much. If we want the specified price to be binding for federal estate tax purposes, you've got to be sure it is binding on the estate; that is,

they *must* offer it at a certain price and any inter vivos sale must be subject to purchase rights at no higher price. It has got to be binding all the way through. Normally it will make sense not to have it simply binding on the estate. After all, we want to be sure that the estate is going to be *able* to sell these shares, so you ought to have it binding as well on the transferee of these shares, the person who is going to buy.

Then we've got to decide how we are going to work out this price. And this is a tough one. This is where you may need an accountant's help because, all too often, we talk about the price being set at book value. You and I know that book value has little or nothing to do with the actual value of a business. Book value is set in terms of historical costs based on a concept of a stable dollar.

I now depart from my apostate accountant role and say the accountants have got to face up one of these days to the fact that accounting statements are simply a place to begin interpreting the financial situation. The accounting statement today does not tell us what the business is worth. It does not tell us what the income has been. It is simply a set of figures from which a person with accounting training can begin to evaluate the business and what its income has been and may be.

With this in mind, you can see that book value based on historical costs simply has no relation to actual value. A building may have been purchased many years ago for \$100,000. It may have been depreciated down to \$50,000 and yet be worth many times that amount in terms of current dollars. This doesn't mean you can't use book value if these fellows are satisfied that book value is all right—sort of a Russian roulette deal: whoever dies first gets stuck. That's all right, but make sure they understand this. Don't have them come in, in an equity suit, later on and wonder why you, as the counsel for one or the other of them, didn't advise them that book value did not mean actual value.

If you are not going to use book value then what do you do? You can work out some sort of a capitalization ratio based on earnings. Often this makes sense, but you should have the help of the accountant to work this out.

Every once in a while somebody says, "Well, I'll tell you what let's do. Let's have an appraisal." That is simply shifting the responsibility to somebody else to make an appraisal at a later time. It is pretty hard to appraise a closely held business. You have all had dealings with internal revenue agents. You know what the problem is in setting a fair valuation on a closely held business,

or closely held corporate stock. I suppose that I normally would prefer some sort of a valuation based upon a capitalization of earnings and the like. If you do this, specify how earnings are to be determined.

Once in a while some fellow decides that what they really ought to do is set a price on it *now*. Two fellows get together, decide to set a price on it now, and, having set a price, they provide that it shall be periodically reviewed and then they will set a new price as conditions change. The trouble with one of these things is that about that time old Charlie has gone to the doctor. He comes back feeling kind of low and tells his partner what the doctor told him about his health. The partner, or fellow shareholder says, "Well, Charlie, you've had a hard day. Let's not talk about this buy-sell agreement price now. Let's put it off until you're feeling better!"

Now exactly that sort of situation came up in this case of *Helms v. Duckworth*. They set the price at \$10.00 a share, with a provision for annual review and revision with the consent of both parties. When one party died, the stock was worth about \$80.00 a share. The survivor was kind of an honest guy in one respect: he did go as far as to say that he had never really intended to consent to revalue these shares! The court of equity had no trouble in saying, "This agreement is not binding at \$10.00 a share," and permitting rescission. This can upset a buy-sell agreement, as you can see.

In a second case, the *Galewitz* case, you've got a somewhat different situation. There you had a father-son situation. As you know, one of these agreements can be binding for federal estate tax purposes if it is an arm's length transaction between unrelated people and you've got a fair price set at the time. Now it may be unfair at the time the fellow finally dies, but if it was arm's length and fair at the time it was entered, it will usually hold up for federal estate tax purposes. But where you've got one of these father-son situations, an eighty-year-old father and a thirty-five-year-old son who is the apple of his eye, and they enter into an agreement to sell the stock at about 25 per cent of its value, you can see why the Internal Revenue Service may be a little upset with this and will not consider it to be binding at that point.

In the *Galewitz* case the father-son agreement gave the survivor the right to purchase the shares at a formula-fixed price. At the father's death they were accordingly sold to the son for about \$600,000. Unfortunately, the agreement was not binding for federal estate tax purposes, and it was held for those purposes that

the value of the stock was \$1,345,000. The result of this was to put \$745,000 more in the estate. This increased the federal estate tax somewhere around \$350,000! As a result of this it would have virtually wiped out the estate to have sold the shares for \$600,000 and paid the additional \$350,000 in estate tax.

The court in New York had no trouble in this case saying that under these circumstances the son must reimburse the estate for the amount by which the federal estate taxes were thus increased.

To avoid this, of course, you could put in a clause, if you wanted to: "If the federal estate taxes are increased, then the purchaser shall reimburse the estate." If you do that, though, it is quite clear that the contract price is not likely to be binding for federal estate tax purposes. All I am suggesting to you here is that whether you are dealing with a family situation or whether two shareholders are dealing at arm's length, if this agreement is to fix federal estate tax values, and if you want to try to avoid an equity court suit as a result of it, make sure that the agreement at the time of execution makes some sense in terms of being a reasonably fair value and that you can establish that it was the kind of thing that people dealing at arm's length would have entered into.

Now let's talk about the choice between the so-called entity plan and the so-called cross-purchase plan.

Let's take three fellows—Able, Baker, and Charlie. We'll use them for the next fifteen or twenty minutes. Let's suppose each one of them owns a one-third interest in a business which has 3,000 shares of stock outstanding. Each of them owns 1,000 shares. Let's suppose they decide on an entity plan. All that would mean would be that if Able dies the corporation will purchase, will redeem, Able's 1,000 shares. Nothing happens as far as Baker and Charlie are concerned. They would then own one-half of a corporation which had only 2,000 shares outstanding.

On the other hand, if we were going to work out a cross-purchase agreement we would have Able and Baker and Charlie agree that, upon the death of one of them, his shares would be sold to the survivors, either pro rata or any other way they wanted to work it out. For example, if Able died, Baker would buy 500 shares and Charlie would buy 500 shares from Able's estate. This is a "cross-purchase." The corporation is not redeeming; the surviving shareholders, rather, are purchasing those shares.

In deciding between an "entity" plan or a "cross-purchase" you will want to consider both the tax and the non-tax factors.

Some non-tax factors deal with creditors' rights. Quite often we are going to fund this thing with insurance. If it is decided to fund it with insurance and if the corporation has an entity plan (and is to redeem) it will own the insurance. Therefore the insurance will be subject to the corporate creditors. If we use a cross-purchase agreement, on the other hand, the shareholders will own the insurance and the insurance will be subject to their creditors.

Further, if you are going to use an entity plan, you've got to be careful to comply with the local corporate law. You've got to be sure that the corporation *can* redeem under local corporate law. You can have this agreement but if the corporation doesn't have any retained earnings, or whatever all those fancy terms were you used, Howard, you may not be able to redeem the shares. So you want to be sure that the corporation can redeem under the corporate law, and, *in addition* to that, you had better be sure that there will be cash or other wherewithal to fund this thing when redemption is called for. In other words, you've got to look at the potential liquidity of this corporation.

Furthermore, one of the real troubles here is that every once in a while we get into long-term financing in one of these corporations and, as you know, long-term financing sometimes requires a restriction on redemption of shares or dividends, or both. If we already have one of these agreements in existence, we may find that before we set up a so-called redemption plan we are going to have to decide whether it is possible to redeem these shares under the existing loan agreement. Or, conversely, it may be that we will find that if one of these buy-sell agreements is set up and, later on, they want to go out and get some long-term financing, the lender may set up, as one of the conditions, a restriction on redemption of shares. This may require us to modify this buy-sell agreement later.

A cross-purchase, of course, doesn't get you into this problem. The cross-purchase plan, you'll notice, doesn't have any corporate redemption. Able, Baker, and Charlie, to use our same old example again, each take out insurance on the life of the other. Let's suppose we've got Able, Baker, and Charlie each having a \$50,000 interest in a corporation that has \$150,000 worth of stock. They work out one of these cross-purchase plans. Able takes out a \$25,000 policy on Baker and one on Charlie. Baker takes out one on Able and one on Charlie. Charlie takes out one on Able and Baker.

One thing will be apparent right away, and that is that if you had, let's say, ten of these fellows as co-entrepreneurs, we would

need ninety of these policies. You can see it could become a little cumbersome at this point. Use of a trustee could minimize the number of policies, but it would still leave a different problem—the real trap in the use of a cross-purchase plan—the “transferee for value” rule.

To illustrate, remember my friend, Able? Able has one-third of this, a \$50,000 interest. He is driving down the street, sees a blonde over on the side, is looking at her, there is a horrible crash, and we have two surviving shareholders! Each of these surviving shareholders receives \$25,000. Each one had a \$25,000 policy on Able. There is no federal income tax on receipt of the proceeds of the insurance, under Section 101. They didn't get to deduct the premiums when they paid them, either, of course!

Each takes his \$25,000 in hand, they go down to the widow Able's house, commiserate with her and turn over the \$50,000 in return for receipt by each of one-half of Able's stock. So far so good.

On the way back downtown they stop for a couple of martinis and after the second martini they suddenly get to thinking. Here they now each have a \$75,000 interest in this business, but Baker has only \$25,000 on Charlie and Charlie has only \$25,000 on Baker. Furthermore, each of them now remembers how the widow Able sort of looked at them at that point—and she still has a \$25,000 policy on each one of them.

So they have one more martini and they journey on back to the widow Able's house. They commiserate with her a little bit more and finally Baker says, “You know, Charlie and I have been thinking. You have policies on our lives and we could use these and you could probably use the money. Each of these policies is worth about \$10,000. Why don't we each give you \$10,000. I, Baker, will give you \$10,000 for the policy on Charlie's life, and Charlie will give you \$10,000 for the policy on Baker's life.” So they buy them and off they go.

A couple more premiums are paid. The policies are now worth about \$12,000 each, and now Baker dies and Charlie is under an obligation to buy Baker's shares. Now Charlie receives \$50,000; \$25,000 is received as a result of the policy he originally took out on Baker's life, and this comes home free, no tax. But as to the other \$25,000 policy he is a “transferee for value”; he received the policy from the widow in return for consideration paid over, and as a transferee for value there will be a tax imposed measured by the difference between what he receives—the \$25,000—and what he put out, namely \$10,000 to the widow and \$2,000 additional premiums. He would be taxed at ordinary income rates on the \$13,000.

This is a trap in Section 101. That section provides that if the transfer is to a corporation in which the insured is a shareholder, if the transfer is to a partnership in which the insured is a partner, if it is to one of the partners of the insured, if it is to the insured himself, the transferee for value rule doesn't apply. One place where it does apply, however, is a transfer to a co-shareholder! This is one of the draw-backs to the so-called cross-purchase arrangement.

Let's get into the tax aspects of this thing, and we can dispose of them pretty fast because they are really not as tough as they seem. By way of very brief review, we can first say that, whether we use a cross-purchase or an entity plan, when the premiums are paid there is no deduction. Section 264 takes care of that. A problem that worried us for a while was whether, under either an entity plan or a cross-purchase plan, a shareholder would be deemed to have received "constructive dividends" as a result of the corporation paying the premiums.

Clearly if you've got a cross-purchase plan and the corporation pays the premiums for the benefit of the shareholders who are entering into this cross-purchase agreement, the corporation is really satisfying the obligation of these shareholders to pay for insurance for the shareholders who own the policies. That would result in a dividend.

But if you have an entity plan in which the corporation takes out and owns the policy, pays the premium, and is itself the beneficiary, then I think the cases are clear now, as are the revenue rulings, that there should be no constructive dividends to the shareholders. Indeed, you can go a step further under Revenue Ruling 59-184. You can even pay the proceeds over to a trust for the benefit of the beneficiaries of the deceased shareholder, but you must make sure that as a consideration for turning over the proceeds to the trust the trust surrenders the shares to the corporation. The key to this whole area is: Use an "orthodox" plan. Have the corporation take out and own the policy, pay the premiums, be named as beneficiary, and make sure the corporation has the obligation to redeem these shares. Under those circumstances, no constructive dividends to the other shareholders should result.

One of the problems we run into, though, is: "What about the cost of these particular plans?" Is an entity plan better or is a cross-purchase better? Let's take a corporation taxed in a 52 per cent bracket, which earned \$5.20 which is available for the purchase of insurance on a shareholder's life. The corporate tax will take about 52 per cent. Say it takes \$2.70. That leaves the corporation with \$2.50 which it can now apply to the purchase of insurance.

If, on the other hand, we were using a cross-purchase plan, the corporation presumably would have to declare a dividend and get this into the hands of the shareholders. If the shareholder is in the 60 per cent bracket or so (after the dividend credit), he then pays an additional \$1.50 in tax on the dividends and he only has \$1.00 left over. So, quite often the entity plan permits us to have more dollars available for the purchase of the insurance.

Now it is possible that this won't always be true. You may have a corporation in which it is possible to raise the compensation of some of these shareholders. Most of them are doing pretty well already, but suppose you have a corporation where you can raise the compensation and where your shareholder is in a fairly low bracket, say about 30 per cent. If this is the case, then the corporation could raise the salary, get the \$5.20 out of its taxable income by way of his salary, since it takes a deduction for the salary. The \$5.20 is in the shareholder's hands and, with a 30 per cent tax, this leaves him with about \$3.64 to fund this insurance. You might be better with a cross-purchase there. But it is a relatively rare situation where you will find that compensation can be raised, in a top-bracket corporation, where your shareholder will still be in a low enough bracket to make this thing worthwhile. So, one of the advantages of the entity plan is using these pre-dividend tax dollars to fund the buy-out insurance.

Following our comparison of the plans in a chronological manner, we reach a problem which arises during the period prior to a shareholder's death. If we are using a so-called entity plan and funding it with insurance, somebody will say, "Look, doesn't use of an entity plan get us into a Section 531 'unreasonable accumulation of surplus' situation?" As you know, there is a fairly stiff "unreasonable accumulation of surplus" provision in the Internal Revenue Code. When you get to this point, however, I suggest to you that you recall that the tax is only upon an "unreasonable" accumulation. There is a credit for the "reasonable needs" of the business. I would suggest that there is no more "reasonable need" of the business in this world than the need in a small closely held corporation to keep that business interest within the hands of the small group of entrepreneurs and not let that thing be sold so some outsider, or let it fall into the hands of some outsider. I think the *Prunier* case makes it clear that the court will recognize the business purpose of the insurance-funded buy-sell agreement. Certainly the *Emeloid* case, which came down on another point, also makes this clear by way of its language.

Even if you are worried that you can't establish that this is a reasonable need of the business, the 1954 Code contains a provision

that the first \$100,000 of accumulated earnings are not subject to the tax; thus in most small corporations we are all right. But many a small corporation soon becomes a larger corporation, and once you get past that \$100,000, then you no longer have that exception. Keep this Section 531 problem in mind, but remember that it is only the unreasonable accumulation within a particular year that gives rise to the tax. If you fund this insurance, not with some single premium insurance, but with insurance that builds up a fairly low cash value, or if it is clear that you are buying protection and not investment, I think in most cases the purchase of insurance to fund the agreement should not trigger a claim of unreasonable accumulation of earnings.

One last thought about this problem of funding before we get out of the area and start worrying about constructive dividends when one of these fellows dies. You all know that group insurance is a great thing. Group insurance is where the corporation takes out term insurance on its employees, including the president of the corporation. The corporation gets a deduction, the employees in turn need not pick up the value of the premiums as income, even though they designate the beneficiaries. It has been a wonderful thing, but like all great things somebody will start to abuse them.

I suppose the clearest indication of the Treasury's reaction to current abuses was the proposal in the new bill, H.R. 8683, in which it was proposed that premiums would be tax-exempt only on an amount of \$5,000 worth of group insurance on anybody's life. Above that face amount of group insurance the premiums would be taxed as income to the employee. The amount of group insurance which will not require the employee to include the value of the premium has been raised to \$30,000.

What were the abuses? Well, let me give you an example of how people begin to take advantage of the thing. One scheme centered around what we call "jumbo" policies. Where a sufficiently broad group of employees was covered by a relatively small face amount, say \$1,000 or \$2,000 on all the little minions, the insurance company permitted insurance of executives, under the group plan in much larger amounts, say \$50,000. Then Able, Baker, and Charlie decided to carry it a step further. Able said, "Look, we don't have to worry about whether we are using \$2.50 left after taxes or \$1.00 left after taxes; let's use the whole \$5.20! We will get one of these "jumbo" policies and then Able will assign his policy to Charlie, Baker to Able, and so on around the line. What we will be doing is using this group term "jumbo" policy in order to have the government pay for all of our premiums with respect to a buy-out agreement! The corporation gets a deduction for

premium payments and we, the insured employees, need not recognize income since this is group-term insurance."

The government issued a letter ruling last August in which it said, in effect, "There will be no deduction for the corporation in this situation." Over in New York there is a ruling by the Insurance Commissioner which says, "This isn't even group insurance as far as we are concerned." And there is an indication at least that more than one revenue agent has suggested that even if Able does assign the proceeds of this policy to Charlie, and vice versa, the assignee will be treated as a "transferee for value," and when they receive that \$100,000 (and the assignee has no cost, no basis for it) that whole \$100,000 is going to be taxed as ordinary income. And that would take most of the joy out of this arrangement!

There are just one or two last points to consider in connection with this so-called "entity" plan. Let's suppose we are now worried about the problem of what is going to happen when one of these fellows dies. Let's suppose, for example, that Able dies. Baker and Charlie are the remaining shareholders. On the cross-purchase, as you remember, we run into the "transferee for value" rule but that is all. Otherwise, it is simply a case of their taking their proceeds, going down and buying Able's shares and they, in turn, get a stepped-up basis of their interest in the corporation (the stock) because they paid for it. There is no tax to them on receiving the insurance proceeds except for the "transferee for value" rule.

But what happens if we have an entity plan? Able dies and the corporation now receives the proceeds of the policy, tax free. At this point the corporation redeems the shares. Is there any possibility of a constructive dividend to the remaining shareholders? Or, conversely, even if the estate redeems all of its shares, is there a possibility that this will not be treated as a sale or exchange, but that it will be treated in this case as a dividend to the extent of earnings and surplus of the corporation? I suggest to you that, under current law, there should be little danger if you exercise a bit of caution at the planning stage and at the time of redemption.

First, let's take the question of whether there will be a constructive dividend to the remaining shareholders. The argument here is that, after all, the corporation has used its assets to retire the interest of a deceased shareholder and thereby made it possible for the remaining shareholders to have a larger percentage interest of the corporation which is for their benefit. The cases, however, have made it quite clear that as long as you use an orthodox agreement (corporation takes out the policy, pays the premiums, receives

the proceeds, and turns them over in return for the stock) there will be no constructive dividend to the surviving shareholders.

Where you get into trouble is where the surviving shareholders have agreed that they will purchase the stock and, then, instead of their doing so, they have the corporation use its funds to redeem the stock, thus satisfying the obligation of the surviving shareholders. When that happens it is quite clear that the corporation has used its funds to satisfy the obligation of the surviving shareholder and you will have a claim of a constructive dividend. These situations should never come up again. They still do come up, however, as the cases I have cited in the outline indicate. The most recent cases, for example the *Schalk* case, or the *Television Industries* case, are simply illustrations of situations that should not arise in the future!

A bit of carelessness can get a client into this kind of a spot. Suppose, for example, that Able owns all the business and he wants to sell it to Baker. Baker agrees to buy. Baker, having agreed to buy all of the business, now finds he has only enough cash to pay half of the price. He turns in half of the shares to the corporation and the corporation, redeeming those shares, pays the redemption price to Able in satisfaction of Baker's obligation, thus setting the stage for a classic claim of a constructive dividend to Baker. The corporation is satisfying Baker's obligation to pay for the whole thing.

But they could have set it up quite differently. If they had wanted to, Baker could have agreed to buy half of Able's shares. Baker pays for that half. Able now has the remaining half. Able now sells all of his remaining shares to the corporation. This is a complete redemption of all of Able's interest. Baker never had any obligation. This does not give rise to a constructive dividend. It is not a dividend to Able, the fellow who is redeeming; he has redeemed all of his shares—complete redemption under Section 302(b)(3). This does not get you into a situation where it is a constructive dividend to Baker; Baker never had any obligation to buy.

Now it may not make sense to you that exactly the same result results in quite different tax consequences, but this is a case where the paths are pretty carefully charted and all you've got to do is follow the signposts.

One last thing on this buy-sell agreement. You have a buy-sell agreement and you are thinking of redeeming and are worrying about whether or not a complete redemption by the estate will be treated as a sale or exchange. Since we get a stepped-up

basis at death there should be no gain or loss and no dividends. Suppose you have this situation, though: The husband owned half the stock and his wife owned the other half of the stock. She died and left her stock in trust for her son. The trustee decided that it would like to redeem all the shares. It didn't like having this closely held stock. The trustee therefore turned in all of the shares that it held to the corporation in return for a redemption price exactly the same as the fair market value of the shares at the wife's death. You would think at this point that there has been complete redemption, no dividend, and that there should be no gain or loss.

An Internal Revenue Service agent comes along and says to them, "Mr. Trustee, you have received these proceeds and they are all taxable as a dividend at ordinary income rates." Shocking? It is exactly what could happen. Why? Because there is something you've always got to think about, and that is Section 318, the so-called family attribution rule of 318(a) (1) and the other attribution rules of 318(a) (2).

Under the attribution rules the shares which are owned by a member of the family, such as father, mother, spouse, or lineal descendants are deemed to be constructively owned by the shareholder. Now under the family attribution rule of Section 318(a) (1), there can be only a one-step hop; but in this particular case the father's shares were attributed to the son. The son now is treated as if he owned the shares under that second set of attribution rules. Under Section 318(a) (2) shares of a beneficiary of an estate or trust (subject to 25 per cent rule in the latter case) are treated as if owned by the estate or trust itself. Result: The son is deemed to own the father's shares under 318(a) (1), while the second step, under 318(a) (2), results in the estate's being deemed to own the shares which the son constructively owned; therefore, the estate or trust redeemed only one-half of the total shares it constructively owned. The result of this: There was not a complete redemption under Section 302 and to the extent of earnings and profits, there is a dividend which presumably will be taxable.

You can avoid the family attribution rule, however, under the waiver rules of Section 302(c) if you are very careful about it. On the other hand, the attribution rules of 318(a) (2) cannot be waived. This area is intricate. We can't take all of this up now. All I want to do is be sure that you see this. Wherever you are dealing with a buy-sell where Able, Baker, and Charlie are otherwise unrelated, usually you are all right, but in a closely held situation watch these rules.

Now what does that mean with respect to whether a so-called entity plan or a so-called cross-purchase plan will make more sense? In other words, which one of these things is going to make the most sense in any given situation? Which one should we use? I am simply going to suggest to you that at this point you can't say one is better than the other. It simply depends upon the circumstances. We can certainly say that from the standpoint of the entity plan it does have some advantages. It avoids the cross-purchase problems of the so-called "transferee for value" rule. It isn't quite as cumbersome. It does permit the use of dollars before they are paid out in dividends and taxed a second time. From that standpoint it is more attractive. It has certain pitfalls. You've got to watch your corporate law and be sure that you can redeem. You've got to keep Section 531 in mind. I don't think this is going to be a major problem in most corporations, but watch it. And finally, the toughest part of this entity area requires a careful look to see what happens with respect to the family attribution rules. Be sure that you do not have a potential problem there. Where you think you've got a complete redemption under 302(b)(3) and you find out that you don't have a complete redemption, because of the attribution involved, sometimes we can avoid the impact of this by the use of the waiver. If you are going to use a waiver, however, you will find that the transferors must agree that they will not acquire a proscribed interest in the company within ten years, and the like. And there is a ten-year "look-back" as well. In addition to this, they must agree to notify the commissioner of any such acquisition.

There was a sad case, called the *Archbold* case, which came up in the Second Circuit. The revenue agent finally got around there and said, "I don't think you signed an agreement; the family attribution rules apply." The little taxpayer said, "Oh, yes, well, let me sign an agreement now." The Second Circuit said, "It is too late. You haven't done it and therefore the waiver rules don't apply, attribution does," and the result was ordinary income in the form of a dividend.

A similar case came up in the Tenth Circuit just about a couple of weeks ago in the *Van Keppel* case. I think probably the Tenth Circuit took a more, shall we say, equitable view of the situation. They said, "No real harm has been done here, and besides they filed it before the revenue agent came around, and therefore we will hold that it is effective."

The answer to you ought to be clear. If you've got a problem of the family attribution rule and want to get that waiver, file the agreement with the return! Don't rely on the *Van Keppel* case.

It is an interesting case; I am not saying it is wrong, but just don't put yourself in the position where you must rely on it.

There is also, then, the situation in which you may find that in a given corporation there may be a father and a son, and there may be an entirely unrelated shareholder named Charlie. Some of those shares may be subjected to a corporate redemption agreement, other shares may be worked out on a cross-purchase agreement. One type of buy-out may be better with respect to one set of shares, another with respect to another set of shares. But don't use what I call the "hybrid" where you set up a so-called cross-purchase and then have the corporation pay the premiums! That one is going to get you into trouble with respect to so-called constructive dividends.

I don't want to keep you very long with respect to this private annuity. I have summed it up, I think, by saying it can be dangerous. Just take a look at your outline and let me run through, very briefly, the situation with respect to a private annuity and suggest to you the dangers that may be involved.

We have here a situation in which a man has shares in a closely held business. He, you will notice, has shares which are worth \$600,000; the stock is now worth \$1,000,000. This is a fellow who would like to avoid income tax, wants to avoid estate tax, wants to avoid gift tax, wants to be sure his heirs get the stock. Well, this is nice if you can work it out.

How can we do this? Well, some barber has convinced him that he ought to use a private annuity. He comes down to you and says, "Isn't this great? Look, if we set this thing up as a private annuity and can have it treated as an annuity, I transfer the shares which are worth \$1,000,000 now in return for an annuity which will pay me, let's say \$87,500 a year, a total of \$1,312,500 over my expectancy of fifteen years. This is worked out on the basis of a 3½ per cent rate of return."

Further, he says, "Now, I apply the ordinary annuity exclusion ratio of Section 72. That means that each year as I receive this, I have ordinary income of \$20,833 but the other \$66,667 represents a return of capital, and under the peculiar rules of the private annuity, until now at least, we have been able to exclude the gain until there has been a complete return of my basis. So, I exclude this for the first nine years until I recover back my basis of \$600,000. Then for the next six years each of those \$66,667 payments will be treated as capital gain until I have recovered my \$400,000 gain, the difference between the \$600,000 basis and the \$1,000,000 which was the fair market value at the time of the

transfer. After that each year \$20,833 is income and the remaining \$66,667 is excluded."

Now the man says, "This looks great because when I die there will be nothing in my estate, no estate tax. Furthermore, I am not being taxed on the whole \$87,500 each year; I am only getting tagged on a bit over \$20,000 each year. That is even better. And there is no gift tax because I exchanged stock worth \$1,000,000 in return for an annuity which was worth \$1,000,000, so there wasn't any gift involved here. And I am sure my son is going to end up with this thing. If I had gone out and purchased a private annuity I would have had to sell the shares. Then there would have been an immediate gain of \$400,000 on this thing, and that would have reduced the proceeds that were available for me to invest in this annuity."

Furthermore he says, "If I had done that and I had died early, the insurance company would have ended up with the benefit of this, and I would have had to sell the shares and my son wouldn't get it."

Well, I suppose, now, that I've convinced you that this is the greatest thing that has ever come down the 'pike. What's wrong with it? Well, on cold analysis, you'll see that it really isn't that good at all. In the first place, if this fellow instead of using up all of that \$87,500 each year, simply uses up the $3\frac{1}{2}$ per cent return on his \$1,000,000, the \$35,000, and puts the other \$52,500 in the bank, as he would if he's living on income, and if he lives exactly fifteen years he will end up with exactly the same \$1,000,000. You haven't saved any federal estate tax!

What about the income tax saving? Well, he is going to pay on the ordinary income, the interest element as he goes along. And furthermore that \$400,000 gain will be taxed to him if he lives out his life expectancy. If he dies before that, it is true we will save that tax, but by the same token the son will get no stepped-up basis on the stock! Indeed, the son's basis will only be the amount that has actually been paid out, and he may end up with a good deal smaller basis than \$1,000,000, and you don't get the stepped-up basis at the father's death. So that is no particular advantage.

Furthermore we have assumed here, thus far, that there will be no gift tax. But notice that we are dealing here with two variables. How do you know this closely held stock is worth exactly \$1,000,000? And how do you know that the right to receive \$87,500 a year for fifteen years is going to be valued as an annuity of \$1,000,000? If the annuity is worth more than the stock, they will claim a gift by the son to the father. If the stock is worth

more than the annuity, they will claim there was a gift from the father to the son on this particular thing. We've already got a problem built in.

Furthermore, if the father is going to transfer the stock, he loses control over it; he is at the mercy of the son from here on out. Suppose he tries to surround this with a few safeguards, you know, like "the stock shall be escrowed and shan't be sold unless I agree, and all the income from this stock shall first go to me, and I shall have a right of veto before the stock is sold, and I still have a right to vote the stock of the corporation." About that time the commissioner says, "Whoa, boy, federal estate tax. You have retained sufficient control so that we must pull the whole thing back into your estate." You haven't saved any estate tax at all. Well, you can see the problem there that we can get into.

Now, turn it around and look at it from the son's standpoint. The son has a real problem at this point. Let me use simpler figures. Let's suppose that the father had stock which was worth \$60,000, transferred it to the son when it was \$100,000, and the son agreed to give the father \$12,000 a year for the father's life expectancy of ten years. As he pays each \$12,000 to the father, the father applies the exclusion ratio. The stock was worth \$100,000, he expects to get back \$12,000 a year for ten years; therefore the ratio in this case will be ten-twelfths under Section 72; \$2,000 is ordinary income, \$10,000 is return of capital for the first six years until he has gotten back his \$60,000 basis. After that each of the \$10,000 payments for four years will be capital gain.

What about the son, though? As the son pays that \$12,000 each year he is treated as if he is making a purchase, so while the father recognizes income on \$2,000 of the \$12,000 that he gets, the son gets no deduction for any of the \$12,000 that he pays over. It is treated as if he had made a purchase. If the father died after one year, the son's basis in the stock would be \$12,000. If the father dies after ten years the son's basis is \$120,000. This may keep right on going beyond what the value of that stock may happen to be.

Let me carry it one step further. Suppose the son decides to sell this stock somewhere between the first and the tenth year. His basis for recognizing a loss is what he has already paid out. His basis for gain is what he has paid out plus the actuarial value of estimated future payments. Suppose five years have gone by, and he sells the stock for \$150,000. His basis for gain is the \$60,000 he has already paid in the first five years, five times \$12,000, plus the present value of future payments. What are the future payments? Well, it is true the father was only going to live ten more years at the time of the agreement, but now we look at the tables for

the father's present age (five years after the agreement) and this means the father would live about 7.3 years more. The present value of the obligation is about \$80,000, so his basis for gain is \$140,000. He sells it for \$150,000, his gain is \$10,000 at that particular point.

Now he has got to keep track of this, because if the father dies before the aggregate payments are \$140,000, there will be a further gain. But once he gets past that \$140,000 and the father is still living, then he has a loss as payments are made in each subsequent year.

What if he sold the stock for around \$30,000? His basis for loss is what he has already put out, \$60,000. His loss would be \$30,000 and then each year from then on out he would have a loss in each succeeding year.

Suppose he sold it for \$80,000? There is no loss because his basis for loss is \$60,000. His basis for gain is \$140,000, so there is no gain. But each year now he must keep track of this in order to decide whether he has a gain or loss on the father's death or with the continuing payments.

Now if this has got you worried enough at this point, suppose the son dies? What about the stepped-up basis, and the obligation of the son's estate? By now we have a battery of three C.P.A.s working with us.

Take it one step further. Suppose, instead of using corporate stock, as I have been doing, someone convinces a local farmer that he should take the family farm, the buildings, the sows, the mares, the horses, and indeed a few steers, and transfer these to the son. Again the basis is \$60,000 and the value is \$100,000. Now as the son makes his \$12,000 payment he is going to sell some of this livestock and he is going to depreciate the buildings. The basis for depreciation in this case is a different basis than you use for gain and loss. The basis for depreciation is the allocable basis of the present value of the future payments. In the case of buildings, let's suppose the building was worth \$100,000 and transferred for an annuity worth \$100,000. We would depreciate on the basis of \$100,000. Now if you use the double declining balance method we can get to the point where we depreciate the barn faster than the son makes payments and we end up with a negative basis. There is no clear answer as to what happens here if you sell the property.

And what happens as he begins to sell these sows off, these brood sows subject to depreciation? Do you have to recalculate your depreciation gain and loss every time he does this? Every accountant and lawyer in the country is going to be busy for years

if enough farmers get into this. If you are going to use a private annuity—and I suggest to you that, quite often, it really isn't worth the candle if you compare it to an installment sale or other appropriate possibilities—if you are going to use this, the least you can do is incorporate this farm or business and then transfer the stock. Don't get into this depreciation bog along with all the other problems that we have suggested.

There are one or two situations where a private annuity might make sense. One is the case where the fellow who owns the stock—the prospective annuitant—is retiring from the corporation and wants to sell the shares to his son. Assume that there is a deferred compensation agreement which will have a heavy pay-out in the first five or six years, and will have a lot of taxable income in those years. He would like to defer the recognition of gain beyond those years in which the compensation agreement pay-out occurs. In such a case, the private annuity may make some sense, but only if the father and son each have other financial resources, aren't dependent on each other, and get along fine; and you may still have problems with it! It does assure a father of having this thing for life, but the trouble is, if he is dependent on the son you've bought yourself a family situation that is hard to live with.

Well, I probably have lectured too long. Let me end up with a tax proposal because we have a Washington visitor here that I would like to try my new tax plan on. You have all seen H.R. 8386, that short little 300-odd page remedial measure that is pending down in Washington. I suggest to you in winding this up that what we need, rather than any patching on our Internal Revenue Code, is an over-all, bold approach. You will recognize that our highly progressive tax system has resulted in three things: (1) loss of incentive (people just aren't willing to work for a million dollars any more, as you know from talking to your clients); (2) an inability to accumulate capital (all these oil people out in the western part of the state have a hard time accumulating capital any more) and without accumulating capital you can't create new jobs; and (3) you have a tremendous national debt, over three hundred billion. Now if we got this way with a highly progressive tax system, it is obvious, isn't it, that the way to rectify this situation is to come up with a highly regressive tax system. Let me show you how this could cure all our ills.

First of all you start out with a guy who has made a million dollars. You don't tax him anything. Here is a guy who has maximized his opportunities! Now everybody works real hard, because the guy who makes a million dollars pays no tax. As the income comes down from a million you begin taxing him more and

more until you get to the guy who made nothing, and you tax him a hundred per cent. Now this gets everybody working hard, everybody has that old American get-up-and-go and works sixteen, seventeen hours a day. Furthermore, now if you can make a million dollars you can hang onto all of it, and you keep investing it because you want to make more money, and this creates new jobs, and our national growth rate, GNP, as the economists call it, goes up to about 30 or 40 per cent.

Now that cures two of our problems, incentive and capital accumulation, but it does not solve the third one—the national debt. And of course there will still be the guy who will lose \$10,000. How do we tax him? Well, there are two views on this: A Keynesian might suggest that a minus \$10,000 times 120 per cent would result in a tax of a minus \$12,000. In other words, we give him \$12,000. This makes some sense because this guy has already put \$10,000 more into the economy than he took out and it's obvious he is going to put the \$12,000 back in and keep it circulating rather than saving it. You've got a golden pump-priming operation going here, and this spurs the economy.

But that wouldn't solve our national debt problem, so I propose to you that we go the other route: That is, the guy who loses \$10,000 is taxed 120 per cent, or \$12,000. Now this guy has already lost \$10,000 and probably he doesn't have \$12,000 to pay the government. Sooner or later we have as many of these citizens owing the government money as the government owes people money. The result of this is that we have offset the national debt, just cancel the thing out.

Thus, we have increased incentive, permitted capital accumulation, wiped out the national debt. What is wrong with this?

Well, I thank you very much.

CHAIRMAN MASON: Al, we are deeply grateful to you for coming out here and addressing us this afternoon.

This will adjourn our program until nine-fifteen o'clock tomorrow morning.

[The Thursday afternoon session adjourned at four-thirty o'clock.]

ANNUAL BANQUET

November 7, 1963

The annual banquet was presided over by Mr. Flavel A. Wright of Lincoln.

TOASTMASTER WRIGHT: Ladies and gentlemen, may I have your attention. For your information my name is Flavel Wright. I am substituting for George Healey because of a temporary throat condition which prevents him from conducting the meeting this evening.

I would like to introduce to you the gentlemen at the head table. I will start on my far left and I would suggest that you withhold your applause until we have the entire group introduced, at which time you may recognize them.

On my far left is Mr. Laurens Williams, Chairman of the President's Advisory Council and an old member—old, I say, maybe not advisedly—of the Nebraska State Bar Association and one of our staunchest supporters.

Next to him, Mr. Jerry W. Housel, President of the Wyoming Bar.

Next to him, Mr. Leo Eisenstatt, President of the Omaha Bar.

Next to him, Mr. Hale McCown, the Association Delegate to the American Bar Association—I am just reading what they have given me here. The only credentials I read are what they have given me to read.

Mr. George H. Turner is next, State Delegate to the American Bar Association.

Next to him, Mr. Edward L. Wright, no relative of mine but one I would like to claim, who is the Chairman of the American Bar Association House of Delegates. He is from Little Rock, Arkansas.

Next to him, Mr. Floyd E. Wright who is a relative of mine and one that I like to claim, who is the President-Elect of the Nebraska State Bar Association.

Next to him, Judge Richard E. Robinson, Chief Judge, United States District Court for the District of Nebraska.

Next to him, Harvey M. Johnsen, Chief Judge, United States Court of Appeals for the Eighth Circuit.

Next to him, Leslie Boslaugh, Judge of the Nebraska Supreme Court.

Next to him, Edward F. Carter, Judge of the Nebraska Supreme Court.

Next to him, Frank B. Morrison, Governor of the State of Nebraska.

And next, George A. Healey, President of the Nebraska State Bar Association and the man for whom I am substituting.

You may acknowledge this group at this time. [Applause]

Now, starting on my far right, Dr. Rudy Sievers, who is President of the Nebraska State Medical Association.

Robert E. Driscoll, Jr., President of the South Dakota Bar Association.

Wiley E. Mayne, President of the Iowa Bar Association.

Ralph E. Svoboda, past President of the Nebraska Bar Association.

John J. Wilson, Association Delegate to the American Bar Association.

Roy E. Willy, Member of the A.B.A. House of Delegates, who comes from Sioux Falls, South Dakota, and is a staunch friend of the Nebraska Bar Association.

Harry B. Cohen, President-Elect Nominee of the Nebraska State Bar Association.

Robert Van Pelt, Judge of the United States District Court, Lincoln. We'll get a plug in for our home town.

John W. Delehant, Judge, United States District Court for the District of Nebraska.

Robert C. Brower, Judge of the Nebraska Supreme Court.

Harry A. Spencer, Judge of the Nebraska Supreme Court.

Paul W. White, Chief Justice, Nebraska Supreme Court.

That will be all I will introduce at this time, if you want to honor them with applause. [Applause]

SECRETARY-TREASURER TURNER: Ladies and gentlemen, one item about which we did not advise our Toastmaster, and it is not listed on our menu, will be, shall I say, "handled" by Ralph Svoboda, a past President of this Association. Mr. Svoboda!

RALPH SVOBODA, Omaha: Mr. Chairman, Mr. Turner, Mr. Justice Whittaker, Honorable Guests, Ladies and Gentlemen: This might be mishandled instead of handled, but it is an innovation and I hope it will be a permanent one for the Nebraska State Bar Association.

We borrowed this from one of our neighboring associations that has for many years made it a practice to honor one of their

members who has been conspicuous in his service to the Bar, and appropriately we call it "Lawyer of the Year."

I am going to do this somewhat in reverse. The gentleman I refer to was born in 1913 in western Nebraska. His father was a lawyer and later a judge. He had four sons, one of whom died during the war, but the remaining three sons all became lawyers; two daughters, both married. A strange thing, or maybe a unique thing, is that all the sons and the daughters went to the University of Nebraska and graduated therefrom. The three boys all belong to the same fraternity. The two daughters belong to the same sorority.

One son was admitted to the bar in 1936 here in Nebraska. He was a lieutenant in the United States Navy. He was a member of Phi Delta Phi, which is a legal fraternity, and he was a member of the Order of the Coif, which is an honorary fraternity, as a testimonial to his high intellectual abilities.

He is married, has one daughter who is married, has one son who is in the University, one son in high school, and one still a little nipper at home. He has always led a staid life. I made a brave effort to find out if he had ever got into any scrapes. He doesn't even have unruly hair like his father had, nor is he the story teller that his father was. But he did acquire the greatness of his father.

He is a past President of this Association. His brother is about to be President of this Association. He is a member of the State Judicial Council. He was a member of our Merit Plan Committee. Today he was made chairman of our new Nebraska State Bar Foundation.

Bill Wright, will you stand up? Would you have your mother stand up also? Floyd, would you stand up and remain standing? Charlie, would you get up, Charlie Wright? And Ed, as long as all is "Wright" with the Association, would you stand up?

I'll say one thing, that the gentleman I have reference to was not a member of the team that made the first flight at Kitty Hawk. Now, Marian, will you stand up? Marian, do you recognize whom I am talking about? This is your husband's life! Flay!

[The audience arose and applauded.]

I happen to be personally grateful to this gentleman. While I was President of the Bar Association I prevailed on him—and I didn't have to work very hard in prevailing—to be chairman of the Merit Plan Committee. While there were many members of the Association who were on that committee and who worked on that Plan, not being on the committee, this fellow was the ramrod of the whole works and he did a fabulous job.

I am privileged therefore to read from a resolution of the Executive Council of the Association:

IN RECOGNITION, the Nebraska State Bar Association acknowledges with gratitude and appreciation the unstinting labors and outstanding services of Flavel A. Wright, whose selfless devotion to duty and excellent leadership as the Chairman of its Merit Plan of Judicial Selection Committee in 1962-63 brought lasting benefits to the Bench and Bar of Nebraska and conspicuously advanced and immeasurably aided and promoted the cause of a better system of judicial administration of justice for its citizens.

In testimony of his diligent efforts and his generous contributions, this resolution is respectfully dedicated and accordingly salutes him as "Lawyer of the Year."

By order of the Executive Council,
George A. Healey, President
George H. Turner, Secretary

George, will you do the honors?

[President George Healey presented the certificate to Flavel A. Wright.]

TOASTMASTER WRIGHT: Thank you, George.

I am somewhat overwhelmed to be a party to "This Is Your Life." I certainly appreciate the thoughtfulness. I think I should correct the record on one or two points. This campaign to get the Merit Plan established was a campaign of all the lawyers, and I had lots of help. I could only start naming a few, but Tracy Peycke, who was subchairman of the committee, should not be overlooked. Earl Cline, my law partner, was made chairman of the Citizens Committee, so he did a great deal of work. Harry Coffey did a lot of work; he is a non-lawyer but did a great deal of work. And of course Dick Shugrue, who is a young lawyer, was largely responsible for this.

I am not sure, too, but what we had a great break in the way the election went on all these issues, but whatever happened I am real pleased that the campaign was successful. I am pleased that we do have the Merit Plan in Nebraska for the Supreme Court, the district court, the municipal court, and the juvenile court.

I certainly thank you, George, and you, Ralph. I have always known that you could pour it on pretty heavy, and I think you did tonight.

The Governor was heard to mutter that it sounded just like the Kennedy family—or was that the Governor?

There is one other introduction that I didn't get to make that I think we should make, and that is Mrs. George Healey. Rose Healey, will you stand and be recognized?

The annual banquet is generally the highlight of the state Bar Association meetings, and the highlight of the annual banquet is the speech by the main speaker. It is the duty of the President of the Association—and this is a duty which he performs as all Presidents do, with the able assistance of George Turner—but this is a duty which he sort of has earmarked to take the lead in. This I did not know until after my term had expired, but the President should arrange for the speaker at the annual banquet.

Over the past ten or twelve years we have had as speakers two syndicated columnists and radio personalities, two editors, a Congressman, trial judges, appellate judges, two distinguished lawyers from far away, and two distinguished lawyers from nearby. We have had lawyers who are called humorists. All of them, I think, have been personages who are nationally recognized. They have spoken on subjects such as war and peace, the cold war, and even such subjects as trial tactics in default matters, or the responsibilities of notaries public. So there has been a wide range of subjects made available to the speakers at our annual banquets.

George Healey has had the responsibility of arranging for the speaker for this banquet, and I am here to tell you that he has done his job well.

I thought I was sort of "conned" into coming into this job. George asked me if I would introduce the speaker for the evening, and that I expected to do until earlier in the evening when they asked me to introduce the guests at the head table. But I did feel that, in keeping with my responsibilities, I should check somewhat into the history of the speaker this evening. I am afraid I didn't do as exhaustive a job as Ralph Svoboda did in my case.

At any rate, I found his history to be most fascinating, and I think that if I were in charge of the Voice of America broadcasts or the Radio Free Europe broadcasts I would broadcast this message to all countries all over the world because this story is certainly fascinating and inspiring. It typifies, I think, the greatness of this country and the opportunities that the country affords to those who have the ability and who are willing to work to take advantage of it.

Our speaker this evening was born in 1901 on a farm in Doniphan, Kansas. He grew up on the farm, going through the ninth grade of the public schools in that county. After that he worked on the farm for three years. Now this happened in the Twentieth

Century, and I think if I were to stop here I am sure all the mothers in the audience would say it was a terrible thing that he didn't continue his education.

Incidentally, he was born on Washington's Birthday, which I think was of some significance; and he was given the first two names of Charles Evans, which indicates that his parents had some inkling of what was about to happen to him.

After working on the farm for three years, he moved to Kansas City and took a job in a law office as office boy. Now this is a job that they have in big city law offices that we don't have in Lincoln. I don't know what his responsibilities were, but I suspect he took the filings up to the courthouse and one thing and another.

During the next four years he not only completed his high school education but he also got his degree as a lawyer, a Bachelor of Laws degree from the University of Kansas City, and then entered into the practice of law as a member of the Missouri state bar.

You would say at this point that it was fine that he finally started making something of himself but it was too bad he didn't get a better start. Those three years on the farm would probably bother some of the mothers.

He started practicing law and like most young lawyers in a busy trial firm he was engaged in investigation work, so I am informed, and then finally started trying lawsuits and spent a full ten years, day in and day out, in the rugged life that is involved in trying jury cases and all types of trial work. He continued in this law firm in the appellate field and in counseling and stayed there for thirty years, at which time he was a member of a firm which is one of the great firms in Kansas City, at that time known at Watson, Ess, Whittaker, Marshall & Enggas.

After thirty years he was elected to be President of the Missouri State Bar Association. At that time he attended this Association meeting as a state bar president. He was appointed then as Judge of the United States District Court for the Western District of Missouri and served as a trial judge for a full two years, during which time he brought a docket, which was described to me as being somewhat crowded, into current status, which at that time particularly was a really masterful piece of work.

This was recognized and he was then made a Judge of the Circuit Court of Appeals for the Eighth Circuit where he served for only eight months, at which time he was then made a Judge of the United States Supreme Court. He is still a Judge of the United States Supreme Court but serving in a retired status in

which he is capable of trying cases in any federal court. He retired from the Supreme Court on orders of his physician.

He has three children, one of whom is a graduate of Princeton and Northwestern Medical College and is a neurosurgeon, I believe, engaged in the active practice of medicine. His second boy is a graduate of Dartmouth and the University of Michigan Law School and is engaged in the active practice of law. His third son is a graduate of Dartmouth and is engaged in the stock brokerage business.

He is a delightful individual. He has told me that he is not a humorist but he certainly fills all the other qualifications of our prior speakers. He has published material, I know that. It has been material which has been used by the columnists, although he is not a syndicated columnist. He is from our neighboring state; he was a great lawyer and is and was a great trial judge, appellate judge, and Supreme Court judge.

It is a real privilege and pleasure for me to introduce and present to you as the speaker this evening, Justice Whittaker, Charles Evans Whittaker, Justice of the United States Supreme Court, who will address you on some of his reminiscences. Justice Whittaker!

[The audience arose and applauded.]

SOME REMINISCENCES

Honorable Charles E. Whittaker

Mr. Chairman, Mr. President, Governor Morrison, Members of the State and Federal Judiciary, Other Distinguished Guests, Members of the Nebraska Bar, Ladies and Gentlemen: One can hardly do wrong here among so many "Wrights." One of them, an old and valued friend, Ed Wright, not related to these very prominent Nebraska Wrights, said to me downstairs as we started up here, "Now, Your Honor, this is the hour when I suppose you wish you had used a little more discretion when, four or five months ago, you agreed to come here and talk." He knows from experience, and how right he is!

Nebraska, of course, to me is just next door to the scenes of my childhood, and it is a warm place, a very hospitable one, and I find this to be especially true within the sanctum of your Bar. But last night I had occasion to doubt for a moment whether you were running true to tradition when your old and perennial Secretary-Treasurer, George Turner, said at the conclusion of a very nice dinner for the dignitaries of the Bar, "This is all, gentlemen. I hope

to see *most* of you here next year." Now he didn't say what ones he hoped *not* to see, but the implications were obvious to those who would draw them.

When your officers invited me to come here and speak to you this evening I was told, as you might imagine, that I was wanted for my own sake, but having been a bar president myself, and knowing something about the difficulties of retaining and maintaining interest in the waning days of an annual meeting, I suspected that what they really wanted was a curio, someone who would "pack 'em in," one that the folks might turn out not so much to hear as to see. And it seems that a Justice, even a retired one, very well meets those specifications, as there are fewer of them in existence than there are monkeys in the local zoo.

May I say that I am glad I made the choice to come. Nevertheless, despite the warmth of your welcome, I must say that I feel a keener sympathy than before for the old chimpanzee who had been longer in captivity than any other. His keeper, seeking to stimulate interest in the zoo, awakened to this fact and thought it would be good for the zoo to tell the people about it, and so he got an audience. There was the old chimpanzee, whose name was Hokum, and there was a ladder. All things needed being on hand, he started the show. He said, "Hokum, climb the ladder." Well, the old chimpanzee managed clumsily in one way or another to climb up the ladder. Then the keeper said, "Hokum, make a noise like a chimpanzee." And Hokum made a noise that most of the people thought sounded like a chimpanzee. Now, that concluded the show, ladies and gentlemen. That is all there was to it—and that's about all there'll be to this. But it did help to advertise the zoo, which thenceforth was on its way. And I should like to hope that my appearance here this evening may serve an equally valuable purpose for the Nebraska Bar. But I should also like to express the hope that these comparisons will not be extended by implication and will end where I have left them.

I once thought that being made a Justice would alone put one in a rather exclusive company and society. I have learned that there is no virtue in names. Let me illustrate.

Some years ago, while actively at the bar, a lawyer by the name of Clear in my state, one of those ubiquitous souls of the long past, was arguing a case before our state Supreme Court and in the course of his arguments he repeatedly cited, as precedents, the judgments of Mr. Justice Pethley. Finally the Chief Justice said, "Mr. Clear, the Court does not identify Mr. Justice Pethley. Would you please tell us who he is?" Mr. Clear answered: "Mr. Justice Pethley is a Justice of the Peace of the Fifth District of

Kaw Township in Jackson County, Missouri." Thereupon the Chief Justice said, "Mr. Clear, the Court doesn't care to hear any more references to the judgments of Mr. Justice Pethley." Mr. Clear then exclaimed: "Well, what a coincidence! Only last week I heard him make the identical statement concerning the judgments of *this court*."

Something within continues to question the wisdom of my efforts here this evening and causes me to wonder whether my position here has any greater support in reason than did the position in which I found myself when, as a young lawyer, I was sent by the Republican State Committee to make a Republican political speech in the nearly one hundred per cent Democratic community of Fulton, Missouri. Fulton, as you may know, is remembered not only as the town in Missouri's "Little Dixie" where, in 1947, in the company of President Truman, Sir Winston Churchill delivered his famous speech in which he coined the phrase "the Iron Curtain," but Fulton is also well remembered as the home of Missouri's asylum for the feeble minded.

On the appointed day I made my way to the bus station in Columbia to catch the six o'clock bus for Fulton. When I arrived, there was the bus displaying the Fulton marquee; the motor was running; the door was open; so I stepped in and took the fifth seat from the front. Soon afterward there came a group of marching men followed by one in uniform. These men filed into and took seats on the bus, whereupon the uniformed one closed the door and, pointing with his finger, counted, "1, 2, 3, 4," and then coming to me he asked, "Young man, what's your name; where are you going; and what for?" I calmly answered, "My name is Whittaker; I am going to Fulton to make a Republican political speech," whereupon he instantly continued "5, 6, 7."

Again I should like to express the hope that this comparison, too, will not be expanded by implication, however justified, and that my appearance here this evening still offers greater hope of success than that one ever did.

Throughout this week, you have been engrossed in serious and, I hope, profitable considerations, and I should think you might welcome a little coasting—that you will not really mind if I do not indulge in heavy imponderables but, on the contrary, permit my remarks to cover more latitude than altitude, perhaps salted only occasionally with a grain of serious thought.

Ladies and gentlemen, do not be disheartened by the published title of my speech. I promise it will not be over-long. You know, you have to have a title. The program chairman always insists on

it; and so, when pressed to name my subject as I knew I would be, I was ready. "Some Reminiscences," I said. Now, this seemed to satisfy him but it surely could not have left him any wiser than before. I regard that title as having some of the qualities of the Mother Hubbard. It covers 'most everything but touches nothing in particular, and so it will not cramp our style here this evening.

As I came up the stairs into this room this evening I was asked by a lady if I had a manuscript of my speech. I said, "Yes, Lady, I have, but I am really just going to rehash an old speech." She then said, "I would like to have a copy of the manuscript." I replied, "Well, I have only the one and I will need it here this evening." She then asked, "Will it be published?" I replied, "Maybe it will be some day, perhaps posthumously." And thereupon she said, "Well, I hope it won't be long."

In recent years my work has brought me in touch with a great many more lawyers, particularly government lawyers, than before, and I cannot avoid comparing, at least in part, their lot with yours. I find them to be usually highly trained specialists of fine honor and ability but inclined, in some cases at least, toward the ephemeral and the complex. You know, that type of individual who will never say, "This is a summary," if he can say it is a "compendium." He will never say "This as opposed to that" if he can say "vis-a-vis," and sometimes good ideas are buried in such a maze of verbiage as to obscure the real thought they may have conceived.

They represent the largest and most powerful litigant in America, and perhaps in all the world. Its fingers, at least in comparison with those of private litigants, are incalculably long. I have never heard it suggested that its lawyers are forced to forego any needed investigation or research for want of facilities or funds. Now, do you have a comparable abundance in your practice? Would you like to have? Would it be at least a convenience?

In addition to those advantages and the not inconsiderable advantage before juries—and I may add before some courts—who incline to believe that they are really the government's guardians, the government has the advantage of a loud voice in the Congress respecting legislation, and also, through its bureaus and administrative agencies, the power to fill in the gaps or plug up the holes by rules and regulations. And I submit, and I believe you will agree, that these are rather super-powers for a litigant to possess, and, with them, one may wonder that the government ever loses a case. Nevertheless, it does. It does lose cases.

I can assure you that although it is by all odds the largest litigant in your nation's highest court, it is not there a preferred

litigant. That it may obtain the grant of a higher percentage of its petitions for certiorari, and even win a higher percentage of its cases on the merits than private litigants is not evidence to the contrary. The government, out of an extremely large volume, picks and chooses the cases it will present to the high court—a privilege not possessed by private litigants, however large. This alone, my friends, explains the percentage differences in results.

We lawyers proudly boast that under our legal system all litigants are equal before the law, and we try to make this literally and uniformly true, but it seems to me there is cause to question whether we very well succeed. An admittedly extreme example is reflected on the mirror of memories. Doubtless you, or many of you, have seen its counterpart.

I visualize a dark-skinned youth named Willie Jones sitting at the counsel table accompanied only by an appointed, unpaid counsel in the solemn atmosphere of a federal court. The black-robed judge mounts the bench and solemnly calls for trial the case of *The People of the United States of America v. Willie Jones*. Surely that announcement of the impending contest sounds one-sided! And can we doubt that it really is? Do you feel that, in these circumstances, equality before the law is assured? Do you feel that in these circumstances, or even in others not quite so aggravated, it would be conscionable for the court to give the government the breaks of the trial—for breaks there will surely be—or should the defendant get them? Should they, like doubts, go to the accused defendant who presumably is innocent until, by a preponderance of the credible evidence, he is proven guilty beyond any reasonable doubt? I must confess a sympathy for the latter view. Yet it has been my experience that most district attorneys feel compelled to claim them. There could be nothing wrong with that if the accused has competent paid counsel to claim them for him, and otherwise fully to protect his rights and assure him a fair trial.

As Americans we proudly proclaim that all men are created equal, and from that premise we lawyers go on to reason that, being men, all lawyers are equal. But I slyly suggest that there may be some error in this, for it has been my impression that some lawyers are just a little more "equal" than others.

Now this is not an impression lightly gained. It derives from impressions received when, as a young lawyer in my home community, I admiringly watched the maneuvers of the giants at the bar. My impression then was, and the intervening years have only strengthened it, that all men are not equal, save in the sight of

God, and that what we really mean, if more than that, is that all men are entitled to equality of opportunity. And that, my friends, is but an opportunity to prove unequal talents.

If I may reminisce—and it seems permissible these days for Justices, even retired ones, to reminisce—I go back to a scene laid nearly forty years ago in the assignment division of the courts in my home city. The room was full of lawyers attending the assignment of cases to particular divisions for trial. Business was proceeding routinely until a particular case was called and there was no answer for defendant. “A defendant without counsel,” I thought, a predicament that concerned me then but which has more recently become a torment. With some agitation, the court asked the second time, “Who represents the defendant?” Presently there entered the room a tall, broad-shouldered, erect, and graceful man, graying at the temples, who, as he proudly approached the bench, said, as only he could say, “Your Honor, I, I represent the defendant.” I didn’t know who he was but I did know, ladies and gentlemen, from his mere presence and the manner of his announcement, that the defendant was really represented.

This man I came to know as James A. Reed, who for many years so admirably represented our state in the halls of the United States Senate and with whom, as fortune willed in later years, it became my duty, on a few occasions, figuratively to cross legal swords. Pains of inadequacy troubled me then, as they do now, and as they almost always have in the courtroom.

Indelibly fixed in my mind, and I suppose it always will be so, is his closing argument to a jury in a certain bodily injury case in which his client, a boyhood friend, had lost a leg in a railroad accident. I quote a bit, that you may note its power:

“Gentlemen of the jury, back in the little town from which we came, Louis Jones and I were schoolmates. We laughed and played together. We hung our clothes on the same tree and swam in the same old swimming hole. A finer physical specimen I had never seen. But as I look at him now by my side, torn to shreds by the negligent act of this defendant, can you wonder that my heart cries out for him in sympathetic pain?”

Well, I was bleeding by this time myself, and feeling that this argument was designed to appeal more to the passions and prejudices of the jury than to the controverted issue of negligence—for really, my friends, I was not denying the man had lost a leg—I made an objection upon that ground. And after it was overruled—improperly, I thought—came this retort from James A. Reed: “Counsel who so heatedly objects to what I have to say on behalf

of my old friend, Louis Jones, must be actuated by the same motives that spurred the woman of bad repute to object to a reference to virtue in her presence because it hurt to the core."

Well, on my appeal from the judgment I was, of course, able to present what he had said but never quite able to capture and present just *how* he had said it, which, as every trial lawyer knows, makes quite a difference with a jury. You may well imagine what this did to my notions of the theory that all men, all lawyers, are equal.

Like many of the eminent trial lawyers of that day—and such stories could be endlessly repeated from an experience so long and colorful—his tongue was very versatile and, depending on the mood, which he seemed to be able to create and control at will, it could soothe like slumber or cut like a sword. Its cutting swath may be seen in his characterization, in a trial, of a valued newspaper client of ours with which, for years, he had been at open war. In a speech, he said, "If ever that newspaper has anything complimentary to say about me, I want you to write to my dear old mother up in Albion, Iowa, and tell her that her once good boy has gone wrong."

Continuing my reminiscences, may I say that throughout my more than thirty years of active practice at the bar, and a good many of them in the trial of cases, I was almost constantly plagued with doubts about how best to cope with the arts and wiles of opposing counsel. Some of them were pretty cute. I hope you will bear with me while I mention just a few.

Clever counsel for the plaintiff, who was blind and suing my client for causing her blindness, concluded his examination of his client by putting his foot on the step that led to the witness stand, facing the jury, pointing his finger heavenward and asking, "Now, then, Mrs. Robertson, from that day to this one have you been able to see the light of day?" The answer was a sob and a muffled "No." Then, turning to me and bowing over-politely from the waist, he said, "You may cross-examine."

How many of you have received such an invitation under similar circumstances? And just how did you go about cross-examining such a witness in those circumstances? I must say that I did not learn the answer to that question in that case nor in the many similar ones I was to try.

In addition to the problem of coping with opposing counsel, I have had my share of troubles with the courts as well, and I ask you to indulge me for a moment on this score. Often, too often from my point of view, when pressing a determinative mixed ques-

tion of law and fact upon the trial judge, he would decline to go deeply into the matter saying, off the record, that the question was really beyond his competence, and, anyway, it would have to be determined by the supreme court of the state. But, on the record, he simply ruled against me.

Then on appeal the appellate court would often, again too often from my point of view, say, if indeed it would not sing, the familiar language, or perhaps I should say "tune": "Great deference is to be paid to the ruling of the trial judge, and he is not to be convicted"—note the word—"of error in the absence of a clear and strong showing by appellant upon whom the burden rests." And the court would then simply affirm the judgment on that basis.

As anybody can see, the result was that the "buck" was passed from the one to the other and back again and fumbled at both places, and no real, considered judgment was ever given to the determinative question in the case.

Now, ladies and gentlemen, it was, and it is yet, my view that when the question is one of law, no such deference should be paid to the ruling of the trial court, and certainly no heavier burden should rest upon the one than upon the other of the parties. The effort, it seems obvious, should be to determine the answer to the legal question, not whether the trial judge is innocent, for the Lord knows most of them are *plenty* innocent, and hence not to be convicted of error.

Not infrequently, too, I fell victim to that process of reasoning in the courts—"reasoning" I've called it; it may again be indeed a song—which goes something like this: "This case involves a remedial statute which, under familiar rules of law, must be liberally construed." And then the court, under the guise of liberal construction of the statute, proceeded also liberally to construe the facts.

Is not this, in your experience, a prime breeding place for the miscarriage of justice? If more fidelity is to be paid to the details of one aspect of a lawsuit than to another, it seems to me it ought to be the facts. Why? Because legal questions do not arise in a vacuum; they arise only in relation to particular or concrete facts, and slight differences in the facts often make wide differences in results. Surely there is no warrant for a liberal construction of the facts, even though governed in legal consequence by a remedial statute.

While I am on that subject, may I ask you: Just how are statutes to be construed? Volumes have been written on the subject, but as the late lamented Judge Learned Hand said, "They

haven't advanced us very far." Perhaps the late Professor Llewellyn, of the University of Chicago, was delving deeper than he thought in his clowning on the subject when he asked, "Do you want to know how to construe statutes, really? I'll tell you how to construe statutes. Statutes in derogation of the common law are to be strictly construed. Remedial statutes are to be liberally construed. But every statute in derogation of the common law is remedial, and every remedial statute is in derogation of the common law. Now, 'ain't' it clear?"

Being unable, after more than thirty years of effort at the bar, to overcome my deficiencies in coping with such matters from that arena, and looking to what appeared to me to be vast opportunities for improved public service on the bench, I thought it would be good to become a judge. And so, in baseball terms, "I got on." And with the support of a good team, some of them Nebraskans by the way, I was enabled to touch three bases in three years. I went to first on a walk, to second on a fielder's choice, and on the second pitch thereafter I was sacrificed to third.

First base, ladies and gentlemen, the district court, being close to the dugout of the home team and its fans, was a perfect delight. Second base, the United States Court of Appeals, particularly the Eighth Circuit, due to my great affection for, and great help from, our old friend, Harvey Johnsen, was a fine and comfortable position. And by mentioning my old friend, Harvey Johnsen, I do not mean to dilute for one moment my great respect and affection for every member of that court with whom I served.

But third base, ladies and gentlemen, I soon found truly to be, as the fans say, the "hot corner." Then came the most solemn quest for light that can proceed from the broodings of a human soul. People free of the awful weight of ultimate responsibility are likely to be persuaded by prejudices and passions and to voice them, sometimes irresponsibly, and whether in good taste or bad. But may I say to you that any normal man called to the Supreme Court of the United States will find the weight and volume of his responsibility to be a most sobering experience.

The literature of the law is nearly endless and its growth is unabated. Technological developments and the tremendous growth of our country have opened new vistas that daily cry for resolution. Many of the rules of decision were devised for other times and conditions. Statutes are not always clear, even when applied to subjects which Congress had in mind, and particularly when applied to subjects it appears not to have contemplated or foreseen. Yet the Court, faced with a concrete case for decision, cannot seek counsel of the Congress but must proceed to decision upon its best

understanding of the legislative will, or upon what it thinks would have been that will if Congress had even thought about the matter.

Our Constitution, too, ladies and gentlemen, designed for the ages, is in many respects vague, vague indeed. Some say wisely vague, that it might be sufficiently elastic to adapt to the changing conditions and mores of advancing times. Whatever you may think of this, the plain fact is, my friends, as often has been said, that the Constitution does not interpret itself, and simple necessity as well as history and logic have cast that burden upon the Court. There is no place else to go, and you have to have an umpire if you are to have a government of laws.

Precedents for almost any proposition can be found, and questions presented are often so razor sharp that they might be decided either way with almost equal support of precedent and reason.

Ladies and gentlemen, the Supreme Court of the United States does not seek its problems but it cannot avoid decision of those rightfully presented. Those it must take and upon them it must act; and so it does according to the oaths and consciences of the Justices and their best understanding of the law's commands.

It is too much to expect, in the myriads of circumstances involved in these cases, that even nine men, though equally dedicated, devoted, and competent, will view all things alike. Hence the Court frequently divides, and firm dissenting views are often stated in strong language. But I am happy to say to you that mutual respect is such that this is always, or nearly always, done without personal rancor or ill will, and that, at least outside the conference room on Fridays, the Justices are a reasonably happy family.

Since the function of the Court is to resolve great issues, it is inevitable that it must proceed in the midst of tensions, and it always has. The very nature of its duties fate it to be the target of almost continual criticism. This is inherent in the process, for there will be dissatisfactions in every case, as every lawyer knows that only one side can win and the loser is never pleased. The winner gets only that to which he believes he is entitled, and the loser and those who take his view, being human, feel that they are victims of injustice, and sometimes worse. Of course, as you would expect, the greater the importance of the issue the higher the pitch of tensions will likely be, and hence some irresponsible things are said by some people more in anger and ignorance than in wisdom and compassion.

Being composed of human beings, the Court has doubtless made mistakes, and it likely will make them in the future regardless of who may be its Justices. But as a great President once said—I think

Calvin Coolidge was a great President—"It's not necessary to prove that the Supreme Court never made a mistake. But if the power is to be taken from them, it is necessary to prove that those who are to exercise it would be likely to make fewer mistakes."

That, I think, my friends, is a temperate, responsible, and logical statement. You are entitled to your view. I am not a salesman, nor here for sales purposes. Every one has the right—indeed, a constitutional right protected by the guarantees of the First Amendment—to speak his mind on all public questions and institutions. Indeed, the exercise of that right is essential to the vibrancy of our democratic processes. Hence there can be no objection to criticism of judicial opinions. Moreover, we know that respect for the judiciary cannot be won by shielding judges or their judgments from criticism. But this thought I wish to leave with you: If criticism is to serve any worthy purpose, must it not be advised, temperate, and responsible? Much of it is not.

A fair example is the statement, recently oft repeated, respecting the segregation and the prayer and Bible reading cases, that "the Supreme Court put the negroes in and kicked God out of the schools." Now, my friends, of that type and kind of criticism the most charitable thing I can say is that it is made without understanding of the problems presented, of the commands of governing constitutional provisions, or of what the Court actually decided.

Whatever you may think of this, surely I need not remind you, or people of your thoughtfulness, responsibility, and intelligence, that it is of the essence of orderly government that the Court's decisions, so long as it is charged with the responsibility of decision, must be accepted and obeyed. It is too obvious, I submit, for serious discussion—and I have not the time or patience for any other type of discussion—that any other course is destructive of ordered liberty, and would lead inevitably to chaos, calamity, and the loss of all our liberties.

My thanks to you all for your attention.

[The audience arose and applauded.]

TOASTMASTER WRIGHT: Justice Whittaker, we are indeed indebted to you for coming here and presenting that thought-provoking address, and we certainly hope you will come back next year.

JUSTICE WHITTAKER: Won't you have to clear that with George?

TOASTMASTER WRIGHT: Yes, I will have to clear that with George. He knows this Association better than I do.

I have one further responsibility which I propose to carry forward on behalf of President George Healey. Floyd Wright, will you step forward?

At this stage of the annual meeting, and this is the final event of the evening, the President of the Association presents the gavel to the incoming President who will take office, as I understand it, tomorrow afternoon.

Floyd, it is a real pleasure to me to be able to be here and witness this, because, as a younger brother, I can say that Floyd is the favorite of the family and I was a little bit concerned that I might have short-circuited what I knew he was entitled to, and that was to be President of this Association. Congratulations!

[The audience arose and applauded.]

PRESIDENT-ELECT FLOYD WRIGHT: Members of the Association and Guests: Needless to say I am extremely proud to have been elected President of this Association. I want to thank all of the members for the honor that they have given me. With the help of the other officers and the members of the Association I shall do the best I can during the coming year to carry on the work of the Association. I thank you.

TOASTMASTER WRIGHT: I believe that concludes the annual banquet and we now stand adjourned.

[The banquet session adjourned at nine-thirty o'clock.]

FRIDAY MORNING SESSION

November 8, 1963

The Friday morning session of the Institute on Corporation Law was called to order at nine twenty-five o'clock by Howard H. Moldenhauer of Omaha.

CHAIRMAN MOLDENHAUER: Gentlemen, in considering the subject of corporation law for an institute, we felt we certainly would have been remiss in not having someone come to speak on the farm and ranch corporations, so we immediately looked around for one of the very few authorities in this field, and I think we have found him right here.

Mr. Neil Harl was born on a farm near Centerville, Iowa. He grew up on a farm. Then he pursued his education at Iowa State University at Ames where he received a Bachelor of Science degree. Then he went to the University of Iowa where he received his Juris Doctor degree from the Law School. He is a member of the Order of the Coif and several honorary societies.

In 1957 and 1958 he was Field Editor for the farm magazine, *Wallace's Farmer*. During that time he spent a great deal of his time out in the field talking to farmers and agricultural people. It is my understanding that during that time he also began to see a great need and a great lack in the legal writings of the law on the farm and ranch type entity in organization.

From 1958 to 1961 he was a research associate at the Agricultural Law Center at the State University of Iowa, and since 1961 he has been working toward a Doctor of Philosophy in Economics at Iowa State. He is sort of a hybrid individual, both a lawyer and an economist.

He has authored and co-authored several articles on farm corporations, tax law, and agrarian reform. His dissertation for his doctorate degree is "The Legal Economic Analysis of the Corporate Form as Applied to the Farm Firm." He is now preparing a second draft of a book entitled "Farm Corporations."

I am very, very pleased to introduce to you Mr. Neil E. Harl from Ames, Iowa.

THE FARM AND RANCH CORPORATION—BUSINESS ORGANIZATIONAL FORM OF THE FUTURE

Neil E. Harl*

Thank you, Howard. You know, all the talk about my being an economist reminds me of something that comes to mind every time I am so introduced, and that is the two or three or half dozen definitions of an economist. I would like to just share two of those with you this morning by way of introduction.

One that I have always treasured is that an economist is a chap who tells you how to spend the money you wouldn't have had if you had listened to him the last time. Then there is the old saying that if all the economists in the world were laid end to end they still couldn't reach a decision.

Howard's reference to me as a "hybrid" merits comment. We normally think of hybrids as being something eminently desirable. We think readily of hybrid corn; we think also of the hybrid effort between chemistry and physics that produced the atomic bomb and all of the knowledge now associated with nuclear fission. But then there is the other side of the coin, too. I am sure you are all familiar with that institution known, at least down where I came from in southern Iowa, as the Missouri mule. That too is a hybrid, and it is an interesting hybrid in that it has "no pride of ancestry nor hope of posterity." I would hope that our legal-economic hybrid would perhaps not be quite so sterile intellectually as that hybrid has turned out to be.

Some of my colleagues in economics are frankly skeptical about this combination of law and economics. It is becoming more and more popular but still there is skepticism. My economist colleagues tell me that they have yet to see an economical lawyer. Then my friends at the bar say there hasn't been anything legal about economics since Lord Keynes of the 1930s.

At any rate, it is with great pleasure that I do appear before your sixty-fourth meeting of the Nebraska Bar Association and, along with Dean Mason Ladd and President Mayne of our Association, bring you greetings from Iowa.

This subject of farm and ranch incorporation has been kicked around for years. Much of the talk, I am afraid, has stemmed from some misconceptions and perhaps some misunderstandings as to

*Agricultural Economist, Land and Water Economics Branch, Resource Development Economics Division, Economic Research Service, U.S. Department of Agriculture; Member of Iowa Bar.

just what this corporate animal is that has sneaked into farming and ranching. I am reminded of the story of the old Englishman who was making his first visit to the United States, visiting a dude ranch in one of the western states. He was really one from the old sod. One of the aspects of American life that he simply scorned was the tomboyish ways of American girls. He thought this despicable, and made this fact known at every opportunity.

On his first morning at the dude ranch he walked out of his air-conditioned bunkhouse and the first thing he saw was a raw-boned, teen-age girl leaning against the corral fence. She had on a man's shirt and she was wearing faded Levi's. This set him off on his pet peeve. "Look there!" said the English chap to a bystander, with a great deal of disdain, as only an Englishman could, "you can't tell if that's a boy or a girl!"

"Oh, it's a girl," spoke up the equally raw-boned bystander, "she's my daughter."

This touched the Englishman deeply and he replied, apologetically, "Oh, please forgive me. I didn't realize you were her father."

Whereupon the bystander said, "I'm not. I'm her mother."

As I said, there has been some confusion about the corporate form as applied to farm firms, too. As one examines the literature over the past several years, two distinct eras stand out in bold relief with respect to the corporate form as applied to farm firms. The most recent era, dating from about 1955, is essentially an era of application of the close corporation to farm firms in which ownership is frequently maintained within a family.

The other era, extending through the 1920s and 1930s, was characterized first by an emergence of a few well-publicized farm corporations of substantial size. Some of these behemoths were even publicly held. Later on in the period, more particularly during the 1930s, ownership of farm land by absentee corporations, especially by insurance companies, came to play a very significant role in agriculture. Much of this corporate land ownership actually evolved through mortgage default by farmers during the depression. As an indication of the extent of corporate ownership, nearly 12 per cent of the farm land in Iowa was owned by corporations in 1939. This percentage dropped off rapidly in the 1940s.

Largely in response to the fears that an agricultural economy of a few very large corporate farms might develop, with the concomitant death of the so-called family farm, several states enacted legislation prohibiting or discouraging farm incorporation. Several of these statutes are in effect today. Kansas and North Dakota have perhaps the most complete limitations on farm incorporation.

The North Dakota statute constitutes a flat prohibition; the Kansas statute is only selectively prohibitive. The Oklahoma constitutional provision is of undetermined breadth. The author of an article in the May 1963 issue of the *Oklahoma Law Review* suggests that the provision may not prevent farm corporations from owning land in Oklahoma; the matter is still open to considerable doubt in Oklahoma. The Minnesota acreage limitation, the Texas limitation on what has come to be known as vertical integration, and the West Virginia special tax merit only passing mention.

Data from several sources indicate that increasing use has been made of the corporate form by farmers in recent years. Much of the evidence shows a substantial increase in farm incorporation since about 1958. This interest and increased use of the corporation probably stem from several independent factors: (1) the passage of Subchapter S of the Internal Revenue Code; (2) the emergence of the small closely held corporation as a relatively mature business organizational structure; and (3) the vast and pervasive effects of technological change that has swept agriculture during the past several years. For example, the changes in investment per farm and per farm worker since 1940 have been substantial. The value of production assets per farm has shot up from \$6,094 in 1940 to over \$34,000 in 1960. These figures are for the nation as a whole. Looking at another statistic, and this for the State of Nebraska, the average size of farm in Nebraska has increased from 391 to 528 acres during the nineteen-year period from 1940 to 1959. These are indications of the technological transformation that agriculture has been through in recent years. The substitution of capital for labor has had far-reaching effects.

The essential link between technological change in agriculture and greater use of the corporate form has been the economic and legal motivations for incorporation. Under the corporate form of doing business there are certain economic motivations that bear mention here. Resource allocation within the firm may more nearly approach what economists call the theoretic optimum. The decision makers' effective planning horizons—and by that I mean the distance into the future to which the farm planners look in making plans—may be extended, resulting in more nearly optimum production over time. Problems of capital accumulation may be alleviated. And the economic effects of the so-called "family farm cycle" may be ameliorated as well. It might be added, parenthetically, that the family farm cycle is caused by the relative scarcities of labor and capital during the productive life of the farm family. During the first few years that a farmer operates he is usually long on labor, short on capital; in the final years this reverses itself so

that a farmer wishes to contribute less and less labor in his final years and usually has more and more capital with which to work. The family farm cycle frequently involves some economic inefficiencies. In many respects the corporation offers a near perfect form of organization from an economic viewpoint, where there is multiple ownership of resources of production.

Several empirical studies have been conducted in recent years in an effort to determine, among other things, what precise factors have influenced farmers to incorporate. Data from studies in four States—Nebraska, Iowa, Oregon, and South Dakota—indicate that there are four principal reasons why farmers have incorporated in those states. Incorporation has occurred mainly to accomplish objectives of estate planning, business planning over time, limitation of liability, and income tax saving. There have been numerous variations of these answers by specific firms but those categorize, in very general form, the motivating factors for incorporation.

As we turn now to the more technical aspects of the presentation, let me say just a word about the amount of material included in the outline. It will not be possible in the time allotted to discuss every point in detail. Therefore some sections will be submitted "on the brief," as it were.

One of the important considerations in almost every instance wherein the corporation is considered as an alternative business organizational form is that of the income tax effect of incorporation. Income taxes are relevant, indeed, in a discussion of farm and ranch incorporation. It is often the first question or among the first questions asked by people who are interested in incorporation.

In most cases in which agriculture is carved out for special treatment in the tax law, a farm corporation is a farmer for tax purposes. This is true of most of the elections on deductions for expenditures, for example. However, a farm corporation does face some differences in terms of income taxation. For example, a farm corporation is permitted less extra first-year 20 per cent depreciation deductions than is allowed for an unincorporated farm firm. A farm corporation is limited to \$2,000 of such depreciation per year. A married farmer filing jointly can claim up to \$4,000, as can a married partner filing jointly.

Even more importantly, death of an owner has a much different effect upon the tax basis of property after incorporation. Under present law, property passing through a decedent's estate takes as tax basis the fair market value on the date of death or the alternate valuation date. This wipes out the capital gain in the property at periodic intervals, and, among other things, makes it

possible for depreciable property to be depreciated out in each generation. For example, buildings that are depreciated out can again be placed on the depreciation schedule after death of the owner. After incorporation, the adjustment of basis at death of a shareholder inures to the corporate stock, but not to the underlying corporate assets. Therefore, older farmers in particular may want to consider carefully this aspect of tax treatment under the corporate form of doing business.

It is perhaps noteworthy to point out that the matter of filing income tax estimates changes after incorporation. A corporation has its own rules on estimates. There is no need for an estimate by a corporation unless income tax is expected to exceed \$100,000. Of course, a Subchapter S corporation need not file a declaration of estimated tax in any event. The special provision available to "farmers," of filing tax by February 15 and avoiding estimates, is not extended to farm corporation employees. Thus, after incorporation a farmer as an employee is an ordinary taxpayer and may be required to file a declaration of estimated tax.

It is worth noting that individuals need not withhold income tax on wages paid to agricultural labor. This provision is extended to a farm corporation as well as to individual farmers.

Until recent years the greatest disadvantage to farm and ranch incorporation in most instances was said to be the basic corporate income tax treatment of ordinary income and capital gains. Until 1958 this apparently discouraged many firms from incorporating. The corporation, in a great majority of the cases, suffered from five disadvantageous tax aspects:

- (1) Corporate income was taxed at only two rates, 30 per cent on the first \$25,000 and 52 per cent on the remainder.
- (2) Corporate income was taxed twice if paid out as dividends before it was in spendable form in the hands of the shareholders, with only a limited exclusion and credit.
- (3) Corporate long term capital gains were taxed at a flat 25 per cent.
- (4) Corporate capital gains and tax exempt interest lost their tax-privileged identity when passed to the shareholders as dividends.
- (5) Excess capital losses could be used only to offset capital gains and could not be used to offset up to \$1,000 of ordinary income as in the case of individual taxpayers.

It is easy to see, then, why farm corporations, before 1958, generally paid very little income tax. Operations were carefully calculated to keep corporate taxable income low and this was gen-

erally accomplished by paying out corporate income in the form of tax deductible salaries, interest, or rent.

Since 1958 it appears that many farm corporations have utilized Subchapter S of the Internal Revenue Code despite its numerous shortcomings. Without going into great detail, let me say that many of the disadvantages of the regular corporate method of taxation are alleviated inasmuch as the Subchapter S corporation pays no tax. The corporation passes through to the shareholders, to be included in their individual income tax returns, their pro rata share of undistributed taxable income, long term capital gains (but not capital losses) and operating losses. In addition, each shareholder also reports, as usual, any salary, interest, or rent that he might receive from his corporation.

The requirements for Subchapter S election are undoubtedly quite familiar to you. One requirement for continued eligibility has caused some difficulty for some of the farm "landlord" corporations. By landlord corporation is meant a corporation that owns land and rents it out to tenants under a conventional leasehold arrangement. The law specifies that the election under Subchapter S terminates if more than 20 per cent of the corporation's gross receipts come from investment type income—rents, royalties, dividends, interest, and so forth. The question has arisen over the definition of "rent" in the statute. Does it capture landlord corporations that merely own land and rent it out under a lease? The Treasury has taken the position that income of farm corporations owning and leasing farms to tenants is not "rental" income if the corporate officers or agents participate to a material degree in production through physical work, management decisions, or both. The rule seems to have been picked up from social security law.

Every practitioner engaged in the preparation of farmers' tax returns fights the battle of household-firm transactions. The problem may take the form of deductibility of automobile expenses, the tax aspects of home-raised products that are consumed at home, or it may take the form of deductibility of expenses for the personal residence of the taxpayer. These problems are not really avoided if a farmer incorporates; they are often cast in a slightly different and more formal context. If the residence is conveyed to the corporation, all costs in connection therewith are deductible. This includes some expenses that may not have been deductible before. But the tax man's *quid pro quo* is a reasonable rental picked up by the occupants on their personal income tax return.

Some taxpayers have raised this question: Can you deduct meals and lodging furnished to employees residing on the farm ostensibly to take care of baby pigs, baby chickens, etc., that

demand the almost constant attention of the farmer? This question has apparently not been settled. The *Schwartz* case cited in the outline made it work with six employee-shareholders of a corporate undertaker whose religious practices required that bodies be processed immediately after death.

The problem of the tax aspects of automobile expense and the question of which farm vehicles to convey to the farm corporation have many angles. Individual ownership of automobiles presents the problem of expenditure deduction in its usual form—claiming as great a proportion of expenses as possible on the corporate return. If the corporation owns the automobiles, then personal use of the automobiles may be taxable income to the user.

There are other considerations, too, in deciding which vehicles should be conveyed to the corporation and which vehicles should be kept out. It is well to consider any differential in insurance costs and differences in insurance coverage under corporate ownership versus ownership by the individuals. It is well also to consider the matter of liability for claims arising out of personal use in the case of corporate ownership and liability for claims out of business use in the event of individual ownership.

Undoubtedly one of the most crucial stipulations laid down by incorporating farmers is that incorporation must proceed without recognition of the potential gain wrapped up in the farm property to be conveyed to the new corporation. Farm property in particular often has a fair market value substantially in excess of tax basis. Land, for example, has appreciated in value in recent years. Land worth \$100 an acre twenty years ago may be selling for \$300 or \$400 an acre today. Many farmers have used rapid depreciation methods which may have driven tax basis well below fair market value. And, of course, much of the farm inventory may consist of animals and crops with zero basis because costs of production have been deducted. In almost every case the tax basis is substantially below the fair market value of the property at the time it is conveyed to the corporation. Thus, for the vast majority of farmers, a so-called "tax-free" incorporation is essential.

The two basic requirements of a tax-free incorporation, wherein the parties do not recognize the capital gain in the property, are: (1) the transfer of property must be solely in exchange for stock or securities in the corporation; and (2) the transferors of property must end up "in control" of the corporation after the transfer. This requires that 80 per cent or more of the stock go to the transferors. Gifts at the time of incorporation in excess of 20 per cent of the stock may preclude a tax-free incorporation. With a tax-free

exchange there is simply an exchange of basis and holding periods between the corporation and the individuals who form the corporation and contribute property to it. The stock received in exchange for the property takes its basis from the transferred property. Mortgages or other obligations simply reduce the basis of stock or securities received by the transferor.

In a few cases a "taxable" incorporation may appear to be advantageous for some farmers. They may find it desirable to trade capital gains recognition for deductions from ordinary income, or to spread the recognition of income over a period of years. There is no election between a "taxable" or a "tax-free" incorporation. The result depends precisely on how the transaction is handled. For most farm corporations a "taxable" incorporation loses its luster because of the restraints placed upon a taxable incorporation in which the gain is recognized on all of the property conveyed to the corporation. First, transfers of property to a "controlled" corporation are not eligible for capital gains treatment. Secondly, it has been held that the gain on growing crops is taxable as ordinary income and not as capital gain. Thirdly, losses incurred in a transfer to a controlled corporation are not deductible. These features remove much of the glamour of a taxable incorporation for most family farm situations.

In financing a farm corporation a farmer faces several new decisions after he incorporates. The basic decision of whether and to what extent to use debt capital as well as equity capital takes on new significance. A shareholder can be a creditor as well as a contributor of equity securities. With debt capital, income tax savings accrue in a regularly taxed corporation because of the deductibility of interest. Moreover, a shareholder may have greater investment security as to the debt portion of his contribution. Also, repayment of principal on a debt may avoid the dividend consequences of repayment of equity capital. And imposition of the accumulated earnings tax is less likely in the case of accumulations to pay off debt obligations. The controversy over the deductibility of bad debts arising from a transaction between a shareholder as a debtor and his corporation was virtually settled in a recent United States Supreme Court case. Tax-wise, it has been advantageous to get some of the investment into the corporation as debt and then, if the business fails, to claim a bad debt deduction. Under the *Whipple* case, however, such bad debts are treated as non-business bad debts, receiving only capital loss treatment and not business bad debts which merit ordinary loss deductibility.

It should be noted that debt capital cannot be substituted for

equity capital throughout the entire range of capitalization with impunity. The advantages of debt capital may be lost if debt is pushed too far. The guidelines as to what constitutes excessive debt to equity in farm or ranch firms are not abundantly clear.

In addition to facing the debt-equity capital decision, incorporating farmers face also the question of fashioning the equity capital structure. The precise use made of equity capital in a farm corporation is heavily dependent upon the latitude accorded the incorporators under state law in setting up the capitalization pattern. Normally classes of equity securities are differentiated on the basis of dividend priorities, voting rights, and liquidation preferences.

In Nebraska, as in many states, some restraints are imposed upon the differentiation of equity securities on these bases. The articles of incorporation may provide for non-voting stock; otherwise, every share is entitled to vote. Again, with respect to voting, the Nebraska Constitution makes cumulative voting mandatory for elections to boards of directors. And all shares must have par value.

Within the framework of these rather broad restraints, incorporators in Nebraska have a great amount of latitude in fashioning the equity capital structure best suited for their needs, differentiating on the basis of voting rights, dividend priorities, and liquidation preferences.

Very little need be said about sources of equity capital for farm corporations. Although arguments can be made for the beneficial effects to agriculture of tapping the equity securities markets, there are several reasons why this does not loom large in importance today, nor is it likely to in the future. Given present earnings in agriculture (which are relatively low), present sizes of firms in a relative sense (again quite low), present costs of obtaining outside equity capital (which may be quite large), and present attitudes relative to diffusion of ownership and control rights among outsiders, it is unlikely that outside equity capital will play a very important role in farming at least in the near future.

The notable exception to the statement that outside equity capital is not likely to play a very important role in farming in the near future seems to be equity capital supplied by non-farmers wherein the equity capital devolved upon the non-farmer by gift or by testate or intestate succession. This situation often involves brothers, sisters, and other relatives of those remaining on the farm. Non-farm heirs may have received equity securities during the lives of the parents or at their deaths and thus become outside equity shareholders. This type of involuntary investment by related

non-farmers is often a necessary by-product of use of the farm corporation to accomplish estate planning objectives, at least for an interim period. Professor O'Neal will cover some of the problems involved in such situations at a later point in the program.

Turning now to sources of debt capital, it can, as suggested earlier, be obtained from shareholders at least up to some maximum level. It should be pointed out, however, that the fiduciary duty requires that loans from officers or directors be free from fraud or impropriety and that the lender act in good faith and be able to show the inherent fairness of the transaction.

A farm corporation does face certain restrictions on the availability of debt capital from some of the usual sources. Federal Land Bank loans may be made to a farm corporation, provided holders of 75 per cent or more of the stock assume personal liability for the loan. Similarly, Production Credit Association loans may be made to farm corporations if the holders of a majority of the shares sacrifice limited liability for that particular obligation. Farmers Home Administration real estate and operating loans and FHA farm housing loans and grants are simply not available to farm corporations. Small Business Administration loans are available to farm corporations only if the corporation engages in a non-farm business activity accounting for more than 50 per cent of the corporation's income.

In obtaining loans from private credit agencies, a 1959 Iowa study revealed that in many cases shareholders are required to guarantee personally loans to the corporation. The question of whether farm or ranch incorporation improves or inhibits credit availability is still an open question. We have no good quantitative data on the precise effect of incorporation upon credit availability. There are both pluses and minuses to consider. Some of them have been indicated in the outline.

One of the most dramatic and perhaps far-reaching effects of farm and ranch incorporation is the transformation of self-employed farmers into employees. This new employee status is accompanied by both advantageous and disadvantageous consequences.

Looking first at social security, there are several social security implications to consider before incorporation. The social security tax is levied at a greater rate after incorporation, which results in substantially greater total social security tax. Using 1963 rates, the tax is computed at the rate of 5.4 per cent for a self-employed farmer on the first \$4,800 of self-employment income. The tax is imposed at a 3½ per cent rate on employees and a like rate is

imposed upon the corporation, making a total of 7.25 per cent for the combined employee and employer shares. This results in a maximum of \$88.80 per year per employee more in social security tax *after* incorporation than before at 1963 rates.

However, it might be pointed out that if the entire tax, both the employee's share and the employer's share, is paid by the corporation, the corporation can deduct the entire amount. Of course, if the corporation pays the employee's share, that amount is taxable to the employee as additional compensation.

It is worth noting also that wages earned by children under 21 years of age are not subject to social security tax if the child is working for a parent. However, if the child is working for the parent's farm corporation, the wages would be subject to social security tax.

One offsetting factor to these social security tax disadvantages is the fixed nature of employee compensation. This feature may result in greater social security benefits for owner-employees after retirement compared with the fluctuating income of a self-employed person. Farm income frequently fluctuates widely, sometimes above and sometimes below \$4,800 per year. If an employee of a farm corporation receives a salary of \$4,800 per year, assuming that is the maximum base for social security benefits, then upon retirement that person would be entitled to maximum social security benefits. But if he is a self-employed person, and his income drops below \$4,800, this will reduce his benefits after retirement except for the drop-out years. This aspect of "evening out" income over time may partially offset the increased social security tax cost.

The corporate form may facilitate retirement planning for senior owner-employees. Neither dividends nor undistributed taxable income of a Subchapter S corporation is subject to the social security tax and they do not produce social security benefits. Likewise, such income does not reduce social security benefits after retirement and before age 72.

Thus, a retired corporate employee could receive a part-time salary of \$1,200 per year, assuming that is reasonable compensation for services rendered. The \$1,200 salary is in keeping with receipt of the maximum social security benefits to which the individual is entitled. And additional income could be received in the form of dividends or distributions out of previously taxed income in the case of Subchapter S corporations. Such retirement arrangements must be reasonable in terms of contribution of effort and allocation of income. It can be said that the corporation offers

substantial flexibility in planning for retirement of employees with the possibility of at least limited participation by the retiring employee in the affairs and activities of the firm. It may be easier to work out an arrangement for a retiring farmer on the basis of his being a part-time corporate employee than trying to use the traditional lease arrangement or a partnership.

In passing, some additional aspects of employee status might be mentioned. A corporation may elect to come under workmen's compensation. And a corporation may choose to take advantage of certain tax privileged fringe benefits for its employees, including owner-employees. The possibilities include group term life insurance, which is perhaps an ideal fringe benefit. Premiums are deductible by the corporation, and neither premiums nor proceeds is taxable to the beneficiary in certain instances. Nebraska law, however, requires a minimum of five employees for a group plan. This requirement might render group term life insurance of very little usefulness for many farm corporations inasmuch as few have as many as five employees. Some insurers do have "baby group" plans, or plans that are set up to handle less than five employees per firm. A word of caution is in order since these special groups may require medical examinations; the Internal Revenue Service has indicated that a plan may not qualify for the group insurance deduction if a medical examination is required.

Time does not permit discussion of some of the interesting possibilities and problems posed by some of the other tax privileged fringe benefits. For example, a farm corporation may set up for its employees health and accident plans and various types of deferred compensation plans. Some of our Iowa farm corporations are taking advantage of the deferred compensation plan provisions for retirement planning and receiving a current tax benefit as well. It was thought for a time that perhaps the Self-Employment Retirement Act of 1962 might substitute for employee status granted by incorporation for purposes of tax-privileged retirement planning. However, the 1962 Act is of very little interest to most farm people because of the relatively small contribution and deductions that can be made under it.

One result of farm or ranch incorporation is a restructuring of member liabilities for firm obligations. In this regard, and before moving into a brief examination of limited shareholder liability in a farm corporation, two aspects of liability that are particularly affected by incorporation might be mentioned. One is the matter of bankruptcy. Federal law has long provided that an individual farmer may file a petition as a voluntary bankrupt but cannot be declared a bankrupt involuntarily. But a farm corpora-

tion enjoys no such exemption from involuntary bankruptcy. A farm corporation can be an involuntary bankrupt, given the necessary set of facts with respect to debts owed and acts of bankruptcy committed.

Another result of incorporation is the loss by farmers of exemptions from execution by creditors. An individual farmer who is head of a family in Nebraska may be able to claim a substantial amount of property exempt from creditors: a homestead not exceeding \$2,000 in value or 160 acres in area, and considerable personal property, for example, all pigs under six months. These exemptions are lost if the exempt property is conveyed to a corporation.

Shareholder limited liability is, of course, a concomitant of a legally organized corporation. Limited liability is generally not denied merely because the stock is held by members of a family or even by one shareholder. Of interest to farm corporations is the requirement that the parties must comply with certain corporate formalities in order for the shareholders to be assured of continued limited liability. A seemingly inexorable tendency exists in many closely held farm corporations for the usual corporate formalities to be ignored or at least slighted after incorporation. During the first year or so after incorporation, the parties generally follow the corporate formalities fairly well. The shareholders hold an annual meeting and they keep minutes; and the board of directors meets and votes on certain matters. Even though in most cases the same people occupy all three groups, the parties are relatively careful about which hat they have on when they make decisions, whether it is the shareholder's hat, the board of director's hat or the officer's hat. But as time goes on there seems to be less and less attention given to the matter of maintaining corporate formalities. An effort should be made by counsel at every opportunity to stress the importance of corporate formalities.

It has frequently been asserted that shareholder limited liability has little meaning if shareholders own no non-exempt assets other than stock in the corporation. In many cases farmers own no property, or virtually no property, other than what they have invested in or conveyed to their farm corporation. However, in the case of an unsatisfied judgment, corporate limited liability may be of value even though the shareholders own no non-exempt property individually, other than stock in the corporation.

Let's examine for a moment problems arising when a farm corporation does business in two or more states. In this peripatetic age, it is unlikely that a farm corporation will long function without

some out-of-state contacts. Even the most provincial farm corporation may purchase feeder cattle from out-of-state vendors; sell livestock or crops at terminal markets out of the state; or its vehicles may travel out of the state. These are a few of the possible contacts that a farm corporation may have with states other than the state of incorporation or principal operation. If corporate operations extend across state lines, three different types of legal problems may arise: (1) A corporation may be subjected to the judicial jurisdiction of the foreign state. This requires very little contact, at least in states having modern "single act" jurisdictional statutes; (2) the corporation's income or property may be subjected to taxation in the foreign state; this normally requires substantially greater contact than for jurisdiction to be taken; (3) or the corporation may be subjected to the regulatory or qualification statutes of the foreign state. Inasmuch as qualification requires paper work and expense, most farm corporations are reluctant to qualify to do business in other states. To encourage qualification, some states impose sanctions for non-qualification. Farm corporations doing business outside the state of incorporation should be cognizant of these provisions and take appropriate steps to insure protection of their interests. Some non-qualification statutes deny use of the courts and some involve a penalty which may be substantial in amount.

The last major point in this presentation is a brief discussion of the estate planning aspects of farm or ranch incorporation. It can be said that certain attributes of the corporate form may facilitate the accomplishment of specific estate planning objectives. But it should not be supposed that a satisfactory estate plan involving a farm or ranch cannot be developed without the corporate form. The corporation simply offers a tool for estate planning. The point is that the flexibility of the corporation may make the estate planning task somewhat easier in some essential respects.

Some of the corporate attributes that commend the corporation as an estate planning device might be mentioned briefly. The 1959 Iowa study revealed that the estate planning aspects were one of the major reasons why farmers incorporated their farms. Many of the farm corporations in Iowa involve parents and children, both on-farm heirs and off-farm heirs. Parents having most of their assets tied up in the farm business are in a quandary as to how to be equitable and fair to the children, both those on the farm and those off the farm, and still maintain the farm as a going operation from one generation to the next. This has posed problems, and some farmers have turned to the corporation as a possible solution.

(1) First of all, in looking at estate planning attributes of the corporation, a majority shareholder can accomplish something that is virtually impossible elsewhere in the tax law. Unqualified gifts of stock can be made that remove the stock from the estate of the transferor yet control over the corporation, and thus indirectly over the gift property, may be maintained so long as the transferor retains 51 per cent of the voting stock in the corporation, or whatever is required under state law and the articles of incorporation to give control. In a corporation operating under simple majority rule the holder of all of the stock could give away 49 per cent of it without loss of corporate control. He is still in a position of dominance with respect to the board of directors.

(2) The transfer of corporate stock represents the transfer of a portion of the total farm business, not just a transfer of specific assets.

(3) The transfer of stock may be restricted. In the case of property other than stock, it is difficult to impose a restriction on transfer that would be upheld. Yet it is frequently desirable from the standpoint of the firm to prevent the recipients of a gift from later transferring the interest to a third party, as might be done to gain ready capital to undertake some venture other than continued affiliation with the farm business. This attribute promotes the continuation of the firm over time as an organizational unit. Again, Professor O'Neal will be discussing this point with you from the standpoint of problems involved therein.

(4) Minority shareholders do not have the right of partition and sale that tenants in common and joint tenants or lessees have. This, too, promotes continuation of the farm business, but it also raises problems as well. Intra-firm disputes may arise because of the locked-in characteristic of investments in a small closely held corporation where the stock is virtually unmarketable because of restrictions placed on stock transfer, the difficulty in valuing the stock, and the relatively small potential market for the stock of a farm corporation.

In this regard it should be recognized that the present rate of out-migration from farming is such that each generation carries off the farm rights to a very substantial proportion of agriculture's net worth. A high proportion of the young people reared in agriculture are leaving agriculture for non-farm pursuits. In many cases they take with them rights to property received or to be received from their parents at death, either by testate or intestate succession. This assumes, of course, some basic notion of equitable treatment of heirs by farm parents.

Without some limitation on partition and sale, death of the parents may be an occasion for either splitting up the farm business or forcing the heirs remaining on the farm to purchase the interests of those off the farm. As capitalization per farm increases in the future, and there is every indication that it will continue to increase, the buy-out problem of the heir who remains on the farm becomes more and more severe. Some type of interim or permanent ownership of farm corporation securities by off-farm heirs may help to bridge the gap that arises in the transition of ownership between generations.

(5) Corporate stock can, to some degree, be used as an income channeling device for minimizing over-all income tax liability.

(6) Corporate stock may be issued in convenient denominations of \$1.00 or \$10.00 or \$100 per share. This makes it easy to take advantage of the federal gift tax exclusions and exemptions.

(7) Finally, corporate stock is eligible for transfer to minors under the Nebraska Uniform Gifts to Minors Act. Gifts of farm personalty or farm realty are not eligible for transfer to a minor under the statutory custodianship.

It perhaps should be emphasized that many models of intra-generation stock transfer, using the corporate form as an estate planning device, do not provide adequate protection to certain groups. Unity of objective is not a common element of all groups interested in the farm business. The father may have one set of objectives; his wife may have another. Those children remaining on the farm may have yet another set of objectives; those children off the farm may have still different ideas as to how and when property shall pass. It is quite important as a matter of planning and drafting to consider with care the rights and protection accorded the spouse. And it is well to consider the situation of the non-farm heirs as minority shareholders. They might well become a vocal and bitter locked-in minority.

In conclusion, it is perhaps safe to say that the corporation is not the most suitable form of organization for every farm firm. The farm corporation is not like much of the technology that farmers have become used to accepting. The farm corporation is not like fertilizer, for example; it doesn't apply the same to everyone up and down the road, but in different amounts.

For many farmers the disadvantages of farm incorporation far outweigh the advantages. In general, however, as farms grow larger and as continuation of the business from one generation to the next becomes more important, the advantages will carry greater and greater weight. There seems to be no reason why farm and

ranch incorporation should not increase unless other states follow the lead of Kansas and North Dakota in either limiting or prohibiting, by the enactment of appropriate legislation, the incorporation of farm firms.

CHAIRMAN MOLDENHAUER: Thank you, Neil.

I think you will find there is a wealth of material in his outline, which he didn't have time to cover, which should supplement that very excellent speech.

Now rather than have questions I think we will take a ten-minute break, but Mr. Harl will be up here. I know several of you have written him letters with personal questions. I think he would be very happy to meet you and talk with you about them.

[Recess.]

CHAIRMAN MOLDENHAUER: Gentlemen, we have a lot of material to cover before noon. It is almost impossible for anyone who has dealt with corporate problems at all and done any research in the field to do so without coming across the name of Professor F. Hodge O'Neal from Duke University. He is one of the leading writers on the closely held corporation and has devoted his life to the subject.

Professor O'Neal is a professor of law at Duke University in Durham, North Carolina. He received his A.B. degree and LL.B. degree from Louisiana State University. He has received a J.S.D. from Yale Law School and an S.J.D. from Harvard Law School. I asked him what that meant and he wasn't quite sure. He thinks one of them is Doctor of Science of Jurisprudence and one a Doctor of Juridical Science, but he isn't sure which belongs to which school.

He is the author of the two-volume set on *Close Corporations: Law and Practice*. He was co-author of that little pamphlet which so many of you have utilized entitled "The Drafting of Corporate Charters and Bylaws." He was also co-author of a book—and I admire his courage for entitling it this—*Expulsion or Oppression of Business Associates: "Squeeze-Outs" in Small Enterprises*. Very few authors are that frank.

He is editor of the *Corporate Practice Commentator*. He is one of the leading authorities in the field of the closely held corporation. We are very privileged to have him give us two presentations, one this morning and one this afternoon. I think that he may speak a little more slowly than some of our previous speakers because of the fine Southern gentleman that he is, and we thought we would give our convention reporter a little break on that.

I am very happy to present Professor F. Hodge O'Neal from Duke University!

PROTECTING MINORITY SHAREHOLDERS AGAINST SQUEEZE-OUTS

F. Hodge O'Neal

I wish my son Mark, age nine and one-half, could have heard that introduction. Then he would know who I am. About a year ago I moved into the country among the tobacco farmers of North Carolina. The tobacco farmers have about the same opinion of teachers that some of you gentlemen may have, and I think with reason: That teachers are utterly without muscle, corpuscle, vitality, personality, sex appeal, common sense, or practicality. Therefore, when I moved to the country I was very conscious of need for good public relations.

One day I heard Mark say to one of his playmates, the son of a farmer, "My father is professor of law at Duke," just as if that amounted to something.

I called Mark aside and said, "That doesn't sound very nice. I don't want ever to hear you say that again."

Well, those orders really backfired. A few days later we had a visitor who was standing out in front of the house and Mark came running up. The visitor put his hand on Mark's shoulder and said, "Son, who are you? Who are your father and mother?"

Mark thought a moment and answered, "Well, my mother is Mrs. O'Neal but, sir, I can't tell you who my father is."

Now that I am here, I think of a man I used to see getting on a bus in Nashville, Tennessee, when I lived in Nashville. He would always cross himself just before he stepped on the bus. I watched that for several days and then my curiosity got the better of my manners and of my judgment. I went up to the man and said, "You must be very religious."

He said, "Me? No, I'm not religious, I'm just checking."

"Checking?" I asked.

"Yes, checking," he said—"False teeth, zipper, ticket, glasses."

I feel I should do some checking. It is really a good question why you gentlemen wanted a country teacher from North Carolina to come here and talk about practical matters. I guess it's because I have spent the better part of the last ten years working on the problems of the close corporation, that is the small corporation, the type that most lawyers deal with. Not many lawyers have much

to do with organizing a General Motors or a U.S. Steel, and certainly in North Carolina at least the lawyers are accustomed to working with small corporations, perhaps incorporating the local lumber company or something of that sort.

What I have to say is not something that I have thought up myself. I have picked the brains of lawyers throughout the country, so to speak, by writing them, by reading their articles, by reading the papers they have delivered at institutes of this type.

What I am going to talk about is really in a sense preventive law. My theme is going to be, in general, this: That it is possible to tailor the corporate form of business organization until it almost ideally suits a small business, not just any small business but the particular one with which you are dealing.

I am quite conscious of the fact that sometimes a client will not be able to pay for the amount of work that I may be trying to get you to do. But if the client can, I think you are only fair to your client if you do put in some of the safeguards that I am going to suggest.

Although you undoubtedly are familiar with the characteristics of the close corporation, I want to go through those characteristics very briefly to emphasize them, because I want to bring out very strongly the difference between the needs and problems of a small corporation and the needs and problems of the big corporation.

As you know, when we say "close corporation" we are talking about a corporation with relatively few shareholders. Note that these shareholders are usually from the same geographical location. They usually know each other and are very familiar with each other's skills and characteristics. They quite often look upon themselves as partners. It is amazing how often they refer to each other as "partners" even though their business is incorporated.

In most instances all of the shareholders in a close corporation have employment, at least a good number of the shareholders have employment with the company. They are not investors: They are not investors in the sense that shareholders in United States Steel are investors.

Furthermore, shares of stock in a close corporation are not traded on an exchange. That means there is no market for the shares. That means that you have difficulty establishing the value of those shares for estate tax purposes or for any other purpose. You will find quite often a great source of trouble in a small business is that nobody really knows what a share of stock in that business is worth.

Since there is no market for the shares, an unhappy shareholder can't get out easily. In a large corporation, of course, with shares listed on an exchange, if a shareholder doesn't like what management is doing he can sell his shares with no loss, or with relatively little loss; but in a small corporation the other shareholders are usually the only prospective buyers, and if they are not willing to buy, the dissatisfied shareholder is in trouble.

Furthermore, in a close corporation tax considerations often control, at least with respect to dividend policies. In most closely held corporations no dividends or very little in the way of dividends are declared. Most of the profits are taken out in the form of salaries.

In spite of the differences between the large corporation and the close corporation, in the past, as a general proposition, the same statutory rules have been applied to both types of corporations. The same court-made rules have also been applied. And yet, as I have indicated, the wants of the participants, the wants of the businessman in a small corporation are entirely different.

One of the well-recognized attributes of a corporation (this is hornbook law) is that the shares are freely transferable, and that is painted in the hornbooks as being an advantage. And of course that is an advantage in a big corporation, but in nine cases out of ten the participants in a small business do not want shares in their company to be freely transferable.

Furthermore, in a large corporation the courts are reluctant to order dissolution and they carry that attitude over to a small corporation. Yet when strife develops in a close corporation, when trouble comes, very often the best solution is a dissolution. At least many of the corporate experts have reached that conclusion.

Not only have the courts and the legislatures as a whole failed to distinguish between the close corporation and the public issue corporation, but most of the form books were prepared with the public issue corporation in mind and not the small corporation. Now why is that? Well, an employee of a publishing company or a law teacher decides to put together a form book. What does he do? He says to himself, "We might as well get the best. We will write to the big public issue corporations and get their documents." He gets those documents, selects from them, maybe edits them a bit, and he has a form book. Charters and bylaws in such a form book might be excellent, but they are excellent for the corporation for which they were drafted, not for the small business, the type of business that most lawyers have to incorporate.

Some members of the corporate bar have tried, in spite of

unfavorable legislation and unfavorable court made rules, to tailor a corporate form to the needs of the small business and have used a great variety of rather complex devices—restrictions on the transfer of stock, voting trusts, shareholders' voting agreements, special dissolution arrangements, special charter and bylaw provisions, etc. Some of those devices and arrangements I will talk to you about this afternoon, but this morning I want to talk about protecting minority shareholders against squeeze-outs. I am not even sure this is a strictly legal discussion. In any event, it is going to be a fairly light discussion.

When I talk about squeeze-outs I mean the use of legal device or of the power that majority shareholders have, through their voting control, to eliminate associates, i.e., other shareholders, from the business. I am also going to talk about devices that you might call partial squeeze-outs, devices that can be used to decrease the participation of minority shareholders.

The reason I got interested in this subject was that the federal government made a grant to Duke and told us to use it for the benefit of small business. Someone suggested that we study squeeze-outs. We thought it would take us just about a month to discover all the techniques, all the arrangements that had been used by one businessman to squeeze out another. But actually our project ran for over a year, and we found that the ingenuity of man is endless when it comes to figuring out ways to eliminate from a business someone he doesn't want.

We ended up with a fairly good-sized book which has now been put into a hard cover; and, to tell you the truth, I am afraid that in place of decreasing squeeze-outs we have contributed to squeeze-outs. The Duke University Press gets communications something like this: "Send the book. Be sure *not* to send it to my business address. Send it to my club."

Let me point out some of the losses which are caused by friction among business associates and by squeeze-outs. It is obvious, of course, that the time loss by key personnel when they get into one of these fights, the cost of the litigation, the bad publicity—all of that is bound to hurt the business. In many instances, a business has been destroyed by fights among shareholders.

Furthermore, from the point of view of the economy, a source of needed funds, of needed risk capital, is being dried up because people are learning about squeeze-outs; and they will not come into a corporation as a minority shareholder. As you know, unless a business wants to raise as much as a million dollars, it is almost impossible to arrange for a public issue of securities. In small

businesses, if money is to be raised, it usually must be raised locally. So, as I say, the fear of squeeze-out or pressure in a small business tends to dry up a source of risk capital.

From the point of view of the minority shareholder, what does he stand to lose? Well, he stands to lose first of all any voice in the management and control of the business. He very often loses, too, as a practical matter, in spite of his right to inspect corporate books, any knowledge about what is going on in the business. Furthermore, even though he has come into the business expecting to be an employee, a key employee, he may lose his employment. Finally, he loses the value of his investment because he can't sell his stock; nobody will buy his stock; he can't even borrow against his stock if there is trouble in the corporation.

So largely what I am going to talk about this morning is how to protect the minority shareholder. Now, I am not unmindful that there are 16-cylinder S.O.B.s among the minority, and many lawyers have told me, "You are on the wrong side." And it is true that there are unreasonable, obstreperous minority shareholders. They take up all the time of management. Management can't run the business because of having to pacify minority shareholders who are not willing to pull their share of the load.

Here are the squeeze-out techniques. I am not going to give you all of them. I am only going to give you the ones most frequently used. The most frequent of all is dividend withholding. Quite often the majority shareholders, or the directors who represent the majority shareholder or shareholders, will very bluntly tell the minority shareholder, "As long as you are in this corporation we are not going to declare any dividends. You might as well sell out; you might as well sell out to us." Now, that is not very smart. The squeezors need to be more subtle, and usually we find that the majority shareholders are more subtle. They will say something like this: "We can't foresee any dividends in the near future because we are going to have to replace our machinery. We foresee dark years ahead; we are going to have to build up some reserves. Also, as you minority shareholders know, it is unwise from a tax point of view to be declaring dividends because that results in a double taxation of corporate earnings." Some very good cover-ups can be fabricated by the majority shareholders who want to withhold dividends.

There are certain legal principles which help the majority shareholder if he decides to refuse to declare dividends. The courts have laid down what is called the "business judgment rule." As long as the directors use their business judgment in making corpo-

rate decisions, the courts will not interfere. The courts feel that the shareholders have elected the directors to run the business; the court should not step in. So there is this reluctance on the part of the courts to interfere.

Also the courts recognize the principle of majority rule. After all, why shouldn't the decisions be made by a majority vote? The only difficulty is that if you are in a democracy the majority is constantly shifting, but if you own 40 per cent of the stock and another man owns 60 per cent you soon get tired of democracy.

If you are representing the minority shareholder, there are several things that you might do to get relief. If the minority shareholder has the money, a good lawyer, and the will to fight, he can cause an awful lot of trouble. So this is not just a problem of protecting the minority shareholder. Quite often you are really trying to protect the business by avoiding these disputes and fights.

Here are possible solutions for the minority shareholder. He can bring a suit to force the declaration of dividends. The odds are all against him because the directors in the first place have a great deal of leeway in determining what accounting methods will be used by the corporation. And even though the corporation shows a surplus or other funds legally available for dividend, the directors have a great deal of discretion under the rules that the courts have laid down in determining whether or not that money will be kept in the corporation or will be paid out in the form of dividends.

Furthermore, if you are the minority shareholder, suppose you *do* go into court and force a declaration of dividends? You get the dividends today but what about dividends the next year and the year after? There is one case where the court kept jurisdiction and ordered the corporation to declare reasonable dividends in the future. If you are representing the minority shareholder you should keep that case in mind, because as far as I know it is the only case in the country.

If you will refer to page 16 of the outline you will see cited there at the top of page 16 the case of *Patton v. Nicholas*. The court there kept jurisdiction of the case for five years after ordering the corporation to declare dividends not only immediately but in the future.

One of the most effective ways, if you are the minority shareholder and are not worried about being cricket, is to threaten the majority shareholders with tax trouble. There is a federal tax rule, which you are all probably familiar with, which imposes a

tax on unreasonable accumulations of corporate earnings. If you are the minority shareholder and corporate funds are not being paid out as dividends but are being allowed to accumulate, you can put the majority shareholder on notice that if the corporation becomes subject to this tax, if this tax is imposed, you intend to bring a suit against the directors of the corporation to make them reimburse the corporation for the amount of that tax because they are breaching their fiduciary duty to the corporation in failing to pay out dividends and in permitting the corporation to become liable to the tax.

You will notice, again on page 16 in the outline, the case of *Mahler v. Trico Corporation*. That litigation was settled, when a minority shareholder brought suit against the directors, for \$1,000,000. As you see, it has been discussed in several law journal articles.

The second squeeze-out technique which is nearly always coupled with dividend withholding, is elimination of a minority shareholder from the board of directors and from any employment he has with the corporation. After all, if the majority is going to bring pressure, if it is going to put pressure on the minority shareholder, it has to see that he does not get any money.

The third squeeze-out technique is usually the paying of handsome salaries to the majority shareholder or shareholders and their friends and sisters and cousins and aunts. After all, if the minority shareholder has been eliminated from employment with the company, the amount of work the majority shareholders have to do has been increased. So they nearly always feel that they have to increase their salaries, and these salaries take many forms—pensions, profit-sharing plans, options, etc.

Another group of squeeze-out techniques revolve around fundamental corporate changes; that is, charter amendment, dissolution, merger, etc.

Notice down at the bottom of page 16 what you can do to a shareholder through corporate amendment. You can change the preferences of preferred stock under your new statute and under practically every statute in the country. You can create prior preferred stock with preferences ahead of existing preferred stock. You can substitute one class of stock for another class of stock. You can take a man's stock and give him something else for it, as I read your code. Now, under your new statutes, a charter amendment requires a two-thirds vote of the affected class, and that is a considerable amount of protection, but suppose Mr. X owns all of the common stock and three-fourths of the preferred, and Mr. Y

owns the other fourth of the preferred. You can see that Mr. X can easily get the required vote to do just about what he wants to Mr. Y's stock.

The only protection the minority shareholder has is to try to assert a fiduciary duty on the part of the majority and the directors representing the majority.

Mergers are also a source of squeeze-out. Let me give you the facts of one Washington case. This case, *Matteson v. Ziebarth*, is cited at the top of page 17 in subparagraph c. In that case the majority shareholders wanted to sell their shares to an outsider. The prospective purchaser would not buy less than all the shares. The minority shareholders refused to sell. The majority shareholders then organized a new company. They did this solely with the idea of merging the old company into the new one. The majority shareholders took all the common stock in the new company. They then entered into a plan of merger under which the shareholders in the old corporation received preferred stock. That preferred stock was redeemable.

Remember now that the majority shareholders have all of the common stock in the new corporation. They obviously planned to redeem the preferred stock which had been given to all of the shareholders in the old corporation, both majority and minority. That would leave only common stock in the new corporation, only the majority shareholders in it. They then might dissolve the old corporation, change the name of the new corporation so as to adopt the name of the old, and sell all of their stock to the outside purchaser. Now you might say, "The courts won't let a man get away with that." But the Washington court did.

Quite often in what, in effect is a merger, the minority shareholders do not even get appraisal rights. Under your statute, if a corporation merges, the minority shareholders who are opposed to the merger have the right to have their shares appraised and to be paid the fair value of those shares. Furthermore, if a corporation sells substantially all of its assets, the minority shareholders have a right of appraisal and the right to be paid the fair value of their shares, i.e., whatever those shares were worth prior to the sale of assets. Well, how can you avoid that if you are the majority shareholder?

Your statute, like most other statutes, does not say anything about appraisal rights when a corporation *buys* all of the assets of another company. So if you want to merge Corporation A, a small company, into Corporation B, you just reverse the process. You have Corporation A, by issuing huge amounts of its stock, buy

all of the assets of Corporation B; it issues so much stock to Corporation B that its controlling interests also control A. And yet A's minority shareholders have no appraisal rights because, although there has been a de facto merger, in theory the A is buying the business and assets of B. In many states that procedure would be permissible and would not give rise to appraisal rights. Other state courts have held that this in fact is a merger and that appraisal rights must be honored.

An obvious way of squeezing out a minority shareholder is to bring about the dissolution of the corporation, then have the majority shareholders or a corporation which they control buy up the business and assets.

Now let's turn to the issuance of new stock. Majority shareholders not uncommonly move to decrease the participation of minority shareholders by issuing to themselves new stock at less than the value of the stock. Or even if the stock is issued at its real value, it is issued to the majority shareholders or to their relatives; that decreases the minority's participation. If the corporation is a growing company, great profits may be anticipated in the future.

You may ask, "What about pre-emptive rights?" Your statutes provide for pre-emptive rights, and you can quite properly ask, "Don't minority shareholders have the right to subscribe to their proportionate part of the stock?"

That is right, except that there are so many exceptions to the doctrine, both at common law and under your statute. Under your statute, for instance, shares can be issued to honor option rights of employees. Now who are the employees? The majority shareholders, if the minority has already been eliminated from the board, from officerships, and from key employment. Who has those options? The majority shareholders. And when they are honored, the directors do not have to recognize pre-emptive rights.

Furthermore, if the new shares are used to purchase property, what is needed? Why, Blackacre, or some property that a majority shareholder has. The corporation has to have it. The only way he'll sell it is for shares. So again the minority's pre-emptive rights are circumvented.

Furthermore, even if there are pre-emptive rights, who decides when the shares are to be issued? The majority shareholders, and they choose a time when the minority shareholder does not have money readily available. Or, even if he has money, what is his situation? He has an investment; he is getting nothing from it either in the way of dividends or salary; he is being forced to pour

good money after bad, to increase the amount he has put into the business with no prospect of getting income from it. So you can see that there is need for a minority shareholder to protect himself against the future issuance of stock.

Incidentally, I notice you have mandatory cumulative voting in this state. There are ways of circumventing cumulative voting. Obviously you can decrease the size of the board, insofar as your statutes will permit you to decrease the size of the board, and thereby increase the percentage of stock that the minority shareholder must have in order to get representation on the board.

In many instances the election of the board is staggered, so in place of all the directors being elected annually the directors are elected some one year, some the second year, some the third year. Again you see that that decreases the effectiveness of cumulative voting. Your statute provides some protection against that, because the number of directors that can be elected in any one year cannot be less than three under your statute; that does provide some protection, say, to a man who has 40 per cent of the voting shares.

Now I want to switch quickly, because my time is running out fast, to what can be done to prevent dissension. It is to the interest of the majority to prevent dissension just as it is to the interest of the minority. What can be done to prevent this dissension and to avoid squeeze-outs and oppression of minority shareholders?

One of the first things that can be taken is to understand why the dissension develops, why strife develops. I think we have found through the study we made at Duke many, many things that are red flags to put one on notice, when the corporation is being organized, that unless certain affirmative steps are taken there will be trouble. I might say that, when we tried to determine what the underlying causes of squeeze-outs were, I was reminded of what hapened back in World War II on an English train.

There were four people on the train facing each other. One was an elderly English woman, not very attractive; one was a very attractive young American WAC; one was an American sergeant; and one was an American private. The train went through a tunnel. These people were facing each other, the seats were facing each other. There was a sound in the darkness in the tunnel that sounded like a kiss. That was followed immediately by something that sounded very much like a slap.

The train pulled out of the tunnel into the light. The sergeant's eye was beginning to swell. Everybody was back in his or her seat, but the sergeant's eye was beginning to swell. Here is what

those four people were thinking: The elderly English woman was thinking, "I'm glad that nice young lady didn't let that beast of a sergeant get away with that."

The young lady was thinking, "My goodness, why did he kiss that elderly woman and not kiss me?"

The sergeant was thinking, "No justice in this world! That private kisses the girl and I get slapped."

And the private was thinking, "Damn clever of me, wasn't it, to kiss my fist and slap hell out of that sergeant."

So the causes of squeeze-outs look different, depending on where you are sitting. But one thing that we soon found was that the cause of most squeeze-outs is not greed, nor just sheer grabs for more money and more power. There is some of that, but that is not the usual situation. Quite often, when a man goes off to the service, he comes back and he finds he has lost his business. We have found cases of that type, but that is not the usual situation. The usual situation is where some conflict of interest has developed, some very deep conflict of interest, or there has been a protracted, an extended disagreement about policy.

The most frequent cause, as we saw it, of strife and squeeze-outs was the inactive shareholder. As long as everybody was needed, as long as everybody had a part to play, as long as everybody was a part of the team, there was no trouble. But when a woman comes in, when the widow comes in, nearly always trouble develops; or when the shares are sold to somebody who is not going to participate, who is going to be inactive, then you very definitely have a conflict of interest. The working shareholders want salaries, that saves taxes; the non-working shareholders want dividends; the working shareholders are not willing to pay salaries to those people who do not work; a widow expects the same return that her husband received from the business, so you have a situation that is almost sure to result in strife.

Another cause of squeeze-outs, as I have already indicated, is the unreasonable minority shareholder. Sometimes you have a minority shareholder who won't work, who can't work, who is frustrated because perhaps he lives at a distance and cannot participate actively in the business, and he throws his weight around causing endless trouble.

Another cause of dissension we found was the founder of the business when he becomes old. He is not willing to retire, he keeps control of the business. We have found cases where the aged founder would go to California, at a long distance from the principal office of the business, and he would make all decisions over

the telephone. I might suggest that one possible solution to this is to have some type of retirement plan so that a person is psychologically ready when the time comes for retirement. Furthermore, if the aged founder continues to receive compensation he is receiving only what he has earned. The other shareholders have no right to complain if he gets deferred compensation because that was the understanding from the beginning.

Another cause of squeeze-outs is disregard of corporate ritual and failure to keep records. There is always a temptation, when there are no records, for people to remember things as they did not happen, or for them to disagree in good faith about what actually took place; thus disputes develop. And yet you'll find that in nine cases out of ten these small corporations do not hold directors meetings, they do not hold shareholders meetings, and if they do, no records are kept. About all they keep in the way of records is what they have to keep for tax purposes.

Another thing that causes trouble is the fact that shareholders quite often think that they are partners, think of themselves as partners, and do not realize the power that the majority shareholders have in a corporation.

Another thing that causes trouble is purchase by the minority shareholders of an interest in a competing company, or rather more often they organize a new company to engage in the same line of activities as the corporation. It is very natural in the second or third generation for the children of the initial minority shareholders to want a voice in the company, and all too often they are not given a voice. What do they do? They have been trained in this business, they have grown up with this business, so naturally they form another company to compete. The moment they do that the majority shareholders really start putting the squeeze on them because they are competitors. Thus going into competition with the company by the minority shareholders is often the cause of trouble.

Another frequent cause of trouble we've found was the failure, when a corporation was being organized to exploit a patent, to provide what was going to happen when the inventor, as is quite often the case, improves the patent or invents a new machine which makes the old machine obsolete. We have found case after case where the majority shareholders and the minority shareholders got into tremendous litigation because of improvements in patents.

Another cause of squeeze-outs is one I have already mentioned, the fact that it is so difficult to value an interest in a business. Quite often everything is going along well, everybody is on amicable

terms. One of the shareholders decides to get out, the other shareholders are willing to buy him out, but they can't agree on a price. In good faith they differ and there is really no accurate way of determining what an interest is worth in a small business where there is no market for the shares.

Finally, a cause of squeeze-outs is failure to plan in advance. The businessmen do not go to lawyers, and lawyers quite often do not foresee the problems and provide some solution.

What can be done? Well, what can be done I am going to talk about in detail this afternoon, but let me give you in broad outline some of the things you can do initially when the corporation is being organized, or at least before trouble has developed.

One thing is impose restrictions on the transfer of stock and set up buy-sell agreements and other buy-out arrangements which you heard discussed yesterday. These restrictions on the transfer of stock and these buy-out arrangements serve many purposes. One thing they do is to keep out the inactive shareholder. If the shares of stock in your corporation cannot be transferred without the shares being first offered to you or to the corporation, you are in a position to keep an inactive shareholder from coming in. If you have an option to buy the shares on the death of a shareholder, then the widow can be eliminated. If you have a buy and sell agreement then *automatically* the shares are sold to the corporation or the other shareholders, as the case may be, on the death of the shareholder.

So restrictions on the transfer of stock do help to solve these squeeze-out problems. I might say that most small corporations now being formed do have restrictions on the transfer of stock. Very few small corporations are now being formed which do not make use of share restrictions of some sort.

Sometimes the women members of my class accuse me of being against women, or of discriminating against women when I use these illustrations of the widow. Actually I want to make it clear that I am not against the women, because I have read the story that the graveyards tell. If you look back at an old New England cemetery, established about the time this country was being founded, you will see old Jonathan Somebody-or-other buried there with his five or six wives buried around him. If you look at a modern cemetery what do you find? You see a woman buried there with her five or six husbands around her. That tells the story of the rise of women in this country. You can ask the sales manager of any store downtown and he will tell you the same thing, that women are now in control, they have most

of the assets of the country in their names; they spend eighty-five cents out of every dollar spent, and, so these sales managers say, they have a great deal to do with how the man spends his little fifteen cents. So I deny that I am against the women. I am with them!

Another device that you can use in the beginning, if you are representing a minority shareholder and are trying to protect him, is some kind of a high vote requirement for shareholder and director action. In other words, if you own 20 per cent of the stock and the shareholders cannot act except by a 90 per cent vote, or by unanimity, you have a power to veto shareholder action. If unanimity is required for director action and you are assured of representation on the board—and I'll point out this afternoon how you can be assured of that, what you can do to assure a minority shareholder that he will have representation—then you are in a position to prevent action you do not want to have taken by the board.

For instance, if salaries are going to be changed, or an employee is going to be discharged, the minority shareholder is in a position to veto the decision.

Another protection to the minority shareholder is a shareholders' agreement which spells out in advance who is going to have what voice in the corporation, who is going to be in what positions of control. You may also have an agreement for the compulsory declaration of dividends. I personally don't recommend this, but there are a few states now, my own State of North Carolina is one of them, which require that dividends be paid under certain circumstances, that a certain percentage of the profits of the corporation be paid out in dividends. If you are in a state which does not have a statute of that type, and your statute in this state does not contain a provision of this kind, you can still provide for compulsory dividends by charter provision or by contract. We'll talk this afternoon about whether that would be legal. But assuming it is legal, although that protects the minority shareholder, it also runs into tax problems, because the directors cannot time their declaration of dividends; the directors are forced to pay dividends irrespective of whether it is wise from a tax point of view.

Another protection to a minority shareholder—suppose the person coming into a corporation in a minority position already has a good job with an established company, with pension rights, etc., but he wants to go into business for himself with new associates. He can insist on a long-term employment contract. I am not talking now about a contract among the shareholders. I am talking about a contract between the shareholder-employee on the one

hand and the corporation on the other. That is another approach to give him protection.

Furthermore, and I am going to cover this in detail this afternoon, there are arrangements which can be provided for settling disputes in a corporation as soon as they develop. There are certain arrangements that can be entered into for resolving a dispute before tempers get too frayed and before relationships are completely impaired.

In conclusion, let me say that if I have suggested squeeze-out techniques to you which you haven't thought of, please close your eyes to temptation and don't make it look like a wink. Thank you.

CHAIRMAN MOLDENHAUER: Thank you, Professor O'Neal.

One of the problems in presiding at a session like this, where we have such outstanding speakers, is the lack of superlatives in the English language to describe both the presentations and the speakers. Our next speaker is surely no exception.

He attended Grinnell College, received his legal training at the University of Iowa, and he, like Professor O'Neal, has an S.J.D. from Harvard—and there is a good chance he may know what it means. Dean Ladd is one of the experts in the nation on the field of evidence, and probably his cases and materials on evidence were instrumental in educating a great many of the members here in the room. He has contributed to many other books. I notice he has contributed to a book on modern marriage. He has contributed to a book called *Law Problems With Solutions by Ballantine*. I suppose that means that Dean Ladd contributed the problems and Ballantine the solutions.

In discussing with him some of the things which he might talk about this morning, I didn't realize that one of the things he is going to discuss is a problem which appeared on the bar examination here in Nebraska last June. Dean Ladd has been very instrumental in contributing to a very exceptional program in the State of Iowa on continuing legal education. He has devoted his life to legal scholarship.

It is with a great deal of pleasure that I present to you Dean Mason¹ Ladd, Dean of the College of Law at the State University of Iowa.

ETHICAL CONSIDERATIONS IN CORPORATE COUNSELING

Dean Mason Ladd

Thank you very much, Howard, for that very generous and kind introduction. We all like to hear nice things about us now

and then. When you go away they talk about things that you wish they would still remember at home.

I recall the story of a superintendent of high schools who wrote to the president of the university and said, "We are going to have a very wonderful commencement at our school this spring, and we want you to select an outstanding speaker for us. We do not want anyone lower than a dean."

The president wrote back and said, "We have no one around here lower than a dean so you are perfectly safe." Deans, janitors, and caretakers share equal glory and have equal work; often much of it is interchangeable.

You have been a very good audience this morning. I was in here the earlier part of the morning and saw you were going well. I noticed the close attention that you have given to the program right up to the very last. I think it is quite wonderful. You know, in my school where I teach students, I have an awful time keeping them awake for an hour, and here you've been at your workshop going on the third hour.

I recall I was teaching a class in evidence one time and I spotted a boy in the back seat who had become a little drowsy and was sort of bent over. I thought, "Well, I will just call on him." I called on him. No response whatsoever. I called on him again and I said, "Can't you discuss this case?"

He made no utterance of any kind at all. Finally I said to the man who sat next to him, "Won't you shake him and wake him up."

He responded, "Wake him up yourself. You put him to sleep!"

I am glad I have an awake audience here and I will try to keep my conclusion from being too long away. You are relatively safe because my time is thirty minutes and I am not going to cover all that is included in my outline upon this subject. I am going to leave that for you to take home for your home work. I am going to touch upon a few of the more interesting problems, as I see them. It is going to be a very matter of fact discussion on matter of fact problems.

I am first going to discuss the attorney-client privilege as it relates to corporations. Is the corporate client entitled to benefit of the attorney-client privilege?

I doubt if you have ever questioned it. Frankly I hadn't questioned it because it seemed to me that the purpose of the attorney-client privilege serves the corporation just as it serves private clients. It is supposed to let people act with the advice of counsel in their personal, in their business, in their industrial affairs, and

other activities involving legal questions. The privilege encourages full disclosure of all facts so that clients can have the benefit of informed counsel. The objective, of course, of the privilege is to promote free consultation of clients with their legal advisors.

Whenever you have a privilege extended, whether it be an attorney-client privilege, doctor-patient, or whatever the privilege may be, it means that we have sacrificed and lost some very valuable evidence, because those things that were communicated were probably facts going to the heart of the problem, and when you cover the ears of the court and the jury as to what clients told their attorney, you are cutting out vital evidence, to be sure. Let's see what the justification is of the attorney-client privilege. The justification really is upon a policy background. The idea of the policy is that if clients have the right to go to their attorneys and put all the cards on the table, tell them everything they know without fear of disclosure, they will seek the advice of lawyers in the conduct of their affairs and will act in accord with it.

The statutes on the subject speak of the protection of communications between attorney and client without any limitation upon who the client may be. Again other statutes refer to communications entrusted to the attorney in his professional capacity, and necessary and proper to enable him to discharge the functions of his office. You see, there is no distinction made in these statutes between different kinds of clients. The purpose of encouraging all clients to obtain legal service is the basic objective. The policy of the law justifies the privilege so that people in a lawful society may live lawfully and may communicate to their legal advisors so as to get proper protection in legal controversies and proper direction in the things they do.

That all seemed to me pretty clear and settled, but I was surprised to find this conclusion seriously challenged as to corporations, because they need planned guidance so that their activities will be in conformity to law.

Take the *Radiant Burners* case.* This case was reversed, 320 F.2d 314 (7th Cir. June 28, 1963). It came out in the federal court in Illinois, and is referred to on page 41 of the outline. Judge Campbell took an entirely different view of this. It surprised the counsel in the case and I think the bar were surprised everywhere. He thought that the attorney-client privilege was much like the privilege against self-incrimination, that it was personal to the

**Radiant Burners, Inc., v. American Gas Association*, 207 F. Supp. 771 (N.D. Ill. E.D. 1962).

client, that it applied to a personal client and that it had no place in corporation law at all. He realized there had been forty-three federal cases that had been decided where the attorney-client privilege for a corporate client had been respected, but they had not gone into that problem, had simply assumed the result. He said that he felt this whole matter should be raised and questioned, that the privilege of attorney and client should be only like the privilege against self-incrimination for a personal client in a face-to-face dealing. He overlooked the consideration, as I see it, of the real purpose of the privilege, which is to have an orderly society under a rule of law which will be aided by confidential consultation of all clients with their legal advisors.

We really don't need to worry very much about the *Radiant Burners* case because there were six federal cases that came up afterwards and each severely criticized the position of Judge Campbell, and then the case went to the circuit court of appeals and they reversed it. So I would say that is out of the way.

But I did pick up an article by a very able author in the *Villanova Law Review*,* James A. Garner's article in which he draws in question the problem of the attorney-client privilege as far as corporations are concerned, and he says most of the things deal with the records of a corporation, that they may be reached in discovery before trial procedures under the *Hickman* case,** that this business of personal communication within the corporation really doesn't exist because they are dealing with over-all things which would otherwise be exposed to examination. Of course, placing with the company's attorney records of the corporation otherwise subject to a subpoena duces tecum would not change the requirement to produce them.

Then he indicated this—I have never heard of it before—that in some companies where they had questionable procedures that they wished to undertake, rather than put them in the formal records of the business they would put them in a memorandum to their corporate counsel, and thus create an attorney-client privilege and not be required to disclose their proposed undertaking until they first decided whether or not it was good or bad.

I had not heard of that procedure, but in any event if you are going to have attorney-client privilege as far as corporations are concerned it means that those in charge of the corporation, those acting for the corporation with authority, may communicate with

* 8 Villanova Law Review 447 (1963).

** *Hickman v. Taylor*, 329 U.S. 495 (1947).

the company's attorney, be he house counsel or private law firm, and seek advice. Now, I think that is a very desirable thing, and I don't think any who are here will disagree with it.

I would hate to see that changed because the heart of a corporation is the direction given by men trained in law to see that this great industrial giant has some supervision and control. The corporations want the guidance so that their conduct will be lawful, and the lawyers daily give it. I think, with the great John Henry Wigmore, that the public good is served and that the policy is justified which sustains the attorney-client privilege, and I would extend it to whoever the client may be if the client is seeking legal services.

Now you had a nice problem in the *United Shoe* case* that Judge Charles Wyzansky of the federal court in Massachusetts decided, in which the question arose as to whether or not corporate counsel who are employed by the company, not for a particular case, employed by the company regularly, whether or not they were entitled to use that counsel with the attorney-client privilege. Judge Wyzansky took the position that whether it be house counsel or whether it be an independent law firm employed by the corporation to act, if this person was serving in a legal capacity and was performing legal services as distinguished from purely business advice, it did come within the scope of the attorney-client privilege.

I felt he made one mistake in the case, when he ruled out the entire patent division and said that because patents were dealing with matters of public knowledge, because they went into the patent records and every one searched for them and they are open for public information, and because they were more matters of business than law, he took the patent division out of the scope of the privilege.

He did discuss this matter, which has become quite acute in corporation law lately, and that is: Who among those engaged in the corporate enterprise may be included within the range of the privilege? Of course the stenographer, secretary in the law office, law clerks, the other partners of the lawyers are within that privilege.

The question comes: What about the employment of an accountant by the lawyer to make an investigation and report to him purely for legal purposes? Is he within the range of the privilege? Not as an accountant, but as one working directly for the lawyer his

**United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

work should be privileged, and generally today that privilege has been thus extended and has been recently expressed in this circuit.

Now the question comes: Is it any kind of matter that enjoys the privilege? Well, here again we do not look upon the corporation differently than we do a private client. If a private client comes into your office and says, "Good morning, Mr. Attorney. I notice the stock market is pretty good. I have got some money over at the bank and I think I'll invest it in so many shares of X stock. What do you think of it?"

There is no legal advice involved in that. You may say, "You had better put your money in government bonds or you had better look for some other stocks," or what not. But here you have a place in which it is purely business advice, and that never has been held to be within the attorney-client privilege.

The problem comes where you have the mixture: It is both business advice and legal advice. It happens to be a small company not on the Exchange. Now the client comes in and says, "Well, I am thinking of buying so many shares of stock in X company. I wonder if you would look into the organization of it and advise me in respect to whether it is legally created so that I will be safe from personal liability if I buy the stock." He wants a double function performed there, advice on whether it is a good thing to buy the stock; and he tells him he has the money to buy the stock, the existence of which may be important to another lawsuit where they claim he concealed the money or whatnot, but the secret comes in to the attorney and the attorney is asked not only about the advisability but upon the legality of the organization in which he plans to buy the stock. Thus according to Judge Wyzansky the communications are privileged. There are not so many things that involve both business and legal advice. This is particularly true of the house counsel or of the law firm that is regularly representing a corporation where the two are so intermingled that you simply cannot make a sharp line between the two. And according to the *United Shoe* case if the major portion of it, if the purpose of it, is to seek legal advice, all other incidental matters related to it are included within the attorney-client privilege.

Judge Leahy, in the *Zenith Radio Corporation* case,* did really a wonderful job. He expanded what Judge Wyzansky had said. He said that we can't bulk the patent division as a whole, or any part of the company as a whole, and say matters pertaining to them are purely business and consequently fall outside of the privilege.

**Zenith Radio Corp. v. R.C.A.*, 12 F. Supp. 792 (D. Del. 1954).

Judge Leahy takes a different view of it, and he said we have to look at each transaction and see whether the transaction involved, which comes up in litigation later—we have to look and see whether or not it was truly professional in character, and in the patent field many of the things for which advice is sought might be very professional in character. So the sweep of the *United Shoe* decision was really too broad, although the opinion was basically sound. In the *Zenith* case Judge Leahy appointed a master in chancery to go over certain papers and things that were involved upon which professional privilege was claimed, and there was a hearing of several weeks in determining what was properly disclosed and what should be retained as a matter of confidence in the exercise of the attorney-client privilege.

The whole matter must be taken up in connection with *Hickman v. Taylor, supra*, where you have the right of discovery, and here again you draw the distinction between the work product and what is really evidence, and I see there is nothing further to say upon this than to follow that line of distinction. Of course the records are open, but the problems of peculiar trust and confidence in respect to litigation involved or in respect to legal action would be in the protective group.

The conclusion of what I have said thus far is that a corporate client is entitled to the attorney-client privilege, and I think there would be a great social and public loss if we didn't have the benefit of confidence under those circumstances.

Now I am going to shift quickly to my next subject which is something that we could spend a great amount of time on, but I am going to simplify it to the problem of ethics of counsel in respect of corporation business where there is a conflict of interest among those whom the attorney mutually represents in a corporate issue. Now, again, this is not just a corporation law problem, it is the law that pertains to *all* cases in which one attorney represents a group of different clients mutually.

You see the problem easily in a criminal case where a person represents A and B charged with a crime, and he finds that A has a different defense than B has, and if A succeeds B is guilty, and if B succeeds A is guilty, so there you have definitely a conflict of interest, and the attorney may represent only one of them and have another attorney represent the other. This business of conflict of interest is most important for the benefit of the legal profession, because the legal profession must stand high in the public image if it is going to perform its real service and command the respect which the legal profession ought to have. That simply means that an attorney can't appear on two sides of the same

matter, that if there is a conflict of interest, according to Canon 6 of the Canons of Ethics of the American Bar Association, approved by the states generally and adopted by the courts, the conflict of interest must be avoided.

Then again we have Canon No. 37, and what does it say? It says that you've got to be concerned with the clients you formerly represented as well as with present clients. It provides that an attorney should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former as well as to his new client.

Here you take the situation in which you have incorporated a small closely held company, with A, B, and C as the incorporators. It happens that you, as attorney, were the attorney for A, had been for a long time, and when A had visited with B and C they said, "Well, we want to incorporate. Who should we get?" And B says, "Why not go to A's attorney?" So they all three go to A's attorney. At that time the attorney becomes the attorney of all three of them, and if, in respect to the work that has been performed by the attorney in this matter, difficulty subsequently arises, can the attorney represent A against B and C? Is there a conflict of interest matter involved that would violate professional ethics?

I think that we have a difficult problem here. A has always used this attorney. He has been his lifetime attorney, but upon the above matter he was the attorney for A, B, and C, and when this problem arises B and C are in the position of being former clients, and it relates to a matter that involved the action when they were former clients and it seems to me that here you have a case where the attorney must disqualify himself.

I look at it quite differently from the derivative stockholders suit. I wish you would check me on my conclusions, because I do feel a little uncertain as to what ought to be the result of some of these cases. But here you have the attorney representing a company, he is the attorney for the board of directors who manage and operate the company; the company seeks his advice from time to time. There are many stockholders, some of them inactive ones who do not participate in the affairs but want to draw equal benefits, and you get into a squeeze play or other conflict. Can this attorney represent the company in a stockholders' suit against it?

Well, I think you have got to look at it in three ways and I am going to draw a line of distinction in which I think I am right, but I am not sure. Say the board of directors has decided upon a program that they believe is for the good of the company. The attorney represents the corporation as the fictitious and legal entity; he

represents it in an action in respect to the board of directors, whose action has been challenged by other stockholders. If this attorney represents the management, I think he has the right to continue to represent the corporation, the board of directors, and that there is not a conflict of interest there. All matters are open as far as the books and records are concerned. The company attorney had never represented the stockholders as such. They were not his personal clients. He has a duty to the corporation and its management, who were his clients, to continue to represent the company. He would not appear to be precluded on the theory that the stockholders were former clients. But if there is a conflict among the directors, for all of whom he acts when he is counsel for the corporation, a different situation may arise. He does represent the fictitious entity, the corporation, at the same time, but it seems to me that there is a case where the factual situation may be such that the attorney ought to step out because of conflicting interests. The knowledge he gained as attorney for all put him in a beneficial position when conflicts arise between those whom he represented mutually. The ethical problem based upon the conflict of interest is difficult and the cases involving it are not in harmony. Undoubtedly, there are many cases where the problem has not occurred to the attorneys, and, not being raised, no question has been presented. The solution must always depend upon the total body of facts in the particular case and is not easily solved.

There are a number of very interesting cases upon that, but one of the most exciting cases that I read was the *Consolidated Theatres v. Warner*.^{*} This was a motion picture case in which Philip Loew, who was the owner of Consolidated Theatres—they had one of their theatres in Worcester, Massachusetts, about which the action was brought. Consolidated brought an action against Warner Brothers et al, a group of picture producers, under the Sherman Act, claiming a national conspiracy, and particularly a conspiracy against them, to prevent their line of theatres from getting first run or second run pictures.

The attorney that Philip Loew and the Consolidated Theatres employed was a man named Nickerson. Nickerson had been employed for eight years with the Dwight law firm which had represented Warner Brothers, Fox Films, and other producers. He had represented them for a number of years and had defended Warner Brothers from other lawsuits against them and the group of de-

^{*}*Consolidated Theatres v. Warner Bros. C. M. Corp.*, 216 F.2d 920 2d Cir. (1954), extensively ann. 52 A.L.R.2d 124S (1957). For earlier cases see ann. 51 A.L.R. 1307 (1927).

fendants on the same ground, that there was a conspiracy to deny the plaintiffs in these other suits the right to purchase first run pictures for their theatres. So here we have Nickerson, a member of a law firm which did all the work for Warner Brothers. He had access to the records. He had been successful in a number of their suits. He was a young lawyer who came in as a law clerk but had worked up and worked with others throughout the cases and was familiar with their files, their procedures, their plan of operation. Over a period of years he had worked representing Warner Brothers on antitrust litigation similar to that in the *Consolidated Theatres* case.

Nickerson quit his employment with the Dwight firm and claimed there had been an arrangement between him and Dwight that he would not take cases involving action of the Warner Brothers Company during the period of time he had been employed with the Dwight firm, but that he might do so as to completely new business upon matters arising subsequently. Nickerson formed a new partnership with a man named Gold and they represented the Consolidated Theatres in this case. Warner Brothers objected to Nickerson's appearance as attorney in the case and made a motion that he be disqualified because he had been an attorney for Warner Brothers as a former client. Nickerson claimed in response to the motion that the case involved totally new material and that none of the evidence would involve any of the matters with which he dealt when representing Warner. He claimed there was no attorney-client privilege involved in this in any way whatsoever; nothing was privileged, and the records were open to everyone. The court, however, held that while Nickerson was working for Warner Brothers as their attorney, he had an inside picture of the operation of the company, that he learned the whole system of their records, that he had obtained an insight into the company's business which enabled him to work against the company, even upon new matters, with special effect because of his knowledge. The court sustained the motion holding that the Canons of Ethics 6 and 37 squarely covered the problem. The court further said that even though Nickerson had spent his life dealing in this kind of antitrust business and even though he might have to learn a new type of professional work in the law, still he cannot engage as attorney in the case because of professional ethics involved.

I see we are due to close. I am going to have to skip over other things. I want to mention two basic lines of authority. One is the California law, which seems to look at this quite differently. They say as long as the matter involved in the litigation, as far as the former client is concerned, is something that does not involve the

attorney-client privilege, this business of who you represent is up to your own free selection without violation of ethics. So if A, B, and C were incorporators of a company incorporated by an attorney, and they had litigation against each other but it didn't involve any attorney-client privilege (and it would not because the privilege would apply to third parties but not intercede between A, B, and C), California says there is no problem of professional ethics and the attorney can go on and represent one against the other.

But in New York, and you get it in this *Packer* case, they took quite a different position and they questioned, "Have you gained inside information? Are you put into a position different from that in which other attorneys would find themselves? If that is the case, is there such a conflict because of the knowledge gained that in the public eye your conduct would look reprehensible in attacking one who had previously employed you and opened up the door to his business in confidence, and now you in turn start action against him?" In other words, they say it is beyond the question of attorney-client privilege and it involves a matter of respect, and standing of the profession. Upon the ground of public interest, New York holds that if the legal profession is to stand high in the public image these matters of conflict of interest, even in cases where attorney-client privilege is not involved, must be avoided.

In conclusion I will simply state this: I think that you can't give a crystallized rule that is going to cover every situation in which legal ethics will preclude a lawyer's employment because of conflict of interests or because of the impropriety of suing a former client. It may be better to withdraw and be on the safe side if the subject of suit is one in which you gained special insight because of your former employment even though the subject matter may be different. It is better to withdraw and recommend the employment of another lawyer. The client will ordinarily ask for a suggestion as to who the lawyer should be. Isn't it common among all law firms to advise that your interest in a subject or case makes it preferable that another lawyer should be obtained? You may have lost a client and a good case, but it isn't too bad after all, because those attorneys in course of time will be referring something back to you. Canon 6 and 37 of the Canons of Ethics are very important to the legal profession and their observance means a great deal to the image which the legal profession holds in the public view. It seems that the New York rule suggested above is the better rule, subject to the right of waiver by a former client unless the conflict is too great. Whatever the cost, as indicated in the *Consolidated Theatres* case, an attorney who has gained inside information in serving a client cannot ethically serve as attorney

for another against him. The obligation of good faith conduct is too great.

I think with this, that I will conclude on time. I congratulate everyone here for staying awake. Thank you.

CHAIRMAN MOLDENHAUER: Gentlemen, I would like to express our deep gratitude to all of the three speakers this morning who took time out from very busy schedules to be with us. Thank you. We will stand adjourned until two o'clock.

[The Friday morning session adjourned at twelve-five o'clock.]

FRIDAY AFTERNOON SESSION

November 8, 1963

The Friday afternoon session was called to order at two o'clock by Chairman John Mason.

CHAIRMAN MASON: If I may have your attention, I would like to remind you that the House of Delegates and the General Assembly meeting will follow this meeting this afternoon at four and four-fifteen o'clock.

Howard Moldenhauer introduced Professor O'Neal this morning and I assume that most of you at least were here to hear his introduction.

Professor Hodge O'Neal is a professor of law at Duke University and has done extensive work in the close corporation field and has written on the subject. We consider him to be the outstanding authority in the country on this subject.

Duke University, the school in which he teaches, is a very interesting school with a very picturesque campus. We have a few graduates in Nebraska from there. Mr. and Mrs. Hale McCown are both graduates of that law school, as is Hal Booth who is connected with Bankers Life in Lincoln; and Jack North has a graduate degree from their law school.

I was privileged to be on their campus a few years ago and had the opportunity to have lunch with a few of the faculty of the law school in their student union building. This school has an international flavor because it is the headquarters of the World Rule of Law studies, the project which Charles Rhyne who is a past President of the American Bar Association had so much to do with a few years back and continues to have much to do with.

In the course of our luncheon meeting they were discussing some of the visitors that come to the school from abroad, the travels that the faculty members take, and they fell into a discussion of

Americans traveling abroad and they discussed the question of who was probably the most unique American ever to travel abroad. Our guest today suggested that probably it was Christine Jorgenson, who is the only American male who ever went abroad and came back a "broad."

We heard a teaser this morning about some of the problems in squeeze-outs and control situations in close corporations, and this afternoon Professor O'Neal will continue with the "Control Arrangements Serviceable in Close Corporations." The outline on page 3 is the beginning of the outline on this subject. Professor O'Neal!

CONTROL ARRANGEMENTS SERVICEABLE IN CLOSE CORPORATIONS

F. Hodge O'Neal

Gentlemen, before I go into what I plan to say I want to make a couple of comments on Dean Ladd's talk. One involves the story he told about a dean, the story which ended with the president writing someone, "Nobody is lower than a dean."

I have gathered, since I came here as an outsider, certain information about one of the schools in this region. You know, quite often an outsider can get information that people in the home community do not know about. I have discovered that some years ago one of your law schools admitted a student from pretty far back out in the country. The boy brought his dog along. His father came along and explained to the dean of this law school that the boy had never been away from the dog and asked the dean to permit the dog to stay with the boy, to go to class with him, and to be with him all the time because otherwise the boy would get very lonesome.

The dean consented, much against his better judgment. The dog caused trouble from the first, because the faculty was sensitive. When the dog would yawn in class the teacher would get upset. Whenever the dog scratched, his bones would strike against the floor. And when the dog would stroll out of the room, all the students would giggle.

But the climax came when the dean called the boy in at the end of the semester. The boy had not made good grades; the dean was giving him the riot act. The dog jumped up and bit the dean, rushed out and bit a secretary and another member of the faculty.

The president called the boy in and said, "Why did the dog bite the dean?"

The boy said, "I guess 'cause the dean was mean."

The president nodded understandingly, he could understand that, "But why did the dog bite the other members of the staff?"

"Well, I guess just to get the taste out of his mouth."

Now as to the other matter that Dean Ladd commented on: Dean Ladd mentioned that if A, B, and C come into a lawyer's office and ask him to form a corporation for them, at a future time when a dispute develops among these people and litigation occurs, the lawyer may find that he is in a conflict of interest situation.

I would like to suggest that he may find himself in a conflict of interest situation even earlier, i.e., when he organizes a corporation for the three people who come in. This was brought to my attention by a group of Cincinnati lawyers at a panel of this sort. They pointed out that there is definitely, in many of these typical situations, a conflict of interest between the desires of a minority shareholder who, if he understands the problem that he is running into, will want a veto or some protection against majority power and the interests of the majority and perhaps the interest of the corporation itself in retaining as much flexibility as possible for future business decisions.

I am not qualified to settle that problem. It is quite common, as you know, for one lawyer to handle the organization of a corporation when three or four friends come in and say that they want a corporation organized. But I am saying that if you concern yourself about protecting the minority and at the same time serve the real interests of the majority, you may find yourself in a very, very difficult position where you can *try* to balance the interests of the two; it is not an easy matter.

To turn to the subject "Control Arrangements Serviceable in Close Corporations": These various control arrangements that I am going into are helpful in protecting against the squeeze-outs that I talked about this morning but they are also helpful in a great many other types of situations. In other words, what I am talking about now should be of interest to you, even though you are representing solely the majority shareholders.

I am going to start with the articles of incorporation. In setting up a control pattern for a corporation there are two places in the articles of incorporation where you have leeway. Those two places are the stock clauses (the financial clauses) and the optional clauses.

First let me talk about the stock clauses. If you will look on page 3 you will see there in I-B-1 that I refer to classification of stock. All of the modern corporation statutes permit use of various classes of stock and the giving to each class whatever preferences,

rights, privileges, etc., are desired. That means that even though, say, Mr. A is going to contribute most of the money and most of the assets to the corporation, if he agrees with Mr. B and Mr. C that they will have an equal voice in the management, by issuing various classes of stock and by allocating those classes carefully, you can give Mr. A a right to participate in dividends and a right to participate in assets on dissolution proportionate to his contribution, and yet you can divide up control equally; or you can make any division of control you want by a careful allocation of the shares. When I say you can use a number of classes of shares to vary the control pattern, I mean not only preferred stock but also various classes of common stock, as I will point out to you more specifically in a few minutes.

Your problem in this state is complicated by a rather peculiar provision of your statute, and this is set forth in Nebraska Business Corporation Act, Section 14. That statute says, among other things, that your stock must have a par value. Now, I judge that is based on a constitutional provision; otherwise the drafters of your statute probably would not have put that in.

In most states of course you can use no par stock. It seems to me, however, that this requirement of par value does not hinder you very much in setting up whatever control pattern you want through the use of various classes of stock because you can use so-called "baby" par stock. You may set the par value very low, but you may sell that stock at any price you can get or you may issue it for cash and property.

There is one danger you need to concern yourself with in the use of baby par stock, and that is that at some future time you are going to find the corporation has so much stock outstanding that you will need to consolidate the shares in some way. But as far as the control pattern is concerned you can use baby par as long as you are not having to sell that stock to the public; you are merely issuing it to the people involved, because the par value has no relationship at all, or need have no relationship at all, to the value of the stock or the interests represented by the stock. You have to issue par value stock for at least par, but there is no requirement that you can't issue stock for much more than par.

I think it is possible to use several classes of no par stock in a very useful way in a close corporation. If there are only three or four shareholders in a corporation and each one wants a man on the board, one way of assuring each shareholder of a man on the board is to issue several classes of common stock, identical except that Class A stock elects a Class A director, Class B stock elects a Class B director, Class C stock elects a Class C director, etc.

One thing you have to watch is not to disqualify the corporation from making an election under Subchapter S of the Internal Revenue Code. As you know, to elect the tax status there provided for, the corporation can have only one class of stock. There is a Revenue ruling, however, that if the only difference in the classes of stock is that each elects a different director, then for Subchapter S purposes the corporation will be considered to have only one class of stock. I think in setting up a control pattern for a close corporation that on occasion you will find it desirable to classify your board as well as to classify your shares and have each class of stock elect a class of directors.

There are some incidental advantages to this because if all of the Class A stock is issued to Mr. X, Mr. X can transfer to his children up to as much as 49 per cent of his stock and still lose no control.

Let me turn now to the optional provisions in the charter. In most states, including this state, there are certain matters you have to include in your articles of incorporation, but the statute goes on and says that there are certain optional provisions that you may include. If you will notice down at the bottom of page 3 of the outline, you will see Section 52 of your statute says: "The articles of incorporation shall set forth . . . any provision not inconsistent with law . . . for the regulation of the internal affairs of the corporation." That section goes on to add that you may include a provision restricting the transfer of stock.

I want to call your attention to what seems like a harmless little phrase in your statute—"not inconsistent with law." What seems to be a blanket grant of power to the draftsman of the articles to include anything on the internal affairs of the corporation that he wants to include may be illusory, because "not contrary to any provision of law" has been interpreted in some states to include not only any statutory rule but any common law rule. Therefore, almost anything you put in might run contrary to what some court has said in the absence of any statute.

For instance, to get specific, suppose you are in a state which says that in order for a corporation to enter into a contract with one of its directors and not have that contract voidable by the corporation, you must have a disinterested quorum and majority of directors voting for that contract, and you put a provision in your articles which says that interested directors may be counted toward a quorum. That point has been litigated, and the court finally concluded that the provision in the articles would be given effect. The court in effect said, "It is true that this provision in the statute

which refers to 'a provision not inconsistent with law' means common law as well as statute law, but it means only common law which is firmly established and firmly supported by strong policy of the state, and we don't think this particular common law rule is."

All I want to say here is that I can't give you a final answer: There are a good many cases on this; but I do want to point out that just because your statute says you can put in your charter, the articles of incorporation, "any provision not inconsistent with law" on the internal regulation of the affairs of the corporation does not mean that you are safe in putting in anything you want.

Here are some of the charter provisions—and this is set forth in D on page 4—that I think you might consider putting in your articles. Mind you, I am not saying you should use these in your charter every time; I am merely saying that here are some provisions that often will prove useful.

1. Perhaps the one most often used, a provision restricting the transferability of stock.

2. A provision giving the shareholders or some of them the power of veto, and I will talk about this in just a few minutes.

3. Provisions which in some way take away from the directors powers that they would normally have.

4. Provisions strengthening the shareholders' powers of inspection or the power to get information.

5. A provision authorizing informal action by the corporation.

Often shareholders and directors do not operate very formally. You might want to consider a provision that would give effect to the informal action, although I can see a reverse side of that. It is best of all to cause the participants to act formally and keep records and to follow the corporate paraphernalia of holding separate shareholders and directors meetings, and not intermingle what they do as shareholders with what they do as directors.

6. A provision to strengthen the shareholders' pre-emptive rights, for the reasons that I mentioned this morning, to protect minority shareholders against squeeze-outs.

7. A provision of the type I mentioned a moment ago saying that contracts between a corporation and a director will be valid in spite of his interest, or at least that he may be counted toward a quorum.

8. Finally, a really unorthodox provision, such as the one I have set forth in D-8. In other words, although it is not customary to use in your articles of incorporation the names of particular shareholders, you may find yourself faced with a situation where

you will want a provision which will relate to a particular person. You may want to personalize a provision in your articles. I have some fear that such a provision will be sustained, but in the only cases which have come up, including the case involving the provision which I have quoted in the outline, the courts have given effect to the provision in the articles.

Now let me turn to another subject. Let me turn to the problem of giving a veto to minority shareholders, or perhaps giving a veto to any shareholder in the company. The most effective way of giving a veto, it seems to me—although there are ways of doing it by the issuance of various classes of stock and the use of voting trusts, etc.—the most effective way it seems to me, the most fool-proof way, is by high vote requirements.

Again, when we come to high vote requirements there are disadvantages but let's look at the positive side first. If you have high vote requirements for shareholder action, for instance, if a vote of 90 per cent of the shares with voting power is required for shareholder action, that means that a minority shareholder, a shareholder with, say, even 15 per cent of the stock can veto elections of the board. It means that he can veto corporate charter changes. It means that he can veto mergers. It means that he can veto amendment of the charter to authorize the issuance of additional shares. Your statute, as you can see at the bottom of page 4, permits high votes for shareholder action.

To give a veto over director action you not only must have a high vote requirement for director action but you also have got to assure each shareholder whom you want to have a veto that he will have a man on the board. For instance, if you require unanimity for director action, that protects a shareholder against a corporate decision of which he does not approve, provided he can be sure that he himself is on the board or that he has a man there to represent him. Your statute very clearly authorizes high vote requirements for director action, as you will see if you look down at the bottom of page 4 at the statutory provision carrying over to the top of page 5.

If you couple a high vote requirement with an arrangement to give each shareholder, each one to whom you want to give the veto, a way of keeping a man on the board, then of course the veto is effective.

Here are the ways of assuring a shareholder a representative on the board. One is by a shareholders' agreement which designates the directors or provides that each shareholder will appoint one of the directors.

You may raise the question: Is this inconsistent with cumulative voting? That question has been raised in about four cases in the country, including one in this state. The answer has been invariably that a shareholders' agreement is not inconsistent with mandatory cumulative voting. At first blush it might seem that they are inconsistent, because a minority shareholder cannot waive his right to vote cumulatively by a provision which he agrees to in the articles of incorporation or by a provision in the bylaws; but he can arrange for the designation of the directors, or for a method of selecting directors; he can do that in advance so that cumulative voting will not operate. At least he can do that if the purpose of the agreement is to do what cumulative would do, that is, protect the minority shareholder.

Your case on that—*E. K. Buck Retail Stores*—is cited at the top of page 6 in paragraph B.

How is it possible to give a veto over officer action? The typical way I am sure you have run into or perhaps have used yourself. The important acts the officers do are concerned with money, and that affects the very sensitive nerve that runs from the hip pocket direct to the heart. Most of the time there is arrangement—designed to give a veto—that requires two officers at least to sign the checks or execute the negotiable paper, etc. So if there are two factions, the signature of both is required before money can be borrowed or money can be spent.

Let me point out that there are some very serious disadvantages to veto arrangements. The obvious one is that the corporation loses a certain amount of flexibility. It can't meet new opportunities, and it can't meet contingencies which may arise because a shareholder can stop a decision, veto a decision. Another obvious disadvantage is that such arrangements enhance greatly the chance of deadlock and corporate paralysis.

A third disadvantage is that minority shareholders sometimes take advantage of their veto power to exact unfair concessions from the majority. About all I can say is that you have a problem here of balancing interests, the interest of the minority against the interest of the majority, and I suppose in the final analysis it is a matter of the parties' business bargain.

Now I want to turn to shareholders' agreements. If you have a problem such as the one here: What voice does each of the shareholders in this three- or four-man corporation have in making decisions? I might say that sometimes you will have a shareholder who wants a voice in a particular area. For instance, he may want to have control of the sales policies of the corporation. Why not

solve problems of this kind by contract? Why not just let the parties agree as to who is going to do what in this corporation? That appears to be a very, very simple solution. But the dangers are overlooked. There are more ways of attacking a shareholders' agreement, more pegs on which to hang an adverse decision about the validity of an agreement, than almost any one would imagine.

Some of the attacks that can be made on a shareholders' agreement are set forth in the articles cited at the top of page 6. Before we go into the attacks that can be made on a shareholders' agreement, however, let's look at what shareholders' agreements typically provide. What do shareholders in a small corporation want to put in an agreement?

Well, they nearly always—maybe I had better not put it quite that strongly—they quite commonly want to provide who the directors are going to be, or to provide some special arrangement for selecting directors. Let me say that a shareholders' agreement can be among all the shareholders or it can be among only part of the shareholders. Four or five people, who together constitute the majority, may consolidate their voting strength. For instance, they may provide in their agreement that the decision on how *all* their shares will be voted will be made by a majority vote by head of the five shareholders who are parties to the shareholders' agreement. So the shareholders' agreement is not a device that must be used by all of the shareholders.

Here are the provisions that go into a typical shareholders' agreement:

1. Who are to be the directors or how the directors are going to be selected.

2. Who are going to be the officers and the key employees, and what their compensation is going to be, or how their compensation is going to be determined.

Or the contract may provide that the initial compensation will be so many dollars for Mr. X, so many dollars for Mr. Y, and if a change in their compensation is made it will be proportionate, so that the man with the lesser voting power will not find himself being held at the same compensation level while the other shareholders, as the business increases in earning power, have their salaries raised.

3. Another provision that is often found in a shareholders' agreement deals with dividends. This provision may be either of two extremes: It may restrict dividend declaration, it may tell the directors "You cannot declare dividends under these circumstances." For instance, not infrequently a shareholder will lend money to

the corporation, and he will insist on an agreement with his associates that the corporation will not declare dividends until that loan has been repaid.

Or, conversely, a minority shareholder may insist on dividends being declared, may insist on depriving the directors of their discretion to determine whether dividends will be declared, by a provision which says that half of the surplus over \$1,000,000 will have to be paid out in dividends. In other words, the minority shareholder is protecting himself against the dividend squeeze that I mentioned this morning.

4. A special dissolution arrangement is another possibility. The shareholders may agree to a special setup for dissolution, one which is different from the dissolution procedure set forth in the statute. In the few cases which have arisen, those contracts have been sustained.

Here are some of the grounds of attack on a shareholders' agreement. The older cases were practically unanimous in holding any voting agreement invalid. They held the voting trust invalid, as you read in the hornbooks, and they also held most voting agreements, even though they were short of voting trusts, invalid on the theory that voting power cannot be separated from beneficial interest in shares; and where an arrangement provides that shares are to be voted in accordance with the majority vote of the shareholders who are parties to the agreement, anything of that sort, that is an invalid separation of voting power from beneficial interest in the shares. That old idea has now been abandoned, but there are other ideas which have come to form a basis for an attack.

One is a notion which is persistent, which is perhaps most strongly enunciated in *Jackson v. Hooper*, the case cited in D-2 on page 6, a New Jersey case, which is to this effect: You cannot be shareholders as to the rest of the world but partners among yourselves; that is inconsistent. If you are going to be a corporation you have to be a corporation; if you incorporate but have these internal arrangements for the control of the organization, which are like partnership arrangements, you have done something which is invalid and inconsistent.

That idea, as I say, keeps cropping up in the cases, although many recent decisions in particular have disregarded it.

The most frequent ground of attack is based on some so-called statutory norm, some provision in the corporation statute. I have picked out a few of these. I certainly don't mean to indicate to you that these are the only provisions that you need worry about. You

should comb the statutes after you have decided on the type of agreement that you are going to use. But here are some of the norms in your statute.

There is a provision in your statute which is quite typical, that the business and affairs of a corporation shall be managed by a board of directors. Unlike some states, you do not have a preliminary phrase saying something to this effect, "Except as is otherwise provided in the articles, in the bylaws, or in the shareholders' agreement." Your statute does not contain that phrase.

If you provide who are going to be the officers of the corporation, or if you provide what the dividend policy of the corporation is going to be, have you violated that statute? I think you might very well have. You might look at the line which has been drawn by the New York court and is set forth in the New York cases cited at the bottom of page 6. Also look at your Section 48 which says, among other things, "The officers of a corporation shall consist of a president," etc., and it says they "shall be elected by the board of directors." If your shareholders' agreement designates the officers, are you violating that statutory provision? You are taking that responsibility away from the directors. You are deciding that in advance. Again there are cases which hold under similar statutes elsewhere that you violate, by your shareholders' agreement, the provision in the statute.

There are also cases which have held that a shareholders' agreement is a voting trust in disguise, that unless you comply with the provisions of your statute for the formation of a voting trust your shareholders' agreement is invalid.

There is a leading Delaware case on that point. It is very difficult in Delaware now, I would say, to draw a line between a voting trust on the one hand and a shareholders' pooling agreement on the other.

A provision of general contract law, which is set forth in the *Restatements of Contracts*, says that a promise to vote shares in a certain way in consideration of a private benefit is invalid. For instance, if another shareholder promises you that if you will promise to vote your shares in a certain way, he will forget about a note that he holds of yours, will cancel the note, and you do so promise, your agreement is not binding on you because of this provision of contract law. An argument can easily be made, it seems to me, that when three or four people get together and say, "Let's vote our shares as a unit. We are together the majority shareholders. We will make ourselves directors and officers and we'll fix our salaries at such-and-such a figure," in a very real sense

the consideration each is receiving for his promise is a private benefit.

This is not a complete list of the attacks that can be made on a shareholders' agreement, which seems on its face to be nothing more than a contract. You would think that the rules of contract law should govern and that you should be safe in relying on those. But there are many hazards which you would see if you would look at the cases. Many shareholders' agreements have been knocked down.

I have set forth on page 7 in paragraph E some precautions which will strengthen a shareholders' agreement.

One is, and I am embarrassed even to mention it, reduce the agreement to writing. It is amazing how often agreements, part of the business bargain among participants in a corporation, things that they understand, are never reduced to writing. It is surprising how often they have never really thought through their deal. They have a sort of vague understanding which is not reduced to writing at all and which, as I have indicated, they have not even really thought through. When you try to draft a document, then you think through a great many things which otherwise might never be settled.

It seems to me desirable to explain in your instrument the business need or the business problem which is giving rise to the shareholders' agreement, so that when litigation comes you can establish that nobody was trying to take advantage of anyone else, that the agreement was made in good faith.

You need to be careful that your agreement does not conflict with the articles of incorporation or the bylaws. Again, time after time litigation has resulted because the articles of incorporation or the bylaws are inconsistent with the agreement that the parties make.

You might want to include a severability clause. If one provision in the agreement is declared invalid, if it is the intention of the parties for the other provisions to be sustained, that should be clearly indicated in the agreement itself.

Now let me turn to another arrangement, the long-term employment contract, and here I am talking about not just a contract among the shareholders but a contract between a particular shareholder-employee and the corporation itself, a long-term employment contract. This device can be used not only for shareholder-employees, but also for any other person who is coming into the corporation even though he is not a shareholder, who needs protection; in other words, he may be giving up a very, very advan-

tageous job where he is to come with this company. He may be giving up vested rights and pension funds, and he may need protection.

In this employment contract you can include profit-sharing arrangements and you can include options for the purchase of stock, but you need to keep in mind that a long-term employment contract is not specifically enforceable, that it can be breached. Therefore you might very well want to include provision for ample severance pay for this key employee and for liquidated damages or pensions, and you may want to include a provision that if he is discharged or if his contract is not renewed after the ten-year term, the corporation will have to purchase his shares at a price to be determined by formula or at a price which has been stipulated.

I mentioned that one of the disadvantages of a long-term employment contract is that a long-term employment contract is not specifically enforceable. There is one recent exception to that. In a New York case, cited at the bottom of page 7, the *Staklinski* case, the employment contract contained a provision for arbitration: if a dispute developed between the company and the employee the dispute was to be arbitrated.

The case was carried into court. The arbitrator had ordered specific performance by the company—I am sure it would not have ordered specific performance against the employee—and the court held that although the court itself would not have ordered specific performance of the employment contract, it would enforce the award of an arbitrator.

You have a statutory provision which is very close to the one in the Model Act, it may be identical, which I set forth in F on page 8, which says: "Any officer or agent may be removed . . . without prejudice to his contract rights." Under this statutory provision the directors, as I understand it, have the power to remove an officer or other corporate employee, but he still has his contract rights. That may make it impossible in this state to have a holding like the New York case which I just referred to, because there there was specific enforcement under an employment contract which seems to me to be inconsistent with a power in the directors to remove an employee, that power being given by statute.

I set forth in G certain precautions that you need to take in a long-term employment contract to increase the likelihood that it will be given effect. They are pretty much the same as the ones I mentioned a minute ago for strengthening a shareholders' agreement except that there are three additional precautions.

One is that you need to be very, very careful that the person

with whom the employee deals, the person who represents the corporation, has authority to act for the corporation and to bind it. The courts have been quite strict in saying that an officer who purports to have authority to enter into a long-term employment contract and to bind the corporation to such a contract, does not in fact have that authority. So you need to be sure that the officer who is representing the corporation is authorized.

Second, you may want to include a charter provision, you may even want to amend your articles to specify that your corporation has power to enter into a long-term employment contract. Some decisions, notably in the State of New York, have said, although later decisions I think by implication overruled the earlier ones, that a board of directors cannot bind a later board to an employment contract which extends beyond the term of the acting board. The theory is again that the power of future boards, power given by statute to manage the affairs of the corporation, is being taken away by the action of the earlier board.

Furthermore, if the contract is important enough you may want to submit the contract to the shareholders for approval and ratification. As far as I know there is no statutory authority for such approval or ratification, but it does seem to me as a practical matter that that greatly strengthens the employee's position, gives him a great deal of added protection.

Now I turn to what is perhaps the most difficult task in setting up a close corporation. I've talked about high vote requirements and I have pointed out that they lead to deadlocks. How are you going to settled disputes, and how are you going to break deadlocks and keep the corporation from being paralyzed?

California has a unique provision in its statutes and incidentally Missouri has recently adopted a similar statute. The California lawyers say it works quite well; I would not have thought so. The statute provides for court appointment of a provisional director in the event there is a deadlock on the board. If the deadlock persists for a certain period of time the court appoints an additional director to break the deadlock, and he stays on the board until the parties can reach some agreement on how to run the affairs of the corporation. You could provide by charter provision or provision in your articles or perhaps by agreement for the same type of arrangement.

Another possibility is arbitration. This is using arbitration in a new setting, but it is being widely used in this way in the New York area now; that is, arbitration is being used to settle disputes within a company. This is intra-institutional arbitration. For instance, if you have two shareholders and each one has half the stock

and they can't agree, you can submit that dispute to arbitrators. Arrangement for arbitration has to be made in advance. In other words, if a dispute comes up there must be an arrangement for automatic submission.

The advantages of arbitration over going to court are, of course, the privacy; in many instances, lesser expense; some feeling on the part of businessmen that other businessmen can make the decision in a better way than the courts; and according to Professor Hornstein of New York University, the fact that arbitration is available causes the parties to settle their disputes amicably. The fact that they know there is a way of solving the deadlock causes them to negotiate their differences. I give you that for whatever it is worth.

The objections to arbitration, aside from the legal objections are these: Many lawyers say that if the parties can't negotiate their differences an outsider can't come in to run the business for them.

And there are legal objections. At common law an agreement to arbitrate future disputes was not enforceable. You could submit an existing dispute to arbitration but you could not enter into a contract which would be binding on you to arbitrate future disputes. That was the common law rule, and, as I take it, that is still the rule here under your arbitration statute. In about half the states the rule has been changed by statute. The authorities which I set forth on page 9, under paragraph 6, indicate that in this state you cannot enter into an enforceable arrangement for the arbitration of future disputes. That seems a little peculiar because that is an unnecessary restriction on the contractual freedom of the businessmen. Whether or not it is wise to provide for arbitration, if they want to provide for arbitration, it does seem bad not to let them do so.

I am reminded of a young lawyer who graduated from Duke not many years ago. He went out and set up practice for himself, hung out his own shingle, which not many lawyers do anymore, incidentally. He opened his office next to an older lawyer so he could get some help, which was understandable. He got his first case and he went to the older lawyer and said, "What do you think of my case?"

The older lawyer listened to the facts and said, "Well, it sounds pretty good, but because of the peculiarities and inequities of the law you might lose this case."

The young lawyer went on back to his own office. He won that case. Later he went to the older lawyer with another case which he thought was open and shut. He thought he had a case

that he couldn't lose. But again the older lawyer said, "Because of the peculiarities and inequities of the law you might lose."

The young lawyer said, "Why do you always tell me about the 'peculiarities and inequities of the law'?"

The older lawyer said, "Well, fifteen years ago I was right at the top of the profession. I had plenty of clients, they were paying good fees, I had a wonderful family, I had a beautiful blonde secretary who could take shorthand, and all of a sudden the whole thing crumbled around my ears. My wife brought a suit for divorce on the grounds that I was impotent. My secretary brought a paternity action claiming I was the father of her child. And because of the peculiarities and inequities of the law I lost both cases."

At the top of page 10 of the outline I want to call your attention to certain buy-out arrangements which are helpful in solving these disputes, arrangements which differ from the ones you heard about yesterday in the discussion of buy-sell agreements. These are intended to serve a somewhat different purpose.

If you have a dispute that persists for a certain period of time, your arrangement, made in advance, may provide that if the parties can't elect a new board of directors, can't agree on a board of directors, for a certain period of time, then the majority shareholders will buy out the minority at a specified price.

An even more effective arrangement, a more useful arrangement, is to provide—and this one seems to be growing in popularity—that any shareholder in a three- or four-man corporation will have the power to dissolve the corporation, that the other shareholders will vote for dissolution at his request. But before dissolving the corporation he must offer his shares to the others at a price to be determined by formula. That gives protection to both sides. In other words, an unhappy shareholder can get out, he can cause the dissolution of the company, he can't be held in against his wishes, but he first must offer his shares to the other shareholders if they want to continue the corporation.

Another arrangement for a buy-out is the so-called Arkansas choice. Provision can be made in advance that if a shareholder in a two-man company with fifty-fifty owners decides to sell, he will name a price which the other fellow then will have the choice of buying at or selling at. You can be sure that nobody is going to name a price recklessly. He is going to try to set the price fairly.

The same principle applies when you tell the kid to cut the pie but let the other child have the first choice.

I want to get very quickly into restrictions on the transfer of shares. As I pointed out this morning, in most small corporations

that are being organized now there is some type of restriction on the transfer of stock. The reasons for the restrictions are numerous. One is that many of the participants will want to have a veto over who the associates may be in the future. They don't want anyone coming into the corporation who will not be active or who will not be congenial, or who will not fit into the team. And they do not want anyone buying in who is a competitor and wants to get access to the books, etc., of the corporation.

Since 1958 and the enactment of Subchapter S of the Internal Revenue Code there is an additional reason for share transfer restrictions. Under Subchapter S, if a corporation does not have over ten shareholders and if, further, all of those shareholders are either individuals or estates, the corporation can elect to be taxed roughly as though it were a partnership. In other words, corporate earnings and losses will be passed through to the shareholders. But if shares get into the hands of another corporation, or if shareholders increase to more than ten, the corporation does not have that election. So you need to restrict the transfer of shares so that a shareholder will not transfer to numerous transferees, so that he won't transfer to an ineligible shareholder, and so he won't transfer to a shareholder who will not agree to the election.

Now as to the kinds of restrictions: The kinds of restrictions are consent restraints; that is, if a man decides to transfer, he has to get the permission of the other shareholders or of a certain percentage of the other shareholders or of a certain percentage of the directors; in other words, he must get someone's consent to transfer his shares. Many courts in this country, particularly the older courts, have said that such a restriction is invalid, that it is an unreasonable restriction on alienation. Some of the more recent decisions have upheld consent restraints.

The most popular type of restriction is the so-called first option. If a shareholder decides to sell, he must offer his shares to the other shareholders or to the corporation. That type of restriction is now held valid almost everywhere.

You may also want to use a first option principle in the event of a man's death, give the corporation or the other shareholders the first option to purchase his shares; or if a man retires and becomes inactive; or if he becomes incapacitated.

Another possibility, which I have some doubt you can use in this state, is to have redeemable common stock. Almost always preferred stock is made redeemable, but almost never is common stock made redeemable. But there is a Massachusetts decision which sustained redeemable common stock. It was the practice

in that corporation to redeem the stock of a man who retired. Only shareholders who were employees were permitted to hold stock, and the board would redeem the stock of any man who retired. That was upheld in the Massachusetts case.

You might examine the exact wording of your statute to see whether or not you think you can have redeemable common stock in this state. I think I have cited somewhere in this outline the pertinent provisions.

I see my time is fast getting away. Let me say that if the first option is the type of restriction you use, the problem is not whether or not the first option is valid—almost everywhere the option will be upheld—but the problem is drafting the restriction so that it is not ambiguous. You need to specify exactly when the option comes into play, upon what event. The courts will very strictly interpret the option. For instance, if you are not specific the courts will say that if the shares are given away or if you pass the shares by will, that the option does not come into play. Or if shares are transferred to another shareholder the courts have held that that is not a transfer within the meaning of non-specific language in a share restriction.

If the shares are once transferred the question comes up: Does the restriction apply to subsequent transfers of the shares, the same shares, that is, to re-transfers? There are all kinds of problems in connection with the drafting of restrictions.

Furthermore, the restriction has to be placed on the share certificates; otherwise it will not bind third parties who purchase the shares not knowing of the restrictions. That is provided in the *Commercial Code* and also in other statutes which I have cited in the outline.

Finally, there is a problem of setting the price. Now I am like Lady Godiva was just before she jumped off her horse. I am "nearing my clothes."

Usually book value is used to determine transfer price. That seems to be an easy way, but actually quite often book value, as you know, is nowhere close to the actual value of the shares.

Sometimes the parties agree on the price. They set a price at which the shares will be transferred if a man dies or if a man decides to sell, and then they adjust that price from time to time. The fault there is that they forget to adjust it; or one man knows that the other is "on his last legs" and he won't agree to an adjustment, even though the shares have gone up in value. A combination which can be used is to provide that the parties will set the price and adjust it from time to time, but that if they fail to adjust it

after a certain period has passed then appraisers will be brought in to set the price.

Let me say, finally, that this is my first trip to Nebraska and I am very, very grateful for the courtesies and the hospitality that all of you have shown me. If you are not willing for me to come back, don't give me anything that looks like an invitation.

CHAIRMAN MASON: I am sure I express the feeling of all of us, Professor O'Neal, that we are very grateful to you for taking the time to address us on this subject on which you are so well informed.

We will now take a fifteen-minute recess.

[Recess.]

CHAIRMAN MASON: Before we start I would like to acknowledge publicly that Howard Moldenhauer had the prime responsibility for putting this program together. He was responsible for the general format of it and the contacts with the speakers. I want to thank him on behalf of myself and on behalf of the whole Bar Association for the work that he has done in assembling this program. I think the attendance of the lawyers testifies that it has been an interesting program to date.

Our next speaker is going to take us into the subject of the articles of incorporation which might be appropriate under our new act.

Professor Lee Bloomingdale of Creighton Law School is a graduate of the Creighton Law School, both undergraduate where he received a B.S. degree cum laude, which I believe is an indication that he was considered one of the better B.S.ers in the class. He also received his law degree from there in 1954. He was a Cook Research Fellow at the University of Michigan Law School where he received a Master of Laws degree in '55. Since that time he has been teaching in the Law School at Creighton University.

Lee has been very active and has contributed immeasurably to the work of the Bar Association committees. He has been a member, and is a member, of the Committee on Continuing Legal Education. He participated as a member of the Committee on the Uniform Commercial Code and did an outstanding job with that committee. And he, of course, also has worked on the Committee for the Revision of the Corporate Law.

His subjects at Creighton are torts, labor law, and trade regulations, and conspicuously absent is the subject of corporations. I don't know how to account for that, but we bring him here today to talk on the subject of articles of incorporation. Lee Bloomingdale!

ARTICLES OF INCORPORATION UNDER THE NEW ACT

A. Lee Bloomingdale

Thank you, John. As we progress in this discussion you will see why I don't teach corporation law at Creighton. The man who does is Barton Kuhns, and I think maybe I had better start off by making reference to his presentation here today.

If you will take a look at the index of the materials distributed for the institute you will see that I have been given credit for the materials appearing on pages 55 to 82. Although I want to thank Howard Moldenhauer for the extra credit that this gives me, I am afraid my friendship with Barton Kuhns will suffer a severe setback unless I point out to you that my materials relating to articles of incorporation appear at pages 55 through 62, and that the materials from 62 through 81, which represent the bulk of the materials, have been prepared by Barton Kuhns.

I also want to mention to you at the outset that there are two printing omissions in the materials, one relating to publication of notice. I will correct these as we come to them in our discussion this afternoon.

As those of you who have had an opportunity to study L.B. 173 already know, the Nebraska Business Corporation Act makes some substantial changes in the manner of incorporating a business corporation and in the requirements as to what must be contained in the articles of incorporation.

First as to incorporators, Section 51 of the act provides that one or more natural persons of the age of twenty-one years or more may act as incorporators of a corporation. This represents a change from prior Nebraska law, in that under the old act at least two persons were required as incorporators. Now all we need is one.

Moreover, the old law in Nebraska simply required any number of persons, not less than two, without specifying that the persons have to be natural persons or that they be of the age of twenty-one years or more. Thus, whereas it may have been possible under the old law to have corporations act as incorporators, it appears that this is clearly not possible under the Nebraska Business Corporation Act.

Howard Moldenhauer mentioned to me a few moments ago that he had had a question after his presentation about whether or not corporations could act as incorporators, and he asked me to have you refer to page 83 of the materials in which he cites a case—this is at the bottom of page 83—*Elson v. Schmidt*, 140 Neb. 646, in which four companies incorporated a corporation. If you read

that case you will find that the court didn't discuss this issue, it simply mentioned that four companies incorporated a corporation. I don't think that this can be done under the new law because it requires a natural person.

On the other hand, the allowing of incorporation by one person, of course, eliminates the need for the use of dummy incorporators in many situations.

The provisions which must be included in the articles of incorporation are set forth in Section 52 of the act. If you will turn to page 55 of your outline you will see that the first required provision of the articles, as set forth in Section 52, is that the articles must set forth the name of the corporation.

The provisions of the Nebraska Business Corporation Act regarding the requirements of the name of the corporation are set forth in Section 7 of the act. Section 7 provides that the name of a corporation "shall contain the word corporation, company, incorporated or limited, or shall contain an abbreviation of one of such words." So now we are limited to corporation, company, incorporated or limited, or an abbreviation of one of these words.

Section 7 also provides that the name of the corporation "shall not contain any word or phrase which indicates or implies that a corporation is organized for any purpose other than one or more of the purposes contained in its Articles of Incorporation."

Section 7 further provides that the name "shall not be the same as, or deceptively similar to the name of any domestic corporation, or a foreign corporation authorized to transact business in this state, or a name reserved under the Act, or the name of a corporation which has in effect a registration of its corporate name as provided in the Act"—unless the corporation which is affected by this consents in writing to the use of the name and the writing is filed with the Secretary of State. So, in addition to the requirement of setting forth the name in Section 52, you will want to take a look at Section 7 to see what this name has to contain and what it cannot contain.

Section 8 of the Nebraska Business Corporation Act gives us in Nebraska a statutory innovation, at least for us, in that it provides that the exclusive right to the use of a corporate name may be reserved by certain parties including any person intending to organize a corporation under the act. As you will notice in your outline on page 56, the reservation is made by the filing with the Secretary of State of an application to reserve the name. If the Secretary finds that the name is available for corporate use, he

reserves the name for the exclusive use of the applicant for a period of 120 days.

Section 8 of the act also provides that the right to use a specified corporate name, which has been reserved, may be transferred by the person who has reserved it, and this transfer is accomplished by filing with the Secretary of State a notice of the transfer specifying the name and the address of the transferee.

I probably should also direct your attention at this time to Section 9 of the act which contains a provision for the registration of a corporate name. We have already talked about Section 8 and reserving a corporate name. Section 9 covers the registration of a corporate name, and it provides that it may be registered by any corporation organized or existing under the laws of any state or territory of the United States or the District of Columbia.

The procedure for the registration is set forth in Section 9. I won't go through all of that now but I might mention that the registration is effective until the close of the calendar year in which the application for registration is filed, but that the person registering the name can renew it from year to year by complying with the requirements for renewal that are set forth in Section 10 of the act.

Section 52 of the act, in talking about what has to be set forth in the articles of incorporation, also provides that the articles of incorporation must set forth "the period of duration of the corporation which may be perpetual." This is rather an interesting provision because Section 4 of the act, the section concerned with the general powers, provides that each corporation shall have the power to have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation. This would lead one to believe that, unless you put a provision in your articles limiting the duration of the corporation, your corporation has perpetual duration. But as I read Section 52 it is quite clear in its requirement that the articles of incorporation themselves must set forth the period of duration.

Moving on to another requirement of the articles of incorporation, Section 52 requires that the articles of incorporation must show the purpose or purposes for which the corporation is organized. In this connection Section 3 of the act provides that corporations may be organized under the act "for any lawful purpose or purposes, unless a different manner is prescribed by the statutes for the formation of corporations for particular purposes."

At this point I might suggest to you that you add to your outline on page 56, No. 3, where it says "unless a different manner

is prescribed by the statutes for the formation of corporations," you might add the words "for particular purposes." Those words were inadvertently omitted from the printed outline.

In my opinion, and I am sure you will all agree, it is extremely important that you take great care in drafting the purposes section of the articles of incorporation. The purposes of a corporation, of course, are separate and distinct from the powers of a corporation, in that the powers define the manner in which a corporation may act to carry out its purposes. Thus the powers must be construed in light of the purposes which are a *limiting* factor upon the exercise of these powers.

There are, of course, various reasons why a person might want to limit the purposes of a corporation. The main reason, I suppose, is to protect the stockholders by setting the bounds within which they are risking their investment so that they know at the time they invest their money what business the corporation will be engaged in and what business a corporation will be limited to.

On the other hand, and there is another side of this, limited purposes of course have the disadvantage of giving a minority stockholder a weapon for attacking the extension of corporate activities on the ground that they are ultra vires. This afternoon we don't have time to get into an extended discussion of just how broadly corporate powers may legally be drawn or how broadly they may prudently be drawn, but one question that has come to my mind in reading Section 52 of the act is whether or not it is sufficient to simply state in your articles that the purpose of the corporation is to engage in any lawful activity. I have had some discussion with lawyers on this. Personally, I am afraid of this type of provision. I am afraid of putting in my articles of incorporation the simple statement that the purpose of this corporation is to engage in any lawful activity. I am not quite sure exactly why it is that I am afraid of it, but I am.

I might point out this, that when Iowa adopted its Business Corporation Act in 1959 it modified the provisions of the Model Corporation Act regarding the statement of purposes to provide that the articles of incorporation shall set forth by way of a statement of purposes either (1) the purpose or purposes for which the corporation is organized; or (2) that the corporation shall have unlimited power to engage in and do any lawful act concerning any or all lawful businesses for which corporations may be organized under the Iowa Business Corporation Act.

So, in Iowa they specifically provided that you can put that type of a provision in; that is, a provision in the articles that the

corporation shall have unlimited power to engage and do any lawful act concerning any and all lawful businesses for which corporations may be organized in Iowa under the Iowa Business Corporation Act. We do not have that provision in our act. We didn't put that in.

The *Model Business Corporation Act Annotated*, that three-volume work which provides some excellent annotations, indicates that Wyoming, in adopting the Model Corporation Act, also permits an all-purpose provision in lieu of stating specific purposes. The *Model Business Corporation Act Annotated* also refers to Nevada and to Wisconsin as permitting the charter to designate as purposes that the corporation will engage in any lawful activity without further specification. But then, in the *Model Business Corporation Act Annotated*, in the "Comment" section, the author, after pointing out the statement regarding Nevada and Wisconsin, goes on to state that except in the last named jurisdictions the charter must state with varying degrees of exactness the nature of the business or businesses for which the corporation is organized.

As I read this, then, it is at least the opinion of the people preparing the "Comment" in the *Model Business Corporation Act Annotated* that, except where you have this specific statutory allowance of putting in the broad statement about any lawful business activity, that the charter in the other states must state "with varying degrees of exactness," whatever that may mean, "the nature of the business or the businesses for which the corporation is organized."

Of course, as I have indicated, the fact that some states in adopting the Model Corporation Act have felt that when they wanted to do this it was necessary to specifically state in their act that the corporate purposes could be set forth in the articles as simply the purpose of "engaging in any lawful activity," this fact makes me very dubious of doing it in Nebraska. I think you ought to spell out your purposes. I am very happy that there is not enough time for me to get into a discussion as to just how broad you can be with these purposes.

I see I still have a lot to cover yet and we are getting a little short on time. As to matters relating to capital structure, Section 52 provides that the articles must set forth the aggregate number of shares which the corporation shall have authority to issue. If the shares are to consist of one class only, then the articles must show the par value of each of such shares. Or if such shares are to be divided into classes, the number of shares of each class must be shown and a statement of the par value of the shares of each such class.

In conformity with the Nebraska constitution, Section 14 of the act provides that all stock shall be of par value, and all stock in the same corporation shall be of equal par value, except that preferred stock may or may not be of the same par value.

Section 52 of the act, in connection with the capital structure and what you must show in your articles, provides that if the shares are to be divided into classes, then the articles must set forth the designation of each class and a statement of the preferences, limitations, and relative rights in respect to the shares of each class. In this connection you should refer to Section 14 regarding this particular subject matter.

Also in connection with what the articles must set forth in connection with the stock, Section 52, Subsection 6, provides that if the corporation is to issue the shares of any preferred or special class in series, then the articles of incorporation shall set forth the designation of each series and a statement of the variation and the relative rights and preferences as between series insofar as the same are to be fixed in the articles of incorporation.

This section also provides, however, that the articles of incorporation may contain a statement of any authority to be vested in the board of directors to establish series and to fix and determine the variations and the relative rights and preferences between series. In this regard you should take a look at Section 15 of the act which provides that if the articles of incorporation expressly vest authority in the board of directors, then to the extent that the articles shall not have established series and fixed and determined the variation in the relative rights and preferences between series, the board of directors shall have the authority to do so.

Section 15 provides what variations may exist between different series of the same class of stock, and Section 15 of the act sets forth the procedure that must be followed where the board of directors are to establish the series.

Section 52, Subsection 7, relating to articles of incorporation provides that the articles of incorporation shall set forth any provision limiting or denying pre-emptive rights to the shareholders.

The subject of pre-emptive rights is extremely important, and I feel that this is particularly so in the case of a close corporation. I recommend to you that you thoroughly familiarize yourselves with the provisions of Section 25 of the act relating to pre-emptive rights in order that you may determine whether or not, in the case of any corporation which you are incorporating, you want to set forth in the articles a provision which will limit or deny pre-

emptive rights to shareholders or which will do something else that we will talk about in a minute.

Those of you who have taken a look at Section 25 of the act will recall, I am sure, that this Section provides that unless otherwise provided by its articles of incorporation the board of directors shall have power (1) to issue and sell shares in performing an incentive option granted its officers and employees, or the officers and employees of any subsidiary corporation, to issue shares in payment for property tangible or intangible and real or personal, and to sell treasury shares without first offering this stock to the shareholders of the corporation.

Section 25 also provides, in connection with pre-emptive rights, that unless the articles of incorporation provide otherwise, the board of directors shall have authority (2) to issue and sell shares of one class without first offering the shares to shareholders of a different class.

What the board of directors can do under Section 25 may be something that you don't want them to be able to do in the particular corporation that you are forming. So I suggest, in fact I urge, that you take a look at Section 25 to see just exactly what the pre-emptive rights situation is without a statement in the articles of incorporation and then decide for yourself what you want to do in that regard.

I am sure there will be many situations in which you will want to limit or abrogate the right of directors as set forth in Section 25.

Also in preparing any provision for your articles of incorporation regarding pre-emptive rights, you may want to consider the question of when pre-emptive rights are to begin. Is this pre-emptive right to arise as soon as the first five or ten shares of stock are issued, or do you want to have it deferred until the entire shares originally authorized have been issued? These are considerations that all of us, I think, need to get into when we are deciding just exactly what we are going to provide in our articles relating to pre-emptive rights.

For examples of provisions covering these matters, I suggest that you refer to the American Law Institute's publication "The Drafting of Corporate Charters and Bylaws" which was prepared by F. Hodge O'Neal and Kurt F. Pantzer. There are some examples in there that cover some of the problems that we have talked about.

Section 52 of the act regarding what the articles of incorporation shall provide also states that the articles of incorporation shall set forth any provision not inconsistent with law which the incorporators elect to set forth in the articles of incorporation for

the regulation of the internal affairs of the corporation, including any provision restricting the transfer of shares and any provision which, under the act, is required or permitted to be set forth in the bylaws. This of course will give us a lot of latitude as to the types of optional provisions that we want to put into the articles of incorporation. We will come back to this after we finish our discussion as to what the required provisions are.

The Nebraska Business Corporation Act also requires that the articles of incorporation set forth the street address of its initial registered office and the name of its initial registered agent at such address. Prior to the Nebraska Business Corporation Act, you will recall that our Nebraska statute provided that the articles must set forth the name of the county and the city, town, or place within the county in which the principal office or place of business of the corporation is to be located in Nebraska; also the name of the corporation's resident agent, which agent shall be an individual. That was the old statute.

Now under Section 11 of the act relating to registered office and registered agent, we see that each corporation shall have and continuously maintain in this state (1) a registered office which may be but need not be the same as its place of business; and (2) a registered agent, which agent may be either an individual resident in this state whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office.

Thus, under the new act we have a new concept, that of the registered office which may be but need not be the same as the place of business of the corporation, and we also have a provision for a registered agent instead of resident agent, and the registered agent may be an individual, a domestic corporation, or a foreign corporation authorized to transact business in this state. The old law of course required that the resident agent be an individual.

The last requirement of Section 52 with respect to the provisions which must be contained in the articles of incorporation is set forth in Subsection 10 of Section 52, and it requires that the articles of incorporation set forth the name and address of each incorporator.

Section 52 of the act also specifically provides that it shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in the act. In this connection you should take a look, of course, at Section 4 of the act which sets forth the general powers of each corporation, and I am sure you know from Howard Moldenhauer's discussion yesterday that these

powers are quite broad. Then you should also look at Section 5 of the act which contains provisions regarding the right of a corporation to purchase, take, receive, or otherwise acquire, hold, own, pledge, transfer, or otherwise dispose of its own shares.

Now let us go back just a moment to that subdivision, Subdivision 8 of Section 52 of the act, which you will recall provides that the articles of incorporation shall set forth any provision not inconsistent with law which the incorporators elect to set forth in the articles for the regulation of internal affairs of the corporation, including any provision restricting the transfer of shares and any provision under this act which is required or permitted to be set forth in the bylaws.

When you examine the act you will see that various sections prescribe statutory rules for the regulation of the affairs of the corporation which are going to apply in the absence of contrary provisions in the articles or bylaws. Thus, in some of the situations you may want to vary the statutory rule, where you can do so, by a contrary statement in the articles.

A few examples are that Section 19 provides that, subject to any provision in respect thereof set forth in its articles of incorporation, a corporation may create and issue rights or options entitling the holders thereof to purchase from the corporation shares of any class or classes.

Section 35 provides that directors need not be residents of this state or shareholders of the corporation unless the articles of incorporation or bylaws so require.

Section 35 also provides that the board of directors shall have authority to fix the compensation of directors unless otherwise provided in the articles of incorporation.

Section 41 provides that if the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the full board, may designate from its members an executive committee and one or more other committees each of which, to the extent provided in the resolution or in the articles or in the bylaws, shall have and may exercise all of the authorities of the board of directors except to the matters specifically provided in Section 41. So there may be another situation where you may want to provide in your articles for this executive committee or another committee.

Section 128 provides that whenever, with respect to any action to be taken by the shareholders of a corporation, the articles require the vote or concurrence of the holders of a greater proportion of the shares or of any class or series thereof than required by the

act with respect to such action, the provisions of the articles of incorporation shall control.

Now I don't mean this list to be in any manner all inclusive, but this is just to indicate that there are many sections in the act that provide that a certain rule shall obtain but that you can change the rule by your articles.

With respect to the mechanics of the execution of the articles, Section 53 of the act provides that the articles shall be signed by each incorporator. The requirement of acknowledgment contained in the old law has been done away with, so all that need be done now is have the incorporators sign.

Duplicate originals of the articles are to be delivered to the Secretary of State who, when all fees provided by law have been paid, will file one of such duplicate originals in his office and return to the incorporators or their representatives the other duplicate original stamped with the date of filing in the office of the Secretary of State. The duplicate original bearing the date of filing in the office of the Secretary of State must be recorded in the office of the county clerk of the county where the registered office of the corporation is located in this state. So we have actually retained the dual requirement of filing and recording that existed under the old Nebraska law.

The requirement of publication of notice of incorporation has been retained under the new Nebraska Business Corporation Act. The requirements of the notice of publication are set forth on page 60 of the materials here; that is, almost all of these requirements are set forth. One of the requirements has been left out of your printed copy and I want to call it to your attention so you can insert it.

Five of the requirements are listed here on page 60 and I suggest that you add a No. 6 to read: "The amount of capital stock authorized, and the time and conditions upon which it is to be paid in."

That is an additional requirement that must appear in your notice of incorporation that has not been set forth in the printed outline. The requirements for the notice of incorporation and what it must contain are set forth in Section 125 of the act.

Proof of publication is to be made by filing proof of publication of the required notice in the office of the Secretary of State and in the office of the county clerk of the county where the registered office of the corporation is located. However, Section 54 of the act makes it clear that corporate existence commences

upon recording, in the office of the county clerk in the county where the registered office of the corporation is located in this state, of the duplicate original of the articles of incorporation bearing the date of filing in the office of the Secretary of State.

I have heard discussion among lawyers as to just when corporate existence began under the old act and you will notice that the old statute is worded in an interesting fashion, and some persons have maintained that corporate existence began under the old act upon filing with the Secretary of State and that there was no question about it. Other persons took the position that, no, corporate existence didn't commence until you recorded with the county clerk of the county. Section 54 makes it clear now that corporate existence commences upon the completion of the dual requirement of filing and recording.

I might mention also, although this may have been discussed by Mr. Moldenhauer, that Section 55 provides that after the corporation comes into existence the first meeting of shareholders shall be held at the call of the incorporators or a majority of them, for the purpose of adopting bylaws, of electing directors, and for such other purpose as shall be stated in the notice of the meeting.

After the election by shareholders of the directors constituting the first board of directors, an organizational meeting of the board of directors is to be held for the purpose of electing officers and for the transaction of such other business as may come before the meeting. Section 55 of the act sets forth the notice requirements of the first meeting of shareholders and the notice requirement of the organizational meeting of the board of directors.

That just about finishes what I have to say this afternoon. I might point out to you that beginning on page 60 of your materials I have set forth some articles of incorporation of a fictitious company, Black Oil Company, which I believe, and I hope I am correct in this, comply with the new Nebraska Business Corporation Act. I submit these to you for your consideration. I would certainly welcome any comments.

I might make one comment about them before I finish here, and that is on page 61, Article VI, I have put in an optional provision entitled "Interest of Directors in Transactions." I really should give credit to Howard Moldenhauer for this because I took this entirely, or almost entirely I am sure, from a provision that he set forth in a model set of articles at the institute that we had at Creighton in 1962. I think that this is a good provision to put in. However, I think before you use it you want to think about it and consider it as to what effect it may have. I am convinced that this

provision isn't going to help any in the event of fraud or in the event of bad faith or in the event of a situation where you have an unfair transaction, but I think that this provision may change the burden of proof or the standard of fairness and that it may exonerate directors from adverse inferences which might otherwise be drawn against them. You can consider this and I would be happy to have any comments you may have. Thanks very much.

CHAIRMAN MASON: Thank you, Lee.

Lee explained the reason he does not teach corporation law, and I don't mean he explained it by the nature of his paper, indeed his paper would lead me to believe he is well qualified to teach corporation law, but he said that Barton Kuhns does teach corporation law at Creighton, so of course our next speaker must be Barton Kuhns.

Barton needs no introduction to this Nebraska State Bar Association, but not being entirely consistent in my logic I intend to introduce him anyway.

He graduated from both the undergraduate and law schools at Harvard University, which is a well known law school somewhere in the northeastern part of our country, and has practiced law in Omaha for many years as a partner of the firm of Finlayson, McKie & Kuhns.

Among other distinguished accomplishments, he has been President of the Nebraska State Bar Association and for a long time has been one of the commissioners on Uniform State Laws for Nebraska, which is an important function in legal work, as you all recognize, throughout our country.

Bart is going to talk to us on the corporate bylaw provisions. I will not extend my remarks any further. Mr. Kuhns, if you would be good enough to come forward, we will hear from you at this time. Barton Kuhns!

BYLAWS UNDER THE NEW ACT

Barton H. Kuhns

Thank you, John. I am well aware of the anxiety of those in attendance to close up a meeting about the end of the second day, and I think the subject matter of lowly bylaws after these very interesting and instructive papers that we have had the last two days is sort of anticlimactic anyway, so I am not going to impose on you very long. I have spent some time in connection with it, though, and I want to get a few things off my chest in connection with bylaws of Nebraska corporations.

First I think it might be helpful for me to tell you just what have been the working tools in connection with the preparation of these bylaws. I might also say that I think with more working tools coming forth when the new session laws are published, and the new supplements of the Revisor of Statutes, some of this material will become less important.

I think, first of all, if you still have saved this printed report of the Committee of the Nebraska State Bar Association, which was mailed out about the time when the last regular session of the legislature was convening, you would still find it very helpful because it is annotated by notations made by the State Bar Association's committee. The first 54 sections of the Nebraska act as introduced to our legislature correspond with the Model Act. After we leave Section 54 we get into some sections that are peculiar to Nebraska and the numbering of our act and the Model Act does not correspond from that point on.

But if you still have this pamphlet that was mailed to all the members of the Association, don't throw it away because it can be very useful in connection with the preparation of bylaws.

Also, of course, you will need the bill itself. I haven't seen any copies of the bill itself around here but I presume there are some. I find the Secretary of State's office, in communicating with people about the act, refers to the bill as prepared for final hearing, Legislative Bill 173. A few weeks ago they were out of copies of the act in pamphlet form unless they have been reprinted. But those are identical except for a few typographical items. The bill in the form for final hearing has the lines numbered, and sometimes, in correspondence with the Secretary of State's office, reference is made to lines in this bill, so if you do have a copy of the bill itself as presented for final hearing it is helpful to keep it.

Then of course the outlines that were distributed as you registered at this meeting are quite important. I might say that if you have not availed yourself of the material in the three-volume set on the *Model Business Corporation Act Annotated* you will want it. Included in that volume is a set of model bylaws called "Official Bylaws," made "official," I presume, by the American Bar Association and its committee. Very frankly I have worked closely from the bylaws as set forth in Volume 3 of this *Model Business Corporation Act Annotated* published by West for the American Bar Foundation.

I have made enough changes that I must assume responsibility to some extent for the bylaws as printed in the program; I have copied enough from the bylaws as they are in the book that I must

give some credit to the committee and the American Bar Foundation for the bylaws that they have presented. I have no hesitancy in using their bylaws because there is a statement in the front of the book to the effect that the printed forms in that book are not copyrighted.

As I say, you will be receiving your supplements to your revised statutes and you will be receiving your session laws in due course. The big trouble with working on bylaws and articles, too, at the present time is the indexing problem because the new Corporation Act is not indexed any place yet.

I might say in connection with indexing that my paper is divided into three parts. It starts on page 62 at the foot of the page. I spent just a little time and space on what is called "general comments" under Part 1. There are really only two items there that I want to impose on your time for now. One is, do not be concerned about any question of the power of a corporation to make bylaws. There doesn't need to be included in your articles of incorporation any provision that the corporation has authority to make bylaws. By the act itself all corporations have authority to make bylaws. Long before the act, a man named Blackstone said that it was inherent, it was incompatibly incident to every corporation that it had the power to make bylaws. So initially let's spend no time trying to find any specific authorization or limitations on any specific authorization upon the bylaws of a corporation because we do not need to be concerned about it.

Of more interest, and this I think is important, something that those of you who may be drawing articles of incorporation and bylaws next week will want to know if it hasn't come to your attention, the initial bylaws of the corporation under the new act are to be adopted by the stockholders. The initial bylaws are to be adopted by the stockholders and not the directors. That, I might say, is at variance with the Model Act, because under the Model Act, as under the Nebraska law prior to October 19, bylaws could be promulgated initially by directors. In Nebraska our statute, copied in 1941 from Delaware, was very clear. That is changed in the new act and I would say the legality of the bylaws of a corporation depend upon the adoption of the initial bylaws by the stockholders.

It would be a long story to go into the question of just how that got into the Nebraska act, but it is there and you might as well know it. In writing up articles of incorporation and minutes of the preliminary meetings and the adoption of bylaws, keep in mind that it is the stockholders who adopt the initial bylaws.

Once they have done it, your bylaws can be amended by the directors. This is all set out on page 63 of the outline. We are talking about the initial bylaws of the corporation. The reason I question the legality of bylaws if that isn't followed is this: I suppose if the initial bylaws should not have been adopted by the stockholders, and then the bylaws, having been wrongfully adopted by the directors, should subsequently be amended, there could be a basis for challenging the validity of the bylaws.

This gets down to the topic, that some of you friends of past years will know, the matter of the emphasis I place on "by whom and how corporations act," because I think that is mechanically and procedurally one of the most important aspects of corporation law; and this is a big change in the "by whom and how corporations act" so far as the adoption of bylaws is concerned.

I mentioned that one of the problems right now, and I mean this afternoon and Monday, Tuesday, or Wednesday when clients come in, we hope, and are interested in forming a new corporation without waiting until we get all the material and get it well indexed, etc.—one of the items that is included in my outline as Part 2 is a reference to bylaws in the new Corporation Act. That starts at the foot of page 63. You will notice it includes 41 items running in chronological section number order up to Section 65.

I want to tell you what that is, and this may be of some use to you in the next few weeks. I mean, when I say "in the next few weeks," that I think this will probably lose its significance then. I went through the new Corporation Act and I have listed every reference to bylaws in the new Corporation Act, and having listed every reference to bylaws in the new Corporation Act I arranged the references in chronological order according to the sections of the act. I felt I should do that in order to know what I was doing and to be sure of my ground in preparing a set of model bylaws or in modifying the bylaws of the American Bar Foundation. When it was done it constituted a sort of an index of what may or may not be provided in the bylaws. In a little over two pages you can run down those columns and see if there is anything in this new act pertaining to bylaws that you have overlooked.

The draft of the bylaws that I have prepared and want to submit to you commences on page 66. If we had a great deal of time it would be interesting and perhaps of some help to both you and me to go through these bylaws one by one and let me point out certain things that are peculiar or unusual about them, certain places where I have made changes from the model bylaws, etc. But I am well aware that time will not permit. I want, however, to call attention to just a few of these provisions.

I might say they are annotated in this sense: In the book here, where there is an official set of model bylaws of corporations formed under the Model Act, they are annotated by references to sections of the Model Act. I have made my bylaws based on the Model Act with some changes and have annotated them by reference to sections of the Nebraska act. I had hoped that in the printing the bylaws themselves might be double spaced and the annotations be single spaced or appear as footnotes but it didn't come out that way.

You will notice under practically each bylaw there are references to sections with invariably higher numbers. Those references are to sections of the Nebraska corporation law, not sections of the Model Act.

In Article I, I must call your attention to a misprint: It should be "Offices" and not "Officers."

In Article II, Section 1, there is a provision with respect to the time of the annual meeting of the corporation. One change has suggested itself to me, but this article as printed follows the official form. There is a provision here that if it is a legal holiday in the state of incorporation, then the annual meeting is to be held the following day. I think it would be better to say—it probably won't arise very often—but if it is a legal holiday at the place where the meeting is to be held, then it will be held on the following day. I was reminded of it, frankly, because of some correspondence indicating that legal holidays in New York and certain other states are not legal holidays here. It is a minor point but if you are using these bylaws watch that legal holiday provision.

Then I do want to call your attention to Section 2 of Article II which is somewhat of an innovation under both the articles and the bylaws whereby "the holders of not less than one-tenth of all the outstanding shares of the corporation entitled to vote at a meeting" may call a special meeting. It has always been possible to have that provision in articles of incorporation but it has not been suggested before, I believe, as a proper provision for bylaws of a corporation.

Also I want to call your attention to Section 7 in Article II which contains a provision that has not been customary in bylaws in Nebraska corporations before, and that is the provision for adjournment of stockholders' meetings and then reconvening and readjournments until there is a quorum without further notice; and also a provision that answers a question that sometimes has arisen in practical operations of corporations: What happens if some of the stockholders walk out of a corporate meeting in order to try to prevent the presence of a quorum? These bylaws provide that

if the stockholders have been there and have walked out, if there was a quorum when they were there, there is still a quorum even after they have left.

I also want to call your attention to a provision in the model bylaws which I think rather interesting with respect to proxies in Section 8. In that connection, since I won't be treading on the toes of anyone who is going to follow me, let me call your attention to Section 33 of the act which has a very long dissertation in the use of proxies. I am not suggesting that that should be included in bylaws but it is very helpful. Until this Model Act came along it was rather unusual to provide in the articles of incorporation all the different circumstances under which different persons and even corporations might hold proxies.

In Section 8, where there is a very short paragraph of the bylaws with reference to proxies, reference is made to an attorney in fact giving a proxy. That, I take it, is the equivalent of a power of substitution in a proxy holder, because a proxy holder, in reality, it seems to me, for purposes of the proxy, is an attorney in fact. I take it that the import of this provision of the bylaws is to give the attorney in fact authority to vote the proxy.

I call your attention to the fact that in Section 11 of Article II the provision of cumulative voting is preserved. There is not any substantial change in that from bylaws which might have been prepared under the old act.

Reference has been made earlier today to the possibility of stockholders and even directors acting without a meeting. In that connection you will notice in Section 12 of Article II there is a provision in these bylaws that there can be effective stockholder action without a meeting of the stockholders, and there is also a provision in Section 42 of the articles which is reflected in Section 3 of Article III of the bylaws to the effect that the directors may act without a meeting unless otherwise restricted in the articles or bylaws.

You will notice that as between stockholders and directors there has to be affirmative provision for the stockholders to act without a meeting. There is a provision that directors *may* act without a meeting unless the articles or bylaws contain a specific prohibition against it.

I will have to skip over some of these sections which I have notes on because of the shortness of time. In the section dealing with officers of the corporation where the president, vice president, secretary and treasurer, etc., are designated, there is an interesting provision that is reflected in these bylaws and is carried

over from the articles to the effect that one person shall not serve as president and secretary of the corporation.

I presume there are two good reasons for that: One has to do with the signing of the stock certificates. I don't know why the same signature couldn't be placed twice on the same certificate but it is required that the president and the secretary sign the stock certificates and there is an implication there of two different persons. The more satisfying reason to me is that if the secretary and the president are one and the same individuals you may run into a problem in obtaining certified copies of resolutions, whereas if they are not you don't have that problem.

It would disturb me a little to draw articles of incorporation and bylaws specifically contemplating that the same person be president and vice president of a corporation. In fact, it has been my practice to provide that the same person shouldn't be, but as far as I know, under the official bylaws and under the articles, there is nothing to keep one person from serving as president and vice president and, for that matter, he might also serve as chairman of the board if he wanted to heap a lot of honors on himself. But so far as these model bylaws are concerned, and I think it does make sense, the same person should not be both the president and the secretary of the corporation.

One other suggestion that isn't peculiar to these model bylaws. I think, in drafting bylaws now, particularly in view of the specific provisions of the new code with reference to vice presidents, it would be well, if vice presidents are to be designated by different titles in the office organization, to give cognizance to those titles in the bylaws. What I mean is, if there is an executive vice president and a senior vice president and a first vice president and a second vice president and an assistant vice president, etc., why isn't it better to designate in the bylaws that there can be offices with those different titles. The same thing would be true, but doesn't create quite as much of a problem, in connection with assistant secretaries and assistant treasurers.

One final provision that I want to mention is in Article XI, dealing with amendments. It is possible to enact what I call unamendable bylaws. The provisions of Article XI follow the provisions of the code with respect to the authority of the corporation to adopt bylaws which, by their terms, cannot be amended. You can adopt bylaws which require stockholder action in order to amend them. You can make it almost prohibitive to amend bylaws, but from the language of the code and the language of the official text of the bylaws, you can provide that some particular bylaw cannot be amended.

So that you will know you are not missing too much, there are some 13 or 14 sections of the bylaws that I think really deserve special comment. I have touched on a third or fourth of those, and an examination of the pamphlet and the bylaws will, I think, disclose the rest.

I see George is counting a quorum to see if the House of Delegates can now meet.

I thank you very much.

PRESIDENT FLOYD E. WRIGHT: The Secretary advises me there is no unfinished business of the Association, so I will now declare the sixty-fourth annual meeting of this Association adjourned.

[The sixty-fourth annual meeting of the Nebraska State Bar Association adjourned sine die at four-fifteen o'clock.]

NEBRASKA STATE BAR ASSOCIATION
Statement of Cash Receipts and Disbursements
Year ended August 31, 1963

Receipts:

Active members' dues	\$ 39,780
Inactive members' dues	5,260
Reinstatements	111
Bridge-the-Gap program	72
Proceeds from bond redemption	3,934
Bill digest subscriptions	1,585
Institute on evidence	510
Expense refunds	207
Miscellaneous	10
	<u>51,469</u>

Disbursements:

Salaries	\$ 7,284
Payroll taxes	486
Printing and stationery	770
Office supplies and expense	527
Telephone and telegraph	133
Postage and express	1,793
Directory	1,028
Officers' expenses	1,901
Executive council	1,172
Judicial council	285
Nebraska Law Review	5,845
Bill digest	405
Nebraska State Bar Association Journal \$ 2,071	
Less receipts for advertising	695
	<u>1,376</u>
Public service	5,898
Less receipts for pamphlets and racks	193
	<u>5,705</u>
Mid year meeting	399
Less registration receipts	115
	<u>284</u>
American Bar Association	
House of Delegates meetings	6,169
Annual meeting	5,067
Less reimbursements and exhibit space	450
	<u>4,617</u>
Committee on inquiry	443
Committee on uniform commercial code	170

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements, Continued

Disbursements, continued:

Committee on cooperation with		
American Law Institute meetings	166	
Advisory committee	877	
Institute on evidence	453	
Real estate, probate and trust law section	45	
Lawyers liaison committee with		
Internal Revenue Service	97	
Committee on county law libraries	1	
Nebraska District Judges Association	250	
Aid to local bars	97	
Tax institute	4,017	
Less reimbursements and registration		
receipts	2,102	1,915
Taxation section		220
Committee on joint conference		
of lawyers and accountants		140
Merit plan	\$13,668	
Less reimbursements	8,372	5,296
Law day U.S.A.		317
State ex rel Nebraska State Bar Association:		
Rhodes	25	
Blanchard	2	
Nielsen	2	29
Insurance		124
Maintenance expense		379
Auditing		235
Dues and subscriptions		135
Purchase of equipment		86
Miscellaneous	21	51,276
Excess of receipts over disbursements		193
Cash balance at beginning of year		953
Cash balance at end of year deposited in		
the First National Bank & Trust Company		
of Lincoln		\$ 1,146

ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely	Omaha	33. 1932	*Ben S. Baker	Omaha
2. 1901	*William D. McHugh	Omaha	34. 1933	*J. J. Thomas	Seward
3. 1902	*Samuel P. Davidson	Tecumseh	35. 1934	*John J. Ledwith	Lincoln
4. 1903	*John L. Webster	Omaha	36. 1935	*L. B. Day	Omaha
5. 1904	*C. B. Letton	Fairbury	37. 1936	*J. G. Mothersead	Scottsbluff
6. 1905	*Ralph W. Breckenridge	Omaha	38. 1937	*C. J. Campbell	Lincoln
7. 1906	*E. C. Calkins	Kearney	39. 1938	Harvey M. Johnsen	Omaha
8. 1907	*T. J. Mahoney	Omaha	40. 1939	*James M. Lanigan	Greeley
9. 1908	*C. C. Flansburg	Lincoln	41. 1940	E. B. Chappell	Lincoln
10. 1909	*Francis A. Brogan	Omaha	42. 1941	Raymond G. Young	Omaha
11. 1910	*Charles G. Ryan	Grand Island	43. 1942	Paul E. Boslaugh	Hastings
12. 1911	*Benjamin F. Good	Lincoln	44. 1943	*Robert R. Moodie	West Point
13. 1912	*William A. Redick	Omaha	45. 1944	George L. DeLacy	Omaha
14. 1913	*John J. Halligan	North Platte	46. 1945	Virgil Falloon	Falls City
15. 1914	*H. H. Wilson	Lincoln	47. 1946	Paul F. Good	Lincoln
16. 1915	*C. J. Smyth	Omaha	48. 1947	Joseph T. Votava	Omaha
17. 1916	*John N. Dryden	Kearney	49. 1948	Robert H. Beatty	North Platte
18. 1917	*F. M. Hall	Lincoln	50. 1949	*Abel V. Shotwell	Omaha
19. 1918	*Arthur C. Wakely	Omaha	51. 1950	*Earl J. Moyer	Madison
20. 1919	*R. E. Evans	Dakota City	52. 1951	Clarence A. Davis	Lincoln
21. 1920	*W. M. Morning	Lincoln	53. 1952	George B. Hastings	Grant
22. 1921	*A. G. Ellick	Omaha	54. 1953	Laurens Williams	Omaha
23. 1922	*George F. Corcoran	York	55. 1954	J. D. Cronin	O'Neill
24. 1923	*Edward P. Holmes	Lincoln	56. 1955	John J. Wilson	Lincoln
25. 1924	*Fred A. Wright	Omaha	57. 1956	Wilber S. Aten	Holdrege
26. 1925	*Paul Jessen	Nebraska City	58. 1957	Barton H. Kuhns	Omaha
27. 1926	*E. E. Good	Wahoo	59. 1958	Paul L. Martin	Sidney
28. 1927	*F. S. Berry	Wayne	60. 1959	Joseph C. Tye	Kearney
29. 1928	*Robert W. Devoe	Lincoln	61. 1960	Flavel A. Wright	Lincoln
30. 1929	Anan Raymond	Omaha	62. 1961	Hale McCown	Beatrice
31. 1930	*J. L. Cleary	Grand Island	63. 1962	Ralph E. Svoboda	Omaha
32. 1931	*Fred Shepherd	Lincoln	64. 1963	George A. Healey	Lincoln

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
25.	1918-18	A. C. Wakely.....	Omaha
26.	1918-22	Fred A. Wright.....	Omaha
27.	1919-19	R. E. Evans.....	Dakota City
28.	1919-22	Geo. F. Corcoran.....	York
29.	1919-20	L. A. Flansburg.....	Lincoln
30.	1920-20	W. M. Morning.....	Lincoln
31.	1920-27	Anan Raymond.....	Omaha
32.	1921-21	Alfred G. Ellick.....	Omaha
33.	1921-23	Guy C. Chambers.....	Lincoln
34.	1922-24	James R. Rodman.....	Kimball
35.	1923-26	E. E. Good.....	Wahoo
36.	1924-26	Robert W. Devoe.....	Lincoln
37.	1924-24	Fred A. Wright.....	Omaha
38.	1925-28	Paul Jessen.....	Nebraska City
39.	1925-27	Clinton Brome.....	Omaha
40.	1927-29	Charles E. Matson.....	Lincoln
41.	1927-28	Fred S. Berry.....	Wayne
42.	1928-29	Robert W. Devoe.....	Lincoln
43.	1928-30	T. J. McGuire.....	Omaha
44.	1928-34	Harvey Johnsen.....	Omaha
45.	1929-31	E. A. Coufal.....	David City
46.	1929-29	Anan Raymond.....	Omaha
47.	1930-32	Paul E. Boslaugh.....	Hastings
48.	1930-30	J. L. Cleary.....	Grand Island
49.	1931-33	W. C. Dorsey.....	Omaha
50.	1931-31	Fred Shepherd.....	Lincoln
51.	1932-34	Richard Stout.....	Lincoln
52.	1931-32	Ben S. Baker.....	Omaha
53.	1933-35	Barlow F. Nye.....	Kearney
54.	1933-33	J. J. Thomas.....	Seward
55.	1934-36	Chas. F. McLaughlin.....	Omaha
56.	1934-34	John J. Ledwith.....	Lincoln
57.	1935-35	L. B. Day.....	Omaha
58.	1935-37	James M. Lanigan.....	Greeley
59.	1935-38	H. J. Reguarde.....	Lincoln
60.	1935-38	Raymond M. Crossman.....	Omaha
61.	1935-40	F. H. Pollock.....	Stanton
62.	1935-41	T. J. Keenan.....	Geneva
63.	1935-39	Walter D. James.....	McCook
64.	1935-37	Roland V. Rodman.....	Kimball
65.	1936-36	J. G. Mothersead.....	Scottsbluff
66.	1936-36	James L. Brown.....	Lincoln
67.	1937-39	David A. Fitch.....	Omaha
68.	1937-39	Raymond G. Young.....	Omaha
69.	1937-41	M. M. Maupin.....	North Platte
70.	1937-41	Golden P. Kratz.....	Sidney
71.	1938-42	Sterling F. Mutz.....	Lincoln
72.	1938-42	Don W. Stewart.....	Lincoln
73.	1940-46	George N. Mecham.....	Omaha
74.	1940-42	Abel V. Shotwell.....	Omaha
75.	1940-42	Frank M. Colfer.....	McCook
76.	1941-43	Virgil Falloon.....	Falls City
77.	1941-43	Joseph C. Tye.....	Kearney
78.	1941-47	Earl J. Moyer.....	Madison
79.	1937-37	C. J. Campbell.....	Lincoln
80.	1938-38	Harvey Johnsen.....	Omaha
81.	1939-39	James M. Lanigan.....	Greeley
82.	1940-40	E. B. Chappell.....	Lincoln
83.	1942-45	Fred J. Cassidy.....	Lincoln
84.	1941-41	Raymond G. Young.....	Omaha
85.	1942-48	Max G. Towle.....	Lincoln
86.	1942-42	Paul E. Boslaugh.....	Hastings
87.	1942-45	John E. Dougherty.....	York
88.	1942-49	Yale C. Holland.....	Omaha
89.	1943-45	Robert R. Moodie.....	West Point
90.	1941-45	B. F. Butler.....	Cambridge
91.	1943-46	Frank M. Johnson.....	Lexington
92.	1944-49	Floyd E. Wright.....	Scottsbluff
93.	1945-50	John J. Wilson.....	Lincoln
94.	1945-48	Robert B. Waring.....	Geneva
95.	1944-46	George L. DeLacy.....	Omaha
96.	1945-47	Virgil Falloon.....	Falls City
97.	1945-49	Leon Samuelson.....	Franklin
98.	1946-48	Harry W. Shackelford.....	Omaha
99.	1946-48	Paul F. Good.....	Lincoln
100.	1947-48	Joseph T. Votava.....	Omaha
101.	1947-48	John E. Dougherty.....	York
102.	1947-55	Lyle E. Jackson.....	Neligh
103.	1948-49	Robert H. Beatty.....	North Platte
104.	1947-50	Frank D. Williams.....	Lincoln
105.	1947-50	Thomas J. Keenan.....	Geneva
106.	1948-51	Laurens Williams.....	Omaha
107.	1949-51	Joseph H. McGroarty.....	Omaha
108.	1949-54	Wilber S. Aten.....	Holdrege
109.	1948-49	Abel V. Shotwell.....	Omaha
110.	1949-55	Paul L. Martin.....	Sidney
111.	1949-55	Joseph C. Tye.....	Kearney
112.	1949-51	Earl J. Moyer.....	Madison
113.	1950-80	Harry A. Spencer.....	Lincoln
114.	1950-56	Paul P. Chaney.....	Falls City
115.	1950-59	Paul Bek.....	Seward
116.	1950-52	Clarence A. Davis.....	Lincoln
117.	1951-55	Barton H. Kuhns.....	Omaha
118.	1952-57	Thomas C. Quinlan.....	Omaha
119.	1951-52	George B. Hastings.....	Grant
120.	1952-53	Laurens Williams.....	Omaha
121.	1953-54	J. D. Cronin.....	O'Neill
122.	1954-57	Norris Chadderdon.....	Holdrege
123.	1954-56	John J. Wilson.....	Lincoln
124.	1955-56	Wilber S. Aten.....	Holdrege
125.	1955-58	F. M. Deutsch.....	Norfolk
126.	1955-	Clarence E. Haley.....	Hartington
127.	1955-58	R. R. Wellington.....	Crawford
128.	1955-	Alfred G. Ellick.....	Omaha
129.	1954-55	Jean B. Cain.....	Falls City
130.	1955-57	Hale McCown.....	Beatrice
131.	1956-62	C. Russell Mattson.....	Lincoln
132.	1956-58	Barton H. Kuhns.....	Omaha
133.	1957-59	Paul L. Martin.....	Sidney
134.	1957-60	Richard E. Hunter.....	Hastings
135.	1957-	John R. Fike.....	Omaha
136.	1957-	Thomas F. Colfer.....	McCook
137.	1958-63	William H. Lamme.....	Fremont
138.	1958-61	Carl G. Humphrey.....	Mullen
139.	1958-60	Joseph C. Tye.....	Kearney
140.	1959-	Charles F. Adams.....	Aurora
141.	1959-61	Flavel A. Wright.....	Lincoln
142.	1959-60	Thomas C. Quinlan.....	Omaha
143.	1960-61	Hale McCown.....	Beatrice
144.	1960-	Ralph E. Svoboda.....	Omaha
145.	1960-	Herman Ginsburg.....	Lincoln
146.	1960-	James F. Begley.....	Plattsmouth
147.	1961-	George A. Healey.....	Lincoln
148.	1962-	Lester A. Danielson.....	Scottsbluff
149.	1962-	Floyd E. Wright.....	Scottsbluff
150.	1962-	John C. Mason.....	Lincoln